"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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And between you and me, I do not think the person is living who needs 30 working days of the year as annual leave for any amount of relaxation.¹

Following enactment of the Federal Employees Pay Act in 1945, little changed in terms of the formal structure of overtime regulation for almost a decade. After giving federal employees a $330 raise in 1948 and raising the FEPA total salary plus overtime ceiling to $10,330,² Congress the following year undertook a major change in the Classification Act by creating the General Schedule (GS) system, into which it folded the Professional and Scientific, Subprofessional, and Clerical, Administrative, and Fiscal Services. CAF-1 through CAF-15 corresponded to GS-1 through GS-15, while PS-1 corresponded to GS-6 and PS-8 to GS-15. Pursuant to the new compensation schedule, GS-3 step 5 was paid $2,970, meaning that the full overtime ceiling of $2,980 kicked in at GS-3 step 6; consequently the entire professional and scientific workforce was deprived of full overtime as were all but the lowest-paid CAF workers. The upper ceiling of $10,330 fit in between GS-15 steps 2 and 3, meaning that all employees from that grade through GS-18 ($14,000) were excluded from the overtime system entirely.³ By 1951, after the next round of salary increases, the overtime system had become largely nonfunctional: the full overtime ceiling of $2,980 slid further down the scale to GS-1 step 7, while the upper ceiling now began at GS-14 step 5.⁴

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Shifting the Overtime Ceilings from Fixed Dollar Amounts to Fixed GS-Grades in 1954

I believe that a point is reached in a professional’s career where he is more concerned with the task to be accomplished than he is with the hours it takes to perform it. When such an employee has to travel on Government business, it is simply considered part of the job.\(^5\)

As soon as the Democrats regained control of the 81st Congress in 1949, bills were introduced to reform the overtime system, the most far-reaching of which would have amended the FEPA to eliminate all ceilings and, as several of them put it, provide “true time and one-half for work in the Government service.”\(^6\) Other bills provided for a 35-hour week\(^7\) or “true time and one-half” after eight hours a day or 40 hours per week and double-time on Sundays and holidays.\(^8\)

The midst of the Korean War did not appear to be a propitious moment for advocating more overtime pay for federal white-collar workers. After all, “[s]pokesmen for industry favor[ed] abolition of premium pay” after 40 hours, although they agreed that it was “‘unrealistic’ to expect Congress to endorse the idea.” The Chamber of Commerce of the United States, for example, recommended revisiting those elements in the FLSA (as well as the Walsh-Healey and Davis-Bacon acts) “which still reflect the aim of lessening unemployment by spreading the work through work-week limitations and mandatory provisions for overtime premium wage rates,” while conceding that overtime was “‘too hot a political potato’....” Nor were employers the only abolitionists. Public officials

\(^5\)Federal Employee Benefits: Hearings Before the Subcommittee on Manpower and Civil Service of the Committee on Post Office and Civil Service House of Representatives on H.R. 3628, H.R. 8085, H.R. 8983, and H.R. 9778, at 4 (Serial No. 92-19, 92d Cong., 1st Sess., July 20-21, 1971) (statement of Robert Hampton, chairman, U.S. Civil Service Commission, opposing proposed bill to pay federal employees for all their work-related travel time on the grounds that private employers only rarely paid FLSA-exempt employees for traveling outside of regular working hours and much of such travel was done by employees in GS-11 or higher who were the equivalent of FLSA-exempt).


such as Federal Reserve Board member and ex-New Dealer Marriner Eccles contended that overtime should not kick in until after 44 hours “so as to increase total production and to help maintain living standards without increased production costs.” And some members of Congress were pushing for 48-hour workweeks before overtime pay began. One southern Democrat introduced a bill in 1951 that proposed the same regime for government employees.

Nevertheless, as the federal white-collar overtime pay regime approached the vanishing point, the Civil Service Commission in its 1951 and 1952 annual reports recommended that Congress amend the FEPA to provide full time and a half for all Classification Act employees through the maximum salary of GS-9. Indeed, so many bills proposing changes in federal premium pay for overtime, night, Sunday, and holiday work had been introduced during the 81st Congress that the Senate Committee on Post Office and Civil Service suggested that the Bureau of the Budget and CSC undertake a comprehensive study of the various problems. The report, which they began in July 1950 and submitted to the committee in August 1951 and which also covered practices in state and local governments and private industry, pointed out numerous unresolved problems in the FEPA.

At the outset of the 82nd Congress in January 1951, Democrats introduced a number of bills similar to those that two years earlier had done away with all salary ceilings. On January 11, 1951, the chairman of the Senate Post Office and Civil Service Committee, Olin Johnston of South Carolina, introduced S. 354, which would have amended the FEPA to provide for time and a half on employees’ salary up to $5,000 for all hours in excess of eight per day, Monday through Friday, and all hours on weekends and holidays. As Johnston himself explained on the
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Senate floor, the bill had not been his idea, but rather that of the CSC and Bureau of the Budget. In March, the subcommittee on civil service held a brief hearing on S. 354 and another bill, touching only marginally on the question of overtime. The president of the National Federation of Federal Employees testified that the $5,000 was "wholly inadequate": there should be a "fixed principle" that any employee, regardless of compensation, should be paid for overtime work, which, he pointed out, was often not recorded, let alone, paid in many agencies.

Half a year later the same subcommittee, chaired by Rhode Island Senator John Pastore, held a two-day hearing, which was keyed to the September 5th Confidential Committee Print version of S. 354. This Federal Employees Overtime Pay Act used the maximum rate of GS-9 as the lower ceiling for calculating overtime for employees whose salary exceeded that rate, and the maximum rate of GS-15 as the upper ceiling for the maximum compensation including overtime. The hearing's centerpiece was the presentation by Robert Ramspeck, the chairman of the Civil Service Commission (and former chairman of the House Civil Service Committee), of the CSC's joint study with the Budget Bureau, "Recommendations and Findings on Overtime, Night, Holiday, and Sunday Pay."

The study found that the principle of premium overtime pay was "almost universal throughout American industry" so that even office workers who were not covered by the FLSA or union agreements "usually" received the FLSA rate. In contrast, in state government, the most common practice was to offer only compensatory time off, followed by straight-time payment. Among cities with more than 10,000 population, only 41 percent provided any compensation whatsoever for city hall administrative or clerical workers; of 331 cities that did pay for overtime work, 219 used time off.

Remarkably, the majority of federal agencies recommending the same time.

16Stenographic Transcript of Hearings Before the Subcommittee No. 1, (Civil Service) of the Committee on Post Office and Civil Service United States Senate on S. 354, at 55-56 (Mar. 7, 1951) (testimony of Luther Steward).
18Compensation for Overtime and Holiday Employment at 4-32.
19Compensation for Overtime and Holiday Employment at 11. Three states specified that employees with monthly salaries in excess of $300 ($3,600 annually), $280-$320 ($3,360-$3,840), and $415-$505 ($4,980-$6,060) receive overtime pay only in exceptional

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an extension of time and a half to higher salary levels—the modal recommendation—urged eliminating all salary ceilings; one agency proposed paying time and a half on all salaries up to the $5,400 rate of GS-11 and using that rate for all higher salaries.20

The CSC and Budget Bureau also devoted some attention to overtime practices in the private sector, which, since the beginning of the Korean War and extended workweeks, firms had restudied with regard to first-line supervisors, who until then had generally been regarded as part of management and thus expected to work overtime without additional pay.21 Relying on several recent studies by private employers' groups,22 the agencies stressed that a National Industrial Conference Board study of 30 large firms with a total of well over a million employees disclosed that four paid supervisors no overtime compensation, 16 straight time, and seven time and a half; the modal salary at which tapering began was $4,800; of the nine firms that set an upper salary ceiling up to which overtime was paid, in seven the ceiling ranged between $7,200 and $8,000, while the highest was $10,020. In contrast, the National Office Management Association had discovered that: few firms extended overtime pay to employees at all salary levels; executive, administrative-staff, and professional employees were typically not eligible for overtime pay; $4,000 was the salary level at which most firms stopped paying overtime, while $4,500 was the average boundary at companies with more than 1,000 employees.23

The CSC and Budget Bureau concluded that although it was necessary to raise the lower ceiling of $2,980 in order for the regulation to remain reasonably consistent with the congressional intent underlying the FEPA as well as with the standards set for the private sector by federal regulation and existing industrial practice, extending time and a half to all salary levels, as worker organizations and some agencies proposed, would be contrary to federal law and industrial practice. Like the committee's revised bill, the study recommended the maximum rate of GS-9 (which at the time was $5,350) as the lower ceiling, thus providing time and a half for 89 percent of full-time Classification Act employees; tapering would then generate straight-time pay at a salary of $8,025 and three-fourths of straight time at $10,700. The study justified the imposition of an upper ceiling as consistent


circumstances. Id. at 14-15.

20Compensation for Overtime and Holiday Employment at 15.
21Compensation for Overtime and Holiday Employment at 13-14.
22The CSC and Budget Bureau did not identify the studies, but one was published by the National Industrial Conference Board: Herbert Briggs, "Paying Supervisors for Extended Overtime," Management Record 12(12):442-44, 470-72 (Dec. 1950).
23Compensation for Overtime and Holiday Employment at 14.
with the FLSA's exclusion of administrative, executive, and professional employees and the general business practice of excluding top management from overtime pay plans. Specifically, it recommended the maximum GS-15 salary rate of $11,000 on the grounds that if a 44-hour workweek were established, GS-14 employees would be prevented from receiving as much take-home pay as GS-15 employees, and that if a 48-hour week were established, only employees receiving the three highest GS-14 salary rates would surpass GS-15 pay.\textsuperscript{24} Oddly, the agencies failed to point out that this consistency of principle nevertheless embraced a considerable quantitative discrepancy since the FLSA long-test salaries, which the study did mention, amounted to only $2,860 a year for executives and $3,900 a year for administrative and professional employees.\textsuperscript{25} Finally, the joint study also rejected the proposal to offer time-and-a-half compensatory time off on the grounds that it would enable employees to earn their basic pay without working 40 hours.\textsuperscript{26}

Subcommittee chairman Senator Pastore, who had not been in Congress when the FEPA was enacted in 1945, asked Ramspeck about the "philosophy behind" the two salary ceilings and the tapered overtime rate: "Was it a political solution in that they felt that in certain higher brackets you did not have the possibility of passing if you made it at the same rate as those up to $2,980.... Does anybody know?" Ramspeck, who had been the House Civil Service Committee chairman at the time of passage, replied that "the thought behind it on the part of Congress...was that you don't pay executives in private industry for overtime, but in order to avoid the supervisory officials getting less that [sic; must be than] the people they are supervising, that tapering off plan was devised...."\textsuperscript{27}

Having reached the limits of his knowledge, Ramspeck handed off the question to Ismar Baruch, who had been chief of the Personnel Classification Division of the CSC in 1945. After Baruch had stated that the underlying philosophy had been "to match as nearly as possible the practice in private industry" under the FLSA,\textsuperscript{28} Pastore asked whether the law, as a practical matter, had worked out well: "Has there been desire and inclination on the part of these people in the higher brackets to work overtime realizing that the emoluments would not be the same percentage-wise as in the lower brackets?" Initially, Baruch's response was less empirical and more a reflection of a personnel officer's ideology or idealization of reality: "In the higher brackets I think there has been, as a rule, very little complaint or difficulty because most people who are rightfully called executives or administrators put in

\textsuperscript{24}\textit{Compensation for Overtime and Holiday Employment} at 16-17.  
\textsuperscript{25}\textit{Compensation for Overtime and Holiday Employment} at 13.  
\textsuperscript{26}\textit{Compensation for Overtime and Holiday Employment} at 18.  
\textsuperscript{27}\textit{Compensation for Overtime and Holiday Employment} at 35.  
\textsuperscript{28}\textit{Compensation for Overtime and Holiday Employment} at 36.
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lots of overtime without any record being made and voluntarily so, on the same theory,...that you do not ask them to punch a clock when they go out and come back at lunch time. It works both ways.” He then abruptly left the subject of higher-paid bureaucrats in order to turn to the salary ranges that were relevant to the reforms that the CSC wanted Congress to enact. He therefore called attention to the “very curious situations” that arose around and somewhat above the average Classification Act salary ($3,667), at which overtime work began to be paid at straight time and eventually even lower rates. In the meantime Pastore was still waiting for an answer to his question: “Have they been able to get people to work overtime under that situation?” Unable to evade the issue any longer, Baruch was forced to assert that the question was empirically unanswerable: “the problem really has not hit the Government yet” because two months after the FEPA was passed, almost all agencies, pursuant to a presidential memorandum, returned to the 40-hour week; not until the Korean War had the problem “actually” arisen. All that Baruch could confirm was that the tapering scale had caused “some dissatisfaction”—the real “fly in the ointment” was that the $2,980 cut-off was too low.29

The assistant director of the Budget Bureau, Elmer Staats, insisted that it was “reasonable to assume that as a matter of equity the pay practices in the Federal service should not be inconsistent with those prevailing in American business.”30 He did not venture an opinion as to whether overtime pay coverage of much higher-paid federal white-collar workers than the FLSA offered was an inconsistency.

The most astounding testimony was submitted by Ralph Wright, the Acting Secretary of Labor,31 who informed the committee in writing that “in limiting the payment of overtime compensation to that part of the employee’s salary which does not exceed $5,000 per year..., the bill falls short of placing the Federal Government among the leaders in the field of employment relations.” Lamenting that the DOL was “unable to accord uniformly the same treatment to its own employees” that it enforced in the private sector with respect to time and a half as the sole recognized overtime compensation, Wright complained that S. 354 would do nothing to change the situation in which “[e]mployees in the upper steps of GS-12, and in grades higher than GS-12, could be required to work overtime hours at less than their straight time rates.” He characterized this “anomalous result” as “directly contrary to the philosophy and purpose of the Federal statutes under which the Government requires private employers to pay premium rates for overtime hours

29Compensation for Overtime and Holiday Employment at 37.
30Compensation for Overtime and Holiday Employment at 50.
31Wright, an official from an AFL union, was the assistant secretary of labor; it is unclear why he was acting for Labor Secretary Maurice Tobin.
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worked." Wright's statement was astonishing because at the time the maximum salary for GS-12 was $8,040 and that for GS-15 was $11,800, whereas the FLSA's new short-test salary for all white-collar exclusions was only $5,200, and the job descriptions for these GS grades would certainly have met the duties tests for those FLSA administrative, executive, and professional exclusions. In spite of this lack of analogous treatment under the FLSA, Wright sought to justify universal time-and-a-half coverage as a means of staunching the outflow of some of the federal government's "most valuable employees" to private industry, which offered higher salaries, often shorter hours, and bonuses. In other words, once again, overtime regulation was being opportunistically stood on its head: instead of limiting hours, the approach was designed to encourage overtime work in order to compensate for lagging wages—only this time, rather than labor or capital, the DOL itself was advocating this policy inversion.

Following the hearings, the Senate committee reported out S. 354, which was virtually identical with the September 5th version. The committee rejected as an

32 Compensation for Overtime and Holiday Employment at 79. The representative of the Organization of Professional Employees of the United States Department of Agriculture also asserted that "it is not clear to us on just what grounds of logic or precedence in industry or business...persons on regular salaries of $5,000 or less should merit full time and a half..., whereas those on salaries above that figure should not." Id. at 93-94 (Frederick Rand). Ultimately he agreed to exclude from overtime employees above GS-15 because they were high executives who made their own decisions as to whether to work overtime. Id. at 94-95. The NFFE urged adoption of the maximum rate of GS-11 ($6,400) as the lower ceiling. Id. at 67. The State Department urged increasing the upper ceiling to $15,000 so that it could compensate most of its executives on a straight-time basis. Id. at 78.

34 Classification Act of 1949, sect. 602(a), 63 Stat. at 962-63.
35 Compensation for Overtime and Holiday Employment at 79.
36 The AFL, for example, warned that "unless overtime is paid for at good old honest full-rate," the government would be unable to hire the workers it needed. In insisting that the government was misguided if it believed that it could "discourage overtime by not paying for overtime done in the so-called upper brackets and upper middle brackets," whereas full payment would be much more effective in discouraging the ordering of overtime, this argument overlooked the self-contradictory character of premium overtime pay: it discourages employers while encouraging workers. Compensation for Overtime and Holiday Employment at 85 (statement of George Riley, member, National Legislative Committee, AFL). In contrast, Charles Stengle of the AFGE insisted on the "humanitarian objective" of the overtime law in constraining "greedy employers" from exploiting workers; consequently, the "man who is receiving $6,000 or $7,000 should not be worked unusually long hours any more than one who is receiving $5,000, or less." Id. at 70-71.
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"extreme," without explanation, the view, expressed by a number of agencies and all employee groups, that time and a half should be extended to all salary levels; instead, it proposed as the lower cut-off point the maximum rate of GS-9, which "would conform more nearly...to prevailing practice in private industry...."37 The Senate committee amended the bill to limit overtime pay to that part of an employee's basic compensation which did not exceed the maximum rate for grade GS-9 and set the maximum rate for GS-15 as an upper ceiling: no premium pay could be paid to any employee whose basic compensation or whose total compensation including overtime exceeded this amount.38 However, the amended bill was recommitted to the committee39 and the Senate never debated, let alone passed it.40

With the Korean War over and just as the federal white-collar labor force was on the verge of effectively losing overtime pay as the FEPA's fixed ceilings were overtaken by salary raises,41 Frank Carlson, the Kansas Republican who was chairing the Senate Post Office and Civil Service Committee while his party controlled the 83rd Congress, introduced a bill at the beginning of 1954 that, among other things, proposed to salvage some semblance of an overtime system by shifting from ceilings based on a fixed-dollar amount to ones keyed to fixed grades in the GS hierarchy, the compensation for which would rise over time with successive pay increases. S. 2665, in other words, tracked the Democrats' S. 354 from 1951, as did several other bills introduced at or around the same time.42 The proposed lower ceiling for time and a half pay was the maximum scheduled rate of basic compensation for GS-9; employees whose basic rate exceeded the GS-9 maximum would be entitled to time and a half only up to that maximum rate. The upper ceiling would be fixed at the maximum GS-15 rate so that no premium

40CR 97:12949-50.
41During the first session of the Republican-controlled 83rd Congress, Republican Representative from Wisconsin Gardner Withrow, a one-time railway brotherhood official and Progressive member of the 74th and 75th Congress, introduced one bill providing for time and a half after eight or 40 hours without any salary ceilings and a second using GS-9 maximum as the ceiling. H.R. 2474 (83d Cong., 1st Sess., Feb. 2, 1953); H.R. 4692 (83d Cong., 1st Sess. Apr. 20, 1953). No action was taken on either bill.
compensation could be paid to any employee whose basic rate exceeded that maximum or when any such premium would cause an employee’s compensation (including the premium) to exceed that GS-15 maximum for any pay period. Finally, the bill would have authorized department heads, at their discretion, to require employees whose basic compensation rate exceeded the maximum GS-9 rate to take compensatory straight time off in lieu of payment for irregular or occasional overtime work.43

The new bill brought in its wake yet another round of hearings. At the Senate hearings in February, Luther Steward, the president of the National Federation of Federal Employees, briefly referred to the increase in the overtime ceiling as “a very welcome and very fair provision....”44 His counterpart at the AFGE, James Campbell, was more critical. Since the existing limit of $2,980 had become the maximum rate for GS-1 so that employees above the third step in GS-2 and first step in GS-3 were no longer entitled to full overtime, only 14 percent of all Classification Act employees remained eligible for full time and a half. Thus while the premium compensation provision “would provide some badly needed corrections of the existing overtime pay law,” the union stood “for time and one-half payment for overtime duty for all employees, regardless of amount of salary. ... Even if no premium pay were provided beyond GS-9, I believe that in principle it does not appear to be sound to reduce the overtime rate below the straight-time rate”—a result that kicked in at the second step of GS-13.45

Philip Young, the chairman of the Civil Service Commission, offered the most detailed analysis. The CSC viewed extending the time-and-a-half entitlement beyond $2,980 as necessary to maintaining reasonable consistency with the original intent of FEPA, standards set by federal statutes and regulations for industry, and existing industry practices. Time and a half should cover employees at salaries up to the top rate of GS-9 ($5,810): “This level is sufficiently low to exclude from the full overtime rate most employees in the executive and administrative group and the higher professional levels.” The fixed dollar amount of overtime pay based on the $5,810 became straight time in GS-13 and less than straight time in GS-14 and GS-15, but some overtime compensation above GS-9 was “necessary to maintain reasonable differentials between aggregate pay rates (salary plus overtime) of employees and their supervisors when the workweek is extended” because the federal government lacked “the devices used by American industry to meet this need, such

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45 Fringe Benefits for Federal Employees at 19-20.
as lump-sum salary adjustments and various kinds of bonuses.” The CSC wel­
comed the fact that the fixed overtime rates would maintain exactly the same differen­
tials in aggregate pay rates as in regular salary rates between employees whose salaries ranged between the lower ceiling of $5,810 and the GS-15 maxi­
imum upper ceiling of $11,800, which would restore that ceiling to its grade level of 1946-49. The CSC also approved of the provision that would authorize agen­
cies to decide whether to give money or time off to employees with salaries in excess of $5,810 for irregular, unscheduled overtime: “In practice, agencies and employees alike generally consider irregular overtime work of personnel at the higher grade levels to be voluntary and such overtime is not paid for. The pro­
posals recognize this practical situation and would bring the overtime pay statute closer to administrative practice.”

S. 2665 as reported out by the Senate committee on April 6 retained the lower and upper ceilings of the original bill. The bill, in the committee’s words, “modernizes and simplifies the overtime law...relating to Federal employees,” most importantly by raising the overtime base for “true time and one-half” from $2,980 to $5,810. The ceiling on base pay plus premium pay would be increased from the then current $10,330 (which was the previous maximum GS-15 rate) to $11,800.

On the Senate floor, the lower ceiling of the maximum rate of GS-9 was changed so that employees whose salaries exceeded that rate were guaranteed over­
time compensation that at the very least equaled straight time calculated on their own salaries. The House, too, adopted this change. Nevertheless, the conference report both deleted this provision, thus permitting the overtime comp­
sensation of employees with salaries above GS-9 to taper down below straight time, and lowered the lower ceiling from the maximum to the minimum rate of GS-9.

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46Fringe Benefits for Federal Employees at 63. Young stressed that supervisors’ being paid less than supervisees was “a very sore point” and “just plain bad from a sound personnel management point of view.” Id. at 71.
The Senate agreed to the conference report without objection, but it did spark token protest in the House, where the chairman of the Post Office and Civil Service Committee called the changes "minor." Representative James Davis of Georgia related that he had offered an amendment incorporating both of these features in the House Post Office and Civil Service Committee, which had been adopted almost unanimously in committee and were passed by the House. Davis, who at the same time was perfecting legislation to "prevent such people as Alger Hiss from drawing retirement pay" based on their government employment, failed "utterly to see any reason why an employee who works overtime should be denied the right to receive at least his regular rate of pay for such overtime work. I do not see the justice at all of requiring an employee to do overtime work at a lower rate of pay than he receives for his regular hours." He was seconded by Harold Hagen, a Minnesota Republican and former Farmer-Laborite, who lamented this "major injustice" and "discrimination."

In the end, then, while the 1954 amendments to FEPA retained the upper ceiling of GS-15 maximum in the original S. 2665, they depressed the original lower ceiling of the maximum rate of GS-9 ($5,810) to the grade's minimum basic rate ($5,060), thus reducing considerably the universe of federal employees who were entitled to full overtime pay. The amendments also adopted the compensatory time off provisions of S. 2665. Consequently, an agency head was authorized, at an employee's request, to grant him or her compensatory time off "in lieu of payment for an equal amount of time spent in irregular or occasional overtime work"; in contrast, at his own discretion, an agency head was authorized to require that an employee whose salary exceeded the minimum rate of GS-9 be compen-
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sated for such overtime work, for which compensation would be due, with an equal amount of compensatory time off.\textsuperscript{57}

Raising the Overtime Ceiling Again in 1966

[Let the professional who wants to work, the supergrade, for nothing, and travel for nothing, show his professionalism. Mr. Hampton believes they really do. We don’t agree because many of our grievances come from this group also.\textsuperscript{58}]

After Congress revamped overtime pay for federal white-collar workers by shifting the lower and upper coverage limits from fixed salary amounts to fixed Classification Act grades—Senator Pastore had called it “a splendid suggestion” in 1951\textsuperscript{59}—those GS-cutoffs presumably had to be periodically increased, at the very least, to keep up with inflation so that time-and-a-half compensation would not fall into virtual desuetude, as it had by 1954. Nevertheless, another decade passed before Congress felt pressure to reform the regime again. In the meantime, the DOL had raised the FLSA long-test salaries twice (in 1959 and 1963) for executives from (the annual equivalents of) $2,860 to $5,200, for administrative employees from $3,900 to $5,200, and for professional employees from $3,900 to $5,980.\textsuperscript{60} The reform process was promoted by the Kennedy administration, when the president, following a recommendation of the presidential Advisory Panel on Federal Salary Systems,\textsuperscript{61} sent Congress a message in early 1962 calling for comparability between federal salaries and those in private enterprise, thus ap-

\textsuperscript{57}Act to Provide Certain Employment Benefits for Employees of the Federal Government, § 202(a), 68 Stat. at 1109.


\textsuperscript{59}Compensation for Overtime and Holiday Employment at 38.

\textsuperscript{60}See above ch 15.

\textsuperscript{61}Chaired by Clarence Randall, the former board chairman of the Inland Steel Co., the panel was composed of seven members, including AFL-CIO president George Meany. It was appointed preliminary to a recommendation to bring government executives’ and scientists’ pay closer to that in private industry. “Randall Heads Federal Pay Panel,” NYT, Dec. 29, 1961 (9:2-3).
plying to federal white-collar employees the same standard that had prevailed for
navy yard production workers since the beginning of the Civil War. To be sure,
both the executive and legislative branches were primarily concerned with the
federal-private salary gap in the higher ranges of the civil service,62 which reputed-
ly was interfering with government efforts to attract and retain those—especially
executives, engineers, and scientists—with “superior” skills and capabilities.63
Shortly after Congress had mandated comparability in the Federal Salary Reform
Act of 1962,64 President Kennedy issued an executive order requiring the director
of the Budget Bureau and the chairman of the CSC to submit an annual report to
the president “comparing the rates of salary fixed for Federal employees compen-
sated under” the Classification Act “with the rates of salary paid for the same levels
of work in private enterprise as determined on the basis of the National Survey of
Professional, Administrative, Technical, and Clerical Pay conducted by the Bureau
of Labor Statistics.... Such report shall contain such recommendations with respect
to statutory salary schedules, salary structures, compensation policy, and other
related matters, as the Director and the Chairman deem advisable.”65

Then in 1965 President Johnson informed Congress that: “We do not have two
standards of what makes a good employer in the United States: One standard for
private enterprise and another for the Government. A double standard which puts
the Government employee at a comparative disadvantage is shortsighted. In the
long run, it costs more.”66 At the same time, the President’s Special Panel on
Federal Salaries reported that the federal government lacked a uniform and
equitable policy regarding premium overtime pay for all of its civilian employees.
The panel observed that in some government activities laws and practices required
scheduling of uneconomical overtime work and payment at regular rates. It there-
fore recommended the authorization of enough manpower to reduce or eliminate
uneconomical overtime, and, as soon thereafter as practicable, the enactment of

108:2578-60 (Feb. 20, 1962); Postal Service and Federal Employees Salary 4-7 (S. Rep.
No. 2120, 87th Cong., 2d Sess., Sept. 24, 1962). On the Civil War-era statutes, see above
ch. 18.

63“Federal Pay to Attract Superior Aides Advised,” NYT, Feb. 15, 1962 (8:5) (quote);

64Federal Salary Reform Act of 1962, Pub. L. No. 87-793, § 502(b), 76 Stat. 832, 841
(Oct. 11, 1962).


66Pay Increases for Certain Civilian Employees and Members of the Uniformed
Services: Message from the President of the United States 2 (H. Doc. No. 170, 89th Cong.,
1st Sess., May 12, 1965).
legislation authorizing premium overtime pay on an equal basis. Alluding to congressional hearings on the FLSA and implying that time and a half had lost its deterrence, the panel mentioned a concurrent discussion of whether premium rates should be increased to “serve again as a substantial financial deterrent to long hours.” This issue was not before the panel, but once more personnel had been hired to avoid uneconomical overtime, employees should be paid premium rates “on a basis comparable with industry practices when overtime is necessary.” Specifically, the panel contended that “sufficient manpower should be authorized to regularize employment to the maximum extent possible on the basis of 40 hours per week with no scheduled overtime.”

By the mid-1960s, federal employees' complaints, echoing those of the early 1950s, about the dysfunctionality of the overtime pay ceilings could no longer be ignored. At a June 1965 House Post Office and Civil Service Committee hearing on federal pay, president John Griner of the American Federation of Government Employees testified that some aspects of the overtime system are greatly in need of correction. The limit on overtime payment to the minimum rate for GS-9 means that true time and one-half now ends at a salary of $7,220. The overtime rate, however, becomes less than the straight time rate at the ninth step in GS-11, and the fourth step in GS-12.

Any overtime approved for the person above the first step, or in any higher grade, would be paid at the rate of time and a half for the first step. So when an individual reaches his ninth step in grade 11, or the fourth step in grade 12, his overtime rate is actually less than his straight time rate. Certainly, if there is need for that man to work, then he should be paid accordingly.

In early August, Arizona Democrat Morris Udall introduced a bill, the Government Employees Salary Comparability Act of 1965, which would have amended the FEPA to substitute GS-10 step 1 for GS-9 step 1 as the ceiling for full
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time and a half and to provide overtime pay for daily hours in excess of eight. The bill was reported out by the House Post Office and Civil Service Committee two weeks later and passed the House, but these provisions were deleted in the Senate, and the House concurred in the changes. Debate did not focus on these general overtime amendments, but proponents, eager to emphasize the recently enacted mandate of comparability with the private sector, exercised little restraint in exaggerating the FLSA’s comprehensiveness and stringency. For example, Congressman James Morrison, a Louisiana Democrat who was the committee’s second-ranking majority member, preposterously claimed on the House floor that: “It is almost unheard of for employees in private industry to work more than 8 hours a day or 40 hours a week...without being paid at least time and a half.”

At the end of 1965, between the defeat of these overtime provisions in the first session of the 89th Congress and the opening of the second session, the Bureau of Labor Statistics published the results of a 1963 survey of the white-collar overtime pay practices of metropolitan-area establishments with 250 or more employees. This study of supplementary compensation, which was designed to supplement the collection of private- and public-sector salary rates that the Federal Salary Reform Act of 1962 mandated, had been requested by the Civil Service Commission and Budget Bureau. The study found that almost all employing units of FLSA-“nonexempt” employees reported paying them something for overtime, whereas only about one-third paid “exempt” employees (excluding upper management), and hardly any (2 percent) paid upper management. More specifically, 90 percent of units paid “nonexempt” employees time and a half, whereas fewer than 10 percent paid time and a half (and 12 percent straight time) to “exempt” employees (excluding upper management), and only one unit paid that premium to upper management.

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73 CR 111:25702 (Sept. 30, 1965) (370 to 7).
76 CR 111:25664 (Sept. 30, 1965). Udall himself echoed this absolutist claim. Id. at 25665.
78 US BLS, Supplementary Compensation for Nonproduction Workers, 1963, chart 8 at 42, tab. 28 at 63. Upper management was defined as “high level workers (but under the
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As the second session of the 89th Congress began in 1966, new bills were introduced accompanied by a fresh round of hearings. AFGE president Griner appeared again before Udall’s Subcommittee on Compensation of the House Committee on Post Office and Civil Service, this time urging that the ceiling for full time and a half be raised from the minimum rate for GS-9 to GS-11: “The proposed increase would not be great, but would provide more nearly equitable payment.... Since this law went into effect in 1945 there has been agency classification of grades, which has been brought about by the increased complexity and responsibility of the jobs. So, ordinarily I would consider that the grade 11 today would be equivalent to the grade 9 back in 1945.”

At the time, 57.6 percent of Classification Act employees were classified in grades below GS-9, while 70.6 percent fell below GS-11; the salaries for the minimum rate in GS-9 and GS-11 were $7,696 and $9,221, respectively, by 1966. In response to a representative’s question as to whether a GS-11 employee “determine[d] his own condition of overtime,” Griner responded: “Above GS-11 you begin to get into principally supervisory grades.” Resuming the agitation that had begun the previous session, Griner also advocated time and a half after eight hours daily, to which federal blue-collar and postal employees were already entitled, and which was a common practice in private industry: 77 of 102 collective bargaining agreements with the largest firms in private industry analyzed by the AFL provided it. Taking the mandate of the Federal Salary Reform Act of 1962 at its word, Griner opined: “If we are going to move to comparability, then I think we ought to move to comparability on premium pay as well as compensation.”

The urgency that the AFGE attached to the issue of overtime ceilings was conditioned by the times: “[S]ince the escalation of the Vietnam war, there is a great deal of overtime.... We have a tremendous amount of...overtime work...now going on in the Department of Health, Education, and Welfare because of the medicare situation. We have...doctors, and others working 6 days a week and the maximum overtime they can be paid is based on the beginning rate of a GS-9, and it is just not fair to them.

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82 Federal Salaries and Fringe Benefits at 185. It would have been relevant to know how many employees were classified at GS-9 step 1 and GS-11 step 1, but the data were not broken down by within-grade steps.
Employees don't work overtime because they ask for it. Employees don't control overtime. They are instructed to work. And if they are instructed to work overtime, certainly they should be paid for it.\textsuperscript{83}

At the end of March, Representative Morrison introduced H.R. 14122, the Federal Salary and Fringe Benefits Act of 1966, which once again substituted GS-10 step 1 for GS-9 step 1 as the ceiling for full time and a half, and also provided overtime pay for hours in excess of eight per day.\textsuperscript{84} The bill was reported out by the House Post Office and Civil Service Committee a few days later with these provisions intact,\textsuperscript{85} and the full House passed it 393 to 1 on April 6.\textsuperscript{86} At the counterpart Senate committee hearings at the end of April, the lead witness, John Macy, Jr., the chairman of the CSC, concurred in the proposal to extend the overtime pay entitlement to daily hours beyond eight for equitable reasons, but not in raising full overtime eligibility from GS-9 to GS-10. Since the FLSA required nonsupervisory clerical and equivalent-level workers in private firms to be paid time and a half, “most of the kinds of positions covered by the act are similar to those most common in Federal grades GS-5 and below.” The $150-a-week short-test salary level (which was the equivalent of $7,800 a year) determined whether a position was excluded under the FLSA—lower-salaried positions could also be excluded under the long-test salaries (unlike the situation under Title 5)—but a salary of $7,800 eliminated some of the other criteria under the duties test required at lower rates: “This figure is very close to the minimum salary rate of grade GS-9, up to which the Federal Employees Pay Act now provides a full time-and-one-half overtime rate. The president has proposed $7,705 as the minimum rate for this grade and $8,475 as the minimum for grade GS-10; H.R. 14122 proposes $7,796 as the GS-9 minimum rate and $8,421 as the lowest rate of GS-10.”\textsuperscript{87} Macy then referred to the results of the aforementioned BLS study:

The findings of this extensive survey do not support a time-and-a-half rate of overtime pay at higher Federal grades than those for which it is now prescribed. Most employers do not pay at all for overtime work of personnel at the higher salary levels; the Govern-

\textsuperscript{83}Federal Salaries and Fringe Benefits at 197.
\textsuperscript{84}H.R. 14122, § 404(a) (89th Cong., 2d Sess., Mar. 30, 1966).
\textsuperscript{86}CR 112:7756 (Apr. 6, 1966).
\textsuperscript{87}The Federal Salary and Fringe Benefits Act of 1966: Hearings Before the Committee on Post Office and Civil Service United States Senate on H.R. 14122, at 4-5 (89th Cong., 2d Sess., Apr. 20-27, 1966). In fact, the long-test salary was more akin to Title 5’s lower ceiling; see below Appendix I.
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ment is already ahead of common practices at these pay levels in providing overtime pay (though at less than time-and-one-half rates) up through grade GS-15.88

A number of union representatives testified, urging higher ceilings—the presidents of the National Federation of Federal Employees and the American Federation of Technical Engineers suggesting GS-11 and GS-12, respectively.89 John Griner, the president of the AFGE, had also originally requested GS-11 as the ceiling, but he chose to focus on the positive impact for workers of the overtime penalty’s deterrence. Many of the union’s members, for example, worked 9 or 10 hours a day until they reached 40 hours “and then they are cut off for the balance of the week. We don’t expect this provision to bring in any additional money in these people’s pocketbooks but we expect better administration.”90 Indeed, Griner was so insistent on this point that he went to the extreme of arguing that although the Johnson administration had questioned this provision as not falling within its wage guideposts: “The purposes [sic] of premium pay is not to increase the income of individuals or to add to payroll costs.”91 If, in Griner’s view, agencies had to pay overtime rates for hours beyond eight, they would start creating 40-hour weeks composed of eight-hour days.92 He related that inspectors in poultry slaughter plants were at one time working as long as 15 hours a day (until they reached 40), but even at nine hours it was “almost impossible” for them “to make any plans from one week to another as to when [their] free time is going to be....”93 The AFGE also, in effect, pointed out that, given the historical shifts in the composition of the GS hierarchy, using GS grades rather than absolute money sums was not a cure-all; lifting the ceiling from GS-9 to 10 “merely update[d] the first limitation on classified overtime payment placed in effect” when the FEPA was enacted in 1945 (the equivalent of GS-7) and raised to GS-9 in 1954: in 1945 GS-9 had been the journeyman level and GS-11 included a great many supervisory positions. But: “Now because of increased complexity of the work, grade GS-11 has come to be looked upon as a journeyman grade. This grade now includes many technical and professional positions which are not supervisory. The increased use of automated processes also has contributed to the change in the significance of grade levels.”94

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Following the hearing, the Senate committee reported out H.R. 14122, including the two overtime provisions, at the end of May, but with one amendment: excepted from the eight-hour overtime provision were "employees engaged in professional or technical engineering or scientific activities for whom the first forty hours of duty in an administrative workweek is the basic workweek and employees whose basic compensation exceeds the minimum rate of GS-10...for whom the first forty hours in an administrative workweek is the basic workweek...." The committee explained the change as designed to avoid paying overtime to employees who did not have a regularly established five-day workweek, but also did not work more than 40 hours a week. On the Senate floor, Oklahoma Democrat Mike Monroney, the chairman of the Senate Post Office and Civil Service Committee, explained the change as applying to "certain employees engaged in scientific and research work whose schedule, while not exceeding 40 hours in a week, does occasionally exceed 8 hours in a day. The nature of the work requires it." Although this explanation did not appear to apply to the broader group of employees whose above-GS-10/1 salary placed them outside the full time and a half group, the real reason for the exclusion was apparently the reduction by two-thirds of the cost of the House provision. In any event, Texas Democrat Ralph Yarborough, the chairman of the Senate Postal Affairs Subcommittee and one of the most pro-labor members of Congress, was carried away by the self-congratulatory mood on the Senate floor when he declared that the bill "would virtually eliminate unpaid overtime work for all classified employees—the only group heretofore left out of overtime pay for work over 8 hours a day." The Senate then passed the bill by a unanimous vote on July 11. The House quickly concurred in this change,
and in July Congress amended the Classification Act to raise the ceiling for full overtime pay to GS-10 step 1 and to entitle some white-collar workers to premium pay after eight hours daily.\footnote{Act of July 18, 1966, Pub. L. No. 89-504, § 404(a), 80 Stat. 288, 297. The change in ceiling became effective the first day of the pay period after enactment.}

To be sure, agency heads were free to require employees whose salaries exceeded the minimum rate of GS-10 to accept straight-time compensatory time off in lieu of time and half calculated on that GS-10 ceiling.\footnote{The 1966 amendments conformed this compensatory-time-off floor to the higher ceiling of GS-10 and after the various government organization statutes were codified later in 1966, the codified provision, § 5543(a)(2), was changed too. Act of Sept. 11, 1967, Pub. L. No. 90-83, 81 Stat. 195, 200; 5 USC § 5543(a)(2) (1970).} Nevertheless, the federal government was failing to live up to its self-proclaimed ambition of being a model employer: despite the entitlement of employees whose salaries fell below that threshold to take their compensation in money at time and a half, by 1967 AFGE president Griner was editorially warning members in the union’s \textit{Government Standard} that “the current management mania for coercing or tricking employees into working overtime without getting the premium pay to which they are entitled stems from the order of President Johnson last year to cut overtime in the agencies by 25 per cent.” The most consistent offender was the Veterans Administration (especially its hospitals and administration centers). Stressing the illegality of such practices, Griner informed the membership that: “Reports continue to pour in that employees are being coerced and ‘conned’ by their supervisors into working overtime and into accepting compensatory time off rather than” time and a half in money.\footnote{John Griner, “Overtime Abuses: Stand Up for Your Rights,” \textit{GS}, Mar 24, 1967 (2:1-4) (editorial).}

\section*{A Special Higher Ceiling for Air Traffic Controllers}

\begin{quote}
Mr. [Frederick] SEIBERLING [Dem. OH]. I have a very simple little amendment...in the future whenever the House debates a minimum-wage bill, we ought to be paid time-and-a-half for overtime.\footnote{CR 119:18377 (June 6, 1973).}
\end{quote}

Important light was cast on the federal government’s overtime system and its
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relationship to the FLSA's by a brief legislative episode toward the end of the Johnson administration involving air traffic controllers. On July 16, 1968, Representative Morris Udall, chairman of the Compensation Subcommittee of the House Post Office and Civil Service Committee, introduced a bill at the request of the Federal Aviation Administration (FAA) to revamp the regulation of overtime compensation solely for this one occupation. H.R. 18630 would have amended Title 5 of the United States Code to permit time and a half for nonmanagerial employees of the Transportation Department who occupied a position determined by the Secretary of Transportation: to involve duties that were critical to the immediate daily operation of the air traffic control system, directly affected aviation safety, and involved physical or mental strain or hardship; in which overtime work was therefore unusually taxing; and in which operating requirements could not be met without substantial overtime work. The bill did not limit the overtime entitlement to any specific GS grades.

At the subcommittee hearings on the bill, David Thomas, the FAA deputy administrator, testified that given the growth in air traffic and the limitations on hiring, the agency either had to limit airport operations or schedule more overtime, the incessant nature of which had been particularly burdensome. However, he also asserted that even if the size of the workforce were not a problem, "the nature of the air traffic control system gives rise to a need for a substantial amount of overtime...because it is not economically feasible to staff our facilities for unanticipated absences, severe weather conditions, peak traffic conditions, or continuous equipment surveillance." Consequently, the FAA did not look at the bill as the remedy to a "rather crucial manpower problem," but as a means to remedy the unfairness of a pay system to which that problem and its impact had helped call attention.

Thomas went on to point out that as a result of the Title 5 ceiling, a controller whose annual base pay was $14,409 or $6.93 an hour, would earn only $6.71 performing overtime work. Yearly the controller worked about 50 overtime days at $40 a day, generating $2,000 in additional income, which "he does not want. He would much rather not have the overtime pay and not do the overtime work."

This disclosure prompted Udall to wax philosophical on hours standards:

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107 The hearings also dealt with miscellaneous unrelated bills.
108 Federal Employee Fringe Benefits at 52.
109 Federal Employee Fringe Benefits at 54.
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I have always been a little troubled by this arbitrary GS-10 limitation on overtime pay. Of course, sometimes you have to have an arbitrary rule or cutoff point. I want you to philosophize a little bit about that. The philosophy of that rule is that sometimes after you climb the ladder you leave the ranks of the hourly employee and begin to have executive and administrative duties. The vice president of a big company, for example, does not punch a timeclock. The idea was at some point in the Federal Establishment to have...a cutoff point and say beyond this point we will not continue to have overtime pay. We placed it at GS-10. What I am asking you now is, if GS-10 is not the proper cutoff point, what is?110

The deputy administrator failed to rise to the philosophical occasion, confining himself instead to expressing sympathy with the notion of limiting overtime pay and perhaps even with reducing overtime work to discourage it for those who were able to control their time.111 The controllers, on the other hand, had “no control over whether they work overtime or not. I can delay answering a letter, but they have no control. ... They can’t schedule their time. ... I think their pay is given them not because of their executive ability, but in recognition of the demanding work they are doing and their safety responsibilities. ... Of course, we have no GS-18 employees in this work, but if we did, I would suggest the legislation be applied to them.” Udall and Thomas then agreed to GS-14 as the appropriate overtime cutoff point.112

Turning away from the pay issue, Indiana Democrat Lee Hamilton finally directed the committee’s attention to the underlying issue of the overwork and its possible safety consequences (if not for the workers’ health):

Mr. HAMILTON. I would think a man’s efficiency would go down after he puts in a full day.

Mr. THOMAS: So do we.

Mr. HAMILTON. So there is some risk, at least in overtime?

Mr. THOMAS. There is no doubt they are getting tired. We would prefer not to work them 60 hours a week as we are doing to some of them now. We are making studies and, if we knew no man should work more than 6 hours a day 5 days a week, we would like to eliminate the overtime. However, if we went to a 5-day week immediately, we would almost close down some airports now.113

After eliciting from Thomas that controllers on average worked six-day, 48-

110 Federal Employee Fringe Benefits at 54.
111 Federal Employee Fringe Benefits at 54.
112 Federal Employee Fringe Benefits at 55.
113 Federal Employee Fringe Benefits at 58.
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to 60-hour weeks at the busiest airports, and that the optimum workweek would be 30 hours on control duty and 10 hours on other activities, Hamilton inquired: "So some are working twice the number of hours you think would be best from the standpoint of safe operation?" Evasively, Thomas replied: "Well, I won't say safe. But I will say more efficient, and much more useful."114

Labor's inconsistent and confused approach to overtime was impressively on display in the testimony of Stephen Koczak, the assistant research director at the American Federation of Government Employees, who appeared in place of the union's president. Although it represented only 5 percent of controllers, AFGE testified because of its interest in the ramifications of any possible resolution—the union urged extending the bill's provisions to other emergency situations in other departments—viewing the issue "primarily from the standpoint of the safety factor."115 The safety of air travel, which was becoming increasingly "dangerous," depended primarily on the controllers' "heroic" work. From this praise the AFGE jumped unmediatedly to the "incredible fact" that, because of the GS-10/1 overtime ceiling (of $4.47 straight time and $6.71 time and a half an hour), 2000 (of 6,803) controllers were paid less for their overtime than during their regular 40 hours.116 In the by this time ritualized hyperbolic universalization of FLSA coverage, the union requested that controllers "receive at least the same treatment afforded every private employee in the United States; that is, that they be paid time and one-half for every hour of overtime, with the computation being determined on their own base rate of pay...."117 Koczak then took the next logical step by noting that "if the concept of comparability with private industry is applied," then if a federal employee "would be receiving one and one-half times his base pay in private employment, he should receive one and one-half times his base pay in Federal employment."118 Because, presumably, his congressional interlocutors were as ignorant as he was, no committee member pointed out to him that many federal administrative, executive, and professional employees were entitled to overtime pay, whereas their private-sector counterparts were not.

At this point Udall posed his "philosophical" question to Koczak: "Are you in agreement that if we remove the GS-10 ceiling we should have another kind of limitation, or do you think the Assistant Secretary of Transportation should be paid

114 Federal Employee Fringe Benefits at 58.
115 Federal Employee Fringe Benefits at 62, 65 (quote).
116 Federal Employee Fringe Benefits at 60.
117 Federal Employee Fringe Benefits at 62. To be sure, since air traffic controllers are presumably neither executive, nor professional, nor administrative employees, they would all be entitled to full overtime compensation under the FLSA.
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overtime?” Insisting again on comparability with the private sector, Koczak merely expressed a preference for GS-15/1 as the ceiling because it would eliminate the inequity for thousands of employees in GS-12/5 and above, where straight time pay exceeded 150 percent of GS-10. In fact, one of the reasons that the AFGE believed that “there should be no arbitrary GS levels on overtime” was precisely that federal agencies often engaged in little or no planning for similar emergencies “because by the GS-10 overtime limitation, you can sweat people in Federal employment and get more out of them. ... So the controller shortage problem...might not have arisen at all if we had not had this GS-10 limitation.”

One organization representing controllers did direct the subcommittee’s attention to the impact of long hours on the workers themselves. James Hill, general counsel of the Air Traffic Control Association, testified that, despite the absence of relief at lunch or for short breaks and the resulting unrelieved pressure and exhaustion: “Yet the same agency which finds it necessary to work controllers on a 48-hour week, has a regulation which forbids airline pilots to fly more than 200 hours a month, a limitation imposed for air safety, and by their labor contracts with their companies most airline pilots have a ceiling of 75 to 85 hours per month.” (In contrast, one controller testified that controllers wanted the right to refuse overtime not because of the grueling conditions, but “because it costs them so much money.”)

Reverting to the issue of compensation, Hill conceded that “some limitation must be placed on the categories of Federal employees who are entitled to be paid premium compensation for overtime. Certainly, high executives should be expected to work overtime as a normal responsibility of their job. But an across-the-board limitation to the lowest pay of a GS-10 is not realistic to a class of employees in which the normal nonsupervisory journeyman grade is GS-12....” Kenneth Lyons, the national president of the National Association of Government Employees, went so far as to recommend revising the bill to provide 2.5-time after 30 hours per week or 6 hours a day.

119 Federal Employee Fringe Benefits at 63. Strongly supporting this legislative initiative, the AFGE magazine Government Standard offered members extensive excerpts from Koczak’s testimony. In addition to repeating his universalist exaggeration of the FLSA’s coverage, the article failed to explain how higher pay could enable fatigued controllers to make air traffic safer. “AFGE Backs FAA Overtime Bill,” GS, Aug 9, 1968 (3:3-5).

120 Federal Employee Fringe Benefits at 70.

121 Federal Employee Fringe Benefits at 84 (testimony of Robert Smith, Los Angeles air traffic control center).

122 Federal Employee Fringe Benefits at 72-73.

123 Federal Employee Fringe Benefits at 81.
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At the close of the hearings Udall introduced a substitute bill, H.R. 19136, which was identical with H.R. 18630, except that, reflecting the consensus at the hearings, it limited the overtime entitlement to positions in GS-14 or below.124 A month later the committee reported out H.R. 19136, emphasizing that an increase in the lower ceiling from GS-10/1 to GS-14/maximum did not exempt controllers’ premium pay from the GS-15 maximum rate. In plainly pragmatic terms, the committee admitted that there was a need to hire additional controllers, but argued that overtime was essential for the time being. The committee justified the innovation on the grounds that controllers’ overtime compensation became less than their regular rates from GS-12/6 ($6.83) and above: “This situation creates gross inequities and inevitably generates employee morale problems, as well as reluctance by employees to remain available for frequent callback for overtime work.”125 The counterpart Senate committee reported out a bill with the same content, but urged more circumspection. Because the bill singled out one group for preferential treatment, it recommended that the Transportation Secretary use the utmost care in determining that overtime pay was justified. Moreover, once additional controllers were available, the practice of paying full overtime to those classified above GS-10 should be limited and/or discontinued.126 Provoking little controversy, H.R. 19136 as introduced by Udall was passed without change by both Houses of Congress127 and became law in October 1968.128 The AFGE’s newspaper hailed enactment for making controllers “a happier group of Federal employees,” but failed to make the union’s members better informed, confusing a long-standing congressional policy with some vague administrative or judicial decision: “This situation occurred because of a ruling that all overtime pay would be compensated on the basis of time and one-half for a GS-10, step one. All employees above this level were being unfairly compensated for their overtime.”129

127Only two nays were cast in the House, where Rep. Broyhill warned that overtime pay would not completely solve the air traffic controller problem. CR 114:27031 (1968).
128Act of Oct. 10, 1968, Pub. L. 90-556, 82 Stat 969 (adding subsec (3) to 5 USC sect. 5542(a)).
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The Application of the FLSA to the Civil Service and the Creation of a Dual Overtime System in 1974

We should like to see Federal workers treated by and large in the same way as any other workers. We do not think that they should be set off in a separate class by themselves with either special privileges or special hardships. If anything, the Government should be a model employer, blazing a trail of progressive labor standards for private industry to follow—a situation which has not prevailed up to the present time.130

Two important legislative-administrative campaigns were both initiated in 1970 and their confluence enduringly shaped overtime pay regulation for federal employees. First, the Job Evaluation Policy Act of 1970 required the Civil Service Commission to reassess its job evaluation and ranking systems; and second, Congress began to consider proposals to integrate federal employees into the FLSA overtime system.

The Job Evaluation Policy Act was driven by a congressional finding that “the tremendous growth required in the activities of the Federal Government in order to meet the country’s needs during the past several decades has led to the need for employees in an ever-increasing and changing variety of occupations and professions, many of which did not exist when the basic principles of job evaluation and ranking were established by the Classification Act of 1923.... The diverse and constantly changing nature of these occupations and professions requires that the Federal Government reassess its approach to job evaluation and ranking better to fulfill its role as an employer and assure efficient economical administration.” Congress also found that “the large number and variety of job evaluation and ranking systems in the executive branch have resulted in significant inequities in selection, promotion, and pay of employees in comparable positions among these systems.”131 Congress then charged the CSC with preparing a comprehensive plan for creating such a coordinated system of job evaluation and ranking for executive branch civilian positions.132

During the following two years the Job Evaluation and Pay Review Task Force

130Overtime Compensation to Government Employees: Hearings Before a Subcommittee of the Committee on Civil Service United States Senate 93 (78th Cong., 1st Sess., Feb. 25-Mar. 2, 1943) (supplementary statement by United Federal Workers of America (CIO)).
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that was established to report on this system became embroiled in a controversy with the AFL-CIO over the reformation of the overtime system for federal employees, while bills were being filed in Congress to amend the FLSA to make it applicable to federal employees. These proposals put forward by a Congress with a much diminished Democratic majority—the number of Senate Democrats fell from 68 in 1965-66 to 54 in 1971-72, while their House majority declined from 295-140 in 1965-66 to 243-192 in 1969-70 and 1973-74—were resisted by the Nixon administration and its CSC. Initially such bills merely redefined the term “employer” in the FLSA to include the United States Government. At a House Education and Labor Committee FLSA hearing in 1970, AFL-CIO president George Meany, in addition to recommending that the FLSA be amended to provide for double time—because supplements as a proportion of total wages and salaries had risen from 4.5 percent in 1938 to 23 percent, time and a half had lost its deterrent effect—which would kick in after eight hours in a day and 35 hours in a week, urged coverage of all workers within the reach of federal authority. In April 1971 the leading pro-labor House Democrats introduced H.R. 7130, The Fair Labor Standards Amendments of 1971, which again redefined “employer” to include the federal government (as well as state and local governments).

At the House hearings on the bill in the spring, Labor Secretary James Hodgson testified that the Nixon administration could not support coverage of federal or state and local employees. To be sure, the objection to the extension to the latter two groups he explained on constitutionally based federalism grounds; for the opposition to federal coverage, however, he offered no reason. Congressman John Dent, the Pennsylvania Democrat and former Rubber Workers union official who chaired the General Subcommittee on Labor, informed Hodgson that although his opposition seemed to be based on the assumption that there was no

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public employee coverage then in existence, 2,665,000 federal employees were already covered and the bill’s intent was to cover an additional 1,672,000. (Dent’s first figure was off: the number of already covered federal workers—blue collar workers incorporated into the FLSA in 1966—was 693,000.) “The principal behind it being that it is hardly justifiable for a local, State, or the Federal government to require that certain employers have to pay minimum wages, but their own government employees are not under such protection. That is the only purpose behind the proposal.” The ubiquitous John Griner, national president of the AFGE went on record in favor of certain of the bill’s provisions, including the granting of protection and coverage to all government employees, but said nothing about overtime.

The bill reported out by the Committee in November 1971 still included the extension of overtime coverage to federal employees. Notably, despite the administration’s rejection of overtime coverage for government employees at all levels, the committee’s Republican minority did not include among the bill’s “most glaring defects” the extension of coverage to federal employees as it did with respect to overtime coverage of state and local government employees. The Republicans accused the majority of having departed from a subcommittee agreement that, whereas compliance with the minimum wage was economically feasible for state and local governments, “one and one half times the regular hourly rate of pay, regardless of how high that rate was (except perhaps for a very small number in supervisory, executive or professional positions who would probably be exempt from the requirement), would be applicable to the vast majority of such employees, many of whom, although they presently are paid for their overtime work, generally receive it at their regular hourly rate of pay, and not at a higher premium rate.” In contrast to this argument based solely on financial incapacity, the minority members also targeted the original congressional intent in 1938 of using time and half to encourage additional hiring; for them it was “plain to see that government employers are not as free to hire additional employees whenever additional work beyond the normal work time is required. Government hiring, at all levels, is

139To Amend the Fair Labor Standards Act of 1938: Hearings...on H.R. 7130, at 580.
140To Amend the Fair Labor Standards Act of 1938: Hearings...on H.R. 7130, at 798-800.
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governed by law, and is limited by legislated budgets.” Thus despite this express extension to the federal government of the critique that the deterrent of overtime premiums could not operate in the public sector, the Republicans did not object to incorporating federal employees into the FLSA overtime system. In contrast “the basic purpose of the premium overtime pay” was, “practically speaking, entirely inapplicable to” state and local government employment; consequently, instead of creating additional jobs, mandatory overtime pay would, given the financial problems of state and local government, result in job loss.143

In March 1972, Illinois Republican John Erlenborn introduced a stripped down FLSA bill, H.R. 14104, which was much closer to the Nixon administration’s perspective in general, but also specifically with respect to providing no extension of coverage to government employees.144 In May, during the floor debate, one of the bill’s co-sponsors, Minnesota Republican Albert Quie, sought to defend this exclusion on the grounds that whereas “an acceptable logic justified” periodic increases in the minimum wage, the reasons that proponents had historically assigned for narrowing or eliminating premium overtime exemptions “usually do not bear close examination.” H.R. 7130 was, in Quie’s opinion, “no exception,” because

all Federal civil service employees making less than $12,150 per year receive time and one half in overtime pay. Many State and local government employees receive similar or equivalent overtime compensation. Nevertheless their employers would all be subject to inspection, investigation, and to the recordkeeping requirements of the law with all the costs and burdensome procedures and inconveniences which these impose. There are no valid reasons justifying this particular expansion of coverage.145

Quie’s argument was oddly under- and overinclusive. Although he correctly stated that federal employees in and below the minimum GS-9 grade were already entitled to time and a half, he failed to point out that many earning much more would also become overtime-entitled under H.R. 7130—perhaps because this disclosure would have required him to mention as well that many of those in grades through the highest GS-15 were entitled to some premium overtime pay, despite the fact that under the FLSA they would have been totally excluded as bona fide administrative, executive, or professional employees. To be sure, because no supporter of H.R. 7130 came forward to furnish this information either, the opportuni-

145CR 118:16602 (May 10, 1972). In addition, to Quie, Florida Democrat Don Fuqua was a co-sponsor.

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ty for a public and substantive debate over the comparative merits and defects of the two overtime systems was squandered. Rather than undermining his own argument as to the FLSA’s excessiveness by revealing that Title 5 was, in certain respects, even more generous, Quie focused on the paperwork burden that would be imposed on public agencies—as if any (government) employer that was legally required to pay premium overtime were not already and should not be subject to an enforcement apparatus. In the event, the following day, after a lengthy general debate, the House substituted Erlenborn’s bill for H.R. 7130 by a vote of 217 to 191.146

This outcome, which resulted from a substantial number of southern Democrats’ joining almost all the Republicans—blatant proof that the Democrats, despite holding a 255-180 formal majority, did not constitute a programmatic voting majority—was “something of a defeat for the Democratic leadership,” which had made amending the FLSA a key part of its legislative program. However, relying on the Senate to pass a more radical revision, the pro-labor House Democrats refused to admit defeat. As Representative Dent himself told the press: “In conference we will write that kind of legislation that will provide the greatest good for the greatest number.”147

In May 1971, one of the most pro-labor senators, New Jersey Democrat Harrison Williams, who was chairman of the Labor and Public Welfare Committee, introduced a generally quite expansive FLSA bill, S. 1861, which, inter alia, extended FLSA coverage to public employers.148 At the committee hearings in May, Labor Secretary Hodgson repeated his House testimony opposing coverage of federal employees without explanation.149 When Williams’s committee reported out the bill (in lieu of H.R. 7130) in June 1972, S. 1861, in addition to retaining the expanded definition of “employer,” specifically defined “employee” in the case of a person employed by the United States, to include a civilian in the military

146CR 118:16872 (May 11, 1972). With the outcome of the test of strength ascertained, the House parties then regrouped and formally passed the bill 330 to 78. Id. at 16873.


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departments, executive agencies, the Postal Service, the Library of Congress, and in competitive service positions of the legislative and judicial branches, and the District of Columbia government.\textsuperscript{150} The committee explained that "[a] major argument" for extending coverage to public employees was "moral": "Government should be willing to apply to itself any standard it deems necessary to apply to private employment. ... Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize his employer, whether that employer is engaged in private business or in government business." In an interpretive comment that would prove to be of overriding significance, the committee declared that although it "did not intend to extend FLSA coverage to those persons for whom the general tangible rewards of government employment are of secondary significance, for example, Peace Corps and VISTA volunteers[,] by the same token, the Committee intended to cover all employees in the competitive service (except professional, executive, and administrative personnel who are exempted under section 13 of the law) in all civilian branches of the Federal Government."\textsuperscript{151} In committee the amendment offered by Senator Robert Taft Jr. to strike coverage of federal employees was defeated 14 to 4, yet in expressing their minority views in the committee report, Taft and his colleagues failed to mention federal (as contradistinguished from state and local) coverage.\textsuperscript{152}

In July 1972, S. 1861 passed the Senate 65 to 27 with federal coverage,\textsuperscript{153} but a conference with the House never took place because House supporters of H.R. 14104, forewarned by Dent's aforementioned announcement and thus skeptical that a majority of the House conferees appointed by the Democratic leadership would fight for an acceptable compromise with the Senate, for the first time ever in the history of the House of Representatives, defeated a motion to go to conference by a narrow margin.\textsuperscript{154} Thus the effort to confer FLSA overtime coverage

\textsuperscript{150}S. 1861, § 2(a) and (b) (92d Cong., 2d Sess., June 8, 1972).

\textsuperscript{151}Fair Labor Standards Amendments of 1972, at 18 (S. Rep. 92-842, 92d Cong., 2d Sess., June 8, 1972). The AFGE reported in its newspaper that although the Senate Labor Committee action would have little effect on federal employees with respect to the minimum wage since their wages were equal to or greater than the proposed minimum, the overtime provisions could affect employees who received differentials in lieu of overtime pay and could revise the prevailing overtime ceiling for General Schedule employees: "Under S. 1861...no federal employee would receive less than his present overtime schedule." "Congress Acts on Vital Federal Employee Bills," GS, June 30, 1972 (9:4-5). Most of this information went beyond what the committee had discussed publicly.


\textsuperscript{153}CR 118: 24758 (July 20, 1972).

on federal employees died for the Ninety-Second Congress. The fact that overtime coverage for federal workers was merely a side-show to the most brisant issues of the size and timing of the increase in the minimum wage and the coverage of domestic employees meant that it could escape strict scrutiny, especially since disputes between the federal government and its employees generally lacked the intensity of class-war-like antagonisms with private employers and few members of Congress understood the proposed dual FLSA-Title 5 overtime system.

In the meantime, during 1971-72, as the House and Senate were proceeding toward a stalemate on overtime pay coverage for federal employees under the FLSA, the Job Evaluation and Pay Review Task Force was, in its own convoluted way, contributing to the same debate. As early as June 1971 the task force, in developing evaluation systems, “adopted the basic concept” of the FLSA: “Private employers, to aid themselves in observing” its provisions, “have grouped their employees into those who are covered by the act and those exempt from the act. Further, in many instances, they have developed job evaluation and pay systems to coincide with these two groupings. ... It is the task force’s thinking that the grouping of Federal employees in conformity with the categories and concepts of the act will facilitate the achievement for Federal employees of congressionally mandated comparability with the private sector.”

The next month, at a House Post Office and Civil Service Committee hearing on the task force’s interim progress report, its director, Philip Oliver, went much further in spelling out the rationale for reorienting the civil service pay system toward the FLSA. Indeed, he declared that the task force was approaching the charge that Congress had given it “from the basic concept that the philosophy expressed in” the FLSA, which specifically did not apply to Federal workers could, in fact, be used as a guide.” Private firms, in complying with the FLSA, “found the division between exempt and nonexempt employees a convenient and logical division of workers and hence this act assumed an aspect beyond that originally conceived by its designers.” Consequently, since more than 46 million private-sector workers were “administered under job evaluation and pay systems specifically designed by private employers in compliance with the concepts and philosophies expressed by” the FLSA and its regulations, the task force grouped 2.2 million federal workers into the two broad categories: exempt and nonexempt


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as defined by the FLSA and the division was almost exactly 50-50.\(^{156}\) Asked why basic concepts underlying FLSA were applicable to classifying federal jobs, Oliver stressed comparability with the private sector as the crux:

[I]f, in fact, we are going to provide equal pay for equal work and we are going to be comparable and we are going to get our fair share of workers in a particular labor market, I feel we have to look like the other users of labor, that is, the private sector, or State and municipal governments. If the vast majority of workers in the United States are under job evaluation and pay systems that recognize differences such as exempt and nonexempt under the FLSA..., and we want to be comparable with private sector employers, perhaps we ought to structure like them so that we can measure our job evaluations and we can measure our pay scales more accurately.

And we become in the communities a part of the community, not something elite or separate, that is, the Federal Government, but a part of the community... and compete for labor and in terms of classification and pay with the private sector workers where we live.\(^{157}\)

After having outlined such exempt/nonexempt systems—the Administrative, Professional, and Technological Evaluation System with 600,000 nonsupervisory positions similar to exempt jobs as defined by the FLSA, and the Clerical, Office Machine Operation, and Technician Evaluation System, including 525,000 nonsupervisory positions similar to nonexempt jobs as defined under the FLSA\(^{158}\)—Oliver asked the members of the task force’s advisory committees whether meaningful groupings of federal employees under rubrics such as exempt/nonexempt, white-/blue-collar, supervisory-nonsupervisory helped the evaluation process. (He informed them that the FLSA, which among other things defined overtime pay requirements for private employees, “is not specifically applied to Federal employees.”)\(^{159}\)

The responses he received were instructive. Comments by members of the


\(^{157}\)Interim Progress Report at 161.


Federal Personnel Directors Advisory Committee included the following: Beyond the purpose of regulating overtime procedures, the exempt/nonexempt concept “may not have any real justification or value.” “The exempt/nonexempt distinction is linked to the blue-collar/white-collar distinction.” “Any attempt to achieve comparability with the private sector has some merit.” “The evolution of salaries and wages throughout our nation indicates a separation of ‘blue-collar’ wages is no longer valid. [T]he term ‘blue-collar’ should be discontinued. There might be one system for supervisory employees and a single compensation plan for non-supervisory employees.” Oliver’s bias in favor of imposing the FLSA scheme on the civil service system was manifest in his summary of these comments: “The consensus on the exempt/nonexempt distinction was that the approach was useful and worth exploring. It might not be desirable, however, to make the distinction precisely as is done by the FLSA.” Among the members of the Industry Advisory Committee, Richard Fremon, the director of salary administration at Bell Telephone Laboratories, “[d]id not think adoption of the FLSA by the Federal Government would contribute anything to job evaluation.” David Lederer, the assistant secretary of the Rand Corporation, “[f]elt FLSA would help the Federal Government maintain comparability of practice with private industry.” Nevertheless, Oliver pressed these kinds of disparate comments into this “Consensus[::] Jobs should be grouped by occupational content and not by artificial divisions such as exempt/nonexempt...”

After the Oliver Task Force had submitted its final report, the House Post Office and Civil Service Committee held hearings in 1972 on various proposals to reform the federal classification systems at which Oliver had another opportunity to advocate incorporation of the FLSA overtime exclusion regime into the civil service classification and pay system and AFL-CIO witnesses appeared in order to criticize that approach. Oliver explained that: “The first decision reached by the Task Force with regard to job evaluation was that, if, in fact, it was the intent of the Congress that the Federal Government as an employer be both competitive and comparable with the private sector, all effort should be made to structure Federal employees in the most common fashion found in the private sector.” For him this precept meant the FLSA’s division of more than half of all employees in the United States “into the exempt/nonexempt dichotomy.... Private employers have found it convenient to develop evaluation and pay systems for their employees built around this division. Hence, over many years the ranking or relative worth


of jobs, one to another, in both an evaluation and pay sense have been developed around the definitions in this law.” Having divided the federal workforce into two approximately equal groups with one million employees in each, the task force “built its evaluation plan around this dichotomy and at the same time tested this concept with its Advisory Committees, the Civil Service Commission, and other interested parties.” He then misrepresented the reaction of the Industry Advisory Committee, which he claimed had “strongly supported this division. It is one with which they have long been familiar and the only one which they regard as being expedient and equitable.” Oliver was unable to deny that the AFL-CIO Advisory Committee had “major objections,” but he quickly added that “[w]ithin the Civil Service Commission there was acceptance of this by the executive staff and the Commissioners.” At this point, however, he was compelled to advert to a different kind of dichotomy: “In talking to groups throughout the country, I have found no serious objections to this concept from an evaluation standpoint. From a pay viewpoint, I have found some apprehension....”

That Oliver’s talks might have engendered such fears is made plausible by the transcript—gleefully made available to the House Post Office and Civil Service Committee by the AFGE—of an address that Oliver made to civilian personnel representatives at an air force base in Alabama in 1972:

The very first decision we made, that is we the Task Force because I made it in the beginning, was that we would try to look like the non-federal sector. ... I believe you have to look like the non-federal sector if you want to compete with the non-federal sector because that’s where our people in the government come from.

Now in the non-federal sector the Fair Labor Standards Act...forced on these people a division of labor between exempt and non-exempt.... So I believe the federal government, which is specifically excluded from the Fair Labor Standards Act should consider this approach.

Since Oliver was recommending that Congress “force” the FLSA’s exclusions of white-collar workers on civil servants, no wonder that his listeners feared the cut-backs in the more capacious Title 5 overtime system. But this consideration was not uppermost in the mind of Oliver, who, according to AFGE president John Griner, “harbored such passionate antiunion sentiments against us and other AFL-CIO affiliates that he was incapable of considering objectively our suggestions for

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163Proposals to Reform Federal Classification Systems at 287.
improving Federal classification.” Rather, in meshing pay relationships with job evaluation, he was primarily concerned to keep the latter “as pure as possible” and to insure that there be maximum freedom to develop pay structures to meet competitive requirements. [T]he exempt/nonexempt dichotomy enables one, from a pay view, to develop a policy of competitiveness and comparability much more closely atuned [sic] to the pay patterns in the non-Federal sector. The reaction of the Civil Service Commission was favorable and the chairman has publicly stated several times his belief that this philosophy of pay treatment should be undertaken by the Government. Among the hundreds of people exposed to this concept of an exempt/nonexempt split, with its pay implications, I have found no serious objections, with one exception: the AFL-CIO. They have indicated that they are opposed to this concept of pay treatment. This is understandable because when the two categories are treated as a single entity, the lower levels enjoy the benefits from the steeper payline of the professional and administrative personnel.

Whatever sense this final argument may have made with regard to the entire sweep of the salary hierarchy under the General Schedule, it overlooked the separate and analytically distinct detriments to federal workers that would have resulted from substituting the FLSA “dichotomy” for the more gradually tapering Title 5 overtime pay system. The AFL-CIO economist Rudy Oswald basically made this point in arguing that the task force’s recommendation to use the FLSA’s exempt/nonexempt categories for job evaluation purposes “flies in the face of present overtime laws as applied to the Federal Service. ... There is no justification for attempting to artificially draw some new dividing line for payment of overtime. The current overtime regulations applicable to Federal employees are related to grade level and not to the pay system. Similarly, the Fair Labor Standards Act makes no reference to job evaluation in regard to overtime payments.” Here Oswald himself manifestly misrepresented the FLSA, whose white-collar duties tests performed precisely the function he denied.

164 Proposals to Reform Federal Classification Systems at 284.
165 Proposals to Reform Federal Classification Systems at 10.
166 Proposals to Reform Federal Classification Systems at 283. Oswald also criticized the task force for not having used the collective bargaining standards of the NLRB—by which he presumably meant the broad definition of “supervisor” in the Taft-Harley Act, which has deprived a large group of workers of the right to self-organization—with regard to exempt/nonexempt instead of the FLSA, which related only to overtime; consequently, Oliver had “tried to make some very ambiguous connection between that and job evaluation and to use that as a justification for fragmenting the current classification system into separate parts. The question of overtime is not relevant to the classification
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In any event, the AFL-CIO Advisory Committee strenuously opposed the creation of "'exempt' and 'non-exempt' Federal employee groupings" on the grounds that the "proposal has no purpose, but could later present a serious obstacle to unions attempting to represent the interest of high level professional, technical and administrative employees."\(^{167}\) To be sure, this attack raised the question as to why the AFL-CIO was vigorously pushing for FLSA coverage of federal employees at this very time. Instead of solving this mystery, AFGE president Griner deepened it by adding "that if—and I hope it will come to pass—amendements to the Fair Labor Standards Act should be passed and certain parts of the Senate version adopted, that would erode the position that has been taken by Mr. Oliver's report."\(^{168}\)

Contrary to Oliver's claim about the CSC's enthusiasm for adopting the FLSA "dichotomy," not only did the Commission oppose its inclusion in the FLSA amendment bills introduced in 1973-74, but, more generally, it publicly stated that because the Job Evaluation and Pay Review Task Force had proposed "'radical changes,'" extensive consultation with agencies and unions was required and it would be premature to propose legislation.\(^{169}\)

As the congressional Democratic leadership had promised, the 93rd Congress (1973-74) witnessed a renewed effort to enact amendments to the FLSA, which included extension of FLSA overtime coverage to federal workers.\(^{170}\) In February 1973 Dent introduced H.R. 4757, which once again redefined "employer" to include the federal and state and local governments.\(^{171}\) At the hearings on the bill, Nixon's new Labor Secretary, Peter Brennan, the former president of the Building and Construction Trades Council of Greater New York, testified that the FLSA "is not the place...to establish standards of pay for Federal employees. This is the role of the Civil Service Commission, and Congress has enacted detailed laws relating to the pay of Federal employees. We must avoid a division of authority over Federal pay practices between the Labor Department and the Civil Service Commission." Since all federal employees were already receiving at least the equiva-

\(^{167}\)Proposals to Reform Federal Classification Systems at 283.

\(^{168}\)Proposals to Reform Federal Classification Systems at 316.

\(^{169}\)GERR, #455, A-11, 12 (June 5, 1972). Oliver himself, however, apparently succeeded in turning his system into a business. http://www.amptv.com/oliver/


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lent of the proposed minimum wage, extending minimum wage coverage to them "would be an empty gesture." In contrast to the quantitative precision that enabled Brennan to brand minimum wage coverage as superfluous, his testimony on the comparative reach of overtime coverage was evasive: "All Federal employees below GS-10 also receive time and one-half for overtime. Employees above that level are authorized to receive overtime based on the top step of GS-10 rather than their own salaries."\textsuperscript{172}

Following the hearings, Dent introduced H.R. 7935, which replaced H.R. 4757 as the chief House bill. Although it also redefined "employer" to include federal, state, and local government, it excluded from overtime coverage any federal employee other than those (blue-collar workers) to whom the 1966 FLSA amendments had already given that entitlement,\textsuperscript{173} thus extending merely Brennan's "empty gesture" of minimum wage coverage to federal civil servants. This overtime exclusion remained in the bill as reported out by the Education and Labor Committee at the end of May.\textsuperscript{174} To be sure, the House Education and Labor Committee understated this massive exclusion by declaring that only "certain Federal employees...will not be subject to the overtime requirements of the Act."\textsuperscript{175} More misleadingly, in consecutive sentences the committee asserted that the proposed "amendments result in the extension of minimum wage and overtime coverage of all Federal...employees" and that pursuant to the aforementioned amendment, "Federal employees (other than those covered by the 1966 amendments) are exempt from overtime coverage."\textsuperscript{176}

Two days later, Representative Erlenborn introduced H.R. 8304, which, like his H.R. 14104 from the 92nd Congress, did not extend coverage to federal or state and local government employees,\textsuperscript{177} and in early June the House debated the FLSA


\textsuperscript{173}H.R. 7935, §§ 201(a)(1) and (b) (93d Cong., 1st Sess., May 21, 1973).

\textsuperscript{174}H.R. 7935, § 201(b) (93d Cong., 1st Sess., May 29, 1973). The exclusion was also included in the version of H.R. 7935 reported by the Senate Labor and Public Welfare Committee on July 6 without recommendation. H.R. 7935, § 201(b) (93d Cong., 1st Sess., July 6, 1973); S. Rep. No. 301 (93d Cong., 1st Sess., July 6, 1973).


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bills. During the floor debates, Dent, in refuting a claim that Erlenborn had circulated in a letter that, if H.R. 7935 were passed, House members would have to pay their staffs time and a half for their 50- and 60-hour weeks, stressed that his bill "does not extend overtime coverage to one single Federal employee." Without ever explaining why the overtime coverage for federal workers had been withdrawn, Erlenborn and the pro-labor California Democrat Phillip Burton virtually vied with each other for the most extreme assessment of how "very, very modest" the coverage of federal workers was. (When Erlenborn, misspeaking, stated that the committee bill "brings six additional workers" under the FLSA, Burton joked that the bill was "very modest at best, and at least give us what little credit we would like to claim".)

When Erlenborn offered H.R. 8304 as an amendment in the form of a substitute for H.R. 7935, the House, reversing its 1972 tally, defeated the amendment 218 to 199. Despite this action, North Carolina Democrat David Henderson then offered an amendment to strike out from the bill the United States Government as an employer and to eliminate the overtime coverage that had been conferred on federal blue-collar workers in 1966. Henderson argued that overtime coverage made even less sense than a minimum wage entitlement because those workers' Title 5 overtime pay benefits "are more liberal and have broader coverage" than the FLSA's. Not only did Title 5 entitle them to time and a half after eight hours a day, but "many employees, such as supervisors and professionals, who are exempt from overtime pay under the Fair Labor Standards Act, are entitled to overtime pay under section 5544 of title 5." The most serious problem that this additional coverage would create, in Henderson's view, was the complications and confusion of dual administration and enforcement by the CSC and DOL. In his brief response, Dent evaded these issues—some of which would reappear later in the context of extending overtime coverage to white-collar workers—but the amendment was nevertheless handily defeated 249 to 167. And shortly thereafter the House passed Dent's bill by the even larger margin of 287 to 130.

The legislative focus then shifted to the Senate where, already in early May two conservative Republicans who had resisted the FLSA amendments in 1972,
Taft and Peter Dominick of Colorado,185 introduced S. 1725, which redefined "employer" and "employee" to include most federal workers, but then excluded all the newly covered employees from overtime pay.186 Two weeks later Harrison Williams introduced a bill once again designated S. 1861, offering the same broad overtime coverage for federal employees as its namesake.187

At the Senate Labor Subcommittee hearings in June, which coincided with the House floor debate, the most important testimony188 was contained in a letter to Williams from the chairman of the CSC, Robert Hampton, repeating the concerns raised by Representative Henderson about adding FLSA coverage to that of Title 5, which already "ensures benefits on the whole equal to or greater than those prescribed by" the FLSA.189 Observing that "many employees" were covered under Title 5 "who would be 'exempt' under the FLSA," Hampton maintained that:

The primary effect of the action would be the application of the FLSA time-and-one-half overtime provisions to a small number of Federal employees, mostly technicians at higher levels. This will not result in equal treatment between Federal and non-Federal employees, however, because Federal supervisors and professionals who would fall in the 'exempt' category under the FLSA would continue to receive the overtime benefits in title 5....

The premium pay provisions in title 5...have been tailored over a period of time to meet the specific needs of the Federal service. They are, in certain respects, based on a policy which recognizes the need for comparability with the private sector but at the same time covers unusual work situations which often are unique to the Federal workforce. ...

With all of these special premium pay provisions in title 5..., it is illogical and most unwise to complicate the situation by covering Federal employees under another law which in some respects requires different treatment. Some of the problems involve the title 5 provisions for additional annual compensation rather than regular overtime pay for administratively uncontrollable overtime, compensatory time off in lieu of overtime pay, and the authorization of overtime work.190

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185Dominick, a Wall Street lawyer, came from a family that owned a Wall Street brokerage house. "Peter H. Dominick Is Dead at 65," NYT, Mar. 20, 1981 (B5:5-6).
186S. 1725, §§ 2(a), (b), (f) (93d Cong., 1st Sess., May 7, 1973).
In sum, then, the CSC "strongly urge[d] deletion" not only of the provisions in S. 1861 creating FLSA overtime coverage for federal employees, but even of the minimum wage extension in Dominick and Taft’s S. 1725. The Senate Labor and Public Welfare Committee took Hampton’s criticisms into account when it reported out S. 1861 in early July with federal overtime coverage largely intact. In addition to repeating the guideline from its 1972 report that it did not intend to cover professional, executive, and administrative personnel exempted under section 13 of the FLSA, the committee declared that it had “resolved” the CSC’s objections to dual coverage “by charging the Civil Service Commission with responsibility for administration of the Act so far as Federal employees” (except those of the Postal Service and Library of Congress) were concerned. The report then added this crucial policy directive: “It is the intent of the Committee that the Commission will administer the provisions of the law in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy. The provisions of the bill would leave the premium pay provisions of title 5, United States Code, in effect to the extent that they are not inconsistent with the Fair Labor Standards Act.” Significantly, the committee evaded the question of whether “consistency” meant that civil servants who would clearly be excluded from overtime pay under the FLSA would continue to be entitled to it under Title 5—and if they were, why “consistency” did not require a revision of the FLSA white-collar regulations to give private-sector workers an equivalent entitlement. The amended bill itself merely provided that the Civil Service Commission was “responsible for administering the provisions of this Act with respect to any individual employed by the United States....”

During the Senate floor debates in July, Dominick and Taft offered their bill S. 1725 as an amendment in the nature of substitute for S. 1861, the effect of the adoption of which would have been to exclude federal employees from overtime under the FLSA. After the Senate had defeated this move 57 to 40, Williams, acting as floor manager, stressed that S. 1861 covered virtually all nonsupervisory

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194 S. 1861, § 6(g) (93d Cong., 1st Sess., July 6, 1973).
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government employees at all government levels. He failed to note the self-contradiction that he constructed by then asserting that the bill did not apply to many nonsupervisory federal workers:

We want to cover all employees—except professional, executive, and administrative personnel who are exempted under section 13 of the law—in all civilian branches of the Federal Government because the Federal Government must be a model employer and must not be allowed to treat its workers any less decently than private employees, particularly where payment of overtime is concerned.

All Federal employees probably now receive minimum wage, but many suffer from excessive hours with only compensatory time off or straight-time pay.

Although it was certainly true that many civil servants were paid only straight time (or even less) for their overtime work, Williams ignored the equally important fact that the counterparts (in terms of salaries and job duties) of many of these federal employees were entitled to no overtime pay at all under the FLSA; indeed, many private-sector white-collar workers with even lower salaries were also excluded from overtime pay.

In the event, on July 19 the Senate passed the bill (as H.R. 7935) by an almost two to one margin (64 to 33), thus necessitating a House-Senate conference, at which the House receded with respect to the federal overtime issue. In the beginning of August both the Senate and House agreed to the conference report by large majorities, but after Labor Day President Nixon, engaged in a more general struggle with Congress over domestic measures, vetoed the bill. Among the numerous reasons that he adduced for his veto, the president included the superfluousness of minimum wage coverage for federal employees and the undesirability of “imposing] a second, conflicting set of overtime premium pay rules.... It would be virtually impossible to apply both laws in a consistent and

198 CR 119:24817.
199 CR 119:24829.
equitable manner.”

As they themselves had correctly predicted, House Democrats proved unable to override the veto, falling short by 23 votes. Although the Democratic leadership was not interested in compromising, the day after Congress sustained the veto, Republican Representative Quie introduced a compromise bill, which would have continued to exclude federal white-collar workers from the FLSA overtime regime. The Congress took no action before the first session adjourned on this bill or on the one that Dominick, Taft, and Beall and another that Williams introduced in the Senate in late November, both of which were similar to their earlier bills. In introducing S. 2747, Williams remarked that Nixon was the first president ever to have vetoed a minimum wage bill: “The demonstrated catastrophe of executive isolation we have seen manifested in the energy crisis, mismanagement of the economy, and other areas, has hopefully brought the administration to a realization that detente is in order, not only with the Soviet Union, but also with the Congress.” In fact, as the Watergate-related impeachment crisis began to engulf his presidency, Nixon increasingly lost the capacity to mobilize enough Republicans to make his veto threats credible.

At the start of the second session, Dent introduced H.R. 12435, which together with Williams’s S. 2747 became the chief vehicle for amending the FLSA. With regard to overtime coverage of federal employees and administration by the CSC, the bills were indistinguishable. In reporting out their respective bills in February and March, the Senate and House committees both used the same language that had already appeared repeatedly in Senate committee reports concerning the exclusion of federal “professional, executive, and administrative per-

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204 CR 119:30292 (Sept. 19, 1973) (259 to 164); Richard Madden, “House Sustains Wage Bill Veto,” NYT, Sept. 20, 1973 (1:4, 52:4). The day the House sustained the veto, Representative Burton inserted into the Congressional Record the AFL-CIO’s “Myth Versus Facts: Analysis of President Nixon’s Veto Message on Minimum Wage.” Although it mentioned that 54,000 federal employees already covered by the minimum wage earned less than the proposed $2.00 an hour minimum, it did not refer to any myths about overtime. CR 119:30271, 30272. See also “Failure to Override Minimum Wage Veto Hurt 64,000 of Us,” GS, Nov. 1973 (UM-2:1-2).
206 S. 2727, § 2 (93d Cong., 1st Sess., Nov. 19, 1973). The bill would have created minimum wage but not overtime coverage for federal employees. Dominick announced on the Senate floor that the bill did not extend any coverage to professional, executive, or administrative personnel. CR 119:37700.
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sonnel who are exempted under section 13 of the law” and charging the CSC with administration of the FLSA for federal employees “in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy. The provisions of the bill would leave the premium pay provisions of title 5...in effect to the extent that they are not inconsistent with the Fair Labor Standards Act.”

By 1974 relatively little overt resistance to overtime coverage for federal employees was on display; the congressional debates barely touched on the question. Even President Nixon in a conciliatory letter to Senator Williams merely mentioned that if Congress wanted to cover federal employees, “who are already protected by other laws,” it should place enforcement in the CSC—a superfluous proposal since the pending bills had already done so. Both Houses passed the bills by very large majorities, and,

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211 The only substantive discussion was triggered by Representative Henderson, who in 1973 had offered an amendment that would have excluded federal employees from the FLSA altogether. Henderson now opined that the language in the committee report on the CSC’s authority to administer the FLSA “seems to be in conflict with the bill”; he assumed that the CSC would have the authority to determine which federal workers were covered and how the existing (Title 5) overtime law for them was to be administered when in conflict with the FLSA. Dent replied that Henderson was “absolutely correct, and if there is any conflict in the report as opposed to any understanding” that Henderson had “given to the situation at this point,” Dent assured him that Henderson’s views were “correct.” Henderson then commended Dent and the committee for their action regarding the administration of the coverage of federal employees “as opposed to” the previous session’s bill. CR 120:7335 (Mar. 20, 1974). Unfortunately, neither Henderson nor Dent specified the alleged conflict between the bill and the report. Already by August 1, 1974, the CSC’s general counsel interpreted this “colloquy” [sic] as showing that “Congress was aware of the difficulties that would arise upon enactment of the Fair Labor Standards Amendments of 1974 and the problem of resolving conflicts between other laws, and gave the Civil Service Commission the authority to resolve such conflicts.” US CSC, FPMS Letter No. 551-4, Attachment No. 2 at 5 (Oct. 31, 1974). Much later the D.C. Circuit Court of Appeals interpreted the colloquy as showing that Congress intended the CSC (and later OPM) “to have a great deal of authority to determine how the FLSA would be administered in the civil service....” AFGE v. Homer, 821 F.2d 761, 770 (D.C. Cir. 1987).

212 Letter from Nixon to Williams (Feb. 27, 1974); CR 120:4706 (Feb. 28, 1974).

213 The vote in the Senate was 69 to 22; CR 120:5743 (Mar. 7, 1974). In the House the vote was 375 to 37; id. at 7337 (Mar. 20). The House also ultimately passed the Senate bill in lieu of its own; id. at 7349.

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since there were no differences, the conference committee did not need to deal with
the issue of federal coverage.214 The House and Senate agreed to the report, again,
by large majorities,215 and “with possible impeachment hanging over his head, Mr.
Nixon could not afford to risk a second veto.”216 Before Nixon had even approved
the law, the AFGE was already demanding time and a half after 35 hours for
federal employees.217

Thus in April 1974, after almost four years of congressional and presidential
stalemate, and almost four decades since the FLSA’s enactment, federal workers
were finally covered by that law’s time-and-a-half regulation. Congress amended
the definition of “employer” to include a “public agency,” which embraced the
Government of the United States or that of any state or political subdivision thereof
and any agency of these governments (including the U.S. Postal Service).218

Coordinately, “employee” was amended to mean, in the case of a person employed
by the United States Government, anyone employed as a civilian in the military
departments, in any executive agency, in any unit of the legislative or judicial
branch having positions in the competitive service, in a nonappropriated fund
instrumentality under the jurisdiction of the armed forces, in the Library of Con­
gress, or the U.S. Postal Service.219 And finally, Congress authorized the CSC to

Mar. 26, 1974).
215In the House 345 to 56 and in the Senate 71 to 19; CR 120:8605, 8769 (Mar. 28,
1974).
216R. W. Apple, Jr., “President Signs Rise in Pay Base to $2.30 an Hour,” NYT, Apr.
9, 1974 (1:8).

(10:1-3). Three decades later, the AFGE, with considerable exaggeration, took credit
for the creation of the dual overtime compensation system for federal employees: “In 1974,
after decades of letter writing and intense lobbying, AFGE...was able to have the definition
section of the FLSA to include, for the first time, federal employees.” American

218Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1) and (6),
88 Stat. 55, 58, 60 (Apr. 8, 1974) (codified at 29 USC §§ 203(d) and (x)).
219Fair Labor Standards Amendments of 1974, § 6(a)(2)(A) and (B), 88 Stat. at 58-59
(codified at 29 USC §§ 203(e)(2)(A) and (B)). The amendments did not cover anyone
employed by a state or local government who was not subject to its civil service laws, and
who either held a public elective office, or was selected by such officeholder to serve on
his personal staff, or was appointed by such officeholder to serve on a policymaking level,
or was an immediate adviser to such an officeholder regarding his office’s constitutional
or legal powers. Fair Labor Standards Amendments of 1974, §6(a)(2)(C), 88 Stat. at 59
(codified at 29 USC § 203(e)(2)(C)).
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administer the provisions of the FLSA "with respect to any individual employed by the United States" (except those employed by the Postal Service, Library of Congress, or TVA).220

The Initial Administration of the FLSA for the Civil Service

[Doris] Hausser [senior adviser to the OPM director] said an undetermined number of the government's blue-collar supervisors may lose their FLSA overtime under the Labor Department plan, but said the supervisors should not suffer any pocketbook losses because they will shift to civil service coverage and receive premium pay for extra work hours.221

Barely one month after the president had signed the FLSA amendments, the Civil Service Commission, exercising its new authority and attempting to provide "as much guidance as possible" under time pressure,222 issued interim instructions for implementing the FLSA stating that the revised statute

does not repeal, amend, or otherwise modify any existing Federal pay laws. However, it does require a new determination (long required in the private sector) as to which employees are "nonexempt" and which are "exempt" from the minimum wage and overtime provisions of the Act. ...

While the FLSA does not modify any existing pay laws, it does establish a minimum standard to which nonexempt employees are entitled. To the extent that the FLSA would provide a greater benefit to a nonexempt employee (e.g., a higher overtime rate) than the benefit payable under other existing pay rules, the employee is entitled to the FLSA benefit. If other existing pay rules provide a greater benefit, of course the employee continues to receive that benefit. Exempt employees continue to be paid for overtime work in exactly the same way as in the past."

The CSC also stressed to federal managers that henceforth they had to conform

220Fair Labor Standards Amendments of 1974, § 6(b), 88 Stat. at 60 (codified at 29 USC § 204(f)).
to FLSA’s concept of “employ” as including “to suffer or permit to work,”\textsuperscript{224} which is far more capacious than Title 5’s framework, which provides for compensation only of overtime work “[o]fficially ordered or approved.”\textsuperscript{225} Thus under the FLSA it became “insufficient to issue a rule that employees covered by the Act may not perform work outside normal work hours unless ordered to do so, or that they may not perform such overtime work without a clear indication from the responsible manager or supervisor that it will be approved after the fact. Management must assure that supervisors enforce that rule.” Consequently, under the FLSA any work performed by covered employees before or after established shift hours or during prescribed lunch periods “is working time if the manager or supervisor knows of or has reason to believe it is being performed.”\textsuperscript{226}

The CSC announced that it was in the process of reviewing the FLSA white-collar exemptions, but that it “anticipated that most supervisory positions will meet the executive exemption and that professional and comparable administrative positions will be exempted.”\textsuperscript{227} Already at this time, however, the CSC had “predetermined” that all employees at GS-4 and below were nonexempt.\textsuperscript{228} (In 1974 the maximum GS-4 salary rate was $9,358,\textsuperscript{229} compared with FLSA long-test salary levels of $6,500 for executive and administrative, and $7,280 for professional employees, and a short-test salary of $10,400.\textsuperscript{230} With regard to (non-professional) administrative occupations—and, according to the AFGE, the administrative exemption was by far the basis for exemption most often claimed by the federal government as its justification for denial of overtime pay\textsuperscript{231}—the CSC instructed management that they “require the kind of knowledge, evaluation [sic] judgment and breadth of outlook expected of competent college graduates. Employees are


\textsuperscript{226}US CSC, \textit{FPMS} Letter No. 551-1, at 2-3. The CSC’s interpretation, however, failed to appreciate the breadth of the “suffer or permit to work” standard; see Goldstein et al., “Enforcing Fair Labor Standards in the Modern American Sweatshop.”

\textsuperscript{227}US CSC, \textit{FPMS} Letter No. 551-1, Attachment 2 at 1.

\textsuperscript{228}US CSC, \textit{FPMS} Letter No. 551-1, Attachment 2 at 2.


\textsuperscript{230}See above ch. 15.

\textsuperscript{231}AFGE, \textit{Fair Labor Standards Act Manual} at 4. To be sure, the AFGE has never had a case in which a federal agency claimed an executive exemption because by definition bargaining unit members cannot be supervisors. \textit{Id.} at 9.
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required to apply this breadth of knowledge and perspective in solving problems for which guides, precedents, and instructions are not fully controlling. Quality of judgment required at the full performance levels depends primarily on reasoning ability and perceptiveness rather than on knowledge, gained through first hand experience or otherwise, of how prior similar cases, problems, etc., have been treated or decided upon."232 Initially, at least, the CSC conceived of excluded administrative workers with regard to their educational background and job duties much more narrowly than did or does the DOL.233 The CSC then appended a three-page list of administrative job titles with GS grades at and above which the positions "typically meet these criteria."234 They included such titles as internal revenue agent, public health program specialist, tax law specialist, coal mine and immigration inspectors, foreign language broadcasting, wage and hour compliance, and fingerprint identification, all of which were GS-7 or GS-9, which at the time encompassed salaries ranging from $9,969 to $15,821.235 The preliminary definition of professional occupations was also more capacious than the FLSA’s in stressing that the work involved “personal responsibility to keep abreast of and exercise judgment and broad perspective in the application of an organized body of knowledge that is constantly studied to make new discoveries and interpretations and to improve the data, materials, and methods.” The list of professional job titles encompassed largely GS-9 with a sprinkling of GS-7.236 Finally, the commission pointed out that any overtime paid under the FLSA was not subject to the salary limitation imposed under Title 5.237

At this early point in the process of coordinating Title 5 and the FLSA there seemed to be general agreement that Congress had given federal employees the best of both worlds. In 1974 the Comptroller upheld the CSC’s interpretation that workers were entitled to whichever overtime benefit was greater,238 while the

233See above ch. 2.
235US CSC, FPMS Letter No. 551-1, Attachment 2 at 5-7; EO 11739, FR 38:27581.
236US CSC, FPMS Letter No. 551-1, Attachment 2 at 7-11 (quote at 7).
237US CSC, FPMS Letter No. 551-1, Attachment 5 at 3; 5 USC § 5547.
238In the Matter of Overtime Compensation for Canal Zone Government Employees, 54 Comp Gen 371, 374-75 (1974). The outgoing Carter administration codified this interpretation at 5 CFR § 551.113: “An employee entitled to overtime pay under this subpart and overtime pay under § 550.113 of this chapter, or under any other authority, shall be paid under whichever authority provides the greater overtime entitlement in the workweek. This overtime pay shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority.”

1154
AFGE interpreted congressional intent as insuring that "all provisions of the Act apply to Federal employees unless workers enjoy greater benefits under the terms of Title V." And the Commission itself observed in an additional set of implementing instructions that if an employee had a greater overtime benefit under the FLSA, he nevertheless continued to be entitled to other kinds of non-overtime premium pay under Title 5 such as a night differential.

In spite of this rosy view, however, signs were also emerging that the integration of the two overtime pay systems might not be frictionless. As the Commission darkly noted in its first FLSA-era annual report: "Because Public Law 93-259 does not repeal, amend, or otherwise modify any existing Federal pay laws, this provision of the act conflicts with certain other Federal pay laws." And by mid-1975 the CSC had developed a broader interpretation of an excluded "administrative" employee. On July 1, the agency both published in the Federal Register partial regulations governing exemptions as a new Part 551 of Title 5 of the Code of Federal Regulations and issued more detailed instructions for applying the FLSA's exemption provisions that superseded the interim regulations issued a year earlier. The instructions were designed as guidelines to "integrate FLSA exemption determination with Federal classification systems to the extent possible, while maintaining results consistent with the basic exemption criteria and interpretations established by" the DOL.

The guidelines were notable for perpetuating the DOL's long tradition of rigorously avoiding any and all explanation of the rationale for treating white-collar workers differently than blue-collar workers, let alone of the relationship between that rationale and the excruciatingly detailed job descriptions. For example, the Commission's conclusion that administrative employees who carried out assignments that "are inherently varied, involving problems susceptible of differing interpretations, approaches, and solutions" and who performed work requiring "substantial discretion and judgment in the development, analysis, and interpretation of facts and inferences" "qualify for exemption" failed to explain why such workers were any less deserving of overtime pay than those performing "non-exempt" work presenting "recurrent kinds of situations that are covered by established guidelines."
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The problematic character of such logical gaps should have emerged more concretely into view with the CSC announcement in its “General principles governing exemptions” that “[e]xemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.”245 Like the DOL, the CSC never explained how it would be possible to identify, let alone operationalize, the “spirit” of an exemption whose purpose has remained totally opaque since 1938.

The CSC’s initial definition of “exempt” executive employee tracked that of the FLSA with several differences. First, such an employee had to supervise at least three subordinate employees, whereas the FLSA required only two. Second, the FLSA specified that an exempt executive either had to have the authority to hire or fire or his recommendations as to hiring, firing, or promotions had to be given particular weight, whereas the CSC more broadly or vaguely required the performance of “significant personnel management duties.” Third, Title 5 called for the regular exercise of discretion and independent judgment, whereas the FLSA required only discretion. Finally, under the CSC regime an exempt executive employee could be classified no lower than GS-5, whose lowest salary at the time was $8,055, while the FLSA long- and short-test salaries were $6,500 and $10,400.246

2455 CFR § 551.202(a) in FR 40:27640 (July 1, 1975). The current version of the regulation is identical except that “shall” has been replaced by “must.” 5 CFR § 551.202(b) (2002). The current version also includes these additional constraints on exclusions: “(e) There are groups of General Schedule employees who are FLSA nonexempt because they do not fit any of the exemption categories. These groups include the following: (1) Nonsupervisory General Schedule employees in...most clerical occupations...; (2) Nonsupervisory General Schedule employees performing technician work in positions properly classified below GS-9...and many, but not all, of those positions properly classified at GS-9 or above...; and (3) Nonsupervisory General Schedule employees at any grade level in occupations requiring highly specialized technical skills and knowledges that can be acquired only through prolonged job training and experience, such as the Air Traffic Control series...unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.”

2465 CFR § 551.203(a) in FR 40:27640; 29 CFR § 541.1 (1974); EO 11739, in FR 38:27581. The executive short test required only the primary duty of management of a department or subdivision and supervision of two employees. Two decades later, the Clinton administration OPM deleted the requirement that an exempt executive had to direct the work of at least three subordinate employees on the grounds that it was inconsistent with the DOL regulation. OPM rejected two unions’ comment that this change was a mistake because agencies would then claim that workers in teams with a team leader who makes recommendations regarding their co-workers’ work would qualify as exempt executives “simply if the employees exercise some independence in their own work.” FR
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The CSC’s definition of an “administrative employee” was both somewhat more stringent and more capacious than the FLSA’s. On the one hand, the Commission required the performance of “office or other predominantly nonmanual work” which was either “[i]ntellectual and varied in nature, or...of a specialized or technical nature that requires considerable special training, experience, and knowledge,” whereas the FLSA did not require anyone to meet the former criterion and permitted as substitutes for the latter either assisting a proprietor or bona fide executive or administrative employee or the execution of “special assignments and tasks” under merely general supervision—an extraordinarily vague criterion absent from Title 5. On the other hand, however, the CSC added “supporting services of substantial importance to the organization serviced” to the FLSA’s capacious primary duty of “work directly related to management policies or general business operations.” Finally, an exempt administrative employee had to be classified no lower than GS-7, whose lowest salary in 1974 was $9,969, which was about 50 percent higher than the FLSA long-test salary, but somewhat lower than the short-test salary.247

247 5 CFR § 551.203(b) in FR 40:27640; 29 CFR § 541.2 (1974); EO 11739, in FR 38:27581. The short test required only work related to management policies or general business operations requiring exercise of discretion or independent judgment. More than 20 years later a labor union commenting on a set of revised OPM FLSA regulations recommended that OPM add a provision modeled on the DOL regulations’ distinction between exempt administrative operations and production work involving the nonexempt performance of activities carrying out the employer’s day-to-day functions, but OPM dismissed the proposal without explanation on the grounds that the existing definition was “legally correct.” FR 62:67240. The current definition of “Management or general business function or supporting service, as distinguished from production functions, means the work of employees who provide support to line managers. (1) These employees furnish such support by—(i) Providing expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts; (ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management; (iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or (iv) Providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies. (2) Neither the organizational location nor the number of employees performing identical or similar work changes management or general business functions or supporting services into production functions. The work, however, must involve substantial discretion on matters of enough importance that the employee’s actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.” In
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The CSC’s professional employee exemption tracked the FLSA’s more closely with the significant exception that it broadened the primary duty to include the performance of work merely “comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.” Here, too, GS-7 was the floor.248

The Reagan Administration’s Attack on FLSA Overtime Pay for the Civil Service

In the long run the rank and file of the American labor would prefer to work overtime rather than to have the sublabor standards of a dictator country imposed on them.249

In March 1983, the Reagan administration’s Office of Personnel Management, which had replaced the CSC in 1979, announced that it was proposing to revamp the regulations applying the FLSA exemption criteria to federal workers on the grounds that the existing regulations were “difficult to administer” and “inconsistent with the exemption standards...applicable to private sector employees.”250 The move was part and parcel of Reagan’s recently announced drive to cut personnel costs251 and put an end to automatic salary step-increases.252 OPM was, inter alia, determined to do away with federal workers’ privileged overtime pay addition, “[p]articipation in the executive or administrative functions of a management official means the participation of employees, variously identified as secretaries, administrative or executive assistants, aides, etc., in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such employees must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures, and take actions which significantly affect the supervisor’s effectiveness.” 5 CFR § 551.104 (2002).

2485 CFR§ 551.203(c) in FR 40:27640-41. For the FLSA short-test duties, see 29 CFR § 541.3(e).
249CR 86:7026 (May 28, 1940) (Rep. Robert Allen (Dem. PA)).
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entitlements. The fact that federal employees were entitled to overtime pay under the FLSA or Title 5, "depending upon which law provides the greater benefit," presumably did not sit well with the OPM, which the following year issued a study characterizing federal workers as overpaid; the result was much lower quit rates than in the private sector: "Compensation rates should be lowered to reduce the Government's unfair competitive advantage over the private sector."

The three main differences, in OPM's view, between the FLSA and Title 5 were: (1) how hours of work were counted; (2) how the overtime rate was computed; and (3) the absence of overtime caps or limits under the FLSA. However, OPM's principal concern seemed to be that: "When OPM's current exemption regulations were promulgated in 1975 there was a rough equivalency between the regulations and the [short-test] exemption criteria applied by the Department of Labor to the private sector. Since that time, however, OPM's grade-level criteria have grown to be dramatically out of line with the flat salary criteria applied by the Department of Labor to the private sector. This discrepancy is not evident in the application of the 'primary duty test.'" Under the DOL regulations, an employee with a weekly salary of more than $250 was exempt so long as his primary duty was administrative, executive, or professional; if his salary was less than $250, he was subject to the long test requiring that no more than 20% of his duties be nonexempt. In contrast, however:

The equivalent cutoff point for GS employees is GS-10, which means a weekly salary of at least $429 a week [i.e. an annual salary in 1983 of $22,307]. This discrepancy results in the application of the long test to many employees who would be subject to the primary duty test if they were employed in the private sector. Therefore, OPM is proposing to establish the cutoff point for application of the primary duty test at GS-7. Since the minimum salary of a GS-7 is $318 per week, this change would still leave OPM's cutoff point well above the $250 standard applied by DOL...

Under the current regulations the minimum grade level at which an exemption can be applied is GS-5 for the executive exemption, and GS-7 for the administrative and professional exemptions. OPM is proposing to standardize the minimum grade level for applying all three exemptions at GS-5. Consequently, all GS employees at GS-5 and GS-6 would be subject to the long test, and could be exempted only if they perform 80% or more exempt work in a representative workweek. All employees classified below GS-5 would be nonexempt. It can be expected that it would be unusual for employees properly classified at GS-5 or GS-6 to meet the long test for exemption. Nonetheless, the proposed change is needed because the General Schedule recognizes the existence of administrative

253 FR 48:13374.
255 FR 48:13374.
and professional work below GS-7, and because OPM’s minimum grade levels for exemption are unrealistically high in comparison to the standard applied by DOL to private sector employees.256

On the grounds that the statutory definition of GS-11 showed that properly classified GS-11 employees presumptively performed executive, administrative, or professional work within the terms of the FLSA, the Reagan administration also proposed to change the definition of “primary duty...so that employees properly classified at GS-11 or above would be presumed to meet the primary duty test.” Since existing OPM instructions already exempted almost all categories of employees at GS-11 and above, the proposed change would exempt only those few categories of employees at GS-11 and above who were non-exempt and “who, if properly classified, should be presumed to be performing exempt work.”257 Consequently, OPM proposed that any employee properly classified below GS-5 be non-exempt, whereas any employee properly classified at GS-11 and above be “presumed to have a primary duty which is executive, administrative, or professional.” Finally, as an additional primary duty criterion, employees classified below GS-7 would also have to spend 80 percent or more of the worktime in a representative workweek on supervisory, administrative, or professional work.258

Within two weeks of their publication, the OPM’s proposals had prompted a hearing before the Senate Civil Service, Post Office, and General Services Subcommittee of the Governmental Affairs Committee. The proposed revisions had sparked considerable opposition, but many members of Congress, including the Republicans who controlled the Senate and its relevant committees during the 98th Congress, were also concerned that the changes were potentially so far-reaching that they should perhaps be undertaken legislatively rather than by an administrative agency.259 Although unions and the Congress focused more on issues pertaining to performance and its impact on promotions and reductions in force and limitations on the subjects open to labor-management negotiations, the Senate subcommittee also expressed concern about the reduction in the number of federal employees who would receive overtime pay under the FLSA.260 In his testimony

256FR 48:13374.
257FR 48:13375. The word “non-exempt” is used here, although “exempt” appeared in the Federal Register, which was manifestly a typographical error.
258FR 48:13376.
260Merit Pay and Proposed Pay-for-Performance Regulations: Hearings Before the Subcommittee on Civil Service, Post Office, and General Services Subcommittee of the Committee on Governmental Affairs United States Senate, Part 1 at 1 (98th Cong., 1st
before the subcommittee, OPM director Donald Devine (a conservative academic and Reagan election campaign official) distorted the congressional purpose in applying the FLSA to the civil service by claiming that in 1974 Congress had “intended to bring Federal overtime standards under the act closer into line with those administered by the Department of Labor for the private sector”—as if the pro-labor Democrats who passed the measure with union support against Republican opposition had been seeking to reduce civil servants’ level of protection. Devine then asserted that after the CSC had “followed through on the requirement that the Federal standards match those in the private sector” by establishing “Federal cutoff points at grade levels for which salaries matched” the DOL dollar-amount standards, during the intervening nine years the DOL had not increased those amounts, while the GS salaries for the cutoff-grades had risen substantially, with the result that the Federal cutoff was now $429 a week compared to $250 in the private sector. OPM was proposing to reduce the federal cutoff from GS-10 to GS-7 or $318 a week. In his prepared statement Devine charged that this “substantial difference” between the two regimes not only failed to “meet the requirements” of the 1974 FLSA amendments, but “imposes very heavy costs on the government.” However, in his response to “technical questions” that subcommittee chairman Ted Stevens had posed by letter after the hearing, Devine admitted that OPM estimated that the proposed changes would save the government only five to seven million dollars annually (which would otherwise be owed to about 20,000 employees) out of a total executive branch overtime cost of $2.6 billion. Devine’s claim that OPM’s reduction would still leave the federal standard “somewhat more generous” was undercut by Stevens’s written question as to why OPM was reducing the short-test salary to $318, while the last DOL proposal would increase the private-sector short-test salary to $345. Devine’s justification that that proposal had been indefinitely postponed in 1981 suggested


That Devine’s inaccurate account may have been the product of ignorance rather than conscious manipulation and bias is suggested by his mistaken claim in his prepared statement that the FLSA short test applied to workers with salaries below the cutoff point and the long test to those with salaries above it. In fact, he inverted the correspondence. Merit Pay and Proposed Pay-for-Performance Regulations at 19.  

Merit Pay and Proposed Pay-for-Performance Regulations at 8.  

Merit Pay and Proposed Pay-for-Performance Regulations at 19.  

Merit Pay and Proposed Pay-for-Performance Regulations at 37, 62.  

Merit Pay and Proposed Pay-for-Performance Regulations at 19.  

Merit Pay and Proposed Pay-for-Performance Regulations at 61. On the suspension of the increase, see above ch. 15.
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the possibility that the Reagan administration was engineering a coordinated race to the bottom to render the salary tests in both sectors nonfunctional.

As a result of "widespread criticism" of the March proposals, OPM published and solicited comment on a second version in July 1983.267 Thus at the same time that it published modified regulations for comment designed to "alleviate the discrepancy between OPM's exemption criteria and the exemption criteria which are applicable in the private sector," it responded to the comments that it had received from federal agencies and unions to the first round of proposed rule-making. In response to several unions that had questioned OPM's authority to issue regulations under the FLSA even for federal employees, the agency argued that Congress had given it such authority to administer the FLSA precisely in order to reconcile the differences between the FLSA and conflicting federal salary and classification statutes. Unions also objected to the OPM's presumption that employees at GS-11 or above were exempt on the grounds that it would be inconsistent with DOL regulations and irrebuttable.269 While conceding that DOL regulations lacked an identical presumption, OPM asserted that it can justifiably presume that employees at a certain level of responsibility or above are performing exempt work. It should not be necessary to require agencies to perform a separate evaluation for FLSA purposes when the exhaustive evaluation required by the classification process results in a determination that an employee is performing duties at a very high level of responsibility, difficulty, and complexity.

It must be noted that title 5 divides the General Schedule into two distinct categories. Those employees paid at less than the rate of GS-10, step 1, are entitled to time-and-a-half of their basic rate for overtime work. Those employees paid at the GS-10, step 1, rate or above are paid at the overtime rate of GS-10, step 1, regardless of grade level. In effect, title 5 provides a statutory division point above which employees are entitled to overtime compensation, but not to time-and-a-half. To determine that employees paid above the statutory break point are nonexempt creates pay distortions which frustrate the distinctions made by the General Schedule. Consequently, OPM believes that a presumption that employees above GS-10 are exempt is an appropriate reconciliation of title 5 and the FLSA and gives the fullest effect to both statutes while preserving the protective features of the FLSA for the segment of the workforce it was designed to protect.

With respect to the presumption of exemption, several labor organizations expressed additional opposition to the proposal on the grounds that FLSA exemption determinations should not be based in any part on classification. The labor organizations state that exemption determinations must be based on actual duties performed. We agree with this

268 FR 48: 32280 (July 14, 1983).
269 FR 48:32280.
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principle, but we do not agree that it precludes the relevance of classification in the exemption determination process. First, the primary use that OPM makes of the classification is as an equivalent to the DOL salary test. Since in all cases the salaries for the proposed grade levels exceed the DOL salary levels, the classification decision is sufficient for this purpose. The only additional use which this proposal is making of the classification grade decision is to establish a presumption that at the highest GS levels, properly classified employees are exempt. The classification decision demands a comprehensive evaluation of duties which when properly done is more than sufficient basis for this presumption. While it is true that the classification process focuses more on the position than on the employee, proper classification is ultimately based on the duties of a position as performed by an employee. Classification in the Federal sector is much more than the assignment of a job title. Rather, it is a statutorily required process which requires the assignment of an occupational series and grade level which is commensurate with the level of responsibility, complexity, and qualifications required. For GS employees all pay determinations flow from the proper classification of the employee's position. Therefore, we do not believe that a presumption of exemption of a position at a defined high level of responsibility and pay, can be equated to the simplistic, prohibited practice of assigning exemption by reference to generic job titles. Rather, it represents the appropriate exercise of OPM's authority to implement the FLSA in a manner which is consistent with the Federal position classification process.

Furthermore, it must be remembered that exemption from the FLSA for a Federal employee does not mean that the employee cannot receive overtime benefits. Exempt employees are subject to the statutory overtime entitlements of title 5. Exemption for employees at the highest grade levels generally means a reduction in overtime benefits, not their elimination.270

OPM rejected the even more radical proposals of several agencies "that the grade level at which exemption is presumed should be lowered, on the grounds that, since the cutoff for time and a half was GS-10, it did "not believe that exemptions should be presumed at levels in the General Schedule where exemption begins to become problematic."271 By the same token, OPM also rejected proposals by unions (and one agency) that "DOL should raise its salary tests, rather than OPM adjusting its grade level test to DOL standards. It is the responsibility of OPM to follow the general criteria determined by DOL to the extent possible within the context of Federal pay and classification statutes. Because OPM's grade cutoff period is so dramatically out of line with the DOL criteria, we believe that OPM cannot honor this mandate without adjusting its criteria to reflect more closely the DOL criteria. The fact that OPM criteria remain above the DOL salary tests and are tied to grade rather than salary reflect OPM's other mandate to

270FR 48:32280-81.
271FR 48:32281.
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integrate the exemption criteria into its pay and position classification processes.\textsuperscript{272}

To unions' objection to the standardization of the minimum grade level for exemption at GS-5, OPM responded that it in fact expected that only few employees would qualify for exemption at these grade levels: "However, the General Schedule recognizes the existence of administrative and professional work at these levels. As adjusted, OPM's minimum grade levels for exemption would be higher than the high salary test of DOL, and far above DOL's minimum salaries for exemption. Therefore, we believe that the standardization of the minimum level at GS-5 makes OPM's criteria more consistent with the DOL criteria and with OPM position classification standards."\textsuperscript{273}

OPM also found it necessary to point out that "[m]any of the objections to the changes in the FLSA regulations were based on the misconception that OPM" was lowering the overtime rate payable under Title 5: "A key feature of the FLSA change is the lowering of the point at which the 'short test' is applied from GS-10 to GS-7. Apparently many people interpreted this action to be related to the statutory overtime cap under title 5 which limits overtime payable to GS employees to the rate payable to a GS-10, step 1. The assumption was that OPM was lowering the point at which the overtime cap is applied under title 5 from GS-10 to GS-7. The FLSA exemption regulations, however, affect only how exemption status under the FLSA is determined and have no effect whatsoever on overtime pay under title 5, or any other pay system." OPM also noted that some comments had erroneously assumed that exempt employees were not entitled to overtime compensation. In fact, however, exempt employees were covered by Title 5's overtime provisions.\textsuperscript{274}

By the summer of 1983, Congress was still dissatisfied with OPM's proposed regulations\textsuperscript{275} and in August passed an appropriations bill prohibiting the agency from spending any funds to adopt, issue, or carry out before October 15, 1983, any regulation based on those published in March and July.\textsuperscript{276} Ten days after this deadline expired, on October 25, 1983, when OPM published the final rules (and promulgated the aforementioned contested regulations more or less unchanged), it also responded to the set of comments submitted to the July version of the proposals. Contending that most of the opposing commenters had misunderstood

\textsuperscript{272}FR 48:32282.\
\textsuperscript{273}FR 48:32282.\
\textsuperscript{274}FR 48:32282.\
\textsuperscript{275}CR 129:22445-50 (Aug. 3, 1983).\
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OPM's role as the FLSA administrator, the agency argued that "Congress realized that...the FLSA would cause conflicts with existing...Federal pay and classification statutes...and that it is OPM's responsibility to reconcile these conflicts to the maximum extent possible, while preserving the basic purpose of the FLSA." OPM chose to illustrate its role by reference to the application of the long and short tests—an area in which OPM was "dramatically out of line"\(^{277}\) with DOL's private-sector regime:

Under the DOL criteria, an employee paid at a salary of $250 or more per week is subject to the less stringent "short test" for exemption. OPM's current regulations make the cutoff for applying the "short test" at the GS-10 level, which currently has a minimum salary of $429 per week. A key feature of the revised regulations is to adjust this cutoff point from GS-10 to GS-7, which currently has a minimum salary of $318 per week. While this adjustment would alleviate somewhat the discrepancy between the OPM criteria and the DOL criteria, it would still leave the standard for Federal employees significantly above that which is applied to employees in the private sector. Under the President's proposal for the Federal pay comparability increase, the minimum weekly salary for a GS-7 would rise to $328 in January. If the "short test" cutoff point were left at GS-10, the equivalent weekly salary in the Federal sector would rise to $486, almost doubling the standard applicable in the private sector.

As can readily be seen from these figures, the proposed cutoff points, even after adjustment, remain higher than the private sector standards. If OPM were to literally interpret its responsibility to be consistent with DOL it would apply a pure salary test, tied directly to the DOL figures. This would mean that the cutoff point for applying the short test should be dropped to approximately GS-4, step 3. However, OPM is concerned not only with its mandate for consistency, but also with its concurrent responsibility to integrate the administration of the FLSA into the Federal pay and position classification process. OPM believes that defining the FLSA minimum grade levels for exemption, and the cutoff points for applying the "short test" in terms of the classification system, make [sic] more sense than using only absolute dollar figures. ... Furthermore...the position classification system is a job evaluation process which is a more logical system for defining exemption for Federal employees than gross weekly salary.

Paradoxically, those who object to the reference to classification in exemption determinations also urge that the cutoff point for applying the "short test" be left at the classification level of GS-10. In other words, it appears that the objection to the proposal is not that OPM is using the classification system in the exemption determination process, but rather that OPM is honoring its other mandate to attempt consistency with DOL in applying more realistic standards by lowering the classification reference points for exemption.

This confusion in the objections to the proposal is well illustrated by the reaction to the assertion of a presumption of exemption for employees classified at GS-11 and above.

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Although this presumption affects only a relatively few highly classified employees (the overwhelming majority of employees at these grade levels are already exempt), it has been objected to on the grounds that it is inconsistent with DOL regulations. We believe that it is reasonable to presume exemption of employees at defined high grade levels, particularly since they are classified at these grades precisely because of the high level of complexity and responsibility of their positions.278

OPM justified its presumption that employees at GS-11 and above were all exempt on the grounds that during almost a decade’s experience it had found “almost all employees” at those levels properly exempt; it estimated that the population of high-graded non-exempt employees who might potentially become exempt under the change did not exceed 20,000.279

On October 18, 1983, a week before OPM issued its final rule, the legislative-executive dispute over the OPM regulations intensified when the House Appropriations Committee reported out a bill that, inter alia, prohibited obligating or expending funds appropriated pursuant to that bill to implement, promulgate, administer, or enforce the March or July regulations.280 The bill that the House passed on October 27281 found its way into a continuing resolution that Congress passed in mid-November.282 Because the bill had been reported out before OPM issued the final rule, and because the continuing resolution was not updated to reflect that issuance, OPM announced on November 21 that the regulations would go into effect; bizarrely, however, Director Devine, while recognizing the congressional intent to prohibit OPM from administering or enforcing the regulations, concluded that each agency would have to perform those activities without OPM’s assistance.283 Already on November 7, the National Treasury Employees Union had filed a complaint in the Federal District Court for the District of Columbia requesting that the regulations be declared void, which it amended two weeks later, requesting that OPM be enjoined to withdraw the regulations based on the con-

278FR 48:49494.
279FR 48:49495.
283National Treasury Employees Union v. Devine, 733 F.2d 114,116 (D.C. Cir. 1984). Devine’s announcement was based on an opinion by OPM’s general counsel that although all departments and agencies would be bound by the regulation, “[t]he most prudent interpretation” was that OPM was “without funds to assist in the implementation of the new rules or to enforce their fair administration.” National Treasury Employees Union v. Devine, 577 F.Supp. at 743.
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The district court did declare the regulations void and enjoined the OPM from taking any action with regard to them, and the appeals court affirmed that judgment. Then in another continuing appropriations act in October 1984, Congress extended the prohibition on the use of funds for implementing, administering, enforcing, reissuing, or revising the regulations until July 1, 1985. As this date approached, the AFGE sought a temporary restraining order blocking implementation of the regulations, which was denied by the district court; the D.C. Circuit Court of Appeals then reversed that ruling, but the Supreme Court vacated the reversal.

After the regulations published as final rules in October 1983 became effective on July 3, 1985 (and began to be implemented 120 days later), OPM republished them as proposed regulations in August 1985 allowing for further comment. In the meantime, the unions unsuccessfully sought a preliminary injunction against implementation of the regulations. In March 1986 OPM adopted the regulations again as a final rule and responded once again to comments. In response to several unions’ objection to the use of the classification system for determining a presumed exemption and a recommendation of a cut-off salary of $21,798 for determining presumed exemption, OPM argued that “defining the FLSA minimum grade levels for exemption, and the cutoff points for applying the ‘short test’ in terms of the classification system makes more sense than using only absolute dollar figures.” OPM also took the position that “a presumption that employees above GS-10 are exempt is an appropriate reconciliation of title 5 and the FLSA and gives the fullest effect to both statutes while preserving the protective features of the FLSA for the segment of the workforce it was designed to protect.”

The unions, however, persisted in their judicial attacks on the validity of the regulations. Although the district court dismissed their complaint at the end of

291 FR 51:7426.
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June 1986, the federal workers’ challenge to OPM’s regulatory presumption that employees classified above GS-10 were excluded from overtime pay under the FLSA ultimately prevailed before the D.C. Circuit Court of Appeals, where the AFGE took the position that OPM’s argument that in establishing the General Schedule for classifying positions GS-11 or above it applied DOL’s criteria for determining the FLSA executive and administrative exemptions had to fail: “It is apparent that OPM has arbitrarily selected the GS-11 salary level as a cut-off for making FLSA exemption decisions rather than attempting to make the more difficult factual determination by applying the tests enunciated by DOL” To be sure, it was difficult to regard the cut-off as arbitrary since it coincided with the cut-off for the entitlement to full time-and-a-half pay under Title 5.

The National Federation of Federal Employees devised a more far-reaching argument. Since a primary difference between Title 5 and FLSA overtime pay was the former’s limitations for employees classified above GS-10, OPM, by presuming an exemption from the FLSA at GS-11, avoided “the logical implication of Congress’s grant of FLSA coverage to federal employees, that overtime pay availability over GS-10 would be based on FLSA exemption categories, not the limited Title 5 categories.” OPM’s argument that allowing employees at GS-11 and above to be FLSA nonexempt created pay distortions frustrating the General Schedule’s distinctions turned, in the NFFE’s view, “Congress’ intent on its head. These ‘distortions’ are caused by paying time and a half to employees who are properly considered non-exempt. When Congress rejected the Civil Service Commission’s claim that the FLSA was inappropriate in the federal sector, it specifically endorsed the ‘distortions’ which OPM is now trying to obliterate.” The NFFE also argued that the Classification Act was inappropriate for FLSA purposes because “classifying an employee at GS-11 creates no implication about the employee’s FLSA exemption status, as those classifications are based primarily on the difficulty of the work and expressly include types of duties which are non-exempt FLSA duties.” The specific point about GS-11 was factually correct, but the broader claim about the GS classifications themselves was overdrawn since

difficulty of work can be a component of a determination of professional or admin­
istrative exclusions under the FLSA.

The D.C. Circuit straightforwardly rebuffed OPM’s approach. Starting from
the position that when the civil service and FLSA systems conflict, OPM must
defer to the FLSA so that any employee entitled to receive overtime pay under the
latter receives it under the former, the court pointed out that the challenged
regulations conflicted with the FLSA in important ways. Although the OPM
regulations, like the FLSA, purported to exempt “only tightly defined executive,
administrative, and professional employees from overtime eligibility,” these
provisions were “completely undermined” by 5 CFR 551 § 203(c), which stated
that “any employee properly classified at GS-11 or above [without regard to the
nature of his duties]...shall be presumed to be exempt....” The conflict between the
OPM regulations and the FLSA was, in the court’s view, quite apparent in the case
of a GS-11 employee who worked as a skilled technician. Although technical
employees were eligible for overtime pay under the FLSA and OPM recognized
as much, GS-11 nevertheless included employees performing technical duties.
Under the new regulations, all GS-11 employees were presumed ineligible and had
to file a complaint with OPM or a suit in court to overcome the presumption. OPM
insisted that few government employees would suffer such inconvenience and
claimed that its presumption was easily rebuttable, but the D.C. Circuit found that
“OPM’s position seems disingenuous. The regulation appears designed to make
it difficult for the employee to rebut the presumption.... Since the presumption
appears to guide or direct the agency to act inconsistently with the FLSA and
places an unwarranted and, at minimum, confusing burden on the employee, sec­
tion 551.203(c) is flawed and must be vacated as inconsistent with the ‘meaning,
scope, and application’ of the FLSA.”296 A half-year after the court vacated 5 CFR

296 American Federation of Government Employees v. Office of Personnel
Management, 821 F.2d at 770, 771 (quotes). The United States Government had argued
that OPM’s reversing the burden of proof by placing it on the worker was appropriate
because job classification in the federal sector was not subject to the kind of manipulation
in which private employers engaged by creating meaningless job titles to avoid overtime
pay obligations; consequently, federal employees did not need the same kind of protection
from mislabeling. Brief for Appellees at 54-55, American Federation of Government
Employees v. Office of Personnel Management, 821 F.2d 761 (DC Cir. 1987) (Nos. 86-
5456, 86-5457, 86-5461) (filed Dec. 15, 1986). An interesting refutation of this claim
stems from a decision involving a deputy U.S. marshal who acted in “‘front line’ capacity
‘protecting jurors, judges, and witnesses,’” and at times worked 12-hour days seven to
eight days in a row. He filed suit under the FLSA because, being classified as a GS-11
step 7 employee, he had been paid less than full time and a half and subjected to the total
earnings limitation. Rejecting the government’s claim that the plaintiff was a FLSA-
§ 551.203(c), the OPM removed the regulation.\textsuperscript{297} Thus currently, “[a]ny employee in a position properly classified at GS-4 or below...is nonexempt,” whereas “[a]ny employee in a position properly classified at GS-5 or above...is exempt only if the employee is an executive, administrative, or professional employee.”\textsuperscript{298}

In 1990 the Bush administration resumed the efforts of previous administrations to restructure federal white-collar compensation systems, inter alia, to substitute merit for automatic pay increases.\textsuperscript{299} In introducing, by request, OPM’s Federal Pay Reform Act of 1990,\textsuperscript{300} Senator William Roth transmitted the agency’s justification for the bill: “The General Schedule system with its monolithic structure and rigid underpinnings is incapable of adapting to this increasingly diverse and dynamic economic environment.”\textsuperscript{301} As one minor substantive provision the bill included an amendment that would “eliminate the current duplicative overtime computations for employees covered by both subchapter V [of Title 5, ch. 55] and the Fair Labor Standards Act. Such employees will have their overtime computed only under the Fair Labor Standards Act, but hours in excess of eight hours in a day are deemed overtime hours.”\textsuperscript{302} OPM’s proposal was not enacted in its entirety,\textsuperscript{303} but the amendment was incorporated into the Federal Employees Pay Comparability Act (FEPCA) of 1990,\textsuperscript{304} which revised § 5542, the exempt administrative employee, the U.S. District Court for the District of Columbia found that his position required the physical strength and stamina of running, stooping, bending, climbing, lifting, and carrying heavy objects and that his “work environment is not that of the white collar office worker but rather includes ‘a wide variety of potentially dangerous’ and physically stressful situations.” Roney v. United States of America, 790 F. Supp. 23, 24, 25 (quote), 28 (quote) (D.D.C. 1992).

\textsuperscript{297}FR 53:1739 (Jan. 22, 1988).

\textsuperscript{298}5 CFR § 551.203 (2002).


\textsuperscript{300}CR 136:8905 (May 1, 1990) (S. 2547).

\textsuperscript{301}CR 136:8917.

\textsuperscript{302}CR 136:8922. The provision itself read that § 5542 “shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act.... In the case of an employee who would, were it not for the preceding sentence, be subject to this section, hours of work in excess of 8 hours in a day shall be deemed to be overtime hours for the purposes of such section 7 and hours in a paid nonwork status shall be deemed to be hours of work.”

\textsuperscript{303}In particular the original merit pay increase proposal was not enacted, but locality pay was introduced. Making Appropriations for the Treasury Department 87-90 (H. Rep. 101-906, 101st Cong., 2d Sess., Oct. 20, 1990) (FEPCA conference report).

\textsuperscript{304}Neither House took any action on OPM’s S. 2547, but the overtime provision was
principal overtime provision for white-collar workers in Title 5, so that its "[s]ubsection (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair labor [sic] Standards Act.... In the case of an employee who would, were it not for the preceding sentence, be subject to this section, hours of work in excess of 8 hours in a day shall be deemed to be overtime hours for the purposes of such section 7 and hours in a paid nonwork status shall be deemed to be hours of work."  

As explained by OPM’s implementing interim regulations in 1991, FEPCA eliminates the need to calculate and compare an FLSA nonexempt employee’s overtime pay entitlement under two laws in order to pay the greater overtime benefit. Instead, employees who are nonexempt under the Fair Labor Standards Act...will always receive overtime pay under the FLSA, as provided in part 551 of title 5, Code of Federal Regulations.


305 The Federal Employees Pay Comparability Act of 1990, Pub. L. 101-509, § 210, 104 Stat 1427, 1460 (Nov. 5, 1990) (adding subsect. (c) to 5 USC § 5542). Two years later, Congress enacted “technical amendments” pursuant to which the second sentence of the FEPCA amendment of 5 USC § 5542(c) was revised to read: “In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding section.” Technical and Miscellaneous Civil Service Amendments Act of 1992, Pub. L. 102-378, § 2(41)(B), 106 Stat. 1346, 1360 (Oct. 2, 1992). In other words, the specific reference to daily working hours beyond eight was replaced by requiring OPM to ensure that federal employees not receive less overtime pay pursuant to the FLSA computation than under FEPA. Aaron v. United States, 56 Fed. Cl. 98, 100 (2003). The relevant provision currently reads: “(a) An agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay.... (d) The maximum earnings limitations described in §§ 550.105, 550.106, and 550.107 of this chapter do not apply to overtime pay due the employee under this subpart.” 5 CFR § 551.501 (2003). In promulgating this revision, OPM noted that Title 5 and FLSA overtime pay would be earned on the same basis beyond eight hours per day and 40 per week FR 56:20343 (May 3, 1991). In 1980 OPM added the statement that the maximum aggregate earnings limitation (including overtime pay) of Title 5 did not apply to overtime under the FLSA at the request of an agency. FR 45: 85662 (Dec. 30, 1980).
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Federal employees who are exempt from the FLSA, but covered by the overtime pay provisions of title 5...will continue to have their overtime pay benefit calculated and paid under the title 5 provisions.... [E]limination of the requirement to perform an overtime pay comparison for nonexempt employees does not affect their entitlement to premium pay under title 5....

Consequently, as OPM specified in its final rule the next year, "overtime pay for nonexempt employees is computed and paid only under the FLSA."  

**Overtime Pay Even for Lawyers: The Unique Scope of Title 5**

Companies simply do not want to get into the position of paying overtime to employees whose work cannot be measured, and who can, to a large extent, determine the amount of overtime they work.

One director of labor relations put his company’s position bluntly:

> There is a little bit of larceny in every man’s heart. If you provide premium pay, some engineers are going to manufacture reasons for working a pot full of overtime. No one is looking over the engineer’s shoulder to see whether he is really working the first eight hours on the job. After all, the engineer who has his feet on his desk or who is staring out of the window may be having his most productive moments. There is no way to check abuses.

The potential power of Title 5 to create entitlements to overtime pay for workers who are unambiguously excluded from the FLSA was demonstrated by a 1998 class action, successfully prosecuted before the U.S. Court of Federal Claims on behalf of 10,000 Department of Justice trial lawyers for overtime pay under §§ 5542, 5543, and 5545(c)(2). According to the facts, as found by the trial court,

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307 FR 57:59277 (Dec. 15, 1992). But as an overtime compensation expert at OPM confirmed: “OPM regulations assure that someone covered under the FLSA will receive no less pay than someone covered under title 5 (5 USC § 5542(c)).” Email from Robert Hendler, OPM, Philadelphia (July 21, 2003).
309 Doe v. United States of America, 54 Fed. Cl. 404 (2002). For official documents and background material, see http://www.dojclass.com. A lawyer in the AFGE general counsel’s office specializing in the FLSA basically dismissed Title 5 overtime law as of
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The lawyers were expected to and did work overtime on a regular basis; they were induced to do so by their direct supervisors, and the overtime work was well known at the highest levels of DOJ, which recognized that it could not function properly within its budget constraints without officially induced and approved overtime. The plaintiffs alleged not that they had been explicitly ordered to work overtime by an authorized official, but that management’s expectations and case-loads required it. The class members were covered by the premium pay provision under the FEPA unless they were paid at GS-15 step 10 or higher. To be sure, as already noted in another context, lawyers classified above GS-10 were not necessarily entitled to overtime pay even if they were ordered to work: instead, at its discretion, the DOJ was empowered to require them to take compensatory time off (5 USC § 5543(a)(2)).

Consistent with the DOJ Attorneys’ Manual statement that lawyers “should expect to work in excess of regular hours without overtime premium pay,” uncompensated overtime hours were not only expected by management, but also used as a basis for evaluations, promotions, and awards. One United States Attorney had, in the court’s words, “an innovative means of encouraging overtime”: with assistant U.S. Attorneys averaging 60 overtime hours per month, he ordained that “[a]ny AUSA failing to meet this average will be expected to pay $1.00 per hour for every hour under 60 hours of overtime a month.” The court further found that the assistant attorney general and deputy assistant attorney general had explained to Attorney General Reno that lawyers were working five to nine additional hours per week and that ordered, approved, or induced overtime should be paid; they also suggested legislation exempting DOJ lawyers from little help because of the impediment that the overtime work has to be authorized/approved in advance (whereas the FLSA’s “suffer or permit to work” standard creates no such obstacles). Nevertheless, he acknowledged, after extended discussion of Title 5’s much higher salary ceilings and its lack of exclusions of administrative, executive, and professional employees, that it was perhaps worth rethinking Title 5’s advantages. He also speculated that if challenged, probably half of the federal employees classified as FLSA-exempt would be found to be nonexempt. Telephone interview with Joe Goldberg, General Counsel’s Office, American Federation of Government Employees, D.C. (July 22, 2003). The appellate reversal of Doe—which turned not on whether the overtime work had been ordered or approved, but on whether such order or approval had been in writing—in part vindicated Goldberg’s view. See below.

310 Doe v. United States of America, 54 Fed. Cl. at 405-406.
311 Doe v. United States of America, 54 Fed. Cl. at 408. For a similar system in engineers’ collective bargaining agreements, see above ch. 2.
313 Doe v. United States of America, 54 Fed. Cl. at 415 n.10.
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overtime compensation, in which Reno concurred, but the Office of Management and Budget objected to the proposal.314

The next group of arguments advanced by the DOJ appeared so redolent of overreaching that the trial judge handily dismissed them:

Defendant argues that the Manual does not establish inducement, but merely advises attorneys what they should expect. The Manual states that “attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay.” Defendant suggests that this phrase was artfully drafted to distinguish it from overtime that will have been “officially approved.” The phrase “work in excess of regular hours” is important in defendant’s view, but we see it as more support for the conclusion that official policy at the Department of Justice has been to accept overtime work from its attorneys without paying for it.

Defendant complains that a judgment here would result in damages being paid retroactively to attorneys who did not ask for overtime pay when it was performed, and therefore did not give the Government the opportunity to make other arrangements. It is essentially an attempt by attorneys to raise their own salaries unilaterally, after the fact. This is an appealing argument, but the fact remains that the work was done. The United States benefitted from overtime that was actually performed. Denial of benefits to which members of the Class are otherwise entitled would require the court to elevate form over substance. ...

The Justice Department Manual states, “United States Attorneys are NOT authorized to approve overtime premium pay for attorney personnel. Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay.” The Government now argues that this section of the Manual advises prospective employees that they will not be paid overtime, and that this language prevents overtime from ever being “ordered or approved.” This language from the Manual could mean that the Justice Department does not pay overtime, so attorneys should not work overtime; or that overtime is common and expected in this business but the Department does not pay overtime, so do not ask for it. In any event, agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime.315

The DOJ argued at trial that the fact that the lawyers handled their cases with professional judgment under largely self-imposed deadlines precluded payment for such overtime, but the court dismissed this argument on the grounds that whether lawyers should qualify for overtime pay under FEPA was not an issue since they were subject to FEPA “and for whatever reason Congress has not exempted them

314 Doe v. United States of America, 54 Fed. Cl. at 415.
315 Doe v. United States of America, 54 Fed. Cl. at 416-17.
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from overtime compensation...."316 The court then went on to offer an extended explanation as to why the professional character of the lawyers’ work was in no way inconsistent with an entitlement to overtime compensation:

Defendant argues most persuasively that a system of paying litigating attorneys overtime would affect their professionalism adversely.

The Department wanted to promote professionalism because treating lawyers professionally, rather than as hourly workers, is consistent with the way attorneys see themselves. Ordering and approving overtime work would be inconsistent with and harmful to this professional atmosphere because ordering overtime requires direction concerning when, where, and for how long work is performed. That type of direction detracts from an attorney’s autonomy, discretion, and control of his or her work product. It is this level of control possessed by individual attorneys which makes the Department so attractive to its highly qualified lawyers in the first place.

We agree entirely with this statement and commend it. For the purposes of this litigation, however, it is irrelevant. Attorneys in the Class are covered by the Federal Employees Pay Act and they are entitled to overtime if they meet its requirements. ... Though one may speculate on the effects of an award of back pay in this case, including possible changes in procedure, or its impact on professionalism in the Department, those issues are beyond the scope of this court’s jurisdiction.317

Even before the trial court handed down its decision, Congress had reacted to the litigation by writing into the appropriations bill for the DOJ a prospective prohibition on using funds to pay its attorneys premium compensation under Title 5.318 Then in 2004 a panel of the Federal Circuit reversed the lower court’s decision on the subordinate issue of the plaintiffs’ alleged failure to have demonstrated that the DOJ had ordered or authorized the overtime work in writing. The appellate judges, whose opinion did not engage the larger questions raised by the lower court, nevertheless apparently felt queasy enough about having exculpated the DOJ from any liability for having induced the plaintiffs to work overtime to add that “we do not wish to be seen as countenancing any effort by DOJ or any other agency to evade the requirements of FEPA....” The DOJ’s candid admissions that its “attorneys were expected to work overtime without compensation” could

316Doe v. United States of America, 54 Fed. Cl. at 415.
317Doe v. United States of America, 54 Fed. Cl. at 417.
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not, however, move the court to admit candidly that the Department, as the claims court had found the government to have done in the past, "in effect was coercing uncompensated overtime." The only (hypothetical) ground that the judges would cede was that "an adverse personnel action...against an employee who declined to work uncompensated overtime...might well be found to be invalid." But even such a judicial finding could not justify "awarding overtime compensation that was not ordered and approved in strict compliance with the regulation." Consequently, the only consolation that the judges offered the plaintiffs was the suggestion that the executive branch "might do well to reexamine the whole overtime question for employees not subject to the FLSA and seek a government-wide legislative solution."319

In spite of the reversal by the Federal Circuit of the Federal Claims Court's ruling in favor of the DOJ lawyers, it remains true that the FEPA, unlike the FLSA, does not exclude professional employees. Consequently, the DOJ is, for the time being at least, "[t]he glaring exception," while attorneys in numerous executive agencies and departments are paid for their overtime work.320

Not With a Bang But a Whimper: Stealth Enactment of a Higher Salary Ceiling

Superpay for supermen.321

At the end of 2003, 37 years after Congress had last adjusted either of the overtime ceilings, a tiny provision embedded deeply within the mammoth Pentagon appropriations bill finally effected the change. Five years earlier, Republican Representative Thomas Davis, who represents a district in Virginia in which many federal employees live, had introduced a bill, the Federal Employees Overtime Pay Act of 1998, which would have amended § 5542 of Title 5 to raise the ceiling for full overtime to the minimum rate for GS-15.322 Congress took no action on the

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bill, but the next year Davis introduced an identical bill with a number of sponsors, including several noted liberals not representing districts near Washington, D.C.323

No action was taken on this bill either, but later the same session Davis introduced yet another bill, this one raising the upper ceiling only to the minimum rate of GS-12, but also requiring that any employee whose salary exceeded that rate be paid an overtime rate at least equal to his hourly basic rate.324 This bill, too, died without any action having been taken on it, but in the meantime even OPM had submitted a legislative proposal to Congress, modifying both the lower and upper ceilings.

OPM’s Federal Employees’ Overtime Pay Limitation Amendments of 1999—which Davis co-sponsored325—would have provided both that no employee whose basic pay exceeded the minimum rate of GS-10 would receive less than straight time for overtime work and that the aggregate pay limit be changed from the maximum rate for GS-15 maximum to the lesser of 150 percent of the GS-15 minimum rate or the rate payable for level V of the Executive Schedule.326 In 2004, this latter change would have disadvantaged the highest paid employees since, for example, in San Francisco GS-15 maximum was $136,000, one and a half times GS-15 minimum is $158,440, and level V of the executive schedule is $127,300.327 (In fact, when Congress amended this provision in 2001, the limitation became the greater of the maximum GS-15 rate or that for Executive Schedule level V.)328

323H.R. 582 (106th Cong., 1st Sess., Feb. 4, 1999). Barney Frank, Lynn Woolsey, and Patsy Mink were among the sponsors.
326Proposed Bill attached to letter from Janice Lachance, director, OPM, to Speaker of the House Dennis Hastert (n.d. [Apr. 28, 1999]).
327http://www.opm.gov. It should be borne in mind that the impact might be limited by the fact that many GS-15 employees are bosses who, because they work overtime on their own discretion, would rarely have had that work “ordered and approved,” as required by Title 5. Email from Robert Hendler, OPM (Feb. 3, 2004). In addition, as a practical matter, employees receiving FLSA overtime would not often exceed the GS-15 cap anyway. Email from Robert Hendler, OPM (Feb. 13, 2004).
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In an accompanying letter to the Speaker of the House, OPM Director Janice Lachance, who characterized the proposals as seeking to accommodate managers’ and supervisors’ concerns, argued that Title 5’s overtime pay limits had been designed in recognition of the fact that private sector supervisors and other non-Federal workers who are exempt from the overtime pay provisions of the... FLSA...typically do not receive overtime pay. Instead of eliminating overtime pay altogether for employees at higher grades, however, 5 U.S.C. 5542(a)(2) reduces overtime pay entitlements gradually for FLSA-exempt supervisory and non-supervisory General Schedule employees by using the GS-10, step 1, rate as the maximum base for computing overtime pay. ... To the maximum extent possible, we believe the Federal Government’s overtime pay practices should continue to reflect non-Federal overtime pay practices. Information available to us about private sector overtime pay practices indicates that the majority of private sector employers still do not pay overtime to supervisors and other FLSA-exempt staff. Nevertheless, it does appear that the percentage of private sector supervisors and other FLSA-exempt employees who receive overtime pay is increasing and that the most prevalent method of paying such employees is at the straight-time rate (not time and one-half). Therefore, we believe the law should guarantee that no Federal employee receives less than his or her hourly rate of basic pay for overtime work. This would eliminate the reduced hourly rate for employees at GS-12, step 6, and above.329

Although OPM continued to maintain that the Title 5 overtime regime merely mimicked the FLSA’s, even it had to concede that they differed without, however, mentioning that the greatest difference was the former’s much higher salary ceiling (even if it were not increased again). The momentum for change was sustained in 2000 when OPM submitted another proposal, this time suggesting merely that no employee receive less than straight time for overtime work.330

Pressure for increasing the overtime ceilings was in large part generated by structural shifts over time in the compensation hierarchy. Using GS grades as ceilings may have marked an advance over fixed dollar amounts, but eventually the grades themselves became obsolete. Thus whereas the average grade for GS employees had been 6.73 in 1960, by 2001 it had risen to 9.71.331 This trend is


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even more impressive in terms of absolute numbers: whereas in 1986 the modal grade was GS-5 (209,664 employees), already by 1990 the modal group had become GS-12, which by 2001 encompassed 226,421 employees. As a result, whereas in 1986 GS-11 to GS-15 had encompassed only 38.9 percent of all GS employees, by 2001 the proportion rose to 53.3 percent.332

This structural shift has also preoccupied OPM, whose director in 2002 issued a white paper advocating “modernization” of federal pay declaring: “When the General Schedule was created [in 1950], the Federal Government was largely a ‘Government of clerks.’ But most Government work no longer revolved around the execution of established, stable processes or the application of physical effort. Instead,...Federal white-collar work has become highly skilled and increasingly specialized ‘knowledge work’ that is properly classified at higher grade levels.”333 This trend was reflected in an accompanying bar chart revealing that in 1950 GS-3 had been the modal grade, with GS-4, 2, and 5 the next most populous grades, whereas by 2000 GS-12, 11, and 13 were the most densely occupied.334

In 2003, the National Commission on the Public Service (or Volcker Commission) picked up on the same theme, observing that in 1950, when 62 percent of the nonpostal white-collar workforce was located in GS 1-5 and only 11 percent in the highest five grades, “[f]or most federal employees, the work was process oriented and routinized. It required few specialized skills.” But in the course of the second half of the twentieth century, “the character of federal responsibilities and the nature of work began to changes in ways that would dramatically alter government functions and revolutionize the workplace.... Nearly every aspect of government became more technically complex”—from administering and regulating foreign aid and trade and insuring the safety of food, drugs, travel, and the workplace, to engaging in scientific research, complex litigation, and financial regulation. Little wonder, then, that by 2000 the GS structure had been reversed: the lowest five grades encompassed only 15 percent of the workforce compared to 56 percent in the highest five.335

These commentaries, which ominously resembled contemporaneous judgments by employers and their federal executive and legislative supporters as to why the


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FLSA overtime regime was increasingly unsuited to private-sector white-collar-dom, were shaped by overarching frameworks advocating less government administration of the federal labor force and more free marketization. Although this perspective did not bode well for expansion of overtime pay for federal white-collar workers, in the interim progress continued to be achieved for the higher-paid administrators, executives, and professionals. On April 1, 2003, in the wake of the release of the Volcker Commission report, the House Committee on Government Reform, which Davis now chaired, held a hearing on Federal Employee Compensation Reform. One of the witnesses, Karen Heiser, a member of the Federal Managers Association (FMA), which represents 200,000 federal managers and supervisors, explained to the Subcommittee on Civil Service and Agency Reorganization that one dimension of the government’s worker retention problem was the “disincentives for moving up the career ladder” caused by the overtime caps. She explained that one of the side-effects of the reduction by several hundred thousand in the size of the nonpostal executive-branch civilian workforce since 1994 had been the increasing prevalence of the performance of overtime work and payment of overtime compensation. Heiser instanced a supervisor at GS-13, step 9, whose $36.14 regular hourly pay rate was transformed by the GS-10, step 1 ceiling into an overtime pay rate of only $26.64. The FMA therefore urged raising the ceiling as one way of eliminating such disincentives. Unmentioned was the unlikelihood that a $75,000-a-year supervisor in the private sector would be entitled to any overtime compensation under the FLSA.

Later in April 2003, Davis introduced the Civil Service and National Security Personnel Improvement Act, which included a stripped-down version of his earlier bills: it proposed to amend § 5542(a)(2) of Title 5 so that employees whose salaries exceeded GS-10, step 1 were at the very least entitled to overtime pay equal to their straight-time pay rate. When Davis’s committee reported out the bill on May 19, it included some interesting data compiled and/or estimated by OPM and the Congressional Budget Office. About 680,000 federal employees, or 36.7 percent of the GS workforce at or above GS-10 were exempt from the FLSA. The change in the law, which would affect only employees at GS-12, step 6 and above, would raise their overtime rate above the fixed GS-10, step 1 overtime rate of about $32 an hour; the cost was estimated at $100 million for 2004 and $700 million for

2004-2008. Three days earlier, the House Armed Services Committee had reported out the National Defense Appropriation Act for the Fiscal Year 2004, which in its original version lacked any overtime cap provision, but now included § 1101, drafted by Davis, containing the same wording as Davis’s bill. The committee report stated that the provision was designed to “ensure that Federal employees who are exempt from the FLSA, and are paid above step 5 of grade 12, do not suffer a pay cut when they work overtime.” The Senate bill lacked such a provision, but in conference the Senate receded on the issue; consequently, when it was approved by the president on November 24, 2003, the military appropriations bill in the midst of the U.S. war in and occupation of Iraq became the almost silent and uncontested vehicle for the first increase in either of the overtime ceilings since 1966.

As to why such a seemingly implausible route finally effectuated this objective—and, to boot, without any overt opposition—the FMA’s executive director noted that:

With the current transformation of the civil service—and an eye towards significant compensation reform—the DOD Authorization bill seemed like the right vehicle to address

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341 Letter from Michael Styles, president FMA, to Rep. Duncan Hunter, chairman, House Armed Services Committee (July 29, 2003), on www.fedmanagers.org/MStyles%2520Ltr%2520to%2520House%2520DOD%2520Conferees%2520on%2520Overtime%2520Provision.pdf+%22defense+authorization+act%22+%22federal+managers+association%22+overtime&hl=en&ie=UTF-8. During the House floor debates on the military appropriations bill it was Davis who spoke up about raising the overtime ceiling. *CR* H4547 (May 22, 2003).


344 Act of Nov. 24, 2003, Pub. L. No. 108-136, § 1121, 117 Stat. 1392, 1636. More than two months after the fact, the largest government defense employee union, the AFGE, when asked about the new provision, was embarrassed to admit that the union’s legislative department had been entirely unaware of it although it benefited thousands of its members. Telephone interview with Joe Goldberg, general counsel’s office, AFGE (Jan. 29, 2004).

345 Email from Didier Trinh, executive director, FMA (Washington, D.C.), to Marc Linder (Feb. 2, 2004).
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overtime pay for managers and supervisors. FMA has been the chief advocate for this relief for years, and given DOD’s push to revamp their pay structure as part of the legislation, this was a good opportunity to make the change to Title 5 regarding overtime pay to ensure government-wide application. ...

Although this was not our goal years back when we sought to get the cap to GS 12, Step 1, we believe this is a positive incremental step that begins to bring fairness into the equation. 

The measure failed to “provide full overtime relief to Federal managers and supervisors,” but the FMA president, in expressing his gratitude to Davis “for championing this provision,” declared: “As we tackle the current human capital crisis we must seek to eliminate those retention barriers that prevent our government from maintaining the strongest possible management cadre.”

346Email from Didier Trinh, FMA (Washington, D.C.), to Marc Linder (Jan. 30, 2004).

347FMA, News Release: “FMA Hails Congressional Passage of Overtime Relief for Managers” (Nov. 12, 2003), on www.fedmanagers.org. Other organizations, including the National Weather Service Employees Organization, which together with other groups had lobbied for such a change for several years, also welcomed the amendment. NWSEO, “FLSA Exempt Employees Get Overtime Boost” (Dec. 2003), http://www.nwseo.org/OT%20Flyer.pdf.
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Appendix I

Comparison of Title 5 Overtime Ceilings and the FLSA Long- and Short-Test Salary Levels

Under Title 5 of the U.S. Code, the lower salary ceiling marks the highest salary at which an employee, whose duties are irrelevant, is entitled to full time and a half for overtime; the higher ceiling marks the highest salary at which no employee is entitled to any overtime compensation. Under the FLSA, until the regulatory revisions of 2004, which collapsed the long and short tests into a "standard" test, the long-test salary marked the point below which all salaried employees were entitled to time and a half; workers with salaries between the long-test and short-test salaries were subject to stricter duties-test scrutiny; workers with salaries above the short-test salary were subject to relaxed duties-test scrutiny. Thus the FLSA long-test salary was more like the Title 5 lower ceiling.

The FLSA long-test salary for executives never equaled Title 5's lower ceiling: from 1950 to 1954 it came closest, falling short by an annualized $120; the long-test salary for administrative and professional employees did exceed the Title 5 lower ceiling from 1950 to 1954 by $920 or 30.9 percent. But once the Title 5 system ceiling was converted from the fixed $2,980 to one keyed to the minimum GS-9 salary in 1954 (and GS-10 in 1966), the FLSA long-test salary for these two groups fell behind. Thus by 1955 the gap was $5,440/$3,900 or 39.5 percent, and when Title 5 shifted to GS-10 in 1966, the gap rose to $8,421/$5,200 or 61.9 percent for administrative employees, but declined slightly to $8,421/$5,980 or 40.8 percent for professional employees, whose long-test salary had been increased above that for administrative employees in 1963. By 1975, the last time the FLSA salary-test levels were increased until 2004, the gap had widened to $14,117/8,060 or 75.1 percent for executive and administrative employees, and $14,117/8,840 or 59.7 percent for professional employees. By 2004, after 29 years of the DOL's failure to adjust the FLSA salary tests, the gap had become as dysfunctional as the salary tests themselves had become nonfunctional: the minimum GS-10 (actual locality) salary of $43,708 was more than 5.4 times greater than the executive and administrative long-test salary and almost five times greater than the professional long-test salary.

The FLSA short-test salary, which, despite efforts by the chairman of the Civil Service Commission in 1966 to characterize it as the relevant point of comparison to the Title 5 lower ceiling, was, if anything, more comparable to the higher ceiling, above which employees are no longer entitled to any overtime pay, and under-

348See above chs. 16-17.
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went a somewhat different development than the long-test salary. When introduced in 1950 at $100 weekly (an annualized $5,200) for all three white-collar divisions, it exceeded Title 5’s lower ceiling of $2,980 by 74.5 percent. When the lower ceiling became keyed to the minimum GS-9 salary of $5,440 in 1955, it exceeded the short-test salary by 4.6 percent, but did not increase this small difference beyond 8.6 percent in 1975, when the short-test salary was increased for the last time. By 2004, the lower ceiling was three times greater than the short-test salary. If, on the other hand, Title 5’s higher ceiling is used as the point of comparison, it was already twice as high at the inception of the short test in 1950, three times as high in 1975, and (using the actual highest locality pay) ten times as high by 2004.

For 2004, federal employees up to the GS-15 step 10 level were entitled to overtime pay. The highest such locality salary was $136,000 or $5,213.60 bi-weekly for San Francisco and Houston; the lowest such salary was $123,682 or $4,740.80 bi-weekly for numerous locations. The highest GS-10 step 1 locality salary was paid in San Francisco and amounted to $48,528; the lowest locality pay was $43,708, which prevailed in many locations. Thus, even after the DOL abolished the long and short tests in 2004 and replaced them with the standard test, whose salary threshold was set at $455 a week or an annualized $23,660, Title 5’s lower ceiling remained twice as high.

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350 The upper salary cap has been keyed to the biweekly pay period (rather than an annual salary) since 1954.
351 http://www.opm.gov
352 See ch. 17 above.
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Table 8: Title 5 Base Salary Overtime Ceilings ($)

<table>
<thead>
<tr>
<th>Year</th>
<th>For full time-and-a-half overtime pay</th>
<th>For any overtime pay</th>
</tr>
</thead>
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<tr>
<td>1945</td>
<td>2,980</td>
<td>10,000</td>
</tr>
<tr>
<td>1946</td>
<td>2,980</td>
<td>10,000</td>
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<td>10,330</td>
</tr>
<tr>
<td>1950</td>
<td>2,980</td>
<td>10,330</td>
</tr>
<tr>
<td>1951</td>
<td>2,980</td>
<td>10,330</td>
</tr>
<tr>
<td>1952</td>
<td>2,980</td>
<td>10,330</td>
</tr>
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<td>1953</td>
<td>2,980</td>
<td>10,330</td>
</tr>
<tr>
<td>1954</td>
<td>2,980</td>
<td>10,330</td>
</tr>
<tr>
<td></td>
<td>GS-9/1</td>
<td>GS-15/max</td>
</tr>
<tr>
<td>1955</td>
<td>5,440</td>
<td>12,690</td>
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<td>12,690</td>
</tr>
<tr>
<td>1957</td>
<td>5,440</td>
<td>12,690</td>
</tr>
<tr>
<td>1958</td>
<td>5,985</td>
<td>13,970</td>
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<td>1959</td>
<td>5,985</td>
<td>13,970</td>
</tr>
<tr>
<td>1960</td>
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<td>15,030</td>
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<td>17,925</td>
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<td>7,030</td>
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<td>7,220</td>
<td>21,590</td>
</tr>
<tr>
<td></td>
<td>GS-10/1</td>
<td></td>
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<table>
<thead>
<tr>
<th>Year</th>
<th>Population</th>
<th>GDP</th>
</tr>
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<tbody>
<tr>
<td>1966</td>
<td>8,421</td>
<td>23,013</td>
</tr>
<tr>
<td>1967</td>
<td>8,821</td>
<td>23,921</td>
</tr>
<tr>
<td>1968</td>
<td>9,297</td>
<td>25,711</td>
</tr>
<tr>
<td>1969</td>
<td>10,252</td>
<td>28,069</td>
</tr>
<tr>
<td>1970</td>
<td>10,869</td>
<td>29,752</td>
</tr>
<tr>
<td>1971</td>
<td>11,517</td>
<td>31,513</td>
</tr>
<tr>
<td>1972</td>
<td>12,151</td>
<td>33,260</td>
</tr>
<tr>
<td>1973</td>
<td>12,775</td>
<td>34,971</td>
</tr>
<tr>
<td>1974</td>
<td>13,379</td>
<td>36,741</td>
</tr>
<tr>
<td>1975</td>
<td>14,117</td>
<td>38,764</td>
</tr>
<tr>
<td>1976</td>
<td>14,824</td>
<td>40,705</td>
</tr>
<tr>
<td>1977</td>
<td>15,524</td>
<td>43,923</td>
</tr>
<tr>
<td>1978</td>
<td>16,618</td>
<td>47,025</td>
</tr>
<tr>
<td>1979</td>
<td>17,532</td>
<td>49,608</td>
</tr>
<tr>
<td>1980</td>
<td>18,760</td>
<td>53,081</td>
</tr>
<tr>
<td>1981</td>
<td>20,467</td>
<td>57,912</td>
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<tr>
<td>1982</td>
<td>21,449</td>
<td>60,689</td>
</tr>
<tr>
<td>1983</td>
<td>22,307</td>
<td>63,115</td>
</tr>
<tr>
<td>1984</td>
<td>23,088</td>
<td>65,327</td>
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<td>1986</td>
<td>24,011</td>
<td>67,940</td>
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<tr>
<td>1987</td>
<td>24,732</td>
<td>69,976</td>
</tr>
<tr>
<td>1988</td>
<td>25,226</td>
<td>71,377</td>
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<td>1989</td>
<td>26,261</td>
<td>74,303</td>
</tr>
<tr>
<td>1990</td>
<td>27,206</td>
<td>76,982</td>
</tr>
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<table>
<thead>
<tr>
<th>Year</th>
<th>Employees</th>
<th>Beneficiaries</th>
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<tbody>
<tr>
<td>1991</td>
<td>28,332</td>
<td>80,138</td>
</tr>
<tr>
<td>1992</td>
<td>29,511</td>
<td>83,502</td>
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<td>1993</td>
<td>30,603</td>
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<td>1995</td>
<td>31,215</td>
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<td>1997</td>
<td>32,571</td>
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<td>33,320</td>
<td>94,287</td>
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<tr>
<td>1999</td>
<td>34,353</td>
<td>97,201</td>
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<tr>
<td>2000</td>
<td>35,658</td>
<td>100,897</td>
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<tr>
<td>2001</td>
<td>36,621</td>
<td>103,623</td>
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<td>2002</td>
<td>37,939</td>
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<tr>
<td>2003</td>
<td>39,113</td>
<td>110,682</td>
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<tr>
<td>2004</td>
<td>39,702</td>
<td>112,346</td>
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</table>

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#### Table 9: FLSA Weekly and Annualized Salary Tests ($)*

<table>
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<tr>
<th>Year</th>
<th>Long Test</th>
<th>Short Test</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Executive</td>
<td>Administrative</td>
</tr>
<tr>
<td>1938</td>
<td>30 [1,560]</td>
<td>30 [1,560]</td>
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*The amounts in square brackets are annual equivalents. Source: Ch. 15 above.*
As of March 2003, the federal government employed 1,414,716 white-collar workers classified in the 15 grades of the General Schedule system; 789,066 or 55.8 percent were excluded from the FLSA’s overtime provision. The proportion of excluded workers rose univocally from 0.1 percent at GS-1 to 99.6 percent at GS-15; the big break came between GS-8 (14.6 percent) and GS-9 (51.5 percent). Workers excluded from the FLSA are covered by the Title 5 overtime system, which offers full time-and-a-half overtime pay up to the minimum rate of GS-10. The total number of employees classified in GS-11 through GS-15 amounted to 770,819 or 54.5% of all 1,414,716; 664,484 or 86.2 percent of all employees in these five grades were both excluded from the FLSA and not entitled to full time and a half under Title 5. To this group must be added an unknown number of employees in GS-10 steps 2-10.

Table 10: Proportion of Federal White-Collar Employees Excluded from the FLSA by GS-Grade (March 2003)

<table>
<thead>
<tr>
<th>Grade</th>
<th>Total</th>
<th>Exempt</th>
<th>Nonexempt</th>
<th>% exempt</th>
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<tbody>
<tr>
<td>1</td>
<td>2,900</td>
<td>4</td>
<td>2,896</td>
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<tr>
<td>2</td>
<td>5,403</td>
<td>123</td>
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<td>3</td>
<td>23,854</td>
<td>746</td>
<td>23,108</td>
<td>3.1</td>
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<tr>
<td>4</td>
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<td>3,116</td>
<td>62,423</td>
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<td>5</td>
<td>114,781</td>
<td>7,977</td>
<td>106,804</td>
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<td>6</td>
<td>88,866</td>
<td>9,445</td>
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<td>7</td>
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<td>9</td>
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<td>67,632</td>
<td>63,587</td>
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<td>10</td>
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<td>11</td>
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<td>187,608</td>
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<td>14</td>
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<td>92,989</td>
<td>1,427</td>
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<tr>
<td>15</td>
<td>58,074</td>
<td>57,844</td>
<td>230</td>
<td>99.6</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td>1,414,716</td>
<td>789,066</td>
<td>625,650</td>
<td>55.8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>229,716</td>
<td>136,469</td>
<td>93,247</td>
<td>59.4</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td>1,644,432</td>
<td>925,535</td>
<td>718,897</td>
<td>56.3</td>
<td></td>
<td></td>
<td></td>
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</tbody>
</table>

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Appendix III

State Employees in California and New York State

The federal government may have been a leader in creating an overtime compensation regime for its white-collar employees during World War II, but it had few followers. The wartime lengthening of work schedules to compensate for manpower shortages and to create the opportunity for higher earnings was, according to a high ranking CSC official, not as widespread as might have been expected based on surveys of city governments and jurisdictions. To meet staffing requirements and increase production, President Roosevelt issued Executive Order No. 9301 on February 9, 1943, declaring that no place of employment was making the most effective use of its manpower if its minimum workweek was less than 48 hours; it excepted state and local government, but some cities voluntarily adopted it.

However, two states that have generally been labor legislation pioneers, California and New York, did develop overtime pay systems for their white-collar workers that are more inclusive than the FLSA's private-sector system. Before and even after the enactment of an overtime pay statute for state employees, the Supreme Court of California took the position that: “When the employee is paid by time, as by the day, week, or month, rather than by the amount of work which he does, he is bound, in the absence of statute, to render services without regard to the number of hours worked.” In 1943, the California legislature declared that

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354 Ismar Baruch, “The Wartime Salary Problem,” PPR 5(2):77-88 at 83-84 (Apr. 1944). In January 1943, one fourth of 938 cities surveyed provided overtime pay or compensatory time for extra hours by salaried or wage employees; of these, two-fifths paid the salaried employees and two-thirds the wage employees money. For example, the city of Flint Michigan paid time and a half after 44 hours by salaried or wage employees; of these, two-fifths paid the salaried employees and two-thirds the wage employees money. For example, the city of Flint Michigan paid time and a half after 44 hours, but this program did not apply to supervisory personnel, some of whom were to be paid straight time; the highest six of 16 classifications were excluded from any overtime pay. Id.; Municipal Year Book 1943 at 208-209 (Clarence Ridley and Orin Nolting eds. 1943). E.O. 9301 §5 stated: “Nothing in this Order shall be construed as superseding or in conflict with any Federal, State, or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary work week, nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act...or any other Federal, State, or local law relating to the payment of wages or overtime.” FR 8:1825 (Feb. 11, 1943).

during the then-prevailing emergency the lack of manpower had made it necessary to pay overtime to state employees so that their services could be used beyond the normal workweek; if they could not be obtained, it would be necessary to try to find less experienced "help" at a greatly increased cost. Thus California amended its Civil Service Act to provide: "Every State employee compensated on a monthly basis required and ordered to work in excess of a normal work week...shall receive overtime compensation based on his regular rate of pay for all overtime; provided, that no overtime compensation shall be paid on any portion of an employee’s regular rate of pay in excess of two hundred fifty dollars...per month.” Compensating time off in lieu of overtime could be granted within 30 days of the date worked if it did not impair delivery of the agency’s services.356

After declaring in 1949 that it was state policy “to avoid the necessity for overtime wherever possible,”357 in 1955 the state legislature required the State Personnel Board to establish a method by which ordered overtime or overtime in times of critical emergency was to be compensated; it gave the board discretion to set the rate as equal to or less than the regular rate. The only guideline that it offered was that: “The provisions made under this section shall be based on the practices of private industry and other public employment, the needs of state service, and internal relationships.”358 Then in 1971 the State Personnel Board was authorized, with respect to ordered overtime or “overtime in times of critical emergency,” to provide for cash compensation or compensating time off at a rate not to exceed time and a half.359 However, after the FLSA became definitively applicable to state employees in 1985, the descendant of the original overtime law, though still on the books,360 fell into virtual disuse: since the California Department of Public Administration has declared that state professional, supervisory, and managerial employees exempt from the FLSA “receive no overtime compensation,”361 and the state’s collective bargaining agreements with its employees’ unions reiterate that such salaried employees “may not receive any form of overtime compensation, whether formal or informal,”362 state employees by and large

Cranston, 362 P2d 492 (Cal. 1961).
3561943 Cal. Stat. 2976-77, ch. 1041, §§ 1-3 (June 7, 1943).
3581955 Cal. Stat. 3296, ch. 1787, § 3.
3591971 Cal. Stat. 147, ch. 111 § 1.
362Agreement Between American Federation of State, County, and Municipal Employees (AFSCME) and State of California Covering Bargaining Unit 19 Health and Social Services/Professional, art. 6.1.B.1 at 22 (July 3, 2001-July 2, 2003), on
receive no overtime compensation to which the FLSA does not entitle them.\textsuperscript{363}

As early as 1901 the New York State legislature passed a law classifying, grading, and establishing compensation rates for clerks and other state employees. It applied to all clerks, bookkeepers, stenographers, copyists, messengers, and all other employees with duties of a clerical character in all the state departments, bureaus, commissions, and offices—except division or bureau deputies, heads, chiefs, and assistant heads and chiefs—creating for them ten grades from $360 to $2,400. As to these workers it declared: "No person holding a position or employed in any department, bureau, commission or office to which this act applies and for which a definite salary or compensation has been appropriated or designated, shall receive any extra salary or compensation in addition to that fixed."\textsuperscript{364}

Almost half a century later, in 1947, the legislature amended the Civil Service Law with respect to overtime compensation of state employees. The new law provided that the workweek for basic annual salary shall not be more than 40 hours for all state officers and employees except of the legislature and judiciary; any such state officers or employees authorized or required to work more than 40 hours "shall receive compensation for the hours worked in excess of forty in each week at the hourly rate of pay received by such employee...or shall be allowed an equivalent amount of time off in lieu of such overtime compensation." The legislature then directed the budget director to promulgate regulations that "may exclude any title or individual position or positions, when the nature of the duties performed or the difficulty of maintaining adequate time controls makes it impracticable to apply to such title or position or positions the provisions of this section...."\textsuperscript{365} Two decades later, the state legislature raised the overtime rate to time and a half and eliminated the alternative of compensatory time off,\textsuperscript{366} and this framework has remained law ever since.\textsuperscript{367}

It is instructive to examine the regulations issued to implement this overtime law for state white-collar workers. Their underlying principle is overtime work rather than pay: "It is the policy of the State that overtime work be held to a minimum consistent with the needs of sound and orderly administration of State government. The State requires supervisors to hold overtime work to such a minimum by the proper scheduling and assignment of activities, simplification of work

\textsuperscript{363}Telephone interview with Edmund Brehl, Labor Relations Counsel, Cal. Dept. of Public Administration, Sacramento (Jan. 30, 2004)
\textsuperscript{364}1901 N.Y. Laws ch. 521, §§ 1, 3, 4, at 1281, 1282 (quote from § 4).
\textsuperscript{365}1947 N.Y. Laws ch. 270, § 1, at 664, 665.
\textsuperscript{366}1967 N.Y. Laws ch. 615, § 1, at 1422.
\textsuperscript{367}N.Y. Civ. Serv. § 134.1 (Consol. 2003).
The regulations then set out the excluded categories of employees. In this context it is important to note that certain categories are excluded without reference to salary, while for others a salary in or above grade 15, which in 2002 was fixed at $36,398\(^{369}\)—almost three times higher than the FLSA short-test salary—was a prerequisite for exclusion:

Officers and employees in positions or types of positions meeting the following criteria shall not be eligible to earn overtime pay:

(a) The head of every department, institution or other State agency and the head and members of boards and commissions.
(b) Deputies of principal executive officers.
(c) Administrative and staff personnel. This group includes those officers and employees in grade 15 and above and officers and employees in unallocated positions paid a salary equal to or in excess of that paid for the minimum of grade 15:
   (1) whose primary duty consists of the management of a bureau, division or major subdivision of a department or agency; or
   (2) who are in charge of independent offices or physically separated branches; or
   (3) whose primary duty consists of administrative or staff work not performed under close and proximate supervision.
(d) Professional and technical personnel. This group includes those officers and employees in grade 15 and above and officers and employees in unallocated positions paid a salary equal to or in excess of that paid for the minimum of grade 15:
   (1) whose positions require, as a minimum qualification, four or more years of study beyond a high school education, or equivalent experience, in a specialized intellectual field, as distinguished from apprenticeship or training in the performance of routine mental, manual or physical processes; and
   (2) whose primary duty consists of the performance of work of such a character that the output produced or the results accomplished cannot be standardized in relation to a given period of time; and
   (3) whose work is not performed under close and proximate supervision.
(e) Personnel whose duties involve:
   (1) a close working relationship with an individual executive; and
   (2) work which is exclusively, or almost exclusively, for such executive; and
   (3) a work schedule which depends on the personal needs and specific directions of such executive.
(f) All positions for which time records showing actual hours worked each day are not required to be maintained.

\(^{368}\)Official Compilation of Codes, Rules and Regulations of the State of New York, title 9, § 135.0 (1995).

\(^{369}\)N.Y. Civ. Serv. § 130 (Consol. Supp. 2003) (administrative payroll); for the professional, scientific, and technical payroll the corresponding threshold was $34,549.
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(g) All positions, including field positions, in which the incumbents exercise personal discretion in the scheduling of their hours worked, whether or not the number of hours worked exceeds the basic workweek. This group includes any officer and employee:

(1) whose hours of work are controlled by him or the work situation, rather than subject to the direction and control of a supervisor; or

(2) who, subject to appropriate clearance with his supervisor, has substantial freedom in planning his work assignments to make adjustments in the schedule for his basic workweek to meet work requirements efficiently.

(h) All full-time officers and employees whose normal work schedule does not consist of five working days and two days off in a workweek as defined under subdivision (a) of section 135.1.370

Thus the excluded categories can be summarized as follows: (1) the highest-ranking executives (not subject to a salary test but whose salaries are presumably high); (2) (a) high-ranking administrators; (b) vaguely defined administrative and staff work not closely or proximately supervised; (3) professional and technical employees with at least four years of post-secondary education or equivalent experience in a specialized intellectual field, the results of whose work cannot be time-standardized and whose work is not closely and proximately supervised; (4) vaguely and ambiguously defined personal and confidential subordinates of individual executives (not subject to a salary test and whose salaries may not be high); (5) undefined employees who are not required to punch a time-clock (and not subject to a salary test); and (6) undefined employees who schedule and control their own hours (not subject to a salary test).

Overall, then, even apart from the much higher salary test, the executive exclusions are much narrower than the FLSA’s, while the administrative exclusions are either somewhat narrower or possibly narrower; the professional exclusions are similar to the FLSA’s, but because they are vastly less specific, they may be narrower. In contrast, the exclusions for confidential employees and those who exercise greater formal freedom to set their working hours are absent from the FLSA and, because they lack a salary-level test, considerably expand the universe of excludibles.

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Appendix IV

Title 5 Overtime Provisions

5 USC § 5542 (2003): Overtime rates; computation:

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), and all that amount is premium pay.

(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of Transportation who occupies a nonmanagerial position in GS-14 or under and, as determined by the Secretary of Transportation,

(A) the duties of which are critical to the immediate daily operation of the air traffic control system, directly affect aviation safety, and involve physical or mental strain or hardship;

(B) in which overtime work is therefore unusually taxing; and

(C) in which operating requirements cannot be met without substantial overtime work; the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

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(c) Subsection (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act.... In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding sentence.

5 USC § 5543 (2003): Compensatory time off

(a) The head of an agency may--

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

(b) The head of an agency may, on request of an employee, grant the employee compensatory time off from the employee’s scheduled tour of duty instead of payment under section 5544 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work. An agency head may not require an employee to be compensated for overtime work with an equivalent amount of compensatory time-off from the employee’s tour of duty.

5 USC § 5547 (2003): Limitation on premium pay:

(a) An employee may be paid premium pay under sections 5542, 5545 (a), (b), and (c), 5545a, and 5546 (a) and (b) only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed the greater of--

(1) the maximum rate of basic pay payable for GS-15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(2) the rate payable for level V of the Executive Schedule.

(b) (1) Subject to regulations prescribed by the Office of Personnel Management, subsection (a) shall not apply to an employee who is paid premium pay by reason of work in connection with an emergency (including a wildfire emergency) that involves a direct threat to life or property, including work performed in the aftermath of such an emergency.

(2) Notwithstanding paragraph (1), no employee referred to in such paragraph may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent
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that, the aggregate of the basic pay and premium pay under those provisions for such employee would, in any calendar year, exceed the greater of--

(A) the maximum rate of basic pay payable for GS-15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.

(3) Subject to regulations prescribed by the Office of Personnel Management, the head of an agency may determine that subsection (a) shall not apply to an employee who is paid premium pay to perform work that is critical to the mission of the agency. Such employees may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent that, the aggregate of the basic pay and premium pay under those provisions for such employee would not, in any calendar year, exceed the greater of--

(A) the maximum rate of basic pay payable for GS-15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.