SOCIAL SECURITY STATUS QUO RESOLUTION

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

EIGHTIETH CONGRESS

SECOND SESSION

ON

H. J. Res. 296

A JOINT RESOLUTION TO MAINTAIN THE STATUS QUO IN RESPECT OF CERTAIN EMPLOYMENT TAXES AND SOCIAL-SECURITY BENEFITS PENDING ACTION BY CONGRESS ON EXTENDED SOCIAL-SECURITY COVERAGE

APRIL 1 AND 2, 1948

Printed for the use of the Committee on Finance

UNITED STATES
GOVERNMENT PRINTING OFFICE
74026 WASHINGTON : 1948

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SOCIAL SECURITY STATUS QUO RESOLUTION

THURSDAY, APRIL 1, 1948

UNITED STATES SENATE,
COMMITTEE ON FINANCE,
Washington, D. C.

The committee met at 10 a. m., pursuant to call, in room 213, Senate Office Building, Senator Eugene D. Millikin, chairman, presiding.

Present: Senators Millikin (chairman), Bushfield, Johnson, and Lucas.

The CHAIRMAN. The meeting will come to order.

This is a hearing on Joint Resolution 296 to maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage.

(The resolution is as follows:)

[H. J. Res. 296, 80th Cong., 2d sess.]

JOINT RESOLUTION To maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 1426 (d) and section 1607 (i) of the Internal Revenue Code are amended by inserting before the period at the end of each the following: ", but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

(b) The amendments made by subsection (a) shall have the same effect as if included in the Internal Revenue Code on February 10, 1939, the date of its enactment.

SEC. 2. (a) Section 1101 (a) (6) of the Social Security Act is amended by inserting before the period at the end thereof the following: ", but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

(b) The amendment made by subsection (a) shall have the same effect as if included in the Social Security Act on August 14, 1935, the date of its enactment, but shall not have the effect of voiding any determination respecting eligibility for, or amount of, benefits of any individual under title II of the Social Security Act made prior to January 1, 1948, or of preventing any such determination so made from continuing to apply on or after January 1, 1948.

Passed the House of Representatives February 27, 1948.

Attest:

JOHN ANDREWS, *Clerk.*

The CHAIRMAN. The first witness is Adrian W. DeWind, of the Treasury Department.

Mr. DeWind, will you come forward, please?

STATEMENT OF ADRIAN W. DeWIND, TREASURY DEPARTMENT, WASHINGTON, D. C.

The CHAIRMAN. Give your full name, residence, and occupation to the reporter, please.

Mr. DEWIND. Mr. Chairman, my name is Adrian W. DeWind. I am tax legislative counsel of the Treasury Department.

Mr. Chairman, I have a prepared statement which I will read if the committee desires.

In addition to that, the Treasury Department has made a report to this committee on Senate Joint Resolution 180, which is identical to this House resolution now before the committee. If there is no objection, I would like to have the report on Resolution 180 appear in this record.

The CHAIRMAN. The report will be incorporated in the record.

Proceed with your statement, please, Mr. DeWind.

(The report referred to is as follows:)

TREASURY DEPARTMENT,
Washington, February 18, 1948.

Hon. EUGENE D. MILLIKIN,
Chairman, Committee on Finance,
United States Senate, Washington, D. C.

MY DEAR MR. CHAIRMAN: Further reference is made to your letter dated January 21, 1948, requesting the views of this Department regarding Senate Joint Resolution 180, Eightieth Congress, second session.

The purpose of the proposed resolution is stated to be "to maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage."

The resolution would amend section 1426 (d) and section 1607 (i) of the Internal Revenue Code and section 1101 (a) (6) of the Social Security Act, as of the date of their enactment, to provide in effect that, for purposes of the social-security program and excepting cases in which "eligibility for benefits" was "determined" prior to January 1, 1948, the term "employee" shall not include any individual who is not an employee "under the common-law rules applicable in determining the employer-employee relationship."

In the first place, the proposed resolution would not maintain the "status quo" but would change the law as pronounced by the Supreme Court in June 1947 (*U. S.* v. *Silk* (67 S. Ct. 1463); *Harrison* v. *Greyvan Lines, Inc.* (67 S. Ct. 1463); and *Bartels* v. *Birmingham* (67 S. Ct. 1547)), and, in so doing, would deprive an estimated one-half to three-quarters of a million employees and their dependents of the social-security coverage to which they are now entitled. Thus the proposed resolution implies a disregard for the protection afforded by the social-security program and would reverse the trend toward expanded coverage which the President and this Department have repeatedly espoused.

In addition, the proposed resolution would require the courts and the administrative agencies to ignore the general purposes of the social-security legislation in identifying the persons to whom it should be applied. It would substitute the common-law rules for the principles of economic reality recently set forth by the Supreme Court, as governing the determination of employer-employee relationship for purposes of the social-security program.

Under common law, the legal right to control the performance of services appears to be the primary test in determining the existence of the employer-employee relationship. In the absence of any other guide, this test was adopted by the Treasury Department in 1936, in the Department's original regulations under the Social Security Act. As experience developed under these regulations, however, it became increasingly clear that such a test permitted employers to avoid employment-tax liability and deprive their workers of social-security coverage by dressing up their relationship through so-called independent contracts but without, in any material sense, altering their relative economic positions. Indicative of the artificiality which arose is the case *Nevins, Inc.* v. *Rothensies* (58 F. Supp. 460, aff'd per curiam, 158 F. (2d) 189), in which a chain drug company converted former branch managers into licensees, advancing all necessary equipment

and inventories to each store. The licensees were held to be independent contractors, despite the fact that their economic relationship with the drug company remained virtually the same as when they were branch managers. The extent to which such artifices were employed might also be illustrated by the following advice published in a nationally known tax service:

"Many employers have taken steps to eliminate pay-roll-tax liability on certain individuals by changing their status from that of employees to that of independent contractors. The types of employees where such change is feasible include, among others, salesmen, selling agents, factors, brokers, bulk-oil operators, store managers, motion-picture-theater managers, and taxicab drivers.

"Before attempting to establish an independent contractor relationship with any individuals * * * be sure that the contract definitely provides for freedom from control as to the manner or method of performance of the work, and be extremely careful not to direct or influence the workers as to their choice of means or methods. Relinquish not only control of the way they do their work and the employees they hire, but also sever all contact with their customers."

In June 1947 the Supreme Court of the United States in the Silk, Greyvan, and Bartels cases finally established that, within the meaning and intent of the social-security legislation, the employment relationship should be determined on the basis of the worker's relationship in fact with the person for whom he performs services, rather than on his technical relationship under the common law. By thus elevating substance above form, the Supreme Court has effectively limited the possibilities of avoiding employment-tax liability and defeating the purposes of the social-security program through mere technical arrangements. The proposed resolution would nullify the results of these Supreme Court decisions and would reinstate the "control" test in spite of its obvious deficiencies.

It is significant that a majority of the States, even prior to the Silk, Greyvan, and Bartels decisions, recognized the inadequacy of the common-law "control" test and abandoned it for purposes of the unemployment insurance program. Many of the workers whose status would be changed to independent contractor by the proposed resolution have been and would continue to be, held employees under the unemployment compensation acts of such States. (See P-H Social Security Tax Service, vol. 1, sec. 27,226, and cases cited therein.) The rest of the States retained the common law "control" test only because they considered the unemployment insurance program to be essentially a federally sponsored program and have been reluctant to depart from the Federal rule. (See *Commercial Motor Freight, Inc.* v. *Ebright* (Ohio), 54 N. W. (2d) 297; *A. J. Meyer & Co.* v. *U. S. C.* (Mo.) 152 S. W. (2d), 184; *Gentile Bros. Co.* v. *Florida Ind. Com.* (Fla.), 10 S. (2d) 568; and *Meredith Publishing So.* v. *Iowa Employment Security Commission* (Iowa), 6 N. W. (2d) 6. See also sec. 2 (K) of California Unemployment Insurance Act; sec. 8 (1) (7) of Delaware Unemployment Compensation Act; sec. 108.02 (h) of the Wisconsin Unemployment Reserves and Compensation Act; and similar provisions in other State unemployment insurance laws.) Now that the Federal concept of "employee" has been brought substantially in line with the majority of the States, it is reasonable to presume that the rest of the States will quickly follow and that the employer-employee relationship will hereafter receive substantially uniform determinations for purposes of the unemployment insurance program under both the Federal and the State laws. Enactment of the proposed resolution would prevent such a result. It would restore the unrealistic distinctions between legal right to control and economic position to control, and between workers on the premises and those off the premises, which pervaded the social-security system under the common law "control" test. Once more, thousands of workers would be deemed independent contractors under the Federal unemployment legislation but employees under most of the implemental State acts. Employers would again be able to avoid their proper share of contributions to the social-security program; and the protection of the program would again be denied to the more than 500,000 individuals whose coverage is assured under existing law.

The objections to the proposed resolution would by no means be removed even if such individuals were eventually to be brought within the old-age and survivors insurance program by a future extension of coverage to include self-employed individuals. There is considerable doubt as to the feasibility of covering self-employed individuals under the unemployment insurance program. Accordingly, to legislate these workers into a self-employed status might forever deprive them of unemployment insurance benefits. Furthermore, all plans proposed to date for the coverage of self-employed individuals contemplate a higher

rate of contribution than that required from employees. Since all of the workers in this area occupy the same economic status as "common law" employees, it would be inequitable to make them pay more than their "common law" counterparts for social security protection, particularly when it is considered that such excess represents a tax burden which should properly be borne by their employers. Likewise, by exempting employers of such individuals from employment taxes, the proposed resolution would revive the discrimination, which persisted under the "control" test, against other employers, including competitors, who either preferred not, or were unable, to rearrange the status of their employees to fit the technical "common law" classification of independent contractor.

In addition to the foregoing, there is considerable doubt regarding the legal effect of section 2 (b) of the proposed resolution. It provides that the amendments proposed therein "shall not have the effect of voiding any determination respecting eligibility for, or amount of, benefits of any individual under title II of the Social Security Act made prior to January 1, 1948, or of preventing any such determination so made from continuing to apply on or after January 1, 1948."

In one respect this provision could mean that any individual who was deemed by the Social Security Administration or the courts to be an employee entitled to wage credits prior to January 1, 1948, would continue to be an employee thereafter for purposes of wage credits and insurance benefits. In this event a number of the individuals under consideration would be allowed to accumulate additional wage credits after January 1, 1948, without paying any taxes, since the Social Security Administration has been making determinations on the basis of the Silk, Greyvan, and Bartels cases since June 1947. Moreover, to hold such individuals to be entitled to accumulate wage credits is meaningless without a simultaneous imposition of tax on their employers, since it is through the employment-tax return that the necessary wage data is obtained. It can hardly be contemplated that the employees themselves would furnish adequate wage data periodically to the Social Security Administration.

In another light the provisions of section 2 (b) of the proposed resolution might be interpreted to apply only to those individuals who were deemed by the Social Security Administration or the courts, prior to January 1, 1948, to be fully qualified, by age and otherwise, to receive insurance benefits. This interpretation would obviously produce an inequitable result. Moreover, under such an interpretation, the Social Security Administrator, in many cases, would be prevented by reason of section 2 (a) of the proposed resolution from applying the "work clause" (sec. 203 (d) of the Social Security Act and reducing such individuals' benefits, even though such individuals thereafter continue to receive substantial remuneration in the same type of employment which qualified them for their benefits.

The proposed resolution was evidently drafted on the assumption that the "control" test has governed all determinations and assessments of employment-tax liability to date. Such, however, is not the case. In 1945 the Court of Appeals of the District of Columbia sustained an assessment against an employer of itinerant coal hustlers, primarily on the ground that the social-security "statutes are remedial and require construction which will give effect to the intention of Congress in the light of the mischief to be corrected and the end to be attained * * *" (*Grace* v. *Magruder*, 148 F. (2d) 679, cert. den. 326 U. S. 720).

Similar departures from common-law principles with respect to assessments of employment taxes for periods prior to January 1, 1948, have been pronounced in *La Lone* v. *U. S.* (57 F. Supp. 947 (1944)); *Schwing, et al* v. *U. S.* (C. C. A. 3, No. 9190 (January 1948)); *Tapager* v. *Birmingham* (U. S. D. C., N. D., Iowa, cent. div., January 16, 1948); and *Atlantic Coast Life Ins. Co* v. *U. S.* (U. S. D. C., E. D., S. Carolina, Charleston Div., January 16, 1948); not to mention the Supreme Court's decision in the Silk case in June 1947. In all of these cases the taxes have been paid and wage credits have been posted to the employees' accounts with the Social Security Administration. Enactment of the proposed resolution might reopen all of such cases. The Commissioner of Internal Revenue would then have to determine whether to make refunds or relitigate such cases under the control test. In either event, the administrative task, would be difficult. Relitigation of the status of the truck owner-drivers and orchestra leaders involved in the Silk, Greyvan, and Bartels cases would also have to be considered, since such individuals were held by the Supreme Court to be independent contractors on the basis of their economic, and in spite of their common-law, relationship with the persons to whom they were rendering services.

The proposed resolution is substantially identical with House Joint Resolution 296, which was reported to the House of Representatives by the Ways and Means Committee on February 3, 1948. In the majority report of that committee it is stated that the pending amendments to the Treasury Department's employment-tax regulations, which seek to implement the Supreme Court decisions in the Silk, Greyvan, and Bartels cases, will affect many "normally independent operations," such as "logging," "marketing of petroleum products," "distribution or sale newspapers," "distribution or sale of household and other items and appliances to the ultimate consumer," and "sales of fire casualty, and some other type of insurance," and will result in confusion and extensive litigation. It is also stated in the Ways and Means Committee report that, in the absence of the type of control required under the common-law rules, many employers will be unable to compute or withhold the employment taxes for which they will be liable.

With respect to the scope of the new regulations, it should be pointed out that "normally independent operations" which are independent in fact will not be affected thereby. The regulations will not convert independent retailers into employees but will apply only where a service relationship exists in fact between the individual performing the services and the person for whom they are being performed. Many individuals engaged in logging, selling newspapers, distributing household appliances, and selling insurance have already been held to be employees under the so-called common-law rules. Many of those considered independent contractors at common law, as in the field of petroleum marketing, casualty insurance, and credit correspondents will, doubtless, continue more clearly in that status under the new regulations than under the "control" test. The only individuals whose status will be affected by the new regulations will be those who, but for certain formal recitations in their employment contracts or certain methods of remuneration, would clearly be employees even under the the common-law rules.

It is believed that an intelligent and practical application of the new regulations will not increase uncertainty or litigation, but will substantially reduce the present uncertainty and controversies with respect to the status of a great number of the workers involved in the new area of coverage. The "control" test produced an endless stream of employment-tax litigation, as well as a constant series of adjustments between employers and employees to circumvent the findings on which adverse decisions have been based. To date approximately 250 employment-tax cases involving the "control" test have had to be litigated in the courts, and more than 50 of such cases are pending in court at the present time. Under the criteria laid down by the Supreme Court and reiterated in the pending regulations, on the other hand, the tendency will be to produce greater stability and less litigation, since the status of individuals thereunder cannot be altered by mere technical adjustments in the form of their reemployment contracts. So that the status of individuals in the new area of coverage might be more easily ascertained it is contemplated that, on final promulgation of the new regulations, a number of rulings in various fields of business and industrial activity will be published by the Commissioner of Internal Revenue illustrating the scope and application thereof.

As to the administrative problems involved, you may be sure that the Treasury Department and the Bureau of Internal Revenue are not insensitive to, or unaware of, the wage reporting and withholding burdens which will have to be sustained by employers in the new area of coverage. It must be recognized, however, that in every case where an individual status is held to be that of an employee under the new regulations, he will be rendering services to, and substantially dependent on, his employer and, as a practical matter, will be no less willing to cooperate with his employer than in the case of any "common law" employee. Accordingly the employer will invariably be in a position to secure from such employees whatever reports or remittances are necessary to enable him to comply with the reporting and withholding provisions of the law.

It is noted that the reporting and withholding requirements were considered a serious problem to employers at the time of the enactment of the original Social Security Act in 1935. Despite these difficulties, however, the program was enacted and the administrative burdens proved much less serious than was anticipated. Furthermore the withholding and reporting problems referred to by the Ways and Means Committee are not new. Many of the individuals covered by existing regulations operate under commission, purchase and sale, and lease arrangements, and procedures have been worked out through which their employers have been able satisfactorily to comply with the withholding and reporting requirements of

the social security program. The difficulties confronting employers in the new area of coverage are no greater than those which have already been resolved by other employers. Certainly it has not been shown that the difficulties confronting them are so formidable as to warrant destruction of the benefit rights to which their employees are now entitled.

On the basis of the foregoing considerations the Treasury Department is opposed to the enactment of Senate Joint Resolution 180.

As stated above, it is estimated that between 500,000 and 750,000 workers would be excluded from social-security coverage under the provisions of Senate Joint Resolution 180. Assuming average earnings of $2,000 by 625,000 workers, the total wages would approximate $1,250,000,000. The employers' and employees' taxes on such wages would run close to $25,000,000 annually.

The Director, Bureau of the Budget, has advised the Treasury Department that there is no objection to the presentation of this report.

Very truly yours,

A. L. M. WIGGINS,
Acting Secretary of the Treasury.

Mr. DEWIND. The declared purpose of this resolution is "to maintain the status quo" in respect of social security taxes and benefits "pending action by the Congress on extended social security coverage." On the surface, therefore, the proposed legislation might appear to have no effect on existing social security coverage other than to freeze it where it is. This, however, is not the case. It would deprive from one-half to three-quarters of a million employees of the social security protection to which they are entitled under existing law and toward which some of them have already made substantial contributions.

The CHAIRMAN. Mr. DeWind, will you submit for the record please your break-down of those one-half to three-quarters of a million employees, showing the type of work in which they are engaged (see below) and will you please also give us a break-down showing those who have already made the substantial contributions to which you refer (see p. 47)?

(The following was submitted for the record in response to the above:)

MY DEAR MR. CHAIRMAN: In the course of my testimony before your committee on April 1, 1948, regarding House Joint Resolution 296, you requested the Treasury Department to furnish you with the following data for incorporation in the record of the hearings on the joint resolution:

(1) A break-down of the estimate that between 500,000 and 750,000 employees will be deprived of social security coverage by the enactment of House Joint Resolution 296, together with a statement reflecting the source of such data.

* * * * * * *

500,000 TO 750,000 EMPLOYEES AFFECTED BY HOUSE JOINT RESOLUTION 296

As I pointed out in my testimony, it is utterly impracticable to develop any precise statistics on the number of employees who would be affected by the enactment of House Joint Resolution 296. In large measure, this is due to the uncertainty as to how the courts will construe the resolution, i. e., whether the resolution would require an application of the strict common law "control" test, as applied in some States, or would permit a liberalized version of the common law rules, as applied in others.

A schedule submitted to your committee by the Federal Security Administrator on April 2, 1948 (see p. 152), discloses that there are over 1,208,500 industrial and commercial workers (excluding nurses) whose services fall within the twilight zone between employee and independent contractor and whose status under the common law depends largely upon the form of their employment arrangements, the method of their remuneration, and the particular jurisdiction in which their cases might arise.

On the basis of information secured by the Federal Security Agency from the Bureau of Census, the Office of Domestic Commerce, the Life Insurance Research Institute, the Department of Labor, the Bureau of Mines, the Interstate Commerce Commission, the United States Forest Service, and the American Trucking Association, the 1,208,500 individuals referred to consist of 666,000 outside salesmen, 150,000 taxicab operators, 40,000 industrial home workers, 22,000 news vendors, 17,500 contract loggers, 50,000 truck operators, 10,000 lessee-miners, and a group of 200,000 made up of journeymen tailors, contract construction workers, and filling-station lessee-operators.

Many of these individuals have been covered under the social-security program as employees since 1936 and their status was not affected by the Supreme Court decisions last June. Also, many of them, who were not covered prior to the Supreme Court decisions, will continue in the status of independent contractor under such decisions as well as the pending Treasury regulations. On the basis of general experience acquired in the administration of the Federal social security laws, these two groups are believed to include relatively few of the 666,000 outside salesmen and to constitute less than one-half of the 1,208,500 individuals in question. Accordingly, the best judgment which can be reached on the basis of available information is that over half of the 1,208,500 individuals, somewhere between 500,000 and 750,000, will be deprived of social security coverage by enactment of the joint resolution.

Mr. DEWIND. Mr. Chairman, we have an estimated break-down of the groups that fall in this general area. They amount to 1,160,500. We have a break-down of that figure, but we have no break-down as to those which are now covered, either by particular industries or in the total except in a general estimate of 500,000 to 750,000.

The CHAIRMAN. How have you reached that estimate?

Mr. DEWIND. That is an estimate based upon the total number of people estimated to be in this area which it is believed are not now covered.

The CHAIRMAN. You have not made a detailed analysis in reaching that conclusion?

Mr. DEWIND. I can put in the record, Mr. Chairman, a break-down of the total number of people that are estimated to be in this general area. We have no precise break-down by industries of the number of people that would be affected by this particular resolution. Our estimate is a rough one which varies from 500,000 to 750,000.

The CHAIRMAN. I am referring to the 500,000 to 750,000, and as to those you are not prepared to submit a break-down?

Mr. DEWIND. I think that is correct. I believe that would be an almost impossible task to attempt such a break-down.

The CHAIRMAN. Do you not think it is rather irresponsible to cover the country with statements to the effect that half a million to three-quarters of a million people were being deprived of coverage by this resolution unjustly and then come in here and not be prepared to sustain a charge of that kind?

Mr. DEWIND. We do know that something in excess of 1,000,000 employees as I have stated are in this general area and we believe that as much as a third of them may already be covered.

The CHAIRMAN. And that rests on a matter of judgment?

Mr. DEWIND. We know that in some groups that social security coverage has been applied to them.

The CHAIRMAN. Are you prepared to give us the facts on the latter group to which you refer?

Mr. DEWIND. I will be glad to attempt to get a further detailed break-down. It is a very difficult thing to get in this area, but primarily we begin with the groups that we know are covered and with

an estimate of the total number of people affected as to which we have a break-down.

The CHAIRMAN. Are these one-half to three-quarters of a million employees to whom you refer covered under your present regulations?

Mr. DEWIND. Under the existing regulations?

The CHAIRMAN. Yes.

Mr. DEWIND. There has been considerable doubt about that. In my statement I will try to elaborate upon it.

The CHAIRMAN. Can you tell me now whether they are or are not covered under the existing regulations?

Mr. DEWIND. That is a question that is quite difficult to answer in a word.

The CHAIRMAN. I do not mind how many words you take. Let us get right to the meat of this as rapidly as possible.

Mr. DEWIND. Mr. Chairman, the 500,000 to 750,000 have not been covered up till this time, both under the court decisions and the administrative practices.

The CHAIRMAN. So that when we say that there are 500,000 to 750,000 people that are being unjustly deprived of coverage, they are being unjustly deprived of coverage if your proposed regulation is just, is that right?

Mr. DEWIND. The existing Treasury Department regulations in effect do not fully cover the area.

The CHAIRMAN. Let me ask you again: the statement which has been made so frequently over the country that there are 500,000 to 750,000 people unjustly denied coverage by virtue of the existing status and that they would continue to be unjustly deprived of coverage if this status quo resolution were adopted, rests entirely on your theory that they are unjustly deprived under a regulation which is proposed. They would only be unjustly deprived if the proposed regulation of the Treasury Department were not promulgated and did not become law, is that right?

Mr. DEWIND. No. Mr. Chairman, let me put it this way: the Treasury Department feels that under the Supreme Court decisions of last June this group is clearly entitled to coverage under existing law.

The CHAIRMAN. Then your position is that by virtue of the Supreme Court decision and by virtue of proposed Treasury regulations which have not become effective that from 500,000 to 750,000 are being unjustly deprived of coverage.

Mr. DEWIND. Mr. Chairman, I think it is entirely as a result of the Supreme Court decisions. Our proposed regulations do no more than to amplify into our regulations the results of the Supreme Court decisions.

The CHAIRMAN. Then they have not been unjustly deprived of coverage except by virtue of the Supreme Court decision, is that right?

Mr. DEWIND. They have under those decisions always been entitled to coverage. That matter is one that has been in doubt until the Supreme Court passed on the matter in June. The issue had been previously raised.

The CHAIRMAN. Is it correct to say that except for the Supreme Court decision no one has been unjustly deprived of coverage? I am assuming that you have been justly covering people who were entitled to it prior to the Supreme Court decision.

Mr. DEWIND. Well, initially, after the social-security law was adopted, Mr. Chairman, the Department promulgated the regulations under that, and proceeded to administer them and attempted in a good many cases to follow the realities of the situation and impose the taxes where the essence of the situation, the reality of the relationship, was employer-employee. Those cases were taken to the lower courts. In some of them the Department was successful.

The CHAIRMAN. How many years did you follow the common-law concept of the employer-employee relationship?

Mr. DEWIND. The common-law employer-employee relationship test is one that is nebulous in itself. It is not a precise test.

As early as 1944 we had lower-court decisions covering employees and imposing taxes in situations which were broader than the narrow control test of the common law.

The CHAIRMAN. Let me interrupt you and ask you again: How many years did you follow the employer-employee common-law concept?

Mr. DEWIND. Mr. Chairman, I think the Treasury regulations have never confined coverage to the narrow control test of the employer-employee relationship.

The CHAIRMAN. How far did you deviate from that, and what were the criteria of deviation?

Mr. DEWIND. The regulations themselves, if I might quote them for a moment, say:

> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

The CHAIRMAN. That is a classic definition.

Mr. DEWIND. That is preceded by the word "generally." Further down the regulation says:

> Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.

The regulation also says:

> In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

The CHAIRMAN. Those are the rules under which you went prior to the Supreme Court decision; is that correct?

Mr. DEWIND. That is right.

Now, in addition to that, Mr. Chairman, there was a twilight zone which these regulations clearly did not cover and some cases in the lower courts, prior to the Supreme Court decisions imposed liability for social security and coverage for employees in situations which were broader than this general language.

The CHAIRMAN. Let me come to the central question toward which I am driving: If from 500,000 to 750,000 people are without coverage, it is because of the nature of your own regulations and your own actions prior to the Supreme Court decision; is that right?

Mr. DEWIND. And the decisions of lower courts.

The CHAIRMAN. And the decisions of lower courts?

Mr. DEWIND. That is correct.

The CHAIRMAN. So they have been deprived of coverage through your own actions prior to the Supreme Court decision, is that right?

Mr. DEWIND. I think you might put it this way, Mr. Chairman: That in the development of a consistent and reasonable administrative position, the Department having failed in some decisions of the lower court, had not tried, prior to getting the final determination by the Supreme Court, to push the matter in such a way that, should the Supreme Court have decided the matter differently than it did a great deal of confusion would have resulted.

The CHAIRMAN. Does it not come to the end point that if 500,000 to 750,000 people have been denied coverage they have been denied it by virture of your own regulations and your own practices prior to th Supreme Court decision, is that correct?

Mr. DEWIND. Mr. Chairman, I think that that is not quite the process that has been followed. I think the Department has developed in a consistent and fair fashion toward obtaining a final answer as quickly as possible from the Supreme Court as to what is covered here.

The CHAIRMAN. I am not challenging that at all. I am driving to the end point as to the 500,000 to 750,000 people who have been denied coverage, and I am asking you whether, if they have been unjustly denied coverage prior to the Supreme Court decision, it is not due to your own regulations and your own practices.

Mr. DEWIND. I think it was largely due, Mr. Chairman, to our inability to obtain a final decision by the Supreme Court any sooner.

The CHAIRMAN. But it follows that they did not have coverage prior to the Supreme Court decision; is that correct?

Mr. DEWIND. These 500,000 to 750,000 have not been covered; that is correct.

The CHAIRMAN. And at that time they did not get coverage because your regulations and practices did not bring them under coverage; is that correct? It seems to me that is capable of a very simple answer. I am not talking about how you have striven to get court decisions. I am talking about what you did. Did you bring these 500,000 to 750,000 people under coverage prior to the Supreme Court decision?

Mr. DEWIND. At one time most of these people were under coverage by rulings of the Department.

The CHAIRMAN. Then what happened?

Mr. DEWIND. Then when many of the lower courts failed to sustain the Department in that position some of the groups who have litigated were finally excluded. The Department tried to follow a consistent position.

The CHAIRMAN. So by your own rulings these 500,000 to 750,000 people were not covered prior to the Supreme Court decision; is that correct?

Mr. DEWIND. That is correct. Until we could get a Supreme Court decision.

The CHAIRMAN. All right.

Senator LUCAS. May I ask a question, Mr. Chairman?

The CHAIRMAN. Surely.

Senator LUCAS. What you are doing, as I understand it, is attempting to follow the law as laid down by the Congress of the United States with respect to the coverage of these people. Whether you went

too fast or too slow depended more or less upon what the lower courts gave you as a guide in the way of an opinion on these problems?

Mr. DEWIND. That is certainly correct.

Senator LUCAS. And you did not lay down any new regulations covering these 500,000 to 750,000 people, until the decision of the Supreme Court last year; that is correct, is it not?

Mr. DEWIND. That is correct.

Senator LUCAS. In other words, if you had started in from the beginning, insisting that these 500,000 to 750,000 be covered, and the Court had reversed your position, you would have had an administrative difficulty that would have been tremendous?

Mr. DEWIND. That would have been a problem and the administrative confusion that would have resulted from having the position reversed would have been quite serious.

Senator LUCAS. And those who are now criticizing you more or less for following that course, had you done that and the Supreme Court had not handed down the opinion that they did, you probably would have been criticized for using too much initiative in the social-security field?

Mr. DEWIND. I think that would have been very probable, Senator.

The CHAIRMAN. Does this follow also: That the Congress of course has the right to review the Supreme Court's decisions in the legislative as distinguished from the constitutional field, and that it is at liberty to accept the decision or not to accept it as it pleases.

Mr. DEWIND. There is of course no doubt, Mr. Chairman, that Congress has the right to change the law.

The CHAIRMAN. And you are aware of course that the House has made rather extensive studies of the whole field of social security and that on this side we have a council especially set up to advice us in the same field.

Mr. DEWIND. Yes; I am aware of that, Mr. Chairman.

The CHAIRMAN. And that coverage is a part of the studies that have been made on both sides?

Mr. DEWIND. That is right.

The CHAIRMAN. It would be rather confusing, would it not, if these regulations became effective and then after becoming effective, with all of the changes and uncertainties that would result under the best administration, to have the Congress take a different viewpoint and upset what might be the new regulations?

Mr. DEWIND. No; Mr. Chairman, I do not think that it would be productive of confusion unless it were determined that the people now covered by existing law should be excluded from coverage.

The CHAIRMAN. Let us assume that that might be the result. Let us assume that the Congress did not agree. Without deciding here what the Congress is going to do, let us assume that the Congress will decide not to accept the theory of the Supreme Court, and decided not to accept your present theory, would that not make for great confusion?

Mr. DEWIND. Mr. Chairman, may I say this: That should the Congress decide that the existing law should be changed, one result of that would be that these employees now covered, even should the Congress decide subsequently to extend self-employment coverage to these people, would not be covered, so far as I can see, in any possible way, for unemployment-insurance purposes.

Now, it might be possible to bring these people back in by extending coverage to the self-employed for old-age benefits. I know of no plan that has been suggested that would restore them to the rights of unemployment insurance.

The CHAIRMAN. Would not what you are proposing to do raise enormous problems in the States as to unemployment-compensation insurance?

Mr. DEWIND. I do not believe so.

The CHAIRMAN. What are the tests in the States to determine an employee under unemployment insurance?

Mr. DEWIND. Most of the States, Mr. Chairman, have already abandoned the narrow common-law tests. Most of the rest have indicated an intention to follow Federal determinations.

The CHAIRMAN. Will you give us a break-down of that?

Mr. DEWIND. I will be glad to put that in the record.

The CHAIRMAN. As to the criteria followed in the States as to what is an employee.

Mr. DEWIND. I will be glad to prepare that and submit it for the record.

The CHAIRMAN. So any deviation, to the extent that there is deviation between your present theories and the theories of the States, it would require new legislation in the States, would it not?

Mr. DEWIND. Mr. Chairman, I believe, as I say, that many of the States have already departed.

The CHAIRMAN. To the extent that there is deviation would it not require new legislation in the States?

Mr. DEWIND. Not necessarily, Mr. Chairman.

The CHAIRMAN. Would it not require new regulation?

Mr. DEWIND. Not necessarily, Mr. Chairman.

The CHAIRMAN. Would it not require new practices by employers and employees?

Mr. DEWIND. I believe on the contrary that our change here would bring the law more in line with the States. There would be less discrepancy than there now is.

The CHAIRMAN. We want to get at it factually. Will you give us the facts so we can get at it factually?

Mr. DEWIND. Yes, Mr. Chairman.

The CHAIRMAN. You will agree that to the extent that we deviate from what is done in the States that to that extent there has to be new law, new regulations, new practices, and new concepts?

Mr. DEWIND. Yes; if the States should conform to the Federal law.

The CHAIRMAN. If they will not conform you are in a very difficult and confused situation, are you not?

Mr. DEWIND. We have no such conformity now, Mr. Chairman.

The CHAIRMAN. Would there not be a tendency to try to bring the whole thing into conformity all the way along the line?

Mr. DEWIND. I think that would be desirable.

The CHAIRMAN. Let us say it is desirable. Would that not be the tendency?

Mr. DEWIND. Yes, perhaps it would.

The CHAIRMAN. And it produces confusion while you are securing conformity, I suggest?

Mr. DEWIND. I believe, Mr. Chairman, our regulations will produce a greater measure of conformity than exists today.

Senator LUCAS. Let me question you along that line: how are you operating with the States at the present time?

Mr. DEWIND. At the present time the implemental State acts in many situations are broader than the administrative practices that have obtained under the Federal law.

Senator LUCAS. So you are dealing with the States at the present time under the social-security laws that the Congress has laid down?

Mr. DEWIND. That is right.

Senator LUCAS. And regardless of what the Congress does you will continue to deal with the States one way or the other. There may be some confusion here and there but nevertheless, ultimately the thing will be straightened out if new people are covered under any social-security program.

Mr. DEWIND. You are, of course, quite right and I believe that the present discrepancies between the States will be narrowed by the promulgation of these regulations and under these decisions.

Senator LUCAS. I take it you will agree with me that the Treasury Department cannot anticipate what the Congress of the United States is going to do with any piece of legislation that is before it and so long as you are following the Supreme Court decision you have got to lay down rules and regulations to comply with that decision or what you believe to comply with it and if the Congress upsets the Supreme Court decision then they will upset your rules and regulations at that time.

Mr. DEWIND. That is correct.

Senator LUCAS. You cannot stand by and wait for an adverse opinion by the Congress of the United States, because nobody knows what the Congress might do or what the Congress might do on a veto of the President of the United States upon legislation of this kind, so in the meantime if you are going to be an efficient servant in the Treasury Department you must continue to move in the direction of laying down the proper rules and regulations to carry out the intent of the Supreme Court.

Mr. DEWIND. I believe that that is quite correct, Senator. I might also point out, of course, that so far as benefits are concerned, under these Supreme Court decisions, there is nothing that the Treasury Department or any other department can do to prevent the benefits accruing while the law remains as it is. All that is happening is that the tax has not been collected to provide those benefits.

The CHAIRMAN. Are you saying that the theory adopted, whether by law or by administrative decisions or by Supreme Court decision, would not influence the criteria in the States as to who is an unemployed or an employed employee?

Mr. DEWIND. As to those States which indicated an intention to follow Federal determinations it, of course, would. It depends on the wording of the State laws and also on their administrative practices. Under the interpretation of that law they are certainly not bound by our administrative interpretation.

The CHAIRMAN. The wordings are different in different States?

Mr. DEWIND. That is right.

The CHAIRMAN. The administrative practices are different in different States.

Mr. DEWIND. There is some discrepancy, yes.

The CHAIRMAN. And if you brought an entirely new concept of the employer-employee relationship into the States, necessarily there would be considerable confusion in trying to reach conformity, would there not?

Mr. DEWIND. Mr. Chairman, I am afraid I have not made myself clear. What I am trying to say is that the present State practices in general come very much closer to the proposed regulations than they do to the previous practice and that our regulation would increase conformity.

The CHAIRMAN. I think you have made that quite clear, but to the extent that there are deviations there would have to be confusion during the period of conformity, would there not?

Mr. DEWIND. Yes. I think a great deal less confusion than at present but there would be that discrepancy.

The CHAIRMAN. Proceed, Mr. DeWind.

Mr. DEWIND. This resolution would also permit hundreds of employers, many of them very large, who either now are or should be paying their proper share of social-security taxes, to avoid such taxes in the future.

The CHAIRMAN. That is on the theory that they should be paying them now, is that correct?

Mr. DEWIND. Under the Supreme Court decisions, that is a fact.

The CHAIRMAN. Now, let us get to the Supreme Court decision. Did the Supreme Court decision lay down an automatic criterion whereby you could include or exclude persons from coverage?

Mr. DEWIND. No, Mr. Chairman. The Supreme Court laid down principles and stated some of the criteria that govern determinations.

The CHAIRMAN. But it did not set up an automatic criterion under which you, acting automatically, exclude or include coverage, is that correct?

Mr. DEWIND. No. As a matter of fact, the Supreme Court said that would be impossible.

The CHAIRMAN. Does your proposed regulation set up such criteria?

Mr. DEWIND. No. They set up the same criteria the Supreme Court mentioned. We believe the regulations are a step toward more definite administrative practice than has obtained in the past.

The CHAIRMAN. Then your administrative regulations are not complete?

Mr. DEWIND. They may not be.

The CHAIRMAN. So what you are suggesting is that the twilight zone be covered by incomplete Supreme Court criteria and incomplete Treasury regulations?

Mr. DEWIND. Mr. Chairman, to the extent that we can narrow the area of uncertainty, and this would substantially narrow it, a great improvement would result.

The CHAIRMAN. You would have as a result to manufacture the criteria for each case, would you not?

Mr. DEWIND. No, Mr. Chairman.

The CHAIRMAN. I suggest you would, because you do not have complete criteria in your regulations.

Mr. DEWIND. No, but we have the general principles.

The CHAIRMAN. You have the general principles but you must apply them, and do you have all the general principles in your regulations?

I remember some language under which you could devise any principle you wanted to.

Mr. DEWIND. I think necessarily we would have to operate within the broad framework of the principles. These are that you look to the realities of the situation rather than the narrow legal forms.

The CHAIRMAN. Let me recapitulate. The Supreme Court does not supply a complete set of determining criteria.

Senator LUCAS. I do not know of any Supreme Court decision which ever did.

Mr. DEWIND. Let me read what the Supreme Court said:

> Probably it is quite impossible to extract from the statute a rule-of-thumb to define the limitation of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.

The CHAIRMAN. That is right. I remind you that is precisely what I suggested to you a while ago. You do not have a complete automatic criterion which will determine coverage or noncoverage in the Supreme Court decision?

Mr. DEWIND. We never have had.

The CHAIRMAN. All right. You do not have it, do you?

Mr. DEWIND. That is correct.

The CHAIRMAN. And you do not have it in your regulations?

Mr. DEWIND. I think we have more than we have had.

The CHAIRMAN. Let us say you have more than you have had, but you do not have it in your regulations.

Mr. DEWIND. There is no doubt of that.

The CHAIRMAN. So in the end, where you have difficult twilight cases they will be resolved by administrative decision under the criterion which you pull out of the regulations where you have established criteria, under criteria which you pull out of the Supreme Court decision where criteria have there been established, and under your general power, let us say, by divine afflatus, is that correct?

Mr. DEWIND. I would not quite agree that it is a divine question. I think it is an everyday administrative task that is undertaken by administrative agencies.

The CHAIRMAN. I want to find out how much certainty we are getting out of these regulations. We are proceeding to do something to bring people in and exclude people. I am trying to find out whether it is going to be by statutory criteria or whether it is going to be by administrative criteria. What are the open fields for your judgment? In other words, as to a man's future security, there will be a large field here where it will come down to your administrative judgment as to whether he is or is not covered; is that correct?

Mr. DEWIND. Yes, Mr. Chairman; but a much smaller field than we have ever had before.

The CHAIRMAN. A much smaller one?

Mr. DEWIND. That is correct.

The CHAIRMAN. But a man left out who thought that he should be in would not be comforted by what you have just said.

Mr. DEWIND. Mr. Chairman, since the decision in the Supreme Court cases, the lower courts have already indicated that they are dealing with this problem and the litigated cases that have been decided

are moving toward wider coverage under the Supreme Court principles and much more definite rules than we have had in the past. There have been several decisions of that type.

The CHAIRMAN. In the past you have had the common-law principle. That has been deduced from thousands of cases; and while there are some twilight zones there yet, you did have a rule to work with and you worked with it, did you not? Is that not correct?

Mr. DEWIND. We worked with it. There have been approximately 250 employment-tax cases litigated under the old regulations and 50 are now pending in the courts.

The CHAIRMAN. Will you please point to anything in the statutes governing the subject, or in the debates or in the reports of committees, that warrant the philosophical basis of the proposed regulation?

Mr. DEWIND. Mr. Chairman, the Supreme Court had the entire legislative history presented to it and made these decisions in the light of that history, with a specific reference to the fact that they had considered the legislative history in reaching their decision.

The CHAIRMAN. Will you enlighten us by putting your finger on the words in the statute, or the words in the reports or the words in the debates that sustain your present theory?

Mr. DEWIND. Mr. Chairman, our present theory is based entirely upon the Supreme Court decisions. We have no choice, Mr. Chairman.

The CHAIRMAN. Let us assume for the moment that you have no choice, without admitting it. Prior to the Supreme Court decision, you were operating under the statute and under the interpretations of the statute as derived from debate and from committee reports.

Mr. DEWIND. To the extent that there was anything helpful in the legislative history we followed it, but there is very little in the legislative history and there is nothing in the legislation itself to define the term "employee."

The CHAIRMAN. Prior to that time it rested on the common law.

Mr. DEWIND. It said "employee" and we had to ascribe some meaning to that for administrative purposes.

The CHAIRMAN. You ascribed, generally speaking, the common-law understanding of the term?

Mr. DEWIND. No, Mr. Chairman; we never did apply the technical common-law rules without deviation.

The CHAIRMAN. What deviations did you make?

Mr. DEWIND. The regulations themselves specified certain factors which were to be considered, and, as I say, some of the lower court decisions covered cases where there was a departure from the narrow question solely of control, which is the primary test of the common-law rule. The common-law rule itself has no definite boundaries. It varies from State to State and from jurisdiction to jurisdiction.

The CHAIRMAN. I suggested that a while ago, that the common-law conception is not static, but that is where you had to look to govern yourself. I do not assume that you are trying to say that you went outside of that to govern yourself prior to the Supreme Court decision. Am I correct in that?

Mr. DEWIND. I think generally correct.

The CHAIRMAN. I mean you would not take unto yourself the right to set up a whole system of law. You did not take unto yourself the right to set up a new system of law prior to the Supreme Court decision?

Mr. DEWIND. No. Nor since the Supreme Court decision, Mr. Chairman.

The CHAIRMAN. The only criterion you had to follow, then, was the common-law theory as it may have evolved during the period that you were administering the bill; is that right?

Mr. DEWIND. Yes. We tried to make a consistent uniform rule, based primarily upon the common-law control test.

The CHAIRMAN. Proceed, please.

Senator LUCAS. May I ask a question right there?

The CHAIRMAN. Certainly.

Senator LUCAS. On the question of the issuance of regulations, you are doing no different than a hundred other agencies of Government in the executive branch of Congress where legislation is passed giving the power to the executive department to lay down rules and regulations and if anyone of these agencies laid down a rule or regulation that was not in keeping with the intent or the purpose of the law, they go to court with it; is that not true?

Mr. DEWIND. That is true.

Senator LUCAS. And you are following the same precedent in the Treasury Department as all other agencies are following, and what you have been following under laws that have been handed you by the Congress or by the Supreme Court?

Mr. DEWIND. Yes. I think there is nothing unusual about the process that is now being followed.

Senator LUCAS. I did not think so either.

The CHAIRMAN. So you can go to the courts and you can also come to Congress, can you not?

Mr. DEWIND. We have the law to administer as it now exists. Of course, it is the prerogative of the Congress to change that law if it sees fit.

The CHAIRMAN. Exactly.

Senator LUCAS. If Congress wants to lay down the rules and standards and criteria for you to follow, they can do that?

Mr. DEWIND. Correct.

Senator LUCAS. And, if they want you to lay down the rules and regulations to follow, they can do that?

Mr. DEWIND. Yes; and, so far as the Treasury Department policy recommendations are concerned, they have been in the direction of broadened coverage. That, as I say, is the recommendation of the Treasury Department.

Senator LUCAS. All the Treasury Department is trying to do, as I see it here, is to follow the law. You are not trying to do otherwise than do your duty as you see it under the law; is that not correct?

Mr. DEWIND. That is entirely correct.

Senator LUCAS. And, if the Congress does not like it, they can change it and charge you to do something else?

Mr. DEWIND. Of course.

The CHAIRMAN. I suggest that the purpose of this proceeding is to determine whether the Congress in the exercise of its rights should hold this matter in status quo until it can reach its policy, and it has that right, has it not?

Mr. DEWIND. It certainly has the right to change the present law.

In general, the proposed resolution would prescribe that the common-law rules shall govern all determinations as to who are employees under the social-security laws. Under the common-law rules governing the liability of an employer for the acts of his employee, the legal right to control the performance of services appears to be the primary test in determining the existence of the employer-employee relationship, and, in the vast majority of cases, that test produces a logical and uniform result.

In the twilight zone between employee and independent contractor, however, where, due to the nature and location of the services rendered, it is either not possible or unnecessary for any such control to be exercised, the status of the individual worker is largely dependent upon the form of his employment contract, the method of his remuneration, and the court decisions of the particular jurisdiction in which the case arises. It is this twilight zone of employment that we are concerned with here.

Neither the Social Security Act nor the related taxing provisions of the Internal Revenue Code contain a definition of the term "employee" other than to provide that it shall include officers of a corporation. Accordingly, since 1936, the Treasury Department and the Social Security Administration have been confronted with the task of ascribing meaning to the term in order to administer the social-security program.

The CHAIRMAN. May I interrupt at that point?

Do you remember why they specifically included officers of a corporation?

Mr. DEWIND. I think because there might be some doubt whether in all cases an officer was an employee.

The CHAIRMAN. So the tendency of that, from a construction standpoint, was to double-rivet the point that a common-law relationship was to prevail.

Mr. DEWIND. I do not believe it had that significance, Mr. Chairman.

The CHAIRMAN. I suggest it did because the inclusion or exclusion of officers of a corporation had great significance as to the definition you were operating under.

Mr. DEWIND. The specific inclusion of officers I do not believe contributes to the determination of the use of the term "employee" and how it was used in the law.

The CHAIRMAN. Officers of a corporation under the common law were frequently considered as not being employees; is that not correct?

Mr. DEWIND. I think that is correct.

The CHAIRMAN. So that, when you put them in, you are emphasizing the fact that you want the common-law interpretation plus such exceptions as the Congress shall specifically carve out; is that not correct?

Mr. DEWIND. I do not believe that it had that significance. I think it was more a clarifying amendment to be sure that officers were covered.

The CHAIRMAN. Exactly.

Mr. DEWIND. And not intended to indicate an intention to narrow the coverage elsewhere.

The CHAIRMAN. If they had been considered as covered, there would be no point in putting them in?

Mr. DEWIND. That is right.

The CHAIRMAN. They were not covered, and therefore an exception was carved out. Proceed, please.

Mr. DEWIND. It was apparent at the outset that it would not be possible by regulations to draw absolutely definite lines of demarcation between employee and independent contractor. It was thought that the best that could be done was to set out the factors which would produce logical, equitable, and consistent results in most cases. With this in view, the two Government agencies adopted a refined version of the court-made tort law governing the employment relationship and provided in their respective regulations as follows:

> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.

It is clear, I believe, that these regulations did not serve to draw a clear or definite line between employee and independent contractor. They did clarify the majority of situations. There remained a twilight zone of employment under the regulations. It is also important to note that the regulations specified certain factors which were to be considered in addition to the factor of control, such as (1) the right to discharge, and (2) the furnishing of tools and a place to work.

The CHAIRMAN. Is it not correct that, even after you get through with your new regulations, if they become effective, and even if you were to follow meticulously the Supreme Court decision, that you still have a twilight zone, for the simple reason that you have not established complete criteria?

Mr. DEWIND. Yes. We hope a much narrower zone.

The CHAIRMAN. When you get into that twilight zone, after your regulations are effective, giving any force that you wish to the Supreme Court decision, there will be many areas where an employer and an employee will be unable to sit down and look at the available criteria and determine whether anyone is or is not covered; is that correct?

Mr. DEWIND. I do not think there will be many areas, Mr. Chairman. I think there will be a limited few. I think the area will be very substantially narrowed.

The CHAIRMAN. Since you have not given weighting to those criteria that you have, it follows that those criteria are subject to any weighting that you wish to give them in any particular case; is that not true?

Mr. DEWIND. I think they are to be considered in the light of the whole picture.

The CHAIRMAN. I am simply suggesting to you that, after you get through, the matter, largely, in this twilight zone will rest upon your own administrative discretion as to whether a man is or is not covered?

Mr. DEWIND. I think it is a matter for the courts to determine whether or not the administrative position is correct, but we can say right from the beginning that hundreds of thousands of employees will be definitely covered, many of whose status has previously been in doubt. I think that is an advancement.

The CHAIRMAN. That may or may not be an advancement, depending upon whether they are or are not in fact employees.

Mr. DEWIND. By advancement I meant to say in the administrative sense under the existing law under the Supreme Court decisions.

The CHAIRMAN. If I may interject a personal note, I am in favor of substantially enlarged coverage, but I would like to see the coverage extended to employees. I would like to have something other than these shifting criteria for the determination of who is an employee.

Senator LUCAS. May I ask whether or not you have some twilight-zone cases at the present time?

Mr. DEWIND. Yes, indeed. As I say, 250 cases have already been litigated and 50 are now pending before the courts.

Senator LUCAS. How long has the Social Security Act been in existence?

Mr. DEWIND. Since 1935.

Senator LUCAS. And you are still litigating it?

Mr. DEWIND. Yes, indeed.

Senator LUCAS. And you will be litigating for some time?

Mr. DEWIND. There is no doubt but that the so-called common-law test has produced very little certainty and a good deal of confusion.

The CHAIRMAN. Does that indicate that Congress itself should perhaps draw more clear criteria?

Mr. DEWIND. Mr. Chairman, if the Congress can establish more precise and clear criteria, that would be desirable. I think it is a very difficult task to eliminate this twilight zone by any language that you might choose.

The CHAIRMAN. I would agree with you on that, but I think what you just said suggests that the Congress try its hand to see if we cannot establish a more or less automatic criterion to exclude from your own discretion the rather important subject of whether a man is or is not covered.

Mr. DEWIND. Pending that determination, Mr. Chairman, I think that the existing law will narrow the area of confusion and doubt much more than the pending resolution would do.

The CHAIRMAN. It may narrow the area of confusion, but it may extend the area of injustice.

Proceed, please.

Senator LUCAS. The Treasury Department would be very happy if the Congress would do that, would it not? It would save you a lot of headaches, would it not?

Mr. DEWIND. Administratively, of course, the clearer the rules are, the easier administrative job it is. As I said, from the point of view of policy recommendation, the department has consistently favored broadened and extended coverage of social security.

Senator LUCAS. May I return to a question that the chairman propounded a moment ago to you about the 750,000, which is only an estimate? What would be the mechanics for getting the precise

number of people that are covered by the Supreme Court decision? What would it take to do that—to get the precise number?

Mr. DEWIND. I think it would be almost impossible to obtain exactly the number of employees who will be found to be covered under the Supreme Court decision. We know in general the important areas where the Supreme Court decisions will have an effect. Primarily, I believe, those areas involve such groups as life-insurance soliciting agents, outside salesmen, and home workers. They constitute a large group, and they would undoubtedly, many of them, be covered as a result of these decisions.

Senator LUCAS. Do you think it would be impossible to get the precise number?

Mr. DEWIND. We have an estimate that there are outside salesmen in the manufacturing and wholesale trade numbering 440,000.

Senator LUCAS. I am not talking about an estimate. The chairman raised that question with you a moment ago.

Mr. DEWIND. I am sorry. It would be quite impossible, I think, to get the precise figure.

Senator LUCAS. That is what I am wondering about—whether or not it would be impossible to get the precise figure; and, if you had to get the precise figure, how many employees it would take to go out through the country and get the exact figure.

Mr. DEWIND. I think it would be an impossible task, and I have no idea what it would take to even attempt it.

The CHAIRMAN. In fact, in 1939, did not the Treasury ask the Congress to exclude salesmen from the common-law definition of an employee?

Mr. DEWIND. I beg your pardon?

The CHAIRMAN. Back in 1939 did not the Treasury ask the Congress to amend the law so that salesmen would be excluded from the common-law test?

Mr. DEWIND. Would be included under coverage?

The CHAIRMAN. Yes.

Mr. DEWIND. There was legislation that was considered in 1939 which would have specifically included outside salesmen.

The CHAIRMAN. And that was refused by Congress?

Mr. DEWIND. As I recall, that was approved by the House and was rejected in the Senate.

The CHAIRMAN. It was refused by Congress?

Mr. DEWIND. That is correct.

The CHAIRMAN. That has a certain significance to you, does it not?

Mr. DEWIND. I think the 1939 legislation would have been broader and would have covered a different area than is now involved here. It would have included outside salesmen regardless of whether or not they were independent contractors.

The CHAIRMAN. A part of this area with which we are dealing here was brought before the Congress in 1939; and Congress, to the extent that the area did duplicate the present area, refused the recommendation of the Treasury; is that correct?

Mr. DEWIND. That is right.

The CHAIRMAN. Proceed, please.

Mr. DEWIND. I should say that that legislative history was presented to the Supreme Court in its consideration of this case and

was specifically noted by the Court that it had considered the legislative history.

The CHAIRMAN. That is included in our own legislative history also.

Mr. DEWIND. In the administration of these regulations, the Treasury Department and the Bureau of Internal Revenue strove to produce uniform and equitable determinations of coverage. Experience revealed the inherent possibilities of tax avoidance through "dressing up" employees as independent contractors. Many individuals who had been employees even under the strictest common-law rules had their status placed in doubt by mere changes in the form of their employment contracts or the form of their compensation. Full-time salesmen who had previously operated on a salary or commissioned basis were transmuted frequently into so-called independent contractors by means of purchase and sales arrangements with credit and minimum guaranties from their employers.

The CHAIRMAN. The test there would be whether it was a bona fide change or whether it was simply a cover up change. Would that not be the test? It is possible to take a legitimate salesman today, under full-time employment of a concern, and by a contract which is sincerely entered into, change him into an independent contractor; is it not?

Mr. DEWIND. I think that under the test laid down by the Supreme Court you are not concerned with the technical form of his relationship.

The CHAIRMAN. I excluded the technical form. I said that you had a right to look at the transaction and if in substance there was a real change in relationship, that would be determining, would it not?

Mr. DEWIND. That, of course, is correct—if in fact the salesman becomes an independent contractor.

The CHAIRMAN. So it does not follow that every change in form was devoid of a change in substance, does it?

Mr. DEWIND. No; it does not. Many, we believe, were. Many truck drivers and branch managers were converted into so-called lessees with the financial aid of their employers. Also, many who had previously worked on an hourly basis were changed to a piece-rate basis. Whenever it appeared that the form of these arrangements was merely an attempt to conceal the employer-employee relationship, the Commissioner assessed the social-security taxes which he considered lawfully due.

The CHAIRMAN. Would you determine that from the practice or from the form?

Mr. DEWIND. In general, an attempt to appraise the reality of the situation; the real relationship of the person to his employer.

The CHAIRMAN. You would have some fact-finding in connection with those determinations?

Mr. DEWIND. Necessarily.

The CHAIRMAN. All right.

Mr. DEWIND. The Commissioner's assessments were sustained by many of the lower courts which, in accordance with the Department's regulations, elevated substance above form and recognized that factors, such as the right to discharge and the furnishing of tools, were to be considered, in addition to the factor of control, in determining whether the individuals involved were employees under the social-security

program. Many other district and circuit courts, however, refused to consider the realities of the situation and ruled against the Commissioner's assessments because the employment arrangements involved did not provide the employer with the legal authority to control the manner in which the services were to be performed.

In a number of these cases, the Supreme Court was petitioned for a writ of certiorari in hopes that order and uniformity might be restored to th eadministration of the social-security program.

It was not until June 1947, however, that the Supreme Court finally laid down the governing principles. In three cases decided during that month, the Supreme Court made it clear that, while the right to control is an important factor to be considered in determining an individual's status under the social-security program, it was not the only factor to be considered. The Court stated in the Silk and Greyvan cases, 67 Supreme Court 1463:

> As the Federal social-security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

The CHAIRMAN. May I interrupt you? Did not the National Labor Relations Board import the economic reality test into its definition of relationship between employer and employee?

Mr. DEWIND. I believe it did.

The CHAIRMAN. Did not the Supreme Court sustain that test?

Mr. DEWIND. It did; about 1944.

The CHAIRMAN. Did not the Congress reject it in the Taft-Hartley Act?

Mr. DEWIND. Yes. I am not an expert on what the effect of that amendment was but I believe the amendment had a narrowing effect.

The CHAIRMAN. So that there also you have a rather late congressional decision as to the congressional viewpoint of the economic reality test; is that correct?

Mr. DEWIND. Yes.

The CHAIRMAN. All right. Go ahead.

Mr. DEWIND. At another place in the Silk and Greyvan opinions, the Supreme Court stated:

> Probably it is quite impossible to extract from the statute a rule of thumb to define the limitation of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.

In none of these cases did the Supreme Court hold the Treasury regulations invalid as far as they went. Indeed, it is clear that the Court considered its decisions to be consistent with the existing regulations, thus bearing out what I have already stated; namely, that the regulations did not specifically cover the twilight-zone cases. In its opinions, however, the Supreme Court filled in this gap and set out the needed criteria which should govern determinations in that area.

The CHAIRMAN. That criterion is not complete, is it?

Mr. DEWIND. It is not complete. After the decisions by the Supreme Court, there were two alternative courses of action which the

Treasury Department could have pursued. It might have continued under the existing regulations and issued immediate rulings to each of the employers in the affected areas advising them of their status under the criteria laid down by the Court; or it could have incorporated the new criteria in its regulations by amendment. The second course of action was followed, in recognition of the desirability of developing consistent and generally applicable rules which would be published in accordance with the principles of the Administrative Procedure Act, thus giving an opportunity for public consideration and comment. In pursuance thereof, a committee comprised of representatives of the Federal Security Agency, the Treasury Department, and the Bureau of Internal Revenue was organized to draft the required amendments. These amendments were published in tentative form in the Federal Register on November 27, 1947. Their final promulgation has not yet occurred.

The CHAIRMAN. I should like to say at this point that the Treasury has been very cooperative in holding up those regulations until there could be a congressional determination of the matter that is before us.

Mr. DEWIND. The pending joint resolution was introduced shortly after the tentative publication of the proposed regulations. Its purpose clearly is to remove the legal basis for the regulations and for the Supreme Court decisions I have referred to.

We have made a careful study of the joint resolution, the report of the House Committee on Ways and Means, and the debate on the floor of the House relative thereto, in an effort to reduce to specific terms the particular considerations on which it seems to rest. There appear to be five such considerations. It is alleged that:

(1) The new regulations will convert normally independent businessmen into employees and may subject the persons for whom they are performing services to sundry labor laws and tort liability.

The CHAIRMAN. At this point, let me ask you: What are you going to do with door-to-door salesmen?

Mr. DEWIND. I think the question is whether the door-to-door salesman is in fact an independent contractor, or is he in substance integrated into the operation of the person whose goods he sells.

The CHAIRMAN. Give us a case history now of where you will toss one group of such salesmen on one side and another group of such salesmen on the other side. We are talking now about door-to-door salesmen. And give us the criteria which will govern your decision in each case.

Mr. DEWIND. I can only talk in a general way without specific cases to deal with.

The CHAIRMAN. I presume there is a great wealth of facts in your department. You stated you have studied all of these matters.

Mr. DEWIND. I might read an example of the sort of thing that may be involved in those areas.

The X company, a manufacturer, is engaged in the manufacture and sale of household products. Sale by door-to-door vendors is the usual method of distributing the company's products, either through full- or part-time salesmen. The X company enters into agreements with salesmen giving them the right to purchase the company's products at wholesale on short-term credit for door-to-door resale at prices suggested by the company.

The agreement specifies the territory of the salesman, and provides that the profit from the sale is his sole remuneration for the services. Discounts are allowed for maintaining a specified volume of business.

A cash deposit is required of the salesman to establish credit with the company and to cover samples. The agreement states that the company shall not have any right to exercise control over the performance of the services or methods the salesmen employ in effecting sales, and expressly negates any requirement to make reports or attend sales meetings.

The agreement expressly denies the existence of the employer-employee relationship, and designates the salesmen as independent contractors. The company, however, provides training courses, selling aids, advertising, forms, leads, and other services for the salesmen. Such services are utilized by the salesmen.

Each agreement is terminable by the company on 60 days' notice and provides for a refund to the salesman of his deposit and of the price paid for products unsold and returned. The salesmen's earnings from the relationship are dependent upon the volume of their sales. They have no place of business distinct from their homes.

In that sort of situation it is the Department's view that the Supreme Court decisions embrace him within the coverage of the social-security program.

The CHAIRMAN. Tell us exactly how you reached that decision.

Mr. DEWIND. By examining the factors I have mentioned which indicate the conclusion that as a matter of reality this salesman is integrated into the business of the person whose goods he sells and has no independent buiness or independent operation distinct from the operations of his employer.

The CHAIRMAN. Can the salesmen go out on a rainy day or stay home if he feels like it?

Mr. DEWIND. Apparently.

TheCHAIRMAN. Can he start or stop at any hour of the day?

Mr. DEWIND. Yes.

The CHAIRMAN. Can he go to any house he wants to?

Mr. DEWIND. He can within the limitations that sales results are deemed important by the employer. His rewards and his rights to retain a territory may be governed by what he produces.

The CHAIRMAN. He can cover such houses as he wishes to and stay out of other houses if he wishes to?

Mr. DEWIND. In this example he had an assigned territory and would only operate within that assigned territory.

The CHAIRMAN. But within that assigned territory he can work it or not work it as he pleases, subject, as you say, to some over-all limitation as to the production?

Mr. DEWIND. And subject to the very important right of discharge.

The CHAIRMAN. Aside from the right to discharge him, what are those factors which make the employer-employee relationship?

Mr. DEWIND. I think many of the factors stated by the Supreme Court are relevant here: his permanency, his lack of investment, the lack of real opportunities for profit or loss as a result of investment. The reality of the situation is such that he is not, in fact, an independent businessman.

The CHAIRMAN. Is his obligation to pay for his goods absolute, even though credit was extended?

Mr. DEWIND. I think he had the right to return unsold goods.

The CHAIRMAN. If he did not return them, did he have an obligation to pay?

Mr. DEWIND. Yes. He was extended credit.

The CHAIRMAN. With the extension of credit, the absolute obligation to pay is a significant factor.

Mr. DEWIND. The right to return destroys the reality of that.

The CHAIRMAN. Suppose he sells the goods, sticks the money in his pocket, and does not return the proceeds?

Mr. DEWIND. In essence he is operating in much the same way a commission salesman operates.

The CHAIRMAN. Yes; of course.

Mr. DEWIND. And a commission salesman is obviously covered.

The CHAIRMAN. What are the factors there that give him the status of an employee? I suggest you have not mentioned anything yet.

Mr. DEWIND. I would be glad to discuss the reasoning: Each door-to-door salesman is dependent, as a matter of economic reality, upon the business of the X company, and is not performing the services in a business of his own as an independent contractor.

The CHAIRMAN. Let's stop at that point. Who is not dependent on someone else, as a matter of economic reality? I am dependent on the United States Government for my salary, and that is a matter of significant economic reality to me. Every person in this world who is active in life depends on somebody or something for his existence. This has relation to economic reality; is that not correct?

Mr. DEWIND. I think that what we are dealing with here is the specific direct dependency, and if I could go ahead and spell this out a little more I think you will see what I am driving at.

The CHAIRMAN. All right.

Senator LUCAS. Mr. Chairman, I agree with you, but do you not believe that the degree of control which the employer has over the activities of the employee is the real test?

The CHAIRMAN. I would say that is very significant. I would say that is very significant and that is what I am trying to get at, Senator.

Mr. DEWIND. Those are the very facts we are getting at here.

Senator JOHNSON. Mr. Chairman, you used the word "discharge" a moment ago. I think that is an unfortunate word. It is really not a discharge. It is a discontinuance of the contract.

The CHAIRMAN. That is right.

Senator JOHNSON. That is a far different thing from a discharge.

The CHAIRMAN. I was beguiled into accepting the witness' word.

Senator LUCAS. After all, Mr. Chairman, it seems to me that we could listen to all kinds of hypothetical cases brought before us. Each one would almost have to stand on its bottom in the final analysis.

The CHAIRMAN. I think there is a lot to that, Senator, but I do believe that there is a great field that is in controversy and I think we ought to know just exactly how the Department's mind operates in that kind of case.

The gentleman has given us a hypothetical case and I would like to have him tell us specifically and concretely, what are the factors in that case that make an employee out of that man.

Mr. DEWIND. Mr. Chairman, I hope I have not beguiled you into accepting the word "discharging." I think I might be able to beguile

the employee into accepting the fact that if his contract is terminated he has been discharged.

The CHAIRMAN. I do not think you can apply the word "discharge" to any terminated contract.

Mr. DEWIND. The economic effect to the employee, the reality of the situation to the employee is that he has been fired.

The CHAIRMAN. If I take an option on your house and I do not make good and the contract lapses I am not discharged in any proper sense of the term.

Mr. DEWIND. No, but your relationship in that case does not amount to the relationship here.

The CHAIRMAN. You are assuming your case. Please do not assume your case. Go ahead and tell us now how that man is an employee under the theory of your Department.

Mr. DEWIND. Though these salesmen may be independent contractors at common law, they are nevertheless employees for social-security purposes. Their services as door-to-door vendors are the essence of the distribution system of the company. The right of the company to terminate the relationship on short notice, the integration of the salesmen's activities into those of the company in the sale of its products, and the power of the company through price adjustments and merchandise made available, to control the amount of the salesmen's earnings, render the salesman subject to the type of control contemplated by the regulations.

The agreement between the company and the salesmen contemplates a continuing or permanent relationship. The services of the salesmen are integrated into a business other than their own, as evidenced by the performance of services essential to the conduct of the company's business.

The cash deposit required of the salesman is not such an outlay as to constitute an investment for the carrying on of an independent business. They devote no capital to a going business of their own. Since the cash deposit is refundable and unsold goods are returnable, the salesmen do not have an operation from which they have opportunity for profit or from which they may sustain a loss. Despite the declarations of the parties in the contract, the relationship is in reality that of the employer and employee.

The CHAIRMAN. The ability of a company to sell its product is the essence of the question as to whether it stays in business or not, is that right?

Mr. DEWIND. Yes, indeed.

The CHAIRMAN. So that in itself is no test of anything except the desire of the company to stay in business, is that not correct?

Mr. DEWIND. Yes. The essence of this particular company's distribution processes is that it keeps it within its control. The right of the company to terminate the relationship, the integration of the salesman's activities into those of the company in the sale of its products and the power of the company through price adjustments and merchandise made available to control the amount of the salesman's earnings render the salesman subject to the type of control contemplated by the regulation.

The CHAIRMAN. Well, to control his earnings is much the same as the control of earnings in many other fields of business. The control of his

earnings depends upon the profit per unit, the number of sales, is that right?

Mr. DEWIND. Generally.

The CHAIRMAN. So he controls his earnings depending upon the number of sales he makes, is that correct? The company, of course, sells him the goods at a certain price and I assume there is an attempt to have a retail price.

Mr. DEWIND. I think in substance, Mr. Chairman, in this case, it is impossible to say that these salesmen have the independence of freedom and action and the stake that any independent businessman really has.

The CHAIRMAN. Let's take the freedom of action of independent businessmen. They buy goods for a price, is that right?

Mr. DEWIND. Subject to control by the company.

The CHAIRMAN. All right. If I am an independent merchant I come to you for some goods for my shelves; you tell me the price I have to pay, is that right? That is perfectly obvious, is it not?

Mr. DEWIND. Yes. Of course that is obvious.

The CHAIRMAN. I take those goods and I have to find customers for them, is that right?

Mr. DEWIND. Yes. But your independent businessman, Mr. Chairman, invests in the goods; he has the risk of loss on them, he sells where and as he pleases.

The CHAIRMAN. Yes.

Mr. DEWIND. These people do not.

Senator JOHNSON. It is not quite correct that "he sells where and as he pleases" in many instances. In the automobile business, we have restricted territory; I think there is a real difference there, Senator.

Senator JOHNSON. If I go to an automobile dealer in another town he will tell me very frankly: "I cannot possibly sell to you. If I sell to you I will have to give the profit to the man living in your town." So you have that restricted area with independent businessmen too.

Mr. DEWIND. I think the distinction there, Senator, is the very important capital investment that that man has in his own business. That is an offsetting factor that is very important.

The CHAIRMAN. What about the invested time of a salesman?

Mr. DEWIND. That is typical of any employee too. It is not a distinguishing factor.

The CHAIRMAN. Would you not say that the time of a professional man and the time of a salesman is his capital?

Mr. DEWIND. That is true also of any employee, Mr. Chairman. I do not see that that leads you to any helpful distinction.

The CHAIRMAN. I do not see that you are making an employee out of him either. That is exactly what I am getting at. We are now analyzing the independent businessman. The independent businessman can open or close his doors when he feels like it; is that right?

Mr. DEWIND. Yes.

The CHAIRMAN. He has to pay a price for his goods and he can sell them for a price, and he has got to make a profit, is that right?

Mr. DEWIND. That is right.

The CHAIRMAN. Let us take the fellow who peddles from door to door. True he has not got shelves, he has not got a store full of goods, but he has got a kit bag full of goods, and he has either paid for it or has agreed to pay for it. He too can sell when he wants to or can refuse

to sell when he wants to. If it is raining he can stay home. If he gets tired he can quit. So can an independent businessman. What are the distinctions?

Mr. DEWIND. There are several distinctions here. One is where the purchase is on credit and he has a right to return it. He is taking no risk of loss. The second is that while he may have a right not to sell or to sell any day he chooses he may only do that under the control of the employer who may terminate the relationship if he does not in fact conduct himself as the employer desires.

The CHAIRMAN. As a matter of fact, the independent businessman, if he does not buy low and sell high and keep his doors open and do business, is terminated by the public rather than by the fellow who sells him the goods, in the case you are talking about. He is discharged, if you please, by the public.

Senator LUCAS. You do not really believe that there is not a difference, Mr. Chairman, between the Fuller Brush salesman and the man who runs the corner grocery store?

The CHAIRMAN. I am not so sure that I see a great deal of difference, as far as I know about the contracts that affect the Fuller Brush salesman. I think that every man in this room at sometime in his youth has sold stuff from door to door and I am quite sure there was a great liberty of action there.

Senator LUCAS. I did some of that in the early days of my life, selling door to door, but I did not have very much invested, I will say that. I was depending upon the fellow I was working for to furnish practically everything, with the exception of my ability to sell.

The CHAIRMAN. I suggest the Senator had his ability to sell and had his time.

Senator LUCAS. I did pretty good at it, but let me ask you this: While you were talking about these door-to-door salesmen, do you know anything about the Fuller Brush Co.? Have you ever investigated that company?

Mr. DEWIND. I personally never have.

Senator LUCAS. I just wondered because my wife is a convert to that product and that salesman is at my door every time I go home.

The CHAIRMAN. Let us take the case of a Ford agent, is he not economically dependent on the Ford Co.?

Mr. DEWIND. Not to anything like the same extent that is involved here.

The CHAIRMAN. He gets a quota of goods?

Mr. DEWIND. At the present time.

The CHAIRMAN. He is besieged by the selling standards of the sales organization of the Ford Co., is that right?

Mr. DEWIND. Yes. I think there are many aspects of that relationship which but for the fact that he does have a large independent investment would point to the employer-employee relationship.

The CHAIRMAN. So if a man has a money investment he is not an employee but if he has a time investment he is?

Mr. DEWIND. A very important distinction.

The CHAIRMAN. Why do you draw that distinction?

Mr. DEWIND. Any person who renders personal services that is what he is rendering. That is true whether he is an employee or whether he

is independent, but I think it makes a real difference if he has a large capital investment.

Senator LUCAS. No one would be covered under that theory.

Mr. DEWIND. That is right.

The CHAIRMAN. Suppose he had a small capital investment?

Mr. DEWIND. The question is the significance of the investment.

The CHAIRMAN. In other words, you do not regard time as capital but you regard money as capital?

Mr. DEWIND. The Supreme Court had a case before it. In one case they had an investment in a shovel and the Supreme Court said that did not make any difference. In the other case they had an investment in a large truck and the Court said it made a difference. I think that is a reasonable sort of distinction.

The CHAIRMAN. Go ahead.

Mr. DEWIND. I think that is about all you can say about that example. I think it shows the sort of problem that you have with door-to-door salesmen.

The CHAIRMAN. The distinction you draw there, the real determining factor, is that this man does not have large capital invested.

Mr. DEWIND. No. It is not that. It is all the factors I mentioned, Mr. Chairman. That is an important one.

The CHAIRMAN. You take all of those factors, and, by a process of judgment, you reach a conclusion.

Mr. DEWIND. Yes. I think that is correct. In this case it seems to be a rather easy one to reach.

The CHAIRMAN. The Supreme Court did not draw a distinction between large and small capital, did it?

Mr. DEWIND. Yes, it did. The amount of investment is significant.

The CHAIRMAN. And did it consider the man's time? Did it give any attention to that?

Mr. DEWIND. I cannot see how that could be an important factor one way or the other.

The CHAIRMAN. Is not this country full of people whose sole capital consists of their time?

Mr. DEWIND. Yes, if course. That is true of every employee.

The CHAIRMAN. How is it possible to just waive that out and say if a man has money he is an independent agent and if a man has time he has no capital?

Mr. DEWIND. I think that it is not that you are throwing it out. The important thing is determining whether or not he is an employee. As Senator Lucas has said, with every employee his time is his capital and unless you propose to throw everybody out from social security you cannot look to services as capital investment to say that a person is not an employee.

It is alleged that—

(2) Employers of outside salesmen will be confronted with serious difficulty in determining the amount of wages paid to such salesmen and in computing and withholding the correct amount of employment taxes due.

The CHAIRMAN. What is your reaction to that?

Mr. DEWIND. I will take them up in order or I will take them up as I go.

The CHAIRMAN. Go ahead.

Mr. DEWIND. It is alleged that—

(3) The new regulations will upset many types of relationship now fixed by contract and will precipitate extensive litigation.

It is alleged that—

(4) The new regulations will allow over one-half million employees to acquire 4 years of social-security wage credits without paying any contributions thereafter.

It is alleged that—

(5) The Treasury Department, by its pending regulations, and the Supreme Court, by its decisions last June, ignored the will of Congress in adopting criteria other than the common-law rules for determining coverage under the social-security program.

The CHAIRMAN. Let us get back again to some concrete examples. How will you handle full- and part-time life-insurance agents?

Mr. DEWIND. As far as I know, the typical soliciting life-insurance agent has a relationship which under these tests would constitute him an employee.

The CHAIRMAN. The average soliciting agent?

Mr. DEWIND. The average soliciting agent would be an employee; that is right.

The CHAIRMAN. What are the factors there that make him an employee?

Mr. DEWIND. Generally speaking it is the same type of factor that I referred to before: the dependence upon the person for whom he sells insurance, the lack of an independent investment, the use of facilities of the employer, the integration into the sales organization, the same sort of lack of independence which was true in the door-to-door salesman case. I think, perhaps, as I go on that will become clear.

The CHAIRMAN. Can a life-insurance solicitor work when he feels like it and not work when he does not feel like it?

Mr. DEWIND. Many of the life-insurance salesmen have always been covered under social security.

The CHAIRMAN. Let us take the type you are referring to, the general type life-insurance agent with whom we are all familiar. He can solicit those he wants to solicit.

Mr. DEWIND. That is right, within an area.

The CHAIRMAN. He can stay home if he wants to.

Mr. DEWIND. That is right.

The CHAIRMAN. If he produces he gets a commission, if he does not, he does not get one.

Mr. DEWIND. And if he does not produce satisfactorily his relationship can be terminated.

The CHAIRMAN. It can be terminated?

Mr. DEWIND. Yes.

The CHAIRMAN. What makes him an employee? Of course, he has got to have an insurance company to work for. Every independent merchant must have supplies of goods, he must have sources for getting his goods.

Mr. DEWIND. I think the important thing always is the reality of the control exercised by the employer, and I would be glad to give you an example of the sort of relationship we have discovered in the life-insurance field.

The CHAIRMAN. That is what I want.

Mr. DEWIND. Life-insurance companies issue life insurance and annuity policies based on applications largely obtained by soliciting agents. Some of these agents are known as full-time agents and render service under arrangements which involve the use of contracts described in a variety of ways such as soliciting agent's contract, special agent's contract, and the life. Other contract forms do not bear any descriptive terms in the title. While some of the contracts are made directly with the insurance companies others are made with or through general agents or branch managers of the insurance companies, subject to the company's approval or endorsement.

By the terms of the agreements applications obtained by the full-time agents are subject to the company's approval. Sometimes the full-time agent is required to produce a volume of business satisfactory to the company or to the general agent or the branch manager as the case may be, though he is not required to devote a specified number of hours of the day or the week to the work.

The full-time agent is required by State law to be licensed to perform services as an agent for the specified company. The entire or principal business activity of the full-time agent is devoted to the solicitation and servicing of policies for the company. In all cases, the relationship may be terminated on short notice by the contracting parties, but both parties contemplate a continuing relationship. The full-time agent ordinarily uses the office space provided by the company or its general agent. Stenographic assistance, telephone facilities and forms, rate books, and advertising facilities are usually made available to him without cost. He has no offices of his own. The expenses of soliciting applications are borne by the full-time agent and include transportation and entertainment expenses as well as some advertising costs and subscription fees to professional journals and services.

The full-time agent in his day-to-day operations must conform to the procedures established by the company for the writing of applications and the servicing of policies although his contract may not specifically require such conformity. The companies make available to the agent such sales help through personal contact and literature as experience had demonstrated to the helpful in the solicitation of applications. The agents may and do exercise their own initiative and independence in their selection of prospects and the means and methods of solicitation. The compensation of the full-time agent is in the form of commissions on policies sold by him, payable in part as a percentage of the first premium payment and in part by renewal commissions or percentages on premium payments in subsequent years. Under that general relationship, as I say, it is our view that under the Supreme Court decisions those full-time agents are employees.

The CHAIRMAN. Now, take the case of the life-insurance agent let us say in a small town. He is in the real-estate business also, and probably has three or four other strings to his bow. Once in a while he goes out and writes a life-insurance policy. Is he an employee?

Mr. DEWIND. Probably not. At least he is not in this category of full-time agent.

The CHAIRMAN. You do not include him?

Mr. DEWIND. I think not. Conceivably he might be.

The CHAIRMAN. You draw the line then as to whether a man is a full-time agent.

Mr. DEWIND. I suppose there are some situations where he might be a part-time employee but there are many situations where a part-time life-insurance salesman, I think, is clearly not an employee.

The CHAIRMAN. And there the determining factor would be whether or not he is full time or part time.

Mr. DEWIND. And the activities in another business.

The CHAIRMAN. Now, let us suppose that the door-to-door salesman has a regular employment and that he uses his spare time for door-to-door salesmanship as many do. What effect does that have on him?

Mr. DEWIND. If the part time employee is in fact a part time employee, he will be covered, just as much as though he were a full time employee, and if the relationship is otherwise the same except that he only devotes part of his time, the fact that it is merely part time would not unclassify him as an employee.

The CHAIRMAN. That is the distinction you just made as to the part-time life-insurance salesman.

Mr. DEWIND. I think not. It is a question of fundamental relationship. He can, of course, be a part-time employee. For example, as to many of the part-time life-insurance agents, the company has no concern with what they produce. If they never sell anything it is all right with the company.

The CHAIRMAN. What about a contractor in the construction field?

Mr. DEWIND. I think generally speaking the bona fide subcontractor is an independent contractor.

The CHAIRMAN. Does he not have a very direct economic relationship to the main contractor?

Mr. DEWIND. Yes; but not in the nature of the dependency which may result in the employment situation.

The CHAIRMAN. Is it not complete dependency? If the main contractor did not have a contract he could not have a subcontract.

Mr. DEWIND. If he has a true independent subcontract on which he takes the chances of profit or loss, he may be of course an independent contractor, but if his relationship is set up in that form but he is guaranteed against loss and he is otherwise made directly dependent upon the prime contractor, he may lose that category.

The CHAIRMAN. But there there is an indispensable economic relationship between the two, is there not?

Mr. DEWIND. Yes.

The CHAIRMAN. There can be no subcontract unless there is a main contract?

Mr. DEWIND. Yes.

The CHAIRMAN. And the subcontract is subservient to the main contract?

Mr. DEWIND. Yes. That is not the relationship we are talking about here.

The CHAIRMAN. You would not include him?

Mr. DEWIND. Generally not, if he is an independent contractor with the risk of loss he is out.

The CHAIRMAN. How about the lessee in a mine?

Mr. DEWIND. Generally speaking, if he has no investment in the business, no material investment, and I am not sure that is the sort of case you are talking about, if that is the case he is probably an employee.

The CHAIRMAN. He has a contract with the mine owner whereby he gets a certain area of ground to work. The mine owner supplies the air for the ventilation; he supplies, we will say, the tracks for the dump cars. He supplies a variety of services which a man must have available to him if he is going to do any mining.

Mr. DEWIND. Offhand it sounds to me as though he is an employee.

The CHAIRMAN. He is an employee?

Mr. DEWIND. Yes; that is right.

The CHAIRMAN. Take the case of sawmill operators and timber cutters and skidders and haulers, how would you classify them?

Mr. DEWIND. In those situations I do not believe that our proposed regulations will have an important effect. That is not to say that there may not be situations where such persons will be deemed employees.

The CHAIRMAN. You cannot be a timber cutter unless somebody has some timber he wants cut, can you?

Mr. DEWIND. That is right.

The CHAIRMAN. So there is a very direct economic relationship between the two, is there not?

Mr. DEWIND. There again, I think it is a question of the capital investment in his own equipment. If he has his own sawmill that makes him an independent contractor.

The CHAIRMAN. Suppose he has his own little saw?

Mr. DEWIND. There again we are back to the Supreme Court distinction between a shovel and a truck.

The CHAIRMAN. So if he has a little saw he is, and if he has a big saw he is not?

Mr. DEWIND. If he has a sawmill he is not.

The CHAIRMAN. I suggest that these distinctions that we are drawing in these cases illustrate precisely what we were talking about a while ago, that you are completely in the field of discretion and you do not yet have dependable criteria on which to base a sensible solution.

Mr. DEWIND. On the contrary, it would be my feeling that the cases we have so far discussed are very clear and easy to decide.

Senator LUCAS. May I ask a question right there, Mr. Chairman?

The CHAIRMAN. Yes.

Senator LUCAS. The witness continues to talk about capital investment as being one of the criteria to determine whether one is an employer or an employee or an independent contractor. In getting back to your door-to-door salesman, what would you say about your door-to-door salesman who has invested in a $3,000 automobile as his own personal equipment to carry his goods from town to town and disposes of his goods after he gets there?

Mr. DEWIND. In the sense that he has substituted his own transportation for public transportation I do not think that would be a very important factor in those cases.

Senator LUCAS. In the Silk case the Court drew the distinction between the fellows who unloaded coal with their own picks and shovels as being straight employees, yet as to the fellow who had the truck and carried the coal from place to place, declared him an independent contractor, on the theory that he had an investment in that truck. That was the prime reason for the Court's opinion. I merely draw the analogy of the person who invests in a $3,000 automobile and car-

ries his goods from town to town rather than the trucker who carries the coal from house to house.

Mr. DEWIND. I think the truck is much more an essential part of the business of the trucker than the automobile to the salesman. Many salesmen may operate without an automobile. In fact, it is probably not required.

Senator LUCAS. Both cases may be correct, but it does seem to me that there is something in that, in view of what the Court said in the Silk case. I know very few salesmen any more who go by train or bus. They have a real investment. In my section of the country where spaces are somewhat wide open he has to have an automobile to get around and he has his own money invested in that automobile in most cases. He is not operating with the company's automobile.

In reading that Silk case, it just occurred to me that there was a fairly close parallel.

Mr. DEWIND. I suppose in many instances that car is used for private purposes and for business purposes and it is not really an essential part of his occupation. It is a convenience to his occupation. I think it occupies a lesser position.

Senator LUCAS. I would not agree with you on that. I think it would be the sole criterion of his occupation, as to whether or not he had an automobile to make these deliveries. If he did not have, he would not be in the business.

The CHAIRMAN. The Supreme Court in the Silk case placed considerable reliance on its decision in the Hearst case.

Mr. DEWIND. The labor case?

The CHAIRMAN. Yes, and it has already been developed, I believe, that the Congress has refused to accept that interpretation.

Mr. DEWIND. Yes. I have no doubt that to the extent that the labor law has been changed that opinion may not have any further relevance to that. It still may operate as an authority for this type of interpretation for the unaltered law.

The CHAIRMAN. The philosophical basis of it was not accepted by Congress in the Taft-Hartley Act.

Mr. DEWIND. It is the prerogative of the Congress to change the law.

The CHAIRMAN. Do you not regard it as significant that the Congress has taken that action with respect to the Root case on which the Silk case was decided?

Mr. DEWIND. It is a question of the policy considerations involved and I merely say that as a matter of policy the broad coverage of social security is a desirable thing.

The CHAIRMAN. It seems to me it has considerable significance on the pending question as to whether we are warranted in maintaining a status quo.

Mr. DEWIND. Yes. As I have tried to point out, Mr. Chairman, in this area the adoption of this resolution would do anything but maintain the status quo.

The CHAIRMAN. And it seems to me that your own definitions would do anything but maintain the status quo. I think we would have the whole thing in a constant state of flux. I do not believe you have developed a single consistent thread that runs through your determination of whether one case is covered or another case is not covered. If

you can develop a consistent thread I wish you would take the time right now to do it.

Mr. DEWIND. I feel that I have developed a consistent statement of principle which is very helpful and provides very usable guides in this area and the examples we have discussed I think point out how useful those guides are in arriving at an answer to the problem.

The CHAIRMAN. That, of course, is in the field of opinion but it seems to me so far we have had no consistent thread between any of the examples you have cited, and that each one conflicts with the other.

Mr. DEWIND. I am sorry if I have made it appear so.

The CHAIRMAN. If on further reflection you would like to elaborate on that we would be delighted to give you the time to do it.

Mr. DEWIND. Thank you.

The CHAIRMAN. Let me put another question to you: The Social Security System, of course, depends on taxes for its maintenance. In the field of taxation, is it not the usually accepted rule that you do not impose taxes by implication and refined theories of all kinds?

Senator LUCAS. Under the Social Security Act, Mr. Chairman, and you cannot do it otherwise. That is the reason we have all these cases pending at the present time.

The CHAIRMAN. The Supreme Court definitely leans to the view that since this is a social-security subject that you can give a new field of implication to what we have said here, but I am talking now about the general philosophy of taxation. Is it not still a generally accepted rule that you should not imply taxes?

Mr. DEWIND. Yes, I think so. That is a very sound rule.

Senator LUCAS. There cannot be any question about that, but as long as we have social-security laws we are going to have to have that implication because we hear from the witness of all these cases pending at the present time in these twilight zones under the common-law theory of the definition of an employee.

You cannot get away from it, it seems to me unless you want to eliminate the social-security law.

The CHAIRMAN. I think it comes down somewhat, Senator, to the rule that you are going to follow, whether you are going to be exceedingly liberal in your construction of what the Congress has said, and thus impose taxes by implication, or whether because taxes are involved there should be a more strict construction of the law and that raises a vast area of disagreement. I don't want to debate it here. Go ahead.

Senator LUCAS. It raises the question primarily as to how far the Congress should go in laying down in the legislation, it seems to me, rules and standards.

The CHAIRMAN. I think that is one of the basic questions before us in this resolution. Go ahead, Mr. DeWind, please.

Mr. DEWIND. With respect to the scope of the new regulations, I wish to emphasize that they are not intended to, and will not, have any effect whatever on a business whose operations are independent in fact. The regulations will not convert normally independent retailers into employees but will apply only where an individual is performing services for another and where, except for the form of his employment arrangement or the method of his remuneration, he would be an employee even under the common-law rules. On the contrary, where the independence of an individual's business is not a mere matter of

words or a mere pay-roll technique, but is based upon such factors as a substantial investment in his enterprise with a real opportunity for profit or loss, he will be more clearly an independent contractor under the new regulations than he would be under the common-law rules.

To illustrate: Where a traveling salesman operates on a commission basis or under a purchase and sales arrangement with a privilege to return at cost all unsold items, he will under the new regulations be deemed to have the same social-security status as his salaried counterpart.

On the other hand, where a distributor, such as a general insurance agent or insurance broker, has a sales organization of his own or a substantial investment in his own distribution enterprise, he will be considered an independent contractor under the new regulations despite his close affiliation with the organization which he represents.

The CHAIRMAN. I invite your attention that the independent merchant always has the opportunity to get back his cost. That is why you have clearance sales and that is why you have all the other techniques of ridding your shelves of unwanted goods.

Mr. DEWIND. But not from the manufacturer or wholesaler, of course.

The CHAIRMAN. It makes no difference. He has the opportunity to get back his cost.

Mr. DEWIND. Or to sell at a loss, conceivably.

The CHAIRMAN. Or to sell at a loss, and the salesman can dissipate the results of his sales and thus find himself a real debtor to the corporation which supplied the material.

Mr. DEWIND. Yes. That is true, but of course he cannot sell at a loss under these arrangements. It can be seen, therefore, that the new regulations do not seek to upset contract relationships. They merely propose to classify the relationships in the light of what they really are. They bring within the social-security program only those individuals who would have been covered from the very beginning under the old regulations had it not been for the fact that a number of lower courts disregarded all but the control factor and put the form of the employment arrangement above the realities involved.

The fear that determinations under the new regulations will subject individuals now deemed independent contractors to tort liability has been grossly exaggerated. The Supreme Court decisions, as well as the new regulations, clearly indicate that the criteria of employment set forth therein do not represent technical common law tort rules and are applicable only to determinations under the social security laws.

The CHAIRMAN. I wish to suggest that there is a lot of speculation in that last sentence. I doubt very much, and I say this most respectfully, whether you are in a position to say what your regulations would have been had there not been a single court decision.

Mr. DEWIND. I think that we are in that position. To say that most of these areas were deemed covered by rulings prior to the Supreme Court decisions, so that the Department started out about in the position where we are now winding up.

The CHAIRMAN. You started out, did you not, operating under the common-law concept of the employer-employee relationship?

Mr. DEWIND. No; I think not, Mr. Chairman. I think the early rulings in this field adopted the present broad construction, and it was

the failure to establish those in the courts in the early cases that led to a narrower administrative practice.

The CHAIRMAN. Are you familiar with the report of the committee whose recommendations were basic to the social-security legislation?

Mr. DEWIND. I have seen those. I do not know that I could say that I am currently familiar.

The CHAIRMAN. Is there anything in that report that even vaguely hints at the kind of interpretation that is in your proposed regulations?

Mr. DEWIND. I think there is nothing helpful one way or the other in it, Mr. Chairman.

The CHAIRMAN. So that you are not required to do any of the things that are included in the proposed regulations by virtue of any antecedent history of the act?

Mr. DEWIND. Not specifically.

The CHAIRMAN. Or by virtue of anything that is in the act?

Mr. DEWIND. No.

The CHAIRMAN. Or by virtue of anything that happened in any report or any debate in the Congress of the United States?

Mr. DEWIND. There is nothing in the legislative history which helps us in any way. There is nothing to say that the common-law rules apply or that a broader interpretation is intended.

The CHAIRMAN. So under the circumstance, it is a little far-fetched to talk about great injustices to large numbers of people.

Mr. DEWIND. We only know that we do have the present law as laid down by the Supreme Court, and as long as we have that to deprive people of that privilege is to deprive them of coverage. I think that is all we are saying, Mr. Chairman.

The CHAIRMAN. Go ahead.

Mr. DEWIND. Regarding the difficulties which employers might encounter in withholding and returning employment taxes under the new regulations, it must be recognized that few, if any, individuals will be held employees under the new regulations unless they are rendering services to and are substantially dependent upon their employers. Many off-the-premises workers engaged in such activities as logging, selling newspapers, distributing household appliances, and selling insurance have already been held to be employees under the old regulations, and procedures have been worked out through which their employers have been able satisfactorily to comply with the withholding and reporting requirements of the social-security program. The difficulties that will confront employers in the new area of coverage are no greater than those which have already been resolved by other employers without undue burden or inconvenience. You may be sure that the Treasury Department and the Bureau of Internal Revenue will make every effort to alleviate this new burden which is to be borne by such employers. However, to deprive their employees of social-security protection merely because of such difficulties would logically lead to a repeal of much of the whole social-security program.

Senator LUCAS. Why do you say that?

Mr. DEWIND. I believe in 1935 when the program was under consideration one of the most prevalent arguments against it was the administrative difficulty that would be entailed on employers in carrying out the operation of the program, and that is the same argument that in effect we are discussing here: that the administrative

burden on the employer is too heavy; and I think the development of the social-security program, including development in areas similar to this, has indicated that those problems are not too difficult in the light of the benefits obtained.

Senator LUCAS. You say—

However, to deprive their employees of social-security protection merely because of such difficulties would logically lead to a repeal of much of the whole social-security program.

Do you mean by that that now that the court has decided that coverage should be extended that these people who are now paying social-security taxes would start a new drive to get out from under and eliminate the social-security laws entirely?

Mr. DEWIND. I am merely suggesting that the administrative difficulties which are urged against the extension to this area are quite similar and in many cases the same difficulties that had to be encountered in the already covered area and if that is to be a serious argument against the extension of this coverage it would apply to other areas.

Senator LUCAS. Yes; but you say it would lead to repeal of much of the social-security program. I presume you mean the present social-security program?

Mr. DEWIND. Yes.

Senator LUCAS. It is now operating fairly well, I would say.

Mr. DEWIND. I think that is quite right.

Senator LUCAS. Do you really believe that if this resolution were passed it would give those who are now paying social-security taxes ammunition for a drive?

Mr. DEWIND. In areas similar to this where coverage is already applied, if this were adopted on the basis that administrative difficulties involved would justify its adoption those people would have just as good an argument: that they would have the same difficulties to put up with. They have been worked out, and I do not think they are very important in the light of the benefits.

The CHAIRMAN. Did not the Treasury in 1935 resist expanded coverage on the ground of administrative difficulties?

Mr. DEWIND. I think the experience with the social-security program that has developed over the years has resolved the administrative questions of extending coverage to such groups as the self-employed and agricultural workers and that sort of thing. Those were the principal problems that concerned us. I think that those problems now seem less unmanageable.

The CHAIRMAN. Did you not in 1939 oppose an additional coverage?

Mr. DEWIND. To such groups as the self-employed; I think so. We were not ready to undertake it. But these areas that are involved here have been covered in other situations. As to the uncertainty of the new regulations and the controversies which might result therefrom, I need only refer once again to the fact that we have had virtually no regulations whatever to date to guide determinations in the twilight-zone cases. Cases arising in that area have been lemt almost entirely to the courts which, prior to the Supreme Court decisions last June, were so widely split on the appropriate criteria that the definition of employee for purposes of social security was virtually anybody's guess in many cases.

The CHAIRMAN. In view of the fact that the elements in the whole criterion are not weighted, is it not still anybody's guess?

Mr. DEWIND. I think not, Mr. Chairman, and the only examples that we have discussed would seem to me show the relative clarity of the proposed new tests. I think that the continuation of a study of examples will reveal that in the great majority of cases it is not a difficult test to apply. That, of course, is, as you say, a matter of opinion, but one that has been arrived at after careful consideration by the administrative groups.

Senator LUCAS. The Supreme Court certainly limited the definition of the world "employee" and gave the Treasury Department the right to not consider it in such a narrow limit as you did in the past.

Mr. DEWIND. That is right.

Senator LUCAS. They said the definitions evolved out of tort law were not suitable for legislation which had a broad social purpose, designed to protect against the hazards of unemployment.

Mr. DEWIND. That is right.

Senator LUCAS. That may be a guess, too, but nevertheless they laid it down as the law.

Mr. DEWIND. I think that is quite right, and the difficulties of drawing lines that it creates are not greater, in fact, are much less, than difficulties that regularly confront administrative agencies in uncertain areas. I do not think it is an unusual type of problem that we are confronting there.

The CHAIRMAN. It is conceivable, is it not, that Congress might decide on a new method of securing coverage and contributions so far as these twilight-zone areas are concerned?

Mr. DEWIND. So far as I know, Mr. Chairman, there has been no proposal made that would bring these people under unemployment insurance by any other system.

The CHAIRMAN. How about the old-age and survivors category?

Mr. DEWIND. If you deemed these people self-employed for old-age purposes, I think you could grant them coverage. That might result in a heavier tax burden on these people and in other losses from their present position, but I think they might be covered for old-age purposes.

For unemployment-insurance purposes, I know of no way in which they could be covered.

The CHAIRMAN. Let us take old-age and survivors category. How far back would you give effectiveness to the Supreme Court decision?

Mr. DEWIND. As a practical matter under the present law, if no wage credits have been established prior to 1944, then they would be cut off as of 1944, but they would be able to establish wage credits as of 1944 in most cases.

The CHAIRMAN. What was the authority for establishing wage credits in 1944?

Mr. DEWIND. The statute has a provision that wage credits become conclusive after 4 years.

The CHAIRMAN. Would the tax go back retroactive to the employer in 1944 to sustain this coverage?

Mr. DEWIND. No. Under the proposed regulation, the Secretary would exercise his statutory authority not to impose the tax retroactively.

The CHAIRMAN. The effect of that would be that those who have paid the taxes in the meantime would carry the burden of this retroactive application of the new regulations.

Mr. DEWIND. I do not think so. To the extent they have paid their taxes they have, of course, contributed in a sense to the benefit of their employees and the employees likewise have paid the taxes.

The CHAIRMAN. But the employers have likewise not paid the taxes on this new field which you would include.

Mr. DEWIND. As to this half to three-quarters of a million, that is right.

The CHAIRMAN. Where would you get the money to make that good?

Mr. DEWIND. The social-security program has always been operated in such a way that the payments of taxes are not a necessary condition to the allowance of benefits, and that has happened frequently, due to various causes.

The CHAIRMAN. Let us assume that that is correct. I am trying to get to the end point that when you include a lot of people retroactively they are living on the fat which has been accumulated by those who have contributed in the past; is that right?

Mr. DEWIND. To that extent they are getting a benefit where no tax has been paid; that is quite right.

The CHAIRMAN. So that the employer, in the normal sense, is paying the cost, so far as the retroactive burdens are concerned, of this new regulation?

Mr. DEWIND. Or the Federal Government.

The CHAIRMAN. Or the Federal Government.

Mr. DEWIND. I would like to comment on that point. I was just coming to it.

At least, under the new regulations, employers know that the status of their employees will not depend upon the particular jurisdiction in which they operate and will be the same as other employees similarly situated anywhere in the United States. Also, under the new regulations, it will be a great deal more difficult, and hence less tempting, to avoid liability under the social-security program by means of adroit schemes and technical employment arrangements. Employees will have greater assurance that their social-security coverage is not dependent upon the formalities of such arrangements. As the Department pointed out in its report on Senate Joint Resolution 180, there have been approximately 250 employment tax cases to date under the old regulations in which the employment status of workers has had to be litigated, and more than 50 of such cases are pending in the courts at the present time. Under the criteria laid down by the Supreme Court and incorporated in the pending regulations, it is believed that the tendency will be to produce greater stability and less litigation.

The fourth point offered in support of the pending resolution is that under the present law the employees now being recognized as covered would receive some 4 years of wage credits without payment of taxes. If the Congress should feel that, contrary to existing law, no employee is entitled to social-security wage credits until he pays his proper share of cotributions, that would be one question. However, to deprive 500,00 to 750,000 employees of their right to

accumulate future wage credits, and to provide a complete employment tax exemption for their employers, merely because their contributions were not withheld during the last 4 years appears to be an irrational method of dealing with the matter.

The CHAIRMAN. It is a question of whether you are going to make the existing system bear the burden of these new interpretations or whether the Congress is going to adopt some kind of a compensatory scheme.

Mr. DEWIND. Mr. Chairman, let me say this: That under the present law there is full authority to make these taxes apply retroactively.

The CHAIRMAN. I am not speaking in terms of authority; I am speaking in terms of effect. When you make them apply retroactily, in the absence of having received contributions from the employer and employee, those who have been in the sytsem and who have been paying up have to bear the burden of that; is that not correct?

Mr. DEWIND. That is not necessary. There is authority under the law to collect the taxes from the employer and employees retroactively.

The CHAIRMAN. Do you contemplate doing that?

Mr. DEWIND. We do not contemplate doing that.

The CHAIRMAN. Therefore, it followings that those who have been in the system and have been paying up have to pay this retroactive benefit.

Mr. DEWIND. They will pay no greater or less burden one way or the other.

The CHAIRMAN. But they will have to pay for it.

Mr. DEWIND. I think that, as in the case of employees who received benefits for past service when they were in the social system, when there were no contributions in effect the burden is borne by the Federal Government.

The CHAIRMAN. These new people that come in throw a certain actuarial or financial burden on the whole system; do they not?

Mr. DEWIND. That has been widely true under some circumstance.

The CHAIRMAN. That is obviously correct insofar as making this thing retroactive is concerned, unless the Government makes it good the system has to make it good; is that not correct?

Mr. DEWIND. There would be nothing in the system to make this good.

The CHAIRMAN. Of course, but that begs the question. I think there is enough in the system to make it good. The question is whether the system should make it good.

Senator LUCAS. Mr. Chairman, may I ask a question on that point?

The CHAIRMAN. Yes; surely.

Senator LUCAS. On page 4 of your manuscript, you set out what this joint report states and under paragraph 4 you stated:

> The new regulation will allow over one-half million employees to acquire 4 years of social security wage credits without paying any contributions therefor.

Do you agree with that statement?

Mr. DEWIND. Yes; as to the years from 1944 on, for which wage credits would be established for these people.

Senator LUCAS. All right. You agree with that—the last 4 years. Now, assuming that the employees refuse to put up their portion of the tax, then what happens?

Mr. DEWIND. The employees?

Senator LUCAS. Yes.

Mr. DEWIND. They are entitled to the credits. The credits arise from their wages paid regardless of what tax is paid. The laws were set up as two separate laws. There is a benefit law.

Senator LUCAS. I understand that, but you have gone along 4 years now, and under this Supreme Court decision you are making it retroactive, and the employer has not taken out any tax from the wage earner working for him.

Now, just how are you going to get that money?

Mr. DEWIND. We would not get it.

Senator LUCAS. Neither from the wage earner, nor from the employer?

Mr. DEWIND. That is right.

Senator LUCAS. It would be taken out of the money that is now in the treasury of the Social Security?

Mr. DEWIND. Of course, for these people that are presently active, there is not a drawing on the fund now.

Senator LUCAS. I am talking about the 750,000 people who probably would be covered by the new regulations under the Supreme Court decision. Would they be retroactively covered for the last 4 years?

Mr. DEWIND. That is right.

Senator LUCAS. And who pays the bill?

Mr. DEWIND. No tax would be paid with respect to their wages for that period, either by the employer or by the employee.

Senator LUCAS. I do not follow you if they are going to be covered.

Mr. DEWIND. It is this way: The employee is entitled to credits for social security based on the wages earned and he gets those credits without regard to the tax paid, nor is there any separate account for each employee showing the amount of tax paid for that employee.

Senator LUCAS. But somebody has to pay, so the fellows who have already paid in are really going to take care of that fellow; is that not true?

Mr. DEWIND. I think, as I said before, it would be the Federal Government.

Senator LUCAS. The Federal Government is going to have to pay the bill. He has a 4-year advantage as a result of the Supreme Court decision. The Federal Government would have to take care of him in the event that he obtains social-security payments later on?

Mr. DEWIND. Yes. Those situations have arisen from time to time where, for one reason or another, employers have not paid taxes. They may go into bankruptcy or be otherwise, for some reason, unable to pay the tax. Nevertheless, the employees get their credits and always have.

Senator LUCAS. That is when they are recognized as being covered under the social-security system?

Mr. DEWIND. That is right. So I think the problem is not at all a unique problem. It is the typical result of having the two separate systems. Now, of course, if that were a stumbling block, retroactive

credits could be denied these employees for the years prior to Supreme Court decisions.

Senator LUCAS. It is quite a little problem, it seems to me, to give 750,000 employees retroactive credit for a period of 4 years.

Mr. DEWIND. Their maximum contribution over that period, by any employee, would be $120.

Senator LUCAS. The employer has not paid anything into the fund either; neither has the employee?

Mr. DEWIND. That is right. It would be a maximum of $120 for each.

The CHAIRMAN. By law, this fund is a trust fund; is it not?

Senator LUCAS. That is a pretty big gift out of a trust fund.

Mr. DEWIND. I beg your pardon?

The CHAIRMAN. By law, this fund is a trust fund; is it not?

Mr. DEWIND. That is correct.

The CHAIRMAN. Is it consistent with your idea of the proper management of a trust fund to throw that burden on the trust which has been made up of the contributions of those already in the system?

Mr. DEWIND. All I am saying is that it is consistent with the present law and it has been done and that is the way the law was passed by the Congress. It is the way the system was set up.

The CHAIRMAN. It is not required. You do that by interpretation or by practice?

Mr. DEWIND. The retroactive benefits are required by law without any question.

Senator LUCAS. I would like to see that section of the law we passed that would bring these people into that category.

Mr. DEWIND. At the time the system was set up there was thought to be some constitutional issue with respect to the compulsory contribution to the system, and that was perhaps part of the reason why they were set up in two separate systems. There is imposition of a tax which is paid without regard to the benefits, the creation of a benefit system without regard to the tax, and they are just two wholly separate laws so that you are entitled to benefits if you have received covered wages without regard to whether or not tax has been paid.

Senator LUCAS. Why do you go back to 1944?

Mr. DEWIND. The law merely says that after 4 years such wage records as there are become conclusive, and if there are no wage records, no benefits can be allowed, and, of course, as to these employees where there has been no reporting back of 1944, there are no records on which credits could be based.

The CHAIRMAN. Does not Mr. Altmeyer contend that you can go back to 1937?

Mr. DEWIND. If he does, I am not aware of that. My own view was that the law cut off the benefits, generally speaking, at 4 years, if there are no wage records beyond that date. Of course, if wage records have been filed for that period, they would be entitled to benefits.

The CHAIRMAN. Independent of the place of the titles in the act, what you are suggesting is that a trust fund should pay the bill for this retroactive application of your regulation, and the fact is that that trust fund has been built up by the contributions of the employers and employees who are already in the system.

Mr. DEWIND. That has been done ever since the system was set up.

The CHAIRMAN. Regardless of whether it has been done, do you think that that is a sound and just procedure?

Mr. DEWIND. Mr. Chairman, I cannot state policy for the Department on the present situation as regards the separation of the two systems.

The CHAIRMAN. I am asking you what you think. What do you think about that. You are not reticent about making suggestions to Congress and I do not want you to be. Now do not be reticent about this. Tell us what you think about that.

Mr. DEWIND. I do not know that I am qualified to speak authoritatively on that problem but it seems to me that there are practical administrative problems that would result from saying that taxes are allocated as paid by each employer for an employee and by employee-employer to a separate account for each employee. I think it might very well be a completely unworkable system. Therefore, we might have to have a general fund with a right to benefits, regardless of whether you can allocate and find dollars to tie to each employee. I think it might be a wholly unmanageable system any other way.

The CHAIRMAN. The end result is that those who have been covered and have been contributing are bearing the weight of this retroactive provision.

Mr. DEWIND. Persons who reached the benefit age shortly after the system went into effect got benefits for which they made no contribution.

The CHAIRMAN. Let us assume that is all correct. I just want clear as crystal what the effect of this is. The system, made up of funds from collections from employers and employees in the past, will have to bear the burden of this retroactivity of this proposed regulation.

Mr. DEWIND. As I say, funds will have to be provided if the benefits are to be met. Now, who provides those funds, whether it is the Federal Government or the employers and employees, is the problem.

The CHAIRMAN. Have you not stated that you would provide them out of social-security funds?

Mr. DEWIND. I might say it this way: That the 1-percent contribution by an employee and the 1-percent contribution by an employer, standing by themselves, in any event, on the actuarial basis, would in any event be inadequate to take care of the contemplated benefits.

The CHAIRMAN. You will get the money out of the system, will you not?

Mr. DEWIND. That is right.

The CHAIRMAN. The system has been built up of the funds accumulated by collections which have been made in the past from employers and employees.

Mr. DEWIND. Yes, that is right.

The CHAIRMAN. All right.

Mr. DEWIND. As I say, if that is a stumbling block here, the retroactive wage credits could conceivably be denied to these employees, but that has no bearing on their future credits.

The CHAIRMAN. Would that not be a gross injustice under your theory of the case?

Mr. DEWIND. I think it would. It would be denying them benefits which the Supreme Court has granted them.

The CHAIRMAN. Under your theory of the case, which is an adoption of the Supreme Court theory, if these people are entitled to coverage they would be entitled to it from the beginning.

Mr. DEWIND. I am only saying that in order to take care of that problem you do not have to pass this resolution.

The CHAIRMAN. Let me ask you again, under your theory of the case, under this theory of yours, the Supreme Court decision, if it is right, it should be retroactive?

Mr. DEWIND. And if nothing is done it will be retroactive.

The CHAIRMAN. And you will make it retroactive?

Mr. DEWIND. The law makes it retroactive.

The CHAIRMAN. And you will administer the law in that way?

Mr. DEWIND. We have no choice.

The CHAIRMAN. And therefore, the system will bear the cost of the money which has been accumulated in the manner described?

Mr. DEWIND. My sole purpose in mentioning the matter at all is to say that in order to take care of that matter, it is not necessary to exclude these employees from future coverage.

The CHAIRMAN. I mentioned it because I am very much interested.

Mr. DEWIND. The last consideration on which the proposed resolution seems to rest has no bearing on the basic merits of its provisions or on the merits of the pending regulations, but relates only to the validity of the Supreme Court decisions last June. In effect, the Supreme Court stated that the broad purposes of the social-security legislation must be considered in identifying the persons to whom the legislation should be applied. It does not appear to be contrary to the will of Congress for the Supreme Court to consider the purposes of Federal legislation which is before the Court on a question of statutory interpretation, nor is it contrary to the will of Congress for the Supreme Court to prevent the purposes of Federal legislation from being compromised or defeated by avoidance devices.

It is the view of the Treasury Department that none of the considerations which has been mentioned to date in support of the pending resolution can justify the results which the resolution would produce. Since 1944 over 12 employment-tax cases have been decided by district and circuit courts in favor of the Government on the basis of criteria other than common-law rules. Substantial contributions have been paid to date into the Federal Treasury by the employees involved in those cases and other employees similarly situated. All of those employees and their families have had a legal right to expect insurance benefits in the event of unemployment, old age, or premature death. Should this resolution be enacted into law, the employers of all such employees would undoubtedly seek refunds for the years still open. All or most of such cases, of course, would be litigated, but of greater significance is the fact that decisions in favor of the taxpayers would deprive numerous employees of social-security wage credits for which they have already paid substantial contributions and which they have had a right to expect would give them some protection against the hazards of old age, unemployment, and premature death.

The CHAIRMAN. Will you please provide us with a list in detail of those who have been entitled to coverage and have had coverage under past interpretations of the law who would be taken out of coverage by the pending resolution?

Mr. DEWIND. I will do my best to give you as much information on that as we have.

The CHAIRMAN. Do you have information?

Mr. DEWIND. We have information, certainly, in some cases. Whether we can get you all the cases, I do not know. We will get you what we can.

Senator LUCAS. May I ask the witness another question?

The CHAIRMAN. May I ask another question, Senator?

Does not the pending resolution specifically provide that no one should be taken out of coverage who has it at the present time?

Mr. DEWIND. Yes; but as I read that provision of the pending resolution it would only apply to persons who have entered upon the benefit-payment period, but a person who has not yet become entitled to receipt of benefits would lose whatever credits have been established to his account.

The CHAIRMAN. That goes to the basic question of whether he is entitled to coverage.

Mr. DEWIND. Even though he has paid for it he would lose them.

The CHAIRMAN. I want you to give us a very detailed and exact presentation on that.

Mr. DEWIND. I will present to you every case of which we have knowledge.

(The following was submitted for the record in response to the above:)

MY DEAR MR. CHAIRMAN: In the course of my testimony before your committee on April 1, 1948, regarding House Joint Resolution 206, you requested the Treasury Department to furnish you with the following data for incorporation in the record of the hearings on the joint resolution:

* * * * * * *

(2) An estimate of the number of employees who have been making contributions under existing law and who might be deprived of coverage under the joint resolution.

* * * * * * *

EFFECT OF HOUSE JOINT RESOLUTION 206 ON CONTRIBUTING EMPLOYEES

Since 1937 the Bureau of Internal Revenue has been collecting social-security taxes with respect to many types of services which fall into the twilight zone between employee and independent contractor. Included are the services of certain securities salesmen, insurance salesmen, news vendors, coal shovelers, coal hustlers, piece-rate garment workers, taxicab lessee-drivers, journeymen tailors, lessee-operator of trucks, salesmen of household appliances, and gasoline station operators. In many of the cases in which the Commissioner's assessments in this area have been sustained, the courts have based their decisions on principles other than the strict common law control or tort test and more in the light of the board purposes of the social-security legislation. (See *U. S.* v. *Vogue, Inc.*, 145 F. (2d) 609 (1944); *Grace* v. *Magruder*, 148 F. (2d) 679, cert. den. 326 U. S. 720 (1945); *Hearst Publications* v. *U. S.*, 70 F. Supp. 666 (1946); *U. S.* v. *Wholesale Oil Co.*, 154 F. (2d) 745 (1946); *Stone* v. *U. S.*, 55 F. Supp. 230 (1943); *Silk* v. *U. S.*, 67 S. Ct. 1463 (1947); *Schwing* v. *U. S.* and *Wannamaker* v. *U. S.*, CCA 3, No. 9190 (Jan. 1948); *Tapager* v. *Birmingham*, U. S. D. C., N. D. Iowa, cent. Div. (Jan. 1948); *Atlantic Coast Life Ins. Co.* v. *U. S.*, U. S. D. C., E. D., S. Carolina, Charleston Div. (Jan. 1948); *Party Cab Co.* v. *U. S.*, CCH Fed. Para. 9317 (1948); and *Fahs* v. *Tree-Gold Cooperative Growers of Florida*, Inc., CCA 5 (1948), CCH Fed. Para. 9332.)

It is impracticable to develop statistics on the number of employees whose status as employees was determined by these cases or by the rulings based thereon. It is clear, however, that a large number of such employees have been required (by withholding procedures) to pay their social-security taxes every year since

the commencement of the program in 1936. As I pointed out in my testimony, if House Joint Resolution 296 is enacted into law, it would probably subject these areas of covered employment to new litigation and, in the event that the joint resolution is construed to require an application of the strict or technical common law rules, many of these employees would be deprived of the social-security protection toward which they have already made substantial contributions.

The Treasury Department has been requested to furnish the information respecting the number of employees involved in the 12 cases referred to in the testimony.

The CHAIRMAN. Obviously, when you commence to take people out of coverage who are covered and have paid for it, that is a serious matter. I thought the resolution made it clear that that was not intended.

Mr. DEWIND. No, sir; it does not.

The CHAIRMAN. Senator Lucas?

Senator LUCAS. I wanted to go back once more to page 4 of your manuscript dealing with one of the alleged considerations on which the House passed the resolution. You say—

> The new regulations will allow one-half million employees to acquire 4 years of social security wage credits without paying any contributions therefor.

You state that is practically true and that is based upon legislative action of Congress followed by the regulations that have been laid down by the Treasury. I presume that you are basing your statement that it is legislation by Congress on article 2 of paragraph 3 of section 205 of the Social Security Act, which I read as follows:

> After the expiration of the fourth calendar year following any year in which wages were paid or are alleged to have been paid an individual, the records of the administrator as to the wages of such individual for such year and the periods of payment shall be conclusive for the purposes of this title, except as hereafter provided.

My question is: Have the courts rendered any opinion on that section?

Mr. DEWIND. I think not. The Federal Security Agency is better equipped to answer that than I.

Senator LUCAS. You think not?

Mr. DEWIND. I think not.

Senator LUCAS. Is your regulation that makes this retroactive based upon that?

Mr. DEWIND. There is nothing in our regulation with respect to the matter at all. The retroactive provision is based solely on the statutory provision.

Senator LUCAS. Have you made any examination of the debates or the history that surrounded that particular provision and why it was put in there?

Mr. DEWIND. Not in any detail. I assume the reason it was put in there was to give finality to wage records at some date so they would not always be open to dispute

Senator LUCAS. Do you believe that that might have been an ameliorative provision dealing with individual cases rather than dealing with a block of 750,000 at one time?

Mr. DEWIND. It is my understanding that as to any individual in that block, that if the Social Security Board has no wage records for him prior to the 4-year period, that that is conclusive that he had no covered wages.

Senator LUCAS. It is pretty difficult for me to believe that Congress ever intended to blanket 750,000 people into a trust fund of this kind under that provision. I may be wrong about it but I do not believe they ever had that in mind.

Mr. DEWIND. The situation is this: the Supreme Court has now said that under the law all during these years these people were entitled to coverage.

Senator LUCAS. Once you are in you have always been in?

Mr. DEWIND. But there is this provision in the statute which cuts it off at the end of 4 years.

Senator LUCAS. Maybe so, but it is a very serious situation, it seems to me.

Mr. DEWIND. Most of the States have already departed from the technical common-law rules in applying their unemployment-compensation laws. Most of the remaining States have indicated an intention to follow determinations under the Federal law. This resolution would perpetuate the incongruity of existing law under which thousands of individuals are considered independent contractors for purposes of Federal social security but held to be employees under most of the implemental State acts. On this ground alone the resolution would obviously be a step in the wrong direction.

The CHAIRMAN. I think we discussed that at the outset of our discussion. You are going to supply us with a compendium of the State interpretations?

Mr. DEWIND. Yes, sir.

(The following was submitted for the record in response to the above:)

MY DEAR MR. CHAIRMAN: In the course of my testimony before your committee on April 1, 1948, regarding House Joint Resolution 296, you requested the Treasury Department to furnish you with the following data for incorporation in the record of the hearings on the joint resolution:

* * * * * * *

(3) A documented statement reflecting the employer-employee relationship under the various States unemployment insurance laws.

* * * * * * *

REVIEW OF STATE UNEMPLOYMENT INSURANCE LAWS

The following provisions (generally known as the (a) (b) (c) provisions), or provisions substantially identical therewith, appear in the unemployment compensation statutes of Arizona, Delaware, Georgia, Illinois, Maine, Maryland, Montana, North Carolina, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, and Wyoming, and have been construed in such States as providing a substantially broader coverage than the common law rules governing the relationship of master and servant:[1]

"Services performed by an individual for wages, or under any contract of hire, shall be deemed to be employment subject to this act, unless and until it is shown to the satisfaction of the Commissioner that—

[1] See *Sisk* v. *Arizona Ice and Coal Storage Co.* (141 P. 2 (d) 395); *Peasley* v. *Murphy* (44 N. E. 2 (d) 876); sec. 19 (g) (6) of the Maryland act; *U. C. C.* v. *Jefferson Standard Life Insurance Co.* (2 S. E. 2 (d) 584); *Singer Sewing Machine Co.* v. *N. J. U. C. C.* (31 A. 2 (d) 818); *Leinbach Co., Inc.* v. *U. C. C.* (22 A. 2 (d) 57); *Northern Oil Co.* v. *Industrial Commission* (140 P. 2 (d) 329); sec. 11 of the Washington act; *Seattle Aerie No. 1* v. *Comm.* (160 P. 2 (d) 614); *Tharp* v. *U. C. C.* (121 P. 2 (d) 172); *Young* v. *B. U. C.* (10 S. E. 2 (d) 412); and CCH U. I. S., vol. 2, p. 11027, vol. 3, pp. 22018 and 22028, vol. 4, pp. 29019, 31023, 31024, 32023, 34017, and 34024, vol. 5, pp. 36020, 36033, 37041, 42017, 42022, 43025, 43036, 48022, 48026, 51020, and 55030.

"(*a*) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of hire in fact; *and*

"(*b*) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside all of the places of business of the enterprise for which the service is performed; *and*

"(*c*) such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service." [Italics supplied.]

The unemployment insurance statutes of Oklahoma and Virginia contain provisions similar to the (*a*) (*b*) (*c*) provisions quoted above except that paragraphs (*b*) and (*c*) and in the alternative instead of the conjunctive. These provisions have likewise been construed to provide a wider coverage than the strict master-servant relationship (*U. C. C.* v. *Harvey*, 18 S. E. 2 (d) 390; *U. S. C.* v. *Collins*, 29 S. E. 2 (d) 388; *Dickinson Oil Co.*, 165 P. 2 (d) 979; and CCH U. I. S. vol. 5, p. 30029, sec. 1390.)

In Oregon the unemployment-insurance statute contains provisions substantially identical with the (*a*) (*b*) (*c*) provisions quoted above, except that paragraph (*b*) has been eliminated. These provisions have also been interpreted to have a broader scope than the strict master-servant relationship (CCH U. I. S., vol. 5, p. 40024 and 40025, secs. 1390 and 1395.

New York has no specific definition of the term "employee' in its unemployment insurance statute but the statute has been applied over a broader area than that generally ascribed to the strict master-servant relationship as developed under the common law (*In re Fitzgerald*, 33 N. Y. S. 2 (d) 304; *In re New York Life Insurance Co.*, 45 N. Y. S. 2 (d) 271; and *In re Weider*, 43 N. Y S. 2 (d) 271). In addition, the New York statute provides at section 560.3: "In determining whether an employer is liable for contributions * * * such employer shall, whenever he contracts with any person for any work which is part of such employer's usual trade, occupation, profession, or enterprise, be deemed to employ all employees by such person for such work * * * unless such person performs work, or is in fact actually available to perform work, for anyone who may wish to contract with him, and is also found to be engaged in an independently established trade, business, or enterprise.

The unemployment insurance statute of Indiana provides: "Services performed by an individual for remuneration shall be employment subject to this act unless and until it is shown to the satisfaction of the board that (A) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract and in fact; and (B) such individual, in the performance of such service, is engaged in an independently established trade, occupation, profession, or business; or is an agent who receives remuneration solely upon a commission basis and who is the master of his own time and effort." While these provisions have been applied more or less in line with the Federal rulings of coverage under the Federal Unemployment Tax Act, there have been occasions when they were given a broader scope. (See *South Bend Fish Corp.* v. *E. S. D.*, 63 N. E. 2 (d) 301; see also see also CCH U. I. S., Indiana, sec. 1330.)

Florida, Louisiana Missouri, Nebraska, Ohio, and Tennessee have adopted the conjunctive (*a*) (*b*) (*c*) provisions quoted above, but the rulings issued to date in such States indicate that such provisions have been generally restricted by interpretation to follow the rulings under the Federal Unemployment Tax Act. (See *Gentile Bros. Co.* v. *Florida Industrial Com.*, 10 S. 2 (d) 568; sec. 18 (g) (7) of the Louisiana Act; *A. J. Meyer and Co.* v. *U. C. C.*, 152 S. W. 2 (d) 184; *Commercial Motor Freight Co.* v. *Ebright*, 54 N. E. 2 (d) 297; *Hill Hotel Co.* v. *Kinney*, 295 N. W. 397; *The Texas Co.* v. *Bryant*, 152 S. W. 2 (d) 627. In *New Hotel Cameron* v. *Murphy*, 179 S. W. 2 (d), however, the Missouri statute was given a broader interpretation.)

In Alabama, California, Colorado, Connecticut, Idaho, Iowa, Kentucky, Massachusetts, Michigan, Mississippi, and Texas the unemployment-insurance statutes either contain no specific definition of the employer-employee relationship or they expressly provide that the determination of such relationship shall be based upon the control exercised over the performance of the services in question. It is noted, however, that section 2 of the California Act and section 42 (7) of the Michigan Act expressly provide for the coverage of all services covered

under the Federal statute. The courts of Kentucky and Iowa have expressed a determination to follow the Federal rulings governing the employer-employee relationship under the Federal social security laws (*Commonwealth* v. *Kaufman Straus Co.*, 187 S. W. 2 (d) 821; and *Meredith Publishing Co.* v. *Iowa*, E. S. C., 6 N. W. 2 (d) 6. In *Buell* v. *Danaher*, 18 A. 2 (d) 697 the Connecticut statute was applied to a relationship not covered by the Federal Unemployment Tax Act.

Arkansas, South Dakota, and Minnesota by statute expressly require the application of their respective common law rules governing the master-servant relationship, and, in addition, have provided for the exclusion of even common law employees if their services fall within the three tests of the (*a*) (*b*) (*c*) provisions quoted above. However, no services covered under the Federal Unemployment Tax Act have been found to be excluded from coverage in these three States. The statutes of Arkansas and Minnesota expressly provide for such coextensive coverage.

The Kansas statute contains paragraphs (*a*) and (*b*) of the conjunctive (*a*) (*b*) (*c*) provisions quoted above but it has been the area interpreted to require an application of the common law rules governing the master-servant relationship (CCH U. I. S., Kansas, sec. 1330).

In Wisconsin, the unemployment insurance statute contains paragraphs (*a*) and (*c*) of the conjunctive (*a*) (*b*) (*c*) provisions quoted above and it has been construed as a declaration of the common law of that State governing the master-servant relationship (*Wisconsin Bridge and Iron Co.* v. *Ramsay*, 290 N. W. 199). However, section 108.02 (*h*) of the Wisconsin statute provides that all services covered under the Federal Unemployment Tax Act shall be likewise covered under the State law.

In summary, it appears that 28 of the 48 States have adopted tests for determining the employer-employee relationship under their respective unemployment insurance laws which are broader, or at least in some instances have been given a broader application, than the so-called common law test adopted by many of the lower courts under the Federal Unemployment Tax Act prior to the Supreme Court decisions last June. In at least 14 of the States, either the legislature or the courts have expressly declared that all services covered under the Federal Unemployment Tax Act should be likewise covered under their respective unemployment insurance laws.

Mr. DEWIND. I have one more item.

Finally, this resolution would establish a precedent for other employer groups to petition the Congress for similar exemptions on the ground that the withholding, reporting and tax burdens imposed by the social security program are too heavy for them to sustain.

If the Congress were to yield to this resolution, it would be yielding to substantially the same considerations which were offered in opposition to the original Social Security Act in 1935. If such considerations had prevailed then, there never would have been a social security program.

I think that concludes my statement, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. DEWIND. Thank you, gentlemen.

The CHAIRMAN. I will announce to those who are here that this afternoon we will reconvene at 2 o'clock, but we expect some voting in the Senate, and our members may have to go to the Senate chamber occasionally, so our proceedings may be somewhat disrupted. I am told that the wire services state that tomorrow we will have a veto from the President of the tax reduction bill. This will make it impossible to have a hearing tomorrow afternoon. We are now considering whether to have one tomorrow night, and it seems necessary now that we have one Saturday morning, but the details of that will be announced later on.

Come forward, please, Mr. Cruikshank.

STATEMENT OF NELSON H. CHUIKSHANK, DIRECTOR OF SOCIAL INSURANCE ACTIVITIES OF THE AMERICAN FEDERATION OF LABOR, WASHINGTON, D. C.

The CHAIRMAN. Mr. Cruikshank, we are glad to have you here. Will you please give your name and address and occupation to the reporter?

Mr. CRUIKSHANK. My name is Nelson H. Cruikshank. I am director of social insurance activities for the American Federation of Labor, 901 Massachusetts Avenue NW., here in the city of Washington.

Mr. Chairman, accompanying me this morning is Mr. George Russ, president of the Industrial and Ordinary Insurance Agents Council, AFL. Knowing the pressure of time under which your committee is holding these hearings, Mr. Russ did not ask to appear in behalf of his organization but with your permission I will file together with this testimony, a statement by Mr. Russ. He will be glad to answer questions which members of the committee may wish to direct to him.

The CHAIRMAN. We will be glad to have it.

Mr. CRUIKSHANK. And if there are any questions you would like to ask about the occupations of the workers he represents he is here to answer the questions.

Mr. Chairman, I have a prepared statement which I shall be glad to present and I will answer any questions that I can that you or the other members care to offer.

Let me say that I am appearing at the designation of Mr. William Green in response to your invitation, Mr. Chairman, to present the views of the American Federation of Labor on the measure now under consideration, namely, the "Joint resolution to maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social security coverage."

May I say at the outset that we appreciate the opportunity to present our views before the Senate Finance Committee as we are convinced that the enactment of this proposal will be harmful to a considerable number of working people. A large proportion of the workers who would be adversely affected by this legislation are not organized in unions affiliated with the American Federation of Labor although many others doubtlessly are. I am not pleading, therefore, for the protection of rights or benefits accruing under the Social Security Act primarily to members of our unions. I am pleading rather for the general principle of the broad protection of social security—a principle which the American Federation of Labor has sponsored for many years. This is a principle which has been supported not only by the labor movement in America but by those individuals and organizations interested in human welfare.

The CHAIRMAN. Generally speaking, members of your union are clearly employes, are they not?

Mr. CRUIKSHANK. Generally speaking, yes, sir.

The CHAIRMAN. Can you think offhand of any exceptions?

Mr. CRUIKSHANK. Just offhand, I do not. I can think of some that are in this questionable area but I do not offhand think of any that are not either in the questionable area, not to prejudice the case, or in the accepted category of employees.

The CHAIRMAN. Proceed, please.

Mr. CRUIKSHANK. This principle is one that has been specifically espoused by both political parties.

House Joint Resolution 296 while attempting to maintain the status quo in the interpretation and application of the coverage provisions of the present social-security program raises a great many complicated problems of a technical nature which I shall not attempt to analyze in detail. It is my purpose rather to present to the committee the ways in which this measure actually fails in its purpose to maintain the status quo and how in so failing it would, if enacted into law, adversely affect the security of thousands of men and women in the United States who, though they may not be according to some legal definition technically in the category of employee, nevertheless depend upon the returns from their labor for their daily livelihood.

Among those so affected are those engaged in the field of life-insurance solicitation; those engaged in industrial home work (which unfortunately has not yet been completely eradicated from the industrial scene in America); door-to-door salesmen; some, though not all, vendors of newspapers and periodicals; some owner-operators of taxicabs and trucks; workers in the field of forestry and lumbering who, having no business of their own, perform services in the business of another; some workers in the building and construction trades; some in the entertainment field; and a limited number of miners. I believe that there has been placed before the committee, or should I perhaps say that there will be placed before the committee, evidence indicating that the total number of persons in this twilight zone of employer-employee relationship who would be affected by the proposed legislation is between 500,000 and 750,000.

The problem to which House Joint Resolution 296 is directed arises in large measure out of the fact that there are two agencies of the Federal Government which administer separate phases of the old-age and survivors' insurance program. The Social Security Administration administers the Social Security Act and in so doing is responsible for determining who is eligible to receive benefits. The Department of the Treasury administers the Internal Revenue Code and in so doing determines on what types of activity the employer and employee tax or contribution should be levied. In so doing, it is impossible for the Treasury Department to escape making in effect a determination in respect to the coverage of the social-security program.

For nearly 10 years there has existed a difference of opinion between these two agencies as to the applicability of their two laws in respect to certain types of occupations including most of those enumerated above. The Social Security Administration has said that it was intended that these persons be provided the security afforded under the Social Security Act while the Treasury Department has interpreted the Revenue Act differently and has not required the payment of contributions on these occupations. In 1947, the Supreme Court in three separate decisions made determinations with respect to the employer-employee relationship which had the effect of upholding the Social Security Administration's interpretation of the Social Security Act. Consequently, the Treasury Department prepared to issue the appropriate regulations requiring tax payments on these types of employment.

Might I interject there, Mr. Chairman, that, since listening this morning, the question of justice of this matter arose. The justice or injustice is involved not with the coverage of the contribution primarily but with the coverage with respect to benefits and the proposed resolutions in two sections tends to deal with both of the phases of the social-security program: The contribution phase and the benefit phase, and if there is an injustice involved, which we believe there is, the injuctice relates to section 2, which takes away the right of the Social Security Administration to declare these persons eligible for benefits.

A third factor in this situation rises from the evidence that both the House of Representatives and the Senate are contemplating revisions in the coverage of the old-age and survivors insurance program. The House Ways and Means Committee of the Seventy-ninth Congress carried on an extensive inquiry into all the phases of the Federal social-insurance program. Some minor changes resulted from this inquiry which the House of Representatives clearly indicated were of a stop-gap character. With the convening of the Eightieth Congress, the distinguished chairman of the Senate Finance Committee introduced a resolution authorizing and directing this committee—

to make a full and complete investigation of old-age and survivors insurance and all other aspects of the existing social-security program, particularly in respect to coverage, benefits, and taxes related thereto * * *.

The resolution also authorized the appointment of an advisory council on social security which was directed to make a thorough study of the social-security program and to make recommendations to this committee. This council was organized in December of last year and has been holding regular meetings since that time. It is evident, therefore, that both Houses of Congress contemplate a review of the present social-security program with a view to making substantive revisions. In these circumstances it is quite clear that it is desirable to maintain the status quo pending action by Congress.

Our objection to House Joint Resolution 296 is precisely that it does not maintain the status quo. The status of the administration of the social-security program is that the individuals in the hitherto disputed types of economic endeavor have been determined to be "employees" for the purposes of the Social Security Act, and this determination has in effect been upheld by the Supreme Court. House Joint Resolution 296 contemplates a reversal of this determination effective as of January 1, 1948, with the obvious result that all persons in the disputed categories who have not as of that date established eligibility for benefits are deprived of the protection intended by the act. The status quo is preserved only in the sense that the earlier determinations of the Treasury now found by the highest Court to have been in error, are written into law, and in respect to beneficiaries over 65 years of age and survivors of deceased workers in these categories who have filed claims shall not be deprived of benefit rights previously established.

A worker in one of these disputed areas of employment who had reached 65 years of age even prior to 1948 but who did not claim benefits would now be denied any right to benefits. For him the status quo would be seriously affected.

The CHAIRMAN. That would depend, would it not, on the ultimate action of Congress? Congress ultimately can go along with the theory of the Supreme Court.

Mr. CRUIKSHANK. Oh, yes, sir; but we have before us this joint resolution, and for any period in the interim prior to the enactment of any further legislation by Congress, these persons would be denied. Now, let me illustrate: Suppose a person reached age 65 sometime during last year, sometime during 1947, but did not apply for his benefits, and sometime in 1948, let us say, in June 1948, when this joint resolution has become law, he is then nearly 66 years of age and he would apply for his benefits.

He would not be entitled to his benefits whereas the person who reached age 65 on the same day or same month he did, who applied for his benefits, maybe on the last day of December 1948, with the same kind of protection, in exactly the same circumstances of employment, would have his benefits, simply because he established his eligibility prior to the effective date of this act.

The CHAIRMAN. Yes; but the House has decided; and so may the Senate, that the Supreme Court decision should be reviewed. We cannot forecast the final decision at this time. The Congress might well decide that we will go along with the interpretation of the Supreme Court. It may well decide that we would not. I doubt whether you would deny the jurisdiction of Congress to make its own decisions in the field.

Mr. CRUIKSHANK. Indeed not. As I see it, the Supreme Court simply has to interpret the applicability of the law and the intention of the law as far as they can as presently written.

The CHAIRMAN. I do not challenge that, but it would be completely within the power of Congress to accept the Supreme Court's determination, modify it, do away with it entirely, set up a new criterion of its own, and to adjust past inequities as it sees fit?

Mr. CRUIKSHANK. Quite so.

The CHAIRMAN. I do not think there is any presumption here that if this resolution is passed that that ends the matter. I can assure you that as far as this committee is concerned it does not end the matter. You have already referred to the council which is working so diligently on all of these problems and we want the benefit of the recommendations which may be coming from it. I may mention, for the benefit of those present, that Mr. Cruikshank is a member of that council and it is not to be assumed for one moment that this is a final determination of the matter and it is not to be assumed that Congress is not in a position if it accepts the Supreme Court ruling to make retroactive rulings.

Mr. CRUIKSHANK. I merely point out two things: That the present law does not preserve the status quo pending further action and I cite these illustrations to show the way in which it does not, in our opinion, preserve the status quo.

Secondly, that there would be a hiatus which, of course, could be corrected retroactively by future actions of the Congress. Of the 500,000 to 750,000 workers affected, about 4,000 to 6,000 will die during the current year and about one-third of them will leave surviving dependents—most of them children. From 2,500 to 3,750 (depending on whether the actual number affected is 500,000 or 750,000) of these per-

sons will reach age 65 during the current year. If House Joint Resolution 296 were to become law at the end of the first quarter of 1948 therefore the 1,000 to 1,500 of these persons who have died during that period would leave any dependents they might have either without benefits or with benefits materially reduced by the period of their engagement in the disputed activity. If this bill should become law, between 600 and 900 of these persons who, in this 3-month period, reached age 65 will find themselves without rights to retirement benefits or with their benefits reduced by the period in which they have been engaged in this type of employment.

Gentlemen, whatever else this proposed legislation does, it does not maintain the status quo.

The CHAIRMAN. May I not suggest, Mr. Cruikshank, that we are in much the same position as any matter is in process of appeal? The final appeal in congressional matters, matters which are not constitutional, is in the Congress of the United States, and we now have in effect an appeal from a decision of the Supreme Court to the United States Congress. We reach the same result by the status quo legislation as we do without legislation when you are in process of appeal to a final court, and this is the final court. I mean, the Congress is the final court.

Mr. CRUIKSHANK. I quite agree with that, Mr. Chairman. I should like to point out that, first, I am not objecting to the desirability of maintaining the status quo. I agree that that is desirable, but I should like to suggest that if we really wish to maintain the status quo, in view of the fact that there are two agencies involved here, two sets of interpretations involved here, that it can be done very simply, and that is by enacting section 1 of House Joint Resolution 296, but not section 2.

The CHAIRMAN. I want to say that I think the statistics which you are presenting here are very useful, and I want to say also that I think, although I would not ask you to agree with me, the basis for the estimate from 500,000 to 750,000 who would be put out of coverage by this so-called status quo legislation is fairly insubstantial, but it may be that the gentleman who testified before you will come up with something that has a little more, so to say, dependability in it.

Mr. CRUIKSHANK. Possibly so. We have relied on the general sources of information with this.

The CHAIRMAN. I am not challenging your figures, but I think the evidence made quite clear this morning that there is not a great deal of reason to accept the validity of the 500,000 to 750,000 figure.

Mr. CRUIKSHANK. It would be our contention that the principle involved would be the same even if it should sink as low as half the figure that has been mentioned.

The CHAIRMAN. I agree.

Mr. CRUIKSHANK. What I should like to emphasize here is that what is proposed by this legislation is two things: One, to hold up these regulations that have been contemplated, but the second and more important thing from our point of view, from the point of view of the wage earners, is not to do anything which will deprive, even during a hiatus period, the people of their benefit rights.

Now, this resolution came up, I think, early in this year. Already 3 months have gone by. Claims have been adjudicated during that 3

months and have been adjudicated in the line with accepting their coverage. Claims are being paid. That, I suggest, can continue for another couple months without doing anybody any great harm.

The CHAIRMAN. I suggest that Congress is moving with extraordinary speed in that matter.

Mr. CRUIKSHANK. That is what we thought.

The CHAIRMAN. That is the way we want it. That certainly is the way I want it to be. I suggest that the basis of your argument rests on the theory of the correctness of the Supreme Court decision, which is now under review by Congress, and that your argument falls unless you assume the correctness of that decision. We simply say we would like to review it, and in the meantime, we will hold things in status quo.

Mr. CRUIKSHANK. That is right.

The CHAIRMAN. That is customary today when you are going through a review procedure.

Mr. CRUIKSHANK. That is right, Mr. Chairman, and we will support any legislation which we feel does maintain the status quo. Our objection can be said in a sentence. That is, that after careful study and review by our attorneys and others, that this does not maintain the status quo particularly on the benefit side. On the contribution side, it does maintain the status quo. I do no wish to be categorical or abrupt about it, but that is our carefully considered opinion.

The CHAIRMAN. Proceed, please.

Mr. CRUIKSHANK. It may be argued that the number of people thus affected is small. The principle is what is important. At a time when all progressive groups in the country are looking to Congress to broaden and extend the benefits of social insurance and in the light of the pledges made by both political parties, the people expect a liberalization of the social-security program, and it would be disastrous for Congress to take a backward step by adopting a legalistic and narrow interpretation of the employer-employee relationship.

The CHAIRMAN. It would be possible, would it not, for the Congress to adopt the common-law concept and at the same time legislate in other ways to bring about the coverage which is in dispute here?

Mr. CRUIKSHANK. I am sorry, I did not catch the first phrase.

The CHAIRMAN. It would be possible for the Congress to readopt the common-law definition of employer and employee and at the same time, by legislation, bring coverage to those people who are in these disputed areas.

Mr. CRUIKSHANK. Theoretically, it would be possible. I think the Congress would run into a great deal of difficulty in sharpening the definition of common law, so much so that it would almost have to depart from common law. It would have to write new law because I should like to point out that in this joint resolution, the seemingly simple return to common law is not at all simple because it is not at all sure just what the common-law concept is.

The CHAIRMAN. I think it is sure that the common-law concept is not the concept of the Supreme Court in the Silk case, because the Silk case definitely says so.

Mr. CRUIKSHANK. I think it is quite clear, Mr. Chairman, what it is not, but in applying the law, the Treasury and the Social Security Board would have to apply it in terms of what it is, and it is not sure what it is.

Now, it was brought out in the previous testimony, Mr. Chairman, that there would still, with these Treasury regulations, have to be interpretation in specific cases, and I should like to point out that if the simple concept or the simple reference to the common law, as contained in this resolution, were written into the law, there would be the same kind of administrative determination that would have to be made.

The CHAIRMAN. You have to make an administrative determination, but you have something that has been building up for many centuries that perhaps has more stability to it than the choices that would have to be made under this completely flexible and unweighted criterion set up by the Surpeme Court.

Mr. CRUIKSHANK. I suggest that that is open to question, because in the field of workmen's compensation where we run into this common-law concept, it has been building up and it has been snowballing and getting more complicated rather than less complicated.

The CHAIRMAN. I agree that there is complication in the common-law concept. I have not reached a final decision but I am wondering if there is not a great complication in the new criteria with which the Supreme Court has presented us.

Mr. CRUIKSHANK. That would be simply a matter of judgment in either case, Mr. Chairman.

The CHAIRMAN. I know that there is a lot of cogitation going on in Congress on giving some kind of coverage to self-employed. It might be possible that the Congress could reach a satisfactory solution of that. That would take care of a considerable part of these twilight-zone cases that we are discussing here now.

Mr. CRUIKSHANK. I think it would, Mr. Chairman. There would still be some administrative determinations that would have to be made.

The CHAIRMAN. I think that is true and it would depend somewhat on the sharpness of the congressional criteria.

Mr. CRUIKSHANK. That is right.

The CHAIRMAN. If we do like we did in the original Social Security Act, of course you leave an enormous field for opinion. I am merely making the point, Mr. Cruikshank, that we do not plunge into complete disaster by doing what is proposed here, because the Congress can affirm what the Supreme Court has laid down, it can modify it, it can reject it. If it accepts it, or whatever it does, it has the opportunity to do justice in the kind of cases that you are talking about.

You may proceed.

Mr. CRUIKSHANK. There is a constructive approach to the problem available to Congress. The Advisory Council on Social Security will within 2 or at the most 3 weeks submit an interim report on the old-age and survivors insurance part of the social-security program. This report will make recommendations on the matter of coverage. When these recommendations are enacted into law with such modifications as the Congress finds appropriate the problem will be solved. There may well remain administrative determinations affecting border-line types of employment, but they can be made without depriving any

worker of the basic protection which Congress plainly meant to make available. We therefore urge you to withhold action on this measure and to undertake instead a constructive program of extending and strengthening the social-security laws.

That completes my statement.

The CHAIRMAN. Thank you very much for your coming, Mr. Cruikshank.

Mr. CRUIKSHANK. Thank you, Mr. Chairman.

STATEMENT OF GEORGE L. RUSS, PRESIDENT OF THE INDUSTRIAL AND ORDINARY INSURANCE AGENTS COUNCIL, AFL, WASHINGTON, D. C.

What factors prompted the enactment of the social-security law?

Among the justifications for the enactment of the social-security law is the fact that a very large number of our people simply do not earn enough money during their active periods of life to put aside a sufficient amount to sustain them in their old age. No one would publicly contend that, say, factory workers ought not to be under the act, for these wage earners admittedly fit the classification of those who are unable to support themselves in old age out of their own savings.

Do insurance agents earn enough to safeguard their own old age?

A relatively small number of insurance brokers and agents earn large incomes, but the great majority of insurance agents earn not more than the average skilled and unskilled industrial worker. Not since the Temporary National Economic Committee's study on insurance matters have we been able to secure any sort of realistic figures as to the average earnings of insurance agents. Each individual insurance company can furnish information as to the earnings of its respective agents, but those are "paper" earnings, not taking into account the expenses involved in such things as the agent's cost of transportation, of taking prospects to lunch and other entertainment, of the need to appear well dressed and groomed.

In spite of the fact that the insurance agents' average earnings would be brought up quite considerably by the fact that a sprinkling of them earn large incomes, it is still reasonable to assume that the average insurance agent's net income is not above that of the average skilled and unskilled industrial worker. When it is considered that the insurance agent's calling demands expenditures for keeping up appearance not called for by the industrial worker, it becomes plain that the insurance agent is even less able to save for old age than is his industrial brother.

Even primitive social orders are known to have taken responsibility for the old and the infirm members of their community. The Social Security Act seems to be a recognition of our moral responsibility—to say nothing of economic advantages to all—to meet our obligation to those who simply did not earn enough during their productive period of life to maintain them in their old age.

Insurance agents simply do not earn enough to enable them to meet current obligations and at the same time to save enough for their old age. What better reason than this can anyone think of for placing these agents under the Social Security Act.

It might be said that some insurance companies have pension arrangements of their own for their respective agents, and that therefore there is no need to place these agents under the Social Security Act. The fact is that the insurance companies' pension arrangements are most modest as far as the average agent is concerned and would not in itself provide the average agent with even food and shelter in his old age. Moreover, if agents should be excluded from Social Security Act on the ground that the company employing them provides a pension plan, then all employees under a private pension plan would be considered ineligible as far as the Social Security Act is concerned.

It would seem that the most justifiable and realistic yardstick to use in determining one's eligibility to the benefits of the Social Security Act, would be a consideration of whether one's earnings are sufficient to meet the current cost of living and at the same time enabling one to save a little for old age. That, it seems, would be an honest way to determine eligibility.

However, we know that sometimes the reality of a situation is obscured by seemingly valid arguments and contentions, until the unreality seems real and the reality unreal. In the case of insurance agents, for instance, it was some-

times argued that the fact that an insurance agent is paid on a commission basis rather than on a wage or salary basis makes him ineligible under the Social Security Act. The fact is, however, that an insurance agent cannot save more money for old age out of a $50-a-week income just because he made that $50 on a commission basis than he would be able to save if he made that same amount, $50 on a wage or salary basis.

The grocer nor the landlord ask the insurance agent whether he earned his money on a commission or salary basis for they do not give him more for his dollar just because he earns those dollars on a commission basis. The point is this: If a man's income is insufficient to enable him to save for old age, and if he works for some employer, that man ought to be under social security. Whether the earnings are reckoned on a commission or wage basis is beside the point. It is the income that matters and not the manner in which the income is computed.

Another frequently used argument for excluding insurance agents from the Social Security Act, and one that many indifferent people fall for, is the contention that an insurance agent is really an "independent contractor"; that no employer-employee relationship exists between the agent and the insurance company whose coverage he sells. Such an argument, it seems to us is again aimed to hide the reality of the situation.

An "independent contractor" it seems reasonable to suppose, is a person who buys commodities or services wherever he can, at whatever price he and the sellers can agree upon, and, in turn, sell those commodities wherever he finds a market for them. He can sell at a profit if he can get it, and he can sell at cost if he sees fit to do so, and he can sell at a loss, if in his opinion it is desirable to do so at a given time because of change in market conditions. Above all, he is the sole judge as to choice of his buyers. If he wishes to sell his services or commodities to a given buyer there is no one to tell him that he cannot do so. The independent contractor, it can be said, buys and sells. When he buys the commodity or service, it becomes his property to sell or to give away as he sees fit.

No matter how lively one's imagination may be he would be hard put to fit an insurance salesman into the category of an "independent contractor." An insurance agent does not buy an insurance policy from an insurance company and then turn around and sell it to a prospective policyholder. The fact is, an insurance agent never sells anything of his own, nor does he assume any risk as an insurer. The agent is an intermediary between the applicant for insurance and the insurer, the company.

The agent has no part in drawing up a contract of insurance. The insurance company, in accordance with law and company practice, determines as to what clauses and provisions an insurance policy is to contain. The company has the final say in determining whether an applicant for insurance is accepted or declined. An agent may be ever so eager to procure a policy of insurance for an applicant, but when the company refuses to accept the applicant, or his property, there is nothing that the agent can do to alter the act of nonacceptance by the company. The insurance company then has the final choice of the insurance buyer. The company determines the amount of premium to be paid, the mode, place, and time of payment. In a word, the insurance company fully and completely controls that which the insurance agent sells. He has absolutely no control over the insurance policy that he sells. He can only sell to those who are acceptable to the company, and at a price and under conditions determined by the insurance company. Where, then, does the agent's independence come in?

It would seem plain that, by complete control of the insurance policy that an insurance agent sells, the insurance companies thereby also have full and complete control of those who sell those insurance policies--the insurance agent.

The CHAIRMAN. We will meet here at 2 o'clock.

(Whereupon, at 12:40 p. m., a recess was taken until 2 p. m. of the same day.)

AFTERNOON SESSION

(The committee reconvened at 2 p. m., upon the expiration of the noon recess.)

The CHAIRMAN. The meeting will come to order.

Mr. Neville.

STATEMENT OF JOHN F. NEVILLE, ASSOCIATE COUNSEL, NATIONAL ASSOCIATION OF INSURANCE AGENTS

The CHAIRMAN. Will you give your full name, address, and occupation to the reporter?

Mr. NEVILLE. My name is John F. Neville, associate counsel of the National Association of Insurance Agents. I am an attorney and my office is at 27 Williams Street, New York City.

In 1935 the National Association of Insurance Agents, a voluntary, nonprofit organization of local insurance agents, filed before the Social Security Board a memorandum and brief covering the independent operations of local insurance agents as not within the purview of the social-security laws.

That representation has not been challenged since that year and such independent contractor status has always prevailed. Recently a proposed Treasury regulation, it is feared, may jeopardize this position. This statement is now filed in support of House Joint Resolution 296 and for the purpose of insisting on the continuation of that independent status; not to be interrupted by any contrary Treasury regulation.

The National Association of Insurance Agents, organized more than 50 years ago, represents approximately 100,000 insurance agents of fire, casualty, and surety insurance companies from every State. During all these years these agents have occupied in our economy the position of small, independent businessmen operating on their own individual account. Both before and since the origin of the Federal social-security laws and in respect thereto, these local agents have operated as independent contractors, wholly separated from any employer-employee relationship.

The work, duty, and obligation of local insurance agents is to act and operate in each local community respectively, as an intermediary between insurance companies assuming liability for insurance protection and the policy holders who purchase such protection through such local agents.

At no time have these local agents ever occupied the position of employees of insurance companies. This is true because each one, in nearly every case, represents several insurance companies and exercises complete freedom and judgment in placing the requirements of the public in a company of his own selection. It is rarely that any buyer of insurance ever directs an insurance agent to place his insurance protection in a given insurance company. The independent status of these insurance agents is recognized by insurance companies and by property owners for the reason that there is no direction given by anyone as to the form of the insurance coverage nor as to the company that shall assume the liability protection.

It is understandable, therefore, that the whole body of local insurance agents (fire, casualty, and surety) is vitally concerned about any suggestion or challenge to have this clearly defined independent status upset or abrogated and an employer-employee relationship substituted.

The CHAIRMAN. Did you hear the testimony of Mr. DeWind this morning?

Mr. NEVILLE. Yes, sir.

The CHAIRMAN. Did it indicate to your mind that they proposed to upset that relationship?

Mr. NEVILLE. Mr. Chairman, one thought came to mind. In the statement of the gentleman from the Treasury Department there was a statement that went something like this: That an agent or a broker who had a well organized force would not be disturbed. It would indicate to me that there would be made a distinction between a large and a small agent, which of course, has nothing to do with the relationship of the companies.

The CHAIRMAN. Go ahead, please.

Mr. NEVILLE. The insurance business, insofar as local agents are concerned, does not lend itself to any such employer-employee relationship. There is no direction ever given to the agent by anyone as to how he shall work, what he shall do, where he shall operate, or what results are to be accomplished. The very livelihood of an insurance agent and the good will he constantly maintains in the business in which he is engaged, in the community in which he resides, depend upon the knowledge and efficiency he displays as an independent operator.

A simple statement concerning the work of a local insurance agent is contained in volume I, page 11 of the Restatement of the Law of Agency, by the American Law Institute as follows:

(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

That definition exactly fits the acts, operations, and work of a local insurance agent everywhere in this country.

It is understood that this representation is not intended to nor does it apply to the relationship existing between a local insurance agent and his clerical office help who are always the employees of such a local agent. The relationship here discussed is that existing between local agents and the insurance companies in whose behalf they operate.

Therefore, the National Association of Insurance Agents is strongly favorable to, and impressed with the necessity of the passage of House Joint Resolution 296. This is not only for the purpose of preserving the position its members have so long occupied in the economy of the Nation, but also to avoid much confusion that is bound to arise if that status shall now be disturbed.

Mr. Chairman, separate and apart from the prepared statement, I have another comment that I would like to make with your permission.

The CHAIRMAN. Go ahead.

Mr. NEVILLE. We have no objection to the extension of social-security coverages to any other group or groups which Congress in its wisdom should determine that they should have the benefits under the Social Security Act.

It is my understanding that both branches of the Congress have established committees to look into the entire social-security structure with the specific purpose in mind of broadening social-security coverages. We feel very strongly that the determination as to who is to be considered an employee under social-security laws is the prerogative of the Congress and that such determination should not be made by any directive or regulation issuing from a Government department or bureau.

The CHAIRMAN. Thank you very much.
Mr. NEVILLE. Thank you, Mr. Chairman, for the time.
The CHAIRMAN. Mr. Searls.

STATEMENT OF CARROLL SEARLS, ATTORNEY AT LAW, MEMBER OF THE TAX COMMITTEE OF THE AMERICAN MINING CONGRESS

The CHAIRMAN. Will you give your name, education, and occupation to the reporter?

Mr. SEARLS. My name is Carroll Searls. My residence is New Rochelle, N. Y. I am an attorney at law, general counsel for the Newmont Mining Corp., of 14 Wall Street, New York City. I am a member of the tax committee of the American Mining Congress and am appearing here as its representative.

I am also vice president and director of Empire Star Mines Co., Ltd., an affiliated company operating the North Star and Empire mines in Grass Valley mining district, California.

The resolution now before your committee is of serious importance to the mining industry, particularly in the older districts where leasers, as they are called, provide a notable part of total production and employment for a number of men. The use of the leasing system is widespread and prevails throughout all of the districts in the Rocky Mountain region, including Colorado, Utah, Idaho, California, Nevada, and Arizona, where it provides a substantial contribution to the mineral production of the country.

The system of mine leasing has been in use for many years in the Grass Valley district, California, where it was introduced by miners from Cornwall. It was used long prior to the current social-security legislation, and, while discontinued for a time when gold mining was closed by limitation order designated as No. L-208, it has been restored and since 1946 has been expanded to provide most of the production at the Empire and North Star mines in Grass Valley, Calif. These properties would not now be in operation were it not for the leasing system.

The chart presented herewith shows lessee production under this system during 1947 and the first 2 months of 1948. From this it will be noted that the total value of the ore has steadily increased, as well as the number of shifts worked. The average income per shift of the lessee has likewise steadily increased until now it is approximately $15 per day for each shift worked.

This payment is substantially in excess of the current rate for miners prevailing in the district, and constitutes a reward to the leasers for their efforts and skill, and at the same time makes possible work on the mining property which would otherwise of necessity be suspended.

The chart shows that while the tons of ore per shift of lessee is limited to even less than 1 ton per shift, the average value per ton is close to $50 per ton, which is likewise substantially in excess of the average value per ton of ore produced on company account, attesting further to the skill of the miners in producing clean and selected ore.

If the rule making proposed by the Bureau of Internal Revenue were placed in effect, such mining leasers would be included within the employer-employee relationship and they would not only be sub-

jected to the social-security taxes, both State and Federal, but would likewise soon find themselves included within the provisions of the National Labor Relations Act and the National Labor-Management Relations Act or regulations thereunder, and subject to contracts negotiated by unions. This would put an end to the independence of leasers, without which the system cannot prevail.

I believe that the resolution here under consideration should be adopted because I believe that the status of mining leasers long recognized as independent contractors should be maintained as such, and that the Bureau of Internal Revenue should not, nor should any other bureau, be allowed to establish by regulation what the courts have repeatedly held has not been enacted by Congress. In *Empire Star Mines Company, Limited* v. *Anglim* (129 Fed. 2d, 914 (C. A. A. 9, 1942)) the court held that mining leasers were independent contractors and not employees of the leaser for Federal unemployment-tax purposes.

That was the decision of the United States Circuit Court of Appeals of the Ninth Circuit.

In *Empire Star Mines Company, Limited*, v. *California Employment Commission* (168 P. (2d) 686 (1946)), the Supreme Court of the State of California reached the same conclusion.

It is of the utmost importance to continue the system of mine leasing under which leasers, as independent contractors, are able to pit their skill against the costs of mining, in the hope of procuring exceptional reward. As the United States circuit court of appeals said in the Anglim case:

> The typical leaser is the resourceful miner who prefers the speculative reward along with the risks of operating on his own account. There was in the practice here no element of calculated tax avoidance. The taxpayer's leasing program was inaugurated years before the Social Security Act was placed on the books. We entertain no doubt that these leasers should be classed as independent contractors.

The CHAIRMAN. It was inaugurated years before we ever had an income tax.

Mr. SEARLS. It was inaugurated prior to the days of Richard Coeur de Lion. It was in the Stannaries Charter adopted in the year 1201 A. D., because in that charter the rights which were then ancient, were recognized and continued. The Cornish miners operating for tin on Cornwall used what they called, and still call, tribute.

They then prevailed in having recognized their right to continue to work mines for their own account, yielding and paying a tribute to the owners, and that custom has been brought down through the ages to the mines of this country, through the Cornish miners who were brought to each district and it has been successful because the Cornish miners themselves have been talented in following ore.

I could give an illustration where one of the leading mines closed for many years, reopened under ample capital, with skilled engineers, and they failed to find the ore. The mine was about to be closed. The engineer in charge became later the director of School of Mines at the University of Nevada, but still with all the capital and all the skill they did not make a success of that mine until the Cornish miners were put in there on a leasing system where they were allowed to mine for their own account as independent contractors and within 3 months'

time they had located ore, and ever since that mine has been one of the successful mines of the district, employing 1,000 men.

The court continued:

> We are not unmindful of the beneficent purposes of the act, but the extension of its benefits to wider fields is not the business of the courts.

Nor in my opinion, is it the business of the Bureau of Internal Revenue.

The leasing system as presently conducted throughout the mining regions of the West constitutes one of the last resorts for small mining business in the mining indutry.

It is possible for a man possessed of skill and energy to "make a stake" on a lease through his own efforts and with little capital. At the same time, it provides not only a reward for skill and diligence, but also makes possible the working of marginal deposits that might otherwise be abandoned. Time and again, efforts of the leasers have led the discovery of new ore bodies, some of which have made important contributions to the mineral wealth of the country. Any regulations which tend to limit or restrict such a well-established, important, and productive system constitute a threat to the welfare of the industry.

I would like to add also that the efforts of the leasers make avail- to the industry ore that would otherwise never be developed from the outlying portions of existing mines. Areas in which it is not possible for mining companies to boss or supervise leases are granted to independent skilled miners who produce from those areas and thus add substantial quantities to the minerals so necessary for our national defense.

Thank you very much.

The CHAIRMAN. Would you mind describing some of the relations of the lessee to the owner?

Mr. SEARLS. Yes. In each case the lessee selected for his skill and diligence as a miner is allocated a certain block of ground defined such as limited between two levels and two raises on a mine. He is allowed to conduct all of his own development, excavation and mining activities as his own judgment may direct. The mine exercises no supervision over him.

He usually selects about half a dozen partners. Occasionally they employ men themselves on day's pay.

The only supervision or the only checking up done by the management is to insure that safety regulations are complied with.

The CHAIRMAN. And that good mining practice is followed?

Mr. SEARLS. That good mining practice is followed.

We have as many as 30 separate leases working out in the North Star and Empire mines in Grass Valley. We make certain that they carry their workmen's compensation insurance. Each leaser carries his own. They employ new partners or additional laborers and we know about that additional employment only at the end of the month when they report the time sheets for workmen's compensation purposes.

The CHAIRMAN. Do you guarantee them any minimum returns?

Mr. SEARLS. No.

The CHAIRMAN. Do you have them on any kind of salary arrangement?

Mr. SEARLS. Not at all.

The CHAIRMAN. Do you supply them with their tools?

Mr. SEARLS. The written contract provides that we supply machine drills and we sharpen the steel and picks that are used by the men. We also provide compressed air and power, but if they require slushers or hoists or things of that character for local operation they provide that themselves.

They have to deliver their ore at the point of delivery within a certain schedule in order to conform with the other uses of the shaft by other leasers.

But aside from those timing regulations the company has no control over their conduct, whether they work or not, or whether they do two shifts per day or any other way in which the work is conducted.

The CHAIRMAN. Within the limits then of maintaining safety and maintaining good mining practice, you exercise no supervision at all over the man?

Mr. SEARLS. That is correct, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Searls.

Mr. SEARLS. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Frank Donner.

STATEMENT OF FRANK DONNER, ASSISTANT GENERAL COUNSEL OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, D. C.

The CHAIRMAN. We are glad to have you. Will you give your name, residence, and occupation to the reporter?

Mr. DONNER. My name is Frank Donner; I am assistant general counsel of the Congress of Industrial Organizations, which is located at 718 Jackson Place, Washington, D. C.

I should like to present the views of the Congress of Industrial Organizations in opposition to House Joint Resolution 296.

This proposed resolution would amend the tax sections of the Internal Revenue Code and the benefit sections of the Social Security Act so as to deny coverage to all those who are not under "common law rules" in an employer-employee relationship. The proposed resolution is designed to have the same effect for tax purposes as if included in the Internal Revenue Code on February 10, 1939, the date of the code's enactment, and for benefit purposes as if included in the original Social Security Act of 1935.

At a time when the expansion of social-security benefits is a universally agreed-upon objective in the public interest, this joint resolution would severely limit social-security coverage.

Experts in the field, as well as both political parties, have committed themselves to an enlargement of our social-security program. In 1944 the Republican platform pledged "extension of existing old-age insurance and unemployment-insurance systems to all employees not already covered."

The CHAIRMAN. Did it pledge such extension by extending the interpretation of the word "employee"?

Mr. DONNER. It was not specified just how that extension would be implemented, sir.

The CHAIRMAN. So that any method on which the Congress decided to achieve the objective would meet the pledge?

Mr. DONNER. That is correct.

The CHAIRMAN. Go ahead, please.

Mr. DONNER. House Joint Resolution 296 would, it has been estimated, retract social-security coverage from some one-half or three-quarters of a million people. These individuals include outside salesmen in the manufacturing and wholesale trades, insurance salesmen, door-to-door salesmen, owner-operators of leased trucks, industrial home workers, entertainers, taxicab operators, loggers, oil-plant operators, journeyman tailors, bulk oil station operators. Members of these groups and their dependents would be denied the social-security coverage to which they are now entitled.

But these individuals are among the most underprivileged in our society. They fall within the marginal groups who peculiarly face the risks of wage losses due to unemployment, premature death, and old age. These individuals and their families face all of the risks which social-security legislation was designed to alleviate.

The proposed resolution is justified on the ground that it will "maintain the status quo." It should be pointed out that the proposed resolution would not maintain the status quo but would change the law as pronounced by the Supreme Court. It is the function of the courts to interpret the scope and meaning of legislation. And in this case the Supreme Court has held that the Social Security Act and the Internal Revenue Code are not limited in employment coverage to the common law master and servant definition in its strictest sense It is, of course, axiomatic that the Supreme Court speaks with final authority on the meaning of a Federal law. The Supreme Court has spoken and this legislation would not preserve the status quo but change it. It is the peculiar function of legislation to change the status quo.

The CHAIRMAN. You would not deny the right of the Congress to review the decisions of the Supreme Court?

Mr. DONNER. If you are asking me whether Congress has the power to change the law, of course I would agree with you that they have the power. They have the power to abolish the whole social-security system but I do quarrel with the term "maintain the status quo."

The CHAIRMAN. Your theory that this does not maintain the status quo?

Mr. DONNER. Yes.

The CHAIRMAN. And stays the operation of the Supreme Court decision on the theory that the Congress is reviewing the Supreme Court decision?

Mr. DONNER. Normally, under our system of Government, as I understand it, the purpose of legislation is to change the status quo. The function of the courts and the whole process of judicial interpretation is to clarify the status quo. So that the act of legislating is, to my mind, a change in the status quo in this field.

The CHAIRMAN. I quite agree with you.

Mr. DONNER. But the question is whether the Congress in its power to review the decision of the Supreme Court in its own field is warranted in staying new interpretations pending its own decision.

The CHAIRMAN. Now the courts themselves do that in successive processes of review.

Mr. DONNER. It is true that the high court of Parliament in England was part of the judicial system, but I do not think under our system that Congress is a court.

The CHAIRMAN. Congress has the complete power to review any decision of the Supreme Court in its own field. Once you concede we have the right to legislate in this field, we have a right to review any Supreme Court decision and accept it or reject it or do as we please with it.

Mr. DONNER. To my way of thinking that is not an appellate function. You are changing the status quo when you legislate.

The CHAIRMAN. We maintain the status quo until we complete our review of the decision.

Mr. DONNER. I think we are quarreling about labels.

The CHAIRMAN. There is no label. You maintain the satus quo as you go up in the courts and now the Congress has clearly indicated it wishes to review the United States Supreme Court decision.

Mr. DONNER. Let me press that one point further. Does one Congress have the power to interpret the intention of an earlier Congress as a court?

The CHAIRMAN. Not as a court, but as a Congress.

Mr. DONNER. That is the point I am making.

The CHAIRMAN. That is inherent in the power of the Congress.

Mr. DONNER. That is correct, but the Supreme Court represents the supreme law of the land and when they have interpreted the statute, presumably that is what it means.

The CHAIRMAN. It represents the supreme law of the land until Congress overturns it in a field in which Congress can overturn it.

Mr. DONNER. But it changes the status quo.

The CHAIRMAN. It changes the status quo just as the Supreme Court decision changes the status quo.

Mr. DONNER. I do not agree that the Supreme Court decision changes the status quo. I think it is useful to point out that in a three-way divided court this decision is remarkable because all of the judges agreed that this was the appropriate test. There was a three-way split but it was only on the propriety of the test. There was a unanimous agreement that this was the appropriate test.

The CHAIRMAN. I agree with you on the merit of having undivided opinions, but sometimes a divided opinion is meritorious because in that way all of the judges are not wrong.

Mr. DONNER. I of course do not agree with that.

Moreover, it should be pointed out to the committee that on the benefit side as well as on the tax side the status quo is not what this proposed resolution assumes it to be.

This proposed resolution would make the common-law control test the dominant or exclusive test in determining the employment relationship but, even before the Supreme Court decisions in June of 1947, many courts in applying a common-law test came to approximately the same result as the Supreme Court did in the Silk case.

I think that is very important to point out, Senator, because we assume there is a rigid dichotomy between what the Supreme Court did and what the common law is and I do not think the case supports that kind of distinction.

The CHAIRMAN. You were here this morning when we mentioned that the Congress did not accept the philosophy of the Supreme Court in the Silk case when it adopted the Taft-Hartley Act?

Mr. DONNER. I am going to address myself to that later on because I think it is reasonably important.

What this proposed resolution does is apparently to elevate to a statutory level that portion of the status quo which applies the most stringent tort theories of liability to employment relationship.

It would be serious enough if the proposed resolution were confined in its application to the elimination of coverage in the area described above.

However, objections to the proposal must recognize the enormous opportunity which it opens up for evasion. If the proposal is enacted there can be no question that there will be widespread attempt to revitalize evasion devices which have been all to common in this area.

Once again we will be confronted with situations in which employers renounce the right of control. We will witness the spread of plans under which salesmen are forced to accept a status which would deny them coverage under the revised law. We fear the revival of practices under which barber chairs are leased to individual barbers in order to escape the obligations of the law.

Now, Senator, this is an extremely important danger to my mind that is posed by this resolution. We have encountered situations, for example, where an employer has separated an employee by chicken wire from the rest of the employees and converted him into an independent contractor, where a barber chair has been leased in an obviously artificial attempt to circumvent the obligations of the law.

The CHAIRMAN. If in substance there is that kind of evasion it ought not to be. Now the preceding witness mentioned the system of leasing mines. It often happens that in one mine you will have men frequently employed by the mine owner and along some other drift you will have a lessee. They are not even separated by chicken wire but their rights and obligations are distinctly separated by the type of work they are doing and the circumstances under which they are doing it.

Mr. DONNER. I have my own opinion about mining leases, but I will not go into that.

Let me point out one thing, that in this field motive is immaterial, if in fact a common-law relationship exists. Courts are impervious to the fact that this was done for one particular motive, as they should be impervious. So the fact that this is done to circumvent the law does not make any difference and the fact that it is essentially an artificial economic relationship does not make any difference.

As long as the test is met on the controls of doing the work, that man is not covered although someone at his side might be covered.

The CHAIRMAN. We are not in disagreement as to evasion.

Mr. DONNER. The thing that troubles me, and I think the thing that troubles a lot of employers who are not present here today, is that it places the employer who has a social conscience at an economic disadvantage. The employer who wants to run his business without going into all of these "monkey shines," who recognizes he is dealing with employees and has responsibilities toward them, is placed at an economic disadvantage as a result of the strict test, because a strict

test invites evasion, and I think it is something that the committee should bear in mind because it is a real evil.

Now let us get into this business of the common-law test. In my opinion, strict common-law tests are not an appropriate guide in determining the employment relationship for social-security purposes. It is apparent from the House committee report that it was actually the purpose of House Joint Resolution 296 to revive the "exclusive control" or tort test in this field.

Such a test might be appropriate to a situation at common law where one person without fault may have to answer for an injury done by another. The purpose of the control test was to mitigate an individual's liability in tort under principles of respondeat superior by confining such liability to relationships where complete control existed. But such strict tests have no meaning in the context of social security. Unemployment and want may strike just as readily and cause just the same public burdens whether or not an employer retains full control over the manner and means of doing the work.

The basic justification for placing the burden of social security taxes on the employer is that he uses the labor of others for his own profit and not the fact that we may or may not choose to retain complete control over the means and manner of doing the work.

Want and insecurity are not analogous to torts, liability for which may be averted by the manner of the "master's" direction, and the constant subservience of the "servant" to the master's control. Wage losses due to unemployment, old age, and premature death strike all of those who are economically dependent upon an employer for a livelihood. If the termination of the arrangement under which services are performed would result in the wage losses, then we are dealing with an employment relationship no matter what label the restrictive common-law tests apply to it.

The CHAIRMAN. You are aware of the fact that the Congress is considering very substantial increases in coverage?

Mr. DONNER. Yes, sir.

The CHAIRMAN. It is considering how to handle the independent employee problem?

Mr. DONNER. I have a section in my statement where I deal with the alternative.

The CHAIRMAN. All right.

Mr. DONNER. Moreover, as the lawyers on this committee are aware, the philosophy and the principles of the common law are not so inflexible as to find an employment relationship only where the basis for tort liability would exist. Common-law courts still have the power to mold the common law to changing situations and, in contrast to the resolution, would not hesitate to substitute a realistic definition of employment for rules fashioned for purposes of vicarious liability.

The resolution assumes that the decision in the Silk case is necessarily inconsistent with an enlightened common-law interpretation. But common-law courts have frequently stressed the fact that narrow tests of control by no means determine the limits of the common-law definition of employment. As I have already pointed out, even before the Silk case, courts applying a so-called common-law standard interpreted social-security coverage broadly in order to effectuate its remedial objectives. And, if the proposed resolution were taken to affirm decisions such as these and to give them uniform application,

the coverage of the social-security system would not be greatly different from that indicated by the Supreme Court.

A common-law standard, moreover, is both vague and lacking in uniformity. One familiar with this field will readily recognize that there is no single common-law standard for determining coverage.

The CHAIRMAN. Then there ought to be no objection to the resolution.

Mr. DONNER. But, Mr. Chairman, what the resolution does is to take the most restrictive common-law test and say that is the test.

The CHAIRMAN. You now lay down the proposition that the courts can do as they please anyhow?

Mr. DONNER. If we have a test, why not have a complete test? Why not have the Supreme Court test?

The CHAIRMAN. I think we have developed this morning that is far from a clear test.

Mr. DONNER. Let me say this. I am going into the subject of vagueness. I submit that, in contrast to the standard laid down in the Silk cose, the common-law test is a combination of roller coaster, escalator, elevator, and what have you. There is no common-law test.

The CHAIRMAN. It is a combination of many things that might be described that way over many hundreds of years. Probably it has much error in it, but it has evolved, as all our common law has evolved, into a rule which is variously interpreted by various judges.

Mr. DONNER. Senator, I am confident if you looked at the common-law test as applied in the States, you would find one court will come to one result and another court will come to another result with respect to the same economic facts.

The CHAIRMAN. You saw the gentleman from the Government this morning do the same thing in respect to half a dozen examples about which we queried him.

Mr. DONNER. I do not agree with you. I think he showed that the test was a clear test and a good guide.

A common-law standard is both vague and lacking in uniformity. One familiar with this field will readily recognize that there is no single common-law standard for determining coverages.

Even in those courts which purport to apply the control test, there are a bewildering number of irreconcilable decisions. And even within a single State one finds inconsistent decisions on who is an employee at common law. Some cases emphasize the right to control the details of the work; others are content if there is a general right of control; while some find in the right to terminate the relationship an implied power of control. Thus, the common-law test would not provide either taxpayers, workers, administrators, or courts with a definite rule.

In contrast, the simple, realistic test laid down by the Supreme Court affords a far greater measure of certainty of definition than that laid down in the proposal.

Moreover, the vagueness of the common-law test will produce a disturbing lack of uniformity in an area where uniformity is most desirable.

The CHAIRMAN. There is quite a little flexibility in the resolution. The words are "usual common-law rule." That gives you quite a

little elbowroom. If not, then under your argument you have definiteness.

Mr. DONNER. Under the common law.

The CHAIRMAN. You say that does not give flexibility. If it does not give flexibility, then it connotes definiteness. If it connotes definiteness, you have reversed the theme of your argument.

Mr. DONNER. No, sir. I said that the common-law test does not give uniformity or definiteness because the common-law test is (*a*) vague and (*b*) interpreted differently in our various districts because it is vague.

The CHAIRMAN. It gives elbowroom for development.

Mr. DONNER. On the contrary, it gives elbowroom for confusion, and no one knows where he stands.

The CHAIRMAN. There seems to have been enough clarification for us to suggest the inclusion in coverage of 500,000 to 750,000 people who previously had been excluded.

Mr. DONNER. That is correct.

The CHAIRMAN. So there was a practical exclusion rule in effect prior to the Supreme Court decision, and your contention is that there is now a practical inclusion rule under the Supreme Court decision, and my contention is that the Congress should review the whole subject and reach its own decision.

Mr. DONNER. I am sure it will, but I still say that the Supreme Court is (*a*) clearer than the common-law test and (*b*) more conducive to uniformity.

The common law as applied in the Federal court is, of course, that of the State in which it is sitting. But the common law in one State as to who is an employee may not be the same as the common law in another State. Our experience in the social-security field with States applying the same tests indicates a wide diversity of conclusions with regard to the coverage of similarly situated individuals, such as taxicab drivers, bulk-oil station operators, and so forth.

The CHAIRMAN. The diversity often works to the advantage of the employee.

Mr. DONNER. You mean he can congratulate himself that if he were in another State he would be worse off?

The CHAIRMAN. He can congratulate himself that he found a favorable decision, whereas other qualified competent jurisdictions would have rendered an unfavorable decision.

Mr. DONNER. Enough of this fencing. Will you not agree with me that it is important to have uniformity in this field?

The CHAIRMAN. I am not sure.

Mr. DONNER. Will you agree with me that it is more important to determine coverage on the basis of an economic relationship rather than on the place where you live?

The CHAIRMAN. Are you talking from the Federal standpoint?

Mr. DONNER. Yes.

The CHAIRMAN. From the Federal standpoint, I think there should be uniformity.

Mr. DONNER. I say under the common-law rule there is no Federal common law, that the Federal court interprets the common law as it is interpreted in the State.

The CHAIRMAN. It defines 48 different interpretations of it. I say sometimes that is to the advantage of the employee.

Mr. DONNER. Because he can be worse off?

The CHAIRMAN. The employer might figure he would be worse off in the same jurisdiction.

Mr. DONNER. It is to the disadvantage of the employer, because an employer in a liberal State which has a broad coverage concept is placed under an economic handicap because he is placed in competition with employers in States where you have narrow coverage.

The CHAIRMAN. You cannot make argument by calling something liberal or narrow. The point is to find a right criteria. Just call it a right criteria. You do not make weight by calling it narrow or liberal. That is an escape from criteria and an escape from argument.

Mr. DONNER. That may be, but when the courts said "liberal" they mean a broad interpretation. I am still deluded enough to believe that it is a good thing to have a broad interpretation, that it is a good thing to cover as many employees as possible. I may be wrong, but that is my point of view.

The CHAIRMAN. We are working to that end, and we are going to achieve it, in my opinion.

Mr. DONNER. Now we come to the Hearst case.

Both with respect to the vagueness of the common-law standard and its lack of uniformity the Supreme Court, in *National Labor Relations Board* v. *Hearst Publications* (322 U. S. 111), has spoken words which are well worth repeating:

> The argument assumes that there is some simple, uniform, and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other.
>
> Unfortunately, this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as the test for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling to the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application.
>
> Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.
>
> It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment, more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes.
>
> It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. (See, e. g., *Globe Grain & Milling Company* v. *Industrial Comm.* (98 Utah 36, 91 P. 2d, 512).) In short, the assumed simplicity and uniformity resulting from application of "common-law standards" does not exist.

Now you raised the question this morning about the persuasiveness of the change in the Taft-Hartley Act so as to define an employee to exclude an independent contractor—the persuasiveness of that legislative action in establishing the loss of vitality of the Hearst case to show congressional intent.

Let me say first that the Labor Board is now wrestling with the problem of what an independent contractor is under the Taft-Hartley Act because, as you know, an independent contractor does not mean anything; it is a trap; it is a legal conclusion of nonliability; it does not say anything; it does not define anything.

The CHAIRMAN. You now make the point that the courts wrestle with the problem, and, if the courts do not wrestle with it, you transfer the problem to the administrative agencies?

Mr. DONNER. The courts have wrestled with it, and I think they have come out with something.

The CHAIRMAN. All I am trying to say is that you do not get rid of your questions by transferring them from the courts to the administrative agency.

Mr. DONNER. I do not suggest that, but the Silk case is a decision of the court.

The CHAIRMAN. So you are sort of a purist, I gather, in trying to have things clear and automatic and clean cut, but you cannot achieve that by transferring issues to administrative agencies.

Mr. DONNER. Let me make one thing clear: There will never be a definition of "employee" that is written in stone and handed down from Mount Sinai—a definition that is automatically enforceable and understandable and leaves no room for doubt.

The CHAIRMAN. Do you not think that we could narrow the field of dispute?

Mr. DONNER. But I think that we can have a definition that defines, and certainly we want a definition that defines.

The CHAIRMAN. I am in favor of that.

Mr. DONNER. Also, we want a definition that defines realistically.

The CHAIRMAN. I am in favor of that.

I think basically there is very slight difference between us.

Mr. DONNER. Well, it is a big "slight."

I am very close to the Hearst case because I helped prepare the brief in the Hearst case.

The CHAIRMAN. You won it, too.

Mr. DONNER. Yes.

The CHAIRMAN. Then you lost in Congress.

Mr. DONNER. That disturbs me, too, because I think it is bad for Congress to reverse a decision of the Supreme Court.

The CHAIRMAN. Every lawyer thinks it is bad to have his decision reversed.

Mr. DONNER. We could have a discussion of that some day and start with the Portal-to-Portal Act about the dangers involved in the congressional reversal of court decisions; but, be that as it may, let us suppose that Congress did do this thing to the Hearst case.

Certainly, by reason of the fact that Congress thinks a certain kind of individual should not be protected in his right to self-organization and collective bargaining, it is hardly persuasive that you should maybe remove from those people the right to protect themselves against wage losses due to unemployment and old age.

The CHAIRMAN. That result does not follow, because, as I stated to you, we are now working on the problem to see how we can cover them.

Mr. DONNER. I am working on what happens if this resolution passes.

The CHAIRMAN. If this resolution passes, we will simply have time to work toward that objective, and we will stay the proceedings just as they do in court.

Mr. DONNER. Well, I do not agree with that.

If the proposed resolution were adopted, coverage would become dependent upon the state of the law in a particular locality. This would Balkanize our entire social-security system. Employees would enjoy benefits not on the basis of their economic relationships, but on the basis of the State in which they happen to live.

During the past few years and certainly since 1945, right after the Hearst case, there has been a distinct and observable elimination of the checkerboard results in the field of coverage produced by varying applications of local common-law concepts.

The recent Supreme Court decisions have been one important step in the steady drive toward uniformity.

The majority of the House committee has suggested that this resolution is justified because of the difficulty inherent in pay-roll-tax payments where unconventional relationships are involved. But the mere absence of a wage fund as such is no reason for denying coverage.

There are many individuals who are employees even at common law who do not have the same relationship to the employer as production workers or mill hands have. But no one could contend that the employer could relieve himself of the burden of social-security-tax payments, which, after all, are a part of the cost of doing business, because it is difficult or inconvenient to do so.

It is difficult to see why the financing of the social-security fund through a pay-roll tax requires, as the majority suggest, the elimination of existing tests and the substitution of a strict common-law control test.

The CHAIRMAN. That is the usual common-law test?

Mr. DONNER. Yes.

What does that mean?

The CHAIRMAN. Well, that gives you more elbow room. It is different from strict.

Mr. DONNER. I think it is one of the worst things that legislators can do; namely, to deliberately legislate ambiguity.

The CHAIRMAN. It gives you the same discretion, perhaps, as the administrative agencies are claiming under the proposed resolution.

Mr. DONNER. But the administrative agencies are under the watchful eye of Congress, you know.

The CHAIRMAN. I wish that were literally true.

Mr. DONNER. Finally, it is no justification for the resolution to suggest that it might be that such individuals will eventually be covered as self-employed individuals. In the first place, it is extremely problematical whether all of the existing social-security benefits can be applied to the self-employed. Moreover, it is universally agreed that to the extent that self-employed individuals are covered the amount of contribution will probably be higher for such personnel.

This would mean that even though a worker occupies the same economic position as his common-law counterpart, he will be forced to bear an excessive burden for social-security protection. This discrimination is indefensible.

The CHAIRMAN. That will depend on what kind of law we enact.

Mr. DONNER. Yes.

The CHAIRMAN. There are some suggestions that will eliminate that criticism.

Mr. DONNER. Yes.

Section 2 (b) of the resolution provides that the amendments to the benefit sections:

> * * * shall not have the effect of voiding any determination respecting eligibility for, or amount of, benefits of any individual * * * made prior to January 1, 1948, or of preventing any such determination so made from continuing to apply on or after January 1, 1948.

In other words, the test of whether benefits would be protected is whether a determination has been made. There is no guidance whatsoever as to what the meaning of the term "determination" is. It is not clear whether it means an official adjudication with respect to coverage or a determination that an individual is entitled to receive benefits.

Whatever the meaning of section 2 (b) is, it seems clear that under it two results will follow:

1. Certain individuals will continue to be covered by the social-security program despite the fact that similarly situated individuals with respect to whom no determination has been made will not be covered, and

2. The covered individuals, though entitled to accumulated wage credits and enjoying insurance benefits, will not be subject to the tax provisions of the law nor the reporting provisions.

In conclusion, because the proposed resolution improperly excludes from social-security coverage large groups of individuals who are peculiarly exposed to the risks which social-security legislation was designed to alleviate; because the proposed definition of "employee" is completely at odds with the realities of industrial life; because the definition lacks clear content and would promote confusion and diversity of interpretation; because it would place the employer who accepts the social responsibilities of his position at an economic disadvantage; because it would place a premium upon evasion and sharp practice. House Joint Resolution 296 should not be approved by this committee.

The CHAIRMAN. Thank you very much for coming.

Mr. DONNER. I enjoyed it very much.

The CHAIRMAN. Mr. Adler?

STATEMENT OF PHILIP ADLER, JR., PRESIDENT, AMERICAN HOSIERY MILLS, INDIANAPOLIS, IND.

The CHAIRMAN. Will you state your name, address, and occupation, to the reporter?

Mr. ADLER. My name is Philip Adler, Jr. I am president of the American Hosiery Mills, Indianapolis, Ind. Indianapolis is my home.

Our business is the manufacture and sale of women's hosiery, which hosiery is sold through some 12,000 salespeople, who call upon customers in homes, offices, places of business, and so forth.

Orders are taken by the salesperson and provision is made for the purchaser to pay to the salesperson her commission at the time the sale is made, which commission is retained by the salesperson.

The order is sent to Indianapolis, and shipped to the consumer for the balance, c. o. d.

Our business is conducted entirely by mail in every State of the Union. We have no personal contacts with the salesperson. Their activities are performed on the average of many miles away from the home office of our company. We have no branch offices.

Our salespeople employ a special skill in selling hosiery. Their success depends entirely upon their ability to determine what prospective customers they desire to call on, what methods they may use to increase their clientele, what means of advertising they may wish to employ, and so forth.

Our line is confined to women's hosiery and men's socks; we carry no other products.

When a salesperson calls upon a prospective customer she may become a logical prospect for merchandise other than ours—such as dresses, foundation garments, greeting cards, toiletries, and so forth, and the skill which our salesperson uses to get a hosiery order is the same kind of skill which she uses to get order for other products.

Since this is true, we encourage our salesperson to carry other merchandise in which their customers may be interested.

While prices to the consumer are suggested, as is also the salesperson's rate of commission, the salesperson is not under any compulsion either to sell at the suggested price, nor to collect the suggested commission. She may lower or increase either at her discretion. As a gesture to a friend, a salesperson may, and we believe often does, accept an order without collecting any commission.

Our salesperson is supplied with facts about our products, the fitting of the same, colors available, descriptions of various styles, and she also receives from time to time suggestions as to how she may promote the sale of our products.

But she is never under any compulsion to use any of these recommendations. In fact, our contact with the salesperson is of such a nature that we have no means by which we could exercise compulsion or control of any kind.

The commission which a salesperson may or may not received for taking an order never comes into our hands. Therefore, we cannot know its exact amount.

The CHAIRMAN. Is it not common practice in the case of an independent merchant, let us say a grocery merchant, to have representatives of the suppliers come around and show him how to arrange his windows; show him how to display his bread; show him how to increase his sales? Is that not a common practice?

Mr. ADLER. Yes, sir; that is quite common.

Many businesses resort to sales helps or dealer helps as they are called.

The CHAIRMAN. That in itself does not destroy the independence of the merchant?

Mr. ADLER. Certainly not. It is in the realm of advertising and sales promotion.

The salesperson may use her own car or a public conveyance to contact a customer, or she may make such contacts over the telephone, by mail, or while making a social call. She may travel long distances

into neighboring communities, or confine her business to her own neighborhood.

Our salesperson may choose to sell as many orders or as few orders as she pleases, or for which she has the disposition, time, or energy. She may suspend or resume her selling operations when and if she chooses. We have no control over the selling time which she may wish to put in.

The CHAIRMAN. Does she have to buy a kit bag?

Mr. ADLER. No, sir; that is supplied to her, but she has the option of buying other sales supplies which are helpful in promoting her business.

Our 12,000 salespeople are constantly changing their residences and they may or may not report to us promptly such changes of address. There are many instances where, because a salesperson has moved or is on vacation, we are completely out of touch with her for long periods of time.

The CHAIRMAN. Would it be practicable for you to keep the necessary contacts with these people to enable you to fill out intelligently the form which must be filled out in connection with social security?

Mr. ADLER. Not only would we have to keep in close contact with them, but they, in turn, would have to keep in close contact with us, because we have no way of knowing what money passes into their hands as a so-called commission or whether any money, in fact, passes into their hands.

The CHAIRMAN. So you would have to revolutionize the contact of your business to comply with the new regulations?

Mr. ADLER. Entirely.

Moreover, I make the point a little later that we doubt whether the sales person herself could properly indicate how much money passes into her hands and designate how much of that would be eligible to be allocated to the expense of her doing business.

Since these are the facts, it is evident that the situation of any sales person of ours is one of complete independence, and sales people have always considered themselves as independent in their own minds. No sales person has ever claimed to us that she considered herself as an employee for the purpose of securing social-security benefits.

We are at a loss to know how it would be within our power—no matter what expense we might be willing to undergo—to obtain accurate records on 12,000 or more individual sales people, because we have no way of knowing what any individual receives from the sale of our hosiery.

We do not know whether she raises or lowers the suggested commission, or whether she waives the commission entirely. We have no right to compel sales people to report to us, nor any way to check the accuracy of such reports if they were made.

A considerable percentage of our sales people would have difficulty even in preparing a properly informative report.

If a sales person carries lines other than ours, we have no way of knowing what portion of her business expenses are properly allocated to our line.

As a matter of fact, we seriously doubt the ability of the sales person properly to make this allocation herself.

Many elderly women sell the American Hosiery line. Some of these are receiving old-age assistance and they take orders to augment this

meager subsistence. If such a sales person is declared to be our employee and her income exceeds $14.99 per month, she thereby loses her right to old-age benefits under the law.

There is no such thing as unemployment of a sales person in this field unless it be strictly voluntary. If one of our sales people desires not to sell our hosiery, then hundreds of other opportunities are immediately available for her to sell other hosiery or other products in this field. Her economic success is entirely dependent upon her own efforts and choice.

The CHAIRMAN. Thank you very much, indeed, Mr. Adler, for coming.

Mr. ADLER. Thank you, sir, for the opportunity of being here.

The CHAIRMAN. Mr. Wallace E. Campbell.

STATEMENT OF WALLACE E. CAMPBELL, VICE PRESIDENT OF THE FULLER BRUSH CO., HARTFORD, CONN.

The CHAIRMAN. Will you give your name, address, and occupation to the reporter?

Mr. CAMPBELL. My name is Wallace E. Campbell. I am vice president of the Fuller Brush Co., of Hartford, Conn., which started in business in 1913.

I would like to lift one paragraph which I will read later in this very brief memorandum by stating that so far as the Fuller Brush Co. is concerned, we are very much in favor of the studies going on today which plan the extension of social security for the independent contractor or the self-employed.

We, however, hope that this is done as the result of congressional or legislative study rather than by judicial decision or departmental regulation or determination.

To continue with the memorandum, you will recognize me quicker when I tell you that my company, the Fuller Brush Co., sells its products to the Fuller Brush man, the gentleman who calls at your home periodically and supplies your wife with all kinds of brushes, toothbrushes, hair brushes, furniture brushes, and also brooms, wet and dry mops, polishes of all kinds; in other words, more than 51 varieties for use from cellar to attic and from head to foot.

When we started business, we believed that to get the business from the housewife we had to use the home-town businessman to get it. So we sold our goods to a local man residing in a town or city and he sold them to his customers, his friends, and acquaintances.

We gave him a territory within which he could sell our products, just like an automobile dealer sells autos. Instead of a Ford dealer, he was a Fuller dealer.

For over 35 years the housewives in the United States have dealt with the Fuller dealer, their home-town businessman. This is the way we operate today and it has proven successful.

I would like to interpolate here by stating that in the years 1906 to 1913, before our business was incorporated, Mr. Fuller, who is still active in the business and is chairman of our board, started to make brushes in the cellar of his sister's home in Summerville, Mass., nights, and going out and selling them during the day. He did that for over 6 years.

In the towns where he would go he would interest a man and turn a kit over to him and continue to the next town.

As a matter of personal history, I started selling Fuller brushes in 1916 to pay college expenses and when I got through college I decided I would stay in the business. So that I know pretty thoroughly the history of the business which I want to discuss very briefly.

The dealer buys from us at wholesale prices less recognized wholesale trade discounts.

He sells at his retail price. We do not know what his retail price is. We do not know to whom he sells. We do not know when he buys from us whether he is buying to refill his inventory or whether he is buying to fill orders which he has obtained from his customers.

If he gives credit to his customers and they do not pay him, it is his loss. We do not know anything about his credit losses, his expenses, his profits, or losses. He never reports anything to us. We must sell him goods for 1 year from the date of his contract. We have no control or supervision over him in any way, shape, or manner.

He may sell to whom he pleases, in the manner he desires, and at such time or times as he himself desires.

In short, we are wholesalers and he is a retailer.

Such individual is in no way restricted to sales of products produced by the Fuller Brush Co., but can and does sell other articles manufactured by other companies or other services. Some of such individuals have regular jobs and sell the company's products in their spare time. Some operate in their territory through their wives or other members of their families or other persons hired by them.

As a matter of fact, during the World War we had about 2,000 of the wives of GI's who went to war who continued to sell Fuller brushes in their territory for their husbands while they were in the armed forces.

Many of such individuals sell the products purchased by them at wholesale from the Fuller Brush Co. to clubs, stores, and other outlets at prices so determined by such individuals.

During the operation of the Office of Price Administration the Fuller Brush Co. filed no retail prices, but such prices were filed by each dealer or buyer to conform with his practice. The Fuller Brush Co., therefore, has no accurate data upon which it could possibly compute the profits of such dealer or buyer.

Under the form of doing business practiced by the Fuller Brush Co. there is no method by which the company could file a return with the Bureau of Internal Revenue for the purpose of showing the income of such dealer or buyer.

It would be impossible for the company to file such returns under oath so long as the company continues to do business in the present manner.

Under the company's present method of doing business it would be impossible to determine when tax payments should stop because there would be no available information as to when the $3,000 limit referred to in the Social Security Act would be reached by any one individual.

Both the Social Security Act by its terms, and the act requiring withholding of tax payments contemplate an amount of "wages" or "remuneration" to be in the hands of the company required to make such payments on behalf of individuals. Under the method of doing

business adopted by the Fuller Brush Co., it is impossible to withhold any amounts from such dealers or buyers because the company at no time has any funds in its hands due to such dealers or buyers.

The very word "withholding" contemplates that there is something that can be withheld from. It is not possible to withhold from nothing.

The utter impossibility of computation is further shown by the fact that at the present time there are approximately 7,500 dealers or buyers who have contracted with the Fuller Brush Co., Only slightly more than 5,000 of such dealers or buyers order from the company each week and the identity of this 5,000 varies from week to week.

What I have described, I believe, gives you the general relationship between our company and the dealers who sell our products at retail.

Now, let me deal a few minutes with the retroactive features of the proposed regulations. I might say that I am not a lawyer and what I am going to state now I think a lawyer would say is without prejudice either to the Government or our own company.

Our company had a ruling on October 22, 1937, from the Bureau of Internal Revenue that these dealers were not employees of the Fuller Brush Co. for Federal employment tax purposes.

On August 21, 1943, the Bureau of Internal Revenue revoked this ruling. This whole subject is now a matter of litigation in the courts.

Actually, when that ruling was revoked we were never called in, we were never given any reason for the same, and we had no conferences of any kind. We have paid under protest to the Bureau of Internal Revenue a token payment and are suing for recovery.

That is the litigation to which I refer.

If this complicated regulation applies to the Fuller Brush Co. and the dealers selling its products, it means that the Fuller Brush Co. would itself be liable for past taxes, for a period of approximately 5 years, not only for that portion of the tax which the employer would be supposed to pay out, but for that which the dealer would be supposed to pay, because, as I pointed out, we have no way of knowing what the dealers make or made, and we have no way of collecting any amounts from such dealers, even if they are still dealers.

Obviously, in nearly 5 years, there has been a great turn-over. Possibly some arbitrary formula could be used, but it would result in the company paying possibly over three-fourths of a million dollars.

As to the future, as distinguished from the retroactive features of the regulations, should it be established that the proposed regulations cover the company and the dealers, it would mean that we would have to change our entire method of doing business.

The dealers would have to become employees of the company and be put on either a salary or commission basis, which many would probably resist.

It would mean the setting up of elaborate personnel and of accounting records throughout the United States. Today, these dealers are not held to be employees of the company in any State in the Union.

But should we be forced to reorganize, we would incur expenses for workmen's compensation insurance as provided by the laws of the various States, public liability insurance, and withholding of income taxes.

It would be inevitable that the price of our products would increase, adding to the vicious inflation cycle.

Moreover, such a change could not be accomplished overnight. Thus, for some period the production of the company's products would have to be cut. The production jobs provided by the company would, therefore, be affected, and at the same time large numbers of individauls who are not dealers would be deprived of their present opportunity to make a substantial income.

Frankly, we cannot conceive that it was ever the intention of the Congress to force changes in the established and successful way of doing business by any company. Stability in the manner of doing business is a fundamental necessity for any company.

We are entirely in favor of granting independent contractors and self-employed persons like Fuller-brush dealers, the benefits of social security as self-employed. This, however, is a matter for legislation and not for administrative ruling, and it is a matter we understand Congress now has under consideration.

I might say I was quite surprised this morning to have the representative of the Treasury Department state that he knew of no plan that had ever been submitted for the coverage of the self-employed because in the spring of 1946 I heard Mr. Altmeyer recommend to the Committee on Ways and Means the coverage of the self-employed through Internal Revenue on the income-tax blanks. It is a very interesting system.

The CHAIRMAN. That has been kicked around since the beginning of social security.

Mr. CAMPBELL. I was quite surprised that comment was made this morning. We are thoroughly in favor of a plan for covering the self-employed.

It seems obvious to us that these proposed rules and regulations should be held in abeyance and that the Congress should have an opportunity to pass upon coverage by legislation and not force the economic impact upon businesses which would be occasioned by these complicated and ill-conceived regulations. Moreover, and, most important, Congress' ultimate decision by legislation as to who will be covered may be entirely different than the coverage provided by the proposed regulation in which event the confusion, possible prohibitive expenses, litigation, and reorganization occurring under the proposed regulations would have been in vain. This unnecessary burden would be obliterated by maintaining the status quo of the present regulations until Congress acts.

Therefore, the Fuller Brush Co. respectfully urge the adoption of this joint resolution.

The CHAIRMAN. Thank you very much, Mr. Campbell. We are glad you could come.

Mr. CAMPBELL. Thank you for the courtesies and I would welcome the opportunity of going before that distinguished committee at such time as possible for further discussion of that matter.

The CHAIRMAN. Let me suggest you get in touch with Mr. Stanley and he will tell you the rigmarole for getting in touch with the advisory council.

Mr. CAMPBELL. Having spent about 4 years in our own legislative office in Connecticut I know I have got to go through quite a routine. Thank you very much.

The CHAIRMAN. Mr. Marshall A. Wiley?

STATEMENT OF MARSHALL A. WILEY, ATTORNEY, APPEARING FOR MASON SHOE MANUFACTURING CO., CHIPPEWA FALLS, WIS.

The CHAIRMAN. Mr. Wiley, will you be seated, please. State your name, address, and occupation. We are very glad to have you here. Mr. Wiley is the son of our very fine Senator from Wisconsin, Senator Wiley.

Mr. WILEY. Mr. Chairman, my name is Marshall A. Wiley. I am attorney at law of Chippewa Falls, Wis. I am counsel for the Mason Shoe Manufacturing Co. of Chippewa Falls, and I am here on its behalf. I have a statement, which, with your permission, I will read.

The CHAIRMAN. Proceed, Mr. Wiley.

Mr. WILEY. The Mason Shoe Manufacturing Co. is engaged in shoe manufacturing and in direct-to-the-consumer selling. It is a small company, but it is important to the small city of Chippewa Falls, a city of 10,000 people. It is a stable industry. The total employees in Chippewa Falls are 175. Last year, the total volume of business of the company was approximately $2,000,000.

I would like to digress for a moment and mention that the company was founded in 1903. At that time, it was engaged in the manufacturing of shoes which it sold through jobbers. By 1923, in the depression years which followed the First World War, it found in very severe financial condition and it changed its method of operation so that it entered the direct selling field. It has continued in the direct selling field from that time to the present and I might say that it took it from 1923 to 1943 to eliminate its earned deficit and get over onto the black side of the ledger.

The company sells its products through salespersons it solicits by mail and by branch offices located in several of the principal cities. Last year over 16,000 persons sent in one or more orders for items appearing in the catalog. These salespersons have never been considered employees, in any sense, of the company. After the decision in the Silk case and in the related cases in 1947, I advised the company of the change in the rules for determining the status of an independent contractor for social-security-tax purposes; at the same time, however, I pointed out the facts of those cases and the decisions reached by the Supreme Court, and expressed my opinion that the status of the salespersons was considerably closer to the typically independent contractor status than was that of the truckers in the Silk and Grayvan cases.

I might point out that in both the Silk and Grayvan cases the truckers were held to be independent contractors by a majority of the Court. When the Commissioner of Internal Revenue published the proposed amendment to the regulations, it was apparent that the language, although frequently quoted verbatim from sentences in the Supreme Court decisions, went considerably beyond the results announced by the Court. One of the most objectionable features of the proposed amendment to the Mason Shoe Manufacturing Co. is that it means that the status of each one of the 16,000 salespersons may be questioned by a representative of the Bureau of Internal Revenue.

After the publication of the proposed amendment, the Mason Shoe Manufacturing Co. sent a lengthy letter to the Commissioner, reviewing its manner of operation and objecting to the adoption of the pro-

posed amendment. Thereafter, in a letter to Senator Wiley, the Commissioner closed with this statement:

> When the amended regulations become effective, it seems quite probable that upon the basis of the facts as disclosed by the files of this Bureau, it will be found that some or all of the agents of the company are employed for Federal tax purposes.

I would like to digress again and point out to the chairman that in that letter the Commissioner first referred to the letter written to him by the Company, so that he had the facts of operation before him, and then concluded with the statement that some or all would be found to be employees, and he says—

> on the basis of the fact as disclosed by the files of the Bureau.

I do not know to what he is referring. I have brought with me copies of all of the literature of the company. I have brought with me every fact which the company has in its possession relating to its relationship to the salesperson, and the substance of all of that information was previously given to the Commissioner.

This expression of opinion on the part of the Commissioner brought the Mason Shoe Manufacturing Co. to a full realization of the danger of the proposed amendment and of the necessity of actively engaging in the opposition to the adoption of the amendment.

It perhaps should suffice, in arguing in favor of House Joint Resolution 296, that in the Silk case, Mr. Justice Reed, speaking for the majority, stated:

> Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the act or amendments thereto.

The excellent report prepared by the Committee on Ways and Means of the House to accompany House Joint Resolution 296 reviews the history of the social-security legislation. This review makes it very clear that salesmen who are not employees in the legal sense were not intended by Congress to be covered by the Social Security Act.

In view of the announced scope of the proposed amendments to the regulation, I should like to go beyond the House report and, briefly summarizing the operation of this one company I represent, point out the impact upon the company of the extension by executive decree of Federal employment taxes to the salespersons handling the items of this company.

The Mason Shoe Manufacturing Co. is a manufacturing company engaged in direct-to-the-consumer selling. About 50 percent of its volume of sales is represented by its own production. The balance is purchases from other companies for resale under its trade names.

In 1923 the company entered the direct selling field. Since that time it has developed a demand for its products throughout the United States which it satisfies by recruiting house-to-house salesmen. The recruiting is done primarily by mail and through advertisements in national periodicals. The company also maintains branch offices in New York City, Chicago, Detroit, and Los Angeles, to obtain salesmen for the areas in which the offices are located.

I would like to elaborate on that by saying that those are purely offices to recruit personnel. No stock is maintained and all orders are filed directly from the home office. Those salesmen are treated exactly as salesmen who are recruited by mail.

The company advertises its products in national publications, but does no local advertising except in the Chippewa Falls area where it maintains a retail outlet. The salesman pays for any local advertising he chooses to do. He pays for any other expenses he incurs in carrying on his activities, such as car expense, postage, telephone, and other sales expenses. He can do as much or as little promotional activity as he chooses to do. He can maintain an office, or he can operate without an office. The company gives him no advances on commissions, and provides no drawing account and no expense account.

The salesman operates under his own name. He is given a certificate of identification by the company in the form of a card which recites that the name person—

is duly authorized by the Mason Shoe Manufacturing Co. to take orders for shoes and other merchandise and to collect the amount of the deposit, as specified in the company's regular catalog and sales literature. All orders are shipped by the company from Chippewa Falls, Wis., direct to the purchaser, c. o. d. for the balance due, plus the uniform postage fee. The company's guarantee of complete satisfaction is clearly set forth on the inside cover of the catalog. The salesman is instructed to give you a receipt for your deposit. This seal attests to the integrity of the company and its authorized sales persons.

And I have here such a certificate of identification which is the only one he has and is the only written evidence of contract between the salesperson and the company.

A salesman has no assigned territory; he may sell wherever he pleases. He has no quotas to meet, no reports to fill out. He is not required to follow up customer leads and is not penalized in any way by the company for his mistakes.

In 1947, approximately 16,000 persons throughout the United States sold one or more pairs of shoes or other articles in the catalog of the Mason Shoe Manufacturing Co. The 1947 sales disclose that the average yearly volume per salesperson was approximately $125, that is, gross, and the average annual commissions were approximately $23. This is an average weekly commission per salesperson of 50 cents, or $6 each quarter, and I might add that obviously many of those salespersons are handling items of other companies, which is perfectly all right with the Mason Shoe Manufacturing Co. In fact, they may handle shoes of competing companies.

The past history of the company reflects a similar low average annual volume per salesperson. The past history also discloses that the company can expect a decided turn-over in salespeople each year. This can be graphically demonstrated by the history of the company in 1947. The volume of business required about 16,000 salespeople. In order to maintain this number, 11,000 new people were recruited throughout the year. In other words, only one salesperson stayed with the company for more than 1 year for each two persons who dropped their contact with the company.

The Mason Shoe Manufacturing Co. has its own manner of handling sales, which may or may not coincide with that of other direct selling companies. In its case, the catalog lists the retail price of each article. It also indicates the amount of the deposit which is to be given by the buyer to the salesman. The deposit approximates 20 percent of the list price, and constitutes the salesman's commission. When the salesman sends in an order, the company fills it by shipping the shoes c. o. d. directly to the buyer. The buyer then pays the list

price less the deposit, plus a uniform postal charge. Once the salesman submits the order, he has nothing further to do with filling the order. He does not send in the deposit to the company. He is not under any obligation to account in any manner whatsoever to the company for the deposit.

The CHAIRMAN. Does he have any responsibility as to payment of the rest of the purchase price?

Mr. WILEY. No. He has no responsibility whatsoever. If the shipment is refused by the buyer, the shipment is made directly to the buyer c. o. d. If it is refused, the goods come back to the company.

The CHAIRMAN. That is company loss?

Mr. WILEY. It is company loss and the only contact with the salesperson is that the company notifies the salesperson that the goods were refused by the buyer, but there is no penalty connected with it whatsoever.

The CHAIRMAN. He does not have to refund the commission made?

Mr. WILEY. Yes. He is notified by the company and requested to refund the commission to the purchaser. In the event he does not refund the commission and the purchaser notifies the company, the company pays the purchaser the amount of the commission and charges it up to loss. He may not take any deposit at all, or he may take only a part of it, thus giving a buyer a discount. He may extend credit to the buyer for all or part of a deposit. The company has no knowledge of what he does in this respect and has no effective way of knowing, and further has no interest in knowing.

The records of the company indicate that the typical salesperson sends in orders for one and a half pairs of shoes a month. This makes it obvious that many salespersons are supplying the shoe needs of themselves, their families, and friends. In such cases, they obviously are not collecting deposits, but are acting as salespeople in order to get the merchandise advertised in the catalog at a discount equal to the amount of the deposit. Usually, when cash accompanies the order, it will be found that the order is to supply the salesperson or his family. He sends in the cash in order to take advantage of the prepaid shipment. About 15 percent of total sales are on such a cash basis.

I would like to add that in this respect the company is no different from Sears and Montgomery Ward, which sells an article directly to the consumer. I should also like to point out in this respect that a number of c. o. d. shipments must also be for the use of the salesperson's family, and instead of sending in the money he gets the order filled c. o. d. and pays for it when it comes, but obviously in such cases he is not collecting the commission.

Very infrequently the buyer will make out a check for the full price of the article, payable to the Mason Shoe Manufacturing Co. The salesman will then send the check in with the order and with a notation to return his commission. This is the only occasion on which the company handles the commission. In the opinion of the sales manager, the amount of business handled on this basis would not amount to 1 percent of the volume of the company.

In the four sales offices records of the 500 salespersons in those areas are kept on a dollar-volume basis, because these salesmen may receive a bonus based on total sales per month. However, the manner of handling the deposit is just the same with these salesmen as with all the rest. In the home office the only separate record on individual

salesmen is a card showing unit sales (but no dollar volume) and the number of unclaimed c. o. d. packages per month.

With reference to the salesmen working out of the sales offices, I would like to point out that the records of the company disclose that there are about 500 salespersons in those areas which are served by sales offices. However, there is about a 50-percent turn-over in the personnel in a year. In other words, in 2 years time the chances are that there will be an entirely different group of salespersons than there were 2 years previously, and, as I already said, the manner of treating the sales of those salespersons is exactly the same as of those recruited by mail.

I have brought with me, just to show to the committee, the only kind of record system which is kept by the company. This is one section taken out of the "Q" section of the record system. It was the one they would miss the least while I was out here. This is the actual record system. It is the only one it has on the 16,000 people. It lists the name; it lists the address. In addition to that, all it lists is a mark for every shipment sent. That is all.

In other words, they make four marks and then they cross it off to show five. No dollar volume, no record of the kind of shipment or anything else. That is the only record they keep. At the end of every 6 months, the company goes through these files and if there has not been an order for pair of shoes or for another item in the catalog during the preceding 6 months, the card is taken out and transferred to the dead file. Subsequently, if that person sends in an order, his card is taken out of the dead file and moved back over into the active file, so-called. Every 6 months when they go through the whole file, at least 5,000 cards will be taken out. It is the only file system they have. The relationship of the company with the individual salesmen is never for a definite period of time and is never terminated by action of the company. Like old soldiers, the salesmen "only fade away." The only action taken by the company is to transfer the card of an inactive salesperson from the mailing-list file to the dead file.

From the foregoing statement of facts, it is apparent that the number of salespersons economically dependent upon selling products of the Mason Shoe Manufacturing Co. is very small. It is also apparent that any system of records designed to reveal the dollar volume of each of the 16,000 salesmen would swamp a company which now employs 195 people in manufacturing, administration, and in its branch offices.

I should like to point out that in addition to the 16,000 they would also have to keep records on the 10,000 replacements that occurred during the course of a year or a total of 26,000 separate cards that would have to be maintained.

It should also be understood that such a system could not disclose the actual commissions taken by the sales person for the reason that the company has no way of knowing if the deposit was paid.

The CHAIRMAN. If I am asking a question I should not ask, do not answer, but how many people do you have in your office? How many people work in the record part of your office?

Mr. WILEY. That is a difficult question to answer, Mr. Chairman, because the office is not broken down that way. The orders are handled by the office force. We have about three people who are work-

ing on what you calls records. The social-security records, the State of Wisconsin unempolyment compensation records, the withholding tax records, and so forth are, all handled directly by the office manager with two assistants.

The CHAIRMAN. How many people are keeping up the files of that type?

Mr. WILEY. Of this type, right here?

The CHAIRMAN. Yes.

Mr. WILEY. I am not exactly sure of the number but we have one person in charge of these files and I think probably two others who are helping on it. Again, three people, I would say.

The CHAIRMAN. If it were otherwise feasible to conform to the proposed regulation, you would probably have to have another dozen people there doing nothing but following up, would you not?

Mr. WILEY. Mr. Chairman, we not only would have to double that, we would probably have to quadruple the number of persons who would be working on the filing system.

The CHAIRMAN. In other words, that would put you out of business, would it not?

Mr. WILEY. It would not in 1947, because the margin of profit was there, but it would in any number of years of operation of the company, definitely.

Furthermore, it should be apparent that the company has no practical means of collecting the salesperson's share of the social-security tax. The result of the adoption of the proposed regulation would be that the company would have to pay the cost of maintaining records on 16,000 additional "employees"—with 11,000 replacements a year—pay its share of the tax, and, in addition, pay the salesman's share.

The office work that would be required to administer the unemployment-tax provisions of the Social Security Act staggers the company. Obviously, none of these salespersons is now considered an "employee" for unemployment-tax purposes under the Wisconsin State Unemployment Act, or under the act of any other State, and let me add here, Mr. Chairman, that Wisconsin, to use a word which came up before, is one of the most liberal States of the Union. It has an unemployment compensation act which antedates the Federal act by a number of years. The salespersons of this company have never been considered to be employees for unemployment-tax purposes under the law of the State of Wisconsin, or under the law of any other State, and the company operates in every State of the Union.

The CHAIRMAN. Let me get it very clear. You received a communication to the effect that under the proposed regulations a part or all of these salesmen would come under the system?

Mr. WILEY. They would come under the Federal Employment Tax Acts; that is correct. I want to make it clear for the record that that letter was addressed to Senator Wiley.

The CHAIRMAN. I cannot assume that they would misrepresent to him.

Mr. WILEY. I do not believe so. Let me also add, in this respect, that the same problem arises in connection with withholding-tax provisions, and the Commissioner has already indicated, before this matter came up for congressional consideration, that he was contemplating the issuance of similar amendments to the withholding-tax provisions of the

Income Tax Act. It also applies with relation to wages and hours, it applies to national labor relations, and it raises problems under the corporation acts and business acts of every State in the Union, all of which affect this company, because it is doing business in every State in the Union.

The substance of the foregoing presentation was given to the Commissioner by the company in its letter of protest. With these facts before him, the Commissioner yet expressed the opinion that "some or all" of these 16,000 salespersons would be "employees" for old-age and unemployment-tax purposes. The company cannot believe that this opinion of the Commissioner reflects the conclusions of Congress. Consequently, it respectfully urges this committee to report House Joint Resolution 296 favorably.

The CHAIRMAN. Mr. Wiley, we are very grateful for your having come here and given us the benefit of your observations.

Mr. WILEY. Thank you very much, Senator.

The CHAIRMAN. Is Mrs. Nola E. Patterson here?

Mrs. PATTERSON. Yes, sir.

The CHAIRMAN. Will you come forward, please?

STATEMENT OF MRS. NOLA E. PATTERSON, ATLANTA, GA.

The CHAIRMAN. Will you be seated please, Mrs. Patterson?

Mrs. PATTERSON. Thank you, sir.

The CHAIRMAN. Give your name, residence, and occupation to the reporter.

Mrs. PATTERSON. I am Mrs. Nola E. Patterson, of Atlanta, Ga. I am a life-insurance salesman, compensated solely by commission.

May I say, Mr. Chairman, that this is an excellent illustration of democracy at its best, when individual citizens who have no other representation can raise their voices one by one and two by two, small group by small group, and gain a hearing before Members of one of the three most important branches of our national government, that is American Government at its best.

The CHAIRMAN. Thank you very much. This committee always aims to conduct very full hearings and give everyone an opportunity to be heard.

Mrs. PATTERSON. Yes, sir; I appreciate that very much.

In behalf of all of the life-insurance salesmen who are compensated solely by commission, I wish to thank you for the courtesy that is extended to me here today. I am a chartered life underwriter, I have been in the business for over 19 years, I am a member of the Women's Quarter Million Dollar Round Table. I am also sole owner and editor of an agents' publication, The Life Insurance Reveille. It was created to provide a voice for our group and to champion the cause of its people. It has spearheaded several movements in their behalf and as a result it has become a clearinghouse for ideas from our field force.

The publication has accumulated a formidable deficit which I have covered from my own earnings.

I am here at my own expense today at the request of representative agents, to plead their case before you in regard to the Gearhart resolution known as House Joint Resolution 296, which seeks to amend the Internal Revenue Code of February 10, 1939, and the Social Security Act of August 14, 1935, by restricting the definition of the word

"employee" to the common-law rule usually applicable in determining an employer-employee relationship, excepting that it will not nullify favorable determinations which were secured prior to January 1, 1948.

I might say there that my personal stake in social security is very small, and, such as it is, it has been determined, so I have no personal ax to grind. I am not here to plead my case at all.

I shall proceed upon the premise that by virtue of the present social-security law and subsequent favorable individual determinations which have been made pursuant thereto by the Social Security Administration, and the interpretation of the law by the United States Supreme Court, that life-insurance salesmen are now covered by the Social Security Act, and that they and their beneficiaries are entitled to old-age and survivor insurance benefits.

I shall further assume that the Gearhart resolution, if passed, will exclude life-insurance salesmen from coverage. Otherwise, I would not be here before you today. Upon these assumptions I wish to base my plea. Many life-insurance salesmen paid solely by commission have secured favorable determinations by individual notification to the Social Security Administration. That is true of almost the entire membership of the Atlanta association. We rather spearheaded the drive there, for social-security coverage. We had directed practically all of our members to the Social Security Administration, and without fail, they have either secured favorable determinations or their claim is in process. We even directed beneficiaries of deceased agents to the same place, and they were able to collect their benefits. Many beneficiaries are now receiving survivorship benefits. Some retired life-insurance salesmen are receiving old-age-retirement benefits under the act.

If the Gearhart resolution becomes law other salesmen and their beneficiaries will be excluded, yet both of these groups will be working under the same conditions of employment. Great confusion and dissatisfaction would surely result.

The Gearhart resolution, if passed, will involve, reduce, or eliminate the advantage now available to our group under the statute of limitations which grants wage credits for the year of notification and the four preceding years of covered employment.

Life-insurance salesmen included into coverage this year would receive credit for their covered employment in 1948, 1947, 1946, 1945, and 1944. The years 1937 to 1943, inclusive, are lost to them forever. Yet their wage credits must be averaged over the entire 12 years, diluting the value to them and to their beneficiaries. Every day of every week of every month of every year, some family is deprived of its benefits by the statute of limitations.

Families of agents who died one day prior to the reach of the statute of limitations have lost their benefits completely. I have attached here two letters from widows in Atlanta, one who filed her claim and received her benefits after her husband died. The other one writes: "The Social Security Board informs me that since I have no children under age 18, and since I am not yet 65 years of age, that my claim for social-security benefits is invalidated by the statute of limitations, which runs only 2 years in such cases. If I had been advised to file my claim a few months sooner"—or if her husband had filed before he died—"they say I would have been eligible for these benefits which

would be an important item to me, since I have an invalid mother who requires my care."

I know that lady personally and knew her husband. In fact, I worked in the same office with him. Any and all of the time during which agents may be excluded by the Gearhart resolution would undoubtedly be excluded under the statute of limitations as exempted employment.

In September 1, 1944, results were published in regard to exhaustive surveys which had been made among different groups of life-insurance agents, to ascertain whether they wished to be included into coverage under the present Social Security Act, and, of course, as we all know, the present Social Security Act includes only employees. They indicated, by overwhelming majority, that they desired to be included.

I have a copy here of the report. By actual tabulation of the combined surveys, 81 percent expressed desire for coverage. I will leave a copy of this booklet for you.

The CHAIRMAN. It may be filed in the record.

(The booklet referred to is as follows:)

A REPORT AND SUMMARY OF A SOCIAL SECURITY SURVEY

(The National Association of Life Underwriters, New York, N. Y.)

This report and summary cover the results of three questionnaires on social security submitted by the various membership groups of the National Association of Life Underwriters.

THE NATIONAL ASSOCIATION COUNCIL REPORT

(Submitted by the subcommittee on social security of the Federal law and legislation committee of the National Association of Life Underwriters: Judd C. Benson, chairman; William H. Andrews, Jr., Patrick A. Collins, Osborne Bethea, Philip B. Hobbs, Herbert L. Smith)

The report, hereafter referred to as the "National Association Council Survey" represents the results of a questionnaire submitted to 889 members of the Council of the National Association of Life Underwriters, which consists of the past national presidents, the present officers and board of trustees, the chairmen of all standing committees of the national association, the State or regional presidents and national committeemen, and the president and national committeemen of each local association.

THE ILLINOIS ASSOCIATION REPORT

(Submitted by the Life Agency Managers of Chicago; Philip B. Hobbs, John D. Moynahan, Freeman J. Wood, committee)

The report, hereafter refered to as "Illinois Association survey," represents the results of a questionnaire submitted to all members of the National Association of Life Underwriters who reside in the State of Illinois. This survey represents a voluntary project of the life agency managers of Chicago.

THE RUTHERFORD REPORT

(Submitted by National Association of Life Underwriters, James E. Rutherford, executive vice president)

The report, hereafter referred to as the "Rutherford report," represents the results of a questionnaire submitted to members of the national association in attendance at regular membership meetings of the New Haven, Conn., association, the New York City association, the Maine State association, the New Hampshire State association, and the Rhode Island association.

OBJECTIVES

The objectives of the three surveys reported herein are as follows:

1. To determine a cross section of the present-day opinion of various representative groups of the membership of the National Association of Life Underwriters relative to certain aspects of the present Social Security Act and its practicability.

2. To determine the current opinion of these representative groups as to the desirability of certain pending legislation designed to extend the scope and benefits of the present Social Security Act.

3. To determine whether or not those members of the National Association of Life Underwriters not covered under the present Social Security Act desire to have the association make efforts in their behalf to the end that they may be included.

SUMMARY

Members of the National Association of Life Underwriters have a keen interest in the subject of social security and have rather decided opinions relative to the merits of certain parts of the present Social Security Act, as well as legislation which is currently pending in Congress. This is evidenced by the fact that 60.7 percent of the members of the National Association Council and 49.1 percent of the members of the Illinois association responded to the questionnaires mailed to them. In each instance returned questionnaires were not identified by signatures.

The average age of persons employed in the field forces of American life-insurance companies is 46 years, and these men have been engaged in the life-insurance business for an average period of 17 years.

Of the members answering the questionnaires, 57 percent have dependent children at the present time.

The combined results do not give a clear-cut answer to th percentage of the members of the Natonal Association who are presently covered by the Social Security Act. The Illinois report indicates that 57.2 percent of our Illinois members are covered, whereas the National Association Council report indicates that 43.1 percent of our members are covered. The Rutherford report indicates that 54 percent of the membership in typical eastern associations are covered. The committee is led to conclude that at least 48 percent and not more than 52 percent of the National Association members are currently covered. Certainly less than one-half of the agents are covered (probably not over 35 percent) and less than 10 percent of the general agents are included. More than 85 percent of those engaged as managers, superintendents, supervisors, assistant managers, and assistant superintendents are covered.

The results indicate that the life-insurance companies have provided retirement plans for 75 to 80 percent of the membership of the National Association and that company retirement plans have been provided for at least 85 percent of the agents.

The results indicate that 75 percent of the members of the National Association feel that life underwriters should be covered under the present Social Security Act. That opinion is shared in almost equal percentage by members in all the various employment categories. It is interesting to note that 84.6 percent of the Illinois membership feel that life underwriters should be covered, while the National Association Council survey indicates that 67.7 percent of our membership feel that underwriters should be included. General agents form the largest percentage group who are not in favor of having underwriters included, but even in that group approximately 64 percent favor inclusion. Those members who are already included in the present act are somewhat more inclined to believe that all underwriters should be included than those who are not presently included, but clearly, the majority are in favor of having life underwriters included.

The membership of the National Association of Life Underwriters is more interested in the provision for old-age benefits than in dependent coverage and this thinking holds true even among those members who have dependent children, although the percentage, as might be expected, is not marked.

The social-security system in its present form is practicable and can be worked out successfully in the opinion of 65 percent of the National Association members. However, 16 percent believe that it will work out successfully, while 18 percent are at the moment undecided as to the practicability of the present Social Security

Act. There is no marked difference in the opinion of agents on this particular question as compared with the opinion of those in the other employment categories.

In considering the question as to whether or not coverage which is presently provided should be extended to cover all workers, i. e., those who work on salary and commission, agricultural and domestic employees, the self-employed, etc., life underwriters feel that the coverage should be extended to cover these workers. Again there is no marked difference in the thinking on this question when the various employment categories are considered separately.

There can be no question but that a large majority of the members of National Association feel that the present subsistence level (maximum of $85 per month) should not be increased under any circumstances. A preponderance of those who are included and those not included, as well as those having dependent children or not having dependent children, all agree, to the extent of 75 to 80 percent, that the maximum should not be increased. It should be pointed out that on this particular question 40.9 percent of the agent group in the Illinois survey feel that the limit should be raised, whereas only 14.5 percent of the agent group in the National Association Council believe that the maximum should be increased.

The survey indicates clearly that the membership of the National Association feels that it is not the proper function of the Federal Government to provide additions to the existing coverage for old-age and survivors insurance. The National Association Council survey indicates that 81.1 percent and the Illinois survey indicates that 53.4 percent share that opinion. The surveys indicate that opinions on this question are influenced to some degree by whether or not members are presently covered. The most significant fact regarding proposed additions to the present coverage is that those desiring such additions have a dominant interest in total and permanent disability benefits with no significant numbers being interested in coverage for medical services, hospitalization, or temporary disability.

It is clearly indicated that those members who believe that the present Social Security Act should be extended to cover life underwriters are quite willing to have the progressive tax schedule, calling ultimately for 3 percent each from employee and employer, made operative before consideration is given to expanding the benefits. There is every indication that men and women engaged in the life underwriting profession have a clear realization of the ultimate cost of such benefits and strongly desire to have the system adequately financed; and believe that no consideration should be given to expanding the benefits until the progressive tax is operating at its top level.

The most decided opinion expressed by both the Illinois association and the National Association Council surveys was that pending legislation designed to provide broad additional benefits and services, estimated to require 6 percent from employee and employer, should not be enacted.

The surveys definitely indicate that 85 percent of the membership of the National Association are not in favor of additional benefits being provided if it is to place a tax burden of 6 percent on employees and employers. Conclusive evidence of the thinking on this point is that approximately 65 percent believe the present progressive tax should be made operative, while at least 85 percent believe that legislation providing for additional benefits and services should not be enacted after consideration is given to the estimated aggregate 12 percent pay-roll tax. It is also significant that there was little difference in the opinions of those who are currently covered and those who are not.

Attention is called to item 14 (No. VII, pt. II), which was phrased differently in the National Association Council survey and the Illinois association survey. The appraisal of the National Association Council group was that wide social-security coverage would have an unfavorable effect on individual initiative and thrift. It is significant that the agent group, whose opinion should be most valuable because they actually talk to prospects, were of exactly the same opinion percentagewise as the entire group.

While the Illinois survey does not indicate quite so pronounced an opinion on this point, the fact remains that a majority believe that it would tend to affect individual initiative and thrift.

A negligible number answering the National Association questionnaire believe that their personal opinions different from the majority of opinions of members of their association, whereas 83.1 percent expressed an opinion that their thinking was parallel to that of a majority of the members of their local or State association.

SUMMARY—THE RUTHERFORD REPORT

The Rutherford report substantiates the conclusions indicated in the National Association Council and the Illinois association surveys, so far as the number of members who are currently covered by social security, the number who will enjoy the benefits of a company retirement or pension plan, and those who desire to be covered by the present Social Security Act. This report indicates that out of the 45.2 percent not covered (238 members) 72.1 percent (172 members) desired to be included.

The very interesting and significant facts developed by the Rutherford report concerned the use of the present social-security system in furthering the sale of new life insurance. The report indicates that 95 percent of all companies have taken cognizance of the "sales" opportunities presented by the present Social Security Act and have developed sales procedures designed to coordinate private life insurance with the benefits of the Social Security Act. They have also taken the occasion to instruct their agents in the proper use of these sales procedures.

It is perhaps even more significant that 91 percent of the members answering the questionnaire have used the old age and survivor insurance feature to aid in selling life insurance and 86 percent of those answering expressed an opinion that it had actually increased the amount of insurance which they were able to sell.

CONCLUSIONS

A majority of the membership of the National Association desire to be included under the present Social Security Act and are of the opinion that the social security system in its present form is practicable.

All workers gainfully employed should be included under the Social Security Act whenever feasible in the opinion of the members surveyed.

The membership is strongly opposed to increasing the maximum benefits of the Social Security Act above $85 per month and also feel that it is not the proper function of the Federal Government to provide additional benefits beyond the present old age and survivors insurance coverage. The only possible significant interest in additional coverage is in such coverage as will provide benefits in the event of total and permanent disability.

Members of the National Association are almost unanimous in their opinion that legislation providing broad additional benefits which will impose an estimated tax of 6 percent on employer and employee should not be enacted.

Regardless of their personal attitude toward the Social Security Act, members of the National Association are of the opinion that it will have an unfavorable effect on individual initiative and thrift.

Published September 1, 1944.

Analysis and break-down of social-security surveys—National Association of Life Underwriters

	Illinois association		National Association of Life Underwriters National Council	
	Number	Percent	Number	Percent
PART I				
Number of questionnaires mailed	2,600		889	
Number of persons answering	1,276	49.1	540	60.7
1. Number of persons in each employment status	1,276		540	
Agent	718	56.2	186	34.4
Supervisor	74	5.7	27	5.0
Assistant manager	114	8.9	35	6.4
Assistant superintendent	39	3.0	10	1.8
General agent	103	8.0	122	22.5
Manager	110	8.6	122	22.5
Superintendent	21	1.6	8	1.4
Others	97	7.6	30	5.5
2. Average age of all persons replying	45.6		47	
Average number of years in life insurance business	15.9		18	

Analysis and break-down of social-security surveys—National Association of Life Underwriters—Continued

	Illinois association		National Association of Life Underwriters National Council	
	Number	Percent	Number	Percent
PART I—continued				
3. Do you have dependent children under 18?				
(a) Number answering "Yes"	726	56.8	315	58.3
(b) Number answering "No"	550	43.1	223	41.2
4. Are you presently covered under the Social Security Act?				
(a) Number answering "Yes"	731	57.2	233	43.1
(b) Number answering "No"	544	42.6	307	56.8
(c) Number answering "Yes" in each employment status:				
Agent	342	47.6	41	22.0
Supervisor	66	81.0	15	55.5
Assistant manager	110	96.4	32	91.4
Assistant superintendent	39	100.0	10	100.0
General agent	15	14.5	4	3.2
Manager	92	83.6	113	92.6
Superintendent	21	100.0	8	100.0
Others	52	53.6	10	33.3
(d) Number answering "No" in each employment-status:				
Agent	376	52.3	145	77.9
Supervisor	13	17.5	12	44.4
Assistant manager	4	3.5	3	8.5
Assistant superintendent		0.0		0
General agent	88	85.4	118	96.7
Manager	18	16.3	9	7.3
Superintendent		0.0		0
Others	45	46.3	20	66.6
5. DOES YOUR COMPANY HAVE A RETIREMENT PLAN FOR YOU?				
(a) Number answering "Yes"	1,059	82.9	281	70.5
(b) Number answering "No"	215	16.8	156	28.8
(c) Number answering "Yes" in agent status	642	89.4	146	78.4
(d) Number answering "No" in agent status	76	10.5	40	21.5
6. DO YOU FEEL THAT LIFE UNDERWRITERS SHOULD BE COVERED UNDER SOCIAL SECURITY ACT?				
(a) Mumber answering "Yes"	1,049	82.2	395	73.1
(b) Number answering "No"	206	16.1	133	24.6
(c) Number answering "Yes" in each employment status:				
Agent	608	84.6	126	67.7
Supervisor	62	83.7	18	66.6
Assistant manager	102	89.4	30	85.7
Assistant superintendent	36	92.3	8	80.0
General agent	63	61.1	80	65.5
Manager	88	80.0	106	86.8
Superintendent	18	85.7	8	100.0
Others	72	74.2	19	63.3
(d) Number answering "No" in each employment status:				
Agent	100	13.9	54	29.0
Supervisor	10	13.5	9	33.3
Assistant manager	11	9.6	4	11.4
Assistant superintendent	2	7.6	2	20.0
General agent	36	34.9	39	31.9
Manager	20	18.1	15	12.2
Superintendent	3	14.2		0
Others	23	23.7	10	33.3
(e) Of those answering "Yes" to No. 4, number answering:				
(1) Yes	662	90.5	207	88.8
(2) No	68	8.6	25	10.7
(f) Of those answering "No" to No. 4, number answering:				
(1) Yes	386	70.9	188	61.2
(2) No	143	26.2	108	35.1
7. WHICH SOCIAL-SECURITY BENEFIT DO YOU CONSIDER MORE VITAL?				
(a) Dependent coverage	445	34.8	169	31.2
(b) Old age benefits	745	58.3	342	63.3
(c) Of those answering "Yes" to No. 3:				
(1) Dependent coverage preferred			142	45.0
(2) Old age benefits preferred			157	49.8
(d) Of those answering "No" to No. 3:				
(1) Dependent coverage preferred			27	12.1
(2) Old age benefits preferred			183	82.0

Analysis and break-down of social-security surveys—National Association of Life Underwriters—Continued

	Illinois association		National Association of Life Underwriters National Council	
	Number	Percent	Number	Percent
PART II				
8. (No. 1, pt. II) DO YOU PERSONALLY BELIEVE THAT THE SOCIAL SECURITY SYSTEM IN ITS PRESENT FORM IS PRACTICABLE, I. E., THAT IT CAN BE WORKED OUT SUCCESSFULLY?				
(a) Yes	855	67.0	340	62.9
No	196	15.3	93	17.2
Undecided	217	17.0	107	19.8
(b) Number answering "Yes" in agent status	490	68.2	119	63.9
Number answering "Yes" in all other status	365	65.4	221	62.4
(c) Number answering "No" in agent status	103	14.3	37	19.8
(c) Number answering "No" in all other status	93	16.6	56	15.8
9. (No. II, Pt. II) Do you feel that such coverage as is presently provided should be extended to cover all workers, i. e., those who work on salary and on commission, agricultural and domestic employees, the self-employed, etc.?				
(a) Yes	946	74.1	329	60.9
No	233	18.2	157	29.0
Undecided	90	7.0	54	10.0
(b) Of those who answered "Yes" under No. 3:				
Yes			205	65.0
No			85	26.9
Undecided			25	7.9
(c) Of those who answered "No" under No. 3:				
Yes			123	55.1
No			71	31.8
Undecided			29	13.0
(d) For the agent group only:				
Yes	547	76.1	112	60.2
No	120	16.7	57	30.6
Undecided	48	6.6	17	9.1
10. (No. III, pt. II) Do you feel that the present "subsistence level" coverage (maximum of $85) should be increased to a maximum of $120 a month as proposed in pending legislation before Congress?				
(a) Yes	455	35.6	75	13.8
No	729	57.1	424	78.5
Undecided	82	6.4	41	7.5
(b) For those who answered "Yes" to No. 3:				
Yes			41	13.0
No			246	78.0
Undecided			28	8.8
(c) For those who answered "No" to No. 3:				
Yes			34	15.2
No			176	78.9
Undecided			13	5.8
(d) For those who answered "Yes" to No. 4:				
Yes	310	42.4	45	19.3
No	365	49.9	169	72.5
Undecided	52	7.1	19	8.1
(e) For those who answered "No" to No. 4:				
Yes	145	26.6	30	9.7
No	363	66.7	255	83.0
Undecided	30	5.5	22	7.1
(f) For the agent group exclusively:				
Yes	294	40.9	27	14.5
No	369	51.3	140	75.2
Undecided	49	6.8	19	10.2
11. (No. IV, pt. II) Do you feel that it is the proper function of the Federal Government to provide additions to present dependent and old-age coverages?				
(a) Yes	462	36.2	65	12.0
No	682	53.4	438	81.1
Undecided	119	9.3	37	6.8
(b) For those who answered "Yes" to No. 4:				
Yes	323	44.1	35	15.0
No	339	46.3	177	75.9
Undecided	60	8.2	21	9.0
(c) For those who answered "No" to No. 4:				
Yes	139	25.5	30	9.7
No	342	62.8	261	85.0
Undecided	59	8.4	16	5.3

Analysis and break-down of social-security surveys—National Association of Life Underwriters—Continued

	Illinois association		National Association of Life Underwriters National Council	
	Number	Percent	Number	Percent
PART II—continued				
11. (No. IV, pt. II) Do you feel that it is the proper function of the Federal Government to provide additions to present dependent and old-age coverages?—Continued				
(*d*) For the agent group only:				
Yes	290	40.3	25	13.4
No	353	49.1	148	79.5
Undecided	69	9.6	13	6.9
(If your answer is "Yes" to the above, check the item or items you feel should be included in the Federal program.)				
Medical service	252	54.5	16	24.6
Hospitalization	260	56.2	21	32.3
Temporary disability	210	45.4	20	30.7
Permanent disability	368	79.6	50	76.9
12. (No. V, pt. II) Do you think the present progressive tax schedule in the Social Security Act, calling ultimately for 3 percent each from employee and employer should be made operative before consideration is given to expanding the benefits?				
(*a*) Yes	973	76.2	312	57.7
No	152	11.9	162	30.0
Undecided	137	10.7	66	12.2
(*b*) For those who answered "Yes" to No. 4:				
Yes	557	76.1	138	59.2
No	86	11.7	70	30.0
Undecided	82	11.2	25	10.7
(*c*) For those who answered "No" to No. 4:				
Yes	416	76.4	174	56.6
No	66	12.1	92	29.9
Undecided	55	10.1	41	11.3
13. (No. IV, pt. II) Do you feel that pending legislation designed to provide broad additional benefits and services, estimated to require 6 percent each from employee and employer, should be enacted?				
(*a*) Yes	194	15.2	9	1.6
No	967	75.7	497	92.0
Undecided	105	8.2	34	6.2
(*b*) For those who answered "Yes" to No. 4:				
Yes	135	18.5	4	1.7
No	525	71.8	215	92.2
Undecided	67	9.1	14	6.0
(*c*) For those who answered "No" to No. 4:				
Yes	54	9.9	5	1.6
No	446	81.9	282	91.8
Undecided	38	6.9	20	6.5
14. (No. VII, pt. II)				
National Association survey: What effect do you feel wide social-security coverage will have on individual initiative and thrift?				
(*a*) Favorable	----------	----------	82	15.1
Unfavorable	----------	----------	383	70.9
No effect	----------	----------	67	12.4
(*b*) For the agent group only				
Favorable	----------	----------	30	16.1
Unfavorable	----------	----------	131	70.4
No effect	----------	----------	20	10.7
Illinois survey: Do you believe that wide social-security coverage tends to affect individual initiative and thrift?				
(*a*) Yes	752	58.9	----------	----------
No	435	34.0	----------	----------
Undecided	79	6.1	----------	----------
(*b*) For the agent group only:				
Yes	408	58.8	----------	----------
No	257	35.7	----------	----------
Undecided	48	6.6	----------	----------
15. Fourth page of survey—National Association survey: Do you feel that the opinions you have expressed in this questionnaire are shared by the majority of the members of your association?				
(*a*) Yes	----------	----------	449	83.1
(*b*) No	----------	----------	21	3.8
(*c*) No opinion	----------	----------	70	12.9

Analysis and break-down of Rutherford social-security survey

	Number	Percent
Number of ballots received	526	
1. Has your home office at any time suggested the use of the old age and survivor provisions of social security in your approach to a prospect or a tie-up with it in presenting a sales proposal?		
(a) Yes	506	96.2
(b) No	15	2.9
2. Has your company furnished you any pamphlets, booklets, sales proposal forms or other literature for distribution to or use with policyholders and prospects, in which social-security benefits were illustrated and related to existing or suggested life insurance coverage?		
(a) Yes	499	94.9
(b) No	21	4.0
3. Have you personally used the old-age and survivorship feature of social security as an aid in selling life insurance?		
(a) Yes	479	91.0
(b) No	41	7.8
4. Do you think the old-age and survivorship feature of social security has increased or decreased the volume of life insurance sold by you?		
(a) Decrease	28	5.3
(b) Increase	457	86.9
SPECIAL QUESTIONS		
1. Does your company have a retirement or pension plan?		
(a) Yes	461	87.7
(b) No	62	9.9
2. Are you now covered by social security?		
(a) Yes	286	54.4
(b) No	238	45.2
Would you like to be covered by social security?		
(a) Yes	329	62.5
(b) No	66	12.5

ACKNOWLEDGMENTS

The National Association of Life Underwriters has received valuable assistance in the preparation of this report through the information developed by the Illinois association survey and the Rutherford report.

Our thanks are expressed to the Continental Assurance Co., of Chicago and the Metropolitan Life Insurance Co., for the tabulations prepared by their statistical departments of the results of the Illinois association survey and the National Association Council, and to the Union Central Life Insurance Co., for the printing of the survey results.

Mrs. PATTERSON. For years life-insurance salesmen have been building insurance estates for their clients upon the basic foundation laid by social-security coverage. They know as perhaps no other group does what social security is. They have educated the public about social security. We have educated them perhaps even more than the Social Security Administration itself, because we go right into their homes and we lay it out and set it down in figures, what it will do for them.

They have spread the gospel of social security as no other group or combination of groups have done. They recognize it as social legislation which is intended to lay an economic floor for employees, a foundation which cannot be duplicated elsewhere, and one to which they, the agents, are now legally entitled.

This legal right is upheld by the law itself, by the Social Security Administration and by the United States Supreme Court. In support of their legal claim to coverage you have probably received many letters and copies of resolutions. There is a steadily rising tide of opposition to the proposed Gearhart resolution. This resentment would not disappear with the passage of House Joint Resolution 296, it would be stimulated to much greater proportions, for it has not gained its full strength. These people are slowly awakening to the

intent of this proposed bill and the repercussions promise to be great.

I have a copy of a letter which came to me just before I left home from an underwriter in New York City:

DEAR MRS. PATTERSON: It has just come to my attention that the House has passed a resolution sponsored by Representative Gearhart and now before the Senate Finance Committee, the purpose of which would be to deny the extension of social-security coverage to many who were previously considered independent contractors. The effect of this would be to vitiate the liberal effect of the recent Supreme Court decision. You are probably aware of this, but inasmuch as you have been carrying on the fight for a long time I thought I would call it to your attention. Certainly the insurance agents should do something about this.

That was written on March 26, 6 days ago.

They are just beginning to realize what is happening and what this bill would do.

If you would ask the man in the street for whom one of our salesmen works, he would reply that he works for a certain life-insurance company, and he would name the company. To the public these agents are identified as employees of their respective companies.

No one would think of them as being self-employed; no one except a lawyer.

I think it has been lawyers who have sought out that idea for certain purposes and for certain interests, that is the reason I make that statement. Mr. William Montgomery who is president of the Acacia Mutual Life Insurance Co. of Washington, D. C., reported in the National Underwriter of February 28, 1947, page 15, that the Treasury decision to regard life-insurance agents paid solely by commission as self-employed was due not to Treasury definition but to the life companies themselves.

He said that following passage of the Social Security Act a number of life-insurance companies made presentations to the Treasury in support of their contention that under the terms of their agency contracts their commissioned life-insurance agents were not employed hence were not covered by the act. I will also leave that little notation for you.

(The article referred to is as follows:)

Then came the Treasury decision to regard life-insurance agents paid solely by commission as self-employed. Mr. William Montgomery, president of the Acacia Mutual Life Insurance Co., reported (National Underwriter, Feb. 28, 1947, p. 15), that this was due not to Treasury definition, but to the life companies themselves. He said that following passage of the Social Security Act, a number of life-insurance companies made presentations to the Treasury in support of their contention that under the terms of their agency contracts, their commission life-insurance agents were not employed, hence were not covered by the act.

Mrs. PATTERSON. These men and women who sell life insurance to the public are not articulate as a group on a united front. They continue to serve the public in a professional manner and they rely upon their elected representatives in Congress to protect their rights as citizens. They are aware of the fact that they are now in covered employment. They do not expect to be forced out again.

We now come to the most important consideration of all. What of the beneficiaries? What is Congress prepared to do for the widows and orphans of the agent who would die between the time they would be excluded by the passage of the Gearhart resolution and that hazy day when they might be returned to the fold?

I wish to read from the September 1947 issue of my publication an article entitled "Unto One of the Least of These." There are two pictures on the front page, one of Mr. Cunningham who was president of the Atlanta association when he discovered that life-insurance agents compensated by commission were entitled to social security. Under his picture:

Little Bob Penland, whose picture appears on this page, has been chosen by us to represent all of the small sons and daughters of life-insurance agents in the United States who are entitled to the benefits of social-security coverage.

Bob's daddy, Mr. Thomas E. Penland, Jr., has the desk next to ours, and as we have watched Bob charging about on his sturdy little legs upon his rare visits to the office, we have pictured many other young Bobs and Marys who are entitled to share in the great national insurance plan. We asked Bob's father to tell us what social-security coverage means to him and his family, and he graciously agreed to do so, as told from Bob's viewpoint.

Here is Bob's story:

Maybe you think I am young to know about such things, but I do want to thank Mr. Cunningham and the others on the social-security committee of the Atlanta association and the Reveille for putting my dad wise to his benefits under the Social Security Act. At their suggestion, he notified the Social Security Administration that he thought we were entitled to coverage. He notified them before last December 31, and so stopped the statute of limitations from depriving us of any more of our benefits.

The Social Security Administration gave us credit for his last 8 years' earnings, which included the 3 years he was in the Army. (Daddy was serving overseas when I was born.) That means that if my dad died today, mother and I would receive $44.83 a month from social security for the next 16 years, and then mother would receive $26.90 a month for life after she becomes 65. Dad figures that is equivalent to $11,911 additional life-insurance protection for us.

He says he will never stop selling life insurance; but if he does after he is 65, his social-security life income will be at least $50 a month, with another $25 a month for mother after she is 65. That income will be a helpful supplement to dad's renewals and retirement-income insurance.

In view of these benefits, it seems to me that it is better for dad to be classified as an employee of his company rather than as an independent contractor.

You gentlemen are not dealing with legalities only. You are dealing with the bread and butter of fatherless children and their mothers, for whom there is almost never enough income to meet their needs.

I have letters here. I have picked up one or two that have come in to me. Here is one from a chartered life underwriter, under January 29, 1948, which is since the date set by this law of not nullifying favorable determinations. He says:

I have a question about social security I would like to ask you—

and he goes on and gives the facts in connection with his case.

I appreciate very much your advice on what to do about this, as I was in the armed services about all the time that the information was going out about applying to the Social Security Board.

His letter under February 5 says:

I am taking steps to file the information that you suggested with the social-security field office today.

He also says he is writing some Congressman in regard to the Gearhart bill.

Under February 10, 1948, he writes:

I have gotten my social-security record brought up to date. As I understand it, they are going back 5 years from now in covering me. I missed out a couple of years by not notifying them in 1946, but at least I am glad to be covered on this. It is a great relief to me because I have three young children, and should I die,

my family would be well protected from social security. Many thanks to you for calling this to my attention.

I could read letter after letter to you along those lines, but that is our case, as I see it, and as I believe that you will find it to be.

Now, here is a clipping from an Atlanta paper which I should also like to leave with you. It is under the title "The House Pulls a Quick One" by Thomas L. Stokes. It says:

The joint resolution is the result of agitation and pressure from interests that would have to pay social-security taxes under the Supreme Court decision.

And I firmly believe that is true. In fact, I have documentary evidence that I could offer in support of that belief.

They got busy to exempt themselves from the decision.

I hope you will give very careful consideration to that statement and the possibility that that is what is back of this move.

(The clipping referred to is as follows:)

THE HOUSE PULLS A QUICK ONE

(Thomas L. Stokes)

WASHINGTON.—They slip these things over quickly and quietly, and with little public notice, so that no matter how closely you try to follow what goes on here, you miss some of the sneak attacks in this Congress on basic laws affecting the public welfare that were won after such a battle originally.

This one treated here, which would withdraw social-security coverage from an estimated half to three-quarters of a million persons, was done hurriedly one afternoon by the House of Representatives. Here again the House exhibited the tendency prevailing under Republican management, noted here recently, of yielding to special interests, even though ostensibly the body "closest to the people."

It happened nearly a month ago. But it's not too late to do something about it, for the joint resolution to perpetrate this injustice still has not been considered by the Senate Finance Committee, where it is pending. The Senate still has an opportunity to stop it, as it has had to do in a number of cases of special-interest legislation originating in the House.

The joint resolution, sponsored by Representative Gearhart, Republican, California, is designed to circumvent and nullify a Supreme Court decision of nearly a year ago which interpreted the Social Security Act so that coverage would be extended to many persons hitherto classified as independent contractors and not eligible. The contributory old-age provisions of the act, the court held, should apply to any person "who is dependent as a matter of economic reality upon the business to which he renders service and not upon his own business as an independent contractor."

Under this decision, coverage would be extended to persons in the category of salesmen, selling agents, brokers, chain-store managers, theater managers, insurance agents, people who do various sorts of jobs in their own homes under contract and the like. In accordance with this decision, the Treasury prepared regulations covering these persons under the law.

Now, by special act of Congress, the Gearhart joint resolution would bar them from social-security benefits by restoring the so-called common law relationship of master and servant. The Supreme Court held that this should not apply under intent of Congress in enacting the social-security law of 1935, but that the rule of economic reality should apply.

The joint resolution is the result of agitation and pressure from interests that would have to pay social-security taxes under the Supreme Court decision, including insurance companies and sweatshop operators who contract out homework of various sorts. They got busy to exempt themselves from the decision.

The resolution was called a shocking piece of legislation by Representative Helen Gahagan Douglas, Democrat, California, who said: "During the past several months I have grown accustomed to the sight of this Congress turning back the clock—crippling where they do not dare repeal, or boring away like termites in an effort to undermine the progress of the preceding 14 years." She stood with

a corporal's guard of 52 others in vain against the Republican steamroller which got help from some Democratic allies to pass the resolution, 246 to 53.

This measure got the now-too-frequent quick and furtive treatment. No hearings at all were held by the House Ways and Means Committee. And the committee voted suddenly one day, without considering—or even having presented to it—the reports from both the Treasury and the Social Security Board that vigorously opposed the Gearhart measure. It was all done most summarily.

This puts the Republican House leadership in a strange position. In its 1944 platform it pledged "extension of existing old-age insurance and unemployment insurance systems to all employees not already covered." It has done nothing thus far to keep this pledge. But by this measure, to the contrary, it tries to deprive those rightfully entitled to coverage, mostly persons in the white-collar class who do not have the protection of labor unions.

Mrs. PATTERSON. If you have any questions you would like to ask I am willing and anxious to hear them. I do not promise to answer, but I will do the best I can.

The CHAIRMAN. I have no questions. We are grateful to you for having given us the benefit of your views on this.

Mrs. PATTERSON. Thank you, sir, and I do appreciate, as I said in the beginning, the privilege of coming here and talking to you and speaking in behalf of these people.

I would like to leave some copies of this article here for the other board members. We do implore you, Mr. Chairman, to vote against this resolution, House Joint Resolution 296.

The CHAIRMAN. I should add that if there is any evidence that any interests, in an improper sense of the word are working for this bill I would like to have those specified. Of course an employer or someone who does not believe that he should come under the act, has a right to advance his viewpoint without becoming a villain in doing so.

Mrs. PATTERSON. Yes, sir; that is true. I brought along a couple of agent's compensation contracts here. Now this, of course, was prior to this particular resolution but I point this out merely as supporting evidence to the gentleman who talked to you this afternoon calling your attention to the possible evasions that might arise.

The CHAIRMAN. I do not think there is any question but that there is evasion in this field and I do not think there is any question but that there will be evasion as to the Supreme Court interpretation or any other interpretation. All I am driving at now is that if anyone is exercising an improper influence in this matter I certainly would like to know about it.

Mrs. PATTERSON. The National Association of Life Underwriters is the only organization to which our group generally hold membership. However, it consists of supervisors, general agents, managers, and even company officials hold associate membership in it, but they call it an underwriter's association, and they have had representatives up here before the Ways and Means Committee. I do not know whether they have been before your committee or not.

Now, going back a little bit to this survey that I left with you, that report is made by this National Association of Life Underwriters in regard to three very exhaustive surveys and they were forced to admit that the agents in the field did wish and do wish to be included under the present Social Security Act as employees. They did not have this word in there but they do wish to be included under the present act.

The CHAIRMAN. Let us assume that that is correct. That does not carry with it that anyone who resists coverage is evidencing an improper interest.

Mrs. PATTERSON. All right, sir. I have some correspondence here that I wish to call to your attention. I have to go back of this proposed Gearhart resolution a little bit, to bring this matter up to date.

The CHAIRMAN. Let me put it this way: The same freedom of opinion that gives you the opportunity to be here and express your own views is equally applicable to those who might have contrary views and there is no suggestion of improper interest on either side.

Mrs. PATTERSON. Yes, sir.

The CHAIRMAN. All I am interested in is if there is an improper opposition to this bill or improper support for this bill I certainly would like to know about it.

Mrs. PATTERSON. That is what I am trying to point out. Following those surveys, here is a report, or rather this is from an editorial in the January 4, 1946, issue of the Life Insurance Field. It says:

> The fairly recent surveys made by the national association among various segments of its membership showed that most ordinary agents want to be covered, but only if the act is extended to include the self-employed.

That "but only if the act is extended to include the self-employed" is not in the survey. It is not in the questions; it is not in the answers; it is not even implied.

All right; when that came out, Mr. Cunningham, of Atlanta, wrote to the editor of that magazine and quoted that clause.

The CHAIRMAN. That would go to the propriety and the correctness of the survey conducted by that particular organization. That would not imply an improper interest behind the resolution in the Congress; would it?

Mrs. PATTERSON. Except that these people have represented, as I understand, and have been representing, before the Ways and Means Committee, that life-insurance agents wished to be included under the Social Security Act, but only if the act is extended to include the self-employed. That is the part that is not substantiated by the facts of the survey.

The CHAIRMAN. What you are saying is that the committee has received this information?

Mrs. PATTERSON. That is right. It is admitted in this correspondence that that reservation was planted on the report of the survey. It was not included.

The agents never said that they wanted to be included only if the act is extended to include the self-employed, which implies that they wished to be included as self-employed, which means that if they are included as self-employed they would have to pay the entire tax. They never said that.

The CHAIRMAN. Thank you very much.

Mrs. PATTERSON. Yes, sir; and thank you.

The CHAIRMAN. Is Mr. George M. Fuller here?

Mr. FULLER. Yes, sir.

The CHAIRMAN. You may come forward, please.

STATEMENT OF RICHARD A. COLGAN, JR., EXECUTIVE VICE PRESIDENT OF THE NATIONAL LUMBER MANUFACTURERS ASSOCIATION, PRESENTED BY GEORGE M. FULLER

The CHAIRMAN. Will you state your name, address, and occupation to the reporter.

Mr. FULLER. Mr. George M. Fuller; however, no connection with the Fuller Brush people, and I am appearing here, Senator, today for Mr. Richard A. Colgan, Jr., who was unfortunately detained in the South, and I would like to read a statement prepared by him—

My name is Richard A. Colgan, Jr. I am executive vice president of the National Lumber Manufacturers Association, which consists of 14 regional lumber associations representing the major commercial wood species in the United States. The lumber manufacturing industry embraces more than 50,000 producing units, varying in size from small one-man operations to very large mills of the South and West.

I appreciate the opportunity of appearing before you today to express our approval of the resolution now before this committee which would maintain the status quo in respect of certain employment and social-security taxes pending action by Congress on the general question of extension of social-security coverage.

We favor the enactment of House Joint Resolution 296 for two fundamental reasons:

(1) The proposed regulation is clearly tantamount to legislation; and

(2) Considered on its merits, the proposed regulation is highly objectionable because of its unreasonable and unrealistic treatment of the problem.

The lumber industry looks upon this legislation as involving a fundamental issue vital to our form of government, and we urge that you treat it as such. It must be remembered that we are not now considering the merits of coverage of certain groups under social-security legislation. The Congress has the power to broaden or to narrow the scope of the law.

That question, I understand, is now pending before the Senate Finance Committee and the House Ways and Means Committee, and at the proper time both the proponents and opponents of extended coverage will be heard. It should be abundantly clear that extension of coverage is essentially legislative in its nature and should come only by congressional action and not by regulations of the type House Joint Resolution 296 proposes to hold in abeyance until such time as Congress acts.

The proposed regulation, considered on its merits, is highly objectionable, for it is unreasonable and unrealistic. In place of the common-law test of control, whether a party is an employee or independent contractor would be determined by a test of dependency, as a matter of economic reality, upon the business for which the service is performed.

In making this determination the regulation suggests the consideration of six factors but makes it clear that these are not the only ones to be considered. Just what the others are is a matter of conjecture, and, apparently, left up to the whim of the Commissioner of Internal Revenue to be made known at such times and under such conditions as he chooses.

Furthermore, the proposed regulation provides that the composite effect of all factors is to be controlling, yet even a casual reading makes it clear that the Commissioner could select any one of the factors or tests and so emphasize its importance as to invalidate many bona fide independent contractor relationships.

Let me explain the operations of our industry and the impact of the proposed regulation on our business. In the lumber industry the services of independent contractors are frequently employed. A mill may own or have timber rights on large tracts of land. The mill may do all or part of its logging, but often it will have at least some of its logging done by an independent contractor.

There are any number of reasons for this. The tracts may be in different localities, and the mill may find it necessary to use its logging equipment in one area and the independent contractor for another area. Or, as is often the case, the mill will devote all its time, energy, and equipment to the manufacture of lumber, and will contract for all its logging.

Although the particular reasons for contracting may vary, these are normal contractual relationships. The logger may own several thousand dollars' worth of equipment. He has complete charge of the men working for him. The contract will usually set forth the agreement in detail, describing the rights and duties of both parties, specifying the type and quantity of logs to be cut, and so on.

Payment is stated in terms of results produced by the logger, usually so much per thousand feet of logs. The compensation to the logger is therefore a matter of profit on the operation, not a wage or salary.

I emphasize this because the logger is in business for himself, and as in any other business, compensation to the owner depends not upon a wage or salary, but upon the management of the business so that the difference in costs and receipts leaves a profit.

Under the generally accepted concepts in the business world, this type of logger is an independent contractor, not an employee of the mill to whom he supplies logs. But under the proposed regulation, he could be determined by the Commissioner of Internal Revenue to be an employee of the mill. A few examples will illustrate this.

The proposed regulation sets up the basic test of "dependency as a matter of economic reality" as the criterion by which to determine whether a person is an employee or an independent contractor.

It is further stated (sec. 402.204 (a), par. 4) that the typical independent contractor offers his services to the public rather than to a single person. Ordinarily the logging contractor I just described is ostensibly offering his services to the public, but in reality he probably is working for only one mill.

Under the proposed regulation he might be determined to be an employee of the mill instead of an independent contractor. No doubt the proponents of the proposed regulation will vigorously deny that this is its intended purpose, but nevertheless it could be interpreted in this manner, and our past experience with bureaucratic agencies does not assure us that this will not happen.

This type of approach permeates the entire proposed regulation.

For example, in the fifth paragraph of section 402.204 (d) (1), it is pointed out that the performance of services which are an integral part of the functions of the business for which performed is indicative of one of the six factors which are to be considered in determining whether the party is an employee or an independent contractor. If the services are essential, the implication is that an employee-employer relationship exists. I can assure you that the cutting of logs is an integral part of the manufacture of lumber. I doubt that we could produce much lumber without logs. All logging contractors and their employees, therefore, could be held to be employees of the mill for which they cut logs.

A similar situation is found in another part of the proposed regulation which deals with "integration" (sec. 402.204 (d) (3)). It is stated that integration of one's services into the business for which performed indicates dependency as a matter of economic reality, and therefore that person is an employee and not an independent contractor.

This integration would be indicated by the fact that the services are essential to the business for which performed. This test is so sweeping that it covers almost anything the Commissioner wants it to cover. It is fundamental in our economic system that business operates for a profit, and it is therefore axiomatic that businessmen expend their financial resources for goods and services that are "essential." Thus, in almost every case whenever one business employs the services of other businesses or individuals those services will be "essential"; there is therefore "integration" within the meaning of the proposed regulation, and the Commissioner would be free to rule that an independent contractor relationship did not exist.

In the case of the logger, the cutting of the logs would of course be "essential" to the manufacture of lumber, and the logger's operations would be "integrated" with those of the mill, and thus he would be held to be an employee of the mill.

In another part of the proposed regulation (sec. 402.204 (d) (2)) it is stated that a permanent relationship tends to establish that a party is an employee and not an independent contractor.

Under this concept, the mere fact that the same mill made a contract year after year with the same logging company, particularly if that logging company did not work for others, could be construed by the Commissioner to show that the logging contractor was dependent as a matter of economic reality on the mill, and therefore not an independent contractor.

This is borne out by the converse statement in the same section that the relationship is impermanent if it is of limited duration and nonrecurring.

There are numerous other provisions of this regulation that would lead to similar results, but these will indicate, I think, that it would be a regulation impossible for many to understand, or if taken for what it seems to say, it would invalidate many bona fide independent contractor relationships.

It would lead to completely unreasonable and unrealistic results. One large operator, employing a number of independent contractors for logging and sawing, has advised me that if this proposed regulation is put into effect he will be forced to immediately cancel all of these contracts. This would mean that the contractors would be thrown out of work, and would possibly go into bankruptcy, for the mill would revise its operations so as to do all its own logging and sawing.

I am told that those who favor this regulation claim that the so-called common-law control test is not completely uniform and has received varying interpretations in different courts.

But the answer to this criticism is that it proves nothing. The common-law test has been a part of the regulations under the social-security laws for over a decade, and its meaning to business, as compared to the proposed regulation, is as clear as a crystal ball.

I am also aware that proponents of the proposed regulation will contend that the interpretations I have suggested are precluded by another part of the proposed regulation (par. 3, sec. 402.204 (e)) which claims not to convert into an employer-employee relationship a normal business arrangement whereby one business obtains the services of another to carry out a portion of its production or distribution.

But this brief paragraph is so general that it does not, in my opinion, prevent unreasonable interpretations of the type I have suggested in connection with logging which will deprive bona fide independent contractors of that status.

The proposed regulation is clearly an attempt of an administrative agency, purporting to rely on Supreme Court decisions, to write legislation.

This is the undisputed function of Congress, and that point is so fundamental that it seems to us there should be no doubt in the minds of the Members of Congress that House Joint Resolution 296 should be passed promptly.

In addition to this, the proposed regulation is so unreasonable and unrealistic we believe that Congress should not permit it to be put into effect.

Many of the objections I have pointed out to you are explained in greater detail in a brief which we filed with the Commissioner of Internal Revenue on January 26, protesting the proposed regulation.

I would like to file a copy of that brief for your further information.

The CHAIRMAN. It may be filed with the record.

(The brief referred to is as follows:)

SUPPLEMENTAL BRIEF OF THE NATIONAL LUMBER MANUFACTURERS ASSOCIATION PROTESTING CERTAIN PROPOSED EMPLOYMENT-TAX REGULATIONS WITH RESPECT TO EMPLOYER-EMPLOYEE RELATIONSHIP

I

In another brief, filed jointly with the American Pulpwood Association, the American Paper and Pulp Association, the Timber Producers Association, and the Northeastern Lumber Manufacturers Association, we urged that the proposed new Employment tax regulations with respect to employer-employee relationship (Federal Register, Nov. 27, 1947, p. 7966) be set aside in their entirety. This supplemental brief is directed to criticism of the various aspects of the proposed regulations and to call to the Commissioner's attention objectionable features of the proposed regulations.

II

The terms "Social Security Act" and "act" are used in the broad sense herein, to refer to the several Federal statutes concerning social-security benefits to which the proposed regulations would apply, as listed in the initial paragraph of the proposed regulations.

III

The proposed regulations purport to conform to the principles enunciated in *United States* v. *Silk* (67 S. Ct. 1463; 15 Law Week 4646 (1947)). *Bartels et al.* v. *Birmingham et al.* (67 S. Ct. 1547; 15 Law Week 4773 (1947)), and related cases. In the Silk case, and its companion case *Harrison* v. *Greyvan Lines, Inc.*, the Supreme Court placed major reliance on a previous case it had decided in connection with the National Labor Relations Board, *N. L. R. B.* v. *Hearst Publications Inc.* (322 U. S. 111 (1944)). The concepts of the Hearst case relating to employees have been specifically repudiated by Congress. This matter is dealt with in the brief referred to in section I. Attached hereto are the pertinent portions of the report of the House Committee on Education and Labor and the conference report, made in connection with the Labor-Management Relations Act of 1947, clearly indicating congressional disapproval of the Hearst case concept of "employee" (exhibits A and B).

But it is not enough to say merely that the Hearst case has been repudiated by Congress. The National Labor Relations Act as amended by the Labor-Management Relations Act of 1947 states that the term "employee" shall not include "* * * any individual having the status of an independent contractor." The Commissioner may reply that the proposed regulations are not inconsistent with this definition, that they do not include independent contractors within the scope of the term "employee," but that these regulations merely attempt to properly define and delimit these terms. However, when the plain, direct wording used in the definition of "employee" in the Labor-Management Act is considered in the light of the statements in the reports referred to and attached hereto, it is clear that Congress expects these terms to be given their usual and ordinary meaning. It is not the function of the administrative agency to give new, artificial, and unintended meanings to terms of a statute. When Congress used the word "employee" in connection with the Labor Act it did not intend that the Labor Board ignore principles of agency and business practices in determining who were independent contractors, and when the Board promulgated its concepts in ruling that the newspaper merchants were employees of the publisher of the newspaper instead of independent contractors and was upheld by the Supreme Court, the Congress labeled the administrative excess as such and specifically repudiated the Supreme Court holding. It should be clear that in the determination of the independent contractor relationship under the social-security laws, Congress likewise expects that the Commissioner will not ignore recognized principles of agency and business practice.

IV

The proposed regulations, it was noted above, purport to rely upon the Supreme Court decisions cited. Upon analysis, it is clear that the reliance is upon dicta of the Court and not its actual decision. The underlying thesis of the proposed regulations as stated in section 402.204 (a) is based principally upon that portion of the Silk case in which the Court discusses and refers to pertinent portions of the Hearst case. In fact, in part of section 402.204 (a) of the proposed regulations language is used identical with that of the Court, which in turn was quoted or paraphrased from the Hearst decision. To base a regulation on dicta of the Court is at best a questionable practice, but to rely on only a part of the decision is even more to be condemned. After stating that application of social-security legislation should follow the same rule that was followed in the Hearst case the Court said:

"This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the act. The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture, and distribute the finished produce to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of the industrial process is in the hands of independent contractors,

they are the ones who should pay the social-security taxes." (*U. S.* v. *Silk*, 15 Law Week 4646, 4649.)

It is our contention, and we give specific examples in the arguments that follow, that the proposed regulations invalidate many bona fide types of independent contracts and so narrow the concept of contracting as to eliminate many normal business relationships recognized by the very decision on which they purport to rely.

The proposed regulations are, in their inception, based upon a false premise. In the third paragraph of section 402.204 (a) it refers to the usual type of workers as examples of employees and in the next paragraph refers to physicians, lawyers, dentists, veterinarians, building contractors, public stenographers, and auctioneers as clear-cut examples of independent contractors. Continuing, this paragraph sets forth the characteristics of the typical independent contractor. By no reasonable construction of the term can these listed characteristics be considered as typical indicia of an independent contractor. They are, rather, a summation of the attributes of a hypothetical, "ideal" independent contractor, who is such beyond any possible question. These criteria simply do not comport to the realities in the business world. There are many thousand bona fide independent contractors who do not meet these tests and it is grossly unfair to assert that they describe the typical independent contractor. Some independent contractors may possess these characteristics, and certain independent contractors may possess some of the characteristics, but they certainly are not typical.

For example, it is stated that "the typical independent contractor * * * at times and places and under conditions fixed by him * * * offers his services to a public or customers of his own selection rather than a single person. * * * The Greyvan case negatives this contention. There, the truck owners offered their services only to the Greyvan Co. and played no part in the selection of the customer for whom they would haul. Likewise, in the Silk case, the truck owners could and did drive for only one company, yet they were held to be independent contractors. Thus, parties held by the Supreme Court of the United States to be independent contractors could not be so considered under the criteria of typical independent contractors of the proposed regulations.

It is stated that "The typical independent contractor * * * performs the services in or under his own name or trade name rather than in or under that of the person for whom the services are performed * * *." This criterion is in direct conflict with the holding in the Grayvan case. There, the truck owners displayed to all the world the trade name of another, and yet were nontheless held to be independent contractors.

It is stated that "* * * the performance of the service (of the typical independent contractor) supports or affects his own good will rather than that of the person for whom the services are performed * * *." This, too, is an erroneous criterion. In the Greyvan case the identity of the truck owner as such was completely merged with the Greyvan Co., and it could hardly be contended that if any truck owner conducted himself or performed his duties in such a manner as to create good will or ill will that it would reflect on anyone other than the Greyvan Co.

There are many bona fide independent contractors who supply a part of a commodity often subject to rigid specifications, which is completely merged with and into the end product which is sold under another's trade name. This is a common occurrence in the business world. Yet, if this particular part or segment should be defective who would content that anyone but the principal manufacturer operating and selling under the trade name, and not the independent contractor producing the defective part, would be blamed by the consumer?

It is stated "the typical independent contractor * * * has a going business which he may sell to another." This is misleading as a requisite for the typical independent contractor. There are many situations where a bona fide independent contractor, perhaps with a substantial number of persons in his employ, has as his principal asset his personal reputation and good will. He may own and operate a thriving business and be thoroughly successful and yet the business would have little if any resale value because it depends upon his personal ability. Suppose, for example, that an interior decorator operates a small business of consulting with builders, architects, and members of the public on problems on interior decoration. Such a person may even employ a number of clerks and possibly have a stock of materials on hand. This may be an operating business, but it would have almost no value if offered for sale, for its mainstay is the intangible ability of the interior decorator and his personal reputation. Any regulation which sets forth this criterion as a typical one will operate to deny the status of independent contractor in many bona fide cases.

The broad language of the third paragraph of section 402,204 (e) is not sufficiently clear to preclude the type of interpretation suggested above.

It is possible that the Commissioner does not intend that the regulations be interpreted as suggested above. However, the language used would permit the results indicated, and if not so intended, should be changed so as to clearly preclude such results.

VI

Section 402.204 (b) of the proposed regulations state that an "employee" is an individual in a service relationship "who is dependent, as a matter of economic reality, upon the business to which he renders service and not upon his own business as an independent contractor." This test is so sweeping and all-inclusive that it is a totally unreasonable construction of the terms of the act. As noted in IV above, the Supreme Court recognized that it was not the purpose of the act to change normal industrial relationships, and that the act was put into the economic fabric of the Nation. The language of section 402.204 (b) can be interpreted to change so many relationships, generally recognized by the business and industrial world and by the Supreme Court as independent contractors, that it is a totally unwarranted extension of the act. Under this definition, only the most clear-cut cases can be held to be independent contractors.

For example, it is conceded that a professional man, such as a lawyer, in private practice, is undoubtedly an independent contractor within the meaning of the act. The proposed regulations cite lawyers as "in most cases clearly independent contractors and not employees." Suppose, however, that a lawyer in private practice, operating his own office and offering his services to the public has only one client, a business enterprise. Suppose that all of his time is devoted to the business of this client, that he receives income from only this one source, and suppose, further, that the legal matters of this client keep him so busy that he can't or won't accept work from the general public, to whom his office is presumably open. Under the test set forth, this man is clearly dependent as a matter of economic reality upon the single client. Will the Commissioner be so willing to change the normal concepts of this relationship as to hold, as he could under this test, that the lawyer is an employee of the company and that the company is therefore liable for social-security taxes?

Suppose a small machine shop which has been open to the public and accepted work from the public for a number of years becomes so proficient at certain types of work that another company engages it on a year-round basis to manufacture a certain mechanical part and that this contract requires 95 percent of the shop's time and facilities, and only 5 percent of its time and facilities are devoted to the work which comes in from the public. As a "matter of economic reality," if these words mean what they seem to say, the workers in this machine shop are now employees of the manufacturing company. The independent contractor would no longer be an "independent contractor" under the proposed regulations.

In the lumber industry this is no mere hypothetical problem. There are many small independently owned and operated logging companies. These companies make contracts with mills which own or have timber rights on large tracts of land. The mill consumes all logs cut and, usually, pays at a contract rate per thousand board feet. Ostensibly these logging companies offer their services to the public, but in practice most of them log for only one company at any one time. Under the proposed tests these small companies could be held dependent "as a matter of economic reality" on the mill and thereby denied the status of independent contractors.

Surely such results were not intended by Congress nor sanctioned by the Supreme Court in the cited decisions. However, the board language of the third paragraph of section 402.204 (e) is not sufficiently clear to preclude such interpretations.

It is possible that the Commissioner does not intend that the regulations be interpreted as suggested above. But, if he does not so intend, the language used should be changed so as to clearly preclude such results.

VII

Section 402.204 (c) of the proposed regulations gives further indication that the effect of the regulations would be to eliminate many bona fide independent contractor relationships. The section is so worded that the Commissioner can so emphasize and evaluate any one of the factors, or a combination of them, that recognized independent contractors are brought within the scope of the definition.

of "employee." Under this section, "the pertinent inquiry" as to each factor is to be whether under that factor an independent contractor relationship actually exists "as a matter of economic reality." Thus, while the regulations purport to take into consideration the total situation in making the determination, upon analysis it is evident that if there is found to be one factor which indicates that the party is dependent as "a matter of economic reality" upon the business to which the service is rendered, the Commissioner is justified under the regulations in holding that such party is an employee instead of an independent contractor.

Such a one-sided approach to the problem is, we contend, an unreasonable abuse of the Commissioner's discretion.

VIII

The position taken with respect to the factor "degree of control," section 402.204 (d) (1), is unjustifiable. The initial paragraph of this section points out that a high degree of control over the performance of services points to an employee relationship, while a low degree of control is less indicative of such a relationship. To contend that a high degree of control necessarily indicates an employee relationship is not borne out by realities of the business world. Probably more often than not, in commercial and business transactions, the contract with an independent contractor sets forth specific and rigid requirements which must be met. Usually, contracts contain provisions for rejection if the specifications are not met. Thus, an independent contractor is frequently subject to the highest degree of control which in no way indicates that he is not a bona fide independent contractor.

This portion of the proposed rule is applicable only to the simplest types of situations. Where, for example, the owner of a pet dog takes it to the veterinarian to be cured of an ailment, he exercises almost no control over the veterinarian, and under the proposed regulation the lack of control rightly points to an independent contractor relationship. Where, for example, an individual takes written matter to a public stenographer to be typewritten the lack of control rigbly points to an independent contractor relationship. But the complex dealings in the business world lead to many contractual relationship which are much more complicated. The degree of control which may, at times, result from these contracts is not a fair basis for contending that the independent contractor relationship does not exist.

It is stated in the fifth paragraph of section 402.204 (d) (1) that the "* * * right power of control may in particular cases be established, by varying degrees, by one or more of a variety or circumstances, such as the performance of services as an integral part of the functions of the enterprise carried on by the person for whom the services are performed * * *." This requirement would prevent the use of the services of independent contractors in that large group of situations where a portion of production or manufacture of an essential part is secured by contract with another business. For in all such instances the services are "integral" and absolutely necessary to the completed article or commodity. This criterion, for example, would permit the manufacturer of tractors to employ an independent contractor to wash the windows of the plant, as that would not be an "integral" part of the function of manufacturing tractors, but would not permit the use of an independent contractor to produce and supply a special type of valve used in the tractor, as that would be an "integral" part of the manufacture of tractors.

It is stated that the right or power to control may be established by "* * * circumstances such as * * * the fact that the individual's services are performed in accordance with procedures, or at times, fixed by the persons for whom the services are performed rather than by the individual performing them * * *." The objection to this criterion is that, literally interpreted, it means that the Commissioner can deprive many bona fide independent contractors of their independent status. Suppose, for example, a logger having a number of trucks and tractors may employ the services of a garage to make regularly mechanical inspections and to repair its vehicles. The company may fix the times at which this is to be done, and may fix, and change from time to time, the procedure to be followed, and prescribe the information about the inspection and repairs made that it wishes furnished by the garage. This is clearly an independent contractor relationship, but under the proposed regulation it could be held that the garage mechanics were employees of the logger.

The proposed regulation states that the "right or power of control * * * may be established by * * * circumstances such as * * * the fact that the arrangement contemplates essentially the performance by the individual of

personal services which he may not delegate (whether or not the arrangement contemplates that the individual will also furnish the services of others)." Under this criterion the Commissioner could hold many bona fide independent contractors to be "employees." Suppose a business organization engages the services of an architect. His skill may be such that the arrangement clearly contemplates his personal services, even though he will use the services of draftsmen, clerks, and others in his own employ. It is usually generally conceded that a practicing architect, when engaged for professional services, is in the status of an independent contractor, but under this rule he could be held to be an "employee."

The sixth paragraph of section 402.204 (d) (1) reads as follows:

"One of the most significant elements in establishing control is the right or power of the person for whom the services are performed to terminate the relationship without cause or on short notice. The individual performing the services knows that the relationship may be terminated by the exercise of such right or power if he does something at variance with the will, policy, or preference of the person for whom the services are performed. Such right or power is generally incompatible with the freedom from control enjoyed by an independent contractor."

It is a common practice to provide for the termination of contracts upon a given notice. This notice may be entirely adequate to the parties to the contract but could nevertheless be considered by the Commissioner to be "short notice" within the meaning of this requirement, thus making it possible for the Commissioner to determine bona fide independent contractors to be "employees." Where a contract exists, setting forth the performance expected by each party, and providing for termination upon given notice, which may be a "long" notice to the parties but which may be considered by the Commissioner as a "short" notice, the fact of the existence of the contract should be the basis for determining if the relationship of independent contractor exists and not the single factor of a provision for termination upon a given notice.

The contention that the right or power to terminate the relationship "without cause" is incompatible with an independent contractor relationship is erroneous and misleading. In a legal sense any contract or engagement for services of another can be terminated without cause. That the party terminating the contract may become liable for damages has no bearing on the issue of whether an independent contractor relationship existed. This principle applies even where the engagement is extremely informal. Suppose a planing mill engages a small sawmill to cut rough lumber from a certain tract of timber. There may be no written contract. The planing mill may simply specify the sizes of lumber and the maximum and minimum quantity to be delivered. The planing mill could cancel the contract without cause before cutting begins, when partially completed, or after being entirely completed. The right of cancellation "without cause" has no bearing on the status of the small mill owner being that of an independent contractor.

It is stated in the portion of the proposed regulations quoted above that where a party engaged to perform certain services knows that the relationship may be terminated if "he does something at variance with the will, policy, or preference of the person for whom the services are to be performed" such knowledge indicates that an independent contractor relationship does not exist. This assertion is directly contrary to the foundation of all contracts, for this is merely another way of saying that if the party engaged does not come forth with the quality and quantity of services for which he was engaged, his contract may be canceled. In other words, the contract (whether written or oral) is broken for cause. It is difficult, indeed, to see how an ordinary contractual principle, accepted as a fundamental of the law of contracts, is indicative that the independent contractor relationship does not exist.

The broad language of the third paragraph of section 402.204 (e) is not sufficiently clear to preclude the type of interpretation suggested above.

It is possible that the Commissioner does not intend that the regulation be interpreted as suggested above. However, the language used would permit the results indicated, and if not so intended, should be changed so as to clearly preclude such results.

IX

The wording of section 402.204 (a) (2) is so loose that it could lead to the absurd results that almost any business which has one or more substantial and regular customers or clients can be held to be employed, and therefore not an independent contractor. It is stated that a "permanent" relationship indicated

dependency as a matter of economic reality, and thus indicates that an independent contractor relationship does not exist. "Permanency" is then described in terms which indicate that almost any type of recurring work tends to establish the "permanent relationship." Conversely, this is further indicated by the statement that "the relation is impermanent if it is of limited duration and nonrecurring."

In the lumber industry, a mill may employ during the logging season each year the same logging company to supply the mill with logs. Under this regulation the Commissioner would be justified, on this single fact, that the employment was of a recurring nature, to hold that the logging company contractor and his employees were employees of the mill.

The broad language of the third paragraph of section 402.204 (e) is not sufficiently clear to preclude the type of interpretation suggested above.

It is possible that the Commissioner does not intend that the regulations be interpreted as suggested above. However, the language used would permit the results indicated and, if not so intended, should be changed so as to clearly preclude such results.

X

Section 402.204 (d) (3) states that "integration of the individual's work in the business of a person to which the individual renders the service" indicates that an independent contractor relationship cannot exist. This contention is directly contrary to the holding in the Greyvan case, where the truck owners merged their efforts and services almost completely with the company but were nonetheless determined by the court to be independent contractors. Thus, merger of the services has little if any bearing on the question.

It is stated that "integration * * * may be established by one or more of a variety of circumstances, such as the fact that the services are essential to the operation of the business * * *." This criterion is so sweeping that it could encompass almost any type of service rendered by any business or individual for any other business or individual. If an operating business engages the services of another establishment, it is highly probable that these services are "essential" in the economic sense of the word, for otherwise the former would not be willing to spend its funds for them. It is fundamental in our economic system that a business operates to make a profit, and when a business is willing to expend its financial resources for the services of another it is probably because such services are "essential." Examples are legion. Suppose a company manufactures leather goods and engages another company to treat its hides chemically in a certain manner, such processing being done after the hides have been obtained but before the finished leather product is manufactured. This service is certainly "essential" to the manufacturing process. There is no reason why it could not be done by an independent contractor but under this regulation the Commissioner would be at liberty to rule that there was "integration" which precluded such a relationship.

In the lumber industry it could have the effect of preventing any logging company from maintaining its status as an independent contractor. Whenever a mill obtains logs from a logging company, operated separate and apart from the mill, the Commissioner would be at liberty to rule that the logging was an "essential" part of the mill's operations and therefore persons in the employ of the logger were actually "employees" of the mill.

It is stated that "integration * * * may * * * be established by one or more of a variety of circumstances, such as * * * the fact that the services, though not essential to the function of the business of the person for whom rendered, are performed in the course of such business * * *." This is a further extension of the sweeping provision just discussed. If the services contemplated are not an essential part of the business for which they are rendered, they will in all probability not be performed in the course of such business. The fundamental objection to the proposed regulations is again illustrtated—many bona fide independent contractors will be deprived of that status if this criteria is enforced. It will be a rare instance indeed when a business will engage the services of an independent contractor which is neither essential to the business nor performed in the course of the business. The phrase "in the course of such business" would cover a multitude of situations which have never before been considered as incompatible with the status of being an independent contractor. Suppose, for example, that a sawmill which sells only standard sizes of unfabricated timbers takes an order for fabricated trusses, and engages a fabricator to come to his mill to fabricate the timbers (cut to exact size, bore, groove, etc.)

before shipment. Apparently, delivery of fabricated parts would be made "in the course" of the lumber business and the sawmill is liable for social-security taxes on the employees of the fabricator. The language of this portion of the proposed rule is so broad that such an interpretation is not precluded.

The proposed regulations state that "integration * * * may * * * be established by * * * circumstances, such as the fact the services of the individual are performed in accordance with procedures, or at times, fixed by the person for whom they are performed * * *." This criteria was discussed above (under part VIII) and the same objections made there apply here. The performance of services at a particular time or in accordance with a particular procedure may be the real consideration underlying the making of the contract or arrangement. To get performance at a particular time or in a particular manner may be economically valuable consideration for which one business may be willing to pay another, and there is little reason to contend that the probability of the existence of the relationship of independent contractor is lessened thereby.

The proposed regulations state that "integration * * * may * * * be established by * * * circumstances such as the fact that the services of the individual are performed in or under the trade name of the person for whom the services are performed * * *." Objection was made to this provision under section V and the same objections apply here. This factor was present in the Greyvan case and the Supreme Court held the truck owner nevertheless an independent contractor, but under the proposed rule the Commissioner, if sufficient weight is given this factor, could hold in a similar situation that such a truck owner was an employee.

The broad language of the third paragraph of section 402.204 (e) is not sufficiently clear to preclude the type of interpretation suggested above.

It is possible that the Commissioner does not intend that the regulations be interpreted as suggested above. However, the language used would permit the results indicated and, if not so intended, should be changed so as to clearly preclude such results.

XI

Section 402.204 (d) (4) sets forth the proposition that a low degree of skill indicates that the relationship of independent contractor does not exist. It is submitted that this criterion, like others in the regulation, would be misleading and erroneous. While it is true that individuals of a low degree of skill may normally turn to employment in established business where they would clearly be classified as "employees," any undue emphasis on this criterion can operate to prevent individuals or groups of individuals from becoming independent contractors merely because their services do not involve a high degree of skill. While this section of the proposed regulations may be of less consequence than others, it is believed that its strict application could operate against parties enttiled to the status of independent contractor.

XII

In section 402.204 (d) (6), concerning the factor of profit or loss as indicating an independent contractor relationship, it is stated that "opportunity for profit or loss * * * may * * * be established * * * by * * * circumstances such as * * * the fact that the services of the individual support or affect good will as an asset of his own rather than the separate good will of the person for whom the services are performed." This criteria has been included in the consideration of other factors. (See section V.) Its application in cases similar to the Greyvan could lead to results directly contrary to the holding in that case. It has no bearing on the question of opportunity for profit or loss.

XIII

The third paragraph of section 402.204 (e) has been referred to in connection with several factors in the discussion above. It is strongly urged that this paragraph would not prevent the unreasonable interpretations which could be made in connection with the various criteria as suggested above. It should be enlarged and clarified, and made specifically applicable to each factor so that it cannot be subordinated to the explanations and amplifications made in connection with each of the factors set forth in the proposed regulations.

SUMMARY AND CONCLUSION

The proposed regulations purport to conform to Supreme Court decisions which rely upon another decision which has since been specifically repudiated by Congress; Congress has indicated that it expects administrative agencies not to ignore recognized principles of agency and business practice in defining terms used in connection with the employment relationships; the proposed regulations rely upon only part of the principle case cited, and ignore important portions of that decision; they invalidate many bona fide types of independent contracts and so narrow the concept of contracting as to eliminate many "normal business relationships" recognized by the very decision upon which they purport to rely; the criteria alleged to be characteristic of "typical" independent contractors are not in fact "typical"; the test of the employer-employee relationship as that of "dependence, as a mater of economic reality" upon the business for which the services are rendered is so sweeping as to permit a totally unreasonable construction of the terms of the act; the proposed regulations permit the Commissioner to so evaluate and emphasize any one, or combination, of the factors to be considered that the total situation is not, in fact, determinative; and the position taken with respect to each of the several factors individually is unrealistic and unjustifiable.

The various features of the proposed regulation are so objectionable, unrealistic, and unjustifiable, we urge that they be set aside in their entirety.

NATIONAL LUMBER MANUFACTURERS ASSOCIATION.

EXHIBIT A

Report No. 245, House of Representatives, Eighth Congress, Report from the Committee on Education and Labor on the Labor-Management Relations Act of 1947, April 11, 1947, page 18:

"(D) An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U. S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'."

EXHIBIT B

Report No. 510, House of Representatives, Eightieth Congress, Report from the Conference Committee on the Labor-Management Relations Act of 1947, June 3, 1947, pages 32-33:

"(3) *Employee.*—The House bill changed the definition of 'employee' contained in the existing law in several respects:

* * * * * * *

"(D) The House bill excluded from the definition of 'employee' individuals having the status of independent contractors. Although independent contractors

can in no sense be considered to be employees, the Supreme Court in *N. L. R. B.* v. *Hearst Publications, Inc.* (1944), 322 U. S. 111, held that the ordinary tests of agency should be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law really contractors.

* * * * * * *

"(D) The conference agreement follows the House bill in the matter of persons having the status of independent contractors."

The CHAIRMAN. Thank you very much for coming.

Mr. FULLER. Thank you, Senator.

The CHAIRMAN. Is Mr. Rogers here?

Mr. ROGERS. Yes, sir.

STATEMENT OF JAMES P. ROGERS, ATTORNEY, APPEARING FOR COLUMBIA BASIN LOGGERS, PORTLAND, OREG.

The CHAIRMAN. Will you be seated, Mr. Rogers, and give your name, address, and occupation to the reporter.

Mr. ROGERS. My name is James P. Rogers; my address the law firm of Hart, Spencer, McCulloch & Rockwood, 1410 Yeon Building, Portland, Oreg. I have been practicing law 10 years in the State of Washington, and am now an applicant for admission on motion in the State of Oregon. Throughout my practice I have specialized in those fields of Federal law having to do with the relationship of employer and employee, principally the Fair Labor Standards Act, the National Labor Relations Act, and like statutes. Throughout nearly my entire practice also I have represented, in one capacity or another, many individual companies engaged in the production of logs, lumber, and their products in the Pacific Northwest, as well as associations of such companies.

Today, I am officially representing an association of loggers engaged in the logging industry in the States of Oregon and Washington, known as the Columbia Basin Loggers. I will mention some companies who are not members of that association, but who are clients of our firm, who have the same type of problem, and urge the same solution; the difficulty on which I here speak attends the whole logging industry in the Douglas fir region, and to a somewhat lesser extent the western-pine industry as well.

In appearing here, then, I am actually speaking for the entire logging industry in the Northwest, and especially the Douglas fir industry. I am appearing in support of the objective the legislation now before you seeks to reach; but in addition it is my principal purpose to point out that, insofar as we are concerned, it meets only half the problem. In order to meet the other half, it is necessary to add to these resolutions a very simple section, which will amend section 3475 of the Internal Revenue Code, known as the Federal Transportation Tax Act. That code section is applicable to independent contractors; to straighten out the "employee" question under the Social Security Act fundamentally involves like action for the "independent contractor" question under this act. For, in determining the applicability of this tax, it is necessary to know if the hauler is an "employee" or an "independent contractor." If the former, the social-security taxes are payable; if the latter, the transportation tax must be borne. To

deal with one without the other would, insofar as the logging, sand and gravel, and contracting businesses are concerned, make the cure worse than the disease.

Before giving you our problem and our proposed short addition to the pending legislation, I would like to pause to remark that we in the Northwest lumber industry, though only a collection of small businesses, seem to have the unhappy faculty of constituting the weather-vane of most of the rest of American business when it comes to troubles, especially (I may add) with Washington's bureaucracy. Long before anyone else ever heard of portal-to-portal, long before the Mount Clemens Pottery case, we in the Northwest were acutely conscious of that peril, not only to ourselves but to all industry. And once again, long before the Silk and Greyvan decision, we had been battling the Bureau of Internal Revenue on the "independent contractor" versus "employee" question. And lest anyone should think we run interference only in legal questions, I might remark we are now negotiating round four, not round three, with our unions, on the matter of wages.

The Federal Transportation Tax Act taxes the transportation of property when performed by "a person engaged in the business of transporting property for hire." It does not, then, tax transportation when performed by an employee, but only when performed by any person other than an employee and who is engaged in the transportation business.

Normally, of course, we think of this tax only in connection with shippers by common carriers, railroad, or truck. But ever since the effective date of the tax, we in the logging industry have been faced with the contention by the Bureau of Internal Revenue that the tax is applicable to all log hauling by truck. At first, the tax was claimed when the gyppo—by which we mean a logger who logs timber for others—was doing his own hauling; we finally, after a long battle, convinced the Bureau he was engaged in logging, not hauling, and that contention was dropped. In all other cases, however, the tax has been claimed.

Let me emphasize here that we have never resisted application of this tax where the hauler was a true independent contractor, but we have resisted and are resisting where the hauler is in fact and law an employee on whom pay-roll taxes have been paid.

It is necessary to explain here that our record production of lumber now flowing from our mills would not be here at all, but for the development of truck logging, which enables us to log small, isolated tracts never available to rail logging with its great investment. The coming of "truck" and "cat" logging has been an economic revolution vital to our war effort and postwar housing needs. It has also meant that where 1 company, doing "high-lead" logging at a "rail show," existed before, 50 now exist—all small, highly mechanized, and utilizing timber in stands never before practicable. It is this vital development in our industry which is so difficult to explain to the Bureau.

In the development of truck logging, there have come into being two types of log truckers. One I call the "itinerant" type, that is, the trucker who owns his own truck and roams the woods looking for some gyppo who wants a load of logs hauled. When he finds one they haggle over the price, which is so much per thousand per mile, and if they finally agree he hauls the logs to wherever they are to be dumped

for that price. Each load is a separate deal; he may come back for another one if he wishes and more logs are available, but usually he does not; in 1 week he may haul on this basis for a dozen different loggers. This is the class we believe constitute true independent contractors, and characteristically the 3 percent transportation tax is always added to the price they are paid.

The second class I refer to, in order not to beg the question, as the "permanent" type trucker. He also owns his own log truck, but there a resemblance with the itinerant trucker ceases. He seeks out a logger and asks for a job for himself and his truck; he is hired in the same as any other employee. His wages are set by union contract; only the amount paid him for the use of his truck is subject to variation. (This amount is arrived at by an agreement for a rate per thousand feet for himself and truck, and which will vary with the length of the haul, of course; from this amount is deducted his wages, and the balance is for the use of the truck.) The logger pays all Federal and State pay-roll taxes on the trucker's wages, as well as the withholding tax. On the job he is subject to the orders of the head loader and woods foreman; he takes his load where and when, and by what route, he is directed. Since the logger usually has a few of his own trucks also, this trucker works exactly the same way as the drivers of the company trucks; in fact, no outside observer could distinguish one from the other. And if he breaks the rules or otherwise fails in his job, he is fired and has no recourse for breach of contract.

It is this second class of trucker we have considered employees for Social Security Act purposes, have paid pay-roll taxes on him in good faith, and have resisted payment of transportation tax on his services.

There are, of course, other situations; some loggers use only their own trucks, but since this requires a greater investment than most small loggers can afford, these are few and far between. Others contract with one man who owns several trucks, usually a fleet, to haul all his logs. But these are also rare situations, for the same reason—too great an investment. The types I have described above are by far the most prevalent in the industry.

Of course, no actual case involves the ideal, or theoretically perfect, formula—normally men do not enter into working relationship with a lawbook in each hand. Sometimes the logger charges back the pay-roll taxes; sometimes the trucker pays his own speeding or overload fines; and often he has an equal voice with the logger in the selection of a substitute to drive his truck if he is off. These are all factors in determining the legal relationship, but minor ones only; the primary factors of control and right to damages for premature termination of the relationship all show clearly the employer-employee relation.

However, the Bureau has taken the position that these truckers are independent contractors in almost every case that came up, even prior to the Silk and Greyvan cases. They held, in effect, that the logger was bound to make the nice legal distinctions involved in this field, the most troublesome I know in the law, and act at his peril whichever tax he paid. Since in almost every case he paid the pay-roll taxes on the truckers in this class, when the Bureau contended the transportation tax was due the logger wound up paying both and then suing to get one back, if he could guess which one.

The Silk and Greyvan decision then was handed down, and what had been an already intolerable situation has become worse. We

now have enough cases on our desks to show that, on the basis of that decision, the Bureau is disregarding every legal test of employer-employee versus independent contractor except the new one that decision added—that of ownership of the equipment and size of the investment. If the Bureau discovers the trucker owns his truck, then apparently they assess the transportation tax without further ado and without reference to the other tests to be used in ascertaining the relation, even though in that decision the Supreme Court said:

No one (test) is controlling nor is the list complete.

I have with me two of the many examples of the Bureau's position, with the accompanying record. The first involves the Atlas Logging Co. of Glenwood, Oreg., which had a good many of the "permanent type' truckers, as well as some of its own trucks. I have here, for insertion in the record if the committee desires, the questionnaire furnished by the Bureau, and Atlas' answers, which comprise 19 typewritten pages, and the Bureau's reply. The second is the Elwin Littlejohn matter, similar in nearly every respect. I can here insert the Littlejohn answers to the Bureau questionnaire, the Bureau's ruling, and our reply.

In both cases it will be seen that the Bureau based its ruling on only one factor—owership of the trucks—and apparently disregarded completely the other facts disclosed by the questionnaire. These are but two of many such cases already pending, and this is only the beginning, for demands of this character are now coming with increasing frequency.

Some months ago, at the resquest of the industry, I took the question up with Senator Cordon; he was good enough to send my memorandum to the Commissioner, who in turn wrote a letter to Senator Cordon on this subject. At that time our only suggestion was that, where there had been a payment of pay-roll taxes on the trucker in good faith, the transportation tax should not be applied retroactively but only prospectively. Since this correspondence was somewhat voluminous, I shall only read the last paragraph of the Commissioner's letter of September 29, 1947, to Senator Cordon, as follows:

Considering all the circumstances of the matter, particularly the fact that there was some justification for the erroneous payments of employment taxes by the loggers due to the uncertainty as to the status of the log haulers, the Bureau is agreeable to an adoption of the recommendation made by Mr. Rogers, subject to the modifications outlined herein. Accordingly, in a case where a person (logger) engaging the services of truckers (log haulers) has paid employment taxes in good faith with respect to such services, and it must now be held that instead the transportation tax should have been paid by such person, the Bureau hereafter will not assess the transportation tax liability against such person retroactively for the period for which the employment taxes were paid, provided, such person will waive his right to refund of the employment taxes imposed by section 1410 of the Federal Insurance Contributions Act and section 1600 of the Federal Unemployment Tax Act paid by him for the period for which the transportation tax is not being asserted. It should be understood, however, that in the case in which the transportation tax has already been assessed or paid with respect to the prior period for which the employment taxes were also paid, recovery of the employment taxes must be effected by a claim for refund.

This action of the Commissioner is eminently just and in every way commendable, and I am sure is appreciated by every logger involved in this problem.

Our proposed addition to the joint resolution now being considered by the committee simply carries this solution into the Transportation Act itself. In doing so, it restores the common-law tests of employer and employee by removing the new feature of the Silk and Greyvan decisions, and it operates prospectively as well as retrospectively, but both for this tax alone. If this legislation is adopted, with the additional section we propose, we feel confident our difficulties, where we are caught between the Scylla of the social-security taxes, and the Charybdis of the transportation tax, will be ended. The additional section to House Joint Resolution 296 and Senate Joint Resolution 180, reads as follows:

Sec. 3. (a) Section 3475 of the Internal Revenue Code is amended by adding thereto a new subsection, to read as follows:

"(f) In the determination of 'person engaged in the business of transporting property for hire' within the meaning of this section, no effect shall be given to the ownership or cost of the equipment used in such transportation, nor shall such term include any individual on whom social security or other Federal employment taxes have been paid in good faith by the person making the payment subject to the tax imposed by this section." (b) The amendment made by subsection (a) of this section shall have the same effect as if included in the Internal Revenue Code on October 21, 1942.

I would not give the impression our industry is the only one caught between these millstones. I know the same trouble exists in the sand and gravel industry and in the contracting business, and there may be more besides. Neither do I want to convey that only our log truckers are involved—the business of truck logging depends on truck roads, and we have precisely this same difficulty with the drivers of our gravel trucks. For illustration, I have for the record, if the committee wishes to receive it, the answers to the Bureau's questionnaire, additional questions, and again the reply, of the Long-Bell Lumber Co., at Grand Ronde, Oreg., which involve the same issues since the same method of employment is used.

In conclusion, I might say that what is sought here is certainty insofar as certainty is ever possible, in the application of these two taxes which administration, not the statutes themselves, have made conflicting. Thus, our suggested addition to House Joint Resolution 296 and Senate Joint Resolution 180 deals with the same problem exactly, and in the same manner, and allows the rules we once, as lawyers, thought governed this relationship, to be reestablished. I cannot emphasize too strongly that unless this action is taken by the Congress, another economic revolution impends in the logging industry in the Northwest, but this time one which runs against the trend of the times, for the only outcome of the present situation is that the large companies, with adequate financing, will take over the hauling of logs.

In other words, the big will get bigger and the little man will once again be forced into a big outfit or lose his livelihood. This trend has already started; already we have advised one or two logging clients that under present conditions, where their truckers were employees for every legal purpose but Federal transportation taxes, they should buy those men out and do their hauling on their own trucks, or contract with the owner of a large fleet of trucks and thus get the truckers off their pay roll.

This is the inevitable end if the present situation respecting these two taxes is not corrected by the Congress.

With your permission, I would like to discuss, in view of the testimony this morning, particularly of counsel from the Treasury Department, our industry, because we form one of those fringe-twilight zones that he was talking to. I think he, as a matter of fact, mentioned the logging industry twice and I here represent the Douglas Fir logging industry. Mr. Fuller, who just read Mr. Colgan's testimony made some excellent points on the general over-all relationship between a sawmill and what we call a gyppo logger. You are familiar with that term, of course. It does not indicate dishonesty, it indicates the fact that he is logging by contract. In the development of the lumber industry in the northwest, as the larger tree stands of timber were cut down, we have had to rely on smaller and smaller tracts, more isolated.

The contract logging has gotten to be an economic necessity in our industry. I take it that what we are after here is the same thing that Joshua was after when he commended the sun to stand still while he got his job done. The Congress is undertaking to look over the social-security field, and they want the law to stand still while that is being done.

I take it that is the purpose of House Joint Resolution 296. Whether this group or that is covered should not be considered as being any part of my remarks, because I think I favor the extension of certain groups, but this is my field and I have seen this worked too many times. Once by regulation the definition of employer-employee is distorted for this one purpose you have started a chain reaction.

The next thing you know, because he is an employee for Social Security Act purposes, he is also an employee under the Wage Hour Act, and although you have no control over his hours, you have got to pay the penalties if they exceed 40, although you knew nothing about the liability you were building up.

Then, you have the National Labor Relations Act coming along next, because if these men are employees under that system, or under the social-security system, then they are under that. Eventually the courts come along and say, "Well, they are employees for all these things, they must be employees for tort liability, too," and you have gone full circle.

I have studied the decision in the Silk and Grayvan case and I have studied the regulations that purport to be issued as required by that decision, and I will tell you, Senator, counsel for the Treasury Department this morning made some statements that, if he knew what was going on in his own department, I think he would not make, because we have an additional thing that is not present in most other industries.

We have what we call "contract truck haulers," truck loggers, and the same Bureau of Internal Revenue that seeks to expand this definition of "employee" because the decision in the Silk and Grayvan case has also used that case to write out every other test of an independent contractor than the ownership and the investment of the vehicle involved, so that with their right hand they are going one way—that is, extending the social-security definition of "employee"—and with their left hand they are going the other, and by the same case, and are extending the definition of "independent contractor."

Now, I have got on my desk at the present time nine cases involving that very thing. We have two different types of truck drivers in the

logging industry. One of them you can call an itinerant driver. He owns his own truck. Today he will go to X Logging Co., and if they have some logs they want hauled and they can agree on a price per thousand feet per mile, he will haul those logs, maybe one trip, maybe two, but that is all, and in a week he will work for a dozen or 15 companies.

On the other hand, we have log-truck drivers who also own their own trucks, but that is where the resemblance stops, because they go and hire in with a logging truck, with their truck, just like you would hire in with any other piece of equipment that you own and were going to use—a saw, for instance—and they are paid wages.

The union contract governs the rate that you pay your log-truck drivers whether they are driving your truck or their own truck. Everything is exactly the same. Every test we ever knew under the common law is the test of "employee," so that habitually we have always paid social-security taxes on those men, the pay-roll taxes and everything else, and under the Silk and Greyvan decision the Bureau of Internal Revenue, Miscellaneous Tax Division, have come along and in nine cases where we have disclosed all those facts they have seized upon the ownership of the truck and said that is the one thing; it does not matter whether you have not paid these taxes for years; you have got to pay the transportation tax, under the section of the Internal Revenue Code which is not applicable to an employee but only to an independent contractor. I think he really did not know what his own Department was doing when he made some of the statements he made this morning because that is a beautiful case.

You can use it either way, whatever you want to do. Now, the truth of the matter is, Senator, that those regulations are not called for by that decision at all. We see it work time and time again. We seem to run interference for a lot of different things. The Portal-to-Portal Act was one. We had that first. We have had this one first, too, but the regulations that were issued by the Treasury Department about 9 years ago, the Supreme Court finally caught up to them in the Silk and Greyvan case and they laid down a test that only added one new thing, and that is the amount of the investment involved in the skill or equipment. That is the only thing. The Supreme Court said that you cannot lay down any rule of thumb, but they did add that one new factor, and that is all they did.

Now, these regulations that have been proposed go far beyond the requirements of that case. I do not think this committee is interested in having an analysis of those regulations probably because all you are doing, as I say it seems to me, is saying to the law, "stand still until we look this thing over," but it needs a very careful looking over, and I do not think those regulations are required by the case that is given as the grandfather of these new tests.

Under those tests, our log-truck drivers that I am mentioning here now, I think have been employees all the time, but it has added a great many new groups.

I could not say under those regulations, as well as I know the fact in our industry, and I hope as thoroughly as I have studied the regulations. I could not tell you what that itinerant truck driver is, whether he is an employee or not. I think the regulations that have been proposed leave the discretion wholly in the Commissioner's hands.

They are so wide that he can do what he wants, and to say that every person has a right to seek the upset of the court if he does not agree with those regulations, is just begging the question, because most of our loggers, for instance, those are little fellows, they are not going to court, and the situation with this transportation tax illustrates the very point I am making there.

You paid social-security taxes for 5 or 6 years on those men. Then the Miscellaneous Tax Division comes along and says, "No, they are not employees under the Transportation Tax Act, they are independent contractors because they own their own truck." No other reason for it. So you have got to pay the transportation tax. You have paid both taxes then.

Then you have to sue in court to get one of them back, and you know what a job that is for any small logger if he ever undertakes it, and most of them say, "Well, we just have to pay both, we cannot sue or fool around in court." As a result, they do not really have any protection against it. It is not just an overlapping where the independent contractor and the employee come like this [illustrating]. They have gone this way now [illustrating], and this is the very case that is used, so it seems to me that those are considerations that Congress is going to have to keep in mind, and it isn't only the Social Security Act, but it is that very Transportation Tax Act itself, because it deals with precisely the same problem.

I came 6,000 miles for this hearing and we have suggested that maybe there is an addition to House Joint Resolution 296 and Senate Resolution 180 that could be made that would take care of that problem at the same time because it deals equally with the employer-employee versus independent contractor relationship, and out in our country we simply cannot segregate the two—social-security or transportation tax—and our loggers have got to pay either one or the other. Unfortunately, in too many cases, they have to pay both, on the theory that a man is an independent contractor under the Transportation Tax Act, and an employee under the Social Security Act, doing the same job. The same man and everything. So we have suggested a very simple addition to this House joint resolution for your consideration. I have it here in the copy of my statement. It would amend section 3475 of code. It is on page 8, but I understand, however, that the Ways and Means Committee of the House has before it a reexamination of a lot of the excise-tax statutes. That may be a better place than here, but this Transportation Act question, as it bears on us and on the contracting industry and the sand and gravel industry, is simply inseparable to the question that is before the committee and as long as the sun is standing still on one we think it ought to stand still on both.

That is all I have.

The CHAIRMAN. Thank you very much.

STATEMENT OF MARSHALL E. LIVINGSTON, ASSISTANT SECRETARY OF C. H. STUART & CO., INC., NEWARK, N. Y.

Mr. LIVINGSTON. My name is Marshall E. Livingston, of Newark, N. Y., assistant secretary of C. H. Stuart & Co., Inc. This corporation, together with some 12 associated and subsidiary companies, en-

gages in manufacturing and handling cosmetics, nursey stock, and flat silverware for distribution direct to consumers through personal-contact selling.

We are in complete accord with the belief that the regulatory status quo of certain employment and social-security taxes should be maintained pending action by the Congress on extended social-security coverage.

The proposed amendment of employment-tax regulations by the Commissioner of Internal Revenue as published in the Federal Register, November 27, 1947, would seriously disrupt regulations in effect since social security became law. Treasury proposes to enforce collection of certain social-security taxes by resorting to ficticious administrative labeling of independent contractors as employees of concerns whose products are dealt in by these independent contractors.

The orderly and proper exercise of the legislative process by Congress should be the method by which the social-security law is amended, and not by administrative fiat of the Treasury Department.

If the newly proposed Treasury regulations become effective, then by a Treasury edict, the fiction of an employer-employee relationship in these cases is established within the framework of social security where none was intended by Congress.

The danger of such a construction by Treasury is that it would in all probability be extended by other agencies into various correlative fields of master and servant relationships such as tort liability upon the master for the acts of the alleged servant. State workmen's compensation liability for injuries received by said servant, employers' liability suits, income-tax-withholding liability, as well as the application of and possible liability for foreign-corporation statutes because of the presence of the company in a given State by reason of alleged servants.

On the eve of legislation to extend social security there should be no last-minute interference with the legislative process. The proposed regulations go far beyond the opinions of the United States Supreme Court in the Silk and Greyvan cases and arbitrarily create an employment relationship in order to broaden the base upon which to collect more social-security taxes. We believe that such broadened coverage and increased revenue can properly be accomplished by amendment to the social-security law which will provide for coverage of the self-employed instead of arbitrarily fixing an employment status, with a myriad of unjust corrollary liabilities, upon an historically and factually independent relationship.

We, therefore, respectfully urge your committee to recommend passage of this joint resolution in order to prevent legislation by administrative regulation.

The CHAIRMAN. We will meet at 10 o'clock tomorrow morning.

(Whereupon, at 4:50 p. m. a recess was taken until 10 a. m. Friday, April 2, 1948.)

SOCIAL SECURITY STATUS QUO RESOLUTION

FRIDAY, APRIL 2, 1948

UNITED STATES SENATE,
COMMITTEE ON FINANCE,
Washington, D. C.

The committee met at 10 a. m., pursuant to recess, in room 213, Senate Office Building, Senator Eugene D. Millikin (chairman), presiding.

Present: Senators Millikin (chairman), Bushfield, Hawkes, Martin, George, and Lucas.

The CHAIRMAN. The hearing will come to order, please.

Is Mr. Ewing here?

Mr. EWING. Yes, sir.

STATEMENT OF OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, FEDERAL SECURITY AGENCY, WASHINGTON, D. C.

The CHAIRMAN. Will you be seated please, Mr. Ewing, and give your full name, address, and business to the reporter?

Mr. EWING. Oscar R. Ewing, Federal Security Administrator, Federal Security Agency.

The CHAIRMAN. Proceed, Mr. Ewing.

Mr. EWING. Senator Millikin, I have only been, as you know, Federal Security Administrator since last August, and there are a lot of things that I do not know about the job, and I may very well have to call on my associates here who will know some of these details and technical material better than I.

The CHAIRMAN. You may feel at complete liberty, please, to do that.

Mr. EWING. I have had prepared a statement which I would like to file with the committee, if I may. On the other hand, I want to read part of it and also comment informally on other parts.

House Joint Resolution 296 would, as we understand it, take away the social-security coverage of some half to three-quarters of a million people.

The CHAIRMAN. Right at the very beginning, the language in your statement is "as the committee knows." That is a fact which is under question here. We are not sure it takes away any social-security coverage which should be covered. That is one of the questions at issue.

In other words, the whole question is now under review of Congress at the present time, and, therefore, at least, I suggest, from some congressional viewpoints, the whole subject already has the same status

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quo as a case would have on appeal, and, therefore, that is a part of the question that is before us.

Mr. EWING. I appreciate that, and that is why I did not read those words.

The CHAIRMAN. The difficulty is, your statement goes into the record, and I assume you want it to go into the record, and if there are any deviations from it they should be noted, because otherwise the statement stands unchallenged.

Mr. EWING. Our people have informed me—and they are prepared with the details that in their view there will be some half million to three-quarters of a million people, who, if this resolution is passed, would no longer receive the benefits of the Social Security Act.

The CHAIRMAN. The basic question is whether they are entitled to the benefits under the word "employee." That is the basic question.

Mr. EWING. The basic question as we understand it, comes down to a rather simple thing. The act was passed originally in 1935, and then over the course of years two different lines of interpretation developed. The Treasury Department, because of certain court decisions, felt that in the collection of the tax, that they had to give a narrower interpretation than the Federal Security Agency was giving in the payment of benefits.

On the basis of what we have been doing in the way of paying benefits down through the years, if this resolution is adopted, there would be probably a half to three-quarters of a million people that would be no longer entitled to the benefits.

Now, the Supreme Court, as we take it, has construed the act practically as we construed it. There is some difference. They are not entirely a parallel. There are some differences, because we included some people that are excluded by the Supreme Court's decision.

The CHAIRMAN. Let me get this very clear. You claim that all through the years you have carried under coverage this half to three-quarters of a million people that you are talking about?

Mr. EWING. Yes, sir.

The CHAIRMAN. All through the years?

Mr. EWING. Yes, sir.

The CHAIRMAN. They would be taken out. I am quite sure you are in error. They have been receiving the benefit?

Mr. EWING. Yes, sir; that is correct.

The CHAIRMAN. When did that start?

Mr. EWING. From the inception of the act.

The CHAIRMAN. Yesterday we tried to get at actually which people would be taken out of the coverage from which they are benefiting and, as I understood the testimony, it would only be a fraction of the 500,000 to 750,000.

Mr. ALTMEYER. I think perhaps the confusion arises this way as to what is meant by "benefiting" under the Social Security Act. The persons who have actually retired after having reached age 65 and are drawing benefits in accordance with the interpretation we have placed upon the Social Security Act, and which has been confirmed by this Supreme Court decision that has just been mentioned, is not 500,000, but the persons who are entitled to wage credits upon which benefits are based, as the Administrator just mentioned, we estimate amount to between 500,000 and 750,000 persons.

The CHAIRMAN. And during that same period of time, have you been collecting their contributions and the employers' contributions?

Mr. ALTMEYER. No. As the Administrator has pointed out, the Bureau of Internal Revenue has placed a narrower interpretation upon the term "employee" than the Federal Security Agency.

The CHAIRMAN. Do you mean to say, Mr. Altmeyer, that despite that narrow interpretation you have put people under coverage without receiving contribution from either the employer or the employee?

Mr. ALTMEYER. That is right.

The CHAIRMAN. Under what theory do you do that?

Mr. ALTMEYER. Under the theory underlying the Social Security Act which was very clearly expressed by Congress in its reports, and in all of the testimony presented in 1935.

The CHAIRMAN. I can now understand your embarrassment over this resolution.

Mr. ALTMEYER. Yes. Well, the theory, Mr. Chairman, in 1935, was that the two titles, the benefit title and the tax title, stood on their own feet, entirely separate and distinct from each other.

The CHAIRMAN. That was for legal purposes, was it not?

Mr. ALTMEYER. Yes, sir.

Mr. EWING. Constitutional purposes.

The CHAIRMAN. It was for constitutional reasons?

Mr. ALTMEYER. That is right.

The CHAIRMAN. They were given separate titles.

Mr. ALTMEYER. Exactly.

The CHAIRMAN. Did anyone suggest that the act should not be construed harmoniously?

Mr. ALTMEYER. No.

The CHAIRMAN. And you have attempted to construe it harmoniously by disagreeing with the Treasury?

Mr. ALTMEYER. Or the other way around.

Senator LUCAS. Would you tell me why two agencies of Government on an important question of that kind could not reach an agreement as to how the word "employee" should be construed?

Mr. ALTMEYER. I would say, Mr. Senator, that two Solicitors General have agreed with our interpretation.

Mr. EWING. And the Supreme Court.

Senator LUCAS. The Treasury Department does not agree now with the Supreme Court.

Mr. EWING. It does now.

Senator LUCAS. It does now.

Mr. EWING. That is what their new regulations would adopt.

The CHAIRMAN. Mr. Ewing, I would like to read into the record at this point a statement from the Social Security Board as late as November 1, 1940. I quote:

> The coverage provisions of the old-age insurance benefit title of the Social Security Act and of the Federal Insurance Contributions Act are identical in terms. Procedures in uniform application of those provisions by the Board and the Bureau of Internal Revenue had previously been inaugurated but an intensified effort has been made during the year to implement these procedures and to adapt them to new interpretations necessitated by amendments to the act as well as to new cases arising under original or unchanged coverage provisions.
>
> In this effort the Board has maintained that the benefit and tax provisions were intended by Congress to be, and have been generally accepted by the public as being one contributary social insurance program rather than separate benefit

and tax programs, and that the legislative objective of a single coordinated program must be borne in mind in approaching all administrative problems involving coverage of this program, notwithstanding the vesting of administrative jurisdiction in two separate agencies of the Federal Government.

So, the way you achieve the harmony that you speak of here is to get yourself in complete disharmony with the Treasury?

Mr. EWING. There were two different bodies there attempting to interpret an act of Congress, and the Treasury interpreted it one way, the Social Security Board interpreted it another way, and it has ultimately developed that the Supreme Court sustained the interpretation that the Social Security Board put on it.

The CHAIRMAN. And what you have said reaffirms the incorrectness of what the Social Security Board said in 1940.

Senator LUCAS. What I cannot understand is: Here are two great agencies of Government, and you have the same problem, and two agencies of Government construe language differently and set up their rules and regulations on an entirely different basis, creating the utmost confusion, it would seem to me, throughout the country on that major and basic proposition.

Certainly somebody along the line ought to have bumped heads together down there and got a decision that would have been satisfactory for both agencies, so that you would not have had this great amount of confusion over a period of years, even though you were right in your position and the Supreme Court sustained. Somebody was wrong certainly.

The CHAIRMAN. The Senator yesterday pointed out, I do not know whether you were here, Senator, that they had been carrying under covered status for many, many years back a large number of people without collecting anything from those people or from the employers. That is their notion of interpreting this act harmoniously, the tax provisions and the other provisions of the act.

Go ahead, please. Let me say about this statement: Let me suggest you either withdraw the statement from the record or adhere to it, because we do not want a statement in the record that is not met in discussion here and that will stand just as stated without the benefit of discussion. So what do you want to do? Do you want to leave the statement in or do you want to take it out?

Mr. EWING. I want to leave it in because it has quite a bit in there that I had not planned to read. That is what I was trying to save you time on. But if you would prefer, I would much prefer to read it.

The CHAIRMAN. Let us take it from the beginning, because in that way we will not have blank spaces in the record and have it later said that these things were put to the committee and the committee apparently acquiesced, because nothing was said.

Mr. EWING. If I may then, I will begin at the beginning.

The CHAIRMAN. That is entirely agreeable.

Mr. EWING. I appreciate your courtesy in permitting me to be here this morning. I am sorry that a previous commitment made it impossible for me to be here yesterday.

House Joint Resolution 296 would, and I will omit the words "as you know," Senator, take away the social-security coverage of some half to three-quarters of a million people. They are salesmen, miners, lumberjacks, journeyman tailors, industrial homeworkers, and a miscellany of other people. Some of them belong in the white-collar

class; some of them are manual workers. They are not capitalists in any man's language. I think it safe to say that they work just as hard, just as long hours, and for no more pay, than the typical factory hand or office worker, and have just as hard a time laying up pennies for a rainy day.

The CHAIRMAN. Does that go to the question as to whether they are or are not employees?

Mr. EWING. It goes to the purposes that Congress had in mind in adopting the Social Security Act in the beginning. It was to give this protection.

The CHAIRMAN. I mean, by that same token you could include farm hands and domestics and all kinds of people who are not now included. They, too, work, and they, too, are not capitalists, and they, too, like to eat. Does that not beg the whole question as to what is the proper interpretation of the word "employee"?

I may say to you, as you know, that we are working on programs that we hope will cover people like farm hands and domestic employees, and, if you please, independent contractors. I am just wondering what is the purpose of language such as "they are not capitalists in any man's language." Has there been any assertion that they are capitalists? You state: "I think it safe to say that they work just as hard, just as long hours, and for no more pay, than the typical factory hand or office worker." Does that argue a definition of the word "employee"?

Mr. EWING. Yes; I think it does. It shows it comes within the general classification.

The CHAIRMAN. By the same token, would you not include a farm hand or domestic employee?

Mr. EWING. They are definitely not included.

The CHAIRMAN. Of course.

Mr. EWING. You had certain categories of factory employees, and so forth, and we think that this comes within the category that the statute was originally intended to cover.

The CHAIRMAN. Your point is that because they share the same handicaps that vast numbers of other people share, that that influences the interpretation of the word "employee"; is that your point?

Mr. EWING. They share the same handicaps that the act was intended to help remove, for certain specified groups, and therefore we can argue from that that if there is a reasonable interpretation for bringing them in, if they are not specifically excluded, that it can at least be argued that this fact can be considered in the interpretation of the act.

The CHAIRMAN. Have you argued that to the Treasury?

Mr. EWING. Well, I have not. Fortunately, the Supreme Court decided this case before I became Federal Security Administrator.

The CHAIRMAN. Go ahead, Mr. Ewing.

Mr. EWING. If they lose their jobs, they are just as much unemployed as the next fellow, and just as hungry.

The CHAIRMAN. I assume, Mr. Ewing, that you will admit that somewhere along the line you can find an independent contractor who is not an employee.

Mr. EWING. Surely.

The CHAIRMAN. I assume that you admit that.

Mr. EWING. Surely.

The CHAIRMAN. As a matter of choice he becomes an independent contractor, does he not? I mean, the same choices are open to all of us. He is not forced into becoming an independent contractor, is he?

Mr. EWING. Well, he might be.

The CHAIRMAN. And he might not be; is that not correct?

Mr. EWING. Yes.

The CHAIRMAN. He might be an independent contractor through voluntary choice; is that not correct?

Mr. EWING. If it were a really voluntary choice.

The CHAIRMAN. Now, that kind of fellow works just as hard, just as long hours, no more pay in many cases than the typical factory hand or worker, is that right? If he loses his job—that is to say, if he loses his work as an independent contractor, he is just as unemployed, just as hungry as the next fellow, is that not correct?

What I am getting at is: What do you argue from that kind of stuff?

Mr. EWING. I argue, Senator, that that "stuff" as you call it, does bear on the interpretation of this statute, that it shows that these people are subject to the very hazards that the statute was designed to protect against.

The CHAIRMAN. I suggest to you that the statute was designed to protect the people who are named in the statute.

Mr. EWING. That is right.

The CHAIRMAN. I suggest to you that they either should or should not be covered by the statute.

Mr. EWING. That is right.

The CHAIRMAN. And that they should or should not be covered by the statute whether or not they are hungry, whether or not they are unemployed. Whatever their situation may be, if they are entitled to be covered they are entitled to be covered.

Mr. EWING. All I can say to that, Senator, is that the Supreme Court has held that these people were covered.

The CHAIRMAN. If that be true, and if the Congress did not have a certain review function in the matter, then what is the relevancy of going into their possible hunger? I am just wondering whether we are not throwing some unnecessary diversions into the consideration of the problem before us. The farm hand might be hungry, the domestic employee might be hungry. There are all kinds of people who might be hungry, but does that argue the interpretation of the words we are interested in here?

Mr. EWING. I think it does. The argument may not appeal to you, Senator, but I think it is a valid argument.

The CHAIRMAN. The argument appeals to this extent: The Congress hopes to make a frontal approach to these problems of hunger that you are talking about instead of trying to get at the problem with, let us say, by circumlocutionary interpretations.

Go ahead, Mr. Ewing.

Mr. EWING. I cannot see any good reason why, as a matter of broad social policy we should deny these people the mite of protection we offer to others who live by their daily toil.

The CHAIRMAN. Do you offer the mite of protection to a farm hand or to a domestic?

Mr. EWING. Congress has not included them, Senator.

The CHAIRMAN. That is right.

Mr. EWING. But Congress did in its interpretation include these.

The CHAIRMAN. The Treasury disagrees with you.

Mr. EWING. But the Supreme Court happens to agree with us.

The CHAIRMAN. And Congress is now taking that matter under review.

Mr. EWING. And that is absolutely within their rights.

The CHAIRMAN. Yes.

Mr. EWING. It is said that these people are independent contractors and ought to be covered as self-employed. I certainly share the hope that the Congress will soon extend old-age and survivors' insurance to cover the self-employed. But we have never recommended that unemployment insurance should cover the genuinely self-employed. We cannot expect State unemployment laws to continue to cover much more in this border-line area than is covered by the Federal unemployment tax. So, for one thing, this resolution would permanently deprive most of these people, who are not genuinely self-employed, of protection when they lose their jobs. Besides that, it would cost them the protection they now enjoy against impoverished old age or premature death and would restore that protection only as they can build up rights under a law not yet enacted.

The CHAIRMAN. Mr. Ewing, with reference to this 500,000 to 750,000 people which we learn have been covered without collecting from either the so-called employee or employer, does that not have the effect of giving them the same coverage in the States so far as unemployment compensation is concerned?

Senator LUCAS. Will you repeat that question, Mr. Chairman?

The CHAIRMAN. Yes. With reference to this enlarged coverage that we have been talking about, the 500,000 to 750,000 persons, does that not enlarge the coverage base for unemployment-compensation insurance in the States?

Mr. ALTMEYER. Mr. Chairman, the States on the whole have adopted what we will call, for shorthand purposes, the liberal interpretation of the term "employee." They are by and large including this group of 500,000 to 750,000 now. If the Congress amends the definition, or states the definition, of "employee" in the terms provided in this resolution, it will have the effect of narrowing the application of the Federal Unemployment Tax Act to a much more constricted basis than the States are now applying in interpreting their State unemployment-compensation laws.

The CHAIRMAN. Are these 500,000 to 750,000 people that you are talking about at the present time covered under the unemployment-compensation system in the States?

Mr. ALTMEYER. Yes.

The CHAIRMAN. All of them?

Mr. ALTMEYER. No. I say by and large.

The CHAIRMAN. What do you mean by "by and large"? That is an important question, and we ought to have some figures on it.

Mr. ALTMEYER. By "by and large," I mean this: That there are 33 States, for example, that have written into their statutes certain tests to guide the administrators which follow the broader interpretation now placed upon the simple term "employee" by the United States Supreme Court. Those other States that have not written in these

three tests, so called, nevertheless have interpreted very broadly the term "employee," so I could not say to you that absolutely every single State has been following this interpretation now placed upon the law by the United States Supreme Court. Therefore I have used the expression "by and large."

The CHAIRMAN. Now, Mr. Altmeyer, please explain to us the relation of the taxing process that goes on in the States in connection with unemployment-compensation insurance and the Federal Government, with particular reference to the credit which the employer gets in connection with his statement of taxes.

Mr. ALTMEYER. The Congress levied what is known as the Federal unemployment tax. It is fixed at 3 percent on pay roll. Any State that enacts a State unemployment-compensation law and collects contributions thereunder may issue a certificate to the employers subject to their State law, which their employers then file with the Bureau of Internal Revenue, and for which they receive a 90-percent credit or offset against this 3-percent Federal unemployment tax.

The net result, therefore, is that the Federal Government receives into the Federal Treasury three-tenths of 1 percent, and the States receive into their respective treasuries the balance that has been paid under their State laws. That is then deposited with the Treasurer of the United States.

The CHAIRMAN. So, roughly speaking, that credit process that you are speaking about applies when the employee in the State meets the Federal definition of "employee."

Mr. ALTMEYER. Did you mean employee or employer?

The CHAIRMAN. I am talking about "employee." If you broaden the base by Federal law, of the meaning of "employee," if the States do not conform and cover the same employees on the same definition, are you not diluting the benefits of the State?

Mr. ALTMEYER. I am sorry. I do not, perhaps, get the point, but the point is that the States are now collecting from employers on pay roll, including for the most part employee's wages, using the term "employees" in the sense that the Supreme Court has interpreted that term.

The CHAIRMAN. Yes; I understand; but, to the extent they do not follow your definition or the Supreme Court definition, what happens so far as credits are concerned?

Mr. ALTMEYER. The employer would have to pay the full 3 percent into the United States Treasury if a State was not collecting that 90 percent under its laws.

The CHAIRMAN. That is right, and the effect of that is to compel conformity in the States with the Federal definition.

Mr. ALTMEYER. If there had not been conformity before?

The CHAIRMAN. And you have admitted that there is not complete conformity?

Mr. ALTMEYER. That is right.

The CHAIRMAN. Let us get at the extent of the conformity that exists in specific relation to whtat we are talking about here today. Can you tell us about that? I think you told us that about 30 States conformed more or less.

Mr. ALTMEYER. I said 33 States have specific provisions in their law. It is called the three-test provision. It follows the Supreme Court decision, or rather preceded the Supreme Court decision, that

without a very minute analysis of those States that do not have the three-test provision, I could not tell you how far those States had gone prior to the Supreme Court decision. My impression is, if you want a guess, that 85 to 90 percent of these persons that we are talking about are already covered under State unemployment-compensation laws.

The CHAIRMAN. I would prefer not to guess, Mr. Altmeyer. Mr. DeWind yesterday promised to give us a compendium of these State laws on that subject. Is it true that as to the remaining 15 States, or whatever the number may be, that follow, let us say, the old common-law concept, that those States either have conformed or there will be a deprivation of benefits?

Mr. ALTMEYER. Senator, I have said that those 15 additional States, for the most part, in my opinion, have already so liberally construed the term "employee" as to conform to the Supreme Court decision.

The CHAIRMAN. Mr. Altmeyer, in laying a foundation for the compendium which we will get, I am asking you the simple question: To the extent that they do not conform, they must conform or they will suffer disadvantages, is that not correct?

Mr. ALTMEYER. Yes.

The CHAIRMAN. All right.

Senator LUCAS. One other question: With respect to the 33 States that have already definitely complied by enacting proper legislation, in the event this resolution passes what happens to the people in those 33 States?

Mr. ALTMEYER. They would still cover, because their laws are independent of the Federal laws, for the most part.

Senator LUCAS. Regardless of what we do with this resolution, the States will continue to cover the 750,000 that are involved here in this resolution.

Mr. ALTMEYER. Yes.

Mr. EWING. That is, so far as unemployment compensation is concerned.

Let me turn back to the phrase "independent contractor." I want to emphasize the word "independent."

In the course of administering the social-security program, we have seen many a person who to every outward appearance is an employee but who has signed some paper writing prepared by his employer, or more likely by his employer's attorney, in which the employer renounced the right of control. We have seen a job in a factory, right on the assembly line, contracted out to a nominally independent contractor. We have seen too many cases where, there being no written contract of employment, the employer can claim, sometimes truthfully, sometimes not so truthfully, that he has stipulated away the right of control.

The CHAIRMAN. That comes down to a question of fact in the particular case that you are considering, does it not?

Mr. EWING. Yes.

The CHAIRMAN. You already have the power to look to the substance of the thing, have you not?

Mr. EWING. Yes, sir.

The CHAIRMAN. In the normal administration of your law, you are entitled to determine who is an employee. That entitles you to look to the substance of the agreement, does it not?

Mr. EWING. Exactly, and not being bound by the terms of any written contract.

It would be naive to suppose that all the people working under such arrangements are really independent operators. One needs no profound knowledge of the ways of the world to know that a man who depends for his bread and butter on his earnings from a job will generally take orders from the boss, no matter what clauses may have been written into his contract. I cannot put this point better than Judge Cardozo put it in a workmen's compensation case in New York:

> If he does anything at variance with the will of his employer, its policy or preference, he knows that his contract of employment may be ended overnight. *Olielmi* v. *Netherland Dairy Co.* (254 N. Y. 60, 63).

The CHAIRMAN. That simply argues that we should be vigilant, does it not?

Mr. EWING. Yes, sir; and you cannot take the formal situation as necessarily being the real one.

The CHAIRMAN. I quite agree with you.

Mr. EWING. So when we talk about independent contractors, let us bear in mind that for a goodly share of the people concerned we are using a legalism to conceal the hard facts of life.

The CHAIRMAN. I wish that you could substantiate that with facts. You speak of a goodly share. Would 10 percent be a goodly share, or would it take more than 50 percent to be a goodly share?

Mr. EWING. I do not know what percentage it would be.

The CHAIRMAN. What you mean to say is that you think there is considerable evasion; is that right?

Mr. EWING. Exactly.

The CHAIRMAN. All right. Proceed, please.

Mr. EWING. In one of the recent cases that went to the Supreme Court, an unloader of coal was asked on the witness stand how regular he was about his work. He answered, "Pretty regular, as regular as any man is when he has to eat." Yet the taxpayer contended and the circuit court held that that man was an independent contractor.

The CHAIRMAN. Mr. Ewing, the man who runs an independent grocery store has to keep his doors open if he wants to eat, doesn't he?

Mr. EWING. Surely.

The Supreme Court, with a greater sense of realism, reversed this holding. Our social-security system is designed to do a real job in a real world: it ought not to be governed by fictions.

The present resolution is defended, however, on the ground that it would preserve the status quo pending congressional consideration of coverage expansion, and it is so entitled.

Opponents have pointed out that legislation is not necessary to preserve the status quo, but only to change it. The facts on this point are perfectly plain, and I see no reason they should not be laid on the table.

The Social Security Act and the Internal Revenue Code mean, and always have meant, what the Supreme Court says they mean. It is an axiom of our constitutional system that the final arbiter on the meaning of a Federal statute is the Supreme Court of the United States.

The CHAIRMAN. I would like to take a little exception to that, Senator. I suggest that, in its proper legislative field, the Congress is

the supreme arbiter, and may well reverse the Supreme Court at any time it sees fit to do so.

Mr. EWING. But that is a new enactment.

The CHAIRMAN. Oh yes. We enact just as the Supreme Court writes a decision.

Mr. EWING. But when you have enacted a law the Supreme Court is the final arbiter as to what you said at that time.

The CHAIRMAN. Yes; until we take it under review and decide whether we want to reverse it, modify it, or sustain it?

Mr. EWING. That is right.

Senator MARTIN. I think that the American people are forgetting that our forefathers in their wisdom in forming this Government put legislative function first in the Constitution, because that was closer to the people than any of the three subdivisions of our Government.

Mr. EWING. Senator, I do not for a minute argue that you cannot do anything you want to here with this law.

Senator MARTIN. But the people through their representatives, in the forming of our Government, in their wisdom put the legislative as the first thing in their Constitution.

Mr. EWING. That is correct.

Senator MARTIN. Because that protected their rights.

The CHAIRMAN. There seems to be quite a little opinion here that the status quo should be preserved during the appeal case, but it should not be preserved when the Congress takes jurisdiction to review the final decision. I would be glad to have your comments on that.

Mr. EWING. I do not think that this resolution preserves the status quo. Here Congress passed an act, and, according to the Supreme Court interpretation of this act, certain taxes should have been collected and certain benefits should have been accrued.

The CHAIRMAN. They did not collect the taxes.

Mr. EWING. I know they did not, but now the Supreme Court has held that, under the interpretation of the act that Congress enacted, the Treasury was wrong about that, so the effect of this resolution is to preserve the status quo of the error that the Treasury committed, but it is doing away with the status quo on the benefit side.

The CHAIRMAN. That always occurs in the process of appeal.

Mr. EWING. Oh, no.

The CHAIRMAN. Oh, yes. You start with the Federal district court and you get a decision. You usually stay the operation of the decision until it goes up to the court of appeals and you get a decision and you usually stay the operation of the decision until it goes to the Supreme Court.

Now, the Congress has decided to review the matter and it has been suggested that the decision be stayed until the Congress reviews it.

Mr. EWING. There are two things here. The effect of what you are doing is staying one, which is continuing an error, and it is reversing what was done on the benefit side.

The CHAIRMAN. The error arises only from the Supreme Court decision, if you have correctly interpreted the Supreme Court decision. It remains to be seen whether there was an error when the Congress gets through considering the matter.

Mr. EWING. No.

The CHAIRMAN. The Congress may agree with the Supreme Court or it may agree with your interpretation of that opinion.

Mr. EWING. Senator that is not my interpretation of our constitutional process. In other words, my point is this: That when Congress enacts a law and the Supreme Court interprets that law that Congress has enacted, that is final word on the interpretation of that law.

Now, Congress can come along later and repeal or amend and do anything they want to.

The CHAIRMAN. Yes.

Mr. EWING. And that is what you are proposing to do in this.

The CHAIRMAN. We are in process of doing that. As I say, we may agree with the Supreme Court. We may agree with your interpretation of the Supreme Court's opinion but we may not. Why should not the matter be stayed now just as it is stayed in the process of appeal through the courts?

Mr. EWING. I do not think this resolution does that. That is my point.

The CHAIRMAN. Then you will come to that, I assume?

Mr. EWING. No. I think your question has brought out my point on that better than what I say here, Senator.

Senator LUCAS. Mr. Chairman, may I clear up some of my own thinking about this question? It is more or less complicated. I want to get back just for a moment to whatever group are covered in these 33 States at the present time. They are paying, under a State law, that is correct, is it not? They are paying 3 percent, is it?

Mr. ALTMEYER. We have what we call experience rating which complicates the picture, but let us say they are paying 2.7 percent which is 90 percent of the 3 percent.

Senator LUCAS. They are paying 2.7 into the State treasury.

Mr. ALTMEYER. Yes, sir.

Senator LUCAS. Assuming the resolution is not enacted, then they would pay what to the State and what to the Federal Government?

Mr. ALTMEYER. In those States that have the broader interpretation they would continue to pay just what they are paying because the State law is independent, and every day the States are depositing contributions collected by employers who are exempt in whole or in part from the Federal Unemployment Tax Act. The States have gone further, in other words, than the Federal act in covering employers and employees.

Senator LUCAS. Do I understand you to say then that insofar as these 33 States are concerned, that the passage of this resolution would have no effect whatever on the question of unemployment compensation in the States, no effect upon the revenues derived and resulting?

Mr. ALTMEYER. Yes.

Senator LUCAS. In other words, they would remain just as they are and it would have no effect whether we pass it or whether we do not pass it?

Mr. ALTMEYER. Yes.

Senator LUCAS. And the only effect in the remaining States where there might be some discrimination and your contention is that in those States they have taken a liberal interpretation of the meaning of the word "employee" that more or less is in line with what the Supreme Court said in its recent opinion.

Mr. ALTMEYER. Yes.

Senator LUCAS. So if your position is correct, then whatever we do here, whether we pass the resolution or whether we do not pass the resolution, it is not going to affect the unemployment compensation of these individuals in the field very much one way or the other.

Mr. ALTMEYER. Except to the extent that the State authorities will feel that the expression of policy on the part of our Congress is persuasive as to what they do under their State laws.

Senator LUCAS. It might have that tendency, of course, perhaps, if we narrowed-it-down to the language that is found in the resolution, it might have a tendency to persuade other State legislatures to follow that provision, or it might create in these other States, where you do not have the liberal interpretation, the same thing.

Mr. ALTMEYER. Yes, sir.

Senator LUCAS. That straightens me out quite a little. It does not seem to me as important as I thought it was, this resolution.

Mr. EWING. It applies to the old-age and survivors' insurance completely.

Senator LUCAS. I know.

Mr. EWING. I have still got that bear to deal with.

May I continue, Senator?

The CHAIRMAN. Yes. Go ahead.

Mr. EWING. On the present question the Supreme Court has spoken. So the meaning of these statutes is settled, and can be changed only by affirmative action of the Congress.

But the matter is not quite as simple as that.

On the benefit side of the program it is, indeed, just as simple as that. Long before the Supreme Court decisions we had been giving to the statute and the regulations an interpretation roughly similar to that adopted by the Court. We had gone too far in some cases, but our administration of the benefit side of the program had been a reasonably good approximation of a correct reading of the law.

The CHAIRMAN. The benefits of this fund are paid out of a trust fund?

Mr. EWING. Yes.

The CHAIRMAN. Specifically designed as a trust fund in the act, set up for the purpose of being a trust fund?

Mr. EWING. That is right.

The CHAIRMAN. Its benefits are available to those who contribute?

Mr. EWING. That is right.

The CHAIRMAN. On what theory do you make its benefits available to those who have not contributed?

Mr. EWING. The benefits are not conditioned on the collections, Senator, under the statute.

The CHAIRMAN. They are, if you consider the whole act together, which you have demonstrated you do, or at least said you do. You made it very clear under the statement which I have read from that you do not consider any of these titles in vacuo?

Mr. EWING. That is right.

The CHAIRMAN. That you necessarily have got to interpret them harmoniously, and here you have to interpret your duty as a trustee, and your interpretation of your duty as a trustee is that you can use the funds of the trust fund for the benefit of those who have not contributed to it. To me that is a rather shocking doctrine.

Mr. EWING. But, Senator, the Supreme Court said we were right.

The CHAIRMAN. Did the Supreme Court tell you to use trust funds for the benefit of people who have not contributed?

Mr. EWING. Congress told us to whom to pay those benefits, and we would do that, and we have been accruing benefits for that, and the Supreme Court has held that our interpretation was correct.

The CHAIRMAN. I suggest you have been accruing benefits, if they are rooted to anything, out of a trust fund.

Mr. EWING. That is right.

The CHAIRMAN. And I suggest that you are now proposing that you are not violating a trust when you pay benefits to people who have not contributed to the trust fund which was supposed to maintain the benefits.

Mr. EWING. I do not think there is even a remote violation of the trust in the payments for the simple reason that we paid under a law that was passed by Congress and has now been interpreted by the Supreme Court.

The CHAIRMAN. You brought those people into coverage, under your own statement here, long before you had that decision.

Mr. EWING. That is right.

The CHAIRMAN. Is that not right?

Mr. EWING. That is right; surely.

The CHAIRMAN. So that you have been doing this independent of the decision of the Supreme Court?

Mr. EWING. We did it under that law that Congress passed, and the Supreme Court held that our interpretation was right.

The CHAIRMAN. I doubt whether the Supreme Court has held specifically on whether you should use trust funds which have been built up by actual contributors who are entitled to the benefit of those funds for the payment of benefits by noncontributors.

Mr. EWING. The problem there would be a question of the Treasury not having collected what it should, but that fact cannot be used, I do not think, as a basis to criticize us for having followed what the law said with respect to the benefits.

The CHAIRMAN. It is perfectly apparent that you and the Treasury have not achieved that harmony of interpretation to which you paid allegiance back in 1940.

Mr. EWING. That is right.

Senator HAWKES. I came here late. May I ask this: Was the particular point you are discussing at issue before the Supreme Court?

The CHAIRMAN. That was not the issue before the Supreme Court. As I say, I think it would be a very strained interpretation of the Supreme Court decision to say that a trust fund might be violated by paying out of it to beneficiaries moneys toward which they had made no contribution whatever.

Senator HAWKES. I agree with you.

Mr. EWING. Which is the theory of the Social Security Board.

Senator HAWKES. I agree with you absolutely.

The CHAIRMAN. Proceed, please.

Mr. EWING. Just one moment. I think we may have a little light on that, Senator.

The CHAIRMAN. Surely.

Senator LUCAS. Let me ask you a question while you are discussing that, on that harmony of interpretation: Would the President of the

United States be the only individual who could finally say to the Treasury and the Social Security Board, "Now, you fellows have not been able to get together on the interpretation of this word. I want you to do it."

Would he be the only fellow who could tell these two agencies what to do toward harmonizing their adverse positions?

Mr. EWING. Yes, Senator.

Mr. ALTMEYER. This may throw some light on the question of our responsibility for certifying to the Secretary of the Treasury payment out of this trust fund. There have been Supreme Court decisions and lower court decisions where we have denied benefits in cases where no contributions had been collected, where we have been directed by the court to make payment of benefits, or to grant wage credits, or to establish wage credits.

The CHAIRMAN. That was in a case where you had an employee so decided by that court.

Mr. ALTMEYER. Yes.

The CHAIRMAN. Did any of those decisions give you blanket authority to cover in from 500,000 to 750,000 people?

Mr. ALTMEYER. It made it clear, Senator, and I thought that was the point of your question, that this trust fund was set up to pay benefits in accordance with title II of the Social Security Act, and when we have ruled that a person is not entitled to benefits under title II, and when no contributions have been paid in that case, nevertheless the Supreme Court has held that that person is entitled to benefits out of the trust fund.

The CHAIRMAN. Because under the facts of the case he was held to be an employee, is that not correct?

Mr. ALTMEYER. Yes, and held not to be an employee by the Treasury and by the Social Security Board.

The CHAIRMAN. But the court held in the particular case before it, that this fellow is an employee, therefore he is entitled to coverage.

Mr. ALTMEYER. Of course the Supreme Court can only decide individual cases.

The CHAIRMAN. That is right, and you have decided 500,000 to 750,000 of them.

Mr. ALTMEYER. We must apply the Supreme Court decisions in individual cases to cases of a similar character, of course. That is the only way an administrator can function.

The CHAIRMAN. Of course you do not need to go into the stratosphere in doing that.

Mr. ALTMEYER. I submit we stayed pretty much to earth.

Senator LUCAS. Do I understand in this case you have cited the individual made no contribution whatever to the fund?

Mr. ALTMEYER. That is right.

Senator LUCAS. And the court came along and said, "notwithstanding that fact, you have got to pay"?

Mr. ALTMEYER. Yes, sir.

Senator LUCAS. What is the difference between that one fellow and your 750,000 involved at the present time?

Mr. ALTMEYER. That is our point. There is none. And that goes to the point that the trust fund is set up to pay benefits regardless of contributions into the trust fund.

The CHAIRMAN. Did the court in any case direct payment out of trust fund?

Mr. ALTMEYER. Yes.

The CHAIRMAN. Out of the trust fund or direct payment.

Mr. ALTMEYER. They directed payment, but there is no other place to get the money.

The CHAIRMAN. Exactly. And might that not suggest in cases of that kind that there should be a congressional appropriation rather than an appropriation by the Security Board?

Mr. ALTMEYER. But the Congress has made a continuing appropriation out of the trust fund for the payment of benefits.

The CHAIRMAN. Did you come before the Congress and say, "We have been required to pay certain benefits, and we do not believe that we have authority to pay them out of the trust fund, and therefore we ask that you make appropriate appropriations to cover these cases."

Mr. ALTMEYER. No; we have not, because we had authority to pay. We did not require additional authority.

The CHAIRMAN. That is your theory. Your theory is you had authority to pay, but then you jumped the next step and said, "that gave us authority to pay out of the trust fund."

Mr. ALTMEYER. The law is clear that we can only certify payments out of the trust fund. There is no other place to certify them from.

The CHAIRMAN. There may not be any other place to certify them from. We are constantly confronted with appropriation bills covering the same sort of situation. We appropriate because the money is not otherwise available. There is nothing new about that.

Senator LUCAS. I would like to see that case, and if it says what you say that it does, it seems to me that that is all you could have done, and if Congress wants to change the rule it is up to them to do it. If the case that you cite directs you to pay that individual out of the trust fund, I would like to see that case.

The CHAIRMAN. Senator, I join in that heartily. I would like to see a case that tells them to pay out of the trust fund where there has been no contribution by the employer or employee.

Senator HAWKES. Mr. Chairman, I think all of us would like to see it, because if that is what we are doing we are destroying the fund for the purposes for which it was created.

The CHAIRMAN. You are dissipating a trust.

Senator HAWKES. Certainly.

The CHAIRMAN. On the orders of the trustees.

(Excerpt from letter dated April 6, over signature of Oscar R. Ewing, Administrator, Federal Security Agency:)

I am attaching a list of court decisions in which the Federal Security Agency has been directed to pay benefits based on wages for which no taxes had been paid. In this connection I should like to point out that under the amendment accepted by Senator Vandenberg in the Revenue Act of 1943, section 201 of the Social Security Act authorizes to be appropriated to the trust fund "such additional sums as may be required to finance the benefits and payments provided under this title." Section 201 (g) also provides that "All amounts credited to the trust fund shall be available for making payments required under this title."

(The list referred to follows:)

CASES IN WHICH COURTS HAVE DIRECTED THE FEDERAL SECURITY AGENCY TO PAY BENEFITS ON THE BASIS OF WAGES ON WHICH NO TAXES HAVE BEEN PAID

Upon final judgment of any court that any person is entitled to a payment under title II of the Social Security Act, section 205 (i) of the act directs that the Federal Security Administrator make an appropriate certificate to the managing trustee of the trust fund, and directs that the managing trustee pay in accordance with the certificate. Section 201 (g) makes amounts credited to the trust fund available "for making payments required under this title." Moneys in the trust fund are therefore available to satisfy court judgments, whether or not contributions have been paid.

See: *Social Security Board* v. *Nierotko* (327 U. S. 358); *Watson B. Miller, Federal Security Administrator* v. *James F. Burger and Maude L. Burger* (161 F. (2d) 992); *Watson B. Miller, Federal Security Administrator* v. *Luccina A. Bettencourt* (161 F. (2d) 995); *Patton* v. *Federal Security Agency, Social Security Board* (69 F. Supp. 282); *Robert W. Black* v. *Miller, District Court, Middle District of Tennessee* (January 27, 1948, not yet reported, copy of order and final judgment attached).

In *Robert W. Black* v. *Miller* (January 27, 1948, not reported) the district court, middle district of Tennessee, reversed in part the decision of the Administrator, who had held that the plaintiff was not entitled to primary insurance benefits as he was not fully insured. The plaintiff applied for such benefits in 1946. The Administrator's wage records did not show any payment of wages to him. During the years 1937 through the first part of 1943, the plaintiff had been employed as an outside salesman for a company which had deducted 1 percent of his commissions which he thought was for the payment of the employees' tax, but which the employer held in escrow and refunded to the plaintiff after filing of the application in this case, as the Bureau of Internal Revenue ruled that the plaintiff's services were not in "employment" under the social security taxing acts. The Administrator concluded that the 4-year limitation appearing in section 205 (c) (2) of the Social Security Act prevented rectification of the wage records for the years 1937 to 1941, inclusive, and that consequently the wage earner was not fully insured. The plaintiff contended that the limitation provision was unconstitutional as thus applied to the facts in this case, that the proper construction of the statue did no bar proof of wages for the years 1937 to 1939, and that the allegation contained in plaintiff's SS-5 filed in December 1937, to the effect that the plaintiff was then employed by the non-reporting employer, was sufficient notice to toll the application of the limitation provision with regard to the service for such employer. In an opinion from the bench the court ruled that the Administrator was in error in barring proof of wages for the years 1937 to 1939, as the limitation provision was not intended to have a retrospective application. We have recommended an appeal to the Circuit Court of Appeals for the Sixth Circuit. A copy of the order and final judgment of the district court is attached hereto.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE TENNESSEE

ROBERT W. BLACK, Plaintiff, *v.* WATSON B. MILLER, Federal Security Administrator, A. J. ALTMEYER, Commissioner for Social Security, Defendants. Civil Action No. 812.

ORDER AND FINAL JUDGMENT

The plaintiff herein having moved the court for a summary judgment on the pleadings and upon having heard the pleadings of the parties and argument of counsel for the respective parties herein and due deliberation being had, it is hereby

ORDERED, ADJUDGED and DECREED that plaintiff's said motion be and it is hereby granted and that the cause is hereby remanded to the Federal Security Administrator with directions to him to credit the plaintiff on his wage records with the amount of wages paid to him by Gladstone Brothers Company the years 1937, 1938, and 1939 and to compute the amount of benefits to which he is entitled, upon

the basis of such wage record and for further proceedings in conformity with Section 205 (1) and the other applicable provisions of Title II of the Social Security Act, as amended.

Enter:

ELMER D. DAVIES,
Judge United States District Court, Middle District of Tennessee.

O. K.:
CECIL SIMS,
JUDSON HARWOOD,
Attorneys for Plaintiff.
WARD HUDGINS,
S. E. WASSON,
Attorneys for Defendants.

The CHAIRMAN. Go ahead, Mr. Ewing.

Mr. EWING. We have been carrying out what we understand to be the statute enacted by Congress, in accordance with the interpretation the Supreme Court has held was correct, Senator. Since last June, of course, we have been paying benefits in accordance with the Court's decisions. We have had, legally, no choice in the matter whatsoever. We will, as we must, continue to follow the Court unless and until this resolution becomes law.

On the benefit side, enactment of this resolution would obviously constitute a drastic change of the status quo, of a status quo that long antedates the Court decisions. And since the whole program exists for the sole purpose of paying benefits, it seems a little odd to speak of a status quo that disregards the benefit side altogether.

On the tax side, the same law is applicable as on the benefit side. But the Treasury Department had been driven, by a series of restrictive decisions by the lower courts, to take a much narrower view of the statute and the regulations. This view the Supreme Court now holds erroneous. Yet because people are still paying taxes in accordance with it, that erroneous view has been described as the status quo. Rather than one to preserve the status quo, the resolution could better be described as one to perpetuate an error.

I believe that it will be helpful to the committee if you will permit me to trace the history of our effort to deal with the employment relation problem in administering the social-security program. The story is a long one, and I will touch only the high spots. As you know, I have been Federal Security Administrator only a few months, but I have this story from Mr. Altmeyer and from our general counsel, both of whom have been intimately concerned with the problem from the very beginning of the program down to this day.

When the Social Security Act was passed in 1935 it gave the administrative agencies no directions as to how they should determine who are employees. We did not at all realize then what a wide area of uncertainty was thus introduced into the coverage of the Social Security System. We did not appreciate then what 11 years of experience have taught us about the diversity, I might almost say the chaos, of the Court decisions on this subject.

The CHAIRMAN. Would you say that that also has been duplicated by the administrative chaos by the two branches of the Government that had to do with the enforcement of the statute?

Mr. EWING. I do not think it has been quite so bad.

We had little notion how many people earn their living from work that falls within this twilight zone. Nor had we any realization how easy it would be for employers to manipulate the coverage of the Social

Security System by changing a few words in their contracts of employment.

We knew that we had a problem on our hands, but we had no real idea of its magnitude or its ramifications. We knew that, in this area as in a good many others, we should have to feel our way and learn from experience. We knew from the books that control is an important factor in determining who are employees, but we also knew that it is not the only factor. We knew, for instance, that the right to fire is often a factor of vital importance. We tried to write some regulations that would not be too inflexible, that would treat control as important but not all-important, that would give us the same freedom the courts have always enjoyed to weigh other factors that seem pertinent in a particular case.

Senator LUCAS. In the previous paragraph you say:

nor had we any realization how easy it would be for employers to manipulate the coverage of the Social Security System by changing a few words in their contracts of employment.

Can you give me an example of how that is done? You see the word "manipulation." That implies something wrong.

Mr. ALTMEYER. If you will rely entirely on the control test, the contract can be written so that on its face it emphasizes no control. The Treasury is at a disadvantage in a tax case in determining the degree of control that actually exists beyond the terms of the contract because it does not have before it the employees affected or the persons affected. Therefore, they cannot, in the ordinary course of their tax collecting duties get all of the facts from the employees themselves as to the actual degree of control exercised over them in their day to day occupation, so it is a relatively easy matter, from the tax side, to phrase a contract in such a way as to make it appear that there is no control.

I should like to point out that that is one of the reasons perhaps that there has been a divergency between the Social Security Board and the Bureau of Internal Revenue in the interpretation, because we get these cases in a different way. We get them by reason of employees filing an application for benefits, or a request that they be granted wage credits based upon their employment, and therefore we get the facts from the employees. I am putting that in quotation marks; I am not trying to prejudge their status. We get the facts or the allegations of facts from these persons who allege themselves to be employees, as well as from the persons for whom they perform the services.

The CHAIRMAN. Obviously, if a man is truly an employee, you are entitled to look at the facts and so determine.

Mr. ALTMEYER. Yes.

The CHAIRMAN. But does that properly lead you to the conclusion of promulgating a rule which invalidates all of these so-called slippery contracts, many of which I suggest are bona fide.

Senator HAWKES. Could you give us an illustration? You said the contract can be so phased. Can you give us an illustration of what you mean by that, just one illustration of the phrasing that would do what you are talking about?

Mr. EWING. This case that was decided by the Supreme Court, the Bartels case, was decided last June. It was one of the three cases.

Senator HAWKES. Does that cover this point I am raising?

Mr. EWING. Yes.

Senator HAWKES. All right. That is O. K.

Mr. EWING. The point there was that there were dance hall proprietors who would hire orchestra or bands. There would be a name band, there would be a leader, Tony Sherril, or whatever his name might be, and he was supposed to have a little different jazz to his music, or what not. They would be employed for usually 1 night stands. The band leader would employ the musicians, he would furnish them their uniforms, he would furnish them the music, he would direct them what to play, when to play, how to play it, he would hire and fire them at will.

Then the musicians union came along. I guess it is Petrillo's union. They required a contract between the orchestra leaders and the proprietors of these music halls in which the proprietor had to agree to pay this tax, and they wrote in there that he had full control over this band and these musicians. Well, the Supreme Court just threw it out, saying it was not so, but that is the type of thing that you do run into.

Senator HAWKES. Thank you.

The CHAIRMAN. What I am suggesting to you, Mr. Ewing, is that because these contracts do cover a field of evasion, merely to serve your administrative convenience, you ditched the rule of control?

Mr. EWING. Oh, no. We have never ditched the rule of control, Senator. It is still one of the very important factors.

The CHAIRMAN. It is one of a dozen factors which you are now promulgating, not a single one of whcih you have weighted. No man in advance can tell how you are going to determine any single issue because you can give any weight you want to to any of the factors and you can disregard them if you want to.

Mr. EWING. That is definitely true and I do not know how you can escape it.

Senator LUCAS. It is true in any agency, is it not?

Mr. EWING. It is absolutely true, and where the courts cannot agree, and the legislatures cannot agree, it is just one of those things.

Senator LUCAS. The Social Security Agency primarily deals with employees.

Mr. EWING. That is right.

Senator LUCAS. And the Revenue Department primarily deals with employers?

Mr. EWING. Yes, sir.

Senator LUCAS. They are the fellows who are looking after the tax?

Mr. EWING. that is right.

Senator LUCAS. So if an unscrupulous fellow in management desires to make one of these evasive contracts he can give the Treasury plenty of trouble from the standpoint of trying to collect that tax in knowing how to judge and what to do, and that is the reason you have all these court decisions.

Mr. EWING. If he is an unscrupulous person, he can make out a perfectly good case and they do not have the force to go into each one of them and dig up the evidence. Even in a tort case, Senator, where they are suing to recover damages in court, it is hard enough when you have all the witnesses before you.

The CHAIRMAN. You have that same problem in any field where evasion is possible.

Mr. EWING. Exactly.

The CHAIRMAN. But that does not warrant you in throwing the rules of decision out the window and doing as you please.

Mr. EWING. Oh, no.

Senator LUCAS. I thought you boys tried to follow the courts?

Mr. EWING. We do.

Senator LUCAS. The distinguished chairman is apparently trying to throw the court out the window.

Mr. EWING. I have high respect for the chairman.

Experience in administering the system, began to give us an awareness how difficult and far-reaching this problem really is. By 1939, we had come to the conclusion that the control test was thoroughly unsatisfactory as the sole or even dominant criterion of coverage, and this for several interrelated reasons. I have already mentioned its lack of realism and its ease of manipulation by employers. Then, too, on any but an open-and-shut case you can almost invariably turn up court decisions on both sides of the question. Really, when you try to find out what the common law is on outside salesmen, for instance, or on taxi drivers, or on any of the other concrete cases we have to deal with, you find yourself in a quagmire. There is just too much law on the subject, and it goes off in too many directions at the same time.

Finally, there is another objection to the control test for social-security purposes. It is exceedingly difficult to administer. In a tort case, where you have the witnesses in court, you have a pretty good chance of getting at the real facts about control. But when you have to make decisions by the hundreds and the thousands, as you do in running a social-insurance system, you cannot go into the facts of each case quite that thoroughly. You have to rely largely on written statements and questionnaires, often—especially on the tax side of the program—without even hearing the employees' version of the facts. And even when we prepare to go into court on a social-security tax case, it is not always easy to get at the real facts. There was one case in which we got hold of telegrams the taxpayer had sent his people instructing them not to answer any questions which Government representatives might ask them. Apparently he controlled their testimony but nothing else.

When we were preparing our recommendations for the 1939 social-security amendments, as I say, we were already beginning to be aware of the seriousness of this problem and of the unsatisfactoriness of the control test. Since no one has ever been able to write an adequate definition of the employment relation, we thought perhaps the best plan would be to pick one segment of the problem and take it entirely out of the employer-employee context, and substitute some arbitrary rules of thumb. We thought that could be done reasonably well in the case of outside salesmen, the largest single group in the borderline area, and we so recommended to the Ways and Means Committee.

That committee accepted our recommendation. The amendment it proposed would have brought into the system pretty much every salesman in the country. It would have covered many genuinely independent dealers whom nobody would ever think of describing as employees. If you read it literally, it might even have brought in a good many shopkeepers and treated them as though they were employees of the wholesalers from whom they buy. I say this to show that

the Ways and Means Committee amendment was in no sense an attempt to define the employment relation. It was a deliberate and avowed attempt to go beyond that relation and reach people who no one thought or argued were in actual fact employees. In reporting out the amendment, the committee expressly stated that in the case of salesmen it was departing from the employer-employee concept and setting up rules of thumb for the very purpose of covering people who were not employees even by the most liberal test.

When the bill came over here and this committee decided to strike out the amendment, your committee merely said it did not wish to go beyond employees. That is all it said.

The CHAIRMAN. What significance does that carry in your mind? In other words, it excluded salesmen as employees; did it not?

Mr. EWING. The importance of this, Senator, is this: That the report of the Ways and Means Committee on this resolution, when it was over there, referred to this legislative history as supporting this amendment, and that is why I am analyzing that—because we do not think that argument was sound.

The CHAIRMAN. I understand that when you were before the Congress in 1939 you asked that the definitions of "employee" be enlarged to—

> cover more of the persons who furnish primarily personal services. The intention of such an amendment would be to cover persons who are for all practical purposes employees but whose present legal status may not be that of an employee. At present, for example, insurance, real estate, and traveling salesmen are sometimes covered and sometimes not. The Board believes that all such individuals should be covered.

Now, that was the issue submitted to Congress?

Mr. EWING. That is right.

The CHAIRMAN. And as to that issue the Senate did not accept your recommendation and preferred to go on the prior definition of the relationship; is that not correct?

Mr. EWING. But that did not intend to make a new definition of "employee."

The CHAIRMAN. I quite agree. The point is that the Senate wanted the old definition.

Mr. EWING. That is right.

The CHAIRMAN. It refused to accept your recommendation for a new definition.

Mr. EWING. We did not recommend a new definition. We recommended that the law be made to cover not only employees but also certain other people who could under no interpretation be regarded as employees.

The CHAIRMAN. And the Senate did not accept that?

Mr. EWING. That is right.

The CHAIRMAN. Now, Mr. Altmeyer has testified that through all these years you in fact have been giving coverage to these people, although you came to the Congress and asked for authority to do it and it was refused you.

Mr. EWING. No. These are not the same people that would have been covered by that 1939 proposed amendment.

Mr. ALTMEYER. The 1939 amendment, Senator, went far beyond what anybody would have said was an employee.

The CHAIRMAN. Have you not testified that you have under coverage insurance, real estate, traveling salesmen?

Mr. ALTMEYER. Some; yes.

The CHAIRMAN. And the Congress refused to give you coverage that would include them?

Mr. ALTMEYER. No, Senator. Congress refused to adopt a specific amendment which had been worked out by our general counsel and had been approved by the Ways and Means Committee and came over as a part of a bill before the Senate Finance Committee.

The CHAIRMAN. I do not challenge any of that.

Mr. ALTMEYER. That was not a definition of "employees."

The CHAIRMAN. I agree with that.

Mr. ALTMEYER. That was a specific proviso that would have covered certain classes of persons some of whom everybody agreed would be independent contractors rather than employees.

The CHAIRMAN. Yes.

Mr. ALTMEYER. This Senate Finance Committee, after considerable discussion of that specific amendment, rejected it, but they did not in their report, nor does the testimony indicate that at that time it was the intention of the Senate Finance Committee or of the Congress, to pass upon the question of who is an employee.

The CHAIRMAN. Let us accept that, in lieu of, by your own practice, despite refusal of Congress to enlarge the covereage to cover the persons specified, you have given some of those persons coverage in your system.

Mr. ALTMEYER. We have not given any greater coverage, Senator, than we were giving in 1939.

The CHAIRMAN. Have you not included in your coverage life insurance salesmen?

Mr. ALTMEYER. Some.

The CHAIRMAN. Yes.

Mr. ALTMEYER. And that was true in 1939.

The CHAIRMAN. Have you not included some real estate salesmen?

Mr. ALTMEYER. Yes; some.

The CHAIRMAN. And have you not included other types of persons from this, what you call, twilight zone?

Mr. ALTMEYER. Those were all before 1939. We always have taken the position that we take today relative to the interpretation of the term "employee."

The CHAIRMAN. But you continued to cover them after the Congress refused you authority to cover them.

Mr. ALTMEYER. We did not cover any who would have been covered under this amendment, but who were not covered under the term "employee"as it appeared then and as it appears now in the Social Security Act.

The CHAIRMAN. It is very diffcult for me to understand that, Mr. Altmeyer. On the one hand you specify people that you would like to have covered, on the other hand you testify they are already covered.

Mr. ALTMEYER. Our general recommendation is to be distinguished from this specific proviso. We were prepared to present to the Congress broader language than this specific language relative to outside salesmen, but that broader language would have covered persons who would not be considered employees under any definition.

The CHAIRMAN. That was not before the Congress. You had a specific thing before the Congress, and if I have understood your

testimony, it is that some of those people have been covered all the time, and that after Congress refused you authority to cover them, you continued to cover them.

Mr. ALTMEYER. That specific proviso would have covered persons whom we had not construed to be covered under the "employee" definition. It would have made more specific the coverage of persons whom we had been covering and to that extent would not have extended our definition or interpretation of the term "employee." Therefore, when Congress rejected that specific language, it was rejecting the extension of the act beyond what we had already interpreted it to be. So we did not change our interpretation, because there was nothing in the action of Congress that indicated that it wished us to do so.

The CHAIRMAN. If you come in and ask that certain categories of people be included, it is to be assumed that they were not included before.

Mr. ALTMEYER. If you will look at that language you will find that it undertakes to cover persons whom we agree, and agreed at that time, were employees.

The CHAIRMAN [reading]:

> The intention of such amendment would be to cover persons who are for all practical purposes employees, but whose present legal status may not be that of employees. At present, for example, insurance, real estate, and traveling salesmen are sometimes covered and sometimes not. The Board believes that all such individuals should be covered.

The Congress refused your amendment. Nevertheless, you continued to cover some of them.

Mr. ALTMEYER. We said that some were covered and some were not covered. Our amendment went to those who were not covered in those categories you just read.

Senator LUCAS. You did not change your position any after the Senate denied your amendment?

Mr. ALTMEYER. No, sir.

Senator LUCAS. You continued to cover those you had covered before but had the amendment been adopted you would have taken in more insurance salesmen and such workers than were covered at that time?

Mr. ALTMEYER. Yes, sir.

The CHAIRMAN. My point is precisely that. They paid no attention whatever to the action of the Congress.

Senator LUCAS. I do not agree with you on that, Senator, I do not see the point at all.

Mr. EWING. It said absolutely nothing about how the term "employee" should be construed.

It is a complete non sequitur, I respectfully submit, to argue that because your committee did not want to go beyond "employees," it therefore intended the term "employee" to be narrowly construed.

The CHAIRMAN. Would it be a complete non sequitur to say that the Congress decided that it did not want insurance, real estate, and traveling salesmen included?

Mr. EWING. As I understand it, there were certain of those groups, traveling salesmen and insurance people, who clearly came within the term "employee." There were others who were outside the term

"employee." The amendment that we proposed intended to cover both those already in and those already out by putting them under the act by reason of specific words in the amendment and not by reason of any change in the definition of the term "employee," and it was that which the Senate rejected. By doing that the Senate did not say that we should cease to define the term "employee" to include people that clearly were employees merely because they happen to be traveling salesmen or something like that.

The CHAIRMAN. I would agree with you but it seems to me very clear that Congress did say to you, "We will not authorize you to include insurance, real estate, and traveling salesmen."

Mr. EWING. We did not interpret it that way, Senator.

The CHAIRMAN. Go ahead.

Mr. EWING. We have always thought that the upshot of what happened in 1939 was to leave the matter of defining the employment relation exactly where it had been before. As far as the written record shows, it has looked to us as though this committee, in striking out the House amendment, deliberately undertook to reestablish the situation just as it had been before the amendment was proposed in the House, and deliberately refrained from comment on the meaning of the term "employee." That left the term entirely undefined, as it had been left in 1935, and therefore left it subject to reasonable administrative and judicial interpretation in the light of the purposes of the statute.

The views of this committee were accepted by the Congress in the 1939 Social Security Act amendments.

If I may get ahead of my story for a moment, I want to deny categorically the statement in the Ways and Means Committee report on the present resolution that the Supreme Court, in passing on this question last June, was apparently unaware of the 1939 legislative history. That was an extraordinary error for the Ways and Means Committee to make. I have here a copy of the Government's brief in the Silk case, which I should be glad to leave with your committee. You will find the 1939 legislative history discussed, beginning on page 41. It was also discussed in the two briefs opposing the Government. The Court remarked that there was no legislative history that threw any light on the problem before it, and in so stating the Court was obviously agreeing with the view that we, and two Solicitors General, had held—namely, that what happened in 1939 was entirely inconclusive. I have those briefs here if you would like to have them to show the discussion.

The CHAIRMAN. I think it would be well to put it in the file.

(Pages 41 through 45 of the brief discussing the legislative history are reproduced below:)

D. THE PROPOSED 1939 AMENDMENT

It has been suggested that the failure of Congress to enact a proposed amendment submitted with the Social Security amendments of 1939, which would have enlarged the definition of "employee" specifically to include salesmen, indicates that the common law concept of the term is in accordance with the legislative intention. *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5); *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. C. A. 6). We think these courts have attached a wholly wrong significance to the amendment proposed in 1939 and to its rejection. What happened is simply that the House of Representa-

tives adopted, but the Senate and ultimately the Congress rejected, a special rule of thumb for determining the coverage of salesmen.[16] In general, under the amendment, a salesman would have been covered if he was a servant at common law, and if not, would nevertheless have been covered unless he was a broker or factor selling on behalf of more than one company and employing at least one assistant salesman in his brokerage or factoring business, or unless the selling was "casual service" not in the course of his principal occupation. The stated intention of the Ways and Means Committee was "to set up specific standards" so that salesmen "may be uniformly covered without the necessity of applying any of the usual tests." (H. Rep. No. 728, 76th Cong., 1st sess., p. 76.) The amendment was stricken by the Committee on Finance of the Senate in the belief that the existing law should continue to be limited to "employees" (S. Rep. 734, 76th Cong., 1st sess., p. 75 (1939–2 Cum. Bull. 565)), and the House receded (H. Conference Rep. No. 1461, 76th Cong., 1st sess., p. 14 (1939–2 Cum. Bull. 593)).

On any view this amendment would have changed the law, since no such rule of thumb can be found in any definition of employee, either under the "common law" tests or the *Hearst* case. As noted, it was for the express purpose of avoiding "the usual tests" that the amendment was proposed. Under the amendment, for example, a broker or a factor would have been covered, however many the companies for which he might be engaged in selling, provided only that he employed no assistant salesman. Neither economic dependence, control, nor any of the other usual criteria would have had any relevance, if the statutory conditions were met. A broker or factor who employed no assistant, even though he might be in every sense and for all other purposes an entrepreneur, would have been declared for this purpose automatically an "employee" of every company for which he was engaged in making sales. The rejection of an amendment which on any view would have changed the law affords no reason to interpret narrowly the law which was left unchanged.

It cannot be said that in 1939 Congress intended the limitation of coverage to employees to be narrowly construed, without regard for the purposes of the statute. That the mere use of the word "employee" does not manifest legislative approval of any such restrictive construction was held in the *Hearst* case, which shows that the concept of employee was sufficiently flexible even at common law to permit an interpretation in accordance with statutory objectives without departing from the "ordinary" meaning of the word. The series of cases applying the Social Security Act definition narrowly did not commence until 1941," so that Congress was not ratifying any such interpretation when it declined to change the statute in 1939. Indeed, in 1937 and 1938, the Treasury had ruled that truck owner-drivers were employees of the companies for whom they worked. S. S. T. 307, Cum. Bull. 1938–2, p. 279; S. S. T. 198, Cum. Bull. 1937–2, p. 393; S. S. T. 259, Cum. Bull. 1938–1, p. 397.

Mr. EWING. Let me now complete the history of this matter as briefly as I can. I then want to say a few words about the effect of the Supreme Court's decisions and of our proposed regulations.

There began in 1941 a series of decisions in the Federal district and circuit courts which gave to our regulations a much narrower interpretation than either the Treasury Department or we thought was called for. I ask you particularly to note the date, because the Congress in 1939, when it last considered the coverage provisions of the system, could not have intended to ratify or approve a line of court decisions which did not begin until 1941.

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[16] "(6) The term 'employee' includes an officer of a corporation. It also includes any individual who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (but who is not an employee of such person under the law of master and servant); unless (A) such services are performed as a part of such individual's business as a broker or factor and, in furtherance of such business as broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or (B) such services are casual services not in the course of such individual's principal trade, business, or occupation" H. R. 6635, 76th Cong., sec. 801 (b).

[17] *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2), decided April 4, 1941, is the first appellate decision in this line.

These courts seized on the language in the regulations about control over the details of the performance of the work and paid, as we think, too little attention to other factors. They tended, moreover, to determine the extent of control by the letter of the contract, without looking behind that to the substance of the relationship.

What disturbs me the most about House Joint Resolution 296 is this line of decisions. While for the reasons I have outlined I think the control test inappropriate as the sole test of coverage of a social insurance system, I do not think it would deprive a great many people of coverage if the control test were applied with the realism of Judge Cardozo in the case I have mentioned. On such an approach the results in terms of actual coverage would not differ greatly, I feel sure, from the results under the Supreme Court decisions. As nearly as we can judge, however, it seems to be the intention of the sponsors of the resolution to reenact the restrictive court decisions I have referred to, and thus to make the actual coverage of the system considerably narrower than it was, by administrative rulings, in 1939 when the Congress last considered coverage. It is on that basis that we have estimated the resolution would retract the present coverage by a half or three-quarters of a million people.

The CHAIRMAN. Mr. Ewing, the House report has this to say on that subject. I am reading from page 5:

> Under the existing law the term "employee" is defined as follows:
> The term "employee" includes an officer of a corporation.
> Under the joint resolution, this definition is amended to read as follows:
> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under common-law rules.
> The purpose of the exception in paragraph (1) is to apply the rule of the existing regulations that an independent contractor under the usual common-law rules is not an employee.
> In determining whether an individual is an independent contractor, the existing regulations apply the usual common-law test of control, irrespective of the law of the particular State. It is the purpose of this resolution to reaffirm this rule.

I think that makes it very clear what the purpose of that resolution is.

Senator LUCAS. May I ask a question?

The CHAIRMAN. Yes, sir.

Senator LUCAS. Does the Senator agree with that last statement, that if this resolution is enacted that the Social Security Agency would have to retract the present coverage by a half or three-quarters of a million people?

The CHAIRMAN. Senator, do you assume that we have no right to review what has been done and we have no right to preserve the status quo until we can make up our minds?

Senator LUCAS. I do not deny that. I just wondered if the staff had worked on that resolution to the point where they have agreed.

The CHAIRMAN. I believe I misconceived your question. I should like to say that we have asked Mr. DeWind, who was a witness yesterday, to give us factual support for the statement of from 500,000 to 750,000 people being included or excluded from coverage. We do not have the basic facts on which to form a judgment.

Senator LUCAS. The last statement made by the witness was to the effect that if this resolution is passed that there would be three-quarters of a million people who were not covered. I take it not including the 750,000 in that statement.

Mr. EWING. Yes.

The CHAIRMAN. Senator, my position on that is, first, I do not know how many, if any, would be excluded from coverage because we have not yet had the basic facts on which we can reach a sound judgment on it.

Secondly, the situation is existly the same as it was during the successive court appeals from the district court to the Supreme Court, and now we have another appeal to the Congress.

Mr. EWING. Senator, I have a document here. We just had it made up this morning and have given it to the Treasury in order that they may give it to you, so I might just as well give it to you now, as to how that figure was arrived at.

The CHAIRMAN. We would like to have it.

Mr. EWING. I can put it in the record or read it. It is just one page.

The CHAIRMAN. Give us the substance of it.

Mr. EWING. We consider here that these border-line cases are estimated to cover about 1,283,500 workers, and we are roughly estimating that it is approximately half. This has been broken down to outside salesmen in manufacturing and wholesale trades, taxicab operators, insurance salesmen, house-to-house salesmen, private duty nurses, owner-operators of leased trucks, industrial home workers, entertainers, newspaper vendors, and distributors, contract loggers, commission oil plant operators, mine leasees, journeyman tailors, subcontractors, building repairs and alterations, contract filling-station operators, and we get that total of approximately 1,283,500, and it is just our best guess that that would be somewhere around half of those.

The CHAIRMAN. Your estimate of one half is not a mathematical result of a break-down?

Mr. EWING. No, and it could not be until you took up each case.

The CHAIRMAN. It is your guess, if you wish to call it that, or your judgment if you wish to call it that, but it rests on nothing more than that.

Mr. EWING. That is true. We do know what the total of these border-line cases would approximately be.

The CHAIRMAN. Mr. Reporter, will you put that in the record at this point?

(The document is as follows:)

COVERAGE OF WORKERS ON BORDER LINE OF WAGE EMPLOYMENT AND SELF-EMPLOYMENT

Under the proposed Treasury Regulations, about 500,000 to 750,000 of these workers would be covered.

Basic information with regard to the number of workers and the conditions of employment in the border-line groups was obtained from the sources indicated on the list. The final estimates were made on the basis of this information.

Border-line group:	*Estimated number of workers*
Total	1,283,500
Outside salesmen in manufacturing and wholesale trade Sources: Census of Business, 1939, and Division of Marketing, Office of Domestic Commerce.	440,000
Taxicab operators Source: Office of Defense Transportation and Taxicab License Bureau, city of Baltimore.	150,000
Insurance salesmen:	
Ordinary life Source: Life Insurance Research Institute.	60,000
Fire, theft, and casualty Source: National Recovery Administration data brought down to date by comparision with data for life insurance salesmen.	90,000
House-to-house salesmen Sources: Census of Business, 1939 and Bureau of the Census.	70,000
Private duty nurses Source: Public Health Service and American Nurse's Association.	75,000
Owner-operators of leased trucks Sources: Interstate Commerce Commission and American Trucking Associations.	50,000
Industrial home workers Sources: Women's Bureau and Wage and Hour Division, Department of Labor.	40,000
Entertainers Source: American Federation of Labor.	30,000
Newspaper vendors and distributors Source: Census of Population, 1940.	22,000
Contract loggers Sources: Bureau of Labor Statistics and Forestry Service.	17,500
Commission oil plant operators Source: Census of Business, 1939.	17,000
Mine lessees Source: Bureau of Mines.	10,000
Journeyman tailors Source: Wage and Hour Division, Department of Labor. Subcontractors, building repairs and alterations Source: Construction Division, Office of Domestic Commerce. Contract filling station operators No specific data obtained.	200,000

Mr. EWING. May I proceed, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. EWING. In 1945 a few of the courts began to take a more liberal view of our regulations, more in line with that of Judge Cardozo in applying the workmen's compensation law. Thus, the court of appeals here in the District said in *Grace* v. *Magruder* (148 F. (2d) 679, 680–681, certiorari denied, 326 U. S. 720):

> The absence of a written agreement or contract of hiring only makes the employment more hazardous for the hustler and puts him more completely under appellant's control.

Under decisions such as this, as I have said, the coverage under the old regulations would be quite similar to that under the Supreme Court rulings.

It was, of course, this conflict between the circuit courts which persuaded us to ask the Supreme Court to review the question.

The CHAIRMAN. Mr. Ewing, let me ask you: Would it not be better to approach this problem of twilight-zone cases and what you call border-line cases frontally by affirmative provision of law which will give them the benefit of coverage than to try to do it with this "minuet" of interpretation that goes along back and forth? Would that not be better?

Mr. EWING. We do not think that is possible. We would not know how to draft language to do it, because whatever language Congress adopts immediately that becomes the subject of differences of interpretation.

The CHAIRMAN. What I am getting at is: We now, for example, have an advisory council. I am not attempting to give any estimate of their conclusions. I do not know what their conclusions will be. But we now have an advisory council which I understand is considering whether it would be possible to make a direct frontal approach to these independent contractor cases, self-employer cases, and see if they cannot be brought into coverage by direct legislation rather than by all of this confusing interpretation. If we can do it, would not that be better?

Mr. EWING. Definitely, it would be a very constructive step forward.

The CHAIRMAN. Proceed, please.

Mr. EWING. One of the most baffling puzzles with which the joint resolution would confront us is whether it would not reenact the very conflict which the Supreme Court resolved. How are we to administer the program, on either tax or benefit side, in those circuits where the courts had previously taken a liberal view? Remember that those liberal decisions were rendered under the very regulations which the resolution is designed to revitalize. I would not venture to guess what attitude those courts will take if the resolution becomes law.

The CHAIRMAN. You would be just in the same situation as you were prior to the promulgation of the regulation, would you not? How have you been administering it?

Mr. EWING. I think what follows will answer that, Senator.

The CHAIRMAN. All right. Proceed.

Mr. EWING. No one will know the answer until the courts themselves give it, probably some years hence. If this committee decides to report out the resolution, I hope you will give us some guidance as to how we should administer the program in the meantime, till the litigation which is certain to ensue, has wound its slow way upward through the courts.

I should like to illustrate the confusion which existed prior to the Supreme Court's decisions, and which would apparently be revived by the enactment of this resolution, by indicating some of the diversity in the actual social security cases which have been decided before last year. In some cases, taxicab operators were held to be employees, while in other cases, taxicab operators performing services under substantially similar circumstances were held to be independent contractors.

Senator LUCAS. On that point, could not Congress say definitely whether they are or are not in view of the conflict between the courts. Let us take taxi drivers alone. Could we or could we not?

Mr. EWING. Could I go right along, Senator? As it has turned out, this language that the Supreme Court has given us has rather surprised us in its simplicity for administrative purposes which I will deal with a little later.

In the timber industry, pulpwood cutters, haulers, and loaders have been held to be employees whereas sawmill operators and logging contractors have been found not to be employees. Truck owner-operators were held in one case to be independent contractors but in another case were held to be employees.

The CHAIRMAN. That could well be under the particular situation of the case, could it not?

Mr. EWING. As I understand these cases which our legal department has cited, it is felt that they are substantially similar cases, but you are quite right, Senator, there could be differentiating facts in each.

The CHAIRMAN. They might be similar but they might not be the same?

Mr. EWING. Yes; but it is the view of our legal department that the circumstances were not sufficiently dissimilar to justify a different decision.

The CHAIRMAN. A considerable part of the confusion which you talk about in the court decision arises out of the fact that the facts of every case are different; does it not?

Mr. EWING. Yes; of course, you get dissenting opinions on exactly the same state of facts.

The CHAIRMAN. That is right.

Senator LUCAS. You have no uniformity of administration where you get these different decisions in different courts and different sections.

Mr. EWING. That is right.

Senator LUCAS. You do not know what to do.

Mr. EWING. That is right.

The CHAIRMAN. And the point is whether there should be uniformity of decision where the facts are different.

Mr. EWING. Where the facts are the same, you mean. There should be uniformity where the facts are the same.

The CHAIRMAN. I agree that where the facts are the same there should be uniformity. The question is, Should there be uniformity where the facts are not the same?

Mr. EWING. Oh, no.

The CHAIRMAN. Of course not. That is the reason you have this appearance of confusion in the cases I suggest.

Mr. EWING. But as I said, our legal department felt that the differences were not sufficient to justify different decisions.

The CHAIRMAN. I have no doubt of that.

Mr. EWING. Lessee managers of chain stores were called independent contractors, but in another court store managers performing services as alleged independent contractors under a purported lease agreement were found to be employees. A seamstress was held to be an employee although home workers were found to be independent contractors. Coal hustlers were held to be employees by the Circuit Court of Appeals of the District of Columbia but the United States Circuit Court of Appeals for the Tenth Circuit (subsequently reversed) held coal unloaders not to be employees. A finding that insur-

ance agents were employees by the Appeals Council of the Federal Security Agency was sustained by the courts. This list is not a complete one. But it shows clearly the lack of uniformity in view and the difficulties encountered in attempting to apply the usual common-law rules adopted as the test of coverage in the original regulation.

If it were proposed to substitute for the test laid down in the 1936 regulations some other usual common-law definition of "employment," the same lack of certainty would prevail. There is no common-law test which is either simple or uniform or which can be easily applied to factual situations for the purpose of determining the existence or nonexistence of an employer-employee relationship. Even in the limited field of tort liability there has been a great variety of application and conflict in results as between States, and even within the same State, in determining whether such a relationship exists.

Another point which should be borne in mind, and which is sure to give us plenty of trouble if this resolution is enacted, is that while the Supreme Court decisions cut both ways, this resolution cuts only one.

The CHAIRMAN. We had a witness here yesterday who said you were taking the Silk case as the basis of arguments you were making here and were giving it exactly the opposite meaning in another line of cases that arose out in Oregon.

Mr. AYERS. I am sorry. That was directed to the Treasury Department, not the Social Security Administration.

The CHAIRMAN. That again emphasizes what we are talking about. Here is a decision of the Supreme Court which one arm of the Government uses for its arguments here which another arm of the Government gives an entirely different meaning for a different purpose.

Senator LUCAS. That is what I cannot understand.

Senator GEORGE. Do you mean to tell this committee that your Board could not apply the common-law principle to determine whether a person is an employee or not?

Mr. EWING. We can try to, but even courts disagree.

Senator GEORGE. I know "even courts disagree," but do you mean to say that you cannot do that as a practical matter? May I suggest to you that it is ordinary book law that the way to get rid of a bad law or imperfect law or inequitable law is to apply it and then let your legislative body come up and correct the error in it? It is just not conceivable to me that any group of men with common sense, who were really seeking to apply what in common parlance, in common law, almost universally throughout this country, the test of whether a man is an independent operator whether he is an employee.

There would be some border-line cases and they would go into the courts. That is what the courts are for. I cannot get your argument at all.

Mr. EWING. Senator, we certainly try to do that, but when you have two circuit courts in which one says one thing and the other the other, what are you to do?

Senator GEORGE. I would not pay any attention to the circuits. I would first try to apply the rules of common sense, and do it here, and I do not believe you would have much difficulty. If the law is a bad one and if somebody else ought to be covered, then your Congress has an opportunity to come along and correct it.

Mr. EWING. I wish it were that simple.

Senator GEORGE. It is that simple, but you confused it.

Mr. EWING. I do not think so. I do not know how you can say what the common law is definitely when you have two circuit courts of appeal saying exactly the opposite thing, and that was why the Supreme Court granted certiorari in these cases.

Senator GEORGE. Maybe the two circuit courts of appeal were not composed of men of common sense.

Mr. EWING. Senator, as a lawyer, I want to say that these differences are the things that help all of us lawyers very much.

Senator GEORGE. Yes; I understand that. I was a lawyer myself for a long time. But there is a difference between a lawyer and an administrative officer, and when a plain act is given to a board to administer, it has but one obvious duty, and that is to apply the plain common-sense rules that ought to be applied, and let the defects in the law appear, so that they may be corrected.

Mr. EWING. Senator, I think you joined us late this morning. A thing that came out here earlier is the fact that identical provisions of this law have been construed differently by the Treasury and by the Social Security Board on this very question of "employee" and that resulted from the fact, very largely, that the Treasury deals with the employer, while we get the case from the employee, and you do not have the advantage of a court hearing where both sides are present, and you have the opportunity of weighing the argument of each.

Senator GEORGE. If I were running a business, Mr. Ewing, and had a manager who could not tell whether somebody in that establishment was an employee or an independent contractor, I would get rid of the manager, and I would not be very long about it, because it is just a mere matter of common sense after all. Of course, there are questionable cases. They have to go into the courts under our system, unless you want to abolish the courts.

Mr. EWING. Oh, no; that is what we are up against all the time. In a system as vast as this social-security system the trouble is you get into thousands of cases.

Senator GEORGE. I understand that exactly and I personally believe in the extension of coverage to cases that are not now covered, but at the same time, I think it should be done by law and not by some tenuous regulations and rules.

Mr. EWING. I do not differ with you a bit on that, Senator, but our interpretation is the one that the Supreme Court has held was correct.

Senator GEORGE. I do not want to discuss the Supreme Court, but I was interested in your discussion here, of how difficult it is to tell whether a man in your establishment is working for you or whether he is an independent contractor there doing a job for himself.

Senator LUCAS. I want to make one further observation and to reiterate what I have said before here. I can understand how judges in different districts who are more or less independent contractors, so to speak, and do about as they please, have that right under the law, to make any decisions that they think the facts and the law justify, but in an executive branch of the Government, where two agencies differ, it seems to me rather shocking, and especially in view of the enormity of the problem that is before us that they cannot harmonize their views. As I understand the facts here, the Treasury Department is interpreting the Supreme Court decision differently now than the Social Security Board.

Mr. EWING. No.

Senator LUCAS. Is that not true?

Mr. EWING. No. The regulation that the Treasury contemplates issuing, was drafted jointly with us. We are all agreed on it, and we were just about to issue ours when Senator Millikin and someone from the House requested that there be no action on the Treasury regulation, so we held up ours, too.

Senator LUCAS. I commend you for getting together with the Treasury Department.

Mr. EWING. The thing about that, Senator, is that we did finally have a Supreme Court decision that settled these conflicts.

Senator LUCAS. Yes, I understand that, but in the original administration of the act there should not have been any conflict between the Treasury Department and the Social Security Administration of this Government, in my judgment. You are both in the executive branch of the Government, and there should have been found some place along the line to have reached a general harmonious conclusion as to the proper interpretation of the proper regulation.

Mr. EWING. I do not think anyone could quarrel with that. I agree with you completely.

The CHAIRMAN. Go ahead, please.

Mr. EWING. The Court did not go the whole way with the Government, by any means, and the resolution would leave people out if they are out either under the Court's decisions or at common law. It is carefully framed to give the taxpayer two chances to get out, and correspondingly to require us to apply both rules. That will not be easy.

Let me illustrate this point. In the Greyvan case counsel for the taxpayer admitted in his oral argument before the Supreme Court that the company would be liable for the torts of the owner-operators of motor trucks, whose social-security status was in issue in that case. Whether he intended to admit that they were common-law employees I am not quite sure, but it seems reasonably clear that they are. Yet the Supreme Court held that, because of their investment in their trucks and their opportunity for profit and risk of loss, they were not within the social-security system. The resolution would not bring them back into the system. So it would not spare us and would not spare taxpayers the necessity of applying the criteria the Court laid down. It would merely tell us to apply them only for purposes of exclusion. It is hard enough, in all conscience, to know what the common-law rules are and to apply them to concrete cases; it would be doubly hard to understand and apply the hybrid rule the resolution would create.

The CHAIRMAN. I suggest, Mr. Ewing, it would be quadruply hard to apply the slithering criteria which you have got in your regulation.

Mr. EWING. In the new ones.

The CHAIRMAN. In the new regulations. You have not weighted them. You can consider them or you can dismiss them at will. You can reach decisions entirely on undisclosed mental processes, and that is an even more uncertain thing than occurs from the decisions of the courts.

Mr. EWING. I think those proposed regulations, Senator, have been drawn so as to lay down the rules as honestly as we could. The ap-

plication of any rule to specific facts is always a matter of judgment, and a difficult one, as we all know.

The CHAIRMAN. All right.

Mr. EWING. And when you come to weighing this or weighing that, that is always a matter of judgment.

The CHAIRMAN. That is right.

Mr. EWING. And of course, as I said before, in response to one of your questions, I think if it were possible to get language that would narrow the field of judgment, if Congress could find those words, I think it would be a great constructive step forward.

The CHAIRMAN. I suggest what you are doing is transferring the uncertainty from the courts to your own agency.

Mr. EWING. We have to be guided by what the courts do. It just naturally gets transferred into our agency. We cannot help it.

When the Supreme Court decisions came down, we quickly agreed with the Treasury Department that the existing regulations no longer adequately indicated to taxpayers and prospective beneficiaries the rules of the game. While the Court did not expressly hold the regulations invalid, they had plainly ceased to serve the function which interpretative regulations are designed to serve. Amendment seemed to all of us to be imperative.

The Treasury and the Federal Security Agency set up a joint drafting committee, with specific instructions to devise a regulation which would incorporate and express the results of the Court decisions. What they came up with, with only minor modifications, is the proposed Treasury decision published in the Federal Register last November.

Now, I am the first to admit that these proposed regulations are not as informative as we could wish, in terms of telling the public who is in the system and who is out. I say that without apology, because neither the courts nor the law professors nor the American Law Institute has ever been able to produce a definition of the employment relation that gives much help toward solving specific cases. Clearly, in view of all the litigation they engendered, our old regulations have not been immune to the charge of uncertainty.

That brings me to a point which I shall have to ask you gentleman to take in part on faith. When we first read the Court's decisions we thought, as has been said in the debate on this resolution, that they gave us a very loose guide to administration. Phrases like "dependent as a matter of economic reality" we thought would be very difficult to apply. But to our surprise, as we have worked over the matter in the intervening months, we have found that taken in their context the phrases used by the Court are far easier of application than we had supposed. In the course of its work on the proposed regulations, the joint committee discussed a great many cases—actual cases, drawn from our 11 years' of experience in administering the program. To their surprise, the committee members found that in nearly all cases they quickly reached a unanimity of opinion; as much so in the case of those activities they found to be excluded by the Court's decisions as in those which they found to be covered. And let me remind you again that the areas of exclusion are substantial, including considerable areas which constitute employment at common law.

We have concluded that the Court wrought better than at first it appeared to have done.

Let me hazard this prophecy: that if these new regulations are allowed to become effective, administrative rulings under them will quickly build a body of precedent that will be more informative to the public than the rules we have tried to operate under in the past.

In support of this prophecy I can offer you one item of evidence. Since the Supreme Court decisions last June 15, cases involving this question have been decided by the Federal district and circuit courts, 10 in favor of the Government and 5 against it. In all these cases, of course, the courts have been bound to give effect to the rulings of the Supreme Court. In most of them the results have been in accord with our interpretation of those rulings, even where the holdings were against the Government.

Of greater importance than uniformity of result is the fact that the courts have already begun to show a better record of uniformity of approach in applying the tests of employment set forth by the Supreme Court. It is too early to be sure, but I firmly believe that the courts are already in process of fulfilling my phophecy. See *Schwing et al.* v. *United States* (C. C. H. Fed. par. 9238 (C. C. A. 3d 1948); *Atlantic Coast Life Insurance Co.* v. *United States* (C. C. H. Fed. par. 9329 (E. D. S. C. 1948)); *Benson* v. *Social Security Board*, not yet reported (D. C. Kans. 1948); *McIntire* v. *United States*, not yet reported (E. D. Mo. 1948); *Fahs* v. *Tree-Gold Cooperative Growers of Florida, Inc., et al.* (C. C. H. Fed. par. 9332 (C. C. A. 5th 1948); *Tapager* v. *Birmingham* (C. C. H. Fed. par. 9333 (N. D. Iowa 1948)); *Forrest M. Woods, d/b/a Dollar Cab Lines d/b/a Zone Cab Co.* v. *Nicholas, Collector* (163 F. (2d) 615 (Sept. 5, 1947)); *Party Cab Co.* v. *United States* (C. C. H. Fed. par. 9317); *Henry Broderick, Inc.*, v. *Squire, Collector* (163 F. (2d) 980, Oct. 10, 1947); *Ellis L. Vaughn* v. *Watson B. Miller; Periodical Publishers' Service Bureau, Inc.*, v. *Brady* (Oct. 22, 1947, C. C. H. Fed. par. 9318); *Co-Op Cab Co.* v. *Allen, Collector* (Dec. 8, 1947), C. C. H. Fed. par. 9325); *William T. Wheeler* v. *Federal Security Agency* (Aug. 26, 1947).

I am sorry that my recital has taken so long. The subject is a complex one with a long history. But the basic issue, I think, is extremely simple. The basic issue is whether, on the one hand, you are going to take away social-security protection from people who now have it, and who need it just as much as any people need it; or whether, on the other hand, you will leave these people in the enjoyment of their present rights and permit the Treasury Department to collect social-security taxes in accordance with the law as it now stands. The basic issue is whether we are to take a long step backward or to hold the ground we have secured. One way lie loss of rights already accrued, confusion of administration, and endless litigation; the other way, stability of rights, realism in administration, and a promise of a workable boundary of coverage.

The CHAIRMAN. Mr. Ewing, is there any assumption that you would consider to be valid, that the Congress itself would not be in a position to do justice to anyone who might be harmed by this resolution?

Mr. EWING. I had not thought of that.

The CHAIRMAN. If we wanted to, once we finally decided the policy in this matter, we could—I do not know whether we will, but we could

do the same congressionally in the way of retroactive benefit that you gentlemen have done administratively, could we not?

Mr. EWING. I hesitate, simply because I do not just visualize what that might be, but it might be quite possible.

The CHAIRMAN. We are constantly engaged in the process of rectifying what we consider to be injustices.

Mr. EWING. Surely.

The CHAIRMAN. I would appreciate it if you would supply for the record the following information. I will hand this over to you after I have finished with it:

1. For each of the calendar years 1940 to 1947, the total wage credits which were established in the year in view.

2. For each of the calendar years 1940 to 1947, the total wage credits which were established on the basis of tax returns.

3. (a) The total number of applications for benefits processed in each of those years. (b) The total number of claims allowed.

4. (a) The number of allowed claims based on unadjusted wage records provided with tax returns. (b) The number of allowed claims based on wage records established in part on the basis of tax returns and in part on the basis of wage-record adjustments by the Administrator. (c) The number of allowed claims based entirely on wage-record adjustments by the Administrator.

5. Further information as may be requested upon receipt and analysis of this data.

(The following information was supplied.)

FEDERAL SECURITY AGENCY,
Washington 25, D. C. April 6, 1948.

Hon. EUGENE D. MILLIKIN,
United States Senate, Washington 25, D. C.

DEAR SENATOR MILLIKIN: At the conclusion of my testimony on House Joint Resolution 296 on April 2, 1948, you asked that I supply certain information for the record. The information you requested is given below:

1. For each of the calendar years 1940-47, the total wage credits which were established in the year in view: 1940, $32,060,000; 1941, $41,087,000; 1942, $52,662,000; 1943, $62,685,000; 1944, $61,741,000; 1945, $62,610,000; 1946, $68,435,000; 1947,[1] $48,504,000 (partial).

2. For each of the calendar years 1940-47, the total wage credits which were established on the basis of tax returns.

It is not possible to obtain the desired information directly. A reasonably close approximation can be developed on the basis of the tax collection figures in the Daily Treasury Statement for periods corresponding to the Social Security Administration accounting years. The tax collection figures can then be multiplied by 50 to obtain the wage credits on the basis of which taxes are paid. By this method the following figures have been obtained: 1940, $32,080,000; 1941, $42,060,000; 1942, $53,320,000; 1943, $62,660,000; 1944, $64,010,000; 1945, $63,160,000; 1946, $68,925,000; 1947, $62,670,000.

The differences between the figures shown in this item and those shown in item 1 are due to the folowing reasons:

(1) While the periods in both cases are roughly comparable, they do not entirely coincide.

(2) The method of converting taxes received to wage credits does not yield entirely accurate results.

[1] The figures shown pertain to the accounting year which is 4 months behind the corresponding calendar year. For example, the wage credits shown for 1940 were processed by the Social Security Administration from May 1, 1940, through April 30, 1941. For this reason, complete figures for 1947 are not available. Those shown represent only approximately two-thirds of the 1947 accounting year.

(3) The tax receipts may include penalties, interest, and other assessments involved in delinquent filing. These amounts will not be reflected in wages credited to the accounts of individual wage earners.

(4) There are cases in which collectors of internal revenue receive tax returns on which they collect no tax. These are cases in which the collector has waived the right to collect the tax under the authority of section 3791 (b) of the Internal Revenue Code and usually concern rulings which were given retroactive effect with respect to wage information but were made nonretroactive insofar as the collection of tax is concerned. Examples of this are the cases outlined in the Bureau of Internal Revenue's A and C mimeographs 5323 and 5504 concerning employment with State banks and services performed by real-estate salesmen, respectively.

(5) Because the statute of limitations with respect to tax collections runs for 4 years after the end of the calendar quarter in which taxes were due and that with respect to establishing wage credits runs for 4 years after the calendar year in which wages were paid, there are instances in which the Social Security Administration records are open to correction but the collectors of internal revenue are unable to assess taxes.

(6) There are cases in which the Social Security Administration is advised by wage earners either at the time they file for benefits or when they periodically check the accuracy of their records, that wage items which should have been reported for them have not been so reported. In such cases the Social Security Administration establishes the alleged wages on the basis of avilable evidence and notified the Bureau of Internal Revenue that the tax is due. The tax may be collected in a different year from the one in which the wages are established and in some instances, for example when the employer unavailable, the tax may never be collected.

Among these cases are those in which the Social Security Administration may establish wages after determining that the services performed were actually covered employment but the Bureau of Internal Revenue will not collect the tax because that Bureau takes the opposite view with respect to the coverage of the services in question. There is no way available to us of ascribing the differences in the figures to each of the causes given above.

3. (*a*) The total number of applications for benefits processed in calendar years 1940–47: 1940, 413,000; 1941, 416,000; 1942, 426,000; 1943, 462,000; 1944, 578,000; 1945, 796,000; 1946, 885,000; 1947, 915,000.

(*b*) The total number of claims allowed: 1940, 375,000; 1941, 392,000; 1942, 395,000; 1943, 427,000; 1944, 525,000; 1945, 710,000; 1946, 798,000; 1947, 792,000.

The differences between the figures in items 3 and 4 are largely due to disallowed claims.

4. (*a*) The number of allowed claims based on unadjusted wage records provided with tax returns.

(*b*) The number of allowed claims based on wage records established in part on the basis of tax returns and in part on the basis of wage-record adjustments by the Administrator.

(*c*) The number of allowed claims based entirely on wage-record adjustments by the Administrator.

It would have added to the cost and complexity of the maintenance of our records covering some 88,000,000 persons if we had attempted to obtain and incorporate in our records information which would have related in every individual case the wage credits and the taxes collected. Therefore, it is impossible to classify the allowed claims into the three foregoing categories.

As a matter of fact, almost every claim allowed requires some adjustment to take into account the wages earned in the lag period between the most recent posting on our records and the most recent wages which should be used in computing the benefit amount. If we considered the establishment of "lag period wages" as the kind of adjustment referred to above, then almost every case would fall into the second of the three categories. In this type of adjustment the tax has been or will be collected in almost every case by the Bureau of Internal Revenue. We do have some information relative to claims allowed since April 1944 in cases involving insurance and outside salesmen. There is given below the total number of such cases adjudicated in the calendar years shown. Our records do not show, however, whether the wage records consist partly or entirely of wages established without payment of tax. While there were some cases prior to the time we began keeping this record, the number was very small: 1944, 1,178; 1945, 1,043; 1946, 980; 1947, 977.

* * * * * * *

If there is anything else that you want please do not hesitate to call upon me.
Sincerely yours,

OSCAR R. EWING,
Administrator.

Senator George, the intervention of the veto matter this afternoon has disrupted our schedule a little bit. Some of the folks who are here waiting to testify have come long distances, and for that reason, if there is no objection, I would like to hold a night meeting. I realize the undesirability of that as a general rule, but these gentlemen have made travel plans, figuring that we would have a meeting this afternoon. As I say, because of the disruption of the veto matter, we will have to hear some witnesses either tonight or tomorrow morning, and the witnesses have indicated that it would be more convenient if they were heard tonight.

Would there by any strenuous objection if we had a night session?

Senator GEORGE. Not on my part, Mr. Chairman, but I must say that all day yesterday and until 12 o'clock last night, I was at work, as a member of the conference committee, on the European aid program, and I would be a pretty listless listener tonight, I am afraid, but perhaps you might have the meeting. What hour would you suggest?

The CHAIRMAN. Say at 8:30. I think we could finish about 10.

Senator GEORGE. Yes, sir. I would be glad to join you.

The CHAIRMAN. Well then, we will recess until 8:30 tonight, in this room.

(Whereupon, at 12:05 p. m., a recess was taken until 8:30 p. m. of the same day.)

EVENING SESSION

The CHAIRMAN. Mr. Canfield, please.

Mr. Canfield, will you make yourself comfortable?

Give you name, residence, and occupation to the reporter.

STATEMENT OF ROBERT E. CANFIELD, AMERICAN PULPWOOD ASSOCIATION AND THE AMERICAN PAPER AND PULP ASSOCIATION, NEW YORK, N. Y.

Mr. CANFIELD. My name is Robert E. Canfield. I am a lawyer. My address is 122 East Forty-second Street, New York, N. Y.

I am representing the American Paper and Pulp Association, and the American Pulpwood Association.

Yesterday morning I gave Mr. Stanley copies of my prepared statement and also copies of a brief submitted to the Commissioner of Internal Revenue on behalf of those two clients that I have mentioned, and also the National Lumber Manufacturers Association, the Timber Producers Association, and the Northeast Lumber Manufacturers Association, which I suggest be incorporated in the record.

The CHAIRMAN. We will make them a part of the files.

Mr. CANFIELD. The brief is brief. It is only 4½ pages long, but I think it analyzes the legal situation fairly well.

The CHAIRMAN. As to the Senate joint resolution?

Mr. CANFIELD. No. It applies to the regulation itself. It is a brief filed with the Commissioner.

The CHAIRMAN. How long is it?
Mr. CANFIELD. It is only 4½ pages long.
The CHAIRMAN. We will put it in the record.
(The brief referred to is as follows:)

To the COMMISSIONER OF INTERNAL REVENUE
Washington 25, D. C.

This statement is submitted jointly by the undersigned pursuant to notice of rule making published in the Federal Register of November 27, 1947, proposing amendments to the employment-tax regulation with respect to employer-employee relationship. Although the notice, as published, states that arguments must be submitted within 30 days, we are advised that such time has been extended to February 1, 1948.

The purpose of the proposal is stated to be to conform the existing regulation covering the relationship of employer and employee under the social security laws to the principles enunciated by the Supreme Court of the United States in *United States* v. *Silk and Bartels* v. *Birmingham*.

We oppose the proposed regulation on the grounds that:

I. No change in the existing regulation is necessary to conform to the cited decisions of the Supreme Court.

II. Conformance of the existing regulation to dicta of the Court is not within the authority of the Commissioner.

III. Congress has directly and specifically repudiated the principles enunciated by the Court to which the proposed regulation is said to conform.

IV. The proposed regulation is so indefinite, incomplete, and uncertain that it does not, in fact, constitute a regulation.

I. NO CHANGE IN THE EXISTING REGULATION IS NECESSARY TO CONFORM TO THE CITED DECISIONS OF THE SUPREME COURT

In the cited cases four categories of workers had been determined by the Commissioner under the existing regulation to be employees rather than independent contractors, and therefore covered by the Social Security Act. The Court sustained the Commissioner in two instances and reversed him in the other two. In the opinions rendered by the Court, the Court discussed the problem of coverage of the act, said that the words "employer" and "employee" were not words of art, but had a broader meaning than that normally given them under the common-law principles of master and servant (adopted by the Commissioner in the existing regulations) and stated a variety of considerations which might be taken into account in determining whether or not a particular person in a particular case was an employee or an independent contractor. None of the principles discussed by the Court was in the slightest degree essential to the actual decision rendered in the cases. In the case of those workers held to be employees, the Court sustained the finding of the Commissioner that in fact they were employees in the ordinary sense of the word as set forth in the existing regulation. No extension of that regulation was necessary in order to arrive at this conclusion. It could only have been necessary if the Court had determined that the Commissioner's finding was erroneous under his own regulation, in which case it might then have found that despite that fact, the decision was correct under the law as more broadly construed by the Court. No such determination was made by the Court. The decision of the Commissioner, arrived at by applying the existing regulation to the particular facts, conforms to the final decision of the Court and obviously, therefore, no change in the regulation is necessary in order to conform to that decision.

In the instances where the Court decided against the Commissioner there was no necessity to apply the broader interpretation discussed by the Court. The Court found that despite its ideas as to broader coverage in the "employee" category, the workers were, in fact, independent contractors. If this was so under an interpretation broader than the existing regulations, a fortiori, it must have been so under the more restrictive rule set forth in those regulations and the Commissioner's finding to the contrary was therefore erroneous. Correct application of the existing regulation to the particular facts results in a finding conforming to the final decision of the Court. Obviously there is no need to change a regulation to achieve a result which would, of necessity, be achieved under the existing regulation applied in accordinance with the decision of the Court.

III. CONFORMANCE OF THE EXISTING REGULATION TO DICTA OF THE COURT IS NOT WITHIN THE AUTHORITY OF THE COMMISSIONER

Since, as has been shown above, it is clear that application of the existing regulation to the particular facts before the Court result in the decision actually made by the Court, the broader interpretation of the act and the criteria discussed at length by the Court are not necessary to the decisions but are simply dicta which form no part of the actual decision of the Court.

It is axiomatic that Congress alone has the right to legislate; that courts may, if necessary because of vagueness, interpret the language used by Congress in order to establish what the law in fact is; and that regulations are effective only if in conformity with the law. The Commissioner under sections 1008 and 1108 of title 42 U. S. C. A. (the Social Security Act) may make regulations only "for the enforcement of" the law. Under the decision of the Supreme Court in *Hasset* v. *Welch* (303 U. S. 303, 1938), construction of the statutes contained in the existing regulation has been adopted by Congress by the repeal and re-enactment of the pertinent provisions of the social-security laws while the regulation was in effect (53 Stat. 1; 53 Stats. 175, 183). See also *Brewster* v. *Gage* (280 U. S. 327, 337, 1930). The regulation also specifically has been held to have been approved by Congress and therefore to be in conformity with the law. *Jones* v. *Goodson* (121 F. 2d 176, C. C. A. 10, 1941). The proposed regulation and the existing regulation are mutually contradictory. If the existing regulation was in conformity with the law, the proposed regulation cannot also be in conformity with it unless the law has been changed. Congress has not changed it. The Supreme Court decisions have not changed it. The Court has stated certain principles which, if used as the essential basis of a future decision by it, would constitute an interpretive broadening of the law, but as yet this has not been done. Congress has specifically refused to broaden the law in the manner subsequently discussed with the approval, but not decided, by the court.[1] Congress has also expressly repudiated the decision of the Supreme Court in *Labor Board* v. *Hearst*, relied upon by the Court for its dicta in the Silk case.[2] The law clearly remains exactly as it was when the circuit court of appeals determined in the Jones case that the existing regulation was in conformity with it. The proposed regulation cannot then be in conformity with it but only with dicta of the Court. This fact is recognized by inference by the Commissioner in the notice of proposed rule making, since there he makes no claim that the proposed regulations are to conform to decisions of the courts, and therefore to the law, but only "to the principles enunciated" by the Supreme Court. What the proposed regulations are is apparent. They are regulations based upon what the Commissioner hopes the Supreme Court will some time in the future determine the law to be. It seems clear to us that the Supreme Court neither could, with propriety, nor would make any such determination in the face of the express refusal of Congress to adopt such principles and its express repudiation of the Court when it did adopt them. Certainly the Commissioner has and can have no authority for any such action.

III. CONGRESS HAS DIRECTY AND SPECIFICALLY REPUDIATED THE PRINCIPLES ENUNCIATED BY THE COURT TO WHICH THE PROPOSED REGULATION IS SAID TO CONFORM

In the Silk case the language of the Court regarding a broader concept of "employer" than that set forth in the existing regulation is expressly stated to be a following of what the Court had previously decided in the Hearst case. The

[1] 76th Cong., H. R. 6035, redefinition of employee under the Social Security Act to include a person "who is not an employee of such person under the law of master and servant." Passed by House; stricken by Senate; Senate action accepted by House conferees.

[2] National Labor Relations Act as amended by Labor-Management Relations Act, 1947, sec. 2 (3) and House committee report thereon, No. 245, 80th Cong., where, at p. 19, the committee said: "An 'employee,' according to all standard dictionaries, according to the law * * * and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U. S. 111) the Board expanded the definition of the term 'employee' beyond anything it had ever included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. * * * It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board, give to words not far fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting mistaken reliance upon the Board's 'expertness' has approved, the bill excludes 'independent contractors' from the definition of 'employee.'"

Bartels case relies upon the Silk case. The Silk case was argued March 10 and decided June 16, 1947; the Bartels case was argued April 3 and decided June 23, 1947. The House Report on the Labor Management Relations Act was written April 11, 1947; the act was passed June 6, vetoed June 20, and passed over the veto on June 23, 1947. The proposed regulation was published November 27, 1947. From this chronology it is clear that the House committee could not include in its specific rejection of the Hearst case similar rejection of the Silk and Bartels cases, which one can hardly doubt it would have done if the cases had been decided before the report was written. Similarly, the intention of Congress as expressly stated in the report was not brought to the attention of the Court at the argument because the report was not then in existence. The report, although in existence when the cases were decided, did not express legislated congressional intent which would have to be taken into account by the Court until after the decision in the Silk case and the day of the decision in the Bartels case. Since the Court has no power to alter the clear intent of Congress (and it would be virtually impossible for its intent to be made more clear than as stated in the report [3]) it is clear that the Court would not have adopted the principles of the Hearst case in the Silk and Bartels cases had they been decided after June 23, 1947.

The Commissioner, of course, has no more right than the Court to vary the clear and express intention of Congress. Yet 5 months after Congress had unequivocally stated, with specific reference to the Hearst case, "Congress intended then and it intends now that the Board give to words not far-etched meanings but ordinary meanings," thus eliminating any semblance of sanction for the principles elucidated in the Silk and Bartels cases, the Commissioner proposes to make a regulation predicated upon those rejected principles and even going far beyond them.

We can only assume that the Commissioner made his proposal in ignorance of the specific statement of congressional intent since it referred to a law not directly within his province, or that knowing of it he did not realize its necessary and direct application to the Social Security Act because of the reliance of the Court on the Hearst case for its pronouncements in the Silk case.

We cannot believe that now, with full knowledge of the facts, he will persist in the promulgation of the proposed regulation which is in direct violation of the unequivocally stated intention of Congress and thus in direct violation of his legal authority.

IV. THE PROPOSED REGULATION IS SO INDEFINITE, INCOMPLETE, AND UNCERTAIN THAT IT DOES NOT, IN FACT, CONSTITUTE A REGULATION

In addition to being in conformity with the law, an administrative regulation, in order to be valid, must be sufficiently definite, complete ,and certain to permit one subject to it to determine what his obligations are, and one who is to enforce it to determine what his duties are. This is, of course, particularly true where, as here, taxes to be paid, and both civil and criminal penalties, including imprisonment for felony, depend upon the application of the regulation.

The proposed regulation purports to establish criteria pursuant to which tax liability and penalties for failure to pay it will be established. In fact, the proposed regulation concerns itself mostly with making it abundantly clear that on virtually no state of facts may anyone be certain whether or not he has a tax liability until the Commissioner has made up his mind about it. It states many criteria which the Commissioner may take into account but then specifically says that the list is not complete, that none of the criteria are controlling, that the weight to be given any factor will vary from case to case depending on the particular facts in each case, that even if all stated factors point to one conclusion, others not set forth or even hinted at may result in any exactly opposite conclusion.

The proposal can be accurately epitomized by the following extracts:

"* * * an employee is an individual * * * who is dependent, as a matter of economic reality, upon the business to which he renders service * * *. Whether the services performed * * * constitute him an employee as a matter of economic reality or an independent contractor as a matter of economic reality is determined in the light of a number of factors including the following (although their listing is neither complete nor in order of importance)." (List of

[3] See footnote 2, p. 3.

six factors.) "Some of the facts * * * which may be considered in applying the above-listed factors are stated in paragraph (d) * * *. Just as the above-listed factors cannot be taken as all-inclusive, so, too, the statements of fact * * * set forth in paragraph (d) * * * cannot be considered complete. No one factor is controlling. The mere number of factors pointing to a particular conclusion does not determine the result. It is the total situation in the case that governs in the determination."

It will serve no useful purpose to catalog all the other similar uncertainties in the proposal. From the above quotations it is clear that no matter what facts exist, the final determination must be subjective. Absolutely no criteria are set forth from which anyone reading the proposed regulation can determine what decision will be reached by the Commissioner on any given sets of facts.

Since neither administrative agents nor persons possibly subject to tax under the proposed regulation can determine what decision would be made by the Commissioner in any given case, it seems clear that the proposed regulation performs neither of its proper functions and is, in fact, not a regulation at all.

If the proposed regulation is claimed accurately to state the law and to be so vague because the law actually is equally vague and indefinite, it is our contention that the law itself is invalid because it fails to establish what anyone's rights or obligations are.

CONCLUSION

Since no new regulations are needed to conform to decisions of the Supreme Court, since there is no legal authority for conforming regulations to dicta, since the prposed regulation is directly contrary to express legislative intent and therefore without legal sanction, and since the regulation would be invalid because of uncertainty even if it had legal sanction, the proposed regulation should be rejected in its entirety.

AMERICAN PULPWOOD ASSOCIATION.
AMERICAN PAPER AND PULP ASSOCIATION.
TIMBER PRODUCERS ASSOCIATION.
NATIONAL LUMBER MANUFACTURERS ASSOCIATION.
NORTHEAST LUMBER MANUFACTURERS ASSOCIATION.

January 19, 1948.

Mr. CANFIELD. The prepared statement is not long either. It sticks strictly to the question of what would happen if the resolution is passed or is not passed, which I understand is the pertinent question here.

The CHAIRMAN. That is correct.

Mr. CANFIELD. It does not go into the merits of whether or not social-security coverage should or should not be extended. Necessarily it covers much of the same ground that has been covered heretofore, and if it is agreeable with you, I would like to discuss the subject matter in the light of what has been said in the last few days and particularly this morning.

The CHAIRMAN. Go ahead, please.

Mr. CANFIELD. There are several statements that I made that seemed to be correct at the time I made them, that do not seem to be so now in the light of information that came out for the first time, to my knowledge at least, this morning.

I had assumed that the 500,000 to 750,000 people that were talked about in the letters submitted to the chairman of the House committee was an estimate of the people who would be covered by this new philosophy expounded by the Supreme Court and covered in this new proposed regulation.

Accordingly, it seemed to me, that if this resolution were passed it would not exclude anyone from the social-security coverage except such people as had apparently been put under the coverage of social security since June 16, but if I understood the testimony correctly this morning, that 750,000 has to do with people who were already under coverage

benefitwise but not taxwise before June 16, and there is not a figure or an estimate at all as to how many people might possibly be brought under it by virtue of this new theory that the Treasury Department and the other administrative agencies are bringing forth.

If that is so, the passage of the resolution, it seems to me, would even more clearly not take anybody out of coverage if the resolution means, as I think Congress intends, an instruction to the administrative offices to continue what they were doing before they heard about the Silk case. All it would do would be to assure us that coverage was not extended to an utterly indefinite number of people under this new philosophy.

As I say, I had thought that the 750,000 was an estimate of that. If, in fact, 750,000 people got under coverage by stretching the common-law theory I shudder to think of how many might be put in under this new regulation, which apparently has no limitations whatsoever.

With that fact in mind, it seems to me it becomes more important than ever to consider perhaps a little more clearly than has been done so far in these hearings, just how vague this present proposed regulation is.

In my written statement I made the statement that it was possible under this proposed regulation for an Administrator to hold that a public stenographer, such as the one who typed the statement for me, was my employee, or to hold that I am the employee of the American Pulpwood Association, although I am an independent practicing lawyer.

I am perfectly certain that the representatives of the Treasury Department and the FSA would say that this is ridiculous, and I agree with them. I picked the examples purposely because they are ridiculous I do not have any idea that they would do any such thing, but the point is that they could.

I would like to read the part of the regulation that makes it perfectly clear that they could do that:

> An employee is an individual * * * who is dependent, as a matter of economic reality, upon the business to which he renders service. * * * Whether the services performed by an individual constitute him an employee as a matter of economic reality or an independent contract or as a matter of economic reality is determined in the light of a number of factors including the following (although their listing is neither complete nor in order of importance).

Then there are listed six criteria.

The CHAIRMAN. If it is not overly tedious, would you mind reading those six?

Mr. CANFIELD. Not at all. [Reading:]

> (1) Degree of control over the individual, (2) permanency of relation, (3) integration of the individual's work in the business to which he renders service, (4) skill required of the individual, (5) investment by the individual in facilities for work, (6) opportunities of the individual for profit or loss.
>
> Some of facts or elements which may be considered in applying the above-listed factors are stated in paragraph (d) of this section. Just as the above-listed factors cannot be taken as all-inclusive, so, too, the statement of facts or elements set forth in paragraph (d) of this section cannot be considered as complete. The absence of mention of any factor, fact, or element, in these regulations should be given no significance. No one factor is controlling. The mere number of factors pointing to a particular conclusion does not determine the result.

Now on that basis, talking of the most extreme example I can think of, and that is calling me an employee of the American Pulpwood

Association, one of the factors that they can take into account and give whatever weight they choose, is permanency of relation, and here is what they say about that:

> One of the most significant elements in establishing control is the right or power of the person for whom the services are performed to terminate the relationship without cause or on short notice.

I am not sure whether I am walking into the field of conflict between Federal and State law or not, now, but in New York, where I practice, regardless of what kind of contract of retainer is made between client and lawyer, the services of the lawyer may be terminated at any time with or without cause and with or without notice. If the president of the American Pulpwood Association were here tonight, he could fire me in the middle of a sentence.

The CHAIRMAN. I would not attempt to express an opinion on that with any pretension of complete accuracy, but I think it is characteristic of any professional relationship that rests on competence.

Mr. CANFIELD. I believe it is generally applicable. Could we say it is the usual common-law rule? [Laughter.]

The CHAIRMAN. I would not want to say, but I should think it would be.

Mr. CANFIELD. On their own statement then, they could take that one factor and give it 100 percent weight, and all the other factors zero weight, or plus or minus zero, and determine that I am an employee. If they can do that in that kind of a situation they can hold anyone under any circumstances to be an employee.

The CHAIRMAN. Suppose a man were a lawyer and had one client and had served that retainer for 15 or 20 years, could he be considered as an employee?

Mr. CANFIELD. He certainly could under this regulation. There is no doubt of that, under this proposed regulation.

The CHAIRMAN. There are many lawyers who are one-client lawyers.

Mr. CANFIELD. I think there are circumstances where a lawyer could be considered an employee under the usual common-law rules, but under this proposed regulation he could be held to be an employee without having to take the extreme case you are talking about. Under any circumstances he could be held to be.

There is another criterion they mentioned which I think, of necessity, exists in almost every one of these border-line cases that they are talking about: that is the matter of integration. They say that if the services rendered are integrated with the business of the principal for whom the services are rendered that that indicates employee status, and they go on to say, that integration can be established by the fact that the services rendered are essential to the business of the principal or are performed in the course of his business. Any business expends money only for services which are either essential or in the course of their business or both.

The CHAIRMAN. If it is not integrated with the business it is philanthropy.

Mr. CANFIELD. It is philanthropy and in the case of a corporation it is also ultra vires the corporation, I believe, and it certainly is not done very often.

That one criterion is certain to exist or almost certain to exist in every instance, and under this regulation it could be given top weighting and be the controlling factor.

In the face of that kind of confusion it seems to me perfectly clear that no business could possibly afford to let a regulation of that sort stand without testing its validity by litigation.

The representative of the Treasury the other day said that there had been only 300 cases in 12 years involving the employee status. He did not say "only." He said there had been that many, as though it were a terrible number. I cannot conceive that there would not be that many in a month under this new regulation, because no businessman could possibly know where he stood in any one of the borderline cases and we have to bear in mind that this law is a tax law as well as a benefit law, with penal sanctions attached to it, including imprisonment for felony, and nobody can afford not to litigate something which puts it in the power of an administrator to put him in the penitentiary for failure to guess what the Administrator is going to do.

There is another point which I think could be clarified somewhat.

The CHAIRMAN. Have you reflected on whether the standards in these regulations meet the standard tests of decisions? With the bulk of administrative law the courts have gotten very liberal on the question of standards and criteria, but have they gotten liberal to the point where you can give any weighting that you want, or no weighting to a series of criteria or standards, and add unspecified criteria or standards?

Mr. CANFIELD. Not to my knowledge, sir, and I do not think it would be administrative law if they did. I think it would be administrative whimsy.

The CHAIRMAN. Do you remember the "sick chicken" case?

Mr. CANFIELD. I have reference to it in my notes here. I will not bring it up though because there is no need to.

In all the discussions yesterday and this morning it seemed to me that nearly everybody acquiesced in the theory that the regulations follow Supreme Court decisions. I think it is worth while clearing up in the record that that is not so, in my judgment. Actually, the decisions in the three cases that give rise to this new theory were made under the existing regulations.

In the brief that was filed before the Commissioner of Internal Revenue, that situation was analyzed, and I would like to read one small part of it:

> None of the principles discussed by the Court was in the slightest degree essential to the actual decision rendered in the cases. In the case of those workers held to be employees, the Court sustained the finding of the Commissioner that in fact they were employees in the ordinary sense of the word as set forth in the existing regulation. No extension of that regulation was necessary in order to arrive at this conclusion. It could only have been necessary if the Court had determined that the Commissioner's finding was erroneous under this own regulation, in which case the Court might then have found that despite that fact, the decision was correct under the law as more broadly construed by the Court. No such determination was made by the Court. The decision of the Commissioner, arrived at by applying the existing regulation to the particular facts, conforms to the final decision of the Court and obviously, therefore, no change in the regulation is necessary in order to conform to that decision.
>
> In the instances where the Court decided against the Commissioner there was no necessity to apply the broader interpretation discussed by the Court. The court found that despite its ideas as to broader coverage in the "employee" category, the workers were, in fact, independent contractors.

Now, if this was so under an interpretation broader than the existing regulations it simply must have been so under the existing regula-

tions. The broader interpretation of the act and the criteria discussed at length by the Court are not necessary to the decisions, and therefore are simply dicta, no more, no less. They are statements of what the Supreme Court in the absence of congressional injunction to the contrary would probably apply in the future to cases where the facts required the application of those principles in order to come to a determination. They were not applied; it was not necessary to apply them to achieve the results in any one of those three cases.

There is another point that seemed to me to need further discussion and clarification in these hearings. It is just what the function is of an administrative agent in making regulations under the law.

It seems to me perfectly clear. It has not been made clear so far in this hearing. It has gotten involved in all kinds of discussions around the edge of it.

What actually happens is that Congress decides what it wants to do and makes a law saying so.

Nobody else can. Congress' intentions are the only ones which count.

Now, a court may construe the language Congress used if it is unclear but their construction is to be based solely on its decision of what Congress intended by the unclear language.

The Administrator's function is to carry out the law as it is. In the absence of any other criteria, he takes the ordinary meaning of the words. If the intent of Congress changes the ordinary meaning, then he follows that. His job is to follow the law in accordance with the latest pronouncements of what Congres intended. He has no authority to go beyond that.

Now, applying that to this particular situation: In 1936, as Mr. Wiggins himself stated in the letter that he wrote to the chairman of the House committe, in the absence of any guide they took the ordinary meaning of the word. No other guide came up for consideration until 1947.

If the congressional debate in 1939 constituted any guide, it was in the same direction, certainly it did not change the situation. But on June 23, 1947, the Supreme Court construed the congressional intent to be something else.

Up to that point the Administrator had no conceivable authority for taking anything but the usual meaning of the words.

On June 16 he had a reason for taking something else but on June 23 that reason ceased to exist, because Congress then gave him another guide. That was done, of course, through the mechanism of the Taft-Hartley law and the report that went out on it. If it is possible to express congressional intent any clearer than it is expressed in the House report on the Taft-Hartley Act, I do not know how it could be done. The reason, of course, why that particular decision of Congress is controlling in this case is that the language that was used on June 16, 1947, by the Supreme Court was taken from the Hearst case and expressly discussed in these cases on the Court's assumption that the definition of "employee" had to be the same in all social legislation, so that when Congress said, on the 23d of June, "what you, the Supreme Court, said we meant by 'employee' in the Hearst case was categorically wrong," it eliminated any possible sanction for administrative action based on that assumption by the Supreme Court of congressional intent.

So, if the Administrator's job is, as I think it quite clearly is, to follow the law in accordance with the latest pronouncements of congressional intent, these new regulations are not justified. What they are doing is following the next to the last pronouncement and not the last one.

There is a point about the regulation that has not been raised at all in these hearings. It seems to me that it is perfectly plain that the coverage of people under social security must be greater, not less, under these new regulations, and I think that is an understatement. The result of doing that by this means is contrary to another congressional intent that is pretty generally known, not statutory but I think something that is accepted as more or less axiomatic. Congress is not in favor of forcing the creation of bigger and bigger business units. It has the general philosophy of fostering small business units, and when business units get too big, of stepping on them somewhat.

If, however, you hold people responsible for social-security coverage of persons that they had not deemed to be employees but were in fact, independent contractors and the employees of the independent contractors, they are going to be taken into that corporate entity as actual employees. Nobody, it seems to me, in his right mind, is going to accept the obligations of employees without having the benefits of them. It necessarily will result, as I see it, in concentration of more and more persons who now are independent, into employment by corporations, which will then become bigger and bigger units.

I think that the adminstrative officers want that result. It has appeared in many other actions that they have taken, and there is a very good reason for it. It makes their job easier. It is pretty hard to police a situation when you have got 10,000 different small enterprises. It is comparatively easy if you have got 50 or 100 or 500 large enterprises. You only have to police in 500 places instead of 5,000, and the people that you are dealing with are, of necessity, responsible, and can be found. I do not think the desire of administrative agents to make their jobs easier is a good basis for making regulations.

The CHAIRMAN. They might be warranted in making regulations but not in making laws.

Mr. CANFIELD. Yes, sir.

The CHAIRMAN. There was considerable testimony today to the effect that these interpretations had resulted, in part at least, from the difficulty of adhering to the common-law conception of an employer-employee relationship.

Mr. CANFIELD. The new proposed regulation, of course, would eliminate that difficulty entirely, because you can, under those things, make the decision first and the criteria to fit it afterward, and cover anyone you want to cover under social security.

The CHAIRMAN. On a wholesale rather than on a retail basis?

Mr. CANFIELD. Yes, sir. I think we can make much more simple this problem of difficulty in applying the common-law rule too. The people who have been opposed to this resolution have, at the very least not emphasized the fact that it says "The usual common-law rule." In many instances they have skipped the word "usual" completely.

The CHAIRMAN. They have stated that that merely adds to the difficulty of the job.

Mr. CANFIELD. As I see it, it is exactly the same situation there is with most dictionary words, or many at least. They have primary

meanings and secondary meanings. The primary meaning is the usual meaning. The usual common-law rule is stated to be, in the House report, that rule which is reflected in the regulations as written. That is what they mean by "usual common-law rule."

I do not know how many people are covered by social security but with the exception of the 750,000 people, everyone else covered by it has been covered by applying that usual common-law rule. The difficulties apparently have only arisen in the Marginal case, and it would not seem to me to be too difficult to continue to apply successfully the defined usual common-law rule which has been applied for 12 years and resulted in only 300 litigated cases.

As I understand it, the resolution says in effect to the administrative agents. "Do not change your rules as you propose. Keep right on doing exactly what you did before you ever heard of the Silk case." That will not take anybody out of coverage unless they were put there on some basis other than the regulations which are still in effect today. It will prevent putting some undetermined number and class of persons under coverage until such time as Congress determines who should be added to coverage. That is all it does, if I understand the intent of Congress.

On the other hand, if the resolution is not passed and the proposed regulations are promulgated, businessmen are faced with the prospect of having to make subjective determinations which match those of an administrator, with the penalties for failure to guess right ranging from retroactive tax liability with interest, up to large penalties and even imprisonment for felony. In addition there is the prospect of an extension of the new employee concept to other fields, each of which brings a new batch of headaches and costs and taxes.

If a man is an employee for social-security purposes it will not be long before the claim is made that he is an employee for purposes of workmen's compensation, for purposes of tax withholding, for purposes of wage-hour controls, for tort liability, and even more important than all of the others put together, for purposes of determining where a company is doing business.

Take the example, for instance, of the mail order shoe house that was talking here the other day. If their agents are employees the company could very easily be held to be doing business in every State in the Union. The tax obligations that go with that are fantastic. No small company can afford it. No big company that I know of actually does business in every State in the Union. The complexities of trying to do business in the legal sense in 48 different jurisdictions are too much, and to be forced into it simply by a tortured definition of "employee' seems hardly desirable. It is with that kind of a prospect in mind that I feel that it is perfectly clear that no business can afford to acquiesce in these new regulations. They will have to litigate them, fight them at every turn of the wheel. You cannot do business on any basis as indefinite as that. That, of course, is why business is in favor of these resolutions. Not because they want to exclude people from social-security coverage, not because they want to keep new people from coming under social-security coverage, but because they want whatever is done, done in a definite way, so that they know what their rights and liabilities are, and so that their rights and liabilities in many other

fields are not accidentally controlled as a result of hasty decisions and unconsidered decisions made in the field of social security.

In the last analysis, I gather that the position of the administrative agencies is that they think they have to follow the Supreme Court. Perhaps they want to also, but that is not exactly pertinent. I believe they are wrong in thinking that they have to follow the Supreme Court for the reasons I outlined: but let us assume that they do have to. The result, I believe, clearly will be great confusion, especially considering that prospective action by Congress could cause three changes in the rules within a very short time. This, I am sure, even the Administrators do not want. It would complicate their job plenty. Should Congress not act to relieve them of that compulsion by giving them the order to continue to do what they have done in the past? That is exactly what this joint resolution does, as I see it.

That is all I have.

The CHAIRMAN. Thank you very much, Mr. Canfield.

May I ask, before you leave the stand: What is the problem of the Pulpwood Association and the American Paper and Pulp Association, which has relevance to the resolution?

Mr. CANFIELD. Specifically, it is a little difficult to pin down, because we do not know what the Administrator is going to do under this regulation. In the production of pulpwood there are in many instances independent contractors producing wood, and by "independent contractors" I do not mean individual contractors. I mean contractors who have employees of their own and lots of them.

Mr. DeWind indicated and Mr. Ewing indicated that people in that category would not be covered, and that is very reassuring, except you cannot prove it by the regulation. They could cover them. They say they will not. The fact that they could makes them a despot, and the fact that they will not makes them a benevolent despot, but benevolent despots have a habit of not staying that way, and that, frankly, is the problem of the pulpwood industry.

In the paper industry, the situation there is that you have got a business that involves several billion dollars of capital investment and several billion dollars of sales per year. It is located in 38 States in the Union, and any business that size is bound to do business in almost every way you can think of: Through individual independent contractors, through independent contractors who have employees of their own, through their own efforts with their own employees, in every way. The paper industry and the pulpwood industry are just like every other industry, every other employer of any sort: they do not know where they would be under these regulations, and being, by and large, law-abiding citizens they would like to know what the law is.

In my prepared statement I have not mentioned anything about the problem of the industries as such, because their problems are the same as every other employer's: complete and utter lack of knowledge of what they are supposed to do or not do, with the penalty for failure to guess more than they can afford to gamble with.

The CHAIRMAN. Thank you very much.

Mr. CANFIELD. Thank you, Mr. Chairman.

STATEMENT OF M. W. ZUCKER, ADMINISTRATIVE ASSISTANT, COMMERCE AND INDUSTRY ASSOCIATION OF NEW YORK, INC., NEW YORK, N. Y.

The CHAIRMAN. Will you state your full name, your residence, and your business to the reporter, please?

Mr. ZUCKER. Yes, sir. My name is M. W. Zucker, administrative assistant of Commerce and Industry Association, 233 Broadway, New York City.

The CHAIRMAN. Will you tell us something about your association?

Mr. ZUCKER. Our association is the largest commercial association in the metropolitan area of New York. It has a membership in a wide diversity of industries, covering both the retail, wholesale, manufacturing, and distributing fields.

The CHAIRMAN. What is the relation of the association to those various businesses?

Mr. ZUCKER. There are a number of firms in our membership who are quite confused as to how this regulation would apply to them. I have touched on it in the prepared statement which I would like to put on file, sir, in order to save time, and make some supplementary remarks, if I may.

The CHAIRMAN. That would be agreeable.

Mr. ZUCKER. I would, sir, if I may, like to take this opportunity to congratulate you as chairman and the members of your committee on the enactment of the tax law of 1948. Is that permitted in the record?

The CHAIRMAN. You may put that in the record, because your joy is shared by at least most of the members of the committee.

(The statement is as follows:)

STATEMENT OF THE COMMERCE AND INDUSTRY ASSOCIATION OF NEW YORK, INC., PRESENTED BY M. W. ZUCKER, ADMINISTRATIVE ASSISTANT, BEFORE THE SENATE COMMITTEE ON FINANCE IN FAVOR OF HOUSE JOINT RESOLUTION 206

The Bureau of Internal Revenue announced a new social-security regulation defining who is an employee under the law. This regulation was to have been promulgated on December 27, 1947.

The Commissioner of Internal Revenue declared that determination of who is an employee under the new regulation was to be based upon: (1) The "social purposes of the law"; (2) whether the individual is dependent on the business to which he gives his service or his own business; and (3) the "total situation" in the case.

Among the factors to be used in making these determinations were: (*a*) The degree of control over the individual performing services; (*b*) permanency of the relation; (*c*) integration of the individual's work in the business to which he renders service; (*d*) the skill required; (*e*) investment by the worker and facilities for work; and (*f*) opportunities of the worker for profit or loss.

As a result of protests from employers and business groups throughout the country, the ruling was not promulgated as scheduled in order to permit congressional action in this matter.

The Commerce and Industry Association of New York, Inc., vigorously opposes the intent of this ruling for the following reasons: (1) The new regulation will introduce more conflicting elements and, therefore, be less clear concerning the status of borderline cases than at present, and; (2) the new regulation being less clear definitely will increase latitude for administrative discretion and will, therefore, increase the uncertainty of business personnel concerning these qualifications.

The proposed new regulation states that it shall be of "no consequence that relationship is designated as a partner, coadventurer, agent, dealer, broker, distributor, vendee, lessee, independent contractor, etc." This implies that the new

regulation will reopen the formerly unquestioned relationships with all these qualifications. Most of the factors listed, if so interpreted, could be held to imply that partners, coadventurers, insurance agents, customhouse brokers, etc., should be considered as employees of the houses which they serve, whereas in fact they are not employees in any ordinary or reasonable sense.

The proposed regulation states that the relationship of employer and employee for the purposes of the social-security legislation and this regulation is not restricted by the technical, legal relation of master and servant as the common law has developed that relationship in all its variations. We believe that clear, legal understandings which have been developed over a period of time concerning the nature of employer and employee should not be abandoned for the substitution of administrative discretion.

The latitude for administrative discretion should be narrowed rather than widened to the end that either an employer or an employee may read the law and understand it and know what his status is without being dependent upon the discretion or the judgment or the inclination of an administrative officer.

If parties are to be classified as employers and employees, they should know it, so that provision for the necessary contribution to the social security fund may be properly calculated. If the relationship is to be that of independent contractors, this should be known so that there can be other independent arrangements for the protection of their old age or for their unemployment.

RECOMMENDATION

The Commerce and Industry Association respectfully petitions, therefore, that the very complicated, cumbersome, and controversy-producing regulation as proposed by the Bureau of Internal Revenue be disapproved and that in lieu thereof Congress clarify the employer-employee relationship by law through the passage of House Joint Resolution 296.

Mr. ZUCKER. As I mentioned, sir, our concern is with the vagueness of the published regulations, that they will give rise to confusion and doubt in the minds of employers not only in New York but throughout the country who have dealings with independent contractors. There is no definiteness as to the criteria for determining whether a person is or is not an employee under these regulations. It will require court decisions to clarify whether the "social purposes" of the law cover individual cases. One example which might be cited as having a very direct bearing on a great industry in New York is in the importing field. Because of the vagueness of this regulation there is no way of knowing, for example, whether custom-house brokers are or are not covered under the criteria set forth in the new regulations.

The regulations state that it shall be of—

No consequence that relationship is designated as a partner, coadventurer, agent, dealer, broker, distributor, vender, lessee, independent contractor, et cetera.

This implies that the new regulations will open the formerly unquestioned relationship with partners, coadventurers, agents, brokers, and so forth.

Most of the criteria listed, if so interpreted could be held to apply to the partners, and coadventurers, insurance agents, customhouse brokers, and so forth, and should be considered as employees of the houses which they serve, whereas in fact, they are not employees in any reasonable or ordinary sense.

The CHAIRMAN. Give us a case example.

Mr. ZUCKER. I was coming to that, if I may. It can be illustrated by the following quotations from the proposed regulations and their application to this type of business.

For example, "the integral part of the functions." An importer cannot import without entering goods through United States customs.

The customs entry is an integral part of the functions of importing. Customhouse brokers have to be separately licensed, and very few importers have the license to do their own entry work. Practically all importers employ the services of customhouse brokers to perform this integral part of the function of importing. These brokers are completely separate identities and in no sense the employee of the importer but the new regulations would raise the implication of employee status.

The next criterion is the "permanency of relations." The custom house broker or the lawyer or the insurance agent who serves the interest of an importer may have continued to serve in that capacity 25 years or longer. Usually these connections are of very long standing. For that reason, the regulations would raise the implication that such parties are employees of the importer whom they serve which is plainly contrary to the actual fact.

Another criterion is "integration." The lawyer, the broker, the insurance agent who serves an importing client may very closely be integrated into the operation of that client. The new regulations would thereby imply that for that reason he is an employee.

The CHAIRMAN. What does the custom broker do?

Mr. ZUCKER. The custom broker actually is an expediter. After an importer or exporter gets the goods the broker then makes certain that he has shipping, he arranges for insurance, he arranges for transportation once it gets into the country.

The CHAIRMAN. Does he clear the goods at the customs office?

Mr. ZUCKER. He does, sir. That is what I meant by "getting it through." Another criterion is "services performed in the name of the principal." The customhouse broker holds the power of attorney for the importer and makes the entry in the name of the importer. The lawyer brings suit in the name of the client. The insurance agent files a claim for recovery in the name of the client. Under the new regulations, this would imply that these people are employees.

Another criterion is "services of the individual supporter affect good will." Naturally the lawyer, the broker, or the agent working quite closely with the client affects the good will of the client.

Does this also imply that he is then an employee for that reason?

The final criterion is "investment in facilities for work." In a genuine partnership one partner may furnish the premises and not the capital, at least so in importing, while another partner furnishes only the experience. This is not an unusual arrangement, and certainly does not make the second partner the employee of the first partner, although the new regulations might so imply.

That takes care of that particular example which we feel is a very valid one, and since New York is so closely aligned with the importing-exporting field, this regulation has a very definite bearing in our business life, because statistics show that 1 out of 10 persons in New York City earns his livelihood through foreign trade.

Another point which I would like to mention, sir, is the growing rule by administrative fiat. What might appear to one administrator as a clear-cut case for inclusion of a certain type of independent contractor, to the next administrator might not be of such import or be controlling in the case. Business cannot be carried on under such vague circumstances nor should administrative discretion be per-

mitted such free and unfettered play. Congress should outline the area within which discretion should be permitted.

Actually the result of this regulation is the broadening of coverage by indirection, or, should I call it, by administrative ruling. The entire subject of coverage is now being studied by the joint committees of Congress, and it is not within the framework of our Government to permit the administrators to abrogate the authority of Congress in this field. Furthermore, if coverage is to be extended, it should not be done in a haphazard or piecemeal fashion but as a result of a careful planning and considered judgment by Congress.

There is another example which, since I was not here yesterday, sir, I do not know whether it was brought up or not, and that is the problem of the house to house solicitor. Many independent contractors are door to door solicitors. There are quite a number of direct selling companies which utilize persons to sell for a percentage, these companies' products. In many cases the sales representatives are housewives who in their spare time engage in this activity merely for pin money.

Each sales representative has complete discretion as to when and where in her particular territory she will work and the choice of her own customers. Her hours of work are of her own making and subject to no control by the company. No customers lists are furnished to the sales representative, and the company does not in fact make any check on her clientele, which is dependent on her own desires and initiative.

She is not prevented from engaging in any other business activity nor from carrying another line of goods while she goes from house to house, or selling even a competing line of goods. She is not required to fulfill any minimum quota of sales. The sales representative's only remuneration is the percentage of gross sales ranging anywhere from 20 to 40, or even 50 percent of the list price. When the volume of sales reaches an amount which she considers sufficient to warrant shipment to the company, she fills out an order blank and sends it in. The company then forwards the ordered goods to her on a 20-day credit.

She then delivers to the customers the particular goods ordered by each and remits a percentage of the list price to the company, ranging anywhere from 60 to 80 percent, and retains the remainder as her commission. While the company endeavors to maintain the list price of its goods, it has no way of knowing at what price a particular representative sells. She can in fact, pass along to the customer any part or all of the commission retained by her.

Similarly, the company has no way of knowing whether she sells for cash or on a delivery basis. If the representative extends credit to one of her customers she would be obliged to carry the burden of the credit. It is interesting to note also that the length of time which a sales representative will be engaged in this type of house-to-house activity, especially if it is a housewife, will depend completely on her own initiative. She is free to terminate her selling activity at any time, and, as a matter of fact, a very large percentage of the sales representatives pursue their activities only for a short time, not more than a year, and there is usually a 100-percent turn-over in the sales force each year. Generally, these door-to-door sales representatives earn approximately $125 a year, and this sum does not qualify them

for benefits under the old-age and survivors' insurance program. Since no benefit would be paid and they were put under the act, the taxes collected, both from the sales representative and from the employer, would be a windfall to the Government—just plain gravy.

Now, there is another problem here with regard to the independent contractors, and that is that there is no way of knowing what is the exact amount of earnings each individual makes. Is the employer to be required to audit each sales representative's books, is he to withhold for income-tax purposes, is he to give direct and minute direction to the affairs of these sales representatives?

To consider these representatives as employees would open a Pandora's box to other difficulties. What about employee-employer relationships in labor relations? How about workmen's compensation? Are income taxes to be withheld?

There is also this item which might be clarified by the Treasury Department. It comes to mind that perhaps if these regulations are put into effect, that there would not merely be a 4-year collection on taxes, but it might possibly be that the Treasury Department could demand a 12-year collection of these taxes, for the reason that, where a tax return is required, the employer is then liable for the full period, since the Treasury Department is not stopped by the statute of limitations.

Now, I do not know if that is valid or not. I did not have an opportunity to look up the law on this matter, but it certainly bears examination.

The CHAIRMAN. Administratively, it appears that the administrators, acting on the principles of benevolence, intend to aid the trust fund for those benefits without making collections from the employer and employee.

Mr. ZUCKER. Are we then to be obliged to court the benevolence of the Administrator?

The CHAIRMAN. That is a question which we shall decide.

Mr. ZUCKER. That sums up the arguments which our association feels are pertinent in this case to warrant the passage of this resolution.

The CHAIRMAN. We are very grateful to you for coming.

Mr. ZUCKER. Thank you very much, sir.

The CHAIRMAN. Is Mr. Stanley here? Mr. Linforth is next on the list, but Mr. Stanley has an emergent reason for leaving soon so I am taking the liberty of calling him out of order.

STATEMENT OF JOHN J. STANLEY, SECRETARY-TREASURER, UNITED OFFICE AND PROFESSIONAL WORKERS OF AMERICA, CIO, NEW YORK CITY

The CHAIRMAN. Will you state your name, your address and your business please?

Mr. STANLEY. My name is John J. Stanley. I am secretary-treasurer of the United Office and Professional Workers of America, CIO, with national headquarters at 1860 Broadway, New York City.

The CHAIRMAN. You may be seated if you wish.

Mr. STANLEY. I should like to present the views of the United Office and Professional Workers of America in opposition to House Joint Resolution 296.

My name is John J. Stanley. I am secretary-treasurer of the United Office and Professional Workers of America, CIO, with national headquarters at 1860 Broadway, New York City. I should like to present the views of the UOPWA in opposition to House Joint Resolution 296.

I have already filed a statement with this committee which sets forth the views of the UOPWA on this legislation. In the interests of brevity, and with the permission of the committee, I will not read that statement but ask that it not only be entered into the record but that it be studied and given careful consideration by the members of the committee.

(The statement is as follows:)

STATEMENT ON HOUSE JOINT RESOLUTION 296 BY THE UNITED OFFICE AND PROFESSIONAL WORKERS OF AMERICA, CIO, SUBMITTED BY JOHN J. STANLEY, SECRETARY-TREASURER, APRIL 2, 1948

DEFEAT HOUSE JOINT RESOLUTION 296

The United Office and Professional Workers of America is a trade-union organization representing 70,000 organized office, professional, scientific, technical, and social service and related employees, employed in a wide variety of industries throughout the United States. Its membership includes employees in the screen, insurance, banking, social service, and direct-mail advertising fields and in a wide variety of commercial and manufacturing offices throughout the country.

Its membership includes, also, thousands of industrial insurance agents located in 31 States of the United States and thousands of news-distribution employees, including news vendors, who would most immediately be hurt were House Joint Resolution 296 to be approved as law.

The United Office and Professional Workers of America wishes to record its vigorous opposition to this measure which, while initially depriving three-quarters of a million American workers and their families of the minimum protection now afforded them under the Federal Social Security Act, is really aimed at the economic well-being of all white-collar workers and of the Nation.

LEGAL ASPECTS—THE SO-CALLED COMMON-LAW RULE

House Joint Resolution 296 purports to "maintain the status quo in respect to certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage." In effect, however, it seeks to upset decisions of the United States Supreme Court and thereby to eliminate from the jurisdiction of the law employees which the courts have ruled are entitled to its benefits. Far from maintaining the status quo, the enactment of House Joint Resolution 296 would be the opening gun in a well-financed campaign by avaricious and money-grubbing newspaper monopolies and the multi-billion-dollared insurance companies to escape their obligations to their employees and thus to increase their insecurity at the expense of the Nation. Their success in this campaign would be but a prelude to finding other pretexts for the exclusions of other sections of their workers and of white-collar workers in other industries which they control from the benefits of the Social Security Act.

This can be seen by examining the successful effort by the Metropolitan Life Insurance Co., $8,000,000,000 Goliath of the insurance industry with assets far exceeding the wealth of any State in the Nation excepting New York and Pennsylvania to exclude insurance agents it employs in the State of Pennsylvania from coverage under that State's unemployment-insurance law on much the same claim that insurance agents are not really "employees." Our union is currently struggling to bring the true facts before the legislature of that State and we know that when the facts are registered the inequitable law on the statute books of the State of Pennsylvania will be reversed.

There is, indeed, more than meets the eye in House Joint Resolution 296. Once it were enacted, the newspaper chains and the insurance companies would not be slow to try to deny the benefits of collective bargaining to their employees on the grounds that they were so-called independent contracts. This claim would be advanced despite the fact that both State and Federal courts have, time

and again, held that the "economic realities of the relationship" of these workers to the employers involved certainly puts them into an employer-employee relationship.

The Social Security Act, as it now stands, contains no definitive explanation of the term "employee" and much confusion had prevailed from State to State as to its meaning. The act did, however, specifically exclude certain groups of employees from its coverage and, where not excluded, the reasonable conclusion has been to permit a liberal interpretation of the term "employee" in keeping with the spirit and purpose of the legislation.

The argument that Congress intended the usage of common-law rules in establishing the master-servant or employer-employee relationship is but an attempt to confuse the issue and to sanction continued difficulty and uncertainty in the application of the law which would inure to the benefit of the employers who advocate it by relieving them of the obligation of making the payments required by the act.

In accordance with the established and fundamental concept of democratic principles and procedures of Government, the judiciary is charged with interpreting the law of our land. Last year, in the *United States* v. *Silk* case (1947, 67 S. Ct. 1463), the United States Supreme Court ruled—with none of the Justices taking exception to the basic opinion of the Court—in clear and unmistakable language that:

"The term 'employee' is not a word of art having a definite meaning. The relationship of employer and employee for the purpose of social-security legislation in this part is not restricted by the technical and legal relation of master and servant as the common law has developed that relation in all its variations. * * *

"As the Federal social-security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit scheme by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation. * * *

"In the application of the Federal Insurance Contributions Act and in the regulations of this part, an employee is an individual in a service relationship who is *dependent as a matter of economic reality* upon the business to which he renders service and not upon his own business as an independent contractor." [Italics not in original.]

Under the guise of "retaining the usual common-law rules," House Joint Resolution 296 seeks to nullify this June 1947 Supreme Court decision, the first complete and over-all interpretation of "employee" which squares with the economic realities and which has been handed down by our highest judicial body.

In accordance with this decision, the Bureau of Internal Revenue now recognizes approximately 650,000 workers previously falsely classified as "independent contractors" as being covered by the act.

The argument is therefore advanced by the proponents of the exclusion of this group of workers that is unfair to other workers covered by the act that benefits for these workers should accrue retroactively even though they have not paid their share of the contributions required by the act. This argument is, of course, morally and legally untenable. What the proponents of exclusion are actually worrying about is that they have to begin now making their share of the contributions required by the act covering these workers. This they would like to avoid.

ECONOMIC STATUS OF THE GROUPS INVOLVED

In August 1935, during the course of the worst depression ever faced by our country, our Nation discarded the concept that the individual worker, through his own resources and initiative, can successfully cope with economic hazards of unemployment and old age. At that time, under the leadership of President Franklin D. Roosevelt, the United States joined the host of other countries which recognized the responsibility of the National Government to its people to minimize their suffering due to unemployment, old age, and dependency.

Though the Federal Social Security Act has its weaknesses and limitations, its adoption by Congress did mark the beginnings of a program designed to alleviate the ills of economic insecurity. As yet, the act has not been extended to millions of workers employed in nonprofit organizations, domestic service,

agriculture, etc., who need its benefits. That Congress has failed to act in their behalf is deplorable. For Congress to even contemplate whittling away the protection already gained for other workers is indefensible.

To do so would not only deprive these workers of the benefits they would otherwise receive, but would, in the event of another economic recession such as is being freely predicted in the press and by governmental bodies, seriously impede the ability of the country to recover.

The research department of the UOPWA has made a survey of the earnings of its membership in the news distribution field, including news vendors and of the earnings of its membership in the insurance industry.

The earnings figures shown below are higher than typical salaries in these fields because they represent the earnings of the organized sector of these employees. It goes without saying, that the vast bulk of the workers in these fields who are unorganized, earn far less on the average:

Industry	U. S. Department of Commerce figures			UOPWA figures, 1947	
	1939	1945	1946	Gross	Net
Insurance carriers	$1,971	$2,584	$2,759		
Insurance agents	1,882	2,084	2,862	$4,160	$3,120
News vendors				[1] 1,040	[2] 3,380

[1] Low.
[2] High.

These earnings should be contrasted with the minimum budget needs of a white-collar family of four shown below:

Heller budget, white-collar family of 4,[1] September 1947—Total annual cost (including State sales tax), 5,030.29

[Based on prices in San Francisco, Calif.]

Item	Percentage of total budget	Total, annually
Food	29.8	$1,498.35
Clothing	12.4	624.85
Man	3.5	174.25
Wife	4.6	230.23
Children	4.3	220.37
Rent	12.8	642.00
House operation	3.2	161.53
Furnishings	3.5	173.26
Income and pay-roll taxes	10.7	540.00
Miscellaneous	27.6	1,390.30
Automobile	7.6	383.98
Medical and dental	5.3	264.45
Personal care	2.4	122.86
Recreation	3.7	185.24
Life insurance	3.5	178.20
Other	5.1	255.57
Total	100	5,030.29
Savings	0	0
Vacation	0	0
Education	0	0

[1] Includes man, wife, boy of 13, girl of 8.

Source: Heller committee for research in social economics, University of California.

Partial listing by item

Food, weekly:
- 7 loaves bread
- ½ pound butter
- 1⅔ dozen eggs
- 18 quarts fresh milk
- ¼ pound bacon
- 11½ pounds potatoes
- 10 pounds meat and fish

Clothing, annual replacement:

Man:
- 1 overcoat (every 4 years)
- 1 sweater (every 4 years)
- 1 business suit
- 7 pairs socks
- Clean and press suits, 3 times
- Press suits, 6 times
- Half soles and heels, twice

Clothing, annual replacement—Con.

Wife:
- 1 winter coat (every 3 years)
- 1 summer coat (every 3 years)
- 1 slip
- 8 pairs stockings
- 1 afternoon dress
- 1 street dress
- Heel repair, 4 times

Son:
- 1 jacket (every 2 years)
- 4 pairs underwear
- 3 pairs school shoes
- 1 pair slacks (every 2 years)

Daughter:
- 1 coat (every 2 years)
- 4 cotton dresses
- 1 skirt (every 2 years)

City worker's budget, family of 4,[1] June 1947, partial listing

	Total annual budget, including taxes		Total annual budget, including taxes
Washington, D. C	$3,458	St. Louis, Mo	$3,247
New York, N. Y	3,347	Los Angeles, Calif	3,251
Boston, Mass	3,310	Richmond, Va	3,223
Detroit, Mich	3,293	Philadelphia, Pa	3,203
Pittsburgh, Pa	3,201	Cleveland, Ohio	3,200
Minneapolis, Minn	3,282	Buffalo, N. Y	3,136
Chicago, Ill	3,282	Cincinnati, Ohio	3,119
San Francisco, Calif	3,317	Indianapolis, Ind	3,098
Baltimore, Md	3,260	New Orleans, La	3,004

[1] Includes man, wife, boy, 13, girl 8.

Source: Bureau of Labor Statistics.

Minimum health and decency budget, single working girl, no dependents[1] (partial listing)

State	Minimum weekly budget	Date of budget	Estimated weekly income needed as of February 1948[2]
California (San Francisco)	$41.63	September 1947	$43.30
New Jersey	41.59	December 1946	45.75
New York	34.55	September 1946	38.87

[1] In New Jersey and California, girl lives alone; in New York, as member of family.
[2] UOPWA estimate, based on BLS indexes (plus 15 percent each index, and an additional 2 percent for estimated price rise between December 1947 and February 1948).

Source: State departments of labor, except for California which was prepared by Heller committee of University of California.

It is apparent that, far from being able to set anything aside to cover the vicissitudes of unemployment, old age, or dependency, the average white-collar worker whom the proponents of House Joint Resolution 206 would have us believe is an "independent contractor" is constantly "going into the hole." It is not only necessary, but it is imperative, that his rights to social security benefits be protected, preserved, and extended.

CONCLUSION

The line of demarcation between "employee" and "independent contractor" such as might be found in common-law usage is extremely vague. It would undoubtedly be open to many abuses. House Joint Resolution 296 would weaken, not strengthen, the Social Security Act. It would be an enterting wedge through which all sorts of exemptions would be claimed. As Congressman Eberharter stated in his discussion of House Joint Resolution 296 on the floor of Congress, the "purpose of the resolution before us today is to do only one thing, and that is to absolve a certain group of employers from payment of social-security taxes."

The proposed resolution is supported by newspaper and insurance monopolies which have repeatedly given ample indication of their determination to reduce the living standards of their employees and of utilizing legislation of this type to deny collective bargaining to their employees.

The proposed resolution is counter to both the 1944 pledge of the Republican Party and the recent policy statement of President Truman. It reverses the trend toward wider economic security for American workers and thereby lessens the stability of our Nation as a whole.

In the light of a possible depression or economic recession, House Joint Resolution 296 would place intolerable burdens on a wide section of our population, who, even under present circumstances, have not been able to raise their standards sufficiently to enable them to obtain a minimum standard of health and decency.

It is shocking and revolting that legislation of such far-reaching import should have been introduced in the House of Representatives and passed by a vote of 246 to 53, without a single hearing having been ordered and held. The suspicion is unavoidable that a smoothly organized and powerful lobby of wealthy, vested interests is behind this measure.

The United Office and Professional Workers of America calls upon the Senate Finance Committee to kill House Joint Resolution 296, to condemn its supporters in the House of Representatives, and to work for the defeat of this legislation should it ever be reported out on the floor of the United States Senate.

The Senate of the United States is an august body of our Government. It is looked to by the people for leadership and wisdom. In a period such as this, where our Nation has before it proposals to spend billions of dollars for armaments and war preparations which are supposed to guarantee democracy abroad, the Senate of the United States cannot afford to neglect the protection of the democratic livelihood of any section of the American workers and might well ponder whether such money would not better protect democracy at home if used to enhance the economic welfare of the American people.

Mr. STANLEY. I shall endeavor in the brief time allotted to me—the secretary of the committee has informed me that I have approximately 15 minutes to present my testimony—to amplify certain aspects of my prepared statement and to deal with certain other questions which we, in the UOPWA, consider are highly important to convey to the Members of the Senate.

I hope that the shortness of the period allotted to me is an indication of the "short shrift" which this committee will give to House Joint Resolution 296 before relegating it to that limbo from which its specter will never again arise to haunt the American people with insecurity from unemployment and fear of destitution in old age.

It appears to me and to the members of my organization more than passing strange that during a period when the cost of living has risen to the point where the purchase of the most elementary necessities of livelihood, food, clothing, and shelter, is getting rapidly beyond the means of the average American worker (the cost of living having risen 66 percent bewteen 1939 and November 1947) and on the same day that the New York Times reports that corporation profits in 1947 of 3,102 large corporations showed a gain of 37 percent over 1946, reaching the astounding total of $9,228,000,000, or 12.2 percent return on the net worth of these corporations (whose net worth, incidentally, has been expanding at the most unheard of rate in history due to swollen and

unconscionable war profits) we should be sitting here, before a body which is supposed to represent the entire American people, discussing or "negotiating" the extent to which legislation should be enacted to "disembowel" us.

The CHAIRMAN. Get to the point and come to the resolution and forget the stump speech.

Mr. STANLEY. I will come to it. It is not a stump speech. It may express the urgency with which we view this problem.

The CHAIRMAN. We would like to have a discussion of the resolution. We are glad to have you here, but there is no point in all of that stuff so far.

Mr. STANLEY. As I was saying——

The CHAIRMAN. Go ahead. Take your own head. There is no use wasting the time of the committee or wasting your own time. Go ahead. Take your own head.

Mr. STANLEY. Thank you.

As I said, it is passed strange that we should be sitting here discussing or negotiating the extent to which legislation should be enacted to disembowel us.

The said truth is that since the death of Franklin Delano Roosevelt, the working people of our Nation, and especially its white-collar workers, have been subjected by the Congress to one attack after another, one deprivation after another. Not a single piece of legislation benefiting the common man has emerged from this Congress in over 2½ years, while gains the workers made in the previous 12 years are rapidly being taken from them. Yet we still sit here today to consider whether more shall be taken away.

It is time to call a halt. It is time to consider whether the Congress and the United States Senate is going to act as the superboard of directors of the big business and vested monopoly interests in our country or whether it is going to be the Government of all of the American people, legislating for the common welfare.

If this is to be a Government of all of the people, this committee must deal with the economic and human experience of the average American, including those who work in all of the white-collar fields and who make so vital a contribution to our economy.

Dealing with this experience and with these economic realities will have to mean that our Congress will have to concern itself, not with what can be taken away from the workers but what must be done to stop this pattern of the vast accumulation of wealth in the hands of the few which results in the impoverishment of the mass of our people and which is destroying the economic health, safety, and security of our country.

The statement which we have already presented points out that House Joint Resolution 296 is being advanced by the most avaricious and rapacious newspaper and insurance monopolies in our country, who have always most strenuously opposed the efforts of their employees to obtain a fair share of the wealth they produce.

This opposition is typified by the 5-year fight the employees of the Metropolitan Life Insurance Co., with assets of over 8½ billion dollars, had to conduct in and out of the courts to establish their right to sit down with officials of that company to even discuss the conditions under which they work and by the seven long years' fight conducted

by the newsvendors in the courts and out against the Hearst newspapers to establish similar rights.

Thomas L. Stokes, writing in the World-Telegram of March 18, 1948, said of House Joint Resolution 296:

> The joint resolution is the result of pressure from interests that would have to pay social-security taxes under the Supreme Court decision, including insurance companies and "sweatshop operators."
>
> No hearings on this measure were held by the House Ways and Means Committee, which voted suddenly one day, without having presented to it unfavorable reports from the Treasury and the Social Security Board.
>
> The House exhibited the tendency prevailing under Republican management of yielding to interests, even though "ostensibly the body closest to the people."

I have only this to say about Mr. Stokes' article, apart from the fact that it confirms the charge in our statement, and that is that such yielding to the interests have unfortunately not only characterized the Republicans but that the Democrats, too, to an overweening extent, share this servile, cringing, fawning attitude toward the "interests" in our country, particularly in the vote on this bill, which passed the House by the shameful vote of 246 to 53.

How else can we account for the action of the House in the face of the charge of Representative Eberharter, made on the floor of Congress and unchallenged here, that House Joint Resolution 296 "was not adequately considered by the joint committee before it was reported for adoption." He claimed, furthermore, that the committee voted on the resolution before a full copy of the Supreme Court's 1947 decision had been submitted to it and before the report of the Treasury Department advising a change in the regulations was submitted to Congress.

Let us turn our attention for a minute to the conditions and needs of just two of the many groups of workers whom the provisions of House Joint Resolution 296 would seriously affect and who are members of the UOPWA, the insurance agents and the news vendors.

In the face of the steeply rising living costs of over 65 percent since 1939, the insurance agents employed by the Big Three industrial insurance companies of the United States—Metropolitan Life Insurance Co., Prudential Life Insurance Co., and John Hancock Mutual Life Insurance Co.—received increase in the same period in their average earnings of but 45 percent. Thus, they are in the hole to the extent of at least 21 percent since 1939. And these, mind you, are the organized agents.

The vast bulk of insurance salesmen, still unorganized, are in a much worse position, as the statement we have filed with you shows. All of them are having the toughest time making ends meet and keeping up the appearances which are necessary to effectuate the sale of insurance.

Our surveys among our own membership reveal that their savings are exhausted and that many of them are already in the installment markets and are borrowing for ordinary, necessary living expenses. At the same time, the sale of insurance is getting tougher as the average American worker must meet the inflationary squeeze and cannot afford to buy new or maintain his old insurance.

The lapsation rate on policies is on the increase, and the companies are bringing back old pressure methods to maintain the sale of insurance.

This is accompanied with finals and dismissals of agents for non-production. This is far from a pleasing prospect for the insurance men, and now House Joint Resolution 296 even proposes to question or threaten their rights to social-security benefits.

Then there is the man who will survive the threat of dismissal and who "makes the grade." He has spent 25 or more years in service of the company, can no longer pound the pavements, and climb the stairs. But the companies, if this legislation is enacted, will be able to cast him off without even the miserable pittance provided by the present Social Security Act for him to fall back on.

It is indicative of the Americanism of these insurance companies that while they batten on the money provided them by the American people, they have no real concern for the public welfare by having even the temerity to support House Joint Resolution 296. Let us "look see" what happened to them since 1939.

Company	Year	Assets	Company	Year	Assets
Metropolitan	1939	$5,100,000,000	Prudential	1947	$6,800,000,000
Do	1947	8,500,000,000	Hancock	1939	900,000,000
Prudential	1939	4,000,000,000	Do	1947	2,200,000,000

The news vendors are even in a worse position. Their earnings still range between a low of $20 a week and a high of $65 a week, that is the organized ones. What the unorganized get is very, very much less. Contrast this with the minimum budget required by a family man with two kids, he is the average news vendor, for a minimum standard of health and decency and you find that he, particularly, cannot make ends meet and can lay nothing aside for the "rainy day" or old age.

Yet, the wealthy newspaper chains who supposedly are out to expose evils in our society in order to correct them, are giving more concern to the few cents they would have to shell out as their portion of the social security contribution required by the law than in seeing that the welfare of these people who make their enormous circulations possible is taken care of.

Both the insurance agents and the news vendors do their business under the most rigorous set of rules and regulations unilaterally issued by the companies. They must report at certain places at certain times, do a certain amount of paper work prescribed by the companies, can be severed from the work of the companies at the pleasure of the latter, are told by and large when and where they must work and are subject to regulation of the most detailed nature by the companies.

But because, in many cases, they also happen to operate under individual contracts and, most of all, because the companies which employ them so desire, they make the claim that these workers are not employees but individual contractors. Under this guise, Metropolitan Life Insurance Co. has already secured the enactment by the State of Pennsylvania of a law which excludes their agents from the benefits of unemployment insurance.

The UOPWA charges that there is more in the desire of these companies to secure enactment of House Joint Resolution 296 than meets the eye. The companies hope, through this means, of securing an entering wedge not only to escape the payment of their social security contributions for these workers and then to extend it to other groups

now covered based upon equally specious contentions to those they have advanced here, but they hope through this means to escape their obligation to engage in collective bargaining with these workers. This right, won by these workers over many years of struggle both in the courts and on the picket line, they will never yield.

One last aspect of the matter and I will conclude.

I have examined only a few of the prepared statements of those who have appeared before this committee in favor of House Joint Resolution 296 but these suffice to illustrate an extremely important point. The first of these is the statement of the Commerce and Industry Association of New York, presented by its Mr. W. W. Zucker. This statement limits itself to purely technical questions and the discussion on them sounds very learned. But there is not a single thing in that statement to show that the defeat of House Joint Resolution 296 would adversely affect a single one of the workers who may be employed or have relations with the members of that association. The statement, when stripped of its veneer of learning boils down to an objection that, under the present law, some administrator will have to make an interpretation of whether or not an employee is covered. What this Associaion of employers wants is that the employer should make that interpretation. We can be sure what that will be and where that will leave the workers. That is right out in the cold.

Secondly, we have the statement submitted by the National Association of Insurance Agents, made by its counsel, Mr. Neville. Here again, not one single word about the economic conditions of the people we are dealing with or how they would be adversely affected by the present law and this association purports to represent the local insurance agents.

Last, but not least, is the long, involved, highly technical statement of Mr. Canfield of the American Pulpwood Association and the American Paper and Pulp Association which, with consummate verbiage seeks to indict the FSA and the Internal Revenue Department for daring to declare what the intent of Congress was when it passed the Social Security Act and asking the present Congress to tell us what the Congress of 1935 intended as though the present Congress is more competent of doing this than the Supreme Court on whose interpretation of the law the FSA and the Internal Revenue Department are required to rely.

Stripped of its verbiage, though, Mr. Canfield's statement does pose the issue and that is this: that the question is now before the Senate. How will it legislate? To protect employees who, in point of fact, are as of this moment covered by the law or, is it going to turn the clock backward and deprive these 500,000 to 700,000 people and their families of these benefits? That is the issue and no technical, weasel words can distort it.

I have but one thing to suggest to Messrs. Zucker, Neville, and Canfield, and that is to put the issue up to the persons involved. Ask them whether they want to be covered. And then do what they ask. Surely, having provided a basic framework in our Social Security System, the Senate of the United States should seek to welcome every person whether on the borderline or over it who wants to come under the provisions of this law which not only benefits all those covered by it but is an essential measure for aiding our country to cope with the catastrophe which another depression in our country would represent.

In conclusion, we ask this committee to kill House Joint Resolution 296. The United States Senate must not "sow the wind," because not only its individual Members who do so, but the entire American people, will then surely "reap the whirlwind." As Henry Wallace said today in a statement released through our union:

The extension of adequate social security to all groups of the population is an essential responsibility of the Federal Government. Our present social-security programs lag far behind the needs of our people.

I therefore favor the expansion of social security by Federal legislation to include the millions of working people now excluded and unfairly discriminated against. I likewise favor provision for larger social-security benefits, which, inadequate to begin with, do not today provide even a subsistence living because of the rising cost of living.

I am utterly opposed to the Gearhart bill, House Resolution 296, recently passed by a bipartisan coalition in the House of Representatives, which, instead of expanding social security, would narrow it by the exclusion of some 600,000 additional workers now covered, among them insurance agents, news vendors, and other groups, chiefly white collar.

The action of the bipartisans in voting for this bill demonstrates once again that they serve special interests rather than the general welfare.

As the Gearhart bill goes to the Senate for a vote, the people should speak up and demand its defeat.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. STANLEY. Thank you, sir.

The CHAIRMAN. Mr. Linforth, please.

STATEMENT OF REGINALD H. LINFORTH, ATTORNEY, REPRESENTING NEWSPAPER PUBLISHERS ASSOCIATION, SAN FRANCISCO, CALIF.

The CHAIRMAN. Will you be seated, Mr. Linforth, and give your name, address, and occupation to the reporter?

Mr. LINFORTH. My name is Reginald H. Linforth. I am an attorney, and I am here this evening representing directly the Newspaper Publishers Association of San Francisco, the Newspaper Publishers Association of Los Angeles, the Newspaper Publishers Association of the State of California, and vicarious other newspaper publishers associations throughout the United States, which associations are listed in my filed statement in detail.

This statement is made in support of House Joint Resolution 296. There are numerous groups of persons engaged in newspaper work of one kind or another who are clearly independent contractors under a proper application of the common-law rule, but who the Social Security Board could seek to classify as employees subject to social security if the presently proposed regulation were to be given effect.

There are the country, or in some places city, distributors who purchase newspapers from the publishers and distribute them through their own vendors and carriers. There are country or neighborhood correspondents who devote only a portion of their time to gathering and fowarding local news. There are the haulers of newsprint, who use their own trucks, and there are the special writers and artists.

If the proposed regulations should become effective, an effort could be made to declare these persons employees of the publishers for the purpose of social security. Adequate machinery of administration would be lacking and the results would be doubt, confusion, unneces-

sary expense and prolonged litigation for the so-called employers, and widespread dissatisfaction and misgivings with respect to the principle of social security in general. For these immediate reasons, this statement is made in support of House Joint Resolution 296.

But there are other reasons why the passage of House Joint Resolution 296 is of utmost importance. Social security covers employees. The extent of its coverage therefore depends upon the meaning to be given the term "employee."

Social-security legislation, as originally enacted, and as presently existing, contains no specific definition of that term beyond providing that officers of corporations are employees. This was not an oversight. It was in accord with the intent of Congress that the word "employee" should be understood to mean what it means under the common-law rule.

To date, this intent has never wavered. The record shows that at the time of the original enactment of the social-security laws, and at the time of their subsequent amendment, Congress steadfastly refused to include a specific definition. This intent was reflected in Treasury Regulation 107, section 403.204, which adopts the common-law rule.

Notwithstanding this clear evidence of congressional intent, those charged with the duty of administering social security have been zealously working to expand its application by going far beyond the limits of the common-law rule in determining who are employees. In this practice, they have had support from some of the courts. Thus, there has been both administrative and judicial encroachment on legislative prerogative.

The proposed regulation is typical of this practice. Its purpose is a broadened definition of employment to extend social-security coverage to persons who under the common-law rule have always been independent contractors. In doing this, the regulation attempts to substitute for the common-law rule, with years of judicial interpretation and application behind it, a vague and untried substitute.

It is submitted that a definition of this type, which includes six tests, is not workable. It would not be workable if it contained any number of tests or only one. The complexities of the social and industrial life of this country are such that the application to them of any preconceived formula must necessarily result in inequities and absurdities.

As long as the policy is to make social security applicable only to employees, it is esential that the term be defined in the light of the common-law rule, the workability of which has been demonstrated by its application throughout the years to changing conditions. If, however, the purpose is to extend social-security benefits to those who are not employees, it should not be done by tampering with the established definition of employment, but only by the specific inclusion in the law of those persons or those classes of persons whom it is desired to cover.

No opposition to the orderly and proper extension of social-security benefits to such persons as those who have been mentioned or to others who are self-employed is to be inferred from this statement.

On the contrary, it is recognized that there are many classes of persons to whom the benefits of social security should be made available.

It is understood that work along these lines is already underway and that an advisory committee is making a study of the subject. This is proper and in accord with orderly procedure.

It has been argued that House Joint Resolution 296 is designed to prevent the desirable expansion of social security. This is not true.

It is designed only to prevent the expansion of social security by improper methods. Unless it is enacted, the proposed regulation will become effective, and the Social Security Board, aided thereby, will take over the prerogatives of Congress and determine for itself who shall and who shall not be covered.

Those in behalf of whom this statement is made earnestly submit that there is a fundemantal question here presented which is far more important to the ultimate welfare of the country than social security itself. The question is, Shall the checks and balances of a three-branch form of government be preserved or shall the legislative branch surrender is prerogatives to the administrative branch?

If the latter is the answer, the fundamentals of democratic government are in hazard, and the ground work will be laid for the development of dictatorship at the hands of an administrative agency operating beyond the control of the electorate.

The passage of House Joint Resolution 296 is respectfully urged by the San Francisco Newspaper Publishers Association, the Los Angeles Newspaper Publishers Association, the California Newspaper Publishers Association, on whose behalf this statement is presented, and also by the following associations:

Northwest Newspaper Publishers Association, Texas Newspaper Publishers Association, New England Newspapers Publishers Association, Pennsylvania Newspaper Publishers Association, Allied Daily Newspapers of the State of Washington, Boston Newspaper Publishers Association.

I have also been asked to affirm the support of House Joint Resolution 296 and the opposition to the proposed regulation set forth in statements sent direct to this committee by American Newspaper Publishers Associations, Inland Daily Press Association, Chicago Newspaper Publishers Association, and the New York State Newspaper Publishers Association.

The CHAIRMAN. Thank you very much for coming.

Mr. LINFORTH. Thank you, Mr. Chairman.

STATEMENT OF J. M. GEORGE, GENERAL COUNSEL, NATIONAL ASSOCIATION OF DIRECT SELLING COMPANIES, WINONA, MINN.

The CHAIRMAN. Will you be seated, please, Mr. George, and give your name, residence, and occupation to the reporter?

Mr. GEORGE. My name is James M. George. I live in Winona, Minn. I am general counsel for the National Association of Direct Selling Companies.

In view of the lateness of the hour, I should like permission of the chairman to turn my prepared testimony over to the reporter to be included in the record.

The CHAIRMAN. It will be put in the record.

(The statement is as follows:)

STATEMENT OF J. M. GEORGE, GENERAL COUNSEL, NATIONAL ASSOCIATION OF DIRECT SELLING COMPANIES, WINONA, MINN., BEFORE THE COMMITTEE ON FINANCE, UNITED STATES SENATE

My name is J. M. George, of Winona, Minn. I am general counsel of the National Association of Direct Selling Companies, having its office at the same place.

The members of that association are all engaged in the marketing of merchandise which reaches the consumer by house-to-house sales methods. The typical operation, very briefly described, consists of establishing contacts with individuals whose function is to make or negotiate sales to consumers or users through personal calls made upon them.

There are from three to four thousand of such companies in this country, the great majority being comparatively small establishments. About 160 of these companies belong to this association. Less than 10 percent of this group do an annual gross sales volume of $1,000,000 or more.

It is impossible for anyone to say how many salespersons there are in this particular distributive field. We do not have this information; there are no census figures.

Each company has what it calls its list. This is a list of names of individuals who during the past year or similarly selected period have had some sales transactions with the company.

In any company's list there are names which are on the lists of one or several of such companies. It is a common practice for these individuals, within their own choice or discretion, to carry the lines of several companies, both competitive and noncompetitive. There is, of course, a continual change in the personnel of these various lists. There are new people coming in and others dropping out for one reason or another. Both good and poor producers of business come and go for various reasons which they themselves deem adequate.

Many are housewives working together augmentation of family income. Many are in to tide themselves over between changes in other gainful occupations. Many are superannuated persons or those who for other reasons are not employable. Less than half of them, by far, are regular and persistent operators.

These individuals are totally free as to time put in at selling, as to their choice of customers, as to which company or how many companies with whom they may have selling connections, and totally free as to the method, manner, and means of their operations. They may, without any liability to themselves, choose to put in no selling time whatever, and they may operate and suspend operations whenever they desire.

These facts and details are given to show the contrast between a list and a pay roll; to show that income is irregular and is measurable or limited solely by the ambition, disposition of free choice of the individual; to show that they are free-lance operators having no obligation to perform any function except as they may choose; to show that they receive profits or commissions as distinguished from regular or measurable wages; to show that they are one step further removed from an employment relationship than an independent contractor—an independent contractor having a mission which he must perform and which, if not performed, can lay him liable to the other party, and this is not true in the case of these individuals.

Notwithstanding these facts, we fear that under the proposed new administrative regulations our operations will be classified as employment. At least we know that under regulations as sweeping as these anything could happen, and no one can tell his fate until the proposed broad administrative discretion is exercised. The proposed regulations throw the situation wide open. They point out specifically that yardsticks laid down therein are not exclusive and that one or more of those specifically mentioned may be used in reaching a decision. These proposed regulations, if adopted, are an administrator's dream come true.

Competition among our own companies and with other types of distribution has developed capable management. Capable management conducts experiments and research. Years of experience coupled with experimentation and applied research under good management has taught us that the individual who sells or produces sales in this field is definitely uncontrollable, that efforts or desires to control him are futile, and that the cost of attempted controls is wasted.

The answer is simple. The customary elements and conditions normal in the employment relationship are almost totally lacking in the relationship of our companies with these individuals. Thus, their activites are carried on entirely

away from the place of business of the company and not under the company's observation in any respect. Time put in cannot be controlled; the way of doing the work cannot be controlled. These companies are unable to make them report regularly or at all. These companies would be unable to check the accuracy of such reports if made. Their working time cannot be restricted by the company to its own project. No wages are paid, and no money belonging to these individuals is ever in the possession or under the control of the company.

The normal elements of the employer-employee relationship involve a place of work being furnished, the performance of work under the observation and supervision of the employer, the definite control of time put in, the availability of first-hand information relating to services performed, a regular wage or compensation based usually on time put in, and the possession and control of funds belonging to the employee prior to the time of payment of employee compensation.

Now, the definite absence of these elements normal to the employment relationship makes it impossible for these companies to comply with the requirements of a law and regulations designed to fit what is commonly and ordinarily understood and recognized as an employer-employee relationship.

It may be interjected here that the methods and procedures of operations of these companies are traditional and were fixed long before the Social Security Act was thought of.

If, under the social-security system, these individuals are called employees, we have no way to meet the situation. Our companies could only resort to reports from the individuals which they cannot get and the accuracy of which could not be checked if they could be obtained.

It is important to note there that in making reports the interest of these individuals is adverse or antagonistic to the interest of the company.

It must be here again emphasized also that these companies do not have possession or control over money belonging to these individuals. Yet, if they are declared to be employees, the companies have the responsibility of remitting the employee tax under social security and the income-tax withholding under the income-tax law. This is a serious matter, and in most cases the companies will be confronted with payment of these items out of their own pockets.

Declaring these individuals to be the employees of the companies confronts such companies with other punishing difficulties.

There is immediately raised a question of tort liability for the acts of these individuals, yet the companies have no way of taking steps to reduce the occurrence thereof. These individuals own and control their own motor vehicles and the upkeep or neglect of the same.

There also arises the question of liability for accidents which may happen to the individual himself, the company having little or no opportunity to know or learn whether at the time of an accident or an injury the individual was engaged in his own affairs, upon pleasure, or upon business with someone else

There arises also the question of meeting the requirements of State workmen's compensation acts and State-imposed industrial insurance.

A question immediately comes up relating to the matter of meeting the requirements of the various State foreign-corporation statutes and the imposition of various additional forms of State taxation in the 48 States.

In many States a conflict is established between Federal and State unemployment-compensation requirements. These companies will be subject to the full 3-percent Federal unemployment-compensation tax, and yet no unemployment-compensation benefits would be payable because of such contributions in States where the persons held to be employees under the Federal law are not employees within the meaning of the State law. The full 3-percent tax would thus go into the general Federal Treasury and would not be used for unemployment-compensation purposes at all. None of the States follows the economic dependency concept used in the proposed regulations, and this question might immediately, therefore, arise in all or most of the States.

These companies would be compelled to reorganize and set up artificial substitutes for the normal employer-employee elements naturally absent in their relationships with these individuals. They, in fact, would be forced to revamp their business procedures so as to take on the unnatural elements of an employment relationship with no benefits to themselves therefrom and with great additional costs of operating.

Since the beginning of the social-security system in this country, these individuals have regularly been classified by the Treasury Department as nonemployees under the long-standing regulations which are still in effect. These

old regulations are based on the common-law concept. That is a concept which is widely understood by businessmen, lawyers, and the courts. It was the concept or test which Congress intended, as is shown conclusively by the legislative history pointed out in detail in the House committe report on House Joint Resolution 296.

No concept, test, or yardstick may ever be available to the extent that there could be no reasonable differences of opinion in application of the same.

However, hundreds of precedents have been established in the social-security system under the common-law test. The test of economic dependency is practically unknown. As a matter of fact, the United States Supreme Court, in the decision announcing the new doctrine, was badly divided as to whether the actual holdings of the Court in the case were in conflict with the stated doctrine.

It has been said by its opponents that House Joint Resolution 296 has been misentitled by reason of reference to maintenance of status quo.

The status quo referred to is that which existed under the common understanding as to the meaning of the statutes and the provisions of the administrative regulations in effect since the beginning of the social-security system in 1936. (See the House committee report on this resolution.) It means the actual functioning and application of law and valid regulations up to the time of the decision in the Silk case.

The reasonings and purposes which brought about the introduction of this legislation are purely temporary in nature. It is not its purpose to do more than temporarily hold the situation as it had been for the 12 or 13 years following the establishment of the system.

Not only the President but both Houses of Congress and both political parties are committed to a general overhaul of the social-security system, including coverage of self-employed persons and other categories now specifically exempt, and the sole purpose of House Joint Resolution 296 is to keep things as they have been for many years, during that short interim period from now until Congress, after due consideration and study, can get to the job of carrying out general social-security revision.

It is reasonable to ask, "Why, after 13 years of operating under a well-established policy, should the entire picture be reversed in the face of the committed intent of Congress to shortly, after due study and consideration, take up legislation in the nature of general amendments to the existing law?"

It would seem that application of the Supreme Court decision in the Silk and allied cases and the resulting proposed regulations constitute legislation by judicial decision and administrative action, and that this decision and these regulations constitute a plain and clear usurpation of the functions and rights of the Congress.

We respectfully submit that Congress should not stand by and see this done. This is not a party question. It is a question of whether or not the Congress shall surrender to the courts or to the executive departments the functions which belong exclusively to it.

It is further respectfully submitted that there is only one issue involved in this piece of legislation, and that issue is who has the power to make and amend our laws.

Congress may do what these regulations propose to do if it so chooses. If it should so choose, Congress is not compelled to act retrospectively.

If a change of this character is made by an administrative agency it must act both prospectively and retrospectively or the action will not stand up in court since the whole theory of the proposed regulations is that Congress intended the coverage which is now administratively proposed at the time the legislation was originally passed in 1935.

If under the new concept contained in the proposed regulations an individual is declared to be covered, he must be covered all the way back, subject to statutory limitation. There has been no change in the statutory definition of 1935. If the resulting retroactive tax liability is not enforced or if it is conditionally waived, as is provided in the published version of the proposed regulations, the result is free retroactive wage credits for benefit purposes, as this wage credit cannot be waived by the Government. This is inconsistent with a contributory system and tends to break it down.

These retroactive repercussions resulting from the placing of the proposed regulations in effect are enough in themselves to compel Congress to take the situation in its own hands and to stop free wage credits and tax foregiveness, and thereafter, when the proper time comes, to act prospectively upon study and due con-

sideration of the entire subject matter. House Joint Resolution 296 paves the way for this and nothing more.

Opponents have said that this legislation will deprive several hundred thousand persons of benefits. There is no foundation for such claims. The resolution takes nothing away from anyone. No awards made in good faith will be canceled. The truth of the matter is that the legislation will prevent the awarding of a large number of benefits on a noncontributory basis to persons who, under the present regulations, rulings and precedents, are not entitled to them. The only question here is who makes the laws entitling people to benefits—the Supreme Court, the administrative agencies, or the Congress.

I appeared before this committee in 1939 in opposition to the House amendment proposing to cover sales persons and independent contractors for OASI purposes. That proposal was carefully and exhaustively considered in the hearings. It was definitely and positively rejected, even though unemployment compensation was not involved in the amendment.

It is now difficult to understand court decisions and regulations which propose to write into the law the very thing which Congress then rejected, and not only that, but to make the new concepts applicable to unemployment compensation as well.

House Joint Resolution 296 is entirely consistent with the action that this committee and the Senate then took. A rejection of this resolution would be as definitely inconsistent.

We are not opposed to the granting of social-security benefits to independent contractors and self-employed persons, but we assert that they should be covered as such and not by their being arbitrarily classified as employees. Such misclassification would result in distortions, disruptions, and unnecessary hardships and would create collateral problems and hardships of a most serious nature which are, in most cases, entirely outside of the field of social security.

With the consent of the chairman, I should like to submit for inclusion in the record a copy of the protest which this association filed with the Bureau of Internal Revenue in respect to the proposed new Treasury Regulations.

IN RE PROPOSED EMPLOYMENT TAX REGULATIONS WITH RESPECT TO EMPLOYER-EMPLOYEE RELATIONSHIP

DEPARTMENT OF THE TREASURY,
BUREAU OF INTERNAL REVENUE,
Washington, D. C.

GENTLEMEN: Pursuant to section 4 (b) of the Administrative Procedure Act request is hereby made for consideration of the following statement of views prior to the proposed final adoption of the above-mentioned regulations. This statement is presented in the interest of business enterprises engaged in manufacturing and handling merchandise for distribution by house-to-house, or personal-contact selling.

In the United States there are some 3,000 to 4,000 such concerns.

The typical operation consists of getting contact with individuals whose function is to make or negotiate sales to the consumer or user by personal calls.

The outstanding feature of these relations between these concerns and such individuals are the complete economic independence of the latter and the practical impossibility of their control. These individuals are self-controlled and in fact are small-business men completely in charge of their own economic success or failure.

Nothwithstanding these outstanding features or factors, which are typical, they cannot be established in the face of these regulations as proposed for final adoption.

According to tradition, general understanding, and usage, these individuals have always been classed as independent. The State minimum-wage acts have never been applied to them. They were by common consent left out of any application of the National Recovery Act in the early 1930's. They are expressly exempted from application of the Federal Fair Labor Standards Act.

Notwithstanding these important factors, these individuals may and probably will be included under the Social Security Act because of the context and purport of the proposed regulations.

These proposed regulations stress the points in the recent Supreme Court decisions in the Silk, Greyvan and Bartels cases indicating an employee status

and to a marked extent play down or ignore the points in such decisions indicating independence. In fact, under the provisions, taken as the yardstick for determination of status, the holding of the United States Supreme Court in the Greyvan case was not justified.

That the proposed regulations go well beyond the scope of the recent Supreme Court decisions may be seen by directing attention to the subsection of the regulations covering the subject of integration. The Supreme Court in the Silk case clearly pointed out that production and distribution are separate segments of business and that it was not the intention of the Congress to change normal business relationships.

Further, it may be pointed out that there is direct conflict in the proposed regulations between the provisions respecting the subject of permanency and the subject of control.

It is respectfully submitted that the proposed regulations go beyond not only the foregoing pronouncements of the Supreme Court on the subject matter but also the intent of the act.

Unfortunately, not yet has the attention of the Supreme Court been called to an instance of expression of legislative intent on the part of the Congress, which is not only pertinent but should be decisive as to the meaning of the statute involved in its reference to the employer-employee relationship. It is submitted that this instance should be considered by the Bureau in the writing of these regulations, and for the information of the Bureau we invite attention to the following facts:

House bill No. 6635 was introduced in the first session, Seventy-sixth Congress for the purpose of generally amending the Social Security Act. As introduced in the House, it contained as to titles VIII and IX relating to old-age benefits and unemployment insurance, the following definition of employee:

"* * * It also includes any individual who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (*but who is not an employee of such person under the law of master and servant*); unless (1) such services are performed as a part of such individual's business as a broker or factor and, in furtherance of such business as broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or (2) such services are casual services not in the course of such individual's principal trade, business, or occupation." (Emphasis supplied.)

The Senate, after giving this particular House proposal extensive and careful consideration, struck it from the bill. The House and Senate conferees accepted the decision of the Senate, and the proposal was lost.

It would seem, in the face of this clear indication of intent, that if in the interest of social security any movement is made to extend the meaning of the present act substantially beyond the ordinary "master and servant" concept, such movement should be made by legislation and not otherwise. Certainly, this indication of intent will come before the Supreme Court eventually. The attention of that Court to the same has already been invited by a circuit court decision. See *U. S.* v. *Mutual Trucking Co.* (141 F. 2d 655), (C. C. A. 6th).

During the 1947 session of the Congress, the Senate Finance Committee Report No. 678, concerning H. R. 3597, said:

"The definitions of 'employment' and 'wages' in these statutes are broad. In a statute such as the Social Security Act, enacted by the Congress as a wide measure of attack against some of the insecurities growing out of a complex economic environment, limited and constricted definitions were neither appropriate nor feasible. Providing broad exemptions and limitations which had discernible grounds, the Congress otherwise left the term 'employment' as meaning broadly 'any service, of whatever nature, performer * * * by an employee for his employer * * *' and 'wages' as meaning '* * * all remuneration for employment * * *' *for subsequent statutory clarification as the necessity manifested itself.* (Emphasis supplied.)

"Clearly, all who render services in the processes by which goods come to be produced and distributed and the facilities of modern life come to be provided are not employees. Many who serve others in these processes are in effect self-employed, have the independence of contractors, stand in a different relation to those with whom they participate in bringing these processes to final fruition from that of employee, or servant, or agent."

This bill setting up an exclusion of news dealers from classification as employees under the Social Security Act was passed by Congress and pocket-vetoed by the President.

The Congress here claimed for itself the right to change its own general language.

The Congress also in effect overruled the Supreme Court in the Hearst Newsboy decision by putting a provision, specifically for that purpose, in the Taft-Hartley Act. Thus, so far as labor relations are concerned, the board concept of employment adopted by the Supreme Court cannot be applied, and the pronouncement of the Senate Finance Committee indicates the imminence of early action to strike such concept from the realm of the Social Security field.

Since the decision in the Silk case, there have been several decisions by the circuit and district courts which have applied the principle of the Silk decision, yet have declared for the existence of an independent status for persons claimed administratively to be employees. (*Periodical Publishers' Service Bureau, Inc.* v. *Brady*, C. C. H. Unemployment Insurance Service, par. 9318 (N. D. Ohio, 1947); *Henry Broderick, Inc.* v. *Squire*, C. C. H. Unemployment Insurance Service, par. 9315 (C. C. A. 9th, 1947); *Woods* v. *Nicholas*, 163 F. 2d 615 (C. C. A. 10th, 1947).)

The disposition of the lower courts to give a narrow construction to the decisions of the United States Supreme Court on this subject is totally at variance with the unjustifiably broad interpretations adopted by these regulations. Accordingly, this situation renders it reasonably certain that a multiplicity of litigation on this question will ensue, resulting in still further confusion. The proposed regulations actually invite litigation on the part of any concern having relationships of the kind involved.

We should like to emphasize that under these regulations and in the light of the varying court decisions, most concerns affected will choose to litigate. This will result in an extremely undesirable position for the Bureau, and it is respectfully submitted that if this question were settled legislatively, this great flood of litigation would be stemmed.

The objectionable results that would flow from the adoption of these regulations cannot be prevented by spot changes or amendments, but would require wholesale revision of the entire job. Not only the context, but the purport and tone of the proposed regulations and the weight given to various factors constitute unjustified interpretation of the court decisions.

Attention is invited to the fact that throughout the regulations failure is made to distinguish between specifications as to the result to be accomplished and control of means, manner, and method of operation.

Typically, in house-to-house selling, the company never has possession or control of any funds belonging to the claimed employee. Furthermore, as no wages are paid, and as the earnings of the individual are not measurable by time or other available yardsticks, there is no practical means whereby the amount of taxable earnings can be established, and no means of definitely assuring collection of the Federal insurance contribution tax from the individual, although the company is responsible for such collection. Of course, it may be said that the base for the tax may be established by estimates or guesses, or upon the basis of information furnished by the individual who, in respect to the furnishing of the same and its purposes, is a party adverse to the taxpayer. This is hardly a sound basis for the establishment of the amount of the tax or the operation of tax administration.

It is obvious that none of our objections to the regulations set forth above is based upon the additional burden of the tax.

We do most strenuously object, however, to the resulting economic impact upon our business coming from matters outside of the social relations field which will be caused by adoption of the proposed regulations.

The moment the individuals in question are included under the Social Security Act as employees, the courts will be clearly invited to hold the companies responsible for the torts of these individuals despite the fact that the companies have no practical means or possibility of controlling the action of such individuals, no supervision over the vehicles which they operate or their care for safety purposes. Immediately, we are confronted with employers' liability, contingent liabilities, personal injury and property damage liabilities, all with respect to the doings of individuals entirely on their own and subject to no practical controls by which the companies could protect themselves from or reduce the occurrence of such liabilities.

Furthermore, declaration of these individuals to be employees would bring about the application of foreign corporation statutes of states and various new forms of state and local taxation.

The coverage of these individuals automatically revamps and changes the legal and business status of the companies involved, an effect which it is difficult to believe that Congress intended.

We also wish to assert that we are not opposed in any way to such economic benefits as application of the act might give to these individuals. We believe, however, that there is a much better way to accomplish it without the terrific impacts coming from doing the same by way of broad regulations of this kind.

We are entirely in favor of granting independent contractors and self-employed persons in general the benefits of social security. This, however, is definitely a matter for legislation and not a matter of administrative rule making.

Congress has recently indicated an intention to clarify its own definition of the word, "employee." It has also claimed the right to do this legislatively. It also has indicated that when the clarification comes it will be contrary to the concept announced by the United States Supreme Court.

It might also be stated that members of the House Ways and Means Committee, on the floor of the House, stated during this year an intention to bring up further legislation changing the meaning of the word "employee," with a view toward limiting the concept expressed in the Silk decision.

The House Ways and Means Committee has already given serious consideration to the inclusion under social security of persons having self-employed status. The Treasury Department, itself, through a special study, has determined that this is administratively feasible. Legislation of this kind is undoubtedly imminent and should be passed with the least practicable delay. New legislation on the foregoing subject matters would eliminate the necessity of the present regulations and the objectionable results which would flow from them and at the same time accomplish every social purpose which the proposed regulations are aimed to produce.

It is respectfully requested, in view of the points and objections here raised, and the terrific impact that the adoption of these regulations would have on the companies in whose interest this statement is made, that the effective date of the proposed regulations be indefinitely postponed until such time as the Congress may pass new legislation which will avoid all of the uncertainties and difficulties of operating under the proposed regulations.

Respectfully submitted.

J. M. GEORGE.

165 CENTER STREET, WINONA, MINN.

Mr. GEORGE. I should like to make some oral statements in connection with the testimony that has come up here in the hope that I can clear up some of the facts that seem to be in dispute.

The CHAIRMAN. Proceed, please. May I ask you to tell us something about the National Association of Direct Selling Companies. What is that?

Mr. GEORGE. The National Association of Direct Selling Companies is an association, a trade association, in the house-to-house selling industry. This trade association operates a headquarters. I am in charge of it and the functions of the association are to assist and help companies in this industry who are members of the association on matters which are of industry-wide importance.

The CHAIRMAN. Who belongs to it? What is the scope of it?

Mr. GEORGE. There are approximately 160 members, large and small, in this particular field. The field consists of about 4,000 to possibly 5,000 companies, most of whom belong to no trade organization, and I do not represent those companies except that I am quite familiar with the entire field. I say that there are 5,000 companies by reason of the fact that the only information on the subject is mailing lists. I saw a reliable mailing list and checked it over. It had somewhere around 4,500 names, and I found that about 20 percent of the names were service companies doing business with direct selling companies. There are no census figures on it, and nobody knows how many salesmen there are.

It has been said these hearings that Federal operations under the proposed regulations would produce coverage uniformity between the Federal unemployment compensation tax and the tax collections under State laws. Insofar as this applies to the people in the field of house-to-house selling, this is definitely incorrect.

Yesterday, as you will remember, Mr. Adler, Mr. Wiley, and Mr. Campbell each testified that insofar as their companies were concerned, their salesmen were not covered under any State unemployment compensation law, and those companies cover all of the States in the United States in the extent of their business.

On behalf of our association, I keep rather close track of matters of this kind in the house-to-house selling industry and am accordingly in a position to state to you that the shituation throughout the industry is as represented by these three witnesses. In other words, the existing situation is that house-to-house selling is not covered under State laws whether those laws specifically provide for the common-law test or whether they have adopted one, two, or all three of the so-called a, b, c tests. It is perfectly patent from the hearings so far that it is the intention of the Federal Government to cover the salespeople of the concerns in this industry under the proposed regulations.

As a matter of fact, since coming here I find there is no doubt about it; they have expressed the intent to cover us.

The CHAIRMAN. May I interrupt to ask whether they have covered any of your people so far as you know?

Mr. GEORGE. In the whole list of direct selling companies, including and outside of our membership, I know of not over four or five companies that are not covered either federally or by the States. In fact, I know of none that are covered by States. These four or five companies might be, but they are under Federal coverage. There are only four or five and they are nontypical companies, having elements that are not typical of direct selling in general.

The CHAIRMAN. Can you tell us what are the nontypical features of those companies?

Mr. GEORGE. One of them owns the equipment and pays a minimum income. In another case, which may be typical of a couple more within the five, they have a manager traveling with the salespeople and he controls their time and the details of their work.

The CHAIRMAN. Controls their efforts and tells them who to call on?

Mr. GEORGE. He goes with them.

The CHAIRMAN. He goes with them?

Mr. GEORGE. That is not typical in direct selling, because it is an uneconomical method of operation.

The CHAIRMAN. But in that case, he exercises surveillance over their activities?

Mr. GEORGE. He is with them during the working time and he knows when they start and when they stop, and he knows what they do, and he has all of the elements of normal employment which gives the company a chance to comply with a law like this without serious hardship.

The CHAIRMAN. Do you know of any typical company that is under coverage at the present time?

Mr. GEORGE. I know of no company that is typical of the entire field. There is one company that exercises field control to a very

definite and marked extent, but they voluntarily came under and never raised the question. They came under immediately without any question of litigation, and when withholding for income tax came in, and when they found out that they had to withhold at first 5 percent and then 20 percent, they were somewhat sick of the proposition. That is the only one that comes anywhere near a typical situation that is in, that I know of.

Accordingly it is perfectly plain that the result of these regulations will not be to bring about a uniformity, as a uniformity presently exists, but instead to force the industry under a Federal coverage which does not exist under the State unemployment compensation laws. It is further obvious that unless and until such State laws are changed by State legislatures, the present uniformity will be destroyed and the net effect of our inclusion under the Federal Unemployment Contributions Act will be to impose an unwarranted and unnecessary burden upon our industry without in any way affecting the unemployment compensation benefit rights of any individual.

During such coverage our industry will be subject to the full 3-percent unemployment compensation tax, which will be covered into the general revenues of the Federal Government.

The question is not even one of electing to come under State unemployment compensation laws, since election is limited to the election to cover employees and the individuals who operate as salesmen for our concerns are not employees under State laws or concepts.

Like all industries, there are a few divergencies in the method of operation, and as I remember, there are three or four of the direct-selling companies which are covered under the Federal act. I am uncertain as to whether or not these have been held covered under State law. Those are the ones I was talking about when you questioned me. However, I am quite positive on the point that none are covered under State law who are not covered under the Federal law.

I am talking now to the point of uniformity. A particularly important matter which was developed during Mr. Ewing's testimony is that the Federal Security Agency has, almost from the beginning, been at substantial variance with the Treasury in determining who are and who are not employees. One thing is certain: That both agencies were in initial agreement in view of the fact that they each in 1936 promulgated identical regulations, each based on the common-law rule of employer and employee.

We do not know whether this divergence was substantial by 1939, but I do know that extensive social-security hearings were held at that time and there is no indication in the record that there was any serious disparity between the Treasury and the Social Security Agency. Again in 1946, I understand that there were very extensive hearings covering a period of many weeks and that both the Treasury and the Federal Security Agency testified at length. It does not appear that Congress was then advised by either agency at that time of any disparity between the tax and benefit decisions.

Furthermore, in addition to the positive statement referred to this morning in the 1940 Federal Security Agency Annual Report, it should be mentioned that, so far as I know, no annual report before or after that date has advised the Congress of the situation which is now stated to be so serious.

Too, the testimony this morning of Mr. Ewing clearly indicates what many of us believed to be the case long before the Supreme Court decisions, namely, that the Federal Security Agency was awarding benefits to persons ineligible therefor under the Social Security Board's own regulations. It is quite obvious from his statements this morning that not only were these awards made under a theory at variance with their own regulations but in disregard of the lower court decisions which he referred to as occurring during this period and which he said they disagreed with. It seems perfectly obvious that if the Federal Security Agency had come forward with an actual change in regulations to conform with their administrative practice several years ago, the matter would have been brought to the attention of the Congress before it had long continued, and doubtless an effective remedy would have been found at that time.

It is pertinent to point out for the record that the employer's evidence is as accessible to the Federal Security Agency as it is to the Treasury for use in reaching status decisions of individuals involved. Accordingly I cannot understand the explanation which has been made that the difference between the Treasury decisions and the Federal Security Agency decisions is that one rests upon the employer's version of the situation while the order rests upon the employee's testimony as to the situation. The information of both sides of this relationship is available to both agencies.

It may also be pointed out, however, that on benefit status determinations the employer is not a party even though he may be very much interested, and in case of an award the employer is afforded no opportunity to appeal to the courts on the legal question involved.

Numerous references have been made to the recent Supreme Court decisions which are the avowed basis of the proposed new regulations. Odly enough, no reference has been made as to the actual holdings of these Supreme Court decisions. It will be remembered that the principal decisions—the Silk and Greyvan cases—each involved situations where the Treasury had found sufficient direction and control being exercised as to warrant their holding of coverage under the social-security tax laws and the present regulations. The appeal to the Court resulted in the Court sustaining one of these Treasury holdings; namely, as to the coverage of the coal shovelers in the Silk case.

However, the Court, while acknowledging the direction and control in the case of the van operators and the truck operators, came to the conclusion that notwithstanding such direction and control the investment and the opportunity of the truck and van operators were such as to warrant holding them to be capitalists and accordingly outside of the purview of social-security coverage. The statements of the Court in holding these persons not to be employees notwithstanding direction and control apparently afford the basis of the proposed regulations, which clearly indicate that they intend to cover individuals without a large capital investment despite the fact that direction and control and other normal employer-employee criteria are missing.

On the point which has been raised as to the great ease with which holding may be made one way or another under the announced criteria, it might be pointed out that in the Silk and Greyvan cases there was a very serious split in the Court itself as to whether or not the truck and van operators should be included or excluded under the proposed

new criteria. Three members of the Court, in a separate opinion, insisted that they should have been covered. The Court did not cover them. One can only read the proposed regulations and the testimony which representatives of the Government have given before this committee to be led irresistibly to the conclusion that in their application of the proposed criteria they would have reached the same conclusion as to the coverage as the minority in the Court on even the specific issue which was before the Court in the Silk and Greyvan cases.

Reference was made in testimony yesterday by Mr. DeWind as to there being some 400,000 in the house-to-house selling field, and, as I understand, the indication he made was that these represented a considerable part of the three-quarters of a million referred to in his estimates. Reference has been made today by Mr. Ewing as to the house-to-house salesmen. I am not yet clear as to whether or not the position of the Treasury and of the Federal Security Agency is that there are 400,000 of these people who are under social security today and who would be excluded by the proposed amendment, or whether they intended to state that if House Joint Resolution 296 is not passed they intend to cover these 400,000 under the proposed regulations.

The CHAIRMAN. Mr. Ayers, that has come up several times tonight. Can you enlighten us?

Mr. AYERS. Mr. Chairman, I did not hear the statement. What did he say?

The CHAIRMAN. The question is whether the four or five or six or seven hundred thousand people that we have been talking about here will come under the coverage of the regulations or whether they have already been covered.

Mr. AYERS. I think that could be answered this way, Mr. Chairman: If the regulation is promulgated as the Treasury Department has written it, all of these people would be subject to the tax. We, in the Federal Security Agency, have all along the way felt that this group of people were covered.

If one of these people within that group filed a claim for benefits, and it was processed on through, and control was found, then that person would be put on the benefit roll. Does that answer your question?

The CHAIRMAN. Then let me put it to you this way: Of this four, five, six, or seven hundred thousand people, how many are on the benefit rolls at the present time in the Federal Security Agency?

Mr. AYERS. I could not answer that question without checking it, of course. Your request to us today will bring that forth.

The CHAIRMAN. Are most of them on, would you say?

Mr. AYERS. No; indeed not.

The CHAIRMAN. A small part of them?

Mr. AYERS. Benefits are being paid to some of those people. It is a very, very small percent of them.

The CHAIRMAN. But as to those that are on the benefit rolls, who are now eligible for benefits when they have met all of the benefit conditions, is that a large part of the four, five, six, or seven hundred thousand people, or is it a small part of them.

Mr. AYERS. I could not even hazard a guess. My guess would be that, of the wage records that are now existing—this group of people within out agency—it is a very, very small percentage of them.

The CHAIRMAN. So that the bulk of them will come on if this regulation becomes effective?

Mr. AYERS. That is true.

The CHAIRMAN. I wanted to suggest that if the Agency did not get the sense of urgency I hope that they are working hard to get that material in.

Mr. AYRES. They have got the sense of urgency. That work was started this afternoon, Senator.

The CHAIRMAN. Thank you very much.

Mr. GEORGE. I feel that the latter must be meant inasmuch as no contributions have been paid by or on behalf of any of these individuals, subject to a very few unimportant exceptions applying to the few nontypical cases I mentioned before.

The CHAIRMAN (addressing Mr. Ayers). I think it worthy of comment that if your analysis of the situation is correct, then there has been a gross amount of misinformation put out as to taking people off the benefit rolls who are already on.

Go ahead, please.

Mr. GEORGE. It has been indicated at these hearings that Treasury has in the past used other tests than the common-law concept. Not one fact or claim advanced by the witnesses to support that statement mentioned an element which is not commonly understood to be an element of the usual common-law concept. Now one element mentioned but does not also appear in the present Treasury regulations and the identical social security regulations. Each of these identical regulations sets forth all of the elements that were mentioned as a basis for rulings, and all of these elements are elements considered by the courts in applying the common-law rule.

Literally, hours were spent yesterday and today by witnesses opposing House Joint Resolution 296, complaining about its title, these complaints having specific reference to the use of the expression "status quo" in the title. This would seem to be a rather strong indication that it is somewhat difficult for the opponents to find potent or valid objections to the context of the resolution. These observations, by the way, seem to be excruciatingly technical.

The confused condition which the Federal Security Agency witnesses claim to exist under the common-law test is largely a matter of the Agency's own creation. This confusion has not resulted from difficulty in understanding and applying the common-law tests. It has definitely resulted from the administration's efforts to stretch and distort the common-law test, as the Agency has admitted doing for a long period of time prior to and following the attempted amendment of 1939.

A Federal Security Agency witness inquired of Chairman Millikin as to what the Agency could do if House Joint Resolution 296 became law for the period from the time of enactment to the time when Congress may act on extended coverage.

It would seem that the obvious answer to that question is for the Federal Security Agency to follow the existing identical regulations of both agencies, as Treasury has been substantially doing for the past 13 years.

The CHAIRMAN. Is it your understanding that the resolution gives them the right to do that?

Mr. GEORGE. I think that is the sole purpose of the resolution, except that it has a few trimmings with respect to taking care of some of the difficulties that have come up by reason of overextension of benefits The only element of certainty in these proposed regulations is that they give the agencies practically unlimited discretion. However, they fail entirely to give persons affected any guide to tell them what class they may fall into.

With such unlimited powers it would not be difficult to completely eliminate the present twilight zone. This, however, is as far as the element of certainty goes, for, after elimination of this zone, they, by reaching out under these regulations, may establish a new twilight zone considerably more extensive than the present zone.

While the purpose of the social-security laws was broadly to alleviate the conditions for which these laws were passed, they, however, were never broader than their delimited terms. It was a new venture in this country and of an experimental nature never intended to cover the entire field of gainful pursuits. These laws were specifically limited to the field of employment as that term was then commonly understood by the Congress and the public.

A desire to extend coverage beyond the intended and limited coverage can only be properly effectuated by new legislation. The "purpose of the act" doctrine, which first appeared in the Hearst newsboy case, cannot be used for legislative purposes.

Our objections to malinclusions are not objections to the broadening of social-security coverage. These objections are directed at the manner and means of doing it and the resulting distortions and hardships. It is one thing to cover self-employed persons as such and another to attempt a distortion by calling them something which they are not. I should like to comment briefly on the matter of free retroactive wage credit, which would occur if House Joint Resolution 296 is not enacted. It has been stated that this will be limited to 4 years. The proposed regulations require wage records back 4 years. The regulations could, if a different administrative decision is reached, require wage records back to December 31, 1936, when coverage began. If it did, free retroactive wage credit could be established for this entire period pursuant to section 205 (c) (4) of the act.

Thus what we have under the proposed regulations is retroactive tax liability, which Treasury presently states it will forgive on condition of the person who is to be furnishing retroactive wage record returns for 4 years. The individual, on the theory that he has been wrongfully deprived of 12 years' coverage, will be given four of these years.

The CHAIRMAN. Might I interrupt you at this point to put something in the record?

Mr. GEORGE. Yes, sir.

The CHAIRMAN. In adopting the Social Security Act, the Congress proceeded on the basis of proposals by the Committee on Economic Security, transmitted with the President's message of January 17, 1935, recommending the legislation.

I will read an excerpt from the report of that committee.

I repeat that the President transmitted the report with his message, and the work of that committee was the source from which the first act was evolved. One of the excerpts is [reading]:

Contributory annuities can be expected in time to carry the major, but never under the plan we suggest the entire load. Difficult administrative problems must be solved before people who are not wage earners and salaried employees can be brought under the compulsory system.

I quote again [reading]:

Both the tax on employers and employees is to be collected through the employers, who shall be entitled to deduct the amount paid in the employees before from wages due them.

I quote again [reading]:

The plan outlined above contemplates that workers who enter the system after the maximum contribution rate has become effective, will receive annuities which have been paid for entirely by their own contributions and the matching contributions of their employers.

It seems to me that those excerpts and others are of great significance in relation to some of the testimony we have been hearing here.

Mr. GEORGE. And some relation to the legislative history.

The CHAIRMAN. Yes.

Mr. GEORGE. The waiver of tax liability, the requirement of 4 years' retroactive tax returns, the provision of 4 years' free coverage, and no more, are all administratively decided, and all may be administratively changed if House Joint Resolution 296 is not enacted. It seems to me that any such important substantive matters as these, and certainly the matter of social-security coverage, should not be determined administratively, but rather should be prescribed legislatively by Congress. Enactment of House Joint Resolution 296 will prevent this exercise of administrative discretion over substantive rights, and afford the Congress itself an opportunity to consider an act on all these matters.

I thank you.

The CHAIRMAN. Thank you very much for coming.

Mr. Robinson.

STATEMENT OF JESSE BAY ROBINSON, REPRESENTING THE NATIONAL ASSOCIATION OF MAGAZINE PUBLISHERS, INC., NEW YORK

The CHAIRMAN. Please state your name, address, and occupation for the reporter.

Mr. ROBINSON. My name is Jesse Bay Robinson. I am an attorney, living in Staten Island, N. Y., and I practice in New York City. I appear here on behalf of the National Association of Magazine Publishers, Inc.

If the committee please, I have submitted copies of a prepared statement to the secretary of the committee. It might seem at this late hour that I should paraphrase it or summarize it. However, it is not long, and in my judgment, I will progress more rapidly if I read it.

The CHAIRMAN. Go ahead with it, please.

Mr. ROBINSON. This statement is respectfully submitted for the information of the Committee on Finance of the United States Senate in connection with its consideration of House Joint Resoluton No. 296.

The National Association of Magazine Publishers, Inc., is the trade organization of over 100 publishers, which publish approximately

400 nationally distributed magazines and periodicals of all kinds and descriptions.

The magazine publishers have been and are greatly concerned as to the effect upon them of the regulations which have been proposed by the Commissioner of Internal Revenue defining who are employees under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. The association early this year filed a statement with the Commissioner of Internal Revenue in opposition to the proposed new regulations, and copies of this statement were sent to the chairman and members of this committee and to the chairman and members of the House Ways and Means Committee.

Various reasons were presented in that statement for not putting into effect the proposed Treasury regulations which apply as well in support of the adoption of status quo legislation by the Congress.

I would like to request, if I may, that that previous statement be noted in the record of these hearings. They contain discussions of a good many points that have been discussed here today and yesterday, and I do not propose to repeat them here now.

(The statement to the Commissioner of Internal Revenue is as follows:)

STATEMENT BY THE NATIONAL ASSOCIATION OF MAGAZINE PUBLISHERS, INC., NEW YORK, N. Y., IN OPPOSITION TO PROPOSED NEW REGULATIONS FOR THE DETERMINATION OF WHO ARE EMPLOYEES UNDER THE FEDERAL INSURANCE CONTRIBUTIONS ACT AND FEDERAL UNEMPLOYMENT TAX ACT

To the COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.:

This statement is respectfully submitted by the National Association of Magazine Publishers, Inc., pursuant to section 4 (b) of the Administrative Procedure Act, for consideration in respect of the proposed new regulations for the determination of who are employees under the Federal Insurance Contributions Act and Federal Unemployment Tax Act, notice of which was published in the Federal Register for November 27, 1947.

The National Association of Magazine Publishers, Inc., is a trade organization made up of publishers of nationally distributed magazines of all kinds and descriptions. Many of the subscriptions to such magazines received by the publishers are obtained by individuals who engage in door-to-door solicitation. Such individuals generally pursue their activities, in the manner and to the extent they themselves determine, with varying degrees of regularity and permanency. Many solicit subscriptions only part time, during vacation periods or while carrying on other occupations or activities. Many solicit subscriptions for several different magazines of different publishers at the same time. In all instances their operations are carried on at places removed from the offices or places of business of the publishers or subscription agencies to which they send subscriptions obtained. In the nature of things, the control which publishers and agencies can exercise over the means and methods of the operations of magazine solicitors is practically nonexistent. Customarily, magazine solicitors are paid a percentage of the subscription price. In virtually all instances the solicitor simply retains in whole or in part the payment for the subscription which the subscriber makes to the solicitor. The earnings of such solicitors are entirely dependent on their individual skill and efforts which they exercise independently in their own way to such extent and at such times and places as they may choose.

The method by which subscriptions are obtained, as described above, represents a long-established business practice in the magazine industry. The relationship between publishers or agencies and solicitors of magazine subscriptions, with few exceptions, is clearly not that of employer and employee as those terms have heretofore been defined and delimited. This has been previously recognized by the Commissioner of Internal Revenue by rulings in typical instances. Moreover, it should be made clear that the industry does not concede that these solicitors will be employees even under the new tests of the proposed new regulations.

However, the press release of the Commissioner of Internal Revenue in reference to the proposed new regulations indicates that their purpose is to bring about broadened coverage of the Federal Insurance Contributions Act and Federal Unemployment Tax Act among such an important group as door-to-door salesmen.

The National Association of Magazine Publishers, Inc., therefore urges that the proposed new regulations not be put into effect, for the following reasons:

1. The changes proposed in the new regulations, although extensive, are not at all clear as a definition or conducive to understanding and certainty. In order to provide for the determination of the status of an individual, as an employee or otherwise, as a matter of "economic reality," it was found necessary in the proposed regulations to expound at length six different factors. But it is stated that the list is neither complete nor in order of importance and that, on the one hand, each factor is to be examined and applied in a particular case for its significance and that, on the other hand, all factors are to be weighed for their composite effect. The proposed regulations ignore the fact that there may be self-employed persons who render services to others neither as employees in the accepted sense nor under contract. It is submitted that the vagueness and uncertainty of the proposed language renders it quite unsuitable to serve the true function of administrative regulations and can only be productive of government by men and not by law.

2. Any change in regulations imposes upon those who may be affected the burden and expense of a reexamination of their position. A change as sweeping and as uncertain as that proposed by the new regulations can only mean that such burdens and expenses will be very greatly increased. Every publisher and subscription agency which customarily receives subscriptions from door-to-door solicitors will be compelled to reassess their status in the light of possible subsequent contentions by taxing officials. Publishers and agencies in many instances will find it necessary to litigate in order to determine their liabilities and duties under the hazy regulations proposed. In the meantime they will be subjected to the risks and contingent liabilities of taxes, interest, and penalties for failure to pay and withhold taxes and contributions. It is submitted that the Commissioner of Internal Revenue should not put himself in the position of creating such a situation without legislative direction.

3. In the event it should ultimately be determined that publishers and subscription agencies are "employers" of magazine solicitors, they would be subjected to altogether unreasonable burdens and expenses. The problem is not merely one of additional taxes. It is even more a matter of the burdens and expenses of setting up and maintaining pay-roll records covering relations not usually or properly so recorded, of reporting and withholding taxes, and the preparation and furnishing of withholding information as to large numbers of individuals, many of whom solicit for only short periods, receiving only small amounts in respect of subscriptions, and move on to other locations and occupations. Particularly, as to withholding, since the magazine solicitors customarily retain in whole or in part the subscription payments made by the subscribers, the publishers or agencies cannot, in actuality, withhold anything. The result can only be liabilities on the publishers and agencies for failures under the withholding requirements which they cannot prevent.

4. There is no sound reason for the Commissioner issuing such proposed regulations and there are strong reasons why he should not do so. The Supreme Court opinion in *United States* v. *Silk* (231 U. S. 704), which the proposed regulations purport to follow, expressly stated that Congress did not intend to change normal business relationships and that few businesses are so completely integrated that they can produce and distribute without the assistance of independent contractors. Furthermore, the Supreme Court proceeded upon the premise that Congress had not given any indication of its intent as to the meaning of the term "employee" in the statutes involved. Unfortunately, it seems not to have been called to the Court's attention that there has been a clear expression of intent on the part of Congress to confine the term "employee" to its established common-law concept under master and servant principles. In 1939, in the Seventy-sixth Congress, the House bill, No. 6635, proposed to change the definition of "employee" in the Social Security Act to include the following:

"* * * It also includes any individual who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (*but who is not an employee of such person under the law*

of master and servant) ; unless (1) such services are performed as a part of such individual's business as a broker or factor and, in furtherance of such business as broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or (2) such services are casual services not in the course of such individual's principal trade, business, or occupation." [Emphasis supplied.]

The Senate, after giving this provision full consideration, struck it from the bill and retained the brief definition which is now section 1426 (d) of the Internal Revenue Code. In conference the Senate view prevailed. The House conference report states:

"Amendments Nos. 97 and 98: The House bill extended coverage to certain salesmen who are not employees * * *. It is believed inexpedient to change the existing law which limits coverage to employees. The House recedes."

In view of the legislative history of the term "employee," Congress will undoubtedly deal with this matter through appropriate legislative channels and it would seem that the Commissioner of Internal Revenue need not and should not undertake to follow the specified Supreme Court decisions without proper congressional sanction.

In conclusion, the magazine industry recognizes that the problem of coverage of the self-employed under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, and the devising of appropriate means of measuring benefits and of collecting the necessary taxes, is a challenge to all, in or out of Government, who are interested in the equitable operation of social legislation. There is no easy solution. What the magazine-publishing industry does object to is an attempted solution which will create more difficulties than the benefits it is intended to produce and which will subject the industry to unreasonable risks and uncertainties and impose upon it burdens and expenses out of all proportion to the results sought to be achieved. It urges that the proposed regulations not be put into effect and that the matter be left to the consideration of the Congress.

Respectfully submitted.

THE NATIONAL ASSOCIATION OF MAGAZINE PUBLISHERS, INC.,
By ARCH CRAWFORD, *Executive Vice President.*

Mr. ROBINSON. What I desire to do at this time is to present information to this committee as to the operations of the magazine industry which would be affected and to give emphasis to the serious practical difficulties which will be created for magazine publishers if appropriate legislation is not adopted and the proposed Treasury regulations should be put into effect.

The operations of the magazine industry which would be affected by the proposed Treasury regulations are in the subscription field where subscriptions for magazines are obtained through personal solicitation conducted by individuals. Approximately 55 percent of all subscriptions received by magazine publishers over the past twenty-odd years have been obtained by such personal solicitation.

Subscriptions to magazines are obtained by individuals in many different ways. Some go from door to door, others solicit in business establishments of their own or where they may be employed. Still others use the telephone or personal correspondence.

Such individuals generally pursue their activities, in the manner and to the extent they themselves determine, with widely varying degrees of regularity and permanency, and at such times and at such places as may suit their conveniences.

Many solicit subscriptions only part time, during vacation periods or while carrying on other occupations or activities.

Many solicit subscriptions for several different magazines of different publishers at the same time.

In all instances their operations are carried on at places removed from the offices or places of business of the publishers or subscription agencies to which they send the subscriptions obtained.

Customarily these magazine solicitors receive a percentage of the subscription price which in virtually all instances is taken out of the payments for or on account of subscriptions which the subscribers make to the solicitors. The income of such solicitors is entirely dependent on their individual skill and efforts which they exercise independently in their own way to such extent as they may choose.

The method by which subscriptions are obtained, as described above, represents a long-established business practice in the magazine industry. In the nature of things, the control which publishers and subscription agencies can exercise over the means and methods of the operations of magazine solicitors is practically nonexistent.

Under the facts, the relationship between publishers or subscription agencies and solicitors of magazine subscriptions, with few exceptions is clearly not that of employer and employee as those terms have heretofore been defined and delimited.

Since social-security and unemployment-insurance legislation was first enacted, a number of publishers have actually secured rulings from the Commissioner of Internal Revenue to the effect that their solicitors are not "employees" within the meaning of such legislation. During this period of approximately 10 years, these precedents could be relied upon by the publishers and subscription agencies in determining who should be considered employees.

Now, the Supreme Court, in *United States* v. *Silk* (331 U. S. 704), and related cases, last year, although not essential to their decision, and, it is believed, under misapprehension as to the congressional intent, has enunciated a doctrine of economic reality, and the Commissioner of Internal Revenue has proposed to issue new regulations which, without legislative sanction, would lay down new tests for the determination of who are employees under the social-security laws.

The publishers, in view of the facts of magazine solicitation, may, of course, be able to establish even under these regulations that magazine solicitors are not employees even under the proposed regulations, and at this point it should be stated that they certainly do not concede that such solicitors are employees under any criteria.

However, the press release of the Commissioner of Internal Revenue in reference to the proposed new regulations indicates that their purpose is to bring about broadened coverage of the Federal Insurance Contributions Act and Federal Unemployment Tax Act among such important groups as door to door salesmen.

This brings us, therefore, to the specific problems and hardships with which magazine publishers and subscription agencies will be faced if something is not done by Congress to hold the status quo.

First. Magazine publishers will be unable to determine their obligations and liabilities under the proposed regulations.

A reading of the proposed regulations shows at once that they are not conducive to understanding or certainty. In order to provide for the determination of the status of an individual, as an employee or otherwise, as a matter of economic reality, it was found necessary in the proposed regulations to expond at length six different factors. But it is stated that the list is neither complete nor in order of importance and that, on the one hand, each factor is to be examined and applied in a particular case for its significance and that, on the other hand, all factors are to be weighed for their composite effect.

It is submitted that the vagueness and uncertainty of the proposed language renders the proposed regulations entirely unsuitable to serve the true function of administrative regulations.

No publisher or agency will be able under such regulations to determine, even with advice of counsel, what he should do in the varied factual situations presented in connection with magazine solicitors.

The regulations leave the way open to differing interpretations in similar factual situations by different representatives of the Bureau of Internal Revenue, and can only be productive of government by men and not by law.

Second. In the determination of their obligations and liabilities publishers will be subjected to unwarranted expense and risks.

Any change in regulations imposes upon those who may be affected the burden and expense of a reexamination of their position. A change as sweeping and as uncertain as that proposed by the new regulations can only mean that such burdens and expenses will be very greatly increased.

Every publisher and subscription agency which receives subscriptions from individual solicitors will be compelled to reassess their situation in the right of possible and unknown contentions by taxing officials.

Publishers and agencies in many instances will find it necessary to litigate in order to determine their liabilities and duties under the hazy regulations proposed.

In the meantime they will be under the necessity of paying such taxes as are assessed and attempting to obtain refunds or be subjected to the risks and contingent liabilities of such taxes and of interest and penalties for failure to pay.

They will also be subject to the risk of penalties for failure to withhold taxes and contributions. It is submitted that pending consideration by the Congress of its policy with respect to the self-employed, publishers and agencies should not be subjected to such burdens and risks.

Third. Publishers are not in a position to withhold taxes of magazine solicitors.

The problem of withholding taxes and contributions would appear to be insoluble. This would be the situation both pending determination of the status of publishers and agencies, under the proposed regulations, and thereafter, if the question of liability should ultimately be determined adversely.

As indicated hereinabove, under long-established business practices the money received by magazine solicitors customarily comes out of the money collected from magazine subscribers by the solicitors themselves at the time the subscription is taken.

Such money does not get into the hands of the publishers or agencies at all. They are therefore simply not in a position to comply with withholding requirements. It is not believed, in view of the factual circumstances of magazine solicitation, as described above, that any practicable change could be made in the business relationships with magazine solicitors which would enable such compliance.

The result, if the proposed regulations are applied to cover magazine solicitors, can only be to impose liabilities on the publishers and agencies for failures under the withholding requirements which they cannot prevent.

Fourth. Record keeping and reporting would be unusually burdensome and expensive in the magazine industry.

There is at least one other important reason why the Congress should act in the present situation which should be mentioned before closing.

Perhaps because magazine soliciting appears to be so easy, but in reality calls for considerable initiative and enterprise, the fact is that a very large proportion of the individuals who undertake to solicit do so for no more than a couple of weeks, and only a few continue to do so for more than 1 year.

Also, as already indicated, there is a great deal of irregularity. It is not at all uncommon for a publisher to receive subscriptions from some individual more or less regularly for a period of time and then after several weeks, during which he apparently is inactive or engaged in some other occupation, to receive further subscriptions from him.

The burden and expense of record keeping and reporting in connection with various taxes is, of course, a subject of some complaint in industry generally. In the publishing industry, by reason of the foregoing high turn-over and irregularity among magazine solicitors, these burdens and expenses would appear to be unusually heavy, if such solicitors should be held to be covered by the tax and withholding requirements of the social-security laws.

Although mentioned last, this problem is by no means the least among those which would confront magazine publishers and subscription agencies under the proposed Treasury regulations.

In conclusion, the magazine industry recognizes that the problem of coverage of the self-employed under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, and the devising of appropriate means of measuring benefits and of collecting the necessary taxes, is a challenge to all, in or out of Government, who are interested in the equitable operation of social legislation. There is no easy solution.

What the magazine publishing industry does object to is an attempted solution which will create more difficulties than the benefits it is intended to produce and which will subject the industry to unreasonable risks and uncertainties and impose upon it burdens and expenses out of all proportion to the results sought to be achieved. It urges that the status quo be maintained until the problem can be fully considered by the Congress.

I appreciate very much the courtesy of the committee in permitting me to make this statement.

The CHAIRMAN. We are very glad to have had you here.

Is there anyone in the audience who wishes to give the committee the benefit of his observations?

STATEMENT OF ED M. ANDERSON, CHAIRMAN, NATIONAL EDITORIAL ASSOCIATION LEGISLATIVE COMMITTEE PRESENTED BY WILLIAM L. DALEY

My name is Ed M. Anderson, of Brevard, N. C. I am the publisher of five weekly newspapers in western North Carolina and chairman of the legislative committee of the National Editorial Association.

This organization is the national trade association of the weekly, semiweekly, and small daily newspapers, with offices in Washington,

D. C., Chicago, Ill., and New York, N. Y. It has a membership of approximately 6,000 newspapers located in every State.

Our association of newspaper publishers and editors petitions the United States Senate for quick and favorable action on House Joint Resolution 296 which has passed the House of Representatives by an overwhelming majority. We are of the opinion that this enactment of this measure is highly important at this time to definitely forestall the extension of coverage of the Social Security Act by regulation far beyond the intent of Congress.

If administrative agencies are permitted to flaunt congressional policy by substituting their concept of the employer-employee relationship, then compliance by the thousands of small city and town newspapers will become burdensome and unnecessarily complicated. Our membership has long and consistently looked with disfavor and apprehension on a tendency to permit administrative fact-finding to be final and conclusive—a condition which stems from a too-broad delegation of power which the people have placed squarely in the hands of Congress. Our newspaper association shares the view expressed by the House of Representatives (Rept. No. 1319) that "the issue involved in the proposed regulations is whether the scope of social-security coverage should be determined by the Congress or by other branches of the Government."

Because these proposed regulations are written in broad language, there are no illustrations as to how the changes would apply specifically to certain phases of newspaper operations. The Bureau of internal Revenue (Press Release No. 3-542, dated November 27, 1947) stated: "It is contemplated that a number of rulings in various fields of business activity will be published illustrating the application of the principles stated in the new regulations." The press release also explained: "The principles set forth by these Supreme Court decisions indicate broadened coverage among such important groups as life-insurance agents, door-to-door salesmen and homeworkers."

Should the Treasury Department by application of the pending regulations decide that country correspondents must be deemed employees of a newspaper, the result would be endless confusion. Some weekly newspapers have less than eight employees and not covered by the act. The Federal Unemployment Tax Act applies only to employers who have eight or more employees. From the beginning several State unemployment-compensation laws have applied to smaller employers than does the Federal act. At the present time 29 State laws cover employers of fewer than eight workers. If these regulations go into effect, many of these newspapers will suddenly find themselves under the act. A ruling of the Commissioner of Internal Revenue addressed to our Washington office, February 10, 1937, was to the effect that country newspaper correspondents are not employees of newspapers within the meaning of section 907 (c) of title IX of the Social Security Act.

Under these broad regulations, almost anything can happen. The proposed regulations contain six different factors to be weighed and considered to reach the decision whether a certain group of workers are employees covered by the Social Security Act. The Treasury may put more weight upon one of them than another, but the Bureau alone will make the decision. The decision made on one set of facts may not hold good in the next case.

It is estimated that the 1937 ruling excluded about 250,000 country correspondents. As the bulk of these casual writers are contributors to the small-town newspapers, the publishers view with concern the extension of these regulations which might bring these individuals into an employee category.

As the United States Department in its booklet Establishing and Operating a Weekly Newspaper (published in 1947) points out, "country correspondents usually also act as advertising and subscription solicitors." This Government agency's studies show the practice is to allow country correspondents freedom from direct control. The brochure advises the person contemplating ownership of a weekly newspaper that "next to yourself and your local staff, the most valuable source of news are the country correspondents. Not only can they supply news from outlying districts too scattered for other coverage but they can also sell your paper to hundreds of people too far distant for you to reach directly."

Surveys show that the main compensation of these contributors comes from other than their newspaper writing. The study showed that the average country correspondent of a newspaper was recruited from women's clubs, Grange organizations, 4–H Clubs, and so forth. There are no instances reported where such a correspondent was a full-time employee of a newspaper and subject to direct control by the editor.

The small daily or weekly usually has a number of local citizens who devote part of their time to the solicitation of subscriptions or advertising and do not engage in writing news as do the correspondents in neighborhoring communities. Their compensation is on a commission basis. Neither the solicitors of subscriptions, advertising, or job printing salesmen are under the direction or control of the local publisher.

Should the stretch of the proposed regulations bring these noncovered correspondents and solicitors of subscriptions and advertising into the classification of "employees," the overwhelming majority of small-town newspapers with fewer than eight employees would be faced with a problem of record keeping and other complications for these correspondents to peddle their wares to other newspapers. It would require a new system of wages and the substitution of wages for space-rate forms of compensation. The feasibility of such extension is doubtful on its face.

Data submitted by State newspaper associations show clearly that the newspapers have always regarded the country correspondent as a free agent. The independent contractor relationship is further strengthened by the fact that the editor is likewise free to accept or reject any or all material submitted for sale by a correspondent. The correspondent who ordinarily is gainfully employed in some occupation other than newspaper correspondence supplements his income by selling news items to newspapers.

The publishers of the smaller daily and weekly newspapers, who offer the principal market for country correspondence, believe that the State commission's data is pursuasive to one conclusion that country correspondents have always been regarded as independent contractors and have never been considered direct or indirect employees of newspapers. Even the workmen's compensation laws with their strict construction as to the relation of employer and employee have never re-

garded the country correspondent as an employee of a newspaper unless the correspondent had contractual relations with the publication.

Failure of the Senate to follow the example set by the House in reasserting the prerogative of Congress to determine coverage extension would be seized upon by the Treasury to put the proposed regulations into effect and presumably on a retroactive basis. Such a state of affairs would impose costly burdens on the thousands of small-town daily and weekly newspapers. Under existing regulations, no casual contributor to a newspaper whether a country correspondent, or salesman of subscriptions, advertising, or job printing, working on a commission, has been deprived of benefits for no deductions have been made at any time which would entitle him to credits.

On behalf of the 6,000 newspapers in our membership, the National Editorial Association respectfully requests that the Senate concur in the House enactment of House Joint Resolution 296.

STATEMENT OF EVERHART CUNNINGHAM, PAST PRESIDENT, ATLANTA LIFE UNDERWRITERS ASSOCIATION, ATLANTA, GA.

For many years I have fought for inclusion under the Social Security Act of life insurance salesmen compensated by commissions. In January 1945 I was instrumental in the formation of a "social security committee" in the Atlanta Life Underwriters Association, which I am informed was the first local committee of the kind in the United States. I was the first chairman of this committee and worked diligently. Senators George and Russell and former Congressman Robert Ramspeck will recall the four-page report I made to them on June 4, 1945, in which report I outlined in detail results of the work and investigations of this committee up to that date.

(The report referred to appears with other memoranda filed for the record.)

As president of the Atlanta Life Underwriters Association from July 1, 1945, to June 30, 1946, I followed through with social security committee work, culminating with report dated March 21, 1946, informing our membership that their individual applications for inclusion under the Social Security Act would be accepted by the Social Security Administration for determination of status.

(The report appears with other memoranda filed for the record.)

I am also submitting reprint from the Insurance Field of April 12, 1946, and tear sheet from the Atlanta Journal of May 5, 1946, which are self-explanatory and in which I thought you would be interested.

(This item appears with other memoranda filed for the record.)

I mention the above in order that you may better understand my intense interest and my desire to preserve the right of inclusion of commission life insurance salesmen under the Social Security Act, a most difficult fight justly and honorably won through the highest tribunal of our land, the Supreme Court of the United States.

Voicing opposition to House Joint Resolution 296 the Atlanta Life Underwriters Association adopted resolution by unanimous vote on January 29, 1948, urging defeat of this proposed legislation. Similar resolution was adopted by the Georgia Leaders Round Table at their annual meeting on February 26, 1948. The writer is the author of these resolutions and I personally sponsored their passage.

In closing I wish to state that I am aware of the very able commission set up by your committee for the purpose of studying the Social Security Act as a basis for Senate consideration of a general revision bill. I recognize the necessity of revision and am in complete accord with your procedure. However, the resolution under consideration not only alters the present act but contains provisions highly detrimental to the interests of thousands of life insurance commission salesmen and their dependents, a group who are devoting their lives to the protection and financial welfare of over 140,000,000 people.

Therefore, until such time as your commission can restudy the entire social-security legislation I think matters should be left exactly as is. I trust your committee is of the same opinion and will kill House Joint Resolution 296 and refuse to take action that will permit the same to become law.

REPORT OF SOCIAL SECURITY COMMITTEE, ATLANTA LIFE UNDERWRITERS ASSOCIATION, MARCH 21, 1946

To members of the Atlanta Association:

The question of inclusion under the Social Security Act of ordinary life insurance agents compensated by commissions has for some time occupied the attention of the social security committee of the Atlanta Association.

In January 1945 the board of directors of the Atlanta Association passed a resolution that we as an association go on record in urging our representatives in Washington to include all life-insurance agents under the Social Security Act.

At the March 1945 membership meeting of your association, the resolution of the board of directors was ratified, and without a dissenting vote resolution was passed that we go on record with our Representatives in Congress to exert legislative influence in putting all life insurance agents under social security.

Your president at that time, Mr. John J. McConneghey, was authorized to appoint a committee to draft the message for the association to be forwarded to representatives in Washington. The committee appointed consisted of: Everhart Cunningham, chairman; James D. Law; Norris Maffett; Oliver Nix; and Charles L. Thomas. The work of this committee included the following:

1. Investigation of the social-security status of State and National bank employees, who were first denied, and then granted, coverage under the act.

2. Analysis of social-security surveys made (*a*) at regular meetings of the New Haven, Conn., association; the New York City association; the Maine State association; the New Hampshire association; and the Rhode Island association; (*b*) by questionnaires submitted to the entire membership in the State of Illinois (taken as a typical State). These surveys showed an overwhelming majority favored the inclusion of life underwriters under social security.

3. Investigation of the social-security status of real estate salesmen compensated by commissions. This investigation revealed: (A) that such real estate salesmen compensated by commissions were considered covered employees and that they and their families were receiving the benefits of the Social Security Act; (B) that the employee status of such real estate salesmen compensated by commissions is, in fact, comparable to the employee status of ordinary life insurance salesmen who are compensated by commissions.

After exhaustive study and investigation your committee drafted and submitted, under date of June 4, 1945, a 4-page report to Congressman Robert Ramspeck and Senators George and Russell, and stated that in the opinion of your committee, ordinary life insurance agents compensated by commissions should be included under the Social Security Act and denial of such inclusion represented gross discrimination.

Your officers and directors serving this fiscal year, July 1, 1945, to June 30, 1946, considered it advisable to continue this special social security committee, the personnel of which committee consists of Jas. D. Law, chairman; Robert L. Foreman, and Charles L. Thomas.

Your committee now wishes to inform you that we have been advised by the Social Security Board as follows:

"1. That applications for inclusion and for old-age and survivors' benefits under the Social Security Act have been received, and approved from or for, ordinary life insurance agents compensated by commissions.

"2. That approval of such applications has been without regard as to whether social-security taxes have been paid, or deductions made from commissions received by such agents; since all tax matters is a function of the Bureau of Internal Revenue.

"3. That if the necessary information is furnished by or for, ordinary life insurance agents compensated by commissions, and applications for inclusion or benefits under the act are properly completed and filed, such applications in all probability will be approved.

"4. That survivors of deceased ordinary life insurance agents who were compensated by commissions might well make immediate application for survivors' benefits, even though the deceased agent had not considered himself covered under the Social Security Act.

"5. That ordinary life insurance agents compensated by commissions, who desire to be classed as covered employees and included under the present Social Security Act, should proceed as follows:

"(A) Complete Form #OAR-7008, 'Statement of Wages and Employment,' and mail same to addressee shown on top of form: 'Social Security Board, Baltimore, Md.' Your attention is called to the following statement on this form: 'The Social Security Board may disclose my name to my employer if, in securing wage information, it is found to be necessary.' The words 'Yes' and 'No' appear opposite this statement and obviously, you may answer either 'Yes' or 'No.'

"(B) The Baltimore office of the Social Security Board will write you direct and their reply should be delivered to the local office of the Social Security Board, third floor of the 10 Forsyth Street Building.

"(C) The local office of the Social Security Board will then furnish you with questionnaire form, especially prepared for use of insurance agents. This form should be completed by you and filed here in Atlanta with the local office of the Social Security Board, third floor of the 10 Forsyth Street Building. The first paragraph of this form reads as follows: 'This questionnaire has been prepared for the purpose of determining with the least possible inconvenience to employers and applicants whether services performed by insurance agents constitute "employment" as that term is defined in section 209 (b) of the Social Security Act, as amended.'

"(D) After you have completed and filed this questionnaire form, you will in due course be advised of the determination of the Social Security Board.

"(E) The Social Security Board has made the suggestion, and emphasized the importance, of all interested applicants making immediate application for coverage, due to the statute of limitations operative within the Social Security Act.

"(F) All necessary forms may be obtained from the local office of the Social Security Board, third floor of the 10 Forsyth Street Building. You will find Mr. Joseph R. Murphy, in charge; Miss May J. McGuire and their staff of assistants most cooperative in every way."

ATLANTA LIFE UNDERWRITERS ASSOCIATION,
Atlanta 3, Ga., June 4, 1945.

HON. WALTER F. GEORGE,

HON. RICHARD B. RUSSELL,
Senate Office Building, Washington, D. C.

HON. ROBERT RAMSPECK,
House of Representatives, Washington, D. C.

DEAR SIR: As chairman of the social security committee of the Atlanta Life Underwriters Association, I have been delegated to advise our Representatives in Washington that our members favor and are highly desirous of bringing life insurance agents compensated by commissions under the provisions of the Social Security Act.

Resolution to the above effect was voted on at the largest attended regular meeting in the past year of our Association, and passed without a dissenting vote.

I am confident that the action taken by the Atlanta Life Underwriters Association is representative of the great majority of the Life Underwriters Associations in the United States, as well as of life insurance agents who are not members of such associations.

(A) Surveys in five Eastern States, (B) a check of the entire membership in the State of Illinois (taken as a typical State) and (C) a questionnaire to all members of the national council has confirmed the fact that agents compensated by commissions are desirous of being included under the Social Security Act.

(B) The surveys in the five Eastern States were made by questionnaires submitted to Association members in attendance at regular meetings of the New Haven, Conn., association; the New York City association; the Maine State association; the Rhode Island State association, and the New Hampshire association. The count of answers was as follows:

Question: "Would you like to be covered by social security?"

Yes, 83.3 percent; No, 16.7 percent.

(B) The check of the entire membership in the State of Illinois was made by questionnaires mailed to all association members who reside in the State of Illinois. The count was as follows:

Question: "Do you feel that life underwriters should be covered under the Social Security Act?"

Yes, 83.6 percent; No, 16.4 percent.

(C) The National Association Council Survey was made by questionnaires mailed to members of the council of the National Association of Life Underwriters, which consists of the past presidents, the present officers, and board of trustees, the chairman of all standing committees of the national association; the State or regional presidents and national committeemen; and the president and national committeemen of each local association. The count of answers was as follows:

Question: "Do you feel that life underwriters should be covered under the Social Security Act?"

Yes, 74.8 percent; No, 25.2 percent.

(A), (B), and (C): The membership of local, State, and national associations and members of the national council consists of: agents, supervisors, assistant managers, assistant superintendents, general agents, managers, superintendents, and others.

Surveys were made without regard to the members classification or employment status.

Our Atlanta association membership comprises individuals in the same classifications above noted, and as stated, the vote here was 100 percent in favor of including all life insurance agents under the Social Security Act.

It is our thought that life insurance agents compensated by commissions should be included under the Social Security Act and denial of such inclusion represents gross discrimination.

Investigation by our committee reveals, for example, that:

(A) Real estate salesmen compensated by commissions are considered covered employees and such salesmen and their families are receiving the benefits of the Social Security Act.

(B) In fact—the employee status of such real estate salesmen compensated by commissions is comparable to the employee status of life insurance salesmen compensated by commissions:

	Compensated by commissions	
	Real-estate salesmen	Life-insurance salesmen
Are regular work hours maintained?	No	No.
Any salary or drawing account?	No	No.
Is compensation derived wholly from commissions?	Yes	Yes.
Are holidays taken by salesmen if, when, and as desired?	Yes	Yes.
Is length of vacation optional and at discretion of salesmen?	Yes	Yes.
Are commissions paid to such salesmen on sales made (brokered) through competitive companies?	Yes	Yes.

Apparently the question of inclusion or exclusion of such life-insurance agents compensated by commissions is being reviewed by the Social Security Board. Mr. J. R. Murphy, manager of the Atlanta district office of the Social Security Board, states that claims for benefits under the act are now pending and having

the consideration of the Social Security Board, claimants being widows and/or children, or agents themselves, who have been denied the privilege of social-security-tax contributions.

I do not know that the following is pertinent to our case, but the fact remains that life-insurance agents are doing a great work in acquainting covered employees in every walk of life with detailed information pertaining to the benefits and rights of the Social Security Act. With the exception of paid employees of the Government, I venture to say that life-insurance agents, more than any other group, and possibly more than all other groups combined, are extolling the virtues of the Social Security Act and keeping our citizenry sold. Yet life-insurance agents compensated by commissions are, to date, denied the benefits of this act.

Your acknowledgement and comments will be greatly appreciated, and with kind regards, I am

Cordially yours,

EVERHART CUNNINGHAM,
Chairman, Social Security Committee,
Atlanta Life Underwriters Association.

Approved:
JOHN J. MCCONNEGHEY,
President, Atlanta Life Underwriters Association.

NOTE.—Since writing this letter our committee has learned about the Wagner-Murray-Dingell bill. Inclusion of life-insurance agents compensated by commissions is desired on basis of employee status, not self-employed, and should be so considered in this or any amendment.

E. C.

THE INSURANCE FIELD

LOUISVILLE 1, KY.

An important message for all life underwriters.

The enclosed news report and editorial reprinted from the Insurance Field already has attracted Nation-wide attention. It covers a subject of vital importance and interest to every life underwriter.

You will want to read and study this not only as a matter of personal interest but also because you may want to discuss it in your local life underwriters' association.

The editors of the Field have just one thought in mind in bringing this to your attention: The life underwriters everywhere may know that procedure exists under which they can investigate their rights under the Social Security Act, if they so desire.

Additional copies of this four-page folder may be obtained from the Field at cost price.

FRED C. CROWELL, Jr., *Editor.*

EDITORIAL

AGENTS AND THEIR SURVIVORS CAN NOW FILE FOR SS BENEFITS

In our issue of January 4 we posed the question, "Are ordinary agents covered under the Social Security Act?" Our answer was, "Yes; if they want to be." Since that time members of the Atlanta Association of Life Underwriters have taken the bit in their teeth and done a job that should be helpful to life-insurance men throughout the country. In this issue we are pleased to present the mechanics by which ordinary agents can file for an individual ruling to determine whether they are covered under the act.

The National Association of Life Underwriters apparently has felt it wise to sidestep the issue and otherwise ignore a matter of deep concern to most full-time ordinary-life underwriters. As an independent insurance journal, serving its many ordinary-agent readers and the industry, and not being immersed in any negotiations or discussions with either the Social Security Board or the Treasury Department, the Field is free to point out the existing facts in this matter which may be of direct dollars-and-cents benefit to many life-insurance men and women.

Employment considered covered

That you may better understand the attitude of the Social Security Board, we recite the following facts:

1. The test of your status is not whether you are a salesman but whether there is in fact an employer-employee relationship in your particular case.

2. In the comparatively few claims involving services as a life-insurance salesman which have come before the Social Security Board, the Board generally has found that a full-time life-insurance agent is in covered employment.

3. When the Board has found insurance salesmen to be employees, as defined in title II of the act, "wage credit" has been given, counting toward entitlement of the worker to benefits under old-age and survivors insurance.

4. The Board has made no general ruling that all work in selling insurance is "covered employment." However, cases already adjudicated have precedent value, and the Board acts in accordance with such case determinations in subsequent cases where similar facts present themselves.

5. When the Board determines that a salesman for an insurance company was in "covered employment," the Bureau of Internal Revenue is notified of the Board's findings. The Bureau of Internal Revenue administers the Federal Insurance Contributions Act, under which taxes are collected on wages paid for work in "covered employment," as determined by the Bureau of Internal Revenue. (The Bureau has refused to collect taxes because it does not consider ordinary insurance agents as a "covered" group. That's the paradox of the era.)

Must file own application

Unless he wants to read a moral issue into this matter, there is no reason why every ordinary-life underwriter shouldn't file, and the sooner the better because of the 4-year statute of limitation in the act.

Remember the Board cannot do anything until the agent files an application on his own. Each application is judged on its individual merits.

The questionnaire reproduced in this issue is being used in Atlanta. It can be used anywhere. You can copy it. You, your general agent or manager, or one of your home-office men can answer all questions fully and file it with your local Social Security Board office, together with or following the filing of the Board's complete Form No. OAR–7008 (Statement of Wages and Employment).

Remember, survivors of deceased ordinary-life underwriters may also file for benefits.

While the House Ways and Means Committee and those consulting with it ponder the question of the Social Security Act's revision, the way has been made clear by the Atlanta association for individual action by any life-insurance agent anywhere with any company. Since most, if not all, ordinary agents have expressed their desire to obtain the benefits of the act, it is our guess that many of them will want to do so.

The barrier has been in knowing how to go about it. Thanks to the work of the Atlanta association, that barrier no longer exists.

[The News Parade, April 12, 1946]

ATLANTA, GA., ASSOCIATION PAVES WAY FOR INCLUSION OF ORDINARY LIFE UNDERWRITERS UNDER SOCIAL SECURITY

DEFINITE PROCEDURE IS WORKED OUT BY COMMITTEE; QUESTIONNAIRE FORM GETS TACIT APPROVAL—AGENTS ARE URGED TO FILE

Applications of ordinary life insurance agents and the survivors of deceased agents who were compensated by commissions for inclusion and for old-age and survivors' benefits under the Social Security Act are considered only upon the basis of facts presented in proper form in each individual case; and these agents and the survivors of a deceased agent, if interested, are provided with a step-by-step plan or outline adopted last week by the Atlanta Life Underwriters' Association.

Based on studies going back to January 1945, the association's social-security committee points out that applications for these benefits have been received, and approved * * * from, or for ordinary life agents compensated by commissions * * * that survivors of deceased ordinary agents who were compensated by commissions and who had not considered themselves covered might well make immediate application for inclusion or benefits under the act.

For comparative purposes, the result of the committee's survey among the members of the Atlanta Real Estate Board on the nature of the contractual or employment relations that exists between these firms and their salesmen, it reported these salesmen were compensated on a commission basis and the character of their work was similar to that of life underwriters. These salesmen were covered under the act.

Majority favors social-security coverage?

Judged on the basis of the surveys contained in "A Report and Summary of a Social Security Survey," published by the National Association of Life Underwriters in 1944, the Atlanta committee said that the summary indicated that a majority of the members of the NALU would like to be covered by social security.

In answer to questions during discussion of the report, Miss May J. McGuire, of the Atlanta office of the Social Security Board, a guest, said that the statute of limitations runs back for only four years. She advised those interested to file their applications without delay, and that the committee's report outlined the necessary procedure.

Along with its report, the committee filed a mimeographed questionnaire for the use of insurance agents. The field reproduces the questionnaire on the next page.

Adopted without dissent

The report, adopted by the association without a dissenting vote, concludes:

"Your committee now wishes to inform you that we have been advised by the Social Security Board as follows:

"1. That applications for inclusion and for old-age and survivors' benefits under the Social Security Act have been received, and approved, from, or for, ordinary life-insurance agents compensated by commissions.

"2. That approval of such applications has been without regard as to whether social-security taxes have been paid, or deductions made from commissions received by such agents; since all tax matters are a function of the Bureau of Internal Revenue.

"3. That if the necessary information is furnished by, or for, ordinary life insurance agents compensated by commissions, and applications for inclusion, or benefits under the act, are properly completed and filed, such applications in all probability will be approved.

"4. That survivors of deceased ordinary life-insurance agents who were compensated by commissions might well make immediate application for survivors, benefits, even though the deceased agent had not considered himself 'covered' under the Social Security Act.

"Procedure outlined

"5. That ordinary life-insurance agents compensated by commissions, who desire to be classed as 'covered employes' and included under the present Social Security Act, should proceed as follows:

"(A) Complete Form No. OAR-7008, 'Statement of Wages and Employment' and mail same to addressee shown on top of form: 'Social Security Board, Baltimore, Md.' Your attention is called to the following statement on this form: 'The Social Security Board may disclose my name to my employer if, in securing wage information, it is found to be necessary.' The words 'Yes' and 'No' appear opposite this statement and obviously, you may answer either 'Yes' or 'No.'

(B) "The Baltimore office of the Social Security Board will write you direct and its reply should be delivered to the local office of the Social Security Board, third floor of the 10 Forsyth Street Building, Atlanta.

(C) "The local office of the Social Security Board will then furnish you with questionnaire form, especially prepared for use of insurance agents. This form should be completed by you and filed here in Atlanta with the local office of the Social Security Board, third floor of the 10 Forsyth Street Building.

(D) "After you have completed and filed this questionnaire form you will in due course be advised of the determination of the Social Security Board.

(E) "The Social Security Board has made the suggestion, and emphasized the importance, of all interested applicants making immediate application for coverage, due to the statute of limitations operative within the Social Security Act."

Members of the committee are: James D. Law, manager, ordinary agency, American National Life, chairman; Robert L. Foreman, CLU, general agent, Mutual Benefit Life, and immediate past president, Atlanta ALU; and Charles L. Thomas, agent, New York Life, and president, Georgia Leaders' Round Table.

(This questionnaire has been prepared for the purpose of determining with the least possible inconvenience to employers and applicants whether services performed by insurance agents constitute "employment" as that term is defined in section 209 (b) of the Social Security Act, as amended.

As used in this questionnaire the term—

1. "Company" refers to _____,
   Address _____,
2. "Account" refers to _____,
   Account No. _____
The questions relate to the period from _____, 19__, to _____, 19__.

Answers to questions should be full and complete. Clarity and accuracy should not be sacrificed for brevity. It is only through the receipt of complete, clear, and specific information that the disposition of this case will be facilitated. Ordinarily "Yes" or "No" answers are found to be inadequate. Careful compliance with this instruction will obviate the necessity of much correspondence.

(If the space provided for any of the answers is insufficient, a supplemental statement making reference to the number of the question should be prepared and submitted with this questionnaire.)

QUESTIONNAIRE FOR DETERMINATION OF COVERAGE UNDER TITLE II OF THE SOCIAL SECURITY ACT

1. Please state briefly if the agency organization is a general agency or branch office system, or both, or any other system, and describe the occupation of the agent.

2. (a) Did the company require the agent to devote any particular amount of time to the company's business?

(b) If so, how much?

(c) Was he required to conform to any fixed hours of service?

3. (a) To what extent was the agent required to confine his selling activities to a particular territory?

(b) Was he required to canvass the territory within any particular time or with specified frequency? (State in detail.)

4. To what extent was the agent restricted as to the class or type of prospects he could solicit?

5. (a) Did the company give the agent "leads"?

(b) To what extent was he required to follow them? (State in detail.)

(c) Was the agent required to make reports regarding "leads"?

(d) What were the reports supposed to contain? (If a form was used, please submit sample.)

6. (a) Was the agent ever required to submit other written reports?

(b) If the answer to the above question is "yes," give the following information: (1) What was their nature and purpose? (2) How often were they submitted? (3) Could they be had by the company on demand? (If forms were furnished to the agent for this purpose, please submit specimen copies.)

7. (a) Was the agent ever required to report personally to the company or to any of its branch offices?

(b) If the answer to the above question is "yes," give the following information: (1) For what purpose? (2) On what occasions? (3) How often? (4) Was it part of the regular routine?

8. To what extent was the agent furnished with facilities such as: (a) Office? (b) Desk space? (c) Telephone? (d) Advertising materials? (e) Clerical or stenographic help? (f) "Programs" drawn up for agents' use in selling to prospective policyowners?

9. To what extent were sales subject to the company's approval?

10. Explain fully the specific nature of instructions or restrictions to which the agent was subject in the conduct of his selling activities. (Include a statement as to: from whom the agent received his instructions; in what form they were given, etc.)

11. (*a*) Was there any advertising in the agent's own name?

(*b*) Who bore its cost?

(*c*) Did the agent bear the cost of any advertising done in the company's name?

(*d*) What letterhead was on the business stationery used by the agent, the agent's or the company's?

(*e*) Who bore the cost of the stationery?

12. To what extent was the agent required to make collections of any kind for the company? (Thus, collect first premiums on insurance he sold, collect subse-

quent premiums on such insurance, or collect premiums on insurance which he did not sell? Explain fully.)

13. Are new agents (of this class) given a training course, or does the company aid in their training (such as contributing to any training organization)? Specify.

14. (*a*) In what manner was the agent compensated (salary, percentage of collections, percentage of first or renewal premiums, etc.)?

(*b*) At what intervals was he paid?

(*c*) If paid by commission alone, was any minimum amount guaranteed the agent?

(*d*) Was he allowed a drawing account, or advance of any kind against unearned commissions?

(*e*) If amounts so advanced were greater than the commissions later earned, was he required to repay the company the excess amount?

15. (*a*) Did the company furnish transportation or contribute toward travel or other expenses? State in detail. (Thus, was there a flat allowance, or did the agent pay and later receive reimbursement from the company, etc.?)

(*b*) Was the agent required to make expense reports?

(*c*) If so, what items were reported? (If a form was used, please submit sample.)

16. (*a*) Was the receipt of commissions on renewal premiums contingent on the production of a certain amount of new paid-in business for any period?

(*b*) Upon termination of the agent's relationship with the company, under what circumstances would the commissions on renewal premiums not be paid to the agent? (Explain fully.)

17. State in detail any special provision for monetary aid to beginning agents of this class. (Thus, an assignment of orphaned policies for servicing with accompanying renewal commissions, or an allowance against deferred commissions, or a flat salary?)

18. (*a*) Was the agent subject to general rules and regulations published by the company?

(*b*) If so, what was the nature of these rules and regulations?

19. (*a*) Was the agent allowed to engage in other employment while performing services for the company? (Explain in detail.)

(*b*) Was the agent allowed to represent other insurance companies?

(*c*) If the agent was allowed to represent other insurance companies, to which company, if any, was he required to give preference in his sales activity?

20. (*a*) If a policy owner failed to pay premiums as due, was the agent in any way held responsible for failure to cooperate or consult with the policy owner? (Explain fully.)

(*b*) Did the salesman have any interest in the collection of premiums? If so, what?

21. Was there any arrangement whereby the agent would be eligible:

(*a*) For bonuses or prizes?

(*b*) For annual leave with pay or other vacation benefits?

(*c*) For any kind of benefits while sick or otherwise disabled?

(*d*) To participate in a pension plan? (State under what circumstances.)

22. (*a*) For what reasons was the agent subject to discharge by the company?

(*b*) On how much notice, if any?

(*c*) State whether it is a policy of the company to require agents of this class to produce a certain volume of business if they are to continue as agents. (Explain fully.)

(*d*) Could the agent have terminated his services at any time? (Explain.)

23. Has the status of the agent, or any other agent performing similar services for the firm, ever been:

(*a*) The subject of a court action?

(*b*) Ruled upon by any State unemployment compensation agency?

(*c*) Ruled upon by any State workmen's compensation agency?

(*d*) Ruled upon by the Bureau of Internal Revenue of the United States Treasury Department?

(If so, identify the proceeding or agency, and, if possible, attach copies of any decisions or rulings that were issued.)

24. In your opinion was the agent an employee of the company? (Check one.)

Yes. No. No opinion.

A statement of the reasons for your opinion would be appreciated:

25. (*a*) If the agent performed services pursuant to a written contract, please submit an executed copy.

(b) If there was no written contract, a statement of any of the terms of the agreement which are not covered by the foregoing questions should be submitted. The date of such agreement should be shown. Supply a statement or attach copies of sales regulations, rules, directions, or policies, record or report forms, with which the agent was furnished.

26. State your position in the company, or your business of family relationship to the agent.

State the source of the information which you have submitted.

This information is submitted for the use of the Social Security Board.

(Date)

(Sign here)

(Address)

RESOLUTION

Be it resolved that:

Whereas it has come to our attention through the insurance press that an effort is being made to block the inclusion under the Social Security Act of life-insurance agents compensated wholly by commissions; and

Whereas Representative Bertrand W. Gearhart has presented a resolution known as House Joint Resolution 296, designed to deny the old-age and survivor's insurance benefits of the Social Security Act to such commission agents; and

Whereas this association of over 500 members has advocated and vigorously sought the rightful inclusion of such life-insurance agents under the Social Security Act; and

Whereas the Social Security Board has approved, or now has pending, the individual applications of every such agent in our membership who has applied for the old-age and survivor's benefits of the Social Security Act; and

Whereas the Supreme Court of the United States has confirmed the rulings of the Social Security Board in that an employer-employee relationship exists and has existed and that such agents are entitled to coverage under the Social Security Act; and

Whereas the exclusion from the Social Security Act of such commission life-insurance agents will represent gross discrimination: Therefore be it

Resolved, That this association opposes the efforts of Representative Bertrand W. Gearhart or any other person or persons, individually or collectively, to retard or delay the acknowledgment by the Treasury Department of the inclusion under the Social Security Act of life-insurance agents compensated by commissions; and, with equal emphasis this association opposes the effort by any person or persons to thwart the apparent mandate of the Social Security Board and the Supreme Court of the United States to the Treasury Department for the inclusion under the Social Security Act of such commission agents; be it further

Resolved, That the inclusion under the Social Security Act of the life insurance commission agents is of material interest and benefit to life-insurance companies as well as to the individuals involved, and by improving the efficiency and reducing the turn-over of agency personnel the policyholders of life-insurance companies will benefit through improved service and reduced costs; it is further

Resolved, That a copy of this resolution be forwarded immediately via air mail to our Senators Walter F. George and Richard B. Russell, and to Congressman James C. Davis, with the request, and it is herein requested, that these gentlemen use their fullest influence against the resolution referred to, namely House Joint Resolution 296.

Adopted and approved at the regular monthly meeting of the Atlanta Life Underwriters Association, Atlanta, Ga., January 29, 1948.

Approved:

DUDLEY C. FORT, *President.*

RESOLUTION OF THE LEADERS ROUND TABLE OF GEORGIA

Be it resolved that:

Whereas the active membership of the Leaders Round Table of Georgia is composed of over 150 of the leading life-insurance agents in this State; and

Whereas the basis of our vocation is an interest in the future financial welfare of our clients and their dependents; and

Whereas we are also interested in our own individual welfare, in the welfare of our dependents, and in the life-insurance companies we represent; and

Whereas we recognize and value the old age and survivor benefits of the Social Security Act, applicable to all persons in "covered employment," and that the inclusion under the Social Security Act of life-insurance agents compensated by commissions will improve the efficiency and reduce the turn-over of agency personnel of life-insurance companies and result in improved service and reduced costs to policy owners; and

Whereas the Social Security Administration has approved, or now has in process of determination, the individual applications of every member of the Leaders Round Table of Georgia who is compensated wholly by commissions and who has applied for the old age and survivor benefits of the Social Security Act; and

Whereas the Supreme Court of the United States has confirmed the rulings of the Social Security Administration with respect to life-insurance agents compensated wholly by commissions and that such agents are entitled to coverage under the Social Security Act; and

Whereas an effort is being made to block the inclusion under the Social Security Act of such life-insurance commission agents and a resolution, known as House Joint Resolution 290, has been introduced in Congress by Representative Bertrand W. Gearhart designed to deny the old age and survivor benefits of the Social Security Act to such commission agents; and

Whereas the exclusion of such commission agents from the Social Security Act will represent gross discrimination; Therefore be it

Resolved, That the Leaders Round Table of Georgia opposes the efforts of Representative Bertrand W. Gearhart or any other person or persons, individually or collectively, to retard or delay the acknowledgment by the Treasury Department of the inclusion under the Social Security Act of life-insurance agents compensated by commissions; and, with equal emphasis the Leaders Round Table of Georgia opposes the efforts of any person or persons to thwart the mandate of the Social Security Administration and the Supreme Court of the United States to the Treasury Department for the inclusion under the Social Security Act of such commission agents; it is further

Resolved, That a copy of this resolution be forwarded immediately via air mail to Senators Walter F. George and Richard B. Russell, Senate Office Building, Washington, D. C., and to the Congressmen Prince H. Preston, E. E. Cox, Stephen Pace, A. Sidney Camp, James C. Davis, Carl Vinson, Henderson Lanham, W. M. Wheeler, John E. Wood, and Paul Brown, House of Representatives, Congressional Building, Washington, D. C., with the request, and it is herein requested, that these gentlemen use their fullest influence against the resolution referred to, i. e., House Joint Resolution 290.

Adopted and approved at the annual meeting of the Leaders Round Table of Georgia, Atlanta, Ga., February 26, 1948.

Approved:

WARREN R. WOODWARD, *Chairman*.

The CHAIRMAN. We will close the hearing.

I apologize again for this night session, but it was unavoidably caused by the proceedings of this afternoon. Thank you very much.

(Whereupon, at 10:40 p. m. the hearing was closed.)

(The following statements, memoranda, and telegrams were received for the record:)

MEMORANDUM IN SUPPORT OF SENATE JOINT RESOLUTION 180, EIGHTIETH CONGRESS, SECOND SESSION

The House has passed and sent to the Senate a joint resolution for the purpose of maintaining the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage.

It has been explained in the House report on this legislation that the purpose of the legislation is to maintain the status quo by correcting misinterpretations of the Social Security Act and related legislation made by the Supreme Court in its decisions in *U. S.* v. *Silk* (67 S. C. 1463); *Carter H. Harrison* v. *Greyvan Lines, Inc.* (67 S. C. 1463); and *Bartels* v. *Birmingham* (67 S. C. 1547). In objecting to the passage of the pending legislation, the Acting Secretary of the

Treasury and the Federal Security Administrator wrote separately to the chairman of the House Committee on Ways and Means stating that the proposed legislation would not appear to preserve the status quo. These objections, however, appear to disregard the issues at stake which are (1) whether (whatever the "status quo" may currently be) the Congress wishes and intends to ratify the decisions of the Supreme Court of last spring or (2) whether Congress wishes to legislate to the effect that the opinions in those cases contained misinterpretations of the law. Viewed in this light, the situation appears analogous to that which faced Congress when it passed the Portal to Portal Act of 1947 stating in the preamble to the law that "The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities * * *."

This memorandum is submitted in support of Senate Joint Resolution 180 because it is believed that Congress should act now to correct the misinterpretations of law included in the Silk, Greyvan, and Bartels cases, and thereby eliminate the "wholly unexpected liabilities," and changes of legal relationships which were brought about by the Supreme Court opinions. Further, it should be for the Congress to determine what persons or classes of persons are to be covered by the Social Security Act, and such a matter of national policy should not be decided by the promulgation of administrative regulations of the Treasury which will go into effect if the pending resolution is not passed.

THE LEGISLATIVE HISTORY

The House Report on House Joint Resolution 296, the companion of the resolution pending before the Senate, treated at some length the legislative history of the original social-security legislation of 1935 and the legislation which followed in 1939. Discussion on the floor of Congress with regard to the 1935 and 1939 legislation was replete with debate as to what scope and meaning should be given to the term "employee." Suffice it to say that although in 1935 the administration proposed a lengthy definition of "employee," part of which was "The term 'employee' shall include every individual—under any contract of employment or hire, oral or written, express or implied," still the final definition which appeared in the act was restricted to "The term 'employee' includes an officer of a corporation."

In 1939, during discussion of amendment of the act, it was pointed out that the undefined word "employee" was limited to the long-standing legal or common-law concept; and it was proposed that amendments to the act should broaden this definition. Such amendments never became part of the law. Further, the Treasury itself adopted regulations which in effect held that the word "employee" was to be given its usual and ordinary significance and treated according to the common-law concept. (See *Glenn* v. *Beard*, 141 Fed. 2d, 376.) These regulations are still in effect; the Treasury now wishes to amend them in the light of the Supreme Court decisions of last June.

Finally, the legislative history of the Labor Management Relations Act of 1947 made it clear that the Eightieth Congress considered that the Supreme Court had, with regard to the National Labor Relations Act, misinterpreted the term "employee" and thereby broadened its scope far beyond that originally contemplated by Congress. In order to correct this misinterpretation, the Congress included in the act, in section 2 (3), the provision that the "term 'employee'—shall not include—any individual having the status of an independent contractor." In discussion of this section, during debate on the bill, numerous specific references were made to the Supreme Court's misinterpretations of the word "employee" under the National Labor Relations Act. The Supreme Court did not have available to it when it decided the Silk, Greyvan, and Bartels cases the legislative history of congressional intent as expressed in the passage of the Labor Management Relations Act of 1947.

The foregoing makes it clear that it was not the intent of Congress in 1935 or 1939 that the word "employee" as included in the Social Security Act, should have any other significance than the ordinary significance as developed according to the common law. If there was ever doubt, however, as to the intent of Congress in 1935 and 1939, this doubt was dispelled by Congress' action in connection with the passage of the Labor-Management Relations Act of 1947. However, in spite of elimination of such doubt, the Supreme Sourt and the Treasury now still desire to broaden the scope of the term "employee." The present

resolution should be passed to put beyond question the fact that the term "employee" is intended by Congress to be restricted to its ordinary significance according to the common law.

THE PROPOSED TREASURY REGULATION

Aside from the question of what Congress intended in 1935, 1939, and 1947, the proposed amended regulations would in any case be objectionable by reason of their unworkability. It is claimed by the Treasury and by the Federal Security Administration that the proposed regulations are intended to act as a guide and to reduce to a degree of certainty matters which, because of the variability of the common law rule among the States, were previously undecided or unpredictable as to their outcome. Far from accomplishing this purpose, however, the proposed regulations, even if one assumed that they were in accord with the intent of Congress, serve to do nothing but confuse the issue. A few examples from the proposed regulations speak for themselves as to their vagueness and lack of clarity:

"An individual performing services for a person is generally an employee of such person unless he is performing such services in the pursuit of his own business as an independent contractor." (Sec. 402.204 A.)

"In the application of the Federal Insurance Contributions Act and the regulations in this part, an employee is an individual in a service relationship who is dependent, as a matter of economic reality, upon the business to which he renders service and not upon his own business as an independent contractor."

There follows the quotation immediately above a list of factors which are to be considered in determining "economic reality." The regulations continue thereafter, with singular lack of precision, by stating:

"Just as the above-listed factors cannot be taken as all-inclusive, so too the statement of facts or elements set forth in paragraph D of this section cannot be considered as complete. The absence of mention of any factor, fact, or element in these regulations in this part should be given no significance."

Indeed it must be difficult, if not impossible, for the employer or employee to assess correctly his legal position when he is told that the factors listed in the regulations are not only not inclusive but that the absence of mention of any factor should be given "no significance."

Not only is this the case, but in the discussion of such factor which is to be considered, the regulations themselves state that "the weight to be given this factor in a practical case depends upon all the facts of that case." Therefore, not only does the person who may or may not be subject to the law not know just what factors determine his coverage by the law, but neither can he determine what weight should be given to each such factor. It is absurd and thoroughly unreasonable to claim that regulations which lack precision to the extent of these contained in the proposed amendment can in any sense be considered a clarification of a previously ambiguous situation.

PRACTICAL EFFECTS

The committee can and may well have already studied the legal aspects of the proposed amendments and the proposed legislation as commented on above, but the committee, by the very limitation of the number of its members, cannot investigate by itself the affect which the proposed Treasury regulations would have on various businesses and business relationships throughout the country, should the regulations go into effect. In this connection, specific examples will be of use to the committee in permitting it to reach a conclusion as to whether to report to the Senae favorably or unfavorably upon the pending resolution.

The example of the manufacture of small cotton tobacco bags is one which will interest the committee. These bags are used as containers for smoking tobacco. They are made by machine. However, until recently, most of the insertion of the drawstring and the tagging of the bags was done by hand. There are only three companies in the United States engaged in the manufacture of these bags. Until recently the bags, ready for stringing and tagging, were delivered to cooperatives, who placed the bags with literally thousands of their members who are householders in Virginia and North Carolina. The only implement that is required is a small needle. The householder is allowed considerable latitude with reference to the time of return of the finished bags, and when the bags are finished and returned, the householder receives a cash payment per thousand. The actual work of stringing can be performed, and generally is performed, at mo-

ments of leisure in the same way that women are accustomed to produce clothing by knitting or sewing at their leisure and in the company of their families. Most of the persons who do such stringing and tagging are engaged in farming. The social conditions of the home are not changed in any way by the work performed. The stringers are most anxious for the opportunity which they thus receive to secure annually a cash fund which is, in many instances, the only cash or the most cash taken in by the family during the year. The cash is not only of benefit to them, but naturally finds its way into commerce in the area in which they live, or may be used to pay taxes or to act, figuratively or literally, as insurance against the variability and insecurity of farm life.

Recently there have been developed machines so that this work is being done by machine instead of by hand. However, there is still a considerable amount of work which could be done profitably by hand, but which will never be turned over for hand stringing if the proposed amendment of the Treasury regulations goes into effect, creating a vague wide area within which it might be construed that the stringers were employees for the purposes of the Social Security Act.

In the above instance, the practical effect of the proposed amended Treasury regulations, if they should not be nullified by this resolution, would be to defeat the very purposes of social-security legislation: Namely, to assure the economic security of the community. This will be so because the thousands of persons previously receiving a cash income per year will no longer receive it, the area in which that money is spent will no longer be benefited by such spending and, in general, this most important margin of security which was afforded the persons who did the stringing will no longer be available. In addition, this discontinuance will defeat the purpose of other social legislation such as the Fair Labor Standards Act, the primary purpose of which was to "spread the work." If the proposed Treasury regulations go into effect, not only will work not be spread in the area involved, but the possibility for such productive enterprise will be eliminated.

It does not seem possible that Congress could have intended the application of social-security legislation to have the effect of impairing precisely the economic security which it unquestionably intended to sustain. Certainly, however, such will be the case if the proposed amended Treasury regulations with regard to the Social Security Act are permitted to go into effect.

SUMMARY

It is, therefore, respectfully submitted to the committee that the committee should favorably report to the Senate the passage of Senate Joint Resolution 180. This recommendation is based upon the belief that in so doing, the Congress will have sustained the original intent of Congress in 1935 and 1939 as corroborated in 1947; that it will have corrected judicial misinterpretation of the Social Security Act included in the Silk, Greyvan, and Bartels cases; that it will have prevented from going into effect administrative regulations so vague that they are unworkable in the reality of the business world to which they are intended to apply, and that the Congress will have prevented the imposition of artificial relations designated "employer-employee," which, if permitted to stand, would result in the curbing of productive activity, thereby damaging not only the employer and the employee, but also the community and the Nation.

Respectfully submitted.

GEORGE GORDON BATTLE.

PANAMA CITY, FLA., *March 30, 1948.*

HON. SPESSARD L. HOLLAND,
United States Senator from Florida,
Senate Office Building, Washington, D. C.

DEAR SENATOR HOLLAND: I appreciated your nice telegram of March 26 (to which I replied thanking you) advising that the Senate Finance Committee will hold hearings beginning April 1 on House Joint Resolution 206, relative to social security coverage regulations.

I have for some years been interested in the sawmill and pulpwood industries in Florida. I am writing this letter as a private individual, although in the past I have represented some clients also interested in these industries.

Most of our lands in this part of Florida are not suitable for agricultural purposes, except some small truck farms, and the timber resources are about all we have to rely upon. As you know, there is a large paper mill at Port St. Joe, one in Pensacola, and one in Panama City. You also know that the sawmills are

scattered throughout the entire State. Many of the pulpwood dealers, or brokers, who buy pulpwood and in turn sell the wood to these paper mills are vitally concerned with the matter now before the Senate Finance Committee above mentioned. Likewise, purchasers of sawlogs for sawmills are similarly interested. They simply buy this wood as you and I might buy a load of firewood or a truckload of coal for fuel purposes. There is no common sense reason why these brokers in pulpwood or brokers in sawlogs should have to have control of the operations in the woods. Back in the old days when a sawmill owned its own large tract of timber, that sort of operation, where its own employees cut the timber and the logs were placed on the mill's tram road, could be handled successfully. At the present time the sawlogs from sawmills come from hundreds of miles away. Some of these pulpwood dealers buy wood in Georgia and Alabama and sell it to the mills in Florida.

When the social security is enlarged, if the amendment proposed by the Treasury Department should take effect, it really would amount to many of these dealers going out of business, for they could not carry the load of insurance, to protect against accidents alone, for all of these various employees whom they do not even know nor should be concerned with.

Once the Federal Government considers these employees as employees of the sawlog dealers or the pulpwood brokers, by the same token these dealers would be liable under the workmen's compensation laws for any accidents which might develop in these hazardous occupations. As the law now stands, and as you know, the employer is liable for social security and workmen's compensation regulations on his own employees, and that is just as far as the law should extend. When this employer with his own employees cuts either pulwood or sawlogs, then in turn sells it to a timber broker, there is no rhyme nor fair reason why that broker should be tied into similar responsibility.

I think the reason for the Treasury Department now seeking to enlarge the definition of the word "employee" is that they don't want to be bothered with having to check up on each of these employers, and would rather go to the source of last consumption and have that plant or that large broker responsible, and make one trip with an investigator instead of a hundred.

When that happens, that broker is going to have to go into the business himself of handling his own operations only, and there will be dozens of the smaller operators who will be thrown out of employment and put out of business, for the big broker would not be able to deal with the small brokers any longer, and these hundreds of small brokers handling sawlogs and pulpwood would have to fold up. If he is financially able, he will become a big broker; if not financially able, he would have to become an employee under big brokers on daily wages.

In view of the fact that the sawmill and pulpwood industry in Florida now has such a large pay roll with the smaller operations throughout the State, I believe it nothing but fair that I will take the liberty of asking you to attend that hearing in order to voice these sentiments I am undertaking to outline to you, which I am sure you already appreciate. You may have some influence with Senators Barkley, Byrd, and Connally of the Finance Committee.

Thanking you for your past consideration of this problem and assuring you that in my humble judgment the stand you have taken is for the best interests of the people of Florida, I beg leave to remain

Sincerely yours,

THOMAS SALE.

THE PENN MUTUAL LIFE INSURANCE CO.,
Miami 32, Fla., February 16, 1948.

Senator HOLLAND,
Washington, D. C.

MY DEAR SENATOR: I am in favor of seeing life insurance agents put under the Social Security Act. This company put us under when the act went into effect for the first year, but other companies fought it, and so our company came out of the act, based on court findings that agents are independent contractors.

Now that the Treasury is promulgating a ruling to put us under the act, I understand that many interests are fighting it. They have a law pending to prevent this ruling taking effect, if I am not mistaken.

I hope you will do your best to prevent the passage of such a law. The National Association of Life Underwriters, of which I am a member, has sponsored the inclusion of agents under the act, and I do not want to see it prevented.

Best wishes,

Sincerely,

ERLING E. AYARS.

MEMORANDUM CONCERNING HOUSE JOINT RESOLUTION No. 296

The New York State Publishers Association, representing the principal newspapers in the State of New York, outside the city of New York, respectfully urge upon the Congress that it pass House Joint Resolution No. 296. On behalf of the association we respectfully submit herewith a brief memorandum concerning the reason for our request for passage of House Joint Resolution No. 296.

TEXT OF PROPOSED RESOLUTION

House Joint Resolution No. 296 proposed the following changes in the law:

1. It amends section 1426 (d), section 1607 (i) of the Internal Revenue Code to read as follows:

"EMPLOYEE.—The term 'employee' includes an officer of a corporation but such term does not include (1) any individual who, under the usual, common-law rules applicable to determining the employer-employee relationship has the status of an independent contractor, or (2) any individual (except any officer of a corporation) who is not an employee under such common-law rules."

2. Amend section 1101 (a) of the Social Security Act to read as follows:

"EMPLOYEE.—The term 'employee' includes an officer of a corporation but such term does not include (1) any individual who under the usual common-law rules applicable to determining the employer-employee relationship has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

These several amendments to the Internal Revenue Code and the Social Security Act will effectively establish, in the statute law, the congressional intent, and the subsequent administrative interpretation, relating to the coverage of the social-security law and the related taxing statutes.

PURPOSE OF THE RESOLUTION

The purpose of the resolution is to spell out clearly in the law the congressional intent that in the administration of the social-security law, and related taxing statutes, the normal, accepted, and well-defined common-law relationship of employer-employee shall form the basis of determination of coverage wherever question may arise as to whether the status of an individual is an "employee" or an "independent contractor."

The need of this legislation has been very recently apparent as a result of an effort by the Commissioner of Internal Revenue to promulgate regulations pursuant to his authority under the Internal Revenue Code, which would extend considerably the coverage of the social-security law, and the applicable taxing provisions, by using criteria which negate the well-accepted common-law criteria in determining whether an individual is an employee or an independent contractor. (Treasury Department, Bureau of Internal Revenue, notice of proposed rule making, vol. 12, Federal Register No. 232, p. 7996, dated November 27, 1947.)

CONGRESSIONAL INTENT

The proposed resolution will conform the present law with the intention of Congress in establishing coverage for the Social Security Act. Congress intended that the word "employee" should be used in the generally accepted legal concept arising out of the law of the master-servant relationship. This is apparent in the language of the present statute, in section 1426 (d) and section 1607 (i) of the Internal Revenue Code, and section 1101 (a) of the Social Security Act, which provides that an officer of a corporation shall be considered an employee. This was necessary because the normal concept of an employee under the law of master-servant in the common law did not accept that an officer of a corporation was an employee of the corporation. The Social Security Act and subsequent regulations were prepared upon the basis of the common-law concept of an "employee" and have never been changed.

In 1939 the Congress considered amendments to the social-security law, and at the time full consideration was given to the subject of employee-employer status under the existing law and Treasury regulations. As the result of considerable congressional investigation, and subsequent action by congressional committees, it was determined that the law as it existed should not be changed, thus reestablishing that the intent of Congress was to construe "employee" under the law as it was generally construed under the common law.

ADMINISTRATIVE INTERPRETATION

Up until the proposed rule making referred to above by the Commissioner of Internal Revenue, and appearing in the Federal Register of November 27, 1947, the pertinent interpretations and administrative regulations under the Internal Revenue Code and the Social Security Act have recognized that the fundamental basis for determining the relationship of "employee" shall be based upon those factors which were appropriate under the common-law definitions of this term. The element of control was the primary factor found in the case law out of which grew the common-law concept of the "employee."

The present Treasury regulations recognize this in stating that the words "employ," "employer," and "employee" are to be taken in their ordinary meaning, and that generally the relationship of employer-employee exists when the person for whom services are performed has the right to control and direct the individual who performs this service, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

The proposed House Joint Resolution 296 will effectuate this present administrative interpretation and will forestall the proposed changes in existing regulations which would be based upon new concepts and new factors which do not appear in the well-accepted, usual, common-law concept of the "employer-employee" relationship.

RECENT CONGRESSIONAL CONSIDERATION

The problem involved in determining employer-employee relationship, as against an independent contractor, arises in the administration of the labor-relations law as well as in the administration of the Social Security Act and applicable provisions of the Internal Revenue Code.

In the case of *National Labor Relations Board* v. *Hearst Publications* (322 U. S. 111) (1944), the National Labor Relations Board expanded considerably the definition of the term "employee" beyond anything which had been intended, and the action of the Board was sustained by the Supreme Court.

As a result of this decision and the action and interpretation of the National Labor Relations Board, this subject was one which was considered in the enactment of the Labor-Management Relations Act of 1947. Out of this consideration the Congress determined to clarify the limit of the Board's jurisdiction and specifically provided in the definition of an "employee" that such definition shall not include "any individual having the status of an independent contractor." An examination of the congressional debate with reference to this part of the Labor-Management Relations Act of 1947 reflects that the Congress intended that the jurisdiction of the Board in its definition of "employee" should be limited to that well-accepted, normal, common-law concept which distinguishes between "employee" and "independent contractor."

It is submitted that House Joint Resolution No. 296 is consistent with and a logical sequel of the consideration given to the question "employer-employee" relationship at the time of the enactment of the Labor-Management Relations Act of 1947. It is apparent that Congress intended to rely upon the well-accepted common-law distinctions between "employee" and "independent contractor." It would be indeed unfortunate to permit the Social Security Act and the applicable Treasury regulations to be so interpreted as to find that a person may be an "employee" for the purpose of the social-security law and the taxing statutes, and not an "employee" for the purpose of bargaining collectively. Consistency requires that the Social Security Act and the Internal Revenue Code be implemented by the method proposed in House Resolution No. 296.

THE PROPOSED TREASURY REGULATIONS

The Treasury Department, in promulgating its proposed rule making with reference to new regulations relating to the definition of "employee," predicated it upon three Supreme Court cases decided at the 1947 term. These cases were *United States* v. *Silk* (331 U. S. 704 (1947)); *Harrison* v. *Greyvan Lines, Inc.* (331 U. S. 704 (1947)), and *Bartels et al.* v. *Birmingham et al* (332 U. S. 126 (1947)). In these opinions by the Supreme Court the Court considered the problem of coverage by the Social Security Act and said that the term "employee" had a broader meaning than was normally given under common-law principles of master and servant as they are adopted in the regulations of the Commissioner of Internal Revenue. The Court proposed a series of new considerations which

should be taken into account in considering whether a person was an "employee" or an "independent contractor." This discussion by the Court was not relevant or essential to the actual decisions rendered by the Court in the cases involved. The decisions of the Court were consistent within the definition of "employee" found in the regulations of the Treasury Department, and did not require the establishment of additional factors. In digressing from the actual decisions involved to offer "dicta" on the nature of the "employer-employee" relationship the Court did not give full consideration to the congressional intent which has been outlined above.

In spite of the fact that the new factors suggested by the Surpeme Court were "dicta," the Commissioner of Internal Revenue has incorporated these factors in an extensively outlined plan for determining the nature of the employer-employee relationship, as may be found in the proposed rule making.

THE CONCERN OF NEWSPAPERS

The regular routine operation of newspapers requires that newspapers maintain many relationships with independent contractors, and among these are persons who purchase newspapers in bulk at wholesale and retail them in specific areas and at specific places. These relationships have been maintained and continued under the basic concepts found in the common-law treatment of the employer-employee as against independent contractor relationship. It is important to the newspapers of the country that this basis upon which they have conducted their affairs for so many years, under appropriate laws and regulations, be clearly embodied in the statute law relating to social security to avoid misunderstanding of the congressional intent and misapplication of the statutory power by the appropriate governmental agency.

CONCLUSION

House Joint Resolution No. 296 is an accurate, workable statement of congressional intent and of present administrative regulations and is consistent with recent congressional enactment in a similar field. It will clearly establish that the well-accepted concepts of the common law relating to master-servant and the "independent contractor" shall form the effective basis of the administration of the Social Security Act, and will relieve the appropriate governmental agency from its present efforts to create new criteria and new concepts without statutory authority or the support of the intention of Congress.

We respecfully submit this memorandum to you and ask that you pass House Joint Resolution No. 296.

Respectfully submitted.

NEW YORK STATE PUBLISHERS ASSOCIATION,
By ——— ———, *President.*

March 29, 1948.

STATEMENT TO SENATE FINANCE COMMITTEE IN SUPPORT OF HOUSE JOINT RESOLUTION 296, BY CLARENCE A. JACKSON, EXECUTIVE VICE PRESIDENT, INDIANA STATE CHAMBER OF COMMERCE; PRESIDENT, NATIONAL ASSOCIATION OF STATE CHAMBERS OF COMMERCE

For reasons outlined later in this statement, favorable action by the Finance Committee of the United States Senate on House Joint Resolution 296 respectfully is recommended.

Our understanding of the situation is that this resolution, if enacted, would maintain for purposes of social-security coverage the status quo of the definition of "employee" as being conditioned upon the common-law test of "master and servant" relationship between the employer and the employee. It is our further understanding that if House Joint Resolution 296 fails of enactment, a new regulation prepared by the Treasury Department, setting aside the commonly accepted definition and establishing in its place a definition of "employee" based upon a new concept of "economic independence," will be placed into effect retroactively insofar as coverage of the old-age and survivors' insurance program and unemployment compensation is concerned.

Obviously the real issue raised by the proposed Treasury regulation and by this resolution to prevent the regulation from going into effect is that of whether the legislative question of coverage of the social-security program is

to be decided by the Congress or by the judiciary and by bureaus of the executive department.

It clearly has been the intent of the Congress in the past that the employer-employee relationship for social-security coverage purposes be determined upon the commonly accepted "master and servant" concept. We agree with the proponents of House Joint Resolution 296 that this congressional intent should not be reversed by an agency outside of the Congress but rather, if it is to be changed, the change should come about only through action by the Congress, after careful consideration of all pertinent factors.

The broad, general reasons for support of the resolution will be developed in detail, we are confident, by others appearing in person before your committee. These reasons include:

1. That the Congress itself should have the opportunity to make a clear-cut decision as to whom it believes should be covered by social-security programs, rather than other agencies of the Federal Government being permitted to "legislate" coverage decisions.

2. That the proposed Treatury regulation, based upon an "economic dependence" concept, is confusing and indefinite, and as interpreted in the future by governmental bureaus might very well have far-reaching consequences of bringing into social-secrity coverage and into the coverage of other Federal programs many individuals never intended by the Congress to be treated as "employees."

3. That the regulation would seek to extend coverage and require the payment of social-security taxes and the submission of social-security reports by employers in respect to the newly conceived "economically dependent" employees in instances where the employer-employee relationship does not exist in fact, and therefore the employer would have no practical means of giving an accurate tax accounting.

4. That the proposed regulation would have retroactive effect for benefit purposes but with tax levies "forgiven" up to January 1, 1948, and therefore be objectionable from the standpoint both of the general unsoundness of retroactive rule and of the fact that benefit rights would be created without having been comparable tax collections to finance the benefit rights.

5. That House Joint Resolution 296 does not, in fact, withdraw social-security coverage from any individuals intended by the Congress to be covered but simply would maintain present regulations until the Congress has an opportunity to consider the coverage question carefully upon its merits.

In addition to the above reasons for support of House Joint Resolution 296, we wish to point out a specific example of how in Indiana the proposed Treasury regulation would conflict with the Indiana Employment Security Act, under which the unemployment-compensation program is administered, and therefore would lead to much unnecessary confusion. The same situation, to our knowledge, also would be applicable in many other States.

The Indiana Employment Security Act follows the commonly accepted definition of the employer-employee relationship. It provides (sec. 801) that—

"(a) Services performed by an individual for remuneration shall be deemed to be employment subject to this Act unless and until it is shown to the satisfaction of the Board that (A) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) such individual, in the performance of such services is engaged in an independently established trade, occupation, profession, or business; or is an agent who receives remuneration solely upon a commisison basis and who is the master of his own time and effort."

The Indiana Act then goes on to provide (sec. 802) that the term "employment" shall include "services performed for an employer which is subject to contribution solely by reason of liability for any Federal tax against which credit may be taken for contributions paid into a State unemployment compensation fund."

If the proposed Treasury regulation is allowed to go into effect, we are not certain how the ensuing confusion in respect to the Indiana law will be resolved. It is obvious that if the State law is interpreted as following the Federal regulation instead of its own definition of the employment relationship, then a situation will have been created wherein the provisions of a State law have been set aside by regulations of a Federal bureau.

Employers now have a clear understanding of the common-law "master and servant" relationship, but an examination of the proposed Treasury regulation gives a strong indication that not even the individuals in the Treasury Department, who drafted the regulation, have an understanding of the employer-employee relationship they are trying to define. It confidently may be predicted that if the proposed regulation is made effective, a long period of confusion and misunderstanding as to whether an individual is or is not an employee will result.

If it is the desire of the Congress to extend social-security coverage to independent contractors and others as self-employed individuals, then that is a matter that should be decided by the Congress after proper study and, if the decision is in the affirmative, then the coverage extension should be accomplished through clear-cut legislation. Meanwhile, the plain intent of the Congress to follow the "master and servant" definition should continue to prevail.

STATEMENT BEFORE THE FINANCIAL COMMITTEE, UNITED STATES SENATE, IN SUPPORT OF HOUSE JOINT RESOLUTION 296, ON BEHALF OF CHICAGO NEWSPAPER PUBLISHERS ASSOCIATION

The Chicago Newspaper Publishers Association urgently requests passage of House Joint Resolution 296 for the reasons set forth below:

1. The proposed regulations do not effectuate the intention of Congress in defining "employee." The operation of such regulations should be postponed indefinitely so that any change in such definition may be made by Congress.

2. The effective date of the resolution should be postponed for the reason that a general over-all examination of the Social Security Act is to be undertaken by Congress and any changes necessary to effectuate the intention of Congress in this respect can be made at that time.

3. The regulation should be delayed until provisions have been made whereby nonemployers under the present regulation who would be employers under the proposed regulations may comply with the withholding provisions of the act.

House Joint Resolution 296 is designed to postpone certain proposed new Treasury Department regulations with regard to employment and social-security taxes which expand the definition of "employee" pending an over-all study by Congress which expand the definition of "employee" pending an over-all study by Congress of social-security coverage.

The original regulations under the Social Security Act have been in effect for a period of more than 11 years and are in accordance with the congressional intent as evidenced by the fact that Congress has considered amendments to the Social Security Act affecting the definition of "employee" but has refused to make any change. The original definition of "employee" is by its context clearly a common-law definition of "employee" and the original regulations were similarly based on the common-law definition of "employee." Court decisions over a period of years have followed the common-law definition. There has been no divergence from this concept nor attempt by the Treasury Department to enforce other than a common-law concept of "employee" until the Hearst case.

In the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U. S. 111) the National Labor Relations Board determined that certain newspaper vendors were employees because of their economic dependence upon the employer. The Supreme Court affirmed relying on the theoretical expertness of the Board to determine such questions. Following the Hearst case, Judge Goodman in the United States District Court for the Southern Division of the Northern District of California, in the case of *Hearst Publications, Inc.* v. *United States*, held substantially the same type of newspaper vendors to be employees under the Social Security Act on substantially the same theory. Recently the Supreme Court in the Silk, Greyvan, and Bartels cases decided certain individuals were employees and in such opinions indicated by way of obiter dicta that they were using the economic reality test rather than the common-law test.

Following these cases, the Treasury Department promulgated the resolutions whose promulgation is sought to be deferred in the pending resolution.

The intention of Congress has not been changed by the aforesaid court decisions. The original definition of "employee" as set forth in the act is still in effect. Congress refused to change it in 1939. As late as 1947, in what is known as the Taft-Hartley law, Congress specifically denied any intention to expand the definition of employee to cover an independent contractor (H. Rept. 245, 80th Cong.,

1st sess., p. 18). If any change is to be made in the concept of "employee," it should be made by Congress and then only after due consideration to the various aspects of the problem and not by an executive department of the Government.

A definite program for the over-all study of social-security coverage is pending before the Committee on Ways and Means of the House of Representatives and the Finance Committee of the United States Senate. Undoubtedly one of the subjects for consideration will be the status of those nonemployees, such as door-to-door salesmen, who are not now considered as employees but who would be considered as employees under the proposed regulation. The study by Congress may result in such person being covered by the act as self-employed persons, or possibly coverage may not be extended to cover such persons. At any rate, in view of the over-all study being made, it is important that the status quo as to the existent regulations be preserved pending a determination of Congress as to needed changes.

A major reason for postponing the proposed regulations is the tremendous burden and hardship it would place on certain persons if the regulations were to go into effect and if certain nonemployees were held to be employees under such regulations. Newspapers throughout the country sell their newspapers to street-corner men who buy the newspaper at a certain price and resell it at a higher price to the readees. These street-corner men sometimes sell five and six different newspapers and some in addition sell magazines and other articles such as gum, razor blades, etc. If the proposed regulation were to go into effect and such street-corner men were to be held to be employees the newspapers would be faced with the impossible problem of trying to determine the basis on which they should withhold for social-security taxes and also for withholding taxes. The social-security-tax laws and the withholding-tax laws require the employer to report accurately the total remuneration paid to an employee excluding such items as reimbursements for expenses. In the example above it would be extremely difficult if not impossible to determine the basis upon which such reporting should be made.

The newspaper would also be faced with the problem of being required to withhold amounts when there is no source of funds since the newspaper pays nothing to the street-corner men from which a withholding can be made. Certainly if coverage is to be extended to this type of situation provision should be made to protect the newspaper in determining the amount to be withheld and providing for a method of withholding under such circumstances.

For the above reasons the association respectfully requests passage of House Joint Resolution 206.

CHICAGO NEWSPAPER PUBLISHERS ASSOCIATION.

STATEMENT EXPRESSING VIEWS OF NATIONAL ASSOCIATION OF SUBSCRIPTION AGENCIES, INC., WITH RESPECT TO HOUSE JOINT RESOLUTION 206

This statement is submitted to the Senate Finance Committee by the National Association of Subscription Agencies, Inc., in support of enactment of the above joint resolution.

The National Association of Subscription Agencies, Inc., is a trade association composed of leading magazine-subscription agencies. We estimate that the total annual retail value of the subscriptions cleared by our members is well in excess of $15,000,000. America's subscription agencies are recognized by magazine publishers as an important factor in attaining and maintaining circulation. Our members serve as a significant link in the transmission of news and enlightenment to all parts of the country.

The members of this association do not sell magazine subscriptions to the public. They place such subscriptions with magazine publishers on behalf of their customers, who are independent subscription dealers. Orders for subscriptions are obtained by such dealers from individuals who deal with the public by means of door-to-door solicitation. These solicitors generally obtain their income from retention of a percentage of the down payment of subscription price by the subscriber, paying the balance of such payment to the dealers.

The dealers cannot maintain any supervision or control over the manner and method of the solicitors' operations. These solicitors have always been regarded by dealers as independent contractors. Their status clearly does not come within the employee category as previously interpreted and traditionally understood, and

is a number of cases there are rulings by the Commissioner of Internal Revenue confirming their independent contractor status.

Proposed new regulations redefining "employees" under the Federal Insurance Contributions Act and Federal Unemployment Tax Act appeared in the Federal Register of November 27, 1947. The Commissioner of Internal Revenue has indicated that these regulations are intended among other matters to extend the application of the above laws to door-to-door salesmen. We are opposed to these regulations and we therefore support House Joint Resolution 295, which would prevent the effectuation of the above regulations pending a general extension of social security coverage:

1. The regulations are not supported by the court decisions on which they are purposedly based

The preamble to the proposed regulations states that they are intended to conform prior regulations to the principles enunciated in *United States* v. *Silk* (67 S. Ct. 1463) and *Bartels et al* v. *Birmingham et al* (67 S. Ct. 1547).

The first of these cases passed upon the status of coal unloaders and truckmen. The second involved that status of band musicians. Neither decision had anything whatever to do with door-to-door salesmen. These cases should be limited to their peculiar fact situations, and should not be used as a springboard for the promulgation of a radical extension of the law to entirely dissimilar situations.

In the Silk decision, the Supreme Court considered two cases together. The first involved a determination of the status of persons who unloaded coal from railway cars at the coalyard of one Silk, a coal retailer. In holding these persons to be employees the Court specifically pointed out that "Silk was in a position to exercise all necessary supervision over their simple tasks." The second case involved the status of truck drivers who, under contracts with Greyvan Lines, Inc., a common carrier, picked up goods from shippers and delivered them to consignees. These truck drivers, whose operations were conducted away from the premises of the common carrier, were held not to be its employees, and were ruled instead to be independent contractors.

Thus, far from supporting the extension of employment taxes to door-to-door salesman, as contended by the Commission of Internal Revenue, the Silk case shows that the fact that solicitors' activities are not performed on the premises of the dealer, but rather door-to-door, where he cannot exercise supervision, is a strong indication of an independent contractor status.

The Bartels case, the second decision relied on by the Commissioner, held merely that the operator of a public dance hall was not the employer of the members of a band who performed there, and indicated that the band leader was the employer. It was of course clear even before this decision that a band member is an employee. The Bartels case, therefore, did not in any way extend the previous definition of the term "employee" in the situation involved, but merely decided which of two persons was the employer of one plainly an employee. Moreover, since the activities of a band musician are obviously conducted in the presence of the band leader, this case supplies no basis for determining the status of a door-to-door salesman not subject to supervision.

2. The regulations violate the congressional intent

It was proposed in House bill No. 6635, Seventy-sixth Congress, (1939) to expand the definition of employee in the Social Security Act as follows:

"* * * It also includes any individual who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (*but who is not an employee of such person under the law of master and servant*); unless (1) such services are performed as a part of such individual's business as a broker or factor and, in furtherance of such business as broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or (2) such services are casual services not in the course of such individual's principal trade, business or occupation." [Italics added.]

The Senate considered and struck out the above provision. The House, in accepting the Senate action, stated in its conference report:

"Amendments Nos. 97 and 98: The House bill extended coverage to certain salesmen who are not employees * * * It is believed inexpedient to change

the *existing law which limits coverage to employees.* The House recedes." [Italics added.]

3. The regulations are intolerably vague and uncertain

The proposed regulations, after citing six specific criteria of an employee status, some of which are uncertain in application, proceed to state:

"The absence of mention of any factor, fact or element in these regulations in part should be given no significance, since the Nation's economy is blanketed with many forms of service relationship, with infinite and subtle variations in terms, which render impracticable an analysis applicable to all situations."

In view of this catch-all clause, it is utterly impossible for any dealer contracting with solicitors, even if none of the six specific tests apply, to determine whether or not such solocitors may ultimately be ruled to be employees nonetheless. Such uncertainty and indefiniteness are intolerable in the application of a tax statute.

The regulations would necessarily require every dealer to reappraise the status of each and every solicitor with whom he contracts, and, in view of the vagueness of the regulations, the dealer would be compelled to undergo the peril of contingent liabilities of taxes, interest, and penalties for failure to pay and withhold taxes and contributions. Litigation may be necessary in many cases to protect the dealer's rights and, until the conclusion of such litigation, he would be unable to conduct his business with any certainty as to the tax burdens imposed on it.

We do not concede that even under the new regulations subscription solicitors would lose their status as independent contractors. However, we wish to point out that in the event that any of them were ultimately held to be employees under the proposed regulations, a heavy bookkeeping burden would be imposed upon the dealers involved. Many solicitors are active in solicitation for only short periods of time, receive only small amounts from subscribers, and go to other localities and into other fields of endeavor. Moreover, it would be impossible for the dealer to withhold taxes, since the solicitors retain as their income part of the down payment of subscription price by the subscriber. To rule that a given solicitor was an employee of a dealer would be to require the dealer to account for taxes which he was unable properly to record or physically to withhold.

Our association is not opposed to legislative extension of social-security coverage to self-employed persons so long as this end is attained in a fair and workable manner. We are opposed, however, to any effort, by the above regulations or other administrative rulings, to classify as employees persons who are actually self-employed.

We therefore heartily support and urge the enactment of House Joint Resolution 296.

Respectfully submitted.

NATIONAL ASSOCIATION OF SUBSCRIPTION AGENCIES, INC.,
By HAROLD F. DELANEY, *President.*
MORTIMER M. LEME, *General Counsel.*

Dated New York, March 30, 1948.

STATEMENT OF F. M. PORTER, PRESIDENT, MID-CONTINENT OIL AND GAS ASSOCIATION, TULSA 3, OKLA., IN SUPPORT OF HOUSE JOINT RESOLUTION 296

My name is F. M. Porter. I am president of the Mid-Continent Oil and Gas Association. This association, with its general headquarters at Tulsa, Okla., is an oil-trade association, with approximately 4,000 members. It represents al branches of the petroleum industry and the majority of the oil and gas producers in the States of Kansas, Nebraska, Oklahoma, Texas, New Mexico, Arkansas, Louisiana, Mississippi, and Alabama. Within the borders of these States, three-fourths of the Nation's natural gas and over two-thirds of the Nation's crude petroleum is produced, and approximately one-half of the Nation's petroleum products are refined.

We appear here today in support of House Joint Resolution 296, the purpose of which is to maintain the status quo with respect to social-security-coverage regulations for employment and unemployment taxes and social-security benefits, pending later decisions by the Congress of extensions of coverage.

The existing regulations apply the usual common-law test of control in determining whether an employer-employee relationship exists. These regulations

have been in effect for a period of more than 11 years and are, we believe, in accordance with congressional intent as expressed in the legislative history of the 1939 amendments to the Social Security Act.

In this respect, the Commissioner of Internal Revenue, pursuant to the Administrative Procedure Act, published notice in the Federal Register of November 27, 1947, to amend the existing regulations with respect to employer-employee relationship. The proposed amendments to the regulations would apply tests other than the usual common-law tests for determining such employer-employee relationship.

An official release of the Treasury Department, dated November 27, 1947, Press Service No. S 542, clearly indicated that the intention of the proposed amendments was to substantially broaden the coverage of social-security taxes so as to make them applicable to important groups not heretofore considered to be covered. This press release clearly stated that: "The proposed regulations—would supersede the common-law test, also known as the 'control' or tort test, used to determine whether a 'master and servant' relationship exists." This statement, and indeed the entire press release, emphasized the importance of these proposed amendments and the widespread effects which they would have if promulgated.

Accordingly, the issue now involved is whether the scope of social-security coverage should be determined by the Congress itself or by other branches of the Government. We believe that it is important that the status quo of existing regulations be preserved pending a determination by the Congress of needed changes in the law, particularly insofar as extensions of coverage are concerned. House Joint Resolution 296 would accomplish this.

The members of the Mid-Continent Oil and Gas Association, in connection with their manifold activities, have many kinds of contractual arrangements which heretofore have never been considered as giving rise to an employer-employee relationship, but the status of which under the proposed regulations is undeterminable. Moreover, certain of those activities, as related to the employer-employee relationship, such as bulk-station operation, have in the past been the subject of rulings and court decisions, and as a result the questions of employment tax liability involved therein have up to now been regarded as finally settled.

If the proposed regulations become effective, we believe that endless confusion will result, existing rulings will be unsettled, and many types of relationship fixed by contract will have to be reviewed at a time when full emphasis should be given to an increase of production and distribution of petroleum and petroleum products. The proposed regulations, by changing the test in existing regulations for determining whether an individual is an employee, will require a full review of existing contractual arrangements and will undoubtedly result in extensive litigation.

It is our belief that the proposed regulations do not serve the purpose of regulations, because the only justification for regulations interpreting the general terms of legislation is to particularize these general terms so that taxpayers may know with reasonable certainty whether or not the legislation is applicable to them and to afford a guide so that administrative officials can apply the legislation uniformly. The proposed regulations do neither. They produce confusion rather than certainty.

The proposed regulations jettison the common-law concept of master and servant that has been developed over a period of hundreds of years and that has previously governed in determining liability for employment taxes. They embark upon an uncharted sea. Under these regulations, an individual apparently regardless of lack of direction and control is to be treated as an "employee" if he is determined to be an "employee" as a matter of "economic reality." Economic reality in turn is to be determined on the basis of a number of factors and facts, some specified and other unspecified. The relative importance of these factors and facts is not prescribed, nor can the taxpayer know whether some not specified will or will not be considered of greater significance than those that are specified. Even those that are specified are vague and indefinite.

It is our belief that the proposed regulations are not warranted by the court decisions cited by the Commissioner of Internal Revenue. It is claimed that the proposed regulations are made necessary by the decisions of the Supreme Court in the *Silk case* (1947) (67 S. Ct. 1463), the *Greyvan Lines, Inc. case* (1947) (67 S. Ct. 1463), the *Bartels case* (1947) (67 S. Ct. 1547), and related cases. Review of these cases, however, fails to disclose any substantial basis for the radical

changes proposed in the existing regulations. The proposed regulations are framed to use factors pointed out by the Court in connection with its decisions in rather restricted fields as a complete substitute for the long-established concepts of the present regulations. Manifestly, if it had been deemed appropriate to recognize these decisions of the Court by any amendments to the Regulations, the needed changes could have been limited to a sentence or so relating to the status of independent contractors.

It is suggested that the effect of the decisions in the Silk, Greyvan, and Bartels cases could have been incorporated in the existing regulations by inserting at the end of the fifth paragraph a sentence reading as follows:

"Moreover, where an individual is subject to direction and control by the person for whom he performs services, this fact alone may not necessarily constitute him an employee. Notwithstanding such direction and control, other factors such as investment in facilities, opportunity for profit, skill required, risk undertaken, et cetera, may constitute such individual an independent contractor."

The practical effects of the proposed scrapping of the common-law concept of employer and employee—and substituting therefor the proposed test of "economic dependency"—are difficult to estimate but manifestly would unsettle a multitude of decisions, result in confusion of the taxpayers, and substitute tenuous and debatable economic concepts for the established case law and tax rulings. A mass of situations—so clearly outside the common law rule of master and servant and the scope of the existing Regulations that they have never been questioned—will be made the subject of rulings and litigation if the common-law rule and the present regulations are abandoned. Rulings predicated upon the proposed regulations can result in nothing other than administrative chaos and practical impossibilities.

It is believed that any possible social justification which may urge the creation of a false employer-employee status on the basis of "economic dependency" should await the consideration and action of the Congress. Also, in view of the widespread effect which the proposed regulations would have upon hundreds of thousands of taxpayers, and in view of the misunderstanding and confusion which would result for many years (until the application of the new criteria of the employee relationship could be made to "each case"), it is believed that a status quo should be maintained in respect to the existing regulations until Congress has an opportunity to and does further consider the very broad and important issue of social-security coverage. The enactment of House Joint Resolution 296 would clarify the entire situation.

STATEMENT ON BEHALF OF THE NATIONAL COUNCIL OF SALESMEN'S ORGANIZATIONS, INC., BEFORE THE SENATE COMMITTEE ON FINANCE IN OPPOSITION TO HOUSE JOINT RESOLUTION 296

Mr. Chairman and members of the committee, I have been requested by the National Council of Salesmen's Organizations of 80 West Fortieth Street, New York, N. Y., as its general counsel, to present to you its views on House Joint Resolution 296.

May I, first, briefly tell you about the National Council and whom it represents? The National Council of Salesmen's Organizations, Inc., is a nonprofit membership association chartered by and under the laws of the State of New York. As its certificate of incorporation and bylaws provide, its aims and purposes include among other things the following:

1. To protect and promote the interest of all persons engaged in selling, other than at retail, in America.

2. To inculcate and foster a spirit of friendly cooperation and of fair, honest, and lawful dealings between merchants, buyers, and wholesale salesmen.

3. To act as a national parent body for and on behalf of any and all persons, corporations, associations, or organizations of wholesale salesmen in any particular industry or industries who may, from time to time, be admitted to membership in the proposed corporation, in connection with all matters affecting wholesale salesmen, excepting those matters pertaining to the regulation of hours of labor, working conditions, wages, or any other similar matters involving employer and employee relationship and generally included in the functions of a labor union.

The National Council is comprised of and represents numerous associations and clubs of wholesale salesmen in the various industries and geographical areas

throughout the United States, totaling over 35,000 individual members in the following organizations:

Associated Millinery Men, Inc.
Far Western Travelers, Inc.
Fur Garment Traveling Salesmen's Association, Inc.
National Handbag & Accessories Salesmen's Association, Inc.
New York Corset Club.
New York-Pennsylvania-Ohio Travelers, Inc.
Infants' & Children's Wear Salesmen's Guild of New York, Inc.
Allied Textile Association, Inc.
Garment Salesmen's Guild of New York, Inc.
The Southern Travelers, Inc.
Piece Goods Salesmen's Association, Inc.
Toy Knights of America, Inc.
Sportswear Salesmen's Association, Inc.
Luggage and Leather Goods Salesmen's Association, Inc.
Sales Representatives, Inc. (plumbing supplies).
Wash Frock Salesmen's Association, Inc.
Philadelphia Textile Salesmen's Association, Inc.
Bakery Salesmen's Association (Milwaukee, Wis.).
New York State Association of Boot & Shoe Travelers.
Men's Apparel Exhibitors' Group of New York.
National Confectionery Salesmen's Association.
New York State Association of Hosiery Mill Salesmen.
National Association of Men's Apparel Clubs.
National Paint Salesmen's Association.
Southeastern Shoe Travelers.
National Association of Women's & Children Apparel Clubs.
Shoe Club of New York.
Underwear-Negligee Salesmen's Association.
Cotton States Fashion Exhibitors.
Fabric Salesmen's Association of Boston.
Housewares Club of New York.
Millinery Displayers' Association of Chicago.
Chicago Yarn Men's Club.
Fabric Salesmen's Club of Boston.

As the parent body and national voice of the wholesale salesmen in America, the National Council speaks to you for these many thousands of member salesmen and their individual trades and geographical organizations and through them on behalf of the 1,500,000 or more other wholesale salesmen throughout the country. They are vitally concerned and disturbed over House Joint Resolution 206.

At the outset, it might be well that I briefly explain to you what we mean by the wholesale salesmen. They are those 1,500,000 men who sell our country's goods, wares, and merchandise at wholesale to those who in turn sell them to the consuming public. These products range from corsets to candy and from plumbing supplies to pajamas. As such, we do not include the retail salesmen, whether they be the over-the-counter salesmen, the door-to-door salesmen or any of the many other types and varieties of selling other than at wholesale.

We will not attempt to set forth here in the details of the relationship existing between the wholesale salesman and the manufacturer whose products he sells. They are indeed varied not only with relation to the method of compensation, the place of performance of the service, the nature of these services, the tenure of the relationship, the amount of direction, control, and supervision exercised over the salesman, but also to all of the other aspects of the relationship. As to compensation, there are those who are paid on a salary, others on commission and still others on both, with or without reimbursement of expenses. As for the locale of their work, virtually all of them are "outside" salesmen in that the major part of their working time is devoted outside of their employers' place of business, some working locally within a particular city, such as the Metropolitan New York area; most, however, traveling and rendering their services in wide geographical areas throughout the United States, generally on an assigned or given territory, exclusive or nonexclusive. Many wholesale salesmen carry a single line, that is, they sell the product of a single manufacturer. Others carry two or more lines. Generally, the term of their employment is one "at will," subject to termination or discharge without notice.

I can go on and set forth many of the other details of the relationship between the wholesale salesmen and the manufacturers or persons whose merchandise they sell. This is unnecessary, however. What it all does point up is the fact that these details of the relationship are indeed varied, complex, and without any uniformity.

The question is: Are these wholesale salesmen, represented by the National Council of Salesmen's Organizations, "employees" under the Social Security Act, and with it, entitled to the benefits granted to employees thereunder? The answer is not an easy or single one. As to some, it is clearly no, for, included among the wholesale salesmen are those whose operations are, in fact, independent. They are "independent contractors" under the law and are not employees covered by the Social Security Act. In this comparatively very small group of wholesale salesmen are the independent sales agents, brokers, and the like. They are in the true and genuine sense of the word, both legal and economic, independent contractors and do not seek nor expect coverage under the present Social Security Act. Nor does the National Council seek here to espouse any cause or claim for their inclusion under the act.

However, by far the greater majority of these wholesale salesmen are not in that category; they are not "independent contractors." They are "employees," and as employees we believe they were intended to and should be included in the act's coverage and afforded the protection and benefits provided for thereunder.

Many employers have recognized this and with it have accepted the social and financial responsibility of the act. Unfortunately, however, far too many others have sought to pursue a narrow legalistic concept of the meaning of the word "employee" and through technical schemes and artifices have set up formalities of employment arrangement, all to the end of avoiding and escaping the tax liability placed upon them by the Social Security Act. Still others, in the bona fide belief that wholesale salesmen are not "employees" at common law, have also not accepted the act's financial obligations. All in all, the end result has been the loss to many tens of thousands of wholesale salesmen of the protection and benefits which the act intended to afford them.

Under all these circumstances, the wholesale salesman cannot help but now ask: How would he fare under House Joint Resolution 296? Would it serve to resolve those twilight or border-line coverage cases? And in resolving them, will it be to deny the act's coverage to those wholesale salesmen who would, but for House Joint Resolution 296, receive the social-security benefits of the act?

The wholesale salesmen of America do not know. They are confused and dubious to a point where they believe that this resolution would in fact serve to deny to them the social-security coverage which they would otherwise receive.

If that be the purpose or ultimate effect of House Joint Resolution 296, and we believe it is, then the wholesale salesmen of America raise their voices in most vehement objection to this resolution and urge that it not be approved by the committee and not be passed by the Senate.

In this connection, the wholesale salesman is not alone in his misgivings about House Joint Resolution 296. The expression of the opinion of a large segment of the American public may be found in a recent column by Thomas L. Stokes, a well-known United Features Syndicate columnist, whose most searching article, entitled "Sneak Attack," appeared under a Washington date line of March 25 in the New York World-Telegram. Mr. Stokes' column, we feel, deserves full quotation:

"They slip things over so quickly and quietly that you miss some of the sneak attacks in this Congress on basic laws affecting the public welfare.

"The one treated here, which would withdraw social-security coverage from an estimated half to three-quarters of a million persons, was done one afternoon by the House. The House exhibited the tendency prevailing under Republican management of yielding to interests, even though ostensibly the body 'closest to the people.'

"It happened nearly a month ago. But it's not too late to do something about it, for the joint resolution is pending before the Senate Finance Committee. The Senate still can stop it, as it has with other special-interest legislation.

"The joint resolution, sponsored by Representative Gearhart (Republican, California) is designed to circumvent a Supreme Court decision which interpreted the intent of Congress, in enacting the Social Security Act, to extend coverage to many hitherto not eligible. The contributory old-age provisions of the act, the Court held, should apply to any person 'who is dependent as a matter of economic reality upon the business to which he renders service and not upon his own business as an independent contractor.'

"Coverage would thus be extended to persons in the category of salesmen, selling agents, brokers, chain-store managers, theater managers, insurance agents, people who do various sorts of jobs in their homes under contract, and the like.

"Now the Gearhart joint resolution would bar them from social-security benefits by restoring the so-called 'common law' relationship of master and servant.

"The joint resolution is the result of pressure from interests that would have to pay social-security taxes under the Supreme Court decision, including insurance companies and 'sweatshop' operators.

"The resolution was called 'a shocking piece of legislation' by Representative Helen Gahagan Douglas (Democrat, California), who said: 'During the past several months I have grown accustomed to the sight of this Congress turning back the clock—crippling where they do not dare repeal, or boring away like termites in an effort to undermine the progress of the preceding 14 years.' She stood with 52 others against the Republican steamroller which passed the resolution, 246 to 53, with Democratic help.

"No hearings on this measure were held by the House Ways and Means Committee, which voted suddenly one day, without having presented to it unfavorable reports from the Treasury and the Social Security Board.

"This puts the Republican House leadership in a strange position. In its 1944 platform it pledged 'extension of existing old-age insurance and unemployment insurance systems to all employees not already covered.' Having done nothing to keep this pledge, it tries to deprive those mostly in the white-collar class, who do not have the protection of labor unions."

Getting down to an analysis of the resolution itself, it declares its purpose to be:

"To maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage."

The wholesale salesmen must ask: What "status quo" does the resolution refer to? Is it the "status quo" prior to the United States Supreme Court's decisions in the Silk and Greyvan cases and with it a reversion back to the strict common law "master and servant" theory of employee? If it be that "status quo" which the proponents of the resolution have in mind, the wholesale salesmen are then most certainly unalterably opposed to it, for it must mean denial of security benefits under the act to a great number of the wholesale salesmen of America. A narrow legal theory of "control" would perforce serve as a complete avenue of escape for those employers who, even under the present common law as declared by the Supreme Court in the Silk and Greyvan cases, are still most adamant about accepting the social and financial duty and responsibility placed upon them by the Social Security Act.

The relationship between many wholesale salesmen and their employers is, unfortunately for the salesmen, inately such that so many of them do fall into that twilight zone of coverage. The national council has been having great difficulty to deal with that problem. It is now most fearful lest House Joint Resolution 296 will resolve that twilight zone by casting the greater number of the wholesale salesmen into the darker side of that zone and out of the light and benefit of the Social Security Act.

The national council sincerely believes that the wholesale salesmen, with those exceptions alluded to above, are employees under the Social Security Act in every realistic, sound, genuine, and practical sense of the word. The theory and philosophy of the United States Supreme Court in the Silk and Greyvan cases confirm that, and by those decisions assures those wholesale salesmen that they will receive the full benefits of the act.

We would, of course, prefer direct congressional assurance by means of an appropriate amendment to the Social Security Act expressly including those wholesale salesmen. The 1939 congressional committee's proposed amendment may well, with some proper revision, serve as the answer. We look to the Senate's Social Security Advisory Committee's report to include a recommendation for the express inclusion in the act of specific types of employees such as the wholesale salesmen. Following such a recommendation, it is our further hope that subsequent congressional action will proceed accordingly.

However, until such time, the answer is not House Joint Resolution 296. In this connection, it may be that the Treasury's new proposed regulations go further than the Supreme Court's decisions in the Silk and Greyvan cases. We do not believe that they do. However, even assuming that they do, the answer does not lie in the passage of House Joint Resolution 296. Congress will, with the completion of the advisory committee's report, act thoroughly and completely on the whole subject matter. The problem of sound and proper "employee" coverage, we hope, will then be resolved, to the extent at least that it can be so

resolved. But as far as the interim period is concerned, it appears clear to us that rather than revert through House Joint Resolution 296 to the "usual" common-law rules, and with it further restrict the social-security coverage of the wholesale salesmen and the others like him, the fairer and prefarable course would be not to pass House Joint Resolution 296.

In short, we see no valid reason or need for this resolution. It certainly does not help to resolve these border-line cases of coverage. If anything, greater confusion may result. The administrative problem would not be simplified thereby. Nor was it the intent of the 1935 Congress, when it passed the Social Security Act, to restrict coverage to those who met a common-law master-servant "control" test of employer-employee relationship. If any intent is to be derived from their purposeful omission in the act of the defintion of the word "employee," it was that the common law ,as our Supreme Court has helped and continues to help develop, should be decisive. We are told by our legal philosophers of the growth of the common law, of its continuing change and evolution to meet the realities of our complex economic and social life. Was not that the common law, and not the "usual" common law, whatever that may mean, that was intended by the 1935 Congress to be determinative when it passed the Social Security Act? And, as for this Congress, we respectfully submit that its aims and purposes should likewise be projected to the realities of our industrial life and the economic needs of our people. If it be so, and we trust it is, then House Joint Resolution 296 should not be passed.

With the very life of our democracy seriously at stake today, it would well behoove our legislative representatives to show the world that here in America our social-security laws will continuously be broadened to meet and eventually help solve the economic weaknesses of our democratic system, leaving with it the full advantages that it offers to our people. The passage of House Joint Resolution 296 would not offer reassuring proof of that.

In closing, I want to thank this committee, on behalf of the national council and its member organizations, for this opportunity to submit its views. We urge the committee's careful consideration of the problem of the wholesale salesman. He is, in a peacetime economy, the key to business and industrial prosperity in our country. When prosperity is with us he is among the last to share its benefits, yet in those recurrent periods of economic distress he is among the first to suffer. He is in many respects the "forgotten man" of both business and industry. Is he also to be denied the full benefits and protection afforded by the Social Security Act?

Respectfully submitted.

NATIONAL COUNCIL OF SALESMEN'S ORGANIZATIONS,
By MITCHELL M. SHIPMAN, *General Counsel.*

APRIL 2, 1948.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
DEPARTMENT OF GOVERNMENTAL AFFAIRS,
Washington 6, D. C., April 1, 1948.

The Honorable EUGENE D. MILLIKIN,
Chairman, Committee on Finance,
United States Senate, Washington 25, D. C.

DEAR SENATOR MILLIKIN: The Chamber of Commerce of the United States favors the enactment of House Joint Resolution 296, a joint resolution to maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage. It is respectfully requested that this letter be incorporated in the record of the hearings on the measure by the Senate Committee on Finance.

The Chamber of Commerce has long supported social-security legislation as well as proposals for extending and improving the existing programs in this field. It has supported the appointment of the Senate Finance Committee's Social Security Advisory Council, now engaged in a study of the difficult problems involved in extending and improving social security.

In particular, the chamber favors an extension of coverage under the old-age and survivors insurance program, insofar as feasible, to all employees and self-employed persons not now covered thereunder. With substantially complete coverage, the program will approach its objective of providing a basic floor of protection for all against the hazards of old-age dependency and of the premature death of the family breadwinner.

However, social-security coverage should be extended by congressional action rather than by judicial decision or administrative regulation; extensions of coverage should be prospective rather than retroactive; and any wages taken into account for benefit purposes—whether through a coverage extension or otherwise—should also be subject to the social-security pay-roll taxes.

The purpose of House Joint Resolution 296 is to make clear a congressional intent that the existing Treasury regulations with respect to social-security coverage should remain in effect until Congress acts on the various proposals for coverage extension. The need for the enactment of this resolution arises because, pursuant—statedly—to several recent Supreme Court decisions, the Treasury Department has published in the Federal Register the text of proposed regulations which would discard the usual common-law tests for determining employer-employee relationship and would substitute a number of broad and vague criteria that would mean a coverage extension to at least half a million persons normally considered as self-employed.

Apart from the questions of (*a*) whether the Supreme Court decisions represent a sound interpretation of existing law and of (*b*) whether the proposed regulations were actually necessitated by the decisions, it is a simple fact that these hundreds of thousands of persons would suddenly find themselves covered by the social-security legislation despite the lapse of more than a decade during which they had every reason to believe that the legislation did not apply to them. Unquestionably, this amounts to an extension of coverage—an extension not a result of careful and painstaking legislative deliberation but rather a somewhat chaotic extension planlessly resulting from judicial and administrative action.

One particularly unfortunate consequence of a coverage extension coming in this way is that it is retroactive to the adoption of the original Social Security Act in 1935. As the law has not changed, the assumption must be made—and is made in the proposed regulations—that the persons apparently acquiring coverage had actually been covered all the time. Yet, the back-wage records, on which benefits would hinge, would not be readily available, could not easily be reconstructed, and—where reconstruction was possible—the use of some of the wage records would be barred by statutes of limitations. To put it mildly, the situation would be obscure and confused in extreme degree.

Still further, it is estimated that under the new regulations, a billion and a quarter dollars a year of back-wage records might be established for each of the 4 or 5 years not barred by statutes of limitations. Many thousands of persons would receive benefits on such records though the collection of the corresponding back taxes would be obviously impractical; in fact, the Treasury has already stated its intention of "forgiving" the back taxes that would be due. Such an utterly unjustifiable situation—of benefit eligibility without tax payments—exists at present, in some degree, by reason of the divisions of opinion and of function between the Federal Security Agency and the Treasury Department, but the magnitude of the abuse would be greatly increased were the proposed regulations to take effect.

Indeed, payment of benefits on a large scale, in cases where there had been no prior tax payments, would so violate the basic contributory principle of the program that public confidence in it would be jeopardized. On the other hand, the adoption of House Joint Resolution 296—by clarifying congressional intent—would minimize the area within which benefits could be based on wages never subjected to the social-security pay-roll taxes.

For these chief reasons, the Chamber of Commerce urges the adoption of House Joint Resolution 296. Moreover, the Chamber urges prompt congressional action to extend social-security coverage by legislation.

Cordially yours,

CLARENCE R. MILES, *Manager.*

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
New York 17, N. Y., March 31, 1948.

Hon. EUGENE D. MILLIKIN,
Chairman, Senate Finance Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR MILLIKIN: The American Newspaper Publishers Association asks to be recorded as opposed to the revised definitions of the word "employee" as proposed by the Commissioner of Internal Revenue and published in the Federal Register of November 27, 1947.

The ANPA is a trade association comprising more than 800 daily newspapers representing approximately 90 percent of the daily newspaper circulation.

It is felt that the definitions proposed by the Commissioner of Internal Revenue establish standards so broad in the determination of who is and who is not an employee, that if they become effective the result will be that the independent contractor practically ceases to exist, so far as the Social Security Act is concerned. The ANPA believes that no such coverage was intended by the Congress when it passed the Social Security Act, and there is nothing to indicate the Congress contemplated that under this act the centuries-old common-law definition of "employee" would be abandoned for a theory having as its basic concept "economic reality."

The primary responsibility of the ANPA is to consider those aspects relating to the newspaper business. If these proposed regulations are put into effect many activities in the newspaper business heretofore considered soundly established on an independent contractor relationship might readily be changed into an employer-employee relationship. Among these activities are newspaper vendors; newspaper carrier boys over 18 years of age; newspaper deliverers and distributors; truckers of newsprint; columnists and feature writers; correspondents; photoengraving shops operated by others but devoted more or less entirely to production for one newspaper; other operations devoted entirely to one newspaper. The relationship between writers, artists, and syndicates might also be affected by some of the provisions in the proposed regulations.

There is nothing in the history of the Social Security Act leading to the thought that Congress intended "economic reality" to be substituted for the common-law definition of the word "employee." The first bill introduced in the House contained a definition of "employee" in part as follows: "The term 'employee' shall include every individual * * * under any contract of employment or hire, oral or written, express or implied." That was not adopted. In the act no effort is made to define "employee," and in the light of action by the Congress in refusing the definition of "employee" it must be assumed that "employee" was to continue to be defined by the common-law precept which has existed for centuries.

The Commissioner of Internal Revenue states that in his proposed revised definition of "employee" he must be guided by dicta of the Supreme Court of the United States in *United States* v. *Silk* (U. S. 91, L. Ed. 1335, 1341); *Harrison* v. *Grayson Lines, Inc.* ((1947) 331 U. S. 704); and *Bartels et al.* v. *Birmingham et al.* ((1947) 332 U. S. 126). As against the holding of the Supreme Court in those cases, there have been innumerable decisions by the Federal courts since the Social Security Act became law based on the established common-law understanding of what constitutes an employee.

An Advisory Council on Social Security was appointed by the Senate to make a study of the entire social-security program and make recommendations for legislation. Until the Congress has had an opportunity to act on the study made by this Council, it is the hope of the ANPA that nothing will be done by executive or administrative action to change the present general coverage of the Social Security Act.

House Joint Resolution 296 which is now being considered by the Senate Committee on Finance does nothing more nor less than to maintain, until the Congress has had opportunity to act, a situation which has existed since the Social Security Act became law. It aims to prevent action by the administrative agency in broadening coverage of the act but at the same time permits the administrative agency to continue to rule on border-line cases as it has done in the past. Until the Congress itself shows by enacting laws that it wishes to change from the established common-law basis of determining an employee to the new concept of "economic reality," the ANPA respectfully requests that the Bureau of Internal Revenue be instructed through enactment of House Joint Resolution 296 to make no such radical change either through definition or administration.

With assurances of high esteem, I am

Sincerely yours,

CRANSTON WILLIAMS, *General Manager.*

AMERICAN PUBLIC WELFARE ASSOCIATION,
Washington 6, D. C., March 31, 1948.

Senator EUGENE D. MILLIKIN,
Senate Office Building, Washington, D. C.

DEAR SENATOR MILLIKIN: In view of the fact that Mr. Stanley, clerk of the Senate Finance Committee, has informed me that the schedule of witnesses to be heard on House Joint Resolution 296 is now complete, I am taking the liberty of submitting this brief statement which I will be glad to have inserted in the record of hearings if appropriate in order to reflect the point of view of the public-welfare administrators and workers who make up the membership of this association.

There is a strong and ever-growing conviction among those persons who administer public assistance that the most pressing need in social security today is the extension of coverage under the old-age and survivors insurance program to all working people, and a sufficient liberalization of benefits under this program to meet the reality of the present price situation. We were therefore much encouraged by your statement in connection with the debate on the tax bill on March 22 that the prospects for House action on this matter now appeared good and that the Advisory Council on Social Security would have completed its recommendations on old-age and survivors insurance coverage in sufficient time to permit Senate consideration of any House bill which might come over. We have ourselves been in touch with members of the Social Security Subcommittee of the House Ways and Means Committee and have been encouraged to believe that the committee might take early action on the question of coverage.

In view of the fact that there now seems a definite probability that the Senate Finance Committee will have the opportunity to consider the total question of coverage in terms of a House-approved measure, we would like to urge postponement of Senate action on House Joint Resolution 296, which raises complicated legal questions of employer-employee relationships and confusing problems of congressional intent both of which would prove quite unnecessary should the total question of coverage be approached on the broad front so much desired by all those interested in the social-security problem.

Sincerely yours,

ELIZABETH WICKENDEN, *Washington Representative.*

MORTON MANUFACTURING CORP.,
Lynchburg, Va., March 31, 1948.

Senator EUGENE D. MILLIKIN,
Senate Committee on Finance, Washington, D. C.

MY DEAR SENATOR MILLIKIN: I am writing to you concerning House Joint Resolution 296 in the hope that you can lay before your committee some aspects of the problems created by the proposed Treasury regulations redefining the status of employees under the social-security laws. Our company through established practices over a 30-year period has worked out its arrangements with its customers who, by some standards, could be called dealers. We have about 18,000 such dealers located in some 47 States and in the District of Columbia. Can they be said to be "employees" within the meaning of State unemployment-compensation laws? If they drive automobiles, are they to be considered "employees" for the purpose of rendering us liable for acts of negligence on their part? If they are to be called employees, will we be required to qualify under the State corporation laws of all of the several States in order to do business in those States? If they are "employees," has Congress fixed their status in that relationship? These, Senator Millikin, are just a few of the questions which are bothering us in the light of the proposed Treasury regulations. Under the present law and under the regulations now in force, our status is definite and fixed on all of these points, and we know just where we stand. Therefore, it seems to us that any measure which will preserve the status quo until Congress has had a change legislatively to fix the bounds within which we must operate is desirable. We therefore further wish to urge favorable action on House Joint Resolution 296, which has received the overwhelming support of the House of Representatives.

Let me submit a brief outline of the facts describing our method of doing business.

We sell some 200 products consisting of toilet preparations, flavorings, and other food products, household products, and simple home remedies. These products are sold outright to some 18,000 customers throughout the United States.

The dealer sells to customers in his community by calling on his prospect through so-called house-to-house canvass. We exercise no control over the amount of time the dealer devotes to selling, the volume of business he sends to us, or his privilege to buy from others. We believe these dealers to be as independent in their relationship to us as that of the retail grocer who buys from his wholesaler.

The average size of orders received is about $10. The dealers are men and women who are not accustomed to keeping sales and profit records of their transactions. Many of them are older men and women who devote a few hours a week to the activity and who are physically unfit to work at a regular job, and in this way produce a profit from their sales which is often an important economic factor in their lives. With few and rare exceptions, these dealers are people who have never been engaged in the conduct of a business that requires the keeping of books or accounts, and their entire lives have been lived outside of the business world.

Since we do not fix the selling price, prices are suggested only, we believe it impossible to determine the profit from sales of these dealers. Many of them sell the products of other manufacturers and we do not believe them capable of segregating the various transactions, and keeping an adequate system of accounting.

Our dealers are scattered over the country, mainly in about 35 States, and for the most part they live in rural communities, villages, small towns, or in the outlying sections of cities. The average volume of business received from the average dealer is very small, not over one to two orders per month, and we are unable to think of any procedure through which the amount of social security or withholding tax can be determined. If a way could be found for establishing the figures, the cost of administration would be prohibitive.

I will greatly appreciate your courtesy in causing my letter to be included in the record of hearings of your committee.

With appreciation, believe me,

Very truly yours,

MORTON MANUFACTURING CORP.,
CHARLES F. MYERS,
Secretary-Treasury.

[Telegram]

LOUISIANA, MO., *March 8, 1948.*

Senator FORREST C. DONNELL,
United States Senate:

Bureau Internal Revenue proposed regulations broadening scope of term "employee" so complicated as to lead to confusion and doubt concerning future relationships between our company and its agents. Proposed definition term "employee" goes far beyond common law acceptance which Congress approved in 1939. On this basis we ask support to approve Senate Joint Resolution 180.

STARK BROS. NURSERIES & ORCHARDS CO.

THE NATIONAL ASSOCIATION OF LIFE UNDERWRITERS,
New York 18, N. Y., March 24, 1948.

Re House Joint Resolution 296 (Gearhart resolution).

Hon. EUGENE D. MILLIKIN,
Chairman, Senate Finance Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR MILLIKIN: The Gearhart resolution, now pending in the United States Senate, has placed the National Association of Life Underwriters in a very awkward position.

Prompted only by the conviction that all citizen should share equally in the benefits provided by a benevolent government, this association has argued con-

tinuously for the broadening of the scope of the act to include all gainfully employed. The files of the Ways and Means Committee will indicate that we have filed formal briefs and repeatedly presented oral testimony designed to persuade Congress that the Social Security Act should be amended.

Many life-insurance agents are clearly in the "twilight zone" of employment. The Social Security Administration, upon reviewing the circumstances surrounding the employment of these agents, has declared many of them (acting as agents for many different companies) to be eligible for benefits, or has established wage credits for them. The general counsel of the Treasury, prior to November 27, 1947, held that such "ordinary commission agents" were not in covered employment under the act as amended in 1939 and, therefore, did not levy social-security taxes upon their earnings.

Following the Silk, Greyvan, and Bartels decisions in June 1947, the Treasury issued new regulations concerning "covered employment" and these regulations inspired the "Gearhart resolution." The members of this association were well pleased with the new regulations of the Treasury Department since their promulgation would have made our ordinary commission agents eligible to participate in the benefits of the Social Security Act, and they are most anxious to be included.

Strictly as a matter of principle, we never appeared before the Treasury Department prior to the Supreme Court decisions in June 1947 to debate with them their attitude relative to the proper definition of "employee." We believed that it was the Department's sole responsibility to make such a determination without suggestion from our Association.

Still inspired by the same principle, we are not at all disposed to communicate with committees or Members of Congress to debate the merits of House Joint Resolution 296. We agree completely that this is a matter which should be resolved by the Congress. We do not, however, enjoy being left out in the cold while this controversy persists.

May we most respectfully, therefore, express the hope that the Congress will not delay beyond the present session in giving full and complete consideration to proper revisions of the Social Security Act to the end that those citizens who are richly entitled to its benefits will be no longer denied their rights.

May we again point out, as we have before the Ways and Means Committee, that there is no group in the United States that has worked more religiously or cooperated more fully to make the Social Security Act a complete success than have the members of this Association. We have worked diligently to make the act fully understood and appreciated, and we have coordinated social-security benefits with the life insurance and estate plans of millions of citizens. This, I believe, will explain why we feel that we are so richly entitled to your prompt and effective consideration of the proper revisions of the act.

Cordially,

JUDD C. BENSON,
Chairman, Committee on Federal Law and Legislation,
National Association of Life Underwriters.

THE NATIONAL ASSOCIATION OF LIFE UNDERWRITERS,
New York 18, N. Y., April 5, 1948.

Hon. EUGENE D. MILLIKIN,
Chairman, Senate Finance Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR MILLIKIN: This letter supplements my letter of March 24 relative to House Joint Resolution 296, and is inspired by information acquired during the recent public hearings on the resolution before your committee. Either Mr. Hallett, our headquarters attorney, or I were in almost continuous attendance during the hearings.

On behalf of our members, I wish to clearly establish certain facts, and then respectfully submit for the consideration of your committee a suggestion which may help to accomplish the stated object of the resolution, and at the same time eliminate any possible hardship which might accrue to any worker or the beneficiaries of any worker while the scope of coverage under the Social Security Act is being carefully reviewed by the Congress.

The facts are:

(1) The governing body of this association voted against a formal appearance in connection with the resolution in view of the fact that the Report of the

Ways and Means Committee (No. 1319) stated: "The issue involved in the proposed regulations is whether the scope of social security coverage should be determined by the Congress or by other branches of the Government."

We are not inclined to comment upon the already clearly established prerogatives of the Congress.

In view of the fact that two administrative arms of the Government have placed completely different interpretations upon the intent of Congress by issuing inconsistent regulations for the determination of "employee status" under the Social Security Act, we find several thousand of our members in a state of complete confusion.

However, it is scarcely the responsibility of this association to attempt to resolve these administrative inconsistencies created by the Social Security Administration and the Treasury Department, in spite of the fact that the resulting confusion may have adversely affected several thousand of our members.

(2) It has been impossible for this association to recommend to its members that they should or should not appear before the Social Security Administration and seek a determination of status designed to establish their eligibility for wage credits or benefits under the Social Security Act. This is true because—

(*a*) It is the present policy of this association to make no recommendation to a member that he or she should seek benefits from a governmental agency so long as we are in possession of the "practical knowledge" that he is precluded from placing himself in a position to pay the appropriate tax which will support those benefits; and

(*b*) There is nothing in our bylaws which in anywise imposes upon any member the obligation to be governed by the attitude or recommendation of the association insofar as his individual rights are concerned.

(3) This association has long since called to the attention of the Congress the fact of the glaring inconsistency in the administration of the Social Security Act by two administrative branches of the Government, and has urgently sought relief through a clarification of the definition or including all those gainfully employed. In any event, we insisted that the matter should be resolved.

(4) Some groups have sought relief by asking Congress to pass legislation, specifically "including" or "excluding" certain categories of persons under the act. Our road to this relief is barred because it is a clearly established policy that this association does not believe in class legislation and, therefore, will not seek such relief for its members.

OUR SUGGESTION

We respectfully suggest that inasmuch as the resolution is designed "to maintain the status quo in respect to certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage," the objects of the resolution would best be accomplished if section 2 (a) section 1101 (a) (6) might be amended as indicated in the resolution, except that determinations after January 1, 1948, would be limited to those workers who have (a) attained age 65, and (b) beneficiaries of workers whose death occurred on or after January 1, 1948.

At once admitting the seeming legal inconsistency of the suggestion, we commend to your consideration its practical advantages which we believe to be as follows:

(1) Those workers and beneficiaries of workers who were reluctant to seek a determination of benefits due to the confusion and inconsistencies would not be precluded the right of determination under the more liberal definition as laid down in the Silk case, until such time as Congress finds it convenient to review the scope of coverage.

(2) The number of people affected, presuming Congress acts within the next 12 months to clarify the statute, would not exceed 6,000 to 7,000, and this reduction of the possible error reduces the problem markedly. We submit that it would be more desirable to err on the side of liberality for these few people than to deprive them of possible benefits to which they may be entitled.

(3) The alternate, of course, is to suggest that Congress can easily provide retroactive benefits to January 1, 1948, in the event a majority in Congress should ultimately conclude to accept the most liberal interpretation and adjust the statutes accordingly. While it may be argued that this is fair, may I suggest that it is not realistic or particularly helpful in the relatively small number of instances where hardship might result from the imposition of the more rigid common law rules in determination of "employer-employee status."

(4) Finally, we wish to point out that no injustice will be done to those persons who might apply merely for "eligibility to establish wage credits" because the Congress could easily provide retroactive relief for that group of people in the event the statutes are changed.

To summarize—we readily agree that a state of confusion exists and, reduced to its simplest terms, our suggestion is to narrow, as far as possible, the group of people to whom the confused set of circumstances applies and grant that small group the benefit of the doubt until the Congress takes appropriate action to relieve the confusion.

May I express our appreciation for your consideration with the hope that its practicality will exceed in importance its seeming legal inconsistency.

Cordially yours,

JUDD C. BENSON,
Chairman, Committee on Federal Law and Legislation,
National Association of Life Underwriters.

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