“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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An Introductory Illustration:
The Joker in the Trinitarian Formula—
What Are “Administrative” Employees and
Why Are They Excluded?

No law is a good law which gets itself involved in procedure and formulae divorced from its goal.¹

The legislative history for the FLSA contains no explanation for the exemption.²

Embedded and operating in a policy vacuum, the Labor Department has continued the unbroken 66-year-old tradition of evading discussion of possible justification for the massive exclusions of white-collar workers. In the three-columned 191 pages of proposed regulatory revisions and background material that it published in the Federal Register in 2003 and 2004 the DOL barely offered any explanation at all. Worse still, in its technocratic zeal to revise its regulations, the Department has totally lost sight of any possible legislative intent underlying the overtime penalty-premium and any possible relationship between the technical rules it is tinkering with and Congress’s social-economic purposes. Consequently, instead of shaping the regulations in reliance on the purposes of the statute’s time-and-a-half requirement, the DOL has permitted the regulations to take on a life of their own divorced from the law. Thus, although Congress undeniably mandated the exclusion of employees “employed in a bona fide executive, administrative, [or] professional...capacity,”³ the Department of Labor has failed to show its own bona fides in excluding 30 million white-collar workers.

Why Are White-Collar Workers Excluded?

Mr. [Leo] Bernstein [United Wholesale and Warehouse Employees]: And you say that it is the intent of Congress to exclude some people or to exclude as many people as possible in the Wage Hour Law?

Mr. [J.] Rosenbluth [New York Dry Goods Association]: I don’t know that I am qualified to answer as to what the intent of Congress was.

Presiding Officer [Harold] Stein: I am glad to hear one witness who is modest enough to claim not to know the intent of Congress.4

In opposition to the analysis here, one former Labor Department attorney has argued: “The white collar exemption, like all FLSA exemptions, is contrary to the purposes of the FLSA. Hence to argue that the exemption makes no sense and is inconsistent with the purposes of the FLSA does not...get us very far in trying to define the scope of the exemption.”5 If the point were merely to measure that scope rather than abolish the exclusion altogether, that argument might, under certain circumstances, be well taken, but it is, nevertheless, not possible to gauge the scope of the white-collar exclusions without identifying the purposes of the overtime provision as well as of the exclusions. Thus, for example, if the purpose of the law were to spread employment,6 excluding occupations that experienced no unemployment would both make sense and be consistent with that purpose; similarly, if the purpose were to enable workers to make ends7 meet by requiring


5Email from James Leonard to Marc Linder (May 26, 2003).

6See, e.g., the congressional testimony of Jacob Potofsky, president of the Amalgamated Clothing Workers: “We are not looking for the overtime here as a source of income. Unlike some other industries where it is an entirely different situation, it is not relevant to us. What we are looking for is the overtime as a penalty so we can have wider employment.” Fair Labor Standards Amendments of 1971: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare United States Senate on S. 1861 and S. 2259, Part 1, at 143 (92d Cong., 1st Sess., May 26-June 22, 1971).

7Such an alleged purpose, which stands the real objectives of overtime regulation on its head, swamped all others in the AFL-CIO/Democratic Party campaign against the Bush administration’s regulations in 2003-2004. Emblematic of the approach was presidential
their employers to pay them overtime premiums, then it would both make sense and be consistent with that purpose to exclude occupations that were so highly compensated that the workers in question were not subject to normal financial stresses.\(^8\) If, however, the excluded workers exhibited the same relevant characteristics as the protected workers and including them would thus serve the statutory purposes, then excluding them would be irrational.\(^9\)

In the real world of labor-protective legislative policy articulation, Congress does not typically announce publicly that it has decided to exclude some group of workers despite the fact that inclusion would benefit them; rather, Congress either

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\(^8\)In contrast, the foremost expert on the early workers compensation statutes argued: "Executive officers of a corporation...are ordinarily highly paid, are exposed to little risk of injury in the performance of their duties and are presumptively able to insure themselves against accidental death or disability. Yet the additional cost of including even executive officers in the compensation system is practically nil and the ground on which they are excluded is the archaic distinction between masters who issue orders and servants who obey them. There is no sufficient reason in economics or equity for denying compensation to a railway president or a bank director who should chance to be injured in the discharge of his official duties." E. Downey, *Workmen's Compensation* 24 (1924).

\(^9\)The authors of a study commissioned by the outgoing Clinton administration DOL rehearsed this incoherent mantra without asking themselves how a guaranteed salary and greater security and promotability could possibly protect excluded white-collar workers from the individual, let alone collective, consequences of overtime work: "The overtime premium is intended to: limit excessive hours worked by those already employed in order to increase employment opportunities for the unemployed and underemployed; provide a greater reward for employees required to work in excess of the normal work week; and, discourage employers from requiring employees to work long hours that might adversely affect health and safety. ... For the most part, the FLSA recognized that certain jobs should be exempt from the overtime provision. These occupations include executive, administrative, professional (EAP), and outside sales workers. The EAP occupations were not subject to the monetary requirements of the FLSA because these employees had a guaranteed salary, more job security, and a greater potential for promotion than did production workers. It was thought that these job characteristics would effectively compensate for removal of minimum wage and overtime protections." Malcolm Cohen and Donald Grimes, *The "New Economy" and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA)* (DOL, Jan. 2001), on http://www.dol.gov/asp/programs/flsa/report-neweconomy/main.htm.
asserts that the group would not benefit from the protection or, evading the harm it is inflicting, instead focuses on the benefit being bestowed on the employers. For example, the real reason for the exclusion of farmworkers from the minimum wage (now partially lifted) and overtime provisions of the FLSA was and is the congressional desire to benefit certain agricultural employers regardless of its impact on this most impoverished working-class stratum. Yet Congress would never admit this political rationale, which, to boot, was originally racially motivated, and has, instead, fabricated some more neutral or benign reasons.10

In the case of the exclusion of white-collar workers from the overtime provision, however, Congress never articulated any reason at all11 and the Department of Labor, the regulatory agency charged with administering the exclusion, has never even asserted that it has divined that unexplicated reason. Indeed, in 2004, it admitted, perhaps for the first time, that “the statute contains no definitions, guidance or instructions as to the[ ] meaning” of the three white-collar terms.12 And shortly after leaving office, Tammy McCutchen, the Wage and Hour Administrator who had overseen the Bush administration’s revisions, was able to deny that the “dearth of legislative history” had left her groping in the dark solely on the grounds that senior career officials in the agency had informed her of a regulatory history focused on work (such as a lawyer’s) that could not be standardized in terms of time and therefore could not be spread to absorb the unemployed. But when asked whether the DOL had ever conducted investigations to evaluate white-collar occupations with reference to this criterion or had extended coverage to occupations because it had empirically determined that such work could be spread, she conceded that on the policy level on which she had operated “that was not something I thought about.”13

Indeed, several months before she released her proposed revisions, McCutchen had insisted even more baldly on abstaining from seeking guidance for regulatory revision from the statute’s purposes. At a Federalist Society panel discussion on the FLSA in November 2002, an audience participant asked whether work-spreading, which had been one of the Act’s major purposes, was still relevant: “And if that’s one of the fundamental underpinnings of the Act, which really isn’t

11See below ch. 9.
12FR 69:22125 (Apr. 23, 2004). The Wage and Hour Administrator attributed much of the difficulty in amending the exclusions to “a lack of direction from both the statute and the legislative history.” “FLSA Exemption Tests Adjusted Only Sporadically in Last 50 Years,” DLR, No. 76, at AA-6, at AA-7 (Apr. 21, 2004).
even a consideration anymore [sic], doesn’t that call into question the need for the Act at all?” McCutchen replied that as WHA she would not “touch that one with a 10-foot pole” because her “job is to...interpret the law as it is currently....” Her persistent abstentionism—which left the audience and, no doubt, the WHA herself, totally in the dark as to what “the law” was currently or ever had been in terms of its purposes—could not obscure the fact that the DOL’s regulatory revision agenda was then and had always been untethered to any congressional intentions, which the agency had long since ceased to be concerned with deciphering.

To be sure, non-office-holding employer advocates at the Federalist Society convention were considerably less reticent to discuss the fate of work-sharing as an underlying purpose of the overtime provision. Annie White, labor counsel for the Senate Committee on Health, Education, Labor, and Pensions, was eager to “argue that there is one big premise that’s gone now.” And although she was “not saying ditch the whole thing,” she did allow as there had been “a major shift in...the reason we enacted the law in the first place” without, however, disclosing what the new reason was.14 In contrast, the Clinton administration WHA, Maria Echaveste, while agreeing that “[o]ne key premise has disappeared,” insisted that “families depending on overtime” had taken its place. Echaveste, however, failed to explain how a national system of overtime regulation that was based on inducing workers systematically to work more than 40 hours a week was worthy of its name. More realistic (and cynical) was the observation of William Kilberg, a former Solicitor of Labor whose corporate law career included representing big business on amending the FLSA before Congress. While agreeing that work-sharing was “pretty much gone” as a purpose, he stressed that “the reason it’s not gone is not because we’re not in a depression but because the cost of benefits is so high today that it would take much more than one and a half times a regular rate for an employer to have a disincentive to work individual employee [sic] overtime rather than hire another employee.”15 Unsurprisingly, the employers’ advocate did not seek to resolve this dysfunctional by proposing an increase in the penalty rate to double or triple time.

The DOL’s regulations, thus, are not underwritten by any express (or even hidden) policy since the DOL has as little conception of why it is doing what it is doing as the current (or perhaps even the enacting Seventy-Fifth) Congress or outside observers. Consequently, it is literally impossible to “define the scope of the exemption” rationally, not because the exclusion “makes no sense” or “is

introductory illustration

inconsistent with the purposes of the FLSA," but because neither the legislature nor the agency has ever revealed a rationale for it.\textsuperscript{16} Furthermore, the real reason—presumably the banal congressional desire to save employers money—cannot function as a useful marker for defining the scope of the exclusion, especially against the interpretive judicial canon that exclusions from protective statutes must be construed narrowly, because, logically, such a goal could just as well have been formulated on behalf of the employers of blue-collar workers.

To be sure, scenarios are imaginable (albeit politically implausible) in which it might be possible to implement an exclusion without knowing its purpose. For example, if Congress had excluded all employees who "wear a white collar during their entire workday" or "are employed in an office,"\textsuperscript{17} defined in such a way as to eliminate vagueness and ambiguity, such an exclusion could perhaps be operationalized even though Congress had never disclosed any rationale and the Labor Department confined itself to issuing regulations that merely described the individual statutory words "white," "collar," "entire," "workday," and "office" in purely functional terms without any socio-economic reference points. Bizarrely, such an improbably literalist, virtually physicalist, approach differs hardly at all from what Congress and the DOL have actually done—in spite of the fact that Congress's use of the modifier "bona fide" inescapably cries out for a nuanced socio-economic regulatory interpretation.\textsuperscript{18} It is the failure to provide such an

\textsuperscript{16}In a rare admission by the DOL that Congress had failed to express its intent, the ESA stated: "The reason for including the executive, administrative and professional employees' exemption in the Fair Labor Standards Act was not explicitly stated either during the hearings or in related Congressional records or reports." U.S. ESA, Executive, Administrative and Professional Employees: A Study of Salaries and Hours of Work 3 (May 1977) (prepared by Robert Turner).

\textsuperscript{17}The hearing officer at the crucial 1940 WHD hearings on the white-collar overtime regulations sarcastically asked an employers' representative whether, in enforcing their proposal that all office workers be excluded, a WHD inspector would simply check to see whether the employees in question "sat behind a desk or office machine...." "1940 WHD Hearings Transcript" at 28 (June 3) (Harold Stein).

\textsuperscript{18}Interestingly, Congress did not attach "bona fide" to "the capacity of an outside salesman," suggesting perhaps that physical rather than socioeconomic definitional criteria were appropriate. Significantly, the WHD has also never adopted a salary requirement for this excluded category. At the first regulatory hearings in 1940, one company witness testified that outside salesmen should be exempt because management did not and should not control their hours. When a union representative asserted that "[i]f I can make any sense or meaning out of the meaning of that exemption," it was that off premises an outside salesman's hours were not subject to control, but that where in fact they were subject to control, imposing a standard workweek was desirable, another company witness insisted
interpretable infrastructure that is irrational and "makes no sense" and for that very reason renders the attempt to define the scope of the exclusions hopelessly irrational. Indeed, the DOL's approach may be regarded as incoherent formalism inasmuch as it labors under the "handicap[ ]" not of "relative indeterminacy of aim,"

Admitting that Congress, when it enacted the Fair Labor Standards Act in 1938, offered no guidance as to how to identify those employees "employed in a bona fide executive, administrative, [or] professional...capacity" who were to be excluded, the Department in 2003 merely asserted that these exclusions "were premised on the belief" that such workers "typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits, greater job security and better opportunity for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Here the DOL overlooked the inconvenient fact that the one thing for which money, tenure, and promotion could not compensate white-collar employees was also the main function of hours regulation: the prevention of overwork and its physical, emotional, intellectual, and interpersonal consequences.

that even if "every true outside salesman is subject to control...Congress has still said that an outside salesman is to be exempt. It is the function of this hearing to determine how to define an outside salesman and not to determine whether they should be exempt or not." Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of "Executive, Administrative, Professional" Employees and "Outside Salesman" at 486-87 (Washington, D.C., April 15, 1940), in RG 155—Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14 (statement of Richard Keck, Kraft Cheese Co.); id. at 765 (Apr. 16) (Joseph Kovner, CIO); id. at 765-66 (Apr. 16) (A. Gilbert, Best Foods, Inc.). Later, under questioning by the hearing officer about employees who work away from the office, a union official testified that although an industrial insurance "agent's time can't be clocked just as regularly as though he were employed in a store, still the companies have a very definite idea that they get from custom and practice of just how much time [he] is actually putting in on his job." Id. at 522 (July 29) (testimony of Sidney Cohn, American Communications Association). Furthermore, the Teamsters Union testified that for years it had deliberately omitted hours limitations from collective bargaining agreements at the unanimous desire of its salesmen-members; hours limitation would adversely affect members' interests without leading to hiring more men or giving them more work, and in any event "we don't want to endanger a wage scale that has taken us 15 to 20 years to build up...." Moreover, it would lead to hiring some additional employees, but for the ones who would be hired the resulting business would be unsatisfactory. Id. at 579-80, 589 (quote) (Apr. 15) (statement of Daniel Carmell, Joint Council No. 25, IBT, Chicago).

The only other reason offered was that "the type of work they performed was difficult to standardize to any time frame"; as a result, because the hours they worked beyond 40 "could not be easily spread to other workers," the "potential job expansion" that the time-and-a-half premium was supposed to exert would not come into play.21

As scanty and unexplicated as these references to underlying congressional beliefs were, they played absolutely no part in the DOL’s further deliberations and the Department never cited them again, let alone used them, to support its proposed revisions. In particular, in estimating the costs that employers might incur in complying with the proposed regulations, the DOL surveyed five possible responses, but the one reaction it failed even to mention was the only one that Congress had in mind—hiring an additional worker.22 To be sure, in this regard the Bush administration differed not at all from any of its predecessors.

The fundamental question here is: Why should white-collar workers be made

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21FR 68:15560-97 at 15561 (Mar. 31, 2003). In its comments on the proposed regulatory revisions of 2003, the National Employment Law Project completely misunderstood the logic of the DOL’s argument in asserting that the “DOL itself admits that the type of work exempt employees perform could not be easily spread to other workers after 40 hours in a week.” The DOL’s claim was in no way an admission—which would have entailed that it somehow impaired the argument that the DOL was really trying to make—but a non-empirical assertion without which it would have been unable to justify the exclusion of white-collar workers from overtime regulation. The NELP’s misunderstanding presumably flowed from its curious claim that: “The purpose behind the exemptions is to permit higher-level employees paid on a salary basis and with duties and responsibilities associated with managerial or professional work to be compensated on a basis other than hourly.” NELP, “Comments on Proposed Rulemaking Re Executive, Professional and Administrative Exemption to FLSA Overtime, Submitted to U.S. Wage and Hour Administrator” at 10 (June 30, 2003).

22FR 68:15576 (Mar. 31, 2003). The DOL was reporting the methodology used in its Preliminary Regulatory Impact Analysis: CONRAD Research Corporation, “Final Report: Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541: Prepared for: US Department of Labor Employment Standards Administration” at 42-44 (Feb. 10, 2003). In its commentary on the final rule published in 2004, the DOL, in defending itself against possible accusations that it had failed to accommodate small businesses sufficiently, did mention that one aspect of “a measure of maximum flexibility” that the FLSA provides to employers in complying with the Act was the possibility of responding to the new final rules by adhering to a 40-hour week and “spreading available work to more employees....” FR 69:22122-274 at 22238 (Apr. 23, 2004). But the DOL never specified that such an outcome was actually the purpose of the overtime provision, let alone used that purpose to guide its revisions.
to work long hours without premium (or any additional) pay? Incredibly as it may seem from the perspective of the monolithic anti-FLSA employer rhetoric of the twenty-first century, in 1941 even the magazine of the Chamber of Commerce of the United States, which conceded that "office workers in the lower exempted positions...have been subject to much exploitation in some companies," found it "natural, therefore, that many exempt employees question the fairness of putting in unlimited overtime without extra compensation...." Secondarily, it is necessary to ask by what logic some white-collar workers (such as claims adjusters) with lower annual incomes than some manual workers (such as automobile or construction workers) are excluded from overtime regulation.

Why did Congress exclude bona fide executive, administrative, and professional employees but not, for example, bona fide skilled craftsmen? If the purpose of the overtime law is work-sharing, the blue-versus-white-collar dichotomy is irrelevant as is the duties test; the only question is whether there are unemployed workers and whether the job in question lends itself to sharing. If the purpose is to protect workers’ health and/or welfare from long hours, there is also no relevant categorical distinction between blue- and white-collar workers; there are, to be sure, some manual jobs that are killers, but there are also millions of white-collar jobs that are at least as strenuous and debilitating as many blue-collar

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23The only person interviewed at the DOL who agreed that economically there was no reason to treat blue- and white-collar workers differently was, ironically, an economist in the Office of the Assistant Secretary for Policy who had been chiefly responsible for working up the background data for the revised regulations of 2003-2004 and who believed that the government had no business regulating minimum wages or overtime altogether because the market and unions could take care of them. Asked about the 90 percent of private-sector workers who were not in unions, he insisted that they did not want to be in unions. Economists’ ahistorical consciousness was nicely captured by his assertion that the origins of the white-collar exemptions went back to “old England,” where clergy, doctors, lawyers, and teachers were exempt from some labor laws that he could not identify. Telephone interview with Mario Distasio, Washington, D.C. (Aug. 16, 2004).

24Edward Cowdrick, “When the Boss Works Late,” NB 29(5):17-19, 114-15 at 115, 19 (May 1941). On Cowdrick, who had written similar pieces as secretary of the big business Special Conference Committee, see below this chapter.

25It was not this kind of arbitrariness that a management attorney had in mind in asserting that the FLSA is “essentially counterintuitive legislation,” in that lots of practices that are violations are not apparent to employers.... “Some employers wrongly believe that if “I’m paying someone $50,000 per year, they have to be exempt!” But maybe they are, and maybe they aren’t....” Victoria Roberts, “Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies,” USLW 71(24):2403-2405 at 2403-2304 (Dec. 24, 2002).
jobs. In fact, why should highly paid executives not be protected from overwork as well?26 If, however, the purpose is to compensate workers for the extra wear and tear of overtime hours, then, while the duties test is still irrelevant, the regulatory salary threshold might not be. Would Congress and the Labor Department have created separate rules for white-collar workers if their salaries had about the same range and distribution as blue collar wages?27 If, in fact, regulators were concerned about overinclusiveness, that is, about the propriety of siphoning off profits into the pockets of employees so highly paid that no one regarded them as deserving additional time and a half compensation, why has the DOL knowingly set and kept the salary thresholds far below the wage level of millions of protected blue-collar workers?28

The purposes traditionally advanced for the FLSA overtime law are: (1) reducing unemployment by redistributing hours of work from the currently overworked to the currently un(der)employed; (2) increasing workers’ leisure; (3) protecting workers’ physical and mental health; and (4) in those instances in which the overtime penalty fails to prevent the imposition of overtime work, compensating workers for the additional wear and tear of longer than standard hours. Do these rationales apply to highly paid executive, administrative, and professional employees? (1) applies, provided that (a) there is unemployment in such occupations; (b) those currently employed in them are working overtime; (c) the overtime penalty is sufficiently great to make it cheaper for employers to hire additional workers than to pay the premium to existing employees; and (d) each employer could employ more than one person in each such position and could therefore hire an additional worker and share the hours.

There was considerable unemployment in the 1930s among such occupations. Indeed, in what appears to have been the very first reported judicial opinion in the

26But see Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355, 368 (7th Cir. 1992) (Easterbrook, J., dissenting): “How does it ‘gravely’ violate the ‘paramount’ requirements of the public interest to tell an employee to do sedentary work in a clean office? ... So far OSHA has not thought it necessary to prescribe rules for stress that may cause heart trouble for desk-bound managers.”

27If it was ever the case in Europe, as claimed by Fritz Croner, *Soziologie der Angestellten* 267 (1962), that income dispersion among salaried employees was not greater than among wage workers, it is not in the United States.

28During one of the Senate floor debates in 2004 on an amendment to block implementation of the DOL’s new regulations, it at least occurred to Republican Senator Michael Enzi that unlike the white-collar groups, blue-collar workers faced no effective $100,000 limit on the amount of wages on which they were entitled to overtime pay, even if he failed to ask why the DOL treated them differently. *CR* 150:S4796 (May 4, 2004).
United States using the term “white collar” in its sociological sense, Judge Augustus Hand of the U.S. Second Circuit Court of Appeals at the nadir of the Depression in 1932 dismissed a challenge to a New York State statute that made employment agencies’ charges to employees contingent on success in securing them a job, thus vindicating the state’s protection even for unemployed lesser executives:

[I]t is obvious, as well as amply demonstrated, that employees (even of the “white collar” class of the present case), have a bargaining power in general far weaker than that of employers. They are often, as in these very times, in a desperately poor condition, ready to pay almost anything possible in the hope of securing employment. ...

It has been suggested that “clerical and executive workers” do not need any legislative protection and therefore cannot properly be included in section 186. This obviously is not true of “clerical workers,” and we have no reason to suppose that the term “executive workers” related to officials of railroads and industrial corporations, but rather to the numberless lesser “executive workers” who naturally seek employment through commercial agencies.

The annual report for the same year of the Special Conference Committee, a “clearing house...for information on labor relations” among eleven of the largest corporations in the United States, went much further, asserting that:

In this depression, probably to a greater extent than ever before, unemployment has struck indiscriminately at manual laborers and salaried employees. In some respects the plight of the “white collar” worker has been even more hopeless than that of his fellow-sufferer from the shop and his opportunities for restoration have been less.

Five years later, in October 1937, just as the FLSA bills were making their way

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29The few earlier uses identified by a search of the Westlaw and Lexis computerized databases involved literal references to clothing.


through Congress, a survey report was issued to the Special Conference Committee on overtime work and compensation of salaried workers. The increasing attention that firms were devoting to salaried employees’ working conditions was in part due to “a growing realization that the efficiency, loyalty and morale of salaried workers are of vital importance to the present success and future leadership of industrial organizations.” Of central relevance here is that firms at this very time, contrary to the DOL’s subsequent undocumented claims in justification of the white-collar exclusions from the FLSA, were concerned about the convergence of blue- and white-collar working conditions:

Employers are coming to realize that the traditional differentials in favor of the salaried man have been diminishing. Today many wage-earners participate in vacations, sick leave with pay, pay for holidays, and dismissal compensation. In many industrial organizations promotion comes at least as readily to the hourly man as to the salaried employee, especially if the former has some background of technical training. Wages probably have risen father above pre-war levels than have salaries in the lower brackets. ... Even social distinctions are disappearing with the increased number of high-school and college graduates who voluntarily or under necessity have gone into manual labor. With this decline in class distinctions there has begun to grow up a community of interest between wage-earners and salaried employees. In some companies salaried workers have shown a desire for collective bargaining with employers, either through their own organizations or by use of the same agencies that serve the wage-earners.

With few exceptions, work-sharing was also possible, although perhaps not quite so easily as among mass-production workers. The work-sharing mechanism would, given the depression conditions, also have made more sense if the overtime

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33E. S. Cowdrick, “Report to Clients, 1937” at 8 (Jan. 25, 1938), in Willis Harrington Papers, Accession 1813, Box, 28, Hagley Museum and Library. Cowdrick was the SCC’s secretary. Although Hagley archivists were unable to locate the separate survey report itself, Prof. Colin Gordon at the University of Iowa generously cut through the bureaucracy there to obtain a copy of the SCC annual report for 1937, which discussed the survey report. The excerpt quoted above appeared verbatim in an unsigned article in a management magazine that provided a few figures from what was presumably the survey. See below ch. 9.


35Deborah Malamud, “Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation,” Michigan LR 96(8):2212-2321, at 2315 (Aug. 1998), criticized the WHD for having failed in its early years to collect data on whether unemployment was a problem among executive, administrative, and professional employees. In fact, the widespread unemployment among them was a well-known fact and socioeconomic problem. See below ch. 12.
trigger had been set at fewer than 44 (the standard for 1938-39) or even 40 hours (beginning in October 1940).

Moreover, unemployment among white-collar workers did not begin and end with the Great Depression. The post-World War II period has witnessed repeated large-scale corporate dismissals and a trend toward greater insecurity. For example, between 1947 and 1959 in the electrical manufacturing industry, which employed many professional employees, large military orders fluctuated and were often cancelled; consequently, many research and design employees working on prototypes lost their jobs, while large corporations began stockpiling engineers in anticipation of government contracts and then dismissing them when the contracts failed to materialize. Thus "lay-offs, which had previously been uncommon for salaried electrical workers, began to occur with alarming frequency after the war." Furthermore, these post-World War II reductions in force were "often accompanied by speed-up efforts."

As early as 1961, Chrysler Corporation made headlines by dismissing 7,000 white-collar workers, including engineers, clerical workers, and administrative and public relations employees as a cost-cutting measure—together with factory shutdowns—in response to overproduction of automobiles. This mass firing of 7,000 of the firm’s 36,000 white-collar employees from secretaries to high-ranking

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36At a congressional hearing, the chief economist of the employer-funded Employment Policy Foundation, in addition to pointing out that in 1938, when the FLSA was enacted, the unemployment rate had been 19.1 percent, whereas in March 2004 it was only 5.7 percent, noted that the act had been envisioned as a way to encourage work-sharing. However, instead of concluding that work-sharing had therefore outlived its statutory purpose, he used his own personal situation to extol the lower rate of unemployment as giving "me power to make demands about...hours...that my grandfather in 1938 would have never attempted." Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004) (prepared statement of Ronald Bird), on http://edworkforce.house.gov/hearings/108th/fc/overtime042804/bird.htm. Even in the implausible case that unemployment were eliminated (for highly paid white-collar workers), the other reasons for opposing overtime work would remain unaffected.

37Referring to engineers and chemists, Herbert Northrup vastly understated the case: "It is possible that in times of economic stress companies may reduce or liquidate technical staffs...." Herbert Northrup, "Collective Bargaining by Professional Societies," in Insights into Labor Issues 134-62, at 160-61 (Richard Lester and Joseph Shister eds. 1948).


executives helped lower its break-even point from 1,000,000 to 725,000 vehicles annually. Since the company's president claimed that the action did not impair efficiency, presumably the surviving employees had to work more.

That employers in general were operating on the basis of a convergence of white- and blue-collar work and workers was reflected two years later in a front-page article in the *Wall Street Journal*. Cutbacks reflected top management's growing conviction that white-collar payrolls had ballooned: since 1947, white-collar manufacturing employment had grown by 65 percent, while the production workforce had shrunk by 7 percent; consequently, the proportion of white-collar workers had risen from 25 to 35 percent. Although some analysts believed that the relentless growth of corporate bureaucracies had put more pressure on profit margins than the widely discussed increase in production costs, most firms focused on their assembly lines, in part, because they allegedly tended to regard all white-collar employees as part of management and thus immune from workforce reductions. A further impediment to mass discharges was lagging automation in administrative and technical areas. On the demand side, the proliferation of fringe benefits increased the need for personnel administration, while other white-collar functions that had sprung up or greatly expanded included market research, product planning, sales promotion, quality control, and operations research. Although by 1963 personnel cutbacks had not reversed the long-term growth in white-collar employment, the *Journal* speculated that if the trend continued, it could mean eventually that "a large body of jobless office workers will join the army of production workers idled by technological advances."41

Professional employees were subject to the same disemployment mechanisms. For example, *The New York Times* reported in 1972 that many engineers and other well-paid professionals "buffeted by massive layoffs in the aerospace industry...have swallowed their pride" and sought affiliation with labor unions. In particular, engineers, who only 10 years earlier had been "often a small elite group within a company..., now sometimes outnumber production workers in companies working on complex government projects. The engineers, jammed in huge rooms before long rows of drawing boards, are often laid off without benefits. Now it is becoming harder and harder for them to be convinced that they are closer to management than to the workers in the shops."42 This shakeout of engineers and

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41Karr, "Firms Try to Reverse Trend to Ever-Larger Office, Technical Staffs."

42Agis Salpukas, "Engineers Eying Help from Unions," *NYT*, May 1, 1972 (36:1). To be sure, the engineers "do not want to be assimilated with rank-and-file production workers." For example, as a condition of affiliating with the UAW, the National Engineers
other science-degree holders in military, space, and government financed research projects, according to a union official, made "‘these people suddenly feel very naked.’”

Later, especially in the 1990s, mass firings of middle managers at large corporations became widespread. Referring in 1993 even to corporation counsel and senior executives, *U.S. News & World Report* noted: “So it goes for the men and women who were once the mandarins of American commerce. Their influential positions, their princely paychecks, their corner offices and their job security all crumpled under the weight of the 1990-91 recession. For the first time on record, white-collar workers have surpassed blue-collar workers in the nation’s unemployment lines....” If, despite “down-sizing,” the number of middle managers did not decline as a proportion of the workforce, the *Wall Street Journal* speculated that one reason might have been that often even more nonsupervisors were fired. In addition, white-collar employees, a growing proportion of the workforce, had historically been supervised by far more managers than their blue-collar counterparts.

A sense of the growing relative employment insecurity for white-collar workers can be gleaned from BLS data on “displaced workers,” that is, those who permanently lost jobs that they had held for three or more years because their plant or company closed down or moved, their positions or shifts were abolished, or there was insufficient work. Displacement rates for all workers 20 years and older declined from 3.9 percent in 1981-82 to 2.5 percent in 1997-98 and 1999-2000; in

and Professional Association wanted almost complete autonomy from the UAW executive board.


45David Hage, Linda Grant, and Jim Impoco, “White Collar Wasteland,” *USNWR*, June 28, 1993, at 42. The number of white-collar unemployed did not exceed that of blue-collar unemployed, but the ratio of the former to the latter and of the unemployment rate of the former to that of the latter did increase sharply beginning with the Reagan depression of the early 1980s. *Economic Report of the President* 107-109 (1994).

manufacturing, the rates fell from 8.2 to 4.2 percent and then rose in 1999-2000 to 4.7 percent; for blue-collar workers the rates fell from 7.3 to 3.1 percent and then rose in 1999-2000 to 3.3 percent. The trend in displacement rates for white-collar workers is shown here in greater detail: 2.6 percent in 1981-82; 2.1 percent in 1983-84; 2.6 percent in 1985-86; 2.1 percent in 1987-88; 2.7 percent in 1989-90; 3.7 percent in 1991-92; 3.3 percent in 1993-94; 2.9 percent in 1995-96; and 2.4 percent in 1997-98 and 1999-2000. Administrative support and clerical workers' displacement rates rose from 2.5 percent in 1981-82 to 2.6 percent in 1999-2000, after having peaked at 3.9 percent in 1993-94. Among executive, administrative, and managerial employees, displacement rates rose from 2.5 percent in 1981-82 to a peak of 4.8 percent in 1991-92, before falling to 2.7 percent in 1999-2000. In the professional specialty occupations, in contrast, there was little variation, with the rate declining slightly from 1.7 percent in 1981-82 to 1.6 in 1999-2000, after having peaked at 2.4 percent in 1991-92. Overall, then, although white-collar workers continued to be less likely to lose their jobs, the gap in displacement rates "has narrowed considerably since the early 1980s."

The leisure and health rationales of (2) and (3) manifestly apply to all workers. With regard to (4), while it is unclear precisely how additional income is supposed to compensate even low-paid workers for excessive working hours (perhaps by enabling them to buy more intense leisure and means of recuperation), unless executive, administrative, and professional employees are already so highly paid that they could not possibly spend any more money to engage in such compensatory rehabilitation, this rationale should also apply to them, though perhaps to a lesser degree. However, even if their salaries did exceed this level, the overtime premium would still have to be examined from its mirror-image perspective as a penalty imposed on the employer—otherwise, the work-sharing mechanism embodied in (1) would not function appropriately. Thus even if white-collar employees with salaries in excess of some fixed level were deemed incapable of

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48The hypnotic disorientation that salary level exerts on judges was vividly on display in a case involving a pilot of a company airplane, in which even the dissenting judge who did not agree that the employer had proved that the employee was engaged in a learned profession, did agree with the majority that the pilot, whose monthly salary ranged from $1,700 to $2,081 and who cleaned and stocked the plane in addition to flying it, did "not need the protection of overtime wage rates" because commercial pilots "command such income as to make overtime rates virtually irrelevant apart from matters of ill will and spite...." Paul v. Petroleum Equipment Tools, Co., 708 F.2d 168, 169, 171, 174 (quote), 175 (5th Cir. 1983).
using the overtime premium to make up for the fatigue linked to the overtime work, it would still have to be imposed on the employer and could be taxed away to fund the re-employment of the unemployed.\textsuperscript{49}

If, then, all four purposes apply to high-salary white-collar employees, why did Congress choose to exclude them from overtime pay? Because they had so much control over their work that their employers could never be certain that their overtime hours were really necessary? Because their incomes and working conditions and status and privileges were so remote from those of covered workers that Congress simply deemed them as belonging to a different category or class for whom labor-protective regulation was not designed and was superfluous? If Congress assumed that they possessed enough bargaining power to prevent employers from forcing them to work long hours (without additional pay), would the fact itself that they did work long hours with no additional pay constitute sufficient proof that Congress’s assumption was incorrect and that not even these workers could be trusted to take care of their own long-run interests, let alone the interests of their unemployed co-occupationists whose re-employment they were thwarting by working excessively long hours? If legislators believed that managers and professionals had more flexibility when scheduling their hours and were therefore able to take more time off when business was slow, would they still have left them unprotected had they known that in reality employers expect such workers to work until the job is done, no matter how long it takes?\textsuperscript{50} If Congress, taking an undifferentiated view of management and professionals as a monolithic mass, simply could not conceive that these people who controlled the (and their own) workplace needed protection from their own actions or that, given their higher earnings and bargaining capacity, there was room for serious exploitation of them,\textsuperscript{51} what kind of empirical evidence would be required to refute the legislature’s implicit premises? And can the exclusion of administrative employees who fail to fit this idealized image of the autonomous self-managed employee be understood as anything but an add-on resulting from objections by these managers concerning their assistants?

Employers may defend separate rules on the basis that white-collar workers do not produce definable, countable output and supervisors cannot stand behind them and supervise or monitor their work.\textsuperscript{52} Consequently, so the defense goes, firms

\textsuperscript{49}For such proposals, see Marc Linder, \textit{The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States} 352-53 (2002).

\textsuperscript{50}Email from Lee Ann Campbell, Labor Standards Officer, Whitehorse, Yukon Territory, to Marc Linder (May 9, 2003).

\textsuperscript{51}Email from Larry Norton (May 30, 2003).

\textsuperscript{52}A boss, as one reporter speculated, walking through a drafting department “has no
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pay them a handsome salary (to discourage them from shirking), they work as long as it takes to get the work done, and some days they may get done early and they can leave. But to make employers pay them overtime would be inappropriate because, since firms do not know how long it should take them to do the work, they could start loafing so that they could get paid for longer hours even though those additional hours are unnecessary. If, finally, government makes firms pay overtime premiums, then they may simply lower the base salaries so that it will all come out in the wash and the workers will wind up with the same amount per week.

Such an account exaggerates and distorts the work that the vast majority of white-collar workers perform: it might be true of a research physicist doing cutting-edge experiments or complex and creative pioneering thinking that his employer cannot monitor his work effort or measure his daily or weekly output, but he is very atypical. Most white-collar workers perform tasks that management has observed countless times before; consequently, if it does not prescribe how much time is to be spent on them, it has acquired a sense of how long the completion of

way of knowing whether a draftsman gazing out the window is thinking or merely daydreaming. Sometimes white collar workers may look busy when they’re really accomplishing little of value.” Albert Karr, “Firms Try to Reverse Trend to Ever-Larger Office, Technical Staffs,” *WSJ*, Jan. 3, 1963 (1:6).

Employers of blue-collar workers have often made related complaints. For example, William Dunn, the executive director of the Associated General Contractors of America, testified at a 1971 Senate FLSA hearing that construction workers would not work and unions would not supply workers unless there was scheduled and guaranteed overtime: “[T]he good reasons the Congress had in mind back in 1938 for limiting overtime...because of the fatigue factors, were completely thrown out the window...when this overtime became an attraction; it became a reward; it became a benefit; and it certainly became inflationary. [I]f you really want to stamp out overtime, we should stamp out the premium in cases of labor shortages, and there would not be any overtime work. It is rather shocking, but what...what has been in the past considered a penalty...to spread the work, in times of labor shortages becomes just the opposite: It is a reward; it is more pay....” In responding, Senator Harrison Williams failed to understand that the fact that “more and more...people have two and three jobs” subverted Congress’s intent in imposing the overtime penalty in order to spread jobs. *Fair Labor Standards Amendments of 1971: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare United States Senate on S. 1861 and S. 2259*, Part 1, at 215 (92d Cong., 1st Sess., May 26-June 22, 1971). Anthony Obadal, the manager of labor relations at the U.S. Chamber of Commerce testified that “workers...go on strike in order to get overtime.” When pressed by Williams, Obadal conceded: “I think you can finally get to the point where the penalty is so great you will eliminate overtime. Now, the question is...is that worthwhile in order to create more jobs?” *Id.* at 266, 268.
such discrete activities takes. Moreover, there is no obvious reason that most white-collar workers cannot stop work at 5 p.m. and start again the next morning—unless, the employer, by custom or command, has structured the work flow so that it really does take more than eight hours a day. As one bank executive, intent on avoiding liability for time-and-a-half pay, discovered shortly after the FLSA had gone into effect: “I find, that very often in order to save my secretary from having to stay as late in the afternoon as I am having to stay,... I will hold over some correspondence until the next morning to give her.” If more than one person performs this work, the firm can relatively easily cut their hours and hire an extra worker. If only one person does and she works 50 hours a week, and it is not feasible to hire someone to work the other 10 hours, then, by the logic of work-sharing, the work presumably should be divided into two 25-hour jobs.

If the regulations are to be modified to bring them current with today’s workforce, then these exclusions must be narrowed to keep under protection the large group of white-collar workers who need their employers to be restrained, in frequency and volume, from requiring them to work more than forty hours. The question, in other words, is identifying which workers lack market-based protection from employers’ simply paying them a salary and working them as much as the labor market will bear.

Although Congress itself made this situation possible by requiring the exclusion of “bona fide” executive, administrative, and professional employees, going back to the pro-labor Roosevelt and Truman administrations, the DOL—which Congress directed to issue regulations defining these terms—has

54 As the Wage and Hour Administrator remarked in 1947 in response to employers’ demand to exclude from the FLSA all employees working away from supervision: “[A]n employer is not without resources for the protection of his interest.... Any experienced supervisor or employer who knows the business has a pretty good idea of how much work can be done in a given time, how many calls can be made, how many assignments can be completed.” “Supplemental Statement of the Administrator, Wage and Hour and Public Contracts Division, United States Department of Labor, on Proposed Amendments to the Fair Labor Standards Act,” in Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the Committee on Education and Labor House of Representatives, vol. 4:2594, 2628 (80th Cong., 1st Sess., Nov. 17-Dec. 17, 1947).

furnished the broad definitions excluding far more white collar workers than social-economic logic can justify.\textsuperscript{56}

The first matter to resolve is the basis for the exclusion of the three categories in the statute. It might be easier to argue that the regulations initially made sense in accomplishing the purposes of the exclusions, but no longer do, but in fact Congress’s failure to furnish any guidance whatsoever as to the general purpose of the overtime provision, let alone of the white-collar exclusions, created a tenuous foundation for the Labor Department’s regulatory mission. Consequently, the DOL not only was compelled to grope in the dark, but also, unsurprisingly, wound up replicating the legislature’s failure to explain why it did what it did.\textsuperscript{57} Because neither Congress nor the Labor Department ever explained why any workers should be paid overtime premiums, let alone why some white-collar workers should not, both have made it impossible to create a rational basis for distinguishing the “bona fide” professional, executive, and administrative employees from the non-bona fide, who are then automatically protected. Articulation of a principled regulatory scheme has been further thwarted by the bizarre situation that in its 66-year stewardship of the regulations, the DOL has never even recognized, let alone acknowledged, this epistemological void in which it has been operating.\textsuperscript{58}

\textsuperscript{56}See below chs. 13-14.

\textsuperscript{57}The assertion by an attorney for the Communications Workers of America that the DOL’s proposed revised regulations constitute “an illegal seizure of legislative power,” “[b]ut the agency doesn’t explain why office workers are less deserving of a 40-hour workweek,” overlooks the fact that Congress itself failed to explain. Mark Wilson, “Overtime Rules: A Boon for Business, a Bust for Workers” (unpub. MS, n.d. [2003]).

\textsuperscript{58}In response to this analysis, John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration, remarked that the WHD was not acting blindly precisely because it had decades of regulations and interpretations on which it relied. This view may offer an accurate self-description of the subjective attitude of WHD officials caught up in their day-to-day regulatory activities, but it neither refutes nor is inconsistent with the argument that objectively the WHD is nevertheless formulating and interpreting regulations that have no demonstrable or rational relationship to any policy that Congress ever articulated. He also stated that it would be unprecedented for the executive branch to inform Congress that it did not understand what the legislature intended and request statutory guidance in lieu of continuing to exercise its own regulatory powers. Telephone interview (July 11, 2004).
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**What Are “Administrative” Employees?**

Misconception No. 1 is the office worker’s false sense of his individual importance to his employer. It is indeed remarkable what a job employers have been able to do in holding office workers at pitifully low rates and paying them through building up in their minds a false sense of importance. Title promotions have been used most effectively to lead the office worker to believe that he is advancing up the job ladder toward a rosy future.59

To illustrate the responsibility that the Department bears for this outcome, consider the thoroughly typical case of a so-called administrative employee, whom the Wage and Hour Administrator in 1949 vacuously characterized as a “white collar” worker who exercises discretion and independent judgment in his work.60 Unlike the situation with the two other constituents of the trinitarian formula—executive and professional excludees—identifying what an administrative employee is and does has to confront a lexicographic confusion.61 A layperson might be excused for imagining an executive excluded from overtime payment as the big boss62 with a colossal million-dollar income who comes and goes as he pleases, and a professional as a research physicist whose first thought upon awakening and last thought on going to sleep each day is some puzzle thrown up by his current project, and who, after years, still cannot believe that he actually gets paid (and well) for doing what he loves to do seven days a week without ever looking at the clock—limiting his hours would torture him and paying him extra for hours beyond 40 would no more serve a purpose than paying a child to play.63

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61 One court found the meaning even of the underlying term “administration” to be “elusive.” Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1126 (9th Cir. 2002).

62 William Whyte, *The Organization Man* 143 (1956), arbitrarily defined executives as corporation men who were either presidents, vice presidents, or those in middle management who had so demonstrably gone ahead of their contemporaries as to indicate that they were likely to keep going.

63 An example that purportedly fit this model was certain engineers in the aircraft industry, in which many managers believed that overtime pay had adversely affected engineers’ attitude toward work and company, one consequence of which was a reduced inclination to work so-called casual or volunteered, i.e., unpaid overtime. This
Although the DOL’s definitions are vastly more sweeping, these layperson’s associations nevertheless form the most plausible and fundamental core of these two categories.

Significantly, this strict model did not sit well with unionized professional employees in the mid-1950s, when the National Industrial Conference Board, a big business organization, published a report on unionization among engineers at a time when the federal government’s guided-missile and atomic programs and aircraft production “demand[ed] a fantastic number of professional engineers” far in excess of their annual production and supply, thus making overtime work and pay issues of intense interest to labor and capital. In his contribution on the causes of unionization, the president of the American Federation of Technical Engineers, AFL-CIO, Russell Stephens explained that engineers were no Einstein disinclination apparently applied less to the “more creative groups, such as the preliminary design and advanced electronics sections” in aircraft firms: “Here the engineer (often a scientist) has his own project with which he becomes identified; he sees immediately the consequences of not continuing to work overtime on his particular problem or project when it becomes necessary.” Richard Walton, The Impact of the Professional Engineering Union: A Study of Collective Bargaining Among Engineers and Scientists and Its Significance for Management 79 and 79 n.2 (1961). That such engineers’ drive to keep working may be more commercially than intellectually determined is suggested by an engineering manager’s admission that “it is sometimes an advantage to provide adequate incentives to work overtime. ... ‘If a guy finally gets a fix on a solution on Friday, it definitely is in the company’s interest for him to work straight through Saturday and Sunday if he likes. It’s certainly worth more to the company than the premium incurred. And if there were no premium involved, he might wait until Monday.’” Id. at 76-77. In sharp contrast, there is no ambiguity whatever in dismissing the model’s applicability to commercial radio station program directors, whom the National Association of Broadcasters tried to exclude from coverage on the grounds that they might spend all their waking hours thinking and “[e]ven if the station could afford to pay him overtime, there would be no way to calculate his working time. ... They are idea men. And creative endeavor just cannot be turned on at nine and off at five.” Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms “Executive, Administrative, Professional...Outside Salesman” as They Affect Employees in the Publication, Communication, Public Utility, Transportation, and Miscellaneous Industries at 102 (Washington, D.C., July 25, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14 (Joseph Miller, labor relations director, National Association of Broadcasters).

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Some will argue that the work day or work week of the engineer and other professionals should not be fixed. Others will argue that the engineer’s interest in his work is such that he takes pleasure in remaining at his desk or laboratory long after the normal work day has been completed, as his interest is such that the just cannot tear himself away from an interesting problem. He is expected to serve longer than the standard eight-hour day without additional compensation. The wage and hour law reflects the attitude of the business interests in its exclusion of professionals from the coverage of the act in the exemption clauses. These exemptions were the result of big business lobbying in a successful attempt to exploit the professional by driving him to do as much work as possible with the minimum possible compensation. Engineering today is far different than it was in our fathers’ and grandfathers’ time. In the days when there were one or two engineers employed in a large plant, the engineer was in fact a bona fide part of management. His individual decisions were respected and carried out. He had freedom to come and go as he pleased. He was truly a professional consultant on engineering problems. Today, the scene has changed. The advent of mass production has made the engineering and design unit of a plant a cog in the production facilities of that plant. The engineer is part of the work force, the same as the machinist, sheet metal worker, or other highly skilled craftsman. In most instances, he punches a time clock on arrival at his office and when leaving. Why then should he not receive compensation for extra hours as do his fellow employees working in the skilled trades? In all our bargaining we are very emphatic about premium pay provisions for overtime and, in many instances, have provided our members with this form of security, which they never had before.  

Attention to one purpose of the FLSA overtime provision, Stephens added that “I have known of many instances in which employees have been laid off while others have worked overtime. In such instances, our union committees sit with management committees and establish a shorter work week for all in order to prevent the unfair feast and famine.”  

Most engineers’ collective bargaining agreements did provide that when employers “directed” FLSA-exempt engineers to work overtime, they were required to pay time and a half up to a certain salary level; beyond that point firms had to pay on a sliding scale. However, such contracts also usually specified that FLSA-exempt engineers “will not receive overtime payment for work they do of their own volition after hours.” For example, one such agreement provided: “Exempt employees are expected to work

footnotes:


additional time over and above the regular workday or workweek at their own discretion and of their own choice, without their being directed to do so by the employer. Such work shall be termed ‘nondirected overtime’ and the employee shall not be compensated therefor, nor receive credit toward the forty hours which must be worked before an employee becomes eligible for overtime payments.”67

So inveterate was this contrivance that even where contracts provided for overtime pay for “directed” overtime: “In practice management would require overtime on a regular basis for as much as six weeks without paying extra compensation before they determined that an extended work week should be ‘scheduled.’”68

Regardless of the reality content of the aforementioned idealized models of the executive and professional employees who might have no need for overtime protection, a bona fide or genuine “administrative employee” fails to conjure up any concrete image at all of a class of workers, regulation of whose working time would be manifestly unnecessary if not inappropriate.69 (The lack of a rationale for this exclusion should trigger its narrowest possible reading, because, absent any evidence that Congress meant it to be read any way at all, there can, a fortiori, be no evidence that Congress meant it to be read more broadly). Little wonder, then, that the DOL itself concedes that the “duties test for administrative employees is the most difficult to apply”70 and the “administrative exemption is the most challenging...to define....”71 An organization of the senior human resources officers of the largest private employers in the United States has tried to explain this “difficulty [as] deriv[ing] from the fact that the exemption is designed to cover employees who do not manage people or belong to a profession.”72 What it failed

67Bambrick, Blum, and Zagat, Unionization Among American Engineers at 21-22. A typical contract from 1958 provided for time and a half pay on salaries up to $570 a month, sliding-scale payments down to straight time on salaries between $570 and $1,106 a month, additional compensation on a diminishing scale on salaries between $1,106 and $1,400 a month, and no overtime pay on higher salaries. Walton, The Impact of the Professional Engineering Union at 75. This system was similar to that adopted for federal employees. See below chs. 19-20. The refusal to pay for overtime work that was “expected” of engineers but that was not “directed” was identical to the defense mounted by the U.S. Department of Justice for failing to pay its attorneys for overtime work in the 1990s. See below ch. 20.

68Walton, The Impact of the Professional Engineering Union at 75.

69Similarly, when the DOL stated that an “employee’s job duties must primarily involve managerial, administrative or professional skills,” unlike the first and last, the notion of “administrative...skills” is fuzzy at best. FR 68:15560.

70FR 68:15566.

71FR 68:15567.

72LPA’s [HR Policy Association’s] Comments on Proposed Rule Defining and
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to explain in its 63 pages of comments on the DOL’s proposed revised rules is why its members should be legally empowered to require non-professional non-bosses to work unlimited overtime without additional compensation. A FLSA treatise for employers was presumably expressing the same frustration in making the vast understatement that the administrative exemption is “the least definitive.”73

In 1940, when investigators of the U.S. Women’s Bureau, in the course of doing a study of office work in various cities,74 asked officials in various firms in Los Angeles to define executive and administrative employees in their organizations: “Very few made a clear distinction between the terms administrative and executive; department heads, superintendents, auditors, controllers, are considered either or both.”75 In Houston, firms listed general manager, office manager, department head, production manager, other supervisor, executive secretary, chief clerk, administrative officer, cashier, and comptroller as administrative and executive.76 More than four decades later, two sociologists conducting empirical research in Britain also concluded that “the boundary between ‘clerical’ and ‘administrative’ work was in practice very difficult to define—even though all three of the organisations we studied had formal grade structures in which the distinction between ‘clerical’ and ‘administrative’ grades was explicit.” At one workplace the chief personnel officer said: “‘If you sit and process bills then you’re a clerk; if you write letters, or service a small committee, that’s administration.’” The researchers found that the general category of administration and management included effective controllers and decision takers as well as relatively subordinate employees and that many in the administrative and managerial grades performed much the same work as their subordinates.77

The beclouded judicial mind-set is well-represented by the confusion of a

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74US Women’s Bureau, _Office Work and Office Workers in 1940_ (Bull. No. 188, 1942).
75US Women’s Bureau, _Office Work in Los Angeles: 1940_, at 14 (Bull. No. 188-2, 1942). Wilbert Moore, _Industrial Relations and the Social Order_ 101, 135-36 (rev. ed. 1957 [1946]), equated executives with top management, but used “junior executive” and “junior administrator” (which belonged to middle management) interchangeably.
76US Women’s Bureau, _Office Work in Houston: 1940_, at 10 (Bull. No. 188-1, 1942).
federal district court judge in 1947 who, after opining that the executive and administrative categories “are somewhat synonymous and of necessity do overlap,” had no qualms about characterizing as having met the “requirements as an administrative officer” and thus not entitled to overtime wages one Lewine, who had “an exceptional talent of being able to judge meat products independent of grades and to pick out for the most finicky customers of Armour and Company....” Because Lewine had a “rather intimate and close acquaintance with, and knowledge of, the tastes and desires of the various customers...the practice...evolved of, instead of filling orders through a mere laborer, send[ing] him into the cooler to bring out a certain number of pounds of a certain designated grade of meat...that [sic] Lewine himself goes into the cooler and applies his general background of knowledge and skill....” Based on this view, the judge jumped to the conclusion that Lewine was performing “responsible, non-manual work directly related to management policies or general business operation along specialized and technical lines requiring special training, experience and knowledge,” and was therefore an exempt administrative employee. To ask why a worker whose job it was to walk into and out of a meat cooler hauling slabs of beef all day long should be required to work more than 40 hours without even being paid time and a half did not occur to the judge, who merely “regret[ted]” that he could not “take the time out from the press of general running business to...write a comprehensive opinion....”

The same underlying vagueness prompted a UAW representative at a 1957 AFL-CIO conference on white-collar workers to “point[ ] out that administrative rulings...under...the Fair Labor Standards Act have plagued [sic] the white-collar worker. The Wage and Hour Administrator...has the authority to exempt employers from paying overtime to white-collar workers who earn from $75 to $100 weekly on the grounds that these are ‘administrative’ employees.” He “urged that legislative action be taken to close this loophole in the law because ‘we in the white-collar field have found this to be a very serious problem, especially in the organized plants where employees are put on the administrative payrolls to avoid payment of overtime.’” (Oddly, almost a half-century later, the AFL-CIO website on overtime pay rights fails even to mention the exclusion of administrative—as distinguished from executive and professional—employees, which is

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80Walling v. Armour and Co. at 71,399.
presumably the exclusion of greatest significance to union members or potential union members.)82

Indeed, the very notion of a bona fide administrative employee is odd: while it is easy to understand why an employer would like to convince the DOL that a non-executive or non-professional qualifies as an executive—mislabeling workers "executives" not entitled to overtime is particularly widespread in retail and service establishments such as grocery and convenience stores and fast-food restaurants83—or professional, an administrative employee, in common parlance, embraces such a huge universe of run-of-the-mill clerical employees that it challenges the imagination to name any white-collar occupation so lowly that it would not even rise to the level of genuine administrative employment.84 (Little wonder that,
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according to a former Wage and Hour Division district office director, "[m]any small- and medium-sized employers still erroneously believe that the 'administrative' exemption automatically applies to their payroll clerk, accounts payable/receivable employee, customer service representative, and many other traditional office positions." And yet the DOL has insisted that "'bona fide administrative' employees...are frequently on a higher economic level than...even 'bona fide executives'...."

Under the rubric "Office and administrative support occupations," the Labor Department's own Occupational Outlook Handbook groups numerous occupations, such as date entry and information processing workers, bill and account collectors, billing clerks, bookkeeping, accounting and auditing clerks, payroll clerks, tellers, customer service representatives, file clerks, hotel clerks, library assistants, receptionists, reservation and transportation ticket agents, freight agents, couriers and messengers, dispatchers, meter readers, shipping, receiving and stock clerks, office clerks, postal service workers, secretaries, and administrative assistants that seem as deserving of regulation and protection as any blue-collar occupations. To be sure, the Occupational Outlook Handbook also includes an entry for "Administrative services managers" classed under "management and business and financial operations managers," but these employees might just as appropriately be assigned to the category of executive employees. The only hint of administrative loftiness that the Occupational Outlook Handbook offers is an

Congress clearly meant that the employees engaged in the administration of the business, not manual employees but employees - in other words, the so-called white collar workers. ... And upon that theory I say that file clerk is well within that scope.

Dr. Teper: Why do you think Congress inserted the term "bona fide" in there?

Mr. Ballew: Well, I don't know unless they thought probably some of the employers might list a person as a stenographer when as a matter of fact he was operating the spindle or something of that kind. And they didn't want them to get away with that.

"1940 WHD Hearings Transcript" at 94-96 (Apr. 10).


entry in the index referring readers for “Administrators” to “Top executives.”

This usage appears to be a distorted terminological remnant of the classification plan for the federal civil service proposed in 1920 by the Congressional Joint Commission on Reclassification of Salaries, which embraced 14 services of clerical, office, or commercial work, of which the first was “the administrative and supervisory clerical service.” The commission used “administrative” not in the broad sense of encompassing all those employed in administration, but in the much narrower sense including only those who were “administrators”: “This service includes classes of positions, the duties of which are to supervise or to administer classes of positions which fall in two or more independent clerical services, or which fall in both clerical and other services, but which do not, for their supervision or administration, require specialized, professional, or scientific knowledge.” Thus, for example, the classes of junior clerical administrator, principal clerical administrator, head clerical administrator, and chief clerical administrator had as part of their duties “administrative supervision” of clerical employees.

Similarly, the same usage was prominently on display in 1921 when President Harding issued an executive order on uniform efficiency ratings. He directed the Bureau of Efficiency to prescribe a system for rating the efficiency of employees in the classified service of the federal government in the District of Columbia: standard ratings first had to be established for “employees engaged in clerical or routine work, such as clerks, stenographers, bookkeepers, messengers, and skilled laborers”; then special ratings had to be installed for “employees engaged in professional, scientific, technical, administrative, or executive work, or any other work involving for the most part original or constructive effort.”

Further contemporaneous light is cast on the meaning that Congress attached to “administrative” by the legislature’s deliberations in 1925 to stop, for reasons of cost, publication of the Official Register of the United States, which since early in the nineteenth century had listed all federal employees in what over time became

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91Report of the Congressional Joint Commission on Reclassification of Salaries, Part II at 5.
93Executive Order No. 3567, §§ 4 and 6 (October 24, 1921).
a huge tome. When some members of Congress complained, a compromise was reached: Representative Albert Johnson suggested that all that the members needed was a much smaller publication showing “the principal Federal officials. ... It will be a catalogue of Federal appointive officers in the United States, while as it is now it is a general directory of Federal employees.” The language that he proposed was then included in a statute: “a full and complete list of all persons occupying administrative and supervisory positions in each administrative and judicial department....” Congress used virtually identical language in 1935 when it amended the statute, and until the publication was discontinued in 1959, even its subtitle tracked the statutory language: *Persons Occupying Administrative and Supervisory Positions in the Legislative, Executive, and Judicial Branches of the Federal Government, and in the District of Columbia Government.* In 1938, the year in which Congress enacted the FLSA, the *Official Register* listed, for example, 130 employees of the DOL (including Labor Secretary Frances Perkins). The two lowest-paid employees, with salaries of $3,200, were the legal editor and chief of the labor law information division of the Bureau of Labor Statistics and an industrial supervisor in the Women’s Bureau. These positions reveal, as do many others (such as the Solicitor of Labor) that “administrative” encompassed employees in the Professional and Scientific Service as well, but did not in any event include clerical workers.

Even more revelatory of the federal civil service’s synonymous use in the 1930s of “administrative” and “executive” was the encyclopedic survey of job descriptions issued by the Personnel Classification Board. Thus an executive chief attorney was the “responsible administrative and professional head of a large group

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95CR 66:5022 (Feb. 28, 1925).
98*Official Register of the United States, 1938: Persons Occupying Administrative and Supervisory Positions in the Legislative, Executive, and Judicial Branches of the Federal Government, and in the District of Columbia Government* 145-47 (1938). In 1959, the *Official Register*’s last year of publication, when the size of the DOL staff had increased enormously, the employees with the lowest salary ($7,030) included the chief of the division of office services in the Office of the Administrative Assistant Secretary within the Office of the Secretary of Labor. *Official Register of the United States, 1959: Persons Occupying Administrative and Supervisory Positions in the Legislative, Executive, and Judicial Branches of the Federal Government, and in the District of Columbia Government as of May 1, 1959,* at 525-38 (1959).
of attorneys...."99 An executive officer served as Governor of Alaska "with full responsibility for the success or failure of his administration...."100 A senior executive officer with sole responsibility for the success or failure of his administration served as chief executive of the Territory of Hawaii or of the Panama Canal; as Governor of the Panama Canal he was "to exercise complete executive and administrative authority...over the Panama Canal and the Canal Zone."101 A senior administrative officer as the chief clerk of the executive department of the Panama Canal supervised the operation of the executive office of the Panama Canal or had "general supervision of the office personnel, assuming responsibility for the coordination of the work, the activities and efficiency of employees, and the maintenance of proper discipline...."102 Finally, a senior administrative assistant exercised "general supervision of the clerical personnel in a district headquarters office," had "full responsible charge for all matters pertaining to personnel," or supervised and directed the general business operation of a moderately large and important field office with difficult problems of administration, laying out and planning the work of subordinates.103

By a semantic quirk, whereas generally and straightforwardly executive employees are called executives and professional employees are called professionals, only relatively few administrative employees are administrators.104 Taking advantage of—or, perhaps, misled by—this semantic overlap in the higher reaches

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100PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 598.

101PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 599.

102PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 581-83.

103PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 560-61. To be sure, in the alternative, a senior administrative assistant could individually "perform highly difficult and responsible general clerical work or specialized clerical work not otherwise specifically classified...." Id. at 561.

104Unencumbered by any sense of the vast difference between these two terms, a pro-employer policy organization used them interchangeably. Employment Policy Foundation, "An Economic Primer to White Collar Reform," at 2-3, in Backgrounder (May 21, 2003), on http://www.wpf.org. Surprisingly, Deborah Malamud, "Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation," Michigan LR 96(8):2212-2321 at 2308, 2315 (Aug. 1998), even imputed the use of "administrator" to the author of the WHD's seminal Stein Report, although he did not conflate them and she did. See below ch. 13.
between administrators and executives, the Communications Workers of America has posted on the World Wide Web an account purporting to be the real legal history of the exclusion of administrative employees, virtually every empirical claim of which is invented out of whole cloth:

Congress stated that top managers of a business could be excluded from overtime pay. This included the “administrator” of the business as well as “executives.” An “administrator” was defined as a principal manager who doesn’t necessarily supervise other workers, and an “executive” is a principal manager who does supervise workers. Low-level supervisors and others who perform paperwork or other office work functions were never considered for exemption. The regulations were written so that the vast majority of workers would have overtime pay rights. The FLSA also allowed “professionals” to be excluded from overtime pay. The “professions” included only doctors, lawyers, and ministers.

The dividing line between exempt managers/professionals and non-exempt regular workers was intended to be quite clear. The general presumption is that all workers should get overtime pay and have their 40-hour week protected. The salary test for exemption was supposed to ensure that only the most highly paid executives would be denied overtime protections. In 1940, 1949, and 1958, the salary tests were set so high that only the top 10 percent of salaried employees would meet the test. The lower 90 percent of workers would be guaranteed to receive overtime pay. Now, the DOL claims only the lowest 10 percent of workers should be protected.105

By the same token, Congress’s use of the term “administrative” must be given some meaning. To be sure, it is possible that Congress used it instead of “administrator” simply because the syntax of the statutory provision required an adjective, in parallel to “executive” and “professional,” and “administrative” had not then, and has still not today, been substantivized into a noun, as had the adjectives “executive” and “professional.” In other words, perhaps “administrative” really did stand for the loftier “administrator” rather than the much more plebeian “administrative employee.” This speculation is strengthened by its placement

105Mark Wilson, “Fair Labor Standards Act: History and Rights,” on http://www.newsguild.org/overtimeflsa.htm; undated ca. July 2003; visited 9-8-2003. For an uncommon judicial use of “administrator” instead of “administrative employee,” see Dalheim v. KDFW-TV, 918 F.2d 1220, 1229-30 (5th Cir. 1990). Although the GAO in its important report on white-collar overtime regulation once used “administrator,” in another passage it revealingly deprived the category of “administrative” employees of any independent significance at all by stating that white-collar tests include showing that salary indicates “managerial or professional status” and that “the employee’s job duties and responsibilities must involves managerial or professional skills....” GAO, Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 5, 2.
between the elevated categories of “executive” and “professional”: if, for example, Congress had substituted “clerical” for “administrative,” sandwiched between “executive” and “professional,” it could have been perceived linguistically and socio-economically as out of its element.

A Case in Point: Customer Service Claims Adjuster

Industrial insurance agents are often told by their employers that they are “professional.” They are from the point of view of income which often is $6,000 to $8,000 yearly. Yet large numbers of these agents have joined unions. What is the reason? These men work on a commission basis and are under constant management pressure to “produce.”

Dorothy Haywood worked for 30 years for North American Van Lines at its headquarters in Fort Wayne, Indiana. As a customer service claims adjuster in the mid-1990s she worked on average 45-50 hours a week and four Saturdays per year without any overtime pay for the princely annual salary of $28,000. (It is indicative of judicial insensitivity to the human dimensions of compulsory overtime work that judges often write their decisions in such an abstract and mechanistic way that in the course of their forced march through the regulations they not only fail to reflect on the exclusion’s underlying purpose, but do not even bother to mention how much overtime the plaintiffs worked.) According to the Labor Department, claims adjusters’ “most important role is acting as intermediaries with the public.” In the insurance industry, many firms “are downsizing their claims staff in an effort to contain costs. Larger companies are relying more on customer service representatives in call centers to handle the recording of the necessary details of the claim, allowing adjusters to spend more of their time investigating claims.” Median annual earnings in 2000 were $41,080. Sig-

106 George Strauss, “White-Collar Unions Are Different!”  

107 Telephone interview with Dorothy Haywood, Kimmell, IN (Apr. 21, 2003).  


nificantly, the DOL classifies claims adjusters as performing “miscellaneous clerical” work.\footnote{US DOL, USES, Dictionary of Occupational Titles, 1:211 (4th ed. rev., 1991).}

When Haywood sued for back pay, the judges, as always in such suits, failed to consider the underlying policy issue of whether Congress meant to deprive such employees of otherwise mandatory premium wages.\footnote{As the chief judge of the Seventh Circuit, Richard Posner, observed with regard to the FLSA white-collar regulations: “Judicial review of administrative action typically involves comparing the action with the criteria set forth by the legislature to guide the agency. If there are no criteria, about all the court can do is determine whether the agency’s action is rationally related to the objectives of the statute containing the delegation. That liberal test is easily passed here, at least with respect to the deduction for absences from work of less than a day. Remember that the issue is entitlement to overtime pay (at the statutory rate of 1.5 times regular pay). There is little purpose in paying overtime if the express or implied contract of employment does not fix specific hours of work, the employee being expected to do as much work (within reason) as necessary to carry out his responsibilities rather than to work exactly the same number of hours day after day.” Mueller v. Reich, 54 F.3d 438, 442 (7th Cir. 1995). Posner ignored (and may be ignorant of) the fact that the point is precisely that the law imposes no such reasonable limit.}

The only instances in which judges have been prompted to examine policy issues have been the few cases in which defendant-employers, wishing to avoid liability for unpaid overtime pay, have challenged the validity of the regulations. In a few early decisions from the early 1940s, manifestly biased federal district judges ruled against alleged managerial-administrative plaintiff-employees by ignoring the salary level requirement on the grounds that the Administrator lacked authority to include it because it was not a “natural,” “reasonable,” or “real” part of the definition. For example, a federal court in Georgia held in 1941, in a case brought by a storage department foreman who had been paid only $16.15 per week (rather than the $30 required by the regulation for the employer to meet the exemption), that:

The power to define “employee employed in a bona fide executive *** capacity,” delegated in the Act to the Administrator,...is constitutionally exercised where the definition is within the limits laid down by Congress. These limits are marked out by the fair and natural meaning of the words “bona fide executive*** capacity.” The definition is within such limits if the Administrator restricts it within the bounds of such meaning and
does not add an element which has no reasonable connection with its connotation. To add such element is to legislate, not to define. The question here presented is whether or not the provision that the salary must be at least $30 a week, added by the Administrator to his definition of the term executive capacity, is a natural and admissible attribute of the term "bona fide executive and administrative * * * capacity."

Although the Administrator may legally define the term administrative employee with wide discretion within the meaning of such term, he can not go beyond that and add elements which form no part of such conception. In other words, he can not add an element which is not a real incident to executive work. He can not go outside of the meaning of such words and add an element not intended by Congress and virtually legislate to bring in a class of employees not intended. It is clear from the record in this case, and conceded by both sides, that plaintiff was an employee employed in a bona fide administrative capacity within the usual meaning of such word and also within the definitions of the Administrator, except with respect to the limitation of $30 a week salary. It might have been wiser for Congress to have classified employees to be covered by the Act upon the basis of their earnings, or to have added with respect to administrative officers the additional requirement of a minimum salary, but it did not do so, and in my opinion, the Administrator can not, by adding such requirement, which has no relation to the character of the work performed, bring within the scope of the Act a class of employees not intended. The fact that an executive may work for less than $30 per week or even $1 a year does not alter the fact that he is an executive.113

A few weeks later a federal judge in Northern Texas,114 unencumbered by any citations to legal precedents, was not distracted by the fact that the plaintiff-florist shop manager, who had "cherished in his heart...the secret determination that it [the employer] was amenable to the wage and hour act, and that against that day of reckoning he would keep some sort of a record so he could assert what he claimed to be the overtime which he worked,"115 had been paid between $17.50 and $26.00 per week:

He was not a very big "boss," but he was a "boss"; not of a very big business, but of a business. He was an executive. You cannot say that executives never sweep out, because if we study the history of America, we know that they do sweep out. ... I know one outstanding example of this town where the executive carried a pack on his back in which were the goods that he subsequently sold. American executives do anything they please, and that is why they get to be executives. The plaintiff's duties were largely executive.

114William H. Atwell (1869-1961) was appointed by Pres. Harding and was in active service from 1923 to 1955. He issued a number of openly racist decisions. E.g., Bell v. Rippy, 146 F. Supp. 485 (ND Tx 1956).
115Tune v. Roselawn Florists, 1 WH Cases 784, 785 (ND Tx 1941).
The administrator, in his first decision on “executive”, under the Act, or of “administrative” officers, did not include the amount of the salary. Had he done so, I think it would have been the duty of the courts to have declared, as they did later, that the amount of salary cannot be considered in this land as an indication of an executive. Many executives forego any pay at all, in order that their employees may have their pay in full and things of that sort.116

Even in later, more reasoned opinions, the courts, showing considerable deference to the agency, have refrained from plumbing the depths of the rationale; typically, indeed, the result has been an uninspired and unenlightening pro forma affirmation of the DOL’s regulations. For example, one judge rejected an employer’s contestation of the constitutionality of the administrative exemption and in particular of the salary basis test (where the plaintiff-employee efficiency experts had been paid in excess of the salary level test but on an hourly basis) by quoting Justice Holmes: “‘Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. ... But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the (Administrator) must be accepted unless we can say it is very wide of any reasonable mark.’”117 Even less substantial was an opinion by the Ninth Circuit: “[U]pon examination of the history behind the promulgation of these regulations, it becomes clear that the rationale underlying them is sound and apparently the one practical method of ‘defining and delimiting’ the rather vague and ambiguous terms used in the statute.”118 Indeed, by 1966, future U.S. Supreme Court Chief Justice Warren Burger had apparently grown so intolerant of obstructionist defenses that he deemed an injunction a superior tool of enlightenment for a newspaper publisher to further jurisprudential elucidation:

Appellees’ final contentions are that the regulations in question are so vague as to offer no guidance to employers who attempt to comply with the Act and that the minimum salary requirement is not a justifiable regulation under Section 13(a)(1) of the Act because not rationally related to the determination of whether an employee is employed in a “bona fide executive...capacity.” These contentions lack merit. The Secretary’s regulations are

116Tune v. Roselawn Florists at 786. The judge’s assertion that the first set of regulations did not include a salary requirement for executive and administrative employees was incorrect. It was $30 per week. 29 CFR § 541.1, in FR 3:2518 (Oct. 19, 1938).
118Craig v. Far West Engineering Co., 265 F.2d 251, 259 (9th Cir. 1959).
clear. They simply require in this context that, in order to qualify for the executive exemption, the employer must pay his district advisers at least $100 weekly over and above any employment-connected cost to them of the tools, i.e., automobiles, required for their work.

The Appellees' attack, coming as it does so long after the passage of the Act and challenging the validity of the regulation tends to underscore the need for injunctive relief to bring home to the employer his duties and obligations under the law. The statute gives the Secretary broad latitude to "define and delimit" the meaning of the term "bona fide executive...capacity." We cannot say that the minimum salary requirement is arbitrary or capricious.\textsuperscript{119}

Perhaps the most detailed policy analysis was offered by the Tenth Circuit in a case involving a bookkeeper-office manager and a head miller, whose executive and professional exclusion the trial court had upheld, despite the employer's failure to pay them the regulatorily required compensation, on the grounds that those salary requirements were arbitrary and unreasonable. Congress, according to the court, in exempting employees:

realized...that the phrases "bona fide executive capacity," "bona fide administrative capacity," and "bona fide professional capacity" would not fix absolute standards or a definite classification within or without which particular employees would fall, and that it was desirable that such phrases be defined and delimited. Congress did not undertake itself to define and delimit such phrases, but delegated that duty to the Administrator. It did not direct that criteria should be laid down as an aid in determining what employees fell within or without the exempted employments, but that the phrases should be made certain by specific definition and delimitation. ... Necessarily, if the classifications are limited by specific definition and delimitation, some employees who might fall within the general meaning of the phrases employed by Congress will be excluded. Exclusion usually results when we descend from the general to the particular, and Congress must have realized that specific definition and delimitation which would result in certainty of application would of necessity exclude some employees who might otherwise be regarded as within the general phrases used by Congress. Nevertheless, Congress did not see fit to leave embraced within the exempted employments every employee who might fall within the general meaning of the phrases employed, but directed the Administrator to specifically define and delimit such phrases. ... Congress, in effect, provided that employees should be exempt who fell within certain general classifications as rationally and reasonably defined and made certain by the Administrator. The general standard was laid down by Congress,—bona fide executive, administrative, or professional capacity. The policy was made manifest by Congress,—that of precise definition and delimitation by a reasonable and rational regulation defining and delimiting the general terms. The delegation of such

\textsuperscript{119}Wirtz v. Mississippi Publishers Corp., 364 F.2d 603, 608 (5th Cir. 1966) (Burger, C.J., sitting by designation).
a power to define and delimit has been sustained by the decisions of the Supreme Court. Congress has laid down a general standard and manifest[ed] a policy and within the framework thereof has delegated to the Administrator the duty to supply the details. So to do is well within the principle of permissible delegation.

The question remaining is whether the standards or criteria laid down by the Administrator are ones which a rational person could have made or are unreasonable and arbitrary. ...

In Federal Security Administrator v. Quaker Oats Co.,...the court said: “It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made.”

Obviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs. Admittedly, a person might be a bona fide executive in the general acceptation of the phrase, regardless of the amount of salary which he receives. On the other hand, it is generally true that those in executive positions assume more responsibility and are generally higher paid than those who work under the supervision and direction of others. The same is true with respect to those employed in administrative and professional capacities. Therefore, in most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation.120

Yet, even this most specific account remained wholly formal and assumed precisely what should have been analyzed—namely, the basis of the congressional “general standard”; instead, the court merely characterized as the congressional “policy” the delegation to the Administrator of the power to define the terms.

Instead of scrutinizing the regulations’ socio-economic rationality, the federal district judge in Indiana121 and the federal Court of Appeals for the Seventh Circuit, assuming that whatever regulations the Labor Department has issued rationally define those terms in the sense Congress meant them, merely checked whether Haywood’s job fit within the regulatory criteria. In this instance, since the employer had claimed that Haywood was an administrative employee—the “exemption” for whom the Labor Department admits “is the most challenging...to define and delimit”122—those criteria were five in number. These requirements will be outlined here and then discussed seriatim in detail: (1) NAVL had to pay Haywood at least $250 per week; (2) NAVL had to compensate Haywood on a salary basis; (3) Haywood’s “primary duty” had to consist of “the performance of office or non-manual work”; (4) that work had to be “directly related to manage-

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120 Walling v. Yeakley, 140 F.2d 830, 831-32 (10th Cir. 1944).
122 FR 68:15567.
ment policies or general business operations of the employer or the employer’s customers”; and (5) “the performance of such primary duty includes work requiring the exercise of discretion and independent judgment.”

Pursuant to the first requirement, Haywood had to be paid at least $250 weekly. Haywood’s salary placed her far beyond this means-tested level, which, despite the fact that the DOL had failed to update it since 1975, making it “outdated,” nevertheless triggered the so-called short test, which was met by an employee who satisfied the aforementioned requirements (3), (4), and (5). Before examining these three so-called duties criteria, however, it will be helpful to scrutinize the second requirement—that Haywood be “compensated on a salary...basis....”

According to the pertinent DOL regulation: “An employee will be considered to be paid ‘on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. ... Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.”

Haywood alleged that she had not been paid on a salary basis because, if she missed work during the course of a workweek, she was required to make up the time, and NAVL admitted that when she was absent from work she was required to make up the time, and that if she was absent on a scheduled mandatory Saturday she might be subject to a non-monetary disciplinary action, such as a verbal or written warning. However, North American argued that “neither action impacts

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124 29 CFR § 541.2(e)(2) (2003). The increase to $455 per week or $23,660 annually would be of no help to workers like Haywood, whose wages exceed that level. See below ch. 17.
125 In 1940, when the DOL first issued a separate definition of a “bona fide administrative employee,” it required a monthly salary of at least $200 to meet the test. 29 CFR § 541.2(a), in FR 5:4077 (Oct. 15, 1940). Adjusted by the consumer price index, that monthly salary was the equivalent of annual salary of $25,406 in 1994.
126 FR 68:15562.
127 29 CFR § 541.2(e)(2).
128 29 CFR §§ 541.118(a) and (a)(2). On the new regulation, see below ch. 17.
her status as a salaried employee. For in neither instance is Haywood's salary subject to deduction. The appeals court rejected Haywood's contention on the grounds that: "Nothing in the regulations suggests that an employee loses his exempt status simply because his employer disciplines him in a non-monetary fashion for failing to work during his scheduled time. The regulations prohibit monetary discipline of exempt employees.... Indeed, if the regulations also were to prohibit non-monetary discipline for the quantity or quality of work an employee performs, employers would have no tool with which to combat chronic absenteeism, tardiness or poor performance. We do not believe that the Secretary intended to create such a result without so much as a word in the regulations." Although the Seventh Circuit conceded that summary judgment against her might be precluded if Haywood could prove that she was threatened with a pay reduction for failing to make up the time she was going to take off, it concluded that she had not made such a showing. However, in the real world of employment, Haywood explained, NAVL did not need to threaten workers: if they refused to make up time, they were written up and the consequence was a bad evaluation and a lower or no salary increase the following year.

Other federal appeals courts have issued similarly restrictive rulings. Thus in a recent case involving production planners at a shipyard, the Fifth Circuit wrote:

Cowart and Durbano contend that if they missed part of a day of work for personal

1:95CV325 at 10-11 (July 18, 1996).


13Telephone interview with Haywood.

14E.g., Renfro v. Indiana Michigan Power Co., 370 F.3d 512 (June 2, 2004); Schaefer v. Indiana Michigan Power Co., 2004 U.S. App. Lexis 2414 (6th Cir., Feb. 13, 2004). But see Oral v. Aydin Corp., 2001 U.S. Dist. Lexis 20625, at 18 n.6, 145 Lab. Cas. (CCH) ¶34,427 (ED Pa. Oct. 31, 2001): "For purposes of determining whether an employee is paid 'on a salary basis,' working extra hours to make up for a partial day absence is no different than having one's pay docked for a partial day absence. Both involve counting the hours that an employee has worked and subjecting an employee to a reduction in compensation based on quantity of time worked. Both methods for dealing with partial day absences are inconsistent with 29 CFR § 541.118(a)'s definition of being paid 'on a salary basis.'"
reasons, they were required to make up the missed time during that same week. In other words, if they took four hours off on Monday afternoon to run personal errands, and chose not to take vacation time, their salary was not reduced, though they were expected to make up for the missed time over the remaining four days of the week. We disagree with Cowart and Durbano that under this scenario they should have received compensation for a total of 44 hours of time, including four hours of overtime, even though they worked only forty hours. There is no support in the case law for the proposition that requiring salaried employees to make up time missed from work due to personal business is inappropriate. Although the salary basis regulation prohibits deductions from an employee’s salary for personal absences of less than a day, the regulation does not prohibit an employer from requiring an employee to make up the time he misses. In the instant case, it is undisputed that there was never a deduction from Cowart or Durbano’s weekly salary for any reason.

Cowart and Durbano contend that an Ingalls written procedure that permits salary deductions for absences of eight or more hours over two days violates the FLSA. Specifically, they challenge Ingalls’s policy number 5050.18, which provides: “Deductions shall be made from the salary of a salaried employee for personal time off of a day or longer. For this purpose, a ‘day’ is defined as eight (8) consecutive hours in one or two days; i.e., an absence of the last four hours of one day and the first four hours of the following day will be considered as an absence of a day.” Policy number 5050.18.

This Court finds no reason to rule that Ingalls’s “eight consecutive hours” provision is impermissible under the FLSA. We will not support a compensation scheme that would permit an employee to work the first hour on Monday morning and the last hour on Tuesday afternoon, take off the fourteen hours in between, and still demand to be paid in full for both days on the ground that the fourteen-hour absence was less than a full day. There is no support for this illogical result, and we therefore reject it.135

The severe obstacles that the regulations and courts have erected to overtime pay recoveries by administrative employees,136 even where judges agree that an employer has unlawfully docked salary for a partial-day absence, are demonstrated by a recent Second Circuit case. After having been docked $60 for arriving two

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136Even during the Roosevelt administration, the WHD adopted a position affording employers great deference regarding their power to resist their white-collar employees’ efforts to control their time: “[S]ince it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work, an employee will not be regarded as being paid on a salary basis if deductions are made for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis if the employer makes deductions from his salary for an afternoon when he goes home early or when he occasionally takes a day off, unless, under the circumstances of a particular case, such absences must be considered unreasonable.” WHD Release No. A-9, Issued, Aug. 24, 1944, published in BNA, Wage and Hour Manual 719 (1944-45 ed.).
and a half hours on the day after Labor Day, the clinical director of a counseling center sued the employer for unpaid back overtime wages, arguing that this pay docking had converted him into an hourly worker, depriving his employer of the administrative employee exemption. The trial court concluded that the worker’s wages had been “impermissibly docked, but held that Alliance could invoke a regulatory ‘corrective window’ and preserve Kendall’s exempt status under the FLSA by simply reimbursing to him the $60 in wages Alliance had withheld.” The court rejected the worker’s claim that “even if administrative employees at Alliance ordinarily fall under the FLSA exemption, Alliance’s impermissible docking of his wages for lateness eliminates that exemption as applied to him. This contention is meritless. The regulations provide that ‘where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.’ 29 C.F.R. § 541.118(a)(6). We agree with the district court that ‘lack of work’ refers only to the unavailability of work for the employee to perform, and not to an employee’s failure to work.” The appeals court therefore found that the trial court had “correctly held that Alliance could invoke the ‘corrective window’ and preserve Kendall’s exempt status by reimbursing him for his $60 in lost wages. Kendall’s wage deduction was for reasons other than ‘lack of work’ as defined by the regulations. Although Alliance has not expressly promised to comply with the regulations in future, Kendall no longer works for Alliance, and therefore its failure to do so is not relevant in this case.”

Even the Bush administration could not bring itself to acquiesce in employer demands for elimination of the salary basis test because the test “reflected the understanding that such [bona fide executive, administrative, or professional] employees have discretion to manage their time and are not answerable for the number of hours worked or the number of tasks performed. Such employees are not paid by the hour or task, but for the general value of services performed.” The Labor Department’s position was rooted in its long-standing belief that the salary basis test best captures the “quid pro quo enjoyed by exempt employees, which distinguishes them from non-exempt workers. Exempt employees are not paid overtime for working over 40 hours in a week. In exchange, the employer must provide a guaranteed salary that cannot be reduced when an employee works less than 40 hours.” In 2003 the DOL decided against amending the test to permit pay docking for partial day absences because the quid pro quo would be violated: “An exempt manager...does not receive extra pay for working 16 hours on a Thursday...

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to complete a project; thus, as a matter of fundamental fairness, an employer should not be allowed to dock the employee’s salary for leaving work early on Friday. Of course, an employer can terminate an employee who abuses this salary arrangement." Apart from the question—which the DOL failed to raise, let alone answer—as to why employees who do in fact “have discretion to manage their time” should nevertheless not be entitled to overtime protection, the Labor Department impermissibly assumed that a weekly or monthly salary is not reducible, or has not been reduced by managers, to an expected amount of work or output per hour, day, or week.

As the DOL’s own illustration reveals, its “fundamental fairness” doctrine is merely qualitative and not quantitative; that is, it does not permit workers to take off precisely as many hours as employers make them work extra hours so that they wind up working only 40 hours. Such an outcome would defeat the whole purpose of the exemption and would doubtless entitle employers to fire such insubordinate employees. Firms, as C. Wright Mills already pointed out at mid-century, had been reducing salaried employees’ salaries for absences “for some time in many places....” This position that such time has to be made up was expressed with all imaginable clarity by the “typical” management statement uncovered by a Harvard Business School study of the engineering industry: “We assumed that time off for personal reasons and casual [i.e., “volunteered” or unpaid] overtime would wash out.”

But if the upshot of the “quid pro quo” is that a worker has to make up time she takes off so that if she normally works 50 hours and, instead, some week works only 46 hours, but the following week will have to work 54 hours to make up the time, in what sense is she ‘off the clock’ and not paid by the hour? If all that her white-collar status amounts to is that she has the freedom to shift her hours around a little, but still has to put in the expected number of hours, why should that bit of

138 FR 68:15572. See also below ch. 16.

139 The U.S. Supreme Court interpreted the salary basis test as indicating that: “The Secretary is of the view that employees whose pay is adjusted for disciplinary reasons do not deserve exempt status because as a general matter true ‘executive, administrative, or professional’ employees are not ‘disciplined’ by piecemeal deductions from their pay, but are terminated, demoted, or given restricted assignments.” Auer v. Robbins, 519 US 452, 456 (1997). The National Association of Manufacturers objected to the resulting lack of flexibility in meting out punishment: “The general trend in the modern workplace is to impose progressive forms of discipline as an alternative to termination.” “NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 8 (June 26, 2003), on http://www.nam.org.

140 C. Wright Mills, White Collar: The American Middle Classes 299 (1967 [1951]).

141 Walton, The Impact of the Professional Engineering Union at 80.
discretion deprive her of overtime protection and why should it be an indicium that
her time is so discretionary that her employer is unable to hire an additional worker
instead of requiring her to work overtime? An attorney in charge of labor relations
at a corporation with more than 100,000 employees frankly put it this way:

It would be pretty rare that a low-paid administrative exempt worker such as you describe
would try and take half a day (non-vacation-time) off to go fishing or otherwise loaf.
Much more likely, s/he would have a personal or family concern that would make it urgent
that the employee be allowed to leave early to attend to it.... In such a case, it is pretty
unlikely that the exempt employee would be asked to make up the actual hours
missed—but pretty much the rule that s/he would be expected to make up any work that
had to get done to catch up, whether that involved extra hours worked or not. Let’s put it
this way—there are certainly times when it does take real hours to make up work, but there
are also plenty of times when it’s just a matter of working harder, more focused, to get
cought up on work. I think it is not as much the quid-pro-quo of hours, but the very fact
that many exemptees have at least some flexibility in figuring out how and when to get
their work done. And keep in mind, many exemptees may come in a few minutes late,
leave a few minutes early—they have more flexibility in doing this, they are not “on the
clock”—and that has value in and of itself.142

In Haywood’s case, the regime was so strict that management would not even
permit her to take off a day to see her dying mother in the hospital.143 The Labor
Department has also impermissibly assumed that workers who retain some
modicum of time discretion during the workday denied, for example, to assembly-
line workers are also permitted to come and go as they please. However, in the
wake of mechanical rationalization and automation, the white-collar worker “no
longer has the possibility of a certain freedom of movement he used to enjoy. He
cannot wander about from time to time, talking with fellow employees; he must be
in at a set hour in the morning. He is almost like a blue-collar employee in that he
is tending an important, costly machine.”144 And workers like Dorothy Haywood
are a far cry from “the men in the higher range of income” whom some employers
had in mind when they complained to the Wage and Hour Administrator shortly
after the FLSA went into effect in 1938 that they saw no reason why men who “can
go fishing when they like” should be paid time and a half.145 Nor, if courts took the

142Email to Marc Linder (Apr. 22, 2003) (identity withheld at writer’s request).
143Telephone interview with Haywood.
144Everett Kassalow, “White-Collar Unionism in the United States,” in White-Collar
Trade Unions: Contemporary Developments in Industrialized Societies 305-64, at 358
(Adolf Sturmthal ed. 1966).
following guideline seriously, would Haywood or millions of other employees be banished from overtime protection: “Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it.”

Indeed, employers have become so aggressive in asserting their unfettered autonomous power to compel their employees to work uncompensated overtime that the National Retail Federation, representing employers of 23 million workers, was apparently not at all embarrassed to inform the Wage and Hour Administrator publicly that its comments on the 2003 proposed regulations “seek to underscore the fundamental reality that exempt employees in today’s work environment do ‘whatever it takes to get their jobs done.’ The final regulations should reflect this fact and eliminate any suggestion that courts should second guess decisions of managers and other exempt employees regarding the manner in which they allocate their time to accomplish their primary goals.”

Remarkably, despite employers’ claim that they should not have to pay white-collar workers overtime premiums because they are off the clock and are paid for the value of their services overall and not by the hour, they nevertheless told the General Accounting Office in 1999 that they objected to the salary basis test because the ban on pay docking for part-day personal absences “limits their ability to hold their exempt employees accountable for their time....” This self-contradiction was also glaringly on display in the comments on the 2003 DOL regulatory proposals by the National Retail Federation: “The regulations should confirm the ability to record and track hours without affecting an employee’s exempt status. Maintaining records of hours worked and missed by exempt employees may be justified by many valid reasons that are unrelated to docking salaries and bear no attempt to control an employee’s day-to-day activities. For example, this can occur...to record and bill hours to customers, clients, and the government, e.g., where lawyers, accountants, and government contractors bill for work on an hourly basis....” But as the Ninth Circuit Court of Appeals observed:

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149“Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541” at 17 (June 30, 2003). David Fortney—who had been deputy and acting
“Subjecting an employee’s pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. ... It is precisely because executives are thought not to punch a time clock that the salary test for ‘bona fide executives’ requires that an employee’s predetermined pay not be ‘subject to reduction because of variations in the...quantity of work performed’—especially when hourly increments are at issue.”150 And as Judge Richard Posner added: “If the employer docks the employee’s pay for an absence of a few hours on a particular day, the implication is that the employee really is expected to work the same number of hours every day, implying in turn that he really is an hourly rather than a salaried worker and that his salaried status is an evasion of the statute.”151

If almost all salaried workers—except the highest executives—are held accountable for their time by means of time sheets,152 records and personnel policies, then the vast majority of white-collar salaried workers fall outside the scope and rationale of the exclusions. Nevertheless, the upshot of the aforementioned case law is that employers can use their personnel policies to ensure that salaried employees work a minimum specified number of hours in a week by threatening either to dock them or to require them to make up the time and work them overtime without compensation. The employer faces liability problems for the overtime only if on many occasions it has actually docked salaried employees for absences of less than one day. If courts, by acquiescing in employers’ practice of compensating employees for a minimum quantity of work measured by hours, are in effect

Solicitor of Labor during the first Bush administration—in testifying as an employer-side private lawyer at a House hearing in 2004 that keeping time records was inconsistent with an employee’s being exempt—rehearsed the legal rule without realizing that employers themselves had already conceded through words and acts that it had become hollowed out. Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/hrarchive.htm.

150Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990).
151Mueller v. Reich, 54 F.3d at 442.
152E.g., a union field representative who negotiated collective bargaining agreements and handled grievances for the union’s bargaining units and members was required to submit weekly time sheets showing his daily hours worked. The court held that deducting, in 15-minute increments, any deficiencies below 40 hours per week from his accrued sick leave and vacation time (as distinguished from his cash salary) did not mean that the employer had not paid him on a “salary basis”; consequently, he remained an exempt administrative employee in spite of the docking. Webster v. Public School Employees of Washington, Inc., 247 F.3d 910, 913, 917 (9th Cir., Apr. 18, 2001)
winking at the rule, one reason may be that judges have not been convinced that there is a rationale for paying overtime to plaintiffs in this situation or for the salary rule altogether. This judicial attitude may, in part, be a function of the overall historic failure of Congress and the DOL to explain the basis of overtime regulation and the white-collar exemptions from it.

With respect to the duties tests, the third regulatory requirement defining bona fide administrative employees involved the performance of office or nonmanual work. Of the relevant regulation, one federal court pithily observed, “DOL has cryptically interpreted the term nonmanual work in its regulations to mean 'white-collar’ work.”153 Until August 2004 the regulation read:

(a) The requirement that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to “white-collar” employees who meet the tests. If the work performed is “office” work it is immaterial whether it is manual or nonmanual in nature. This is consistent with the intent to include within the term “administrative” only employees who are basically white-collar employees since the accepted usage of the term “white-collar” includes all office workers. Persons employed in the routine operation of office machines are engaged in office work within the meaning of 541.2 (although they would not qualify as administrative employees since they do not meet the other requirements of 541.2).

(b) Section 541.2 does not completely prohibit the performance of manual work by an “administrative” employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to “white-collar” employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a “white-collar” employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, it is obvious that employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees within the meaning of 541.2. An office employee, on the other hand, is a “white-collar” worker, and would not lose the exemption on the grounds that he is not primarily engaged in “nonmanual” work, although he would lose the exemption if he failed to meet any of the other requirements.154

At least one federal judge thought that “manual work” was broader than “manual labor” and was therefore applicable to someone “doing the ordinary

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repetitious functional handling of some matter such as merely running an adding machine, comptometer or copying figures....” Consequently, even though a book-keeper was not a manual laborer, “still you would hold that one doing nothing but balancing accounts and totaling figures is performing manual, as distinguished from work requiring the exercise of discretion and individual [sic] judgment.”155

In light of this expansive definition, Haywood conceded that she performed office or nonmanual work.

The court then focused on the fourth criterion—that Haywood’s work had to have been “directly related to management policies or general business operations.”156 This element of the definition had been adopted by the Wage and Hour Administrator in 1940 verbatim from a proposal submitted by the National Association of Manufacturers,157 which had offered it as a component of “a moderate and practical definition,” although the NAM “would [have] prefer[red] a regulation, or amendment to the law if necessary, which would exempt all so-called white collar employees earning a definite minimum regular salary.”158 The organization prevailed with its view that there were a relatively small number of executives in any firm, but many “truly” administrative employees, because whereas an executive was concerned with the formulation of policies or the direction of their application, an administrative employee was concerned with the operating mechanism of the organization and carrying policies into practice.159

Because the NAM contended that the FLSA was not intended to regulate wages or salaries far above the minimum established as a standard of decency,160 it argued that its definition might be “too narrow,” and that the term “administrative employee” “might be broad enough to include practically all clerical work con-

155Walling v. Armour and Co. at 71,400.
15629 CFR § 541.2(a)(1).
157As one part of a three-part alternative definition, the NAM proposed: “The execution of special assignments or tasks directly related to management policies or general business operations, involving the exercise of discretion or independent judgment, and whose work is performed under circumstances in which direct supervision and control over time or manner of performance or hours of work are impracticable.” “Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Hearing on Redefinition of ‘Executive’, Etc. in Manufacturing and Extractive Industries” at 380 (Washington, D.C., June 5, 1940) (testimony of Noel Sargent, Secretary, NAM) (hereinafter “1940 WHD Hearings Transcripts”). See also below chs. 12-13.
158“1940 WHD Hearings Transcripts” at 351 (June 5) (testimony of Raymond Smethurst, Assoc. Counsel, NAM).
159“1940 WHD Hearings Transcripts” at 369 (June 5, 1940) (testimony of Sargent).
160“1940 WHD Hearings Transcripts” at 352-53 (June 5, 1940) (testimony of Smethurst).
Nevertheless, the NAM guessed that its definition would exempt about 20 percent of the office employees in a manufacturing plant.162

The Department's broad but vague interpretive gloss of NAM's contribution "describes those types of activities related to the administrative operations of a business as distinguished from 'production'...work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers. The administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control."163 Employers have argued vociferously against this "administrative-production dichotomy"164 or "production versus staff" dichotomy,165 and some courts have awarded them more than they could plausibly have expected.166 (To be sure, in the 1980s, when some state and local governments erroneously believed that they had the authority to decide independently which of their workers were excluded from the FLSA as administrative employees, public employers triggered an epidemic of such classifications.)167 For example, LPA, the

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161 "1940 WHD Hearings Transcripts" at 364 (June 5, 1940) (testimony of Smethurst).
162 "1940 WHD Hearings Transcripts" at 392 (June 5, 1940) (testimony of Sargent).
163 29 CFR § 541.205(a) and (b).
164 Reich v. John Alden Life Insurance Co., 126 F.3d 1, 23 (1st Cir. 1997).
165 FR 68:15566.
166 For example, the same court that issued Haywood upheld a lower-court that had ruled that a publishing company production editor, who was "expected to put in whatever time was necessary to meet the production deadlines," was an administrative employee despite the fact that her job "fell squarely on the production side of the line," because it met the "directly related to management policies or general business operations" part of the short test on the grounds that according to the DOL's interpretive regulation the regulatory phrase embraced "persons who...carry out major assignments in conducting operations of the business...." Shaw v. Prentice-Hall Computer Publishing, Inc., 151 F.3d 640, 641, 644 (7th Cir. 1998) (quoting 29 CFR § 541.205(c)).
167 Letter from Secretary of Labor Elizabeth Dole to governors of Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Nebraska, Nevada, New Mexico, North Dakota, Texas, Wisconsin, and Washington (July 27, 1989) (unpublished; copy furnished by AFGE, July 28, 2003, and Richard Brennan, Div. of Policy and Analysis, WHD, DOL, Aug. 21, 2003). Dole informed the governors that in determining whether a public employee's activities were directly related to management policies or general business operations, it was essential to consider the agency's mission and functions; where employees were carrying
HR Policy Association, a peak organization of 200 of the largest private employers in the United States, has insisted that the “distinctions between work that is considered exempt and that considered nonexempt under the administrative-production dichotomy” are “illogical.” Yet nowhere in the numerous pages that it devoted to analyzing those distinctions in its comments to the DOL in 2003 did LPA ever try to explain why staff or administrative employees should be excluded from the entitlement to overtime pay or why the illogic that it believed it had uncovered could or should not lead to the conclusion that both groups of workers should be treated in exactly the same way. A former Solicitor of Labor testifying before Congress in 2000 on behalf of the U.S. Chamber of Commerce involved himself in the same predicament by admitting that “the line between blue-collar and white-collar workers” had “become blurred” since 1937 and then adding that there was little reason to believe that a “worker who brings experience, judgment, and discretion to bear in performing his duties should be treated differently depending upon whether the subject of that expertise is the product on which the agency’s ongoing mission and day-to-day functions, they were not exempt. Id., attached enclosure at 3. Recounting this episode in 2003, the DOL observed that beginning in 1985 “[m]any State and local governments classified nearly all of their non-supervisory ‘white collar’ workers as exempt administrative employees without regard to whether their primary duty relates directly to agency management policies or general business operations or meets the discretion and independent judgment test. In the late 1980s, several Governors and State and local government agencies urged the Department to exempt classifications such as social workers, detectives, probation officers, and others, to avoid disrupting the level of public services that would result from increasing costs or limiting the hours of service due to overtime requirements.” The limited responses to Dole’s letter “argued generally that government services are unique because of the impact on health, safety, welfare or liberty of citizens. This, they argued, should allow exemption of positions in law enforcement and criminal justice, human services, health care and rehabilitation services, and the unemployment compensation systems, regardless of whether any particular employee’s job duties include important decision-making on how the agency is operated or managed internally.” FR 68:15583 (Mar. 31, 2003). The DOL added, the next year, that the public employers’ responses “overlooked the focus on ‘management or general business operations’ that has always been an essential foundation to the administrative employee exemption, but without explaining why that result was consistent with the intent of the FLSA and the exemptions....” FR 69:22235 (Apr. 23, 2004). According to Richard Brennan, Deputy Director, Office of Enforcement Policy, WHD, between 1986 and 1992 state and local governments stopped trying to classify all non-supervisory employees as exempt administrative employees between. Telephone interview (Aug. 20, 2003).

168“LPA’s [HR Policy Association’s] Comments” at 21.
The appeals court described a consumer service coordinator as “responsible for trying to resolve billing, damage to cargo and delay claims with...customers. The CSC’s primary role is to ensure quality service to North American’s customers and to prevent the customer’s dissatisfaction with some aspect of his move from escalating into litigation. The CSC is the sole contact person between North American and its customers with respect to these claims. CSCs spend a majority of their time adjusting claims and negotiating with customers to try to settle their claims.” The Seventh Circuit had no trouble concluding that Haywood’s activities settling billing, delay, and damages claims “are the types of classic administrative functions the regulation...contemplates.” The judges found their conclusion strengthened by the fact that Haywood “performed functions somewhat analogous to those performed by claims agents and adjusters, who are specifically mentioned by the regulations as meeting the ‘directly related’ test.”

Rejecting Haywood’s effort to depict herself as a production rather than an administrative employee on the grounds that “North American’s ‘product’ is moving goods from point A to point B. There is no evidence that Ms. Haywood is involved in producing this good in any way,” the court argued that Haywood’s tasks were “functions ancillary to North American’s business...moving household goods from one location to another.” In other words, NAVL’s “production process” is “actually moving the household goods.” This type of you-know-it-when-you-see-it guideline reached its high point when the Department commented that a “messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect.” To be sure, the court noted that the DOL had warned that the term had been most frequently misapplied (by employers and employees) in cases in which it was confused with “the use of skill in applying techniques, procedures, or specific standards” and inappropriately applied to “employees making decisions relating to matters of little conse-

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171 Haywood at 1072 (citing 29 CFR § 541.205(c)(5)).

172 Haywood at 1072 n.6.

173 Haywood at 1072.
The DOL admitted that it was not possible to generate a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term “discretion and independent judgment,” within the meaning of the regulations in subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in subpart A of this part, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations in subpart A of this part also contemplate the kind of discretion and independent judgment exercised by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required.

The DOL’s choice of administrative assistant as the illustration is amusing in light of the trend in recent years to eliminate personal secretaries and to assign them to centralized typing pools. As a result, according to a study done in the 1980s, only a firm’s top few executives still had their own secretaries, who, in addition to typing and filing, continued to perform the traditional diplomatic and personal services such as screening calls, scheduling appointments, sending anniversary cards, and sewing on buttons, but who were now called administrators, assistants, or administrative assistants.

Haywood had testified that she operated “‘freelance’” with regard to billing and that “management deferred to her decisions.” In Haywood’s case, NAVL’s “guidelines provide[d] an overview of what the CSCs should try to do when negotiating with customers.” The employer not only cautioned that CSCs should “[p]lease remember these are guidelines to try to stay within but there is always going to be a customer that is much more demanding and will require more attention and compensation,” but also admonished them that “in those cases” they should “[a]lways seek advice from your leader and assistant leader....” Despite such systematically intrusive supervision, the Seventh Circuit did not find that the guidelines “adequately constrain a CSC’s actions to prevent him from

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174 CFR § 541.207(b).
175 CFR § 541.207(d)(2).
177 Haywood at 1073 n. 8.
Because the regulation itself stated that the phrase "directly related" limited the exclusion to "persons who perform work of substantial importance to the management or operation of the business,"179 the court also had to determine whether Haywood met this sub-criterion. As the Labor Department itself admitted: "It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business." However, the examples that the regulation offered appeared to hinge on whether workers exercised discretion and independent judgment. For example, a bank cashier "performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations," but neither a bank teller nor bookkeepers, secretaries nor clerks, who "hold the run-of-the-mine positions in any ordinary business" do.180 The court was then content to assert that "[b]y any measuring stick" Haywood had "easily met" this test because, as she herself noted, "the corporation's objective is a 'happy move of clients' household goods.' If the move is not 'happy,' the corporation will experience not only increased litigation costs but a reduced customer base. Ms. Haywood's job was to keep the move 'happy.'"181

Finally, the court examined the fifth requirement—that Haywood's performance of her primary duty had to "include[ ] work requiring the exercise of discretion and independent judgment." Here again the regulations were very broad: "[T]he exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered."182 The court therefore dismissed Haywood's attempt to fit her work within the group of employees, such as inspectors, examiners, and graders, "who do not exercise independent judgment" because they "must apply a well-established, specific and constraining standard in assessing the situations [t]hey face[ ] in [their] daily work." The court rejected Haywood's argument about lack of discretion because she had testified that the settlements that the consumer service coordinators reached with customers "could vary depending on...with whom the customer was negotiating. [N]o two CSC's would reach the same settlement on the same case." Finally, the fact that Haywood's supervisors reviewed her work did "not defeat her

178Haywood at 1073.
17929 CFR § 541.205(a).
18029 CFR § 541.205(c)(1) and (2).
181Haywood at 1072.
182Haywood at 1072-73; 29 CFR § 541.207(a).
exempt status"183 because the regulations are quite lax in this regard.184

Thus, although the Department specified that the term "the exercise of discretion and independent judgment" "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance,"185 the regulations undercut much of the force of the term by adding that it "does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment...."186

Convergence of Blue- and White-Collar Work

"[I]f you ask what is a white collar worker, it is very hard to tell these days because there are many men who nominally classify themselves as manual workers but who actually are white collar workers. A man who works in a factory but does nothing but look at a lot of gauges and push switches, involving no great physical expenditure of labor, cannot very well be called a manual worker, but he may consider himself as such."187

While it is possible to criticize the Seventh Circuit's unanimous decision, both the letter and the spirit of the framework that the Labor Department has created for disentitling white-collar workers from overtime protection are extraordinarily capacious—capacious enough even to drive a North American Van Lines truck

183Haywood at 1073.

184In the background materials to its regulatory revisions in 2004 the Bush DOL approvingly cited Haywood for the proposition that a worker was an exempt administrative employee "even though she followed established procedures because the guidelines gave employees latitude in negotiating a settlement, including advising employees to use 'common sense'...." FR 69:22188.

18529 CFR § 541.207(a).

18629 CFR § 541.207(e)(1).

right through. Even if the judges decided Haywood’s case ‘correctly’ in some narrow legal sense, what possible rational relationship did the DOL’s regulations bear to the social-economic issue of whether employers should be legally free to be “‘squeezing as many hours out of salaried workers as they can,’”188 such as requiring Haywood to work 50-hour weeks without additional, let alone, premium pay.

Was Haywood’s $28,000 annual salary the kind that the Wage and Hour Administrator in 1940 characterized as so high that if its administrative-employee recipient were “paid time and a half for overtime, he would have serious doubts he earned it”?189 On the contrary, she is precisely the kind of worker of whom the Wage and Hour Division said as early as 1940: “There is little advantage in salaried employment if it serves merely as a cloak for long hours of work.”190

It is also unclear why the Labor Department believes that office work is hard to standardize in relation to time. After all, Taylorization “colonized” white-collar work191 decades ago. If it did not know already, best-selling popular sociologist Vance Packard informed the public at the end of the quiescent 1950s that:

Scientific management procedures and the introduction of office machinery have been creating working conditions very similar to those out in the plant, which simultaneously has been cleaned up and made to look more like an office. Many white-collar workers—billing clerks, key-punch operators—are actually machine attendants, manual workers in any honest nomenclature. ...

Even the layout of the large office is coming more and more to resemble that of the factory, with straight-line flow of work and in some cases assembly belts for moving paper work from point to point. Each worker does a fragment of the complete operation. The repetitive task of a comptometer operator, for example, depends upon the repetitive tasks of file clerks, stenographers, accountants, and messengers before and after her task is performed.192

If the public was unaware, office employers, which had largely escaped unions,

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189Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in CR 86:6693, 6694 (App.) (1940).

190US DOL, WHD, “Executive, Administrative, Professional...Outside Salesman” Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 8 (1940) (Stein Report).


were increasingly concerned. The magazine *Office Management* told them in the same year that Packard’s book appeared that “with every move toward standardization of work in the office, every step toward increased mechanization, the worker’s basic resistance to unionization may be weakened.” And in fact the magazine explained that: “Work standardization, work measurement, tighter external controls on work methods will be the order of the day.... The growing emphasis on systems planning, forms control, elimination of unnecessary paperwork, will call for a much more rigidly planned clerical processing line. The faster tempo being demanded for all offices will lead to the same result.” These developments toward industrial convergence “will lead to a certain loss of the subtle distinctions that have always separated clerical workers from production workers....”193 Indeed, “the pace of office automation, of improvement in office operating procedures is so swift that, potentially at least, far more office workers than production workers are threatened by improvements in operating efficiency.” In spite of the fact that it was only “a very naive worker who comes in as a typist or bookkeeper who believes that he or she will really move into senior executive ranks,” and in spite of the grim prognosis that these processes tended to “make more and more workers feel like automatons, like factory workers, going through prescribed motions under prescribed time and production standards,” *Office Management* urged management “to emphasize in every possible way the distinctions that do exist between office and factory working conditions.” Great irony attaches to the example of “psychological differentiation” that the magazine used as a way of fending off unionization: “If workers have privileges not ordinarily given in the factory—are allowed to smoke at their desks, for instance—again a subtle line has been drawn.”194

Fifteen years later, the well-known *Work in America* special report to the Secretary of Health, Education, and Welfare declared: “The office today, where work is often segmented and authoritarian, is often a factory. For a growing number of jobs, there is little to distinguish them but the color of the worker’s collar: computer keypunch operations and typing pools share much in common with the automobile assembly-line.”195 With the increasing division of labor, office workers’ activities became just as controllable as factory workers’ and the affected workers just as fungible; consequently, it has been customary for decades,

Introductory Illustration

if not in the United States, then at least in Germany, to pay additional compensation to salaried office workers for overtime and work during unsocial hours. As computerization has driven these processes much farther in recent years, insurance and other companies calculate and prescribe time for these types of activities such as the average number of minutes an accountant should take to complete a trade or enter a transaction or how long a claims adjuster should take to handle a customer complaint. White-collar workers’ once-vaunted independence is further undermined by computer devices such as Desktop Surveillance, which is “marketed as the ‘software equivalent of a video surveillance camera on the desktop.’ It permits third-party observers to view, in real time or in playback, exactly what tasks a user is performing and what keystrokes he or she is entering. Each program lets employers hide the fact that the software is running on an employee’s computer. Desktop Surveillance even allows a record of the employee’s activities to be E-mailed to a supervisor without an employee’s knowledge.” Producers “saw a demand from employers concerned about employees’ wasting time on their computers.” Even for professional employees of accounting, consulting, and law firms, it has long been the custom to track the number of billable hours, making it easy to identify those “who fail to work long enough and bring in whatever levels of revenue currently seem adequate.”


198 Email from Douglas Barkema (Apr. 7, 2003). Barkema, a former corporate credit analyst, added that there was not even a need to standardize these tasks per se: “If a company finds on average all of its credit analysts...are working 50 hours per week and there are 4 of them, why not hire a 5th to work 40 hours. Standardization of tasks seems irrelevant when it is easy to measure the total work product.”

199 Cf. Robinson-Smith v. GEICO, 323 F.Supp.2d 12, 16, 31 (D DC 2004) (insurance adjusters’ software). Richard Edwards, Contested Terrain: The Transformation of the Workplace in the Twentieth Century 88-89 (1979), noted that firms “quickly perceived the benefits of routinizing nonproduction work and...devoted considerable resources to doing so. Their efforts...succeeded...particularly with the lowest levels of clerical and sales work. Indeed, their very success has substantially eroded the usefulness of the blue-collar/white-collar distinction for today’s labor force.” Where routinization was not possible for nonproduction workers, employers found evaluation possible over a long period of time (months or years) during which the “particularities were...evened out....”

200 Matt Richtel, “A Different Type of Computer Monitor,” NYT, Aug. 27, 1998 (G3:3).

Grotesquely, in Haywood’s case, her “official ‘Position Description’ indicates that the job was, ‘Respond to both oral and written communication from non-service watch account customer, within time limits established by corporate guidelines.’”202 Moreover, NAVL management monitored by computer how many customers she and her colleagues—who were required to generate weekly production sheets—dealt with per unit of time, instructed them to complete each individual telephone session faster, and evaluated them for purposes of determining their salaries expressly on the basis of this output.203 The decision in Haywood’s case manifestly contradicts the overly optimistic judgment of the Pocket Guide to the Fair Labor Standards Act that “[c]ourt decisions indicate that employees cannot be classified as administrators simply because they are well educated white-collar workers who exercise discretion.”204 In fact, neither well-educatedness nor significant discretion is required.205

The Department took its claims about lack of standardization from the 1981 Report of the Minimum Wage Study Commission, which stated that the “basic justification” for the exclusion of white-collar workers “resides in the nature of the work performed by the exempt employees. Unlike factory employment and clerical jobs, executives, administrators and professionals perform duties whose output is not clearly associated with hours of work per day.” The Commission opined that there was “no good rationale for eliminating this exemption.”206 The Report noted

203Telephone interview with Haywood.
204Cathleen Williams and Edmund Brehl, Pocket Guide to the Fair Labor Standards Act 97 (2000). The authors’ use of “administrators,” is, as already noted, incorrect.
205A November 19, 2002 DOL opinion letter revealed that the DOL’s interpretation remained firmly in place so that salaried insurance claims adjusters are not likely to qualify for overtime pay because the administrative exclusion applies when employees perform a number of specific duties including processing a claim “‘from the beginning to end, whether it is easily or quickly resolved....’” “DOL Issues Guidance on FLSA Coverage of Insurance Company Claims Adjusters,” USLW, Nov. 26, 2002, at 2344. In 2004 the DOL incorporated this approach in the new final regulations by excluding insurance claims adjusters “if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.” FR 69:22263.
that “compensatory privileges” were designed as “compensation for overtime hours associated with executive and managerial jobs.” It also observed that standardizing work “in relation to a specific period of time” was particularly difficult in the case of professional employees.207 The reason that the Report focused on professional workers was that the regulations themselves confined this defining characteristic exclusively to them, requiring “work...of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.”208

Yet, even many professional workers are subject to “hourly performance quotas.” For example, lawyers at a private law firm providing phone consultations under a pre-paid legal service plan are required to resolve 2.5 complaints per hour. Such constraints—“We end up being telemarketers” said one lawyer—prompted one entire office of lawyers in Phoenix to vote to join the Teamsters Union.209 As early as 1954, the Harvard Business Review observed that: “In a large engineering firm, the drafting engineers with college degrees became militant union members soon after the firm moved them from their individual cubicles to one large room and put their work on a production-line basis with each man responsible for a single detail. Formerly a draftsman handled one job from start to finish.”210 And more generally, as a Harvard Business School study found in 1961, for most engineers in industry, conditions had “changed drastically.” The huge expansion in the scale of engineering firms from dozens to hundreds to thousands of employees provided “new opportunities for rationalization of the engineering function. The work could be broken down and assigned in new ways.” The concomitant rationalization of management and supervision also led to the adoption of “formal control techniques, many of which had been developed in the shop and were not believed by engineers to be appropriate for engineers. Probably
the most ‘notorious’ of the techniques borrowed from the shop was the time clock; it was despised by professional engineers.”\textsuperscript{211}

Hospitals, clinics, and health maintenance organizations (as well as insurance companies) have in recent years begun imposing similar constraints on employee-physicians.\textsuperscript{212} When Congress in 1983 put Medicare on a set fee per case basis according to 467 diagnosis-related groups, it created an assumption that cases within each group were homogeneous: “Patient care could be seen...in terms of standardized ‘products,’” reinforcing the image of the hospital as a factory. ‘Scientific management’ was finally to be achieved.”\textsuperscript{213} By logging on and off computers, physicians themselves are required to enable employers to capture the length of their interaction with clinical patients.\textsuperscript{214} Pharmacists in chain stores, too, are now evaluated on the basis of how many prescriptions they fill per day.\textsuperscript{215} These subordinating trends are inherent in the bureaucratization of professions and professionals, which promotes organizational control by employers.\textsuperscript{216}

Computerized control was also adopted in the 1980s by Wall Street brokerage firms in the form of software programs that generate simultaneous multiple numerical ratings: “For managers and salesmen the grid of information hasn’t yet created the kind of physical constraint that it has produced for data entry clerks. A broker can still stand up, sit down or make a phone call. The computer isn’t timing his bathroom or coffee breaks. But as [a broker] pointed out, ‘With the computers the company can calculate not only how much business you’re doing, but exactly how much money they’ll make on each piece of business.... So now the pressure on the broker is not only to do more business but to do it exactly “our”

\textsuperscript{211}Walton, \textit{The Impact of the Professional Engineering Union} at 18-19.

\textsuperscript{212}By the time of the Great Depression, “[e]ven physicians [we]re constantly becoming salaried dependents.” In 1929, 21,000 or one in seven physicians in the United States worked for salaries. Lewis Corey, \textit{The Crisis of the Middle Class} 251-52 (1935). H. Dewey Anderson and Percy Davidson, \textit{Occupational Trends in the United States} 536 (1940), while noting that 15 percent of all physicians were “employed full time by business firms or agencies,” also stated that 27 percent of all physicians and surgeons at the 1930 census were reported as “working for pay rather than in private practice....”

\textsuperscript{213}Rosemary Stevens, \textit{In Sickness and in Wealth: American Hospitals in the Twentieth Century} 323, 324 (1989).

\textsuperscript{214}Simon Head, \textit{The New Ruthless Economy} at 126. For further description of control of physicians, see \textit{id.} at 117-52.

\textsuperscript{215}Telephone interview with University of Iowa pharmacy professor (May 2003); pharmacist, Osco Drug Store, Iowa City (Sept. 19, 2003).

way.'"217

That so-called expert system software programs exist that automate much clerical decisionmaking218 is perhaps less surprising than the availability of computer programs that track managers' performance.219 Proceeding from the assumption that "‘if there’s an output it can be measured,’" some advocates of the Taylorized office tout other software as capable of measuring productivity for any kind of white-collar work at all. From their perspective, even for creative workers such as computer programmers, "‘programming is production work’": the work of human resources staffs filling positions, or designing salary or promotion plans as well as that of engineers is also production work.220 Tendentially the effect of such programs and organization regimes is to centralize decisionmaking and transform autonomous professional workers into clerks.221

If even practicing lawyers and doctors, whose "‘traditional professions’" the Labor Department has excepted from its salary-level requirement,222 can be subjected to such quota systems, the DOL’s principal excuse for excluding millions of white-collar workers from mandatory overtime premiums collapses. A principled basis for treating them differently than blue-collar workers is additionally undermined by the fact that, according to a recent influential typology of work systems, the highest category, "‘high-skill autonomous,’" which is subject to little task supervision and only rare quantitative measurement of output, includes not only the highest-paid 25 percent of executive, administrative, and managerial occupations and all professional specialty occupations, but also all precision production, craft, and repair occupations.223 Why, under these circumstances, for example, high-skilled and autonomous electricians should be entitled to the same overtime protection as the most tightly constrained category of, inter alia, telephone operators and fast food workers, but millions of administrative and professional employees should be excluded neither Congress nor the DOL has ever bothered to

217Garson, *The Electronic Sweatshop* at 147. For further description of the control of brokers by brokerage firms, see *id.* at 128-54.
219Garson, *The Electronic Sweatshop* at 163, 212
220Garson, *The Electronic Workshop* at 164-65 (quoting a GTE human resources executive).
221Garson, *The Electronic Sweatshop* at 110, 156, 166. For a detailed illustration of the phenomenon using the example of social workers, see *id.* at 73-114.
22229 CFR § 541.314(a). The new regulations retain this exception. *FR* 69:22269 (to be codified at 29 CFR § 541.600(3)).
Despite having done nothing to expand overtime protection for white-collar workers during her tenure as WHA from 1993 to 1997, five years later Maria Echaveste pointed out the unrealistic nature of the DOL's dichotomous approach at a meeting of the right-wing Federalist Society:

I think if we’re going to make any real reforms, especially to the duties test, we need to have an honest conversation that just because of the level of education, people are using more of their brain, if you will, in their work, is that sufficient to say that they’re not entitled to overtime protection? The fact that your employer may very well still be looking at productivity in terms of how many...reports you file or how many things you get through during the hour—the industrial line doesn’t fit. Yet, you’re being measured on your productivity, and we get measured on our productivity, our billables, but we get compensated for it.224

Ironically, then, the rhetoric that employers and Republicans have deployed in their campaign to deregulate overtime and overtime pay—this “Depression-era law” must be modernized to deal with the new realities of today’s workplace225—compels a conclusion diametrically opposite to the one they favor: namely, that as more and more white-collar workers are subjected to Tayloristic rationalization in “the factory-like office,”226 more rather than fewer of them work under conditions requiring the same kind of protection afforded blue-collar workers.227

By the 1990s, even that bastion of corporate security, middle management—whom former Labor Secretary Robert Reich characterized as performing “routine supervisory jobs” analogous to the “repetitive tasks” of “traditional blue-collar jobs”—had begun to face mass terminations.228 If the evolution of “the white-

226Mills, White Collar at 205.
227Compare the assertion in a study by the pro-employer Employment Policy Foundation that legal regimes like the white-collar exemptions “create arbitrary distinctions between workers that do not fit the workplaces and work forces of the 1990s and the twenty-first century....” Edward Potter and Judith Youngman, Keeping America Competitive: Employment Policy for the Twenty-First Century 20 (1995).
collar ‘sweatshop’” in the 1980s and 1990s demonstrated that its incumbents “can be replaced easily,"229 that outcome has in no small part been driven by technological innovations that have left white-collar workers divided into three groups: those with reengineered jobs, those displaced entirely, and the small and contracting group with experience, creativity, or skills that have as yet been able to resist computerization.230

Significantly, even the Labor Department indirectly conceded the proletarianization of this group in discussing the economic impact of its updating of the duties tests: because it will be “less difficult” for employers to determine whether an employee satisfies those tests, “employers will likely incur much lower costs associated with determining the exempt status of employees, including conducting expensive time-and-motion studies...."231

The Labor Department has also undermined its own argument that the kinds of white-collar workers it has excluded from overtime pay protection perform overtime work that cannot be easily spread to other workers by admitting that “an employer’s volume of activities may make it necessary to employ a number of employees...performing identical work."232 This admission raises the question as to why, for example, since NAVL employed 50-55 claims adjusters doing the same work as Haywood,233 it would not have been possible for the firm to reduce the workweek and employ additional adjusters to work a standard 40-hour workweek. After all, as the Wage and Hour Division observed in 1940: “It...does not appear why there should be a reluctance to make...overtime payments to salaried workers.... Either the penalty payments will discourage long hours of work, or the worker will receive a reasonable compensation for his additional efforts. [I]t is a serious misreading of the act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum.

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229Fraser, White-Collar Sweatshop at 20, 35.
230Fraser, White-Collar Sweatshop at 85.
231FR 68:15580.
23229 CFR § 541.205(c)(6).
233Telephone interview with Haywood.
Living conditions can be improved and work spread even where wages are comparatively high."234

It is no coincidence at all that big business organizations such as the Labor Policy Association, which asserts that the FLSA "was put in place to make sure workers at the low end of the pay scale are paid a fair day’s wage for a fair day’s pay, and it’s gotten away from that,"235 also take the position that: "We’re no longer just a white-or blue-collar workforce.... We’re a “gray-collar” workforce with a whole set of workers that just don’t fall under the current system.” Un-supported by the prejudice that the FLSA’s overtime provision was not designed to protect non-minimum wage workers, the LPA might be forced to justify its presumption that the convergence of blue-and white-collar workers should not bring about overtime protection for the hybrid group. To be sure, the LPA prevented any such insight by taking as an example the irrelevant case of “an engineer with a two-year degree [who] is likely eligible for overtime pay, while a colleague doing the same job who has a four-year degree isn’t.”236 In fact, the point is not whether two-year-degree engineers are white-collar workers—they are. Millions of white-collar employees are and have always been covered by the FLSA. The question is whether they are the kinds of white-collar workers whose workday should be subject to societal regulation, and neither the criteria developed by the DOL nor any employer proposals have ever contributed to answering it.

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234*Stein Report* at 7-8.

