Calendar No. 1298

80TH CONGRESS 2d Session | SENATE | REPORT No. 1255

MAINTAINING THE STATUS QUO IN RESPECT OF CERTAIN EMPLOYMENT TAXES AND SOCIAL-SECURITY BENEFITS PENDING ACTION BY CONGRESS ON EXTENDED SOCIAL-SECURITY COVERAGE

MAY 6 (legislative day, MAY 4), 1948.—Ordered to be printed

Mr. MILLIKIN, from the Committee on Finance, submitted the following

REPORT

[To accompany H. J. Res. 296]

The Committee on Finance, to whom was referred the bill (H. J. Res. 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, having considered the same, report thereon with amendments and, as amended, recommend that the bill do pass.

The committee amendments strike out the language appearing after the word "any" in line 17 of the referred bill and substitute the following:

(1) Wage credits reported to the Bureau of Internal Revenue with respect to services performed prior to the enactment of this Act or (2) wage credits with respect to services performed prior to the close of the first calendar quarter which begins after the date of the enactment of this Act in the case of individuals who have attained age sixty-five or who have died, prior to the close of such quarter, and with respect to whom prior to the date of enactment of this Act wage credits were established which would not have been established had the amendment made by subsection (a) been in effect on and after August 14, 1935.

(c) (1) The Federal Security Administrator is directed to estimate and report to the Congress at the earliest practicable date (A) the total amount paid as benefits under title II of the Social Security Act which would not have been paid had the amendment made by subsection (a) been in effect on and after August 14, 1935, and (B) the total amount of such payments which the Administrator estimates will hereafter be paid by virtue of the provisions of subsection (b).

(2) There is hereby authorized to be appropriated to the Federal old-age and survivors' insurance trust fund a sum equal to the aggregate of the amounts reported to the Congress under paragraph (1).

WHAT THE JOINT RESOLUTION WOULD DO

1. The joint resolution would reaffirm the unbroken intent of Congress that the usual common-law rules, realistically applied, shall

continue to be used to determine whether a person is an "employee" for purposes of applying the Social Security Act.

2. The resolution would maintain the status under the act of those who, prior to the enactment of the resolution, have been given coverage by erroneous construction of the term "employee" (as defined in the resolution) if social-security taxes have been paid into the old-age and survivors' insurance trust fund with respect to the covered services.

3. The resolution would assure continued benefits to those who will have attained age 65, and to the survivors of those who will have died prior to the close of the first calendar quarter which begins after the enactment of the act and who have coverage under the system because of misconstruction of the term "employee" (as defined in the resolution) even though social-security taxes have not been paid by them or in their behalf.

4. The resolution would stop extension of coverage of the act to between a half and three-quarters of a million persons who have not been, are not now, and should not be under the act, until coverage is provided by act of the Congress.

5. The resolution would stop the plan of the Treasury Department to give to these 500,000–750,000 persons free, retroactive coverage, and thus would stop a more than one-hundred-million-dollar impairment of the old-age and survivors' insurance trust fund which has been built up out of taxes collected on the wages of those who are truly "employees" and who have paid for their coverage under the system.

6. The pending resolution would not disturb the existing Treasury regulation which construes the term "employee" in the Social Security Act harmoniously with the usual common-law rules.

7. The pending resolution will maintain the moving principles of the decisions of the United States Supreme Court in the Silk, Greyvan, and Bartels cases where, in the opinion of your committee, the Court realistically applied the usual common-law rules. But if it be contended that the Supreme Court has invented new law for determining an "employee" under the social-security system in these cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied.

8. The resolution preserves the integrity of the trust fundby limiting payments out of the fund to persons who are "employees" under the act by the usual common-law rules, realistically applied. It leaves to Congress the opportunity to provide coverage for independent contractors and the self-employed, who are not "employees" under the act, or to those who are "employees" and are now expressly excluded from the coverage of the act.

9. The resolution would restore to the trust fund by appropriation moneys which have been paid out of the fund in the form of social-security benefits to persons not "employees" under the act and who have not contributed social-security taxes to the fund.

HISTORY LEADING TO THE JOINT RESOLUTION

The pending joint resolution arises from problems of application of the Social Security Act in the region between what is clearly employment and what is clearly independent entrepreneurial dealing.

"Employees," or their survivors, receive the benefits paid under the act; "employers" share the taxes to provide the benefits and have weighty administrative duties. Manifestly the applicable rules determining whether a relationship is that of employer and employee, or a relationship in which the parties deal independently with each other, involve important security, and tax and cost consequences for many of our citizens.

The basic assumption since the act became operative in 1936 has been that the term "employee" in the act has its common meaning; which is to say, the usual meaning under common law.

The usual common-law rule defining an "employee" is well stated in the Treasury's regulation:

> *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> 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.

This regulation correctly interprets the intent of Congress when it adopted the Social Security Act.

The usual meaning is inherent

The usual meaning of "employee" is natural in the scheme of the act. This is manifest in the report of the Committee on Economic Security transmitted to the Congress with the President's message of January 17, 1935, recommending social-security legislation.

This report proposed (1) a compulsory system of old-age insurance for employed workers to be supplemented by (2) a voluntary system of Government annuities for others.

Dr. J. Douglas Brown, a member of the Committee on Economic Security now serving the Committee on Finance as member of its Advisory Council on Social Security, in 1935 presented the outlines of these complementary plans to the Congress in the following words:

> * * * This is the old-age security part of the bill:
>
> * * * A Federal plan of *compulsory contributory old-age insurance* to provide a means whereby employed workers with the help of their employers may insure themselves against dependent old age, and lift themselves through thrift up from the level of dependency on public or private charity in old age. * * * [This] plan is contributory and contractual and affords an annuity as a matter of right It applies to all employed persons receiving less than $250 a month * * *
>
> A Federal plan of *voluntary old-age annuities* to provide self-employed persons such as shopkeepers and farmers a means whereby they may make secure and economical provision for old age.
>
> The * * * [two] plans complement each other, one covering employed persons, the other self-employed. (Economic Security Act, Hearings, House of Representatives, 1935, p. 240.)

The Congress did not adopt the voluntary plan, but did enact the compulsory plan substantially as recommended. Under a title providing definitions the act [Section 1101 (a) (6)] says, simply, that:

> The term "employee" includes an officer of a corporation.

It was not necessary to go beyond this simple statement to express the intent that the usual meaning of "employee" should prevail except

that the term should be taken to mean also "an officer of a corporation."

The usual meaning was accepted in the administrative regulations

At the time the act was adopted there was no doubt or dispute or question that "employee" in the act had its usual common-law meaning. The Federal Security Agency (then the Social Security Board) and the Treasury Department proceeded promptly after enactment of the act to issue their interpretative regulations and these, identical in their provisions, were substantially the same as the now-existing regulations:

REGULATIONS 91,[1] ARTICLE 3: WHO ARE EMPLOYEES

Who are employees.—Every individual is an employee if the relationship between him and the person for whom he performs services is the *legal relationship of employer and employee.*

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.

In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Considering this regulation years later a learned judge said:

We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an "employee" and an "independent contractor"—it is really no more than a gloss upon the definition contained in Justice Gray's opinion in *Singer Manufacturing Co.* v. *Rahn* (132 U. S. 518, 523) * * *. The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborates it. * * * —Judge Learned Hand in *Radio City Music Hall Corp.* v. *U. S.* (135 F. (2d), 715 (1943)).

The Congress rejected as "unwise" proposals to enlarge the ordinary meaning of employee

The intention of the Congress that "employee" in the Social Security Act should have its usual meaning under common-law rules, realistically construed, was reaffirmed when the Congress made fundamental revisions of the act in 1939 to establish the present

[1] Presently numbered Regulations 106402.204.

system of old-age and survivors' insurance. The Congress at this time considered the definition of "employee" in the act and rejected a Social Security Board proposal to enlarge it so as to encroach into the field of independent contractors and the self-employed. The proposal was to broaden the definition of "employee" 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.* [Emphasis supplied.] 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. (Hearings, Committee on Ways and Means, House of Representatives, 1939, p. 8.)

In answer to questions submitted in writing to the Board the Board's proposal was further defined, and limited, as follows:

> Question. Do you mean by the inclusion of salesmen the inclusion of those people who are now classified as independent contractors?
> Answer. The intention of this proposal is to clarify the employee relationship of certain persons who are now on the border line of coverage. There is no intention to include all so-called independent contractors (id., p. 2300).

After hearings the Committee on Ways and Means of the House of Representatives reported a bill including an amended definition of "employee" to accomplish the proposal. In its report the Committee on Ways and Means said of the proposed amendment:

> *The tests for determining the (employer-employee) relationship laid down in cases relating to tort liability and other common-law concepts of master and servant should not be narrowly applied.* In certain cases even the most liberal view as to the existence of the employer-employee relationship will fall short of covering individuals who should be covered. For example, certain classes of salesmen. In the case of salesmen it is thought desirable to extend coverage *even where all the usual elements of the employer-employee relationship are wholly lacking* and where accordingly even under a liberal application of the law *the courts would not ordinarily find the existence of the master and servant relationship.* It is the intention of this amendment to set up specific standards so that individuals performing services as salesmen may be uniformly covered *without the necessity of applying any of the usual tests as to the relationship of employer and employee* (Rept. 728, 76th Cong., 1st sess., p. 61). [Emphasis supplied.]

The Committee on Finance, in hearings on the House-passed, amended bill, heard testimony by proponents and opponents of the amended definitions of "employee" and "employer," considering this testimony in the light of the common-law definitions of "employee" and "independent contractor" as stated in the Treasury Regulations, and deliberated on whether the term "employee" in the Social Security Act should have its meaning according to the usual principles of the common law or should be given a special statutory definition. In reporting its conclusion to the Senate the committee said:

> The House proposal to extend coverage to salesmen who are not employees has been stricken out by the Committee. It is believed inexpedient to change the existing law which limits coverage to employees * * * (Senate Report 734, 76th Cong., 1st sess., p. 75).

The committee action was explained on the floor of the Senate:

> Mr. HARRISON. There is a proposal in the House bill for the extension of coverage to salesmen. Under the present law, whether a salesman is covered depends upon the test of whether he is an employee in the legal sense, and your committee believes that it would be unwise at this time to attempt any change * * *.

The Senate adopted the recommendations of the committee, the bill went to conference and the action of the Senate was upheld (Conference report, Rept. 1461, 76th Cong., 1st sess., p. 14).

By enactment of the bill the Congress adopted the rules for distinguishing "employee" and "independent contractor" set out in the Treasury Regulation.[2]

The pending resolution (H. J. Res. 296) merely affirms the existing definition of "employee" in the act and the legislative action taken in 1939 with special reference to this definition.

Lack of uniformity of Federal court decisions applying the term "employee"

In the intervening years prior to the decisions of the United States Supreme Court in 1947, a lack of uniformity developed in Federal district and circuit court decisions construing the term "employee" in the Social Security Act.

The general tendency among the lower Federal courts, when presented with the problem of determining the existence of an employer-employee relationship, was to adopt the precedents of local law. These varying among the different States, considerable conflict in lower court decisions followed even though the factual situations presented for determination were not unlike.

Moreover when the cases presented were on a claim for benefits, the courts tended to a liberal construction of the term "employee." On the other hand, when the cases were on an assessment of taxes, particularly where penalties were involved, the courts tended to construe the term "employee" more strictly.

In consequence the application of the Social Security Act has not been uniform throughout the Nation.

Conflict of viewpoints and actions of the administrative agencies

The courts have not been aided by the administrative agencies, for here too there has been serious conflict of viewpoints and actions respecting application of the act. The Federal Security Agency, which has the responsibility for administering the benefits provided by the act, has strained the meaning of "employee" to place persons on the benefit rolls and—as was revealed to your committee during its consideration of the pending resolution, and as appears certain—has "gone too far in some cases." [3]

The Treasury Department, charged with the responsibility for collecting the taxes imposed on employees and employers under the act, has proceeded with more careful view of the authority conferred by the statute—at least until recently.

Dissipation of the old-age and survivors' insurance trust fund

The discordant meanings assigned to "employee" by the two administrative agencies charged with applying the tax and benefit provisions of the Social Security Act have resulted in uncompensated withdrawals from the trust fund which has been built up from the contributions of persons who have paid social-security taxes and to which the 33,000,000 persons now insured under the act look for payment of their benefits.

[2] "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes are deemed to have received congressional approval and have the effect of law" [*Helvering* v. *Winmill* (59 S. Ct. 45)]. The existing regulations were specifically held to have been approved by Congress and therefore to be in conformity with the law in *Jones* v. *Goodson* (121 F. (2d) 176; C. C. A. 10, 1941).

[3] In the words of the testimony of the Federal Security Administrator (Hearings, Finance Committee p. 137).

This aspect of the present problem is discussed more fully further on. The pending resolution would restore the losses sustained by the fund and preserve it from further dissipation and loss.

Decisions of the Supreme Court

The conflict of decisions by Federal district and circuit courts did not manifest itself markedly until 1945. To resolve the conflict the Supreme Court assumed jurisdiction of three cases involving the coverage of the Social Security Act, handing down its decisions in these cases in June 1947. The cases are:

United States v. *Silk* (331 U. S. 704)
Harrison v. *Greyvan Lines, Inc.* (331 U. S. 704)
Bartels v. *Birmingham* (332 U. S. 126)

These cases are discussed at length in a following section of this report.

In the view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.

But, we repeat, if it be argued that the Supreme Court decisions establish a new definition of "employee," then it is the purpose of this resolution to reestablish its meaning according to the usual common-law rules, realistically applied.

The proposed Treasury Department regulation

In November 1947 the Treasury Department proposed, and unless stopped by the Congress will make effective, a new regulation construing the term "employee," with which it would supersede the regulation that has been in force during the period the act has been effective.

An analysis of this regulation is presented in the following pages. In a word, by unbounded and shifting criteria, it would confer in those administering the Social Security Act full discretion to include, or to exclude, from the coverage of the act any person whom they might decide to be, or might decide not to be, an "employee"; and like discretion to fasten tax liabilities and the administrative duties and costs of compliance with the act upon any person whom they might decide to be an "employer."

Moreover, at the cost of the many millions of workers who with their employers have faithfully paid for their status under the social-security system, and have the right to believe the trust fund established by the act will not be impaired or dissipated, this proposed regulation would grant retroactive, free coverage for a period of four years or more to, by the explicit statement of officials testifying to your committee, from five hundred to seven hundred and fifty thousand persons.

Need for the pending joint resolution

The situation thus outlined obviously calls for a reassertion of congressional intent regarding the application of the act, and for steps to preserve the integrity of the old-age and survivors' insurance trust fund. Both are provided in the pending joint resolution.

THE ISSUE

The issue presented by the proposed regulation is not whether the coverage of the Social Security Act ought to be extended. That is for Congress to decide.

The issue presented is whether, contrary to the intent of Congress manifested by the act and its legislative history and, in the opinion of your committee, contrary to the Supreme Court's recent decisions construing the meaning of "employee" in the act, the Treasury Department shall be allowed to make its own law as to the meaning of "employee" so as to bring within the scope of the act, by administrative regulation, persons not now covered; and whether the Federal Security Agency shall be permitted to dissipate the old-age and survivor's insurance trust fund through benefit payments to persons, not "employees" under the act, who have not, therefore, made contributions to the trust fund.

OUTLINE OF THE ARGUMENT

The following sections of this report discuss the proposed Treasury Department regulation; the Supreme Court decisions upon which the regulation, allegedly, is based; the answer afforded by the Supreme Court decisions to the arguments advanced by the Federal Security Agency in opposition of the pending resolution; the encroachment represented by the proposed Treasury regulation upon the exclusive power of Congress to extend the coverage of the act; the intended impairment of the old-age and survivors' insurance trust fund by the proposed Treasury regulation; and the situation presented by previous dissipations of the fund.

The falsity of the charges that the resolution would "retract" the coverage of the act from any entitled to its coverage and benefits will be demonstrated in the course of these sections, and on the basis of the record of the testimony given at the hearings.

While the references throughout this report are to the proposed Treasury regulation, it ought to be noted, and emphasized, that the Treasury regulation is the joint product of the Federal Security Agency and the Treasury Department. As your committee was informed by the Federal Security Administrator in his prepared statement at the hearings:

> 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 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 (hearings, Finance Committee, p. 159).

THE PROPOSED TREASURY REGULATION

Pursuant to the Administrative Procedure Act, the Secretary of the Treasury caused to be published in the Federal Register for Thursday, November 27, 1947, a proposed regulation to be effective on January

1, 1948, redefining the employer-employee relationship for the purpose of applying social-security taxes.

Introduction of the pending joint resolution in the House and Senate followed publication of this proposed Treasury Department regulation, but only after the Department had indicated it would persist in its intentions to promulgate the regulation notwithstanding protests that followed the announcement of it.[1]

Based on unsubstantiated, guesswork estimates by the Federal Security Agency, reports were widely circulated and Members of Congress were proselyted to persuade them to believe that the pending joint resolution would "take away the social-security coverage of some half to three-quarters of a million people."

On the contrary, the fact is that the pending resolution would stay the promulgation of a proposed Treasury law-making regulation which would broaden the term "employee" to bring this additional number of persons within the scope of the act and thus dilute its protection to those who are entitled to it.

The impression was cultivated that the resolution would snatch matured benefits from this large number of persons whereas the fact is that of this number only a small fraction is now receiving social-security benefits, and their benefits are not disturbed by the pending resolution in anywise, but on the contrary are by it given authority in law.

* * * 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 * * * is not 500,000, but the persons who are entitled to wage credits * * * as the Administrator just mentioned, we estimate amount to between 500,000 and 750,000 persons.—Testimony of Mr. Arthur J. Altmeyer, Commissioner for Social Security, hearings, Finance Committee April 1 and 2, 1948, page 126.

* * * 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.—Testimony of Mr Adrian W. DeWind, tax legislative counsel, Treasury Department (id., p. 7).

The CHAIRMAN * * * 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?

WITNESS. I could not even hazard a guess. My guess would be that, of the wage records that are now existing for this group of people within our agency, it is a very, very, small percentage of them

The CHAIRMAN. So the bulk of them will come on if this regulation becomes effective?

WITNESS. That is true.—Testimony of Mr. Robert C Ayers, Bureau of Old-Age and Survivors Insurance, Federal Security Agency (Finance Committee hearings, p. 202)

Typical of the persons which the proposed regulation would bring within the coverage of the act, in the light of the testimony at hearings before your committee, are persons who buy goods and sell them from door to door retaining for themselves the excess they secure for the goods over their cost; solicitors who take orders retaining for their services the deposits they collect when they write the order; manufacturers' representatives, commission agents, and insurance salesmen who represent several companies, are compensated by commissions, and are substantially free from direction or control over how they discharge their sales activities; advertising and newspaper and

[1] Notice of proposed rule making, Federal Register, Nov. 27, 1947, p 7966 H. J. Res 296 introduced Jan. 15, 1948; S. J. Res. 180 introduced Jan. 30, 1948

magazine subscription solicitors; artists, entertainers, and writers; mine lessees; timber cutters; lessees of sawmills; bulk oil distributors and contract filling-station operators; many subcontractors in the construction field; journeyman tailors; home workers; taxicab operators; truckers and others who occupy themselves, full time or part time, in a variety of activities which are sometimes those of an employee and sometimes are not.

Frequently these services are performed where supervision of performance is impracticable, if not impossible, and the persons who engage in these activities are largely or wholly free from direction as to how they pursue them, and, in the frequent case, as to when or whether they pursue them.

When these services are performed without any direction or right of direction over the persons who perform them, and the persons who perform them are not in the least accountable for what they do as contrasted with the much tighter accountability of wage earners and salaried workers, then under the *existing* Treasury regulation, and quite properly so, such persons are recognized as "independent contractors," or self-employed in a class with "independent contractors."

By the criteria of the common-law rule they are classified as such. We repeat, the usual common-law rule is well stated in the *existing* Treasury Regulations:

> *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> 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.

Thus the inquiry when proceeding under the usual common-law rule, realistically applied, has a clearly focused and practical end point. The whole field of pertinent fact, documentary and otherwise is available to cast its weight one way or the other. Common sense and our own experiences tell us that the rule so applied will work a sensible sifting of difficult cases.

The concept of "economic reality" basic to proposed regulation

The *proposed* regulation discards the common-law rules for distinguishing the employer-employee relationship distilled from many decisions by many courts out of many insights of real situations, for a new rule of nebulous character.

Under the *proposed* regulation 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."

The rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person? The corner grocer, clearly not an employee, is economically dependent upon his customers, his banker, his supplier. No, the economic reality test must be given sharper meanings. It has an appropriate place in the business before us and we shall come to it after reviewing what the Treasury would make of its new and completely amorphous panacea.

The Treasury in its *proposed* regulation provides for determining whether the employer-employee relationship exists the following factors:

1. Integration of the individual's work in the business to which he renders service.
2. Investment by the individual in facilities for work.
3. Opportunities of the individual for profit and loss.
4. Permanency of relation.
5. Skill required of the individual.
6. Degree of control over the individual.[4]

Uncertainty of the proposed new regulation.

The *proposed* regulation specifies that the listing of the factors for determining the existence of an employer-employee relationship is "neither complete nor in order of importance."

Further it provides:

> Just as the above listed factors cannot be taken as all-inclusive so too the statement of facts or elements set forth in (an amplifying) paragraph * * * cannot be considered complete. *The absence of mention of any factor, fact, or element in these regulations * * * should be given no significance.* [Emphasis supplied.]

And further:

> No one factor is controlling. The mere number of factors pointing to a particular conclusion does not determine the result. All the factors are to be weighted for their composite effect. It is the total situation in the case that governs in the determination.
>
> One fact or element may establish or tend to establish the existence of more than one factor, and may even have an independent value of its own * * *. The weight to be given [the] factor in a particular case depends upon all the facts of that case * * *.

Thus, while purporting to specify criteria by which rights and liabilities under the act can be ascertained, the *proposed* regulation concerns itself mainly, as was stated to your committee by a witness at the hearings:

> * * * 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. The regulation states many criteria which the Commissioner may take into account but then specifically says 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 upon the particular facts of each case; that even if all stated factors point to one conclusion, others not set forth, or even hinted at, may result in an exactly opposite conclusion.—(Robert E. Canfield, Finance Committee Hearings, p. 166.)

Of course, all of the first five of the factors supra which are numbered and specified, and any others which are pertinent to the end-point determination of whether there is common-law control, may and should be used.

But the fatal error of the Treasury's proposed regulation is that this end-point determination of the existence or absence of control under the usual common-law rule as required by the act, as is correctly interpreted by existing regulations and by the legislative history of the act, has been subordinated and diluted and reduced to possibly inconsequential effect by making it into only one (No. 6) of the specified, numbered but completely unweighted factors, and into only one of an unlimited number of unspecified and unweighted factors which may be invented by the administrators to satisfy the exigencies of their future decisions.

[4] The criteria are listed above in the approximate order of emphasis they received at the hearings before the committee in lieu of their order of statement in the published regulation.

The reservation of unbridled powers

The classes of persons who purportedly are entitled to the coverage of the act are not delimited so an individual within the class may know his rights and claim them. The persons upon whom the proposed regulation would impose the duties and liabilities of the act—among the latter liabilities for taxes, and civil and criminal penalties that may involve imprisonment for felony—are provided no stated rule by which to determine their obligations, and must guess themselves to be subject to the uncertain language of the regulation or be at their peril. Whether persons have the rights and obligations of coverage is made by the regulation to depend entirely upon administrative findings and determinations.

While the regulation claims benevolent objectives, its character is despotic. It reposes in the administrator unfettered discretion to apply, or to take away, the coverage of the act.

The *existing* regulation as contrasted with the *proposed* regulation is not devoid of uncertainty, but its basis is in established standards of law which frame and limit its application. These standards are both restraints upon the subjects of the act and upon its administrators. There is nothing in the act that authorizes administrators or courts to extend its terms. Indeed, obvious jurisdictional limitations, and the protection of those who are clearly entitled to its benefits, negatives contrary assertion or practice.

The basic principle of the *proposed* regulation—economic reality—as has been pointed out, is a dimensionless and amorphous abstraction. Until precedents are established by administrative rulings applying the new principle in concrete cases, and the courts shall have surrounded the idea with empirical bounds, the meaning of the regulation would continue equivocal, and its application would be vagrant and capricious.

The Treasury and the Federal Security Agency admit the uninformative nature of the regulation but urge that a body of precedent will be quickly built up by administrative rulings, and a more uniform application of the act will ensue than has been possible under the existing regulation as variously interpreted by the courts.

* * * 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 * * *.

In the course of its work on the proposed regulations the joint committee discussed a great many cases * * * to their surprise * * * found in nearly all cases they quickly reached a unanimity of opinion * * *.

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 * * *.—Testimony of the Federal Security Administrator (hearings, Finance Committee, pages 159–160).

Thus there is unreserved administrative claim for functions that are, inherently, legislative and judicial.

The argument for these powers

The claim to the broad powers conferred by the proposed regulation is argued by the Federal Security Agency on grounds of the need for a liberal construction of the term "employee," and one that will apply uniformly throughout the country; as well as by asserted reasons of administrative convenience. According to the Treasury, the *proposed* regulations and the abandonment of the *existing* regula-

tions are compelled by intervening decisions of the United States Supreme Court.

THE SUPREME COURT DECISIONS

In June 1947 the Supreme Court considered the applicable standards for the determination of employees under the Social Security Act in *U. S.* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.* (331 U. S. 704); and in *Bartels* v. *Birmingham* (332 U. S. 126).

The Silk and Greyvan cases were considered together, and are the leading decisions.[6]

Prefacing its decisions in Silk and Greyvan with the statement that application of social-security legislation—

> should follow the same rule that we applied to the National Labor Relations Act in the Hearst case (*Board* v. *Hearst Publications* (322 U. S. 111))[7]—

the Court observed that—

> as 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 [8]—

and that—

> when the problem (of differentiating between employer and independent contractor) arose in the administration of the National Labor Relations Act * * * we rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" * * *.[9]

and recalled:

> We concluded that, since the end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality.[9]

In these prefatory observations of the Court in Silk and Greyvan, and in the Hearst case primarily,[10] the Treasury Department finds the basic principle of its proposed regulation:

> 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 * * *—

enlarging this vastly by the addition of—

> * * * and not upon his own business as an independent contractor.

The Treasury seizes upon these prefatory remarks of the Court to promulgate its test of economic reality. It argues that the test is substantive and will determine the employer-employee relationship; that it replaces the common-law tests; that it is law pronounced by the Supreme Court. The Treasury contends that its *proposed* regula-

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It does not appear whether the Court in arriving at its opinions in these cases considered the definition of "employee" in the act. In its opinions the Court refers to the definitions of "employment" and "wages" cited in the Government's brief as among the pertinent statutory provisions to be considered, but the Government's brief did not cite the definition of "employee" and the Court's opinion omits all mention of that definition. It is therefore a matter of speculation whether the Court took particular notice of the definition of "employee" that is amended by the pending joint resolution, and what the effects on its decision might have been if it did not, and had taken, note of the definition.

[7] *United States* v. *Silk* (331 U. S. 704, 713-714.)

[8] *United States* v. *Silk* (331 U. S. 704, 712).

[9] *United States* v. *Silk* (331 U. S. 704, 713).

[10] The Treasury also relies on *Rutherford Food Corporation et al.* v. *McComb* (331 U. S. 722), a Fair Labor Standards Act case. The Treasury looks to that part of the opinion which refers to language of the circuit court to the effect that the test for determining who is an employee is not the common-law test of control. The Supreme Court did not accept this viewpoint as a part of its own philosophy. It proceeded to make its own analysis of the facts surrounding the work of the alleged independent contractors and, looking beyond the form of the arrangement to its real substance, concluded that "independent contractor" was a mere label and the worker who had it, together with the others who worked with him, were really employees. The Supreme Court pointed out that the individuals involved worked alongside of admitted employees, that they did their work as an integral part of the production line of the business, did all their work in that one plant, were subject to the frequent supervision of the manager of the plant, and that under the circumstances of the case the money they received was equivalent to piecework wages. The moving part of the case is consistent with the realistic application of the common-law control rule.

tion is compelled by the decisions of the Court, and that the regulation does no more than implement the Court's decisions.

By the same arguments, in its report to your committee, it opposes the pending resolution which would represent additional legislative approval of the *existing* Treasury regulation. Its report says:

> 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 * * *. 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 the employer-employee relationship for purposes of the social-security program * * *.

As we have seen, the Treasury borrows this language of the Court in its prefatory remarks in Silk and Greyvan to comfort its arguments in support of the *proposed* regulation. It relies also on the dictum in Bartels where it is said:

> In *United States* v. *Silk* we held * * * control is characteristically associated with the employer-employee relationship, but in the application of social-legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service * * * .[11]

However the argument that the Supreme Court, in the Silk and Greyvan cases, established new substantive law for determining an employer-employee relationship cannot be accepted. It is self-destructive, for Congress continues to have the exclusive power to make law.

Moreover from what the Court proceeds to say after stating that—

> application of social-security legislation should follow the same rule that we applied in the Hearst case[12]—

it appears that it was enunciating the principle that narrow and doctrinaire applications of technical concepts of tort liability do not comport with the purposes of legislation of a remedial character, and that no superseding "rule" of economic reality was intended. For by way of modification and limitation the Court proceeded immediately to say:

> 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 * * * Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product 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 an industrial process is in the hands of independent contractors, they are the ones who should pay the social-security taxes.*[13] [Emphasis supplied.]

The decisions of the Court in Silk and Greyvan and Bartels and the tests, the moving principles by which the Supreme Court reached those decisions, were the usual common-law tests and principles realistically applied. Let us demonstrate this.

In the Silk and Greyvan cases the Commissioner of Internal Revenue had proceeded under the existing Treasury regulation in the assessment of social-security taxes, and the cases were brought for recovery. The lower courts held for the taxpayers and against the Commissioner.

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[11] *Bartels* v. *Birmingham* (332 U. S. 126, 130).
[12] *United States* v. *Silk* (331 U. S. 704, 713).
[13] *United States* v. *Silk* (331 U. S. 704, 714).

The Silk case involved: (1) Unloaders of coal who made themselves available in coal yards at a waiting shed, some of them floaters who came only intermittently. As carloads of coal were delivered by the railroad the unloaders unloaded them into assigned bins at an agreed price per ton. Also (2) truckers who owned their own trucks, paid their own operating expenses, were free to work for others, and delivered coal for Silk at a uniform price per ton.

The Greyvan case involved a formal contract between Greyvan Lines, Inc., a common carrier licensed under the Motor Carrier Act, and local operators who performed the actual service of carrying the goods. The operators were required to haul exclusively for the company, furnish their own trucks, paint the designation "Greyvan Lines" on them, hire their own truckmen, pay all expenses, provide insurance, indemnify the company for losses, and to operate subject to the control of Greyvan dispatchers and under a manual of instructions which regulated in detail the conduct of the truckmen in the performance of their duties.

In the Silk case, where the employment arrangements were informal, the moving ground for the lower court's decision was:

> The undisputed facts failed to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers (the unloaders and truckers) as is necessary to establish a legal relationship of employer and employee between the appellee and the workers in question.[14]

In Greyvan, where a formal contract of employment was involved, the moving ground of the decision of the lower court was:

> The company cannot be held liable for employment taxes on the wages of persons over whom it exerts no control and of whose employment it has no knowledge. * * * While many factors in this case indicated such control as to give rise to [the employer-employee] relationship we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they make use of in their operations.[15]

Thus, in both the Silk and Greyvan cases, the lower courts reached their decisions by applying the common-law test of direction and control.

The Supreme Court took jurisdiction because of conflicting decisions in the lower courts:

> Writs of certiorari were granted * * * because of the general importance * * * of deciding what are the applicable standards for the determination of employees under the act. Varying standards have been applied by the Federal Courts.[16]

The cases were considered together. The Court decided them on the basis of the existing Treasury regulation which is framed to secure realistic application of the usual common-law rules as intended by the Social Security Act.

> * * * The long-standing regulations of the Treasury and Federal Security Agency * * * recognize that independent contractors exist under the Act. * * * The Government points out that the regulations were construed by the Commissioner of Internal Revenue to cover the circumstances here presented.[17]

[14] *United States* v. *Silk* (155 F. (2d) 356, 359).
[15] *Greyvan Lines* v. *Harrison* (156 F. (2d) 412, 415–416)
[16] *United States* v *Silk* (331 U. S. 704, 705).
[17] *United States* v. *Silk* (331 U. S. 704, 714–715).

As to the truckers in Silk and Greyvan:

So far as the regulations refer to the effect of contracts we think their statement of the law cannot be challenged successfully. Contracts, however, "skillfully devised," * * * should not be permitted to shift tax liability as definitely fixed by the statutes * * *.[18]

But we agree with the decisions below * * * that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small-business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.[19]

And as to the unloaders in Silk:

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the act. They are of the group that the Social Security Act was intended to aid. *Silk was in a position to exercise all necessary supervision over their simple tasks.* Unloaders have often been held to be employees in tort cases * * * [Emphasis supplied.][20]

The Court thus applied the existing regulation in deciding the truckers were independent contractors and sustained the finding of the Commissioner of Internal Revenue that the unloaders were employees in the sense of the term as set forth in the Treasury regulation.

We repeat that the existing regulations were framed to secure realistic application of the usual common-law rules as intended by Congress. We emphasize that those regulations have existed since the act became operative. They have survived several legislative revisions of the act. Therefore may be considered as valid expressions of congressional intent.

Since the Commissioner proceeded, and the Court proceeded, by applying the existing regulation, the decisions of the Court do not compel change of the regulation. Furthermore, the Court did not find that extension of the existing regulation was necessary to arrive at the conclusions it reached, and so enlargement of the regulation is not required.

On the contrary in three of the four situations presented for decision the Supreme Court held that the Treasury Department had proceeded without realistic regard for the industrial surroundings within which the act was drawn and in the light of which it was to be enforced. In two of the three situations it constricted the Treasury's application of its own existing regulation by holding that the parties involved were independent contractors rather than employees as claimed by the Treasury; and in the fourth it held that the Commissioner had exceeded his statutory authority in recognizing a contract which purported to make an "employer" of one who was not the employer in fact.

[18] *United States* v. *Silk* (331 U. S. 704, 715).
[19] *United States* v. *Silk* (331 U. S. 704, 719).
[20] *United States* v. *Silk* (331 U. S. 704, 716-718).

Rather than giving the Government a broader license, the decisions of the Supreme Court in Silk and Greyvan and Bartels were that the Government had overextended the powers it had under the *existing* Treasury regulation. Now, contrarily, and despite this rebuff, the Treasury Department brings forward a *proposed* regulation that would give the Department authority to make the very type of interpretations rejected by the Supreme Court. Rather than implementing the Supreme Court decisions, the proposed Treasury regulation attempts to surmount, supersede, and negative them.[21]

The doctrine of the Supreme Court in Silk, Greyvan, and Bartels, as reflected by its disposition of the specific situations presented in those cases, is an applied expression of the following statement of congressional intent in the legislative history:

> The tests for determining the (employer-employee) relationship laid down in cases relating to tort liability, and other common-law concepts of master and servant, should not be narrowly applied (H. Rept. No. 728, 76th Cong., 1st sess., p. 61).

Our interpretations of these decisions is strongly fortified by the fact they are brought into accord with the act, the legislative history of the act, and with the administrative regulations which have acquired force of law. Those who challenge this, and oppose with conflicting interpretations, have the unhappy burden of demonstrating that the Supreme Court has the right to make its own law in the field.

A sound reading of these cases requires that the prefatory and random remarks of the Court which have been seized upon to supply a spurious gloss of validity to the proposed Treasury regulation shall be harmoniously related to the facts involved, the decisions, and to their moving rules; and if this cannot be done they must be regarded as surplusage.

If we were compelled to interpret these remarks of the Court we would say, in untechnical and summary fashion and without aiming at complete exposition, that the lower courts and administrative agencies were told: Don't be fooled or unduly influenced by the form of the arrangement to which you must apply the Social Security Act. Look to the real substance. Illuminate the usual common-law control tests by regard for all the pertinent facts. This requires that all of the realities that will lead you to the truth must be consulted and weighed along with all other significant indicators of the real substance of the arrangement.

But this again should be said: If we have misinterpreted these decisions of the Supreme Court, if we have incorrectly called the real moving principles of these cases, if the Treasury's interpretations and the proposed regulation based upon them are correct, then by this resolution we propose to restore the usual common-law rules, realistically applied.

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[21] The rule of the Hearst case has been repudiated by the Congress. "* * * Although independent contractors can in no sense be considered to be employees, the Supreme Court in *NLRB* v. *Hearst Publications* (322 U. S. 111) * * * refused to consider the question whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law really independent contractors. The House bill contained a clarifying provision to the effect that no individual was to be considered an employee for the purposes of the act unless he was employed by an employer as defined by the act * * * (and) excluded from the definition of 'employee' any person having the status of independent contractors * * *" (conference report, H. R. 3020, H. Rept. No. 510, 80th Cong., 1st sess.). The conference report followed the House bill (cf. p. 33). Therefore, the Treasury Department proposes simultaneously to override the Congress' intent.

UNIFORMITY OF APPLICATION OF THE ACT PROMOTED BY SUPREME COURT DECISIONS APPLYING THE EXISTING REGULATION

The moving principles of the decisions of the Supreme Court in Silk, Greyvan, and Bartels, if we have interpreted them correctly, likewise provide answer to the arguments of the Federal Security Agency for a rule of common application promotive of more uniform coverage of the act than the varying standards reflected in past decisions of Federal district and circuit courts.

The Supreme Court prescribes lower court recognition of the Social Security Act as national legislation of national scope to be interpreted uniformly by applying the Federal rule expressed in the long-standing Treasury regulation. With this prescription, there is more assurance of uniform application of the act by continued application of the existing regulation than could be provided by a changed regulation giving rise to new uncertainties, more varied interpretations, a larger area for litigation, greater diversity of judicial decisions.

IRRELEVANCY OF MAJOR ARGUMENT OF FEDERAL SECURITY AGENCY IN OPPOSITION TO THE RESOLUTION

The major argument asserted by the Federal Security Agency against the pending joint resolution is that the resolution intends to reenact the past restrictive decisions of the lower Federal courts. In the words of the Federal Security Administrator:

> What disturbs me the most about House Joint Resolution 296 is this line of decisions * * *. As nearly as we can judge * * * it seems to be the intention of the sponsors of the resolution to reenact the restrictive court decisions I have referred to * * *.

This argument is based upon false premises. As stated in the report of the Committee on Ways and Means of the House:

> The purpose * * * 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 the regulation to reaffirm this rule * * * (Rept. No. 1319, 80th Cong., 1st sess., p. 5).

INTERFERENCE WITH LEGISLATION BY THE CONGRESS TO EXTEND THE COVERAGE OF THE ACT

The extension of the coverage of the Social Security Act is a matter of great interest in the Congress.

Pursuant to Senate resolution the Senate Finance Committee has established a distinguished Council to survey the act and recommend improvement. The Council is busily at work and has recommended extension of the coverage of the act to the self-employed.

The proposed regulation will predetermine the bounds of that class, or confront the Congress with the undesirable alternative of another change in the status of the persons whose position is affected by the proposed regulation.

As recently as 18 months ago the Federal Security Agency, recognizing that any change in the definition of employee was the exclusive prerogative of the Congress, made the following recommendation in its report to the Congress:

Employer-employee relationship.— * * * It is important that contributors and administrative agencies know as precisely as possible what services and what wage payments are subject to contributions.

It would be desirable that the word "employee" be defined by statute so as to include all service relationships that fall short of being independent businesses. A statutory definition, amplified by suitable regulations, should provide a greater measure of certainty than even the most liberal judicial interpretation—as great a measure as can be attained in dealing with relationships so diverse as those under which one person performs service for another. If self-employment is covered, such a statutory test of the employment relation would afford a dividing line between the two modes of coverage that would be realistic and would be understandable by the man in the street. If self-employment continues to be excluded, it would limit the exclusion to persons who, in a substantial sense, are in business for themselves (Annual Report, Federal Security Agency, 1946, p. 453).

PRACTICAL EFFECTS OF THE PROPOSED REGULATION

1. Compliance difficulties

Persons having no right of direction or control over "employees" constituted such by the proposed regulation would nevertheless have to assume the responsibilities imposed by the act for accurate records showing the amount and time within which the services were performed and specifying exactly the remuneration received by such "employees." Reports on the withholding tax would have to be made and filed with the Bureau of Internal Revenue by such persons with respect to such "employees." Timely tax remittances, and supply of other information would be required.

In instances of failure to comply with the procedures of the law and regulations, persons assigned the status of "employers" by the proposed regulation—but having no right and no practical means to direct or control those who, under the new concept, would become their "employees"—would nevertheless be subject to the penalties that apply to employers generally, including delinquency assessments and civil and criminal penalties, the latter involving imprisonment for felony.

The following excerpt from testimony at the hearings relating to door-to-door salespersons points up some realities which make the proposed regulation unfeasible:

> 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 salespeople, 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 commisssion, or whether she waives the commission entirely. We have no right to compel salespeople to report to us, nor any way to check the accuracy of such reports if * * * made.
>
> A considerable percentage of our salespeople would have difficulty in preparing a properly informative report.
>
> If a salesperson 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 salesperson properly to make this allocation herself.
>
> 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 operations when and if she chooses * * *. There are many instances where * * * we are out of touch with her for long periods of time.—Statement of Philip Adler, Jr., president, American Hosiery Mills, Indianapolis, Ind. (hearings, Finance Committee, p. 78).

The proposed regulation would shift to the newly and erroneously constituted "employers" the administrative difficulties which the

Treasury Department advanced in opposing extension of coverage when the subject was considered in prior years.[22]

2. Interference with long-standing relationships

To sustain the obligations of an "employer," changes would be forced in long-standing relationships that are natural in their industrial environment and which are, as the Supreme Court observed in Silk, a part of the surroundings with a view to which the act was drawn. This is another way of saying that businesses long established and which have been built up by distribution of their products through relationships other than those of employer and employee would have to change their distribution systems so as to use those who truly are employees, or if this is not feasible, to go out of business. The alterations of these relationships will tend to import other liabilities under other unrelated laws.

3. Levy of the Federal unemployment tax

About 25 States have standards for inclusion in their unemployment insurance laws which, if applied, might embrace some or all of the activities which the proposed regulation would bring under the act. But according to testimony presented at hearings few, if any, of the persons who would be embraced by the proposed regulation are now covered under State unemployment insurance laws. In these circumstances the proposed regulation will serve to levy a Federal tax,[23] unrelated to the provision of Federal old-age and survivors insurance, exceeding the tax imposed for the latter purpose on both employer and employee combined—a tax imposed upon employers alone.

4. Increased litigation and appeals for legislation

The uncertainty of the proposed regulation and the seriousness of its effects will burden the courts with increased litigation and the Congress with the task of enacting new legislation to allay the impacts of something invalid and unnecessary to begin with.

DISSIPATION OF THE TRUST FUND

It is a cardinal principle of the act that its benefits are paid, not as charity, but as a matter of right to persons who have contributed what the law requires toward the receipt of those benefits. Persons who are not "employees" in the ordinary sense of the term, who therefore have not paid taxes under the act, should not, in principle, share the benefits with those who are covered by the act and who have contributed the funds from which the benefits are paid.

The past practices of the Federal Security Agency and the proposed Treasury regulation thus take on added significance. An important question is raised whether the integrity of the social-security system is being maintained.

The proposed regulation would subject the persons brought under the act to the social-security tax appropriated to the Federal old-age and survivors trust fund only on wages paid on and after January 1, 1948. On the other hand, the proposed regulation would give these newly covered persons social-security coverage dating back to 1944 and, in an uncertain number of cases, beyond.

[22] Economic Security Act, Hearings, House of Representatives, 1935, pp. 901-904, 911; Social Security Act amendments of 1939, Hearings, House of Representatives, p. 2112.
[23] Under the Federal Unemployment Tax Act, sec. 1607 (i), Internal Revenue Code.

In a letter by the Acting Secretary of the Treasury Department, dated January 30, 1948, to the chairman of the Committee on Ways and Means of the House of Representatives, it is estimated the employers' and employees' taxes which would be collected by the force of the new regulation would be "close to $25,000,000 annually."[24]

It is an actuarial certainty that social-security taxes at current rates represent less than the value of annuities and insurance benefits to which the taxes are appropriated. Accordingly the proposed retroactive grant of coverage, without any offsetting contribution of taxes, represents a potential donation of more than $100,000,000 from the funds in the Federal old-age and survivors insurance trust fund which have been accumulated for the payment of benefits to persons who have contributed to the fund.

What is proposed has already occurred, although to a lesser extent. The Federal Security Agency for some time past has established wage credits and paid benefits to persons from whom the Treasury Department has consistently refused to collect social-security taxes on the grounds they were not covered by the act.

For example your committee is advised of one case in which persons having selling relations with more than 200 companies received letter determinations from the Federal Security Agency granting them coverage under the act, although the Treasury Department has consistently refused to collect social-security taxes.

The number of persons who have received benefit payments without contribution of taxes, according to information furnished by the Federal Security Agency to your committee, is at least 5,000. The amount paid out to these persons has not been specified.

Thus what has been done, and what it is proposed to do by the new regulation, poses serious questions whether the trust fund to which the more than 33,000,000 persons now insured under the act look for the payment of their benefits is being preserved for the purposes to which it is dedicated.

The pertinent provisions of law establishing the trust fund are as follows:

FEDERAL OLD-AGE AND SURVIVORS' INSURANCE TRUST FUND

SEC. 201. (a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the "Federal Old-Age and Survivors' Insurance Trust Fund" (hereinafter in this title called the "Trust Fund"). The Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, * * * and, in addition, such amounts as may be appropriated to the Trust Fund as hereinafter provided. There is hereby appropriated to the Trust Fund for the fiscal year ending June 30, 1941, and for each fiscal year thereafter, out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of the taxes (including interest, penalties, and additions to the taxes) received under the Federal Insurance Contributions Act and covered into the Treasury. There is also authorized to be appropriated to the Trust Fund such additional sums as may be required to finance the benefits and payments provided under this title.

(b) There is hereby created a body to be known as the Board of Trustees of the Federal Old-Age and Survivors' Insurance Trust Fund (hereafter in this title called the "Board of Trustees") which Board of Trustees shall be composed

[24] Under the Federal Insurance Contributions Act alone. Unmentioned is the $37,500,000 in taxes which would be collected annually from employers under the Federal Unemployment Tax Act, in addition to their half-share of the above-mentioned $25,000,000. The $37,500,000 might become subject to off-set by contributions under State unemployment compensation laws, but this is speculative.

of the Secretary of the Treasury, the Secretary of Labor, and the Federal Security Administrator, all ex officio. * * * It shall be the duty of the Board of Trustees to—

(1) Hold the Trust Fund * * *.

* * * * * * *

(f) The Managing Trustee is directed to pay from the Trust Fund into the Treasury * * * (expenses) * * * for the administration of Title II and Title VIII of this Act, and the Federal Insurance Contributions Act.

* * * * * * *

(g) All amounts credited to the Trust Fund shall be available for making payments required under this title.

The above provisions were introduced into the law in 1939 excepting the last sentence of section 201 (a) which was added by the Revenue Act of 1943.

When the act was adopted in 1935, constitutional doubts dictated the separation of the benefit and tax titles, without allocation of the revenues from social-security taxes to the payment of the benefits provided by the act. The Supreme Court, in *Helvering* v. *Davis* (301 U. S. 619, 640–45 (1937)), which decided the constitutionality of the old-age insurance provisions of the Social Security Act, sanctioned appropriation of the special tax imposed by the act to finance the provided benefits. This was followed in the action of the Congress in amending the act to make the appropriation provided by section 201 (a) set out above.

Your committee described the 1939 amendment as follows:

Section 201: This section creates a Federal old-age and survivors' insurance trust fund in place of the present old-age reserve account, which is abolished by these amendments. * * * Amounts equivalent to 100 percent of the taxes received under the Federal Insurance Contributions Act (formerly title VIII of the Social Security Act) are permanently appropriated to the trust fund, and old-age and survivors' insurance benefits will be paid out of the fund. This should clarify the relationship between contributions under the social-security program in the form of taxes and the source of benefit payments (S. Rept. 734, 76th Cong., 1st sess., p. 41).

The Federal Security Agency recognized the intended correlation of benefits and taxes in its report to the Congress dated November 1, 1940:

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 (Fifth annual Report of the Social Security Board (1940), p. 42).

In successive annual reports, through its report for the fiscal year 1946, the Agency referred to the coordinate responsibilities of the two Departments charged with administration of the act, and to the importance of resolving conflicting viewpoints respecting coverage.

Therefore, it is difficult to reconcile the conflicting actions of the Agency in granting wage credits and disbursing benefits when the Treasury Department, proceeding under identical definitions and

under interpretative regulations phrased in the same words, had ruled in the same situations that the services performed were not employment under the coverage of the act.

The case, it should be emphasized, is not that where, because of mistake of law or evasion on the part of the employer, persons within the definitions of the act are paid benefits although social-security taxes have not been paid with respect to the wage credits on which the benefits are based. These are risks which are distributed over the covered group in consonance with the ordinary principles of group insurance, and the spread of these risks is in the mutual benefit.

The case is, rather, that persons outside the group which has contributed to the old-age and survivors' insurance trust fund have been paid benefits out of the fund by the action of one administrative agency, while the other administrative agency has ruled they were not within the coverage of the act and had neither the obligation nor the privilege of contributing to the fund.