compensation (Complaint ¶28, App. 21). For example, some 1,000,000 volunteer firemen[65] will be greatly affected by the 1974 Amendments. The 1974 Amendments will impose on Governments, burdensome recordkeeping requirements (Pritchard Deposition at 10, App. 92), as well as the indecision attending the removal of decisions about volunteer status to the Appellee in Washington (Pritchard Deposition at 120, App. 167). If a "volunteer" is determined by the Appellee to be covered by the Act, he must be paid full compensation. (Pritchard Deposition at 119-120, App. 166-67). This spectre has forced Randolph, New Jersey, for example, to abolish this innovative and economical practice. (Complaint ¶65, App. 34-35) (See also Pritchard Deposition at 154-155, 167-171; App. 191-192, 200-03).

Some State and local Government personnel practices are so foreign to the industrial setting of the Act that they are not dealt with by regulation or existing case law. For example, State and local Governments "employ", as that term is described in §3(g) of the Act, 29 U.S.C. §203(g), people if they "suffer or permit" them to perform largely voluntary or civically motivated activities and compensate them by way of a small stipend or nominal amount to cover expenses. While the intended police and fire personnel regulations, 29 C.F.R. §553 (App. 591-620) deal with this area for

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[65]"About 1 million Americans serve as volunteer firefighters, five times the number of paid firefighters in the Nation." AMERICA BURNING: THE REPORT OF THE NATIONAL COMMISSION ON FIRE PREVENTION AND CONTROL (1973). This Report concludes that it will cost local Governments 4.5 billion dollars annually to replace volunteers with paid firefighters.

public safety employees,[66] the subject is nowhere else treated for other Government employees. Under the Act, absent any interpretation by the Wage and Hour Division, State and local Governments must either entirely eliminate the nominal payments or pay the wage required by the Act. Local Governments who cannot afford to pay that wage must cancel the programs. This concept of "paid volunteers" is used by local Governments not only for firefighters and police, but also for employing poll workers in elections, and for implementing parks, recreation, and other Government projects for involvement of the young, elderly and disadvantaged in the community.

In like manner, 29 C.F.R. §791 regulates and severely restricts use of joint employment arrangements unless the employee is compensated at an overtime rate for hours worked over 40 in a workweek. Because of the variety of services which State and local Governments provide, many Government employees who augment their income by part-time jobs in other areas of the Government may now lose their second jobs because of the inability of their employer to pay the requisite overtime compensation for their second job. Whatever basis such requirements have in private industry is clearly inapplicable here, since State and local Governments may not readily pass added costs on to the "consumer" - their citizens, including their employees.

The traditional use of compensatory time off has

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[66]For police and fire personnel, the Appellee's Administrator of Wages and Hours has already determined that payment averaging more than $2.50 per call precludes "volunteer" status. 29 C.F.R. § 553.11 (App. 611).

allowed State and local Government employers to deal with the peak employment problems encountered by many of the duties thrust upon them. Unlike a corporation, Government is not free to perform or not perform these duties. It must perform them, and do so at the least cost to its citizens. Employees favor the concept of compensatory time off in that it gives them more freedom and flexibility in choosing time off and it gives them more time off. Because they are paid a regular amount each payday even when taking compensatory time off, they are "guaranteed" against seasonal layoffs. Compensatory time off beyond the workweek is prohibited under 29 C.F.R. §778.106 and must be discontinued if the Act is upheld.

The discontinuance of compensatory time-off and the requirement that overtime be paid will conflict with State law. For example, the Arizona Supreme Court in *State v. Boykin*, 109 Ariz. 289, 293, 508 P.2d 1151, 1155 (1973), declared that, while compensatory time off was constitutionally permissible for State and political subdivision Government employees, overtime could not be paid. (See Complaint ¶22, App. 18).

Compensatory time off is used extensively in State and City Government. For example, Salt Lake City accumulates 7000 hours annually for snow removal alone, which, under the 1974 Amendments must be paid for in cash as overtime. (Complaint ¶49, App. 29-30. Pritchard Deposition 61-70, 105; App. 126-133, 157-58).

The effect of this congressional disregard for the unique nature of State and City Government by the challenged 1974 Amendments will be tremendously adverse to the States and Cities, as well as to the

interest of the Federal Government in carrying out Federal-State cooperative programs.

Each State and local Government until now has had wide scope in deciding its governmental form and procedures to meet its peculiar needs. All kinds of nominally paid or purely volunteer Boards and Commissions have operated everything from airports to zoning. Now apparently, members of many of these Boards, if paid anything, must be paid at least the minimum wage and all kinds of records kept and reports filed with the Department of Labor.

From the sturdy New England towns to Western crossroads which became towns as the law became viable, vast individualistic volunteerism has kept Government costs and taxes low.

We could have, in principle, a perfect uniformity of law in the United States - at a price. We could have it by establishing a single legislature, a single system of courts, a single chief executive, and a single phalanx of executive departments and administrative agencies, each possessing within its sphere a nation-wide and general jurisdiction.

The Federal Government has avoided the rigidity which the Congress seeks to impose on States and Cities. The Civil Service Commission's objection to control by the Labor Department of Federal Government employees' terms and conditions of employment[67] was accepted in the 1974 Amendments;[68] implementa-

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[67]See S. Rept. No. 690, 93d Cong., 2d Sess. 23 (1974); H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 28 (1974).

[68]Section 6(b) of Pub. L. No. 93-259, 88 Stat. 60, *amending* 29 U.S.C. § 204.

tion of the Fair Labor Standards Act coverage of Federal employees was committed to the Civil Service Commission.

The General Accounting Office, an agency of Congress, and the Civil Service Commission, charged with enforcement of some aspects of the 1974 Amendments, have concluded that this Act was wrongly enacted and should be amended. A recent GAO Report to Congress on LEGAL LIMITATIONS ON FLEXIBLE AND COMPRESSED WORK SCHEDULES FOR FEDERAL EMPLOYEES (B-179810, Oct. 21, 1974), indicates that while Defendant's Wage and Hour Division is acting to retard progress and diversity in flexible scheduling of both Federal and State and local employees, the Comptroller General feels that such flexibility increases morale and productivity and reduces absenteeism in Federal employees. In recommending that the Chairman of the Civil Service Commission "seek legislation to amend . . . FLSA, as amended, to permit testing of flexible and compressed work schedules", the Report conclusively states that:

> "Work schedules in the Government should be established on the basis of the needs and objectives of the work to be performed rather than on a predetermined and inflexible workday. . . . Those Federal activities which have piecemeal experimentation with altered schedules have. . . reported benefits. *In our opinion, altered schedules can be applied to selected Federal activities with resulting benefits to the Government, its employees, and the public.*
>
> "There have been no comprehensive tests of altered work schedules in the Federal Government. Current law limits the flexibility of Federal

managers and employees to test new work schedules." (*Id.* at 17) (emphasis added).

The Congress in fact made no adequate study of the impact of the 1974 Amendments and seemingly acted largely upon the false representations of no impact. See *supra*, footnote 21.

Preventing the danger of centralization of Government which would destroy Federalism is the paramount purpose of the Constitution, and it was designed to prevent such centralization. Common sense and the instinct for freedom alike can be counted upon to tell the American people never to put all their eggs of hope for governmental problem-solving in one governmental basket. Such prevention is more important constitutionally than the prevention of slight governmental impacts on the concept of a free national trade market.

In *McCulloch v. Maryland*, Chief Justice Marshall said: "[N]o political dreamer was ever wild enough to think of breaking down the line which separates the States, and of compounding the American people into one common mass." 4 Wheat. 316, 403.

But dream they did in the 93d Congress, and the most egregious result (at least from the view point of constitutional Federalism) was the Amendments of 1974.

James Madison, for one, was convinced that a second American Revolution would inevitably erupt if the pressure for centralized power ever resulted in an attempt to usurp the sovereignty to be constitutionally guaranteed to the States, when he wrote in THE FEDERALIST, No. 46:

"But ambitious encroachments by the federal government on the authority of the State

governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse a common cause. A correspondence would be opened. Plans of resistance would be concerted. But what degree of madness would ever drive the Federal Government to such an extremity?" *Id.* at 298.

Madness it may not be, but unconstitutional it is for the Congress to insist that upon the mere recital of an alleged, "magic" impact on commerce, it can than perforce regulate the terms and working conditions of virtually all Government employees. To suggest that the legislation is in derogation of constitutional Federalism is to be too mild; it does more than derogate, it abrogates the federal division of powers in the Constitution. The "common mass" envisioned by Chief Justice Marshall and the "madness" articulated by Madison are embodied in the 1974 Amendments.

There is no colorable argument that regulation of personnel practices – wages, hours, living, promotion practices – is not the single most vital, *internal* function of States and Cities. If there is individuality; if there is innovativeness; if the Governments closest to the people are to function as the "laboratories" of trial and error in democracy (first coined by Justice Brandeis in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311; then, by definition, there must be control over the people hired to man them.

It is important that State and local Government employees look to their employing Governments rather than to Appellee in Washington to improve their employment terms and conditions.

Appellant National Governors' Conference recently published INNOVATIONS IN STATE GOVERNMENT, which contains descriptions by the Governors of their unique approaches to various problems high on the State's agenda. It is instructive to note that the very first article, by Governor Patrick J. Lucey of Wisconsin concerns "Increasing State Government Productivity." Governor Lucey writes:

> "If he [the Governor] is a good administrator, he may be able to widen that line-by improving the efficiency and productivity of government. In a time of increasing fiscal constraints on state government (and political constraints on raising taxes), achievement of his programmatic goals may depend on just such administrative success."

Governor Lucey then describes how he encouraged his employees to become innovative about ways and means of increasing their productivity:

> "Getting agencies to think about productivity was an essential first step to a state productivity policy. Next, working with the Department of Administration (our budget bureau), we decided upon a target figure for productivity improvement-2½ percent per year-a figure which is less than the average yearly productivity gain in the private sector. A memo was sent to all agencies of state government asking them to outline ways in which they would meet this figure for the first year of the 1973-75 biennial budget, and suggesting avenues of approach which they should explore. By setting a target figure and putting agencies on record as to how they would meet it, we made certain that they would do more than "think" about productivity. By giving them sufficient lead time and an active involvement in the planning

> process, we strengthened the possibility that they would become seriously committed to the goal itself."

How can a Governor conceivably initiate innovative progress designed to improve State Government productivity when the power to regulate state personnel practices-wages, hours, working conditions-resides somewhere in the labyrinthine bureaucracy of the Department of Labor? To control personnel is to control program; there can be no meaningful division of powers in the federal system if the National Government controls the terms and working conditions of employment for the "non-supervisory" employees of its supposedly sovereign "partners." The road to this centralization of power in the Federal capital is all too easy to travel; the road back, toward the Federal system envisioned in the Constitution would be difficult, if not impossible, if this Court embraces the Appellee's arguments on behalf of the Amendments of 1974.

g. Congressional regulation under the spending power is an admission that such governmental regulation of Government cannot be accomplished constitutionally under the Commerce Clause.

Federal regulation of States and Cities has been upheld under the spending power, Art. I, Sec. 8, cl. 1 of the Constitution. *Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275, 295; *Stearns v. Minnesota,* 179 U.S. 223, 232.

So, the objection of this Court in *United States v. Butler,* 297 U.S. 1, 64, and *Carter v. Carter Coal Co.,*

298 U.S. 238, 292, that Federal regulation could not proceed under the guise of the Spending Clause, was avoided by the Congress in using "strings" to force State compliance with the Federal social security and unemployment compensation scheme, a mechanism upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548, 586. There, this Court characterized the Federal mechanism as "inducement", not "weapons of coercion, destroying or impairing the autonomy of the states." In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 526, upholding a State act so "induced", the Court declared the essential feature of Federalism which the Fair Labor Standards Act Amendments at issue here contravene:

> "The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."

This distinction between Federal contravention of State sovereignty under the spending power and Federal contravention of the Tenth Amendment was expressly made in *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143:

> "While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to state[s] [redacted] shall be disbursed.

"The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded *in this case.*" (emphasis added).

2. The 1974 Amendments, In Derogating The Constitution's Federal System Partnership, Must Pass A Higher-Than-Rational-Basis Test.

The effect of the Act is not limited to the fiscal and non-fiscal impact on State and City operations.

This Case involves power under the Constitution of the United States to regulate wages, hours and other personnel practices of more than 11,000,000 State and City employees.[69] From the adoption of the Constitu-

[69]Coverage of State and local employees under the Amendments is intended to be all-inclusive. Section 3 of the Act, 29 U.S.C. § 203, conclusively states that activities of a "public agency" (as defined in § 3(x), 29 U.S.C. § 203(x)) are activities performed for a business purpose, therefore making such activities those of an "enterprise" (as defined in § 3(r)) and that employees of an enterprise which is a public agency shall for purposes of subsection(s) be deemed to be employees of an "enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 203(r)(3). The Act's definition of "employee", 29 U.S.C. § 203(e)(1), excludes by grace from coverage only a narrow enclave of elected officials, immediate staffs and appointees, who to be excluded must also not be subject to State civil service laws. 29 U.S.C. § 203(e)(2)(C).

While the Act provides other exemptions such as those in 29 U.S.C. § 213 exempting professional, executive and administrative employees from the Act's minimum wage and maximum hours requirements (29 U.S.C. § § 206 and 207, but not § 206(d)), such exemptions in no way affect the applicability of other of the Act's requirements (such as recordkeeping) to these employees, and therefore in no way restrict coverage of the Act.

tion until 1974 this power to regulate terms and conditions of employment of their own employees was considered to reside in the States and their political subdivisions except, from 1966, for those hospital and school employees competing with similar "enterprises" as to be covered by the Act as upheld in *Maryland v. Wirtz*. As already stated, *supra*, States and Cities treat their employees fairly and reasonably as to terms and conditions of employment. William F. Danielson, Director of Personnel for Sacramento, California, has stated that the average salary of all firefighters is over $11,000 per year.[70] Studies by the Labor Department found that States and Cities pay higher salaries than the wages mandated by the Act. There is therefore no compelling governmental interest or reason for applying the Act to State and City employee terms and conditions of employment.

To follow *Wirtz* in this case would be to ignore the principle—which this Court in *Wirtz* did not consider, likely because of its finding, at 392 U.S. 193, of no Federal interference with the Governments of States, that a rational basis for Federal legislation is more reluctantly found where to do so would force the States and Cities to reduce or eliminate provision of essential Government service.

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[70]Letter of William F. Danielson, December 24, 1974, citing to a survey conducted by the Equal Employment Opportunity Commission in October, 1973. (App. 625-38).

a. Not the rational basis test, but a higher test, must be applied where Federal legislation contravenes a fundamentally protected constitutional right.

State legislation is more carefully scrutinized[71] under the Fourteenth Amendment when it interferes with an expressly stated constitutional right such as freedom of speech. So also must Federal legislation be more carefully scrutinized under the Fifth Amendment standard of rationality when it interferes with rights and powers expressly stated for States and the People to preserve their parts in Federalism under the Tenth Amendment. As to application of the Fifth Amendment to the Commerce Clause of the Constitution, see

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[71] This higher-than-rational basis test has been phrased as "carefully and meticulously scrutinized", *Reynolds v. Sims*, 377 U.S. 533, 562; "that States may not casually deprive", *Carrington v. Rash*, 380 U.S. 89, 96; "the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms . . . ", *Thomas v. Collins*, 323 U.S. 516, 530; "strict scrutiny", *Skinner v. Oklahoma*, 316 U.S. 535, 541; "compelling governmental interest", *Dunn v. Blumstein*, 405 U.S. 330, 342. See also, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670; *Thornhill v. Alabama*, 310 U.S. 88, 95-96, 104; *Meyer v. Nebraska,* 262 U.S. 390, 399-400; *Schneider v. Irvington,* 308 U.S. 147, 161; *Bates v. Little Rock,* 361 U.S. 516, 524; *Gibson v. Florida Investigation Committee,* 372 U.S. 539, 546; *Kramer v. Union Free School Dist.,* 395 U.S. 621, 627; *NAACP v. Alabama,* 357 U.S. 449, 463; *NAACP v. Button,* 371 U.S. 415, 438-439; *Roe v. Wade,* 410 U.S. 113, 155; *Shapiro v. Thompson,* 394 U.S. 618, 641; *Sherbert v. Verner,* 374 U.S. 398, 406; *Sweezy v. New Hampshire,* 354 U.S. 234, 265 (Frankfurter, J., concurring); *Williams v. Rhodes,* 393 U.S. 23, 31.

McCray v. United States, 195 U.S. 27; *Scranton v. Wheeler*, 179 U.S. 141.

A test higher than the general rule of review by this Court of Federal legislation, the rule of seeking a "rational basis" for Federal regulation of private industry,[72] must be applied in this case. This exception requires that Federal legislation contravening fundamentally protected rights[73] be supported by more than a rational basis as was adumbrated in *United States v. Carolene Products Co.*, 304 U.S. 144:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." 304 U.S. at 152 n. 4.

This Court has recommended that "Congress is free to apply the same principle in the exercise of its powers." *Katzenbach v. Morgan*, 384 U.S. 641, 654 n.15. See also, *State Board of Education v. Barnette*, 319 U.S. 624, 638-639:

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[72]" . . . regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152.

[73]Neither the concepts of strict scrutiny nor of fundamental rights under the Equal Protection clause are foreign to judicial review of Federal legislation. *Dennis v. United States*, 341 U.S. 494, 508-509; *Bolling v. Sharpe*, 347 U.S. 497, 499; *Shapiro v. Thompson*, 394 U.S. 618, 641.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. ***The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds*. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." 319 U.S. at 638-639. (emphasis added)

b. The governmental powers of the States are a fundamentally protected constitutional right embodied in the Tenth Amendment.

Mr. Justice Jackson has been quoted as saying of the Tenth Amendment:

"I know that it is now regarded as more or less provincial and reactionary to cite the Tenth Amendment, . . . That Amendment is rarely mentioned in judicial opinions, rarely cited in argument. But our forefathers made it a part of

> the Bill of Rights in order to retain in the localities certain powers and not to allow them to drift into centralized hands. Perhaps the Tenth Amendment is drifting into oblivion . . . ".[74]

But the Tenth Amendment is not to be shorn of its meaning by narrow and technical construction. It must not be consigned by this Court to oblivion. It must be considered fairly and liberally so as to give effect to its scope and meaning. And a major reason is that the guarantees embodied in the Tenth Amendment are a fundamentally protected constitutional right.[75] When the issue is a conflict between State and Federal regulation of a given economic enterprise, and Congress has either explicitly or by construction dealt with the area, such regulation pre-empts that of an individual State. However, when the subject regulated is no longer an economic enterprise but the State Government itself, there exists no precedent for Federal regulation and "the implications of our dual system of Government" cannot thereby be destroyed.

To use whatever impact States may have upon commerce as an excuse for the total restructuring of State budgetary activities and priorities by Federal regulation has been rejected even by the majority in *Wirtz*. This violation of our constitutional Federalism

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[74]Smith, *What Has Happened To The Tenth Amendment*, 10 La. Bar J. 21 (1962).

[75]Constitutional expression of a fundamental right will require the higher than rational basis test, whereas other interests not expressly or impliedly protected in the Constitution itself may be contravened upon a showing of a rational basis. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 30, 35 (education).

has no precedent in the history of the Constitution and has no rational basis today.

In *Polish Nat'l Alliance v. Labor Board*, 322 U.S. 643, 650, the Court said by way of dictum:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make in-roads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." 322 U.S. at 650.

In *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 594, the Court held that a State Governor's suspension of a railroad commissioner would not be inquired into by Federal Courts except on deprivation of "one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen. . . ."

The same policy of noninterference with State Government administration must be applied against the Congress as against the Courts.

And in *Kotch v. River Port Pilot Comm'rs*, 330 U.S. 552, 557 the Court upheld against challenge on equal protection grounds a State law requiring that maritime pilots be qualified State officers. The Court said:

> "[A]n important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. [citing cases]."

The Court stated in *Taylor v. Beckham*, 178 U.S. 548, 570-571, the principle that:

> "It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualification of their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."

This principle is equally applicable to the right and power of States and their political subdivisions to regulate the employment of all employees of State and local Governments, who are the agents and servants of State and local officers.[76]

On the specific point of this Case, the Court in *Newton v. Comm'rs,* 100 U.S. 548, 559, said:

> "The legislative power of a State, except so far as restrained by its own Constitution, is at all

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[76]The independence of States and the State and local officers, which is provided in our constitutional Federalism, can only be preserved by preserving from Federal incursion State judgments about the use of servants and agents in providing essential Government services.

In *Gravel v. United States,* 408 U.S. 606, 616-617, a case determining, *inter alia,* the extent to which a servant and agent of a United States Senator takes the legislative privilege of the Senator, the Court said:

> "that it is literally impossible, in view of the complexities of the modern legislative process . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they *must be treated as the latter's alter ego.*" 408 U.S. at 616-17. (emphasis added).

> times absolute with respect to all offices within its reach. It may at pleasure create or abolish them or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. Butler v. Pennsylvania, 10 How., 402.
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> "The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character." 100 U.S. at 559.

The interest of municipalities in efficiently safeguarding "the health and safety of entire urban populations" was weighed in *Camara v. Municipal Court,* 387 U.S. 523, 533, under this test:

> "[I]n applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration."

As a fundamentally protected constitutional right, the Tenth Amendment stands with other fundamentally protected constitutional rights for the preservation of which this Court has demanded that Federal legislation pass a test higher than that of having a rational basis. See, *American Communication Assn v. Douds,* 339 U.S. 382, 400; *Dennis v. United States,* 341 U.S. 494, 508-509, 526-527; *United States v. C.I.O.,* 335 U.S. 106, 140 (Rutledge, J., concurring); *United States v. O'Brien,* 391 U.S. 367, 376-377; *Marchetti v. United States,* 390 U.S. 39, 44, 58.

Similarly, a higher protection is given to State and City Government operation in analyzing where congressional silence in an area of regulation nonetheless

can be said to have preempted[77] the field from State regulation under the Supremacy Clause, Art. VI, cl. 2 of the Constitution.

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown,* 317 U.S. 341, 351.

This test takes into account "the peculiarities and special features of the Federal regulatory scheme in question." *Burbank v. Lockheed Air Terminal,* 411 U.S. 624, 638. See also, *United Automobile, A. & A.I.W. v. Wisconsin Employment Relations Board,* 351 U.S. 266,

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[77]See e.g., *Hines v. Davidowitz,* 312 U.S. 52, 67; *Pennsylvania v. Nelson,* 350 U.S. 497, 500; *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 229. *Pennsylvania v. Nelson,* 350 U.S. at 497, 501-505, declared several tests for finding Federal supercession. Second of these tests, *Id.* at 504, was whether "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' [citing *Hines v. Davidowitz,* 312 U.S. 52]." Appellants urge that the obverse of this test must find the State and City interest so dominant in preserving the Federal system as to preclude the possibility of Federal interference by the 1974 Amendments being sustained. This Court reasoned similarly concerning congressional silence in §16 of the Fair Labor Standards Act in *Employees v. Missouri Public Health Dept,* 411 U.S. 279, 285. That Congress has acted in the 1974 Amendments to make explicit the interference with States and Cities (here in violation specifically of the Eleventh Amendment; see *infra* section 5) which this Court would not infer in *Employees* merely makes this congressional action unconstitutional.

275 ("We would not interpret an act of Congress to leave [States] powerless to avert [violence] without compelling directions to that effect.")

In this case, there is no possibility of an "unexpressed purpose" to nullify State and City control over Government operations. Congress clearly has spoken in § 6 of the Act, Pub. L. No. 93-259, 88 Stat. 55 amending 29 U.S.C. § 203. But Congress has failed to give compelling directions and reasons supporting its interference with State and City Government. This Court should apply the same protection of State and City Government integrity here where Congress has clearly spoken in opposition to our system of constitutional Federalism, as where Congress' intention is construed to avoid interference with States and Cities. Only the result is different here: the 1974 Amendments cannot be saved by construction; they are unconstitutional and must so be declared.

The States not having surrendered such unique and unusual powers to regulate their own employees as to terms and conditions of employment, the Federal government has no such constitutional power. The States surrendered only a part of their power to the Federal government.

Although he made a much quoted statement about the Tenth Amendment in *United States v. Darby*, 312 U.S. 100, 124 that:

> "The amendment states but a truism and all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitu-

tion before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . ."

Mr. Justice Jackson also said there:

". . . all is retained that has not been surrendered."

Chief Justice Marshall wrote:

"In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland,* 4 Wheat. 316, 410.

No constitutional power is given or implied to burden the instrumentalities by which States and their political subdivisions exercise their governmental functions. The National War Labor Board rendered a landmark war-time decision written by Wayne Morse, but concurred in by all members, holding that the Federal Government did not have constitutional power to fix wages and salaries of state and local government officers and employees – even in war time. In so deciding the Board said:

"It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing service for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its

> power and jurisdiction. The employes involved in the instant cases are performing services for political subdivisions of state governments. *Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employes would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government.*
>
> *In the Matter of Municipal Government, City of Newark, et al.*, National War Labor Board, Nos. 47 and 726 (1942), reprinted in full in Rhyne, LABOR UNIONS AND MUNICIPAL LAW, at 228-240 (1946) (emphasis added).

Interestingly enough, a concurring opinion states at 241:

> "It is unreasonable to believe that a Federal agency or Board can deal with better judgment or with greater justice in these cases than the regularly elected and constituted officers of these municipalities.
>
> *If the public authority were to be centralized in the hands of Federal officials, it would be inevitable that the American system of government would be destroyed.*
>
> It is clear that the National War Labor Board has no jurisdiction in these cases through any of the provisions of the Constitution of the United States, or through any Federal or State law." (emphasis added).

In our Federal scheme of government, the entire nation is composed of a Union of separate and equal state governments, and the concept of Federalism[78]

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[78]"Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or 'States', for common purposes;

rests on the belief that the national Government will fare best if the states and their local governments are left free to perform their governmental function in their separate ways as best adapted to local needs and views.

Such a system embodies a concept in which the national government, in protecting federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states. Mr. Justice Stone, in *Educational Films Corp. v. Ward,* 282 U.S. 379 noted that:

> "The necessity of marking those boundaries [which define the limits of the powers and immunities of state and national governments] grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without

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(2) the division of legislative powers between a 'National Government', on the one hand, and constituent 'States', on the other, which division is governed by the rule that the former is 'a government of enumerated powers' while the latter are governments of 'residual powers'; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the 'National Government' within its assigned sphere over any conflicting assertion of 'State' power; (6) dual citizenship." CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 92-82, 92d Cong., 2d Sess. XVIII (1972).

undue interference from the other." 282 U.S. at 391-392.

On this concept of the relationship between the Federal government and the States, Mr. Justice Black in *Younger v. Harris,* 401 U.S. 37, said for the Court:

> "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism,' The concept does not mean blind deference to 'States Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of the Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S. at 44-45.

And this Court has said in a case in which it found a provision of an Act of Congress (The Federal Home Owners' Loan Act of 1933) to be an unconstitutional encroachment upon the reserved powers of the States under the Tenth Amendment:

> "[T]he Tenth Amendment preserves a field of autonomy against federal encroachment." *Hopkins Federal Savings Ass'n v. Cleary,* 296 U.S. 315, 337 (1935).

3. The Federal Government Cannot Justify, Under Any Test, Usurpation Of State And City Government Functions Under An Act Designed To Regulate Private Industry.

The 1974 Amendments included within the coverage of the Act all State and City employees with minor exclusions.[79] The fact that certain of these employees are given exemptions and exceptions later in the Act in no way changes the Federal assertion of power (including the power to exempt) over all State and City

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[79]Section 3(e) of the Act, 29 U.S.C. § 203(e), as amended by Section 6 of Pub. L. No. 93-259 (App. to this Brief, *infra*, 4a), provides in relevant part:

"(e)(1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means -

* * *

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual -

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"ii) who -

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a members of his personal staff,

"(III) is appointed by such an office-holder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an office-holder with respect to the constitutional or legal powers of his office."

Government employees.[80]

The Court in *Wirtz* recognized the truth of the congressional declaration of full power of usurpation:

> "Nor is it relevant that Congress originally chose to exempt all state enterprises and later partially removed that exemption. Congress was as free to include state activities within the general regulation at a later date as it would have been to omit the exemption in the first place." 392 U.S. at 199 n.28.

In applying the higher-than-rational basis test to the text of the 1974 Amendments and the Act here challenged, and to the facts of this Case, this Court must balance the need of local flexibility against a Federal imposition of rigidity. And in doing so the vast differences between private business for whom the Act is written and the public business for which Governments exist must be kept in mind. This Act was written for private business and the regulations issued under it were written for private business. They do not fit Government or public business. Defendant has so admitted as to 85% of the regulations issued. (Pritchard Deposition at 121-123, App. 167-69). Nowhere is this difference between public business and private business illustrated better than in the variety of tasks Government must perform.

The District Court below found as a fact that "the institutions whose employees are in question here

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[80]C.f., *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 115, and *Choteau v. Burnet*, 283 U.S. 691, 697, construing inclusion of "gross income" within the tax statutes, now 26 U.S.C. § 61 (1970), to include all income, "from whatever source derived" subject to exclusion in other sections of the Internal Revenue Code.

perform governmental functions not seriously in competition with private industry." (App. 650). The functions so found not to be within the "competition" nexus of *Wirtz* are the entirety of State and City functions, (Complaint ¶16, App. 16), each of which involves State and City personnel and personnel costs.

a. The Act violates the principles of local autonomy and of local "ballot box" control over governmental functions.

The system of checks and balances upon which our Nation has thrived includes above all the checks and balances inherent in strong State and local Governments each free to experiment in meeting its responsibilities without centralized Federal control.

Local Government is based on need, thus it is as varied as the need requirements of each community. Climate, topography, rivers, lakes, seas, all play a part.

The variety of our Federal system is strengthened by the wholesomeness of local and regional variations. Disadvantaged particularly by the restrictions of the 1974 Amendments on volunteerism are the rural and sparsely settled parts of our Nation.

In *Sailors v. Board of Education*, 387 U.S. 105, 110-111, a County school board election scheme was upheld, the Court saying:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

See also, *Phoenix v. Kolodziejski*, 399 U.S. 204, 209.

As Justice Brandeis warned in *New State Ice Co. v. Liebmann*:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." 285 U.S. 262, 311 (dissenting opinion).

This Court must consider the Commerce Clause against the needs of the entire constitutional scheme of Federalism,[81] in evaluating whether a claim of Federal power to dictate 85% of City and State budgets, and to eliminate fair and reasonable State and City personnel law, can stand.

Our constitutional scheme of Federalism includes the guarantee of ballot box control by citizens over their governmental units; this is the People's power guaranteed by the Tenth Amendment. In *Hadley v. Junior College District*, 397 U.S. 50, the unifying factor behind this right of local control over governmental functions was recognized:

> "The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions." 397 U.S. 50 at 54.

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[81] The Constitution mentions States 114 times.

Included within the constitutionally protected governmental functions under Federalism are the necessary fiscal decisions comprising the budgetary process of each unit of local Government. Thus, the County Commissioner's Court held subject to ballot box control in *Avery v. Midland County*, 390 U.S. 474, was described as "representative of most of the general governing bodies of American cities, counties, towns and villages" in that:

> "It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop – whether industry should be solicited, roads improved, recreation facilities built and land set aside for schools – and immediate choices among competing needs." 390 U.S. at 483.

Here, the 1974 Amendments remove from State and local "ballot box control" decisions on the extent and nature of State and City Government services. No one has elected Appellee; no one has elected his Administrator of Wages and Hours and the hundreds of Federal employees of that Division, who now under the Act will decide important salary questions with salaries constituting 85% of city budgets. (Pritchard Deposition at 125-126, App. 170-171) These Federal officials are not responsible to the needs and wishes of citizens in 18,000 Cities and 50 States. (Pritchard Deposition at 212-13, App. 230-31)

b. The 1974 Amendments irrationally affect, under the commerce power, Governments which are not in commerce.

The Appellee argues that States are within the commerce power grasp of Congress because States import goods from other States and use these goods in providing services entirely intrastate. S. Rept. No. 93-960, 93d Cong., 2d Sess. 24; Appellee's Motion to Affirm 11-12. Under this reasoning, a State or City would be within the Federal commerce power solely because it purchased a fire truck made in Detroit to put out intrastate fires or a trash truck made in Detroit to collect trash. Whether such a situation is within the Fair Labor Standards Act is before this Court on a question of statutory construction. *Iowa v. Brennan*, No. 73-1565, *petition for cert. filed*, 43 U.S.L.W. 3064. In any case, to say that such a nexus to commerce will pass "strict scrutiny"[82] and counterbalance "indispensable democratic freedoms"[83] would shock those who have acted to preserve "Our Federalism"[84] from irrational interference.

The Appellee's Motion to Affirm at page 21 claims that spreading employment to more workers is a goal of the Act. However sensible this reasoning, carried through the Act from its inception[85] to the present[86]

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[82] *Skinner v. Oklahoma*, 316 U.S. 535, 541.

[83] *Thomas v. Collins*, 323 U.S. 516, 530.

[84] *Younger v. Harris*, 401 U.S. 37, 44.

[85] H.R. Rept. No. 1452, 75th Cong., 1st Sess. 7-9 (1937); S. Rept. No. 884, 75th Cong., 1st Sess. 3 (1937).

[86] See, S. Rept. No. 1487, 89th Cong., 2d Sess. 22 (1966); H. Rept. No. 871, 89th Cong., 1st Sess., 30-31 (1966), concerning application of the Act to State-owned schools and hospitals.

may be as applied to private industry, where the cost of training a new employee and the cost of carrying a new pensioner may be passed on to the consumer, it cannot reasonably be applied here, where States and Cities operate under debt and tax limitations.

As to the specific essential Government functions with which the 1974 Amendments interfere, the Federal Courts have recently reaffirmed that the collection of State taxes is primarily of local nature and activities incidental to it do not amount to the production of goods for commerce. In *Hodgson v. Hyatt Realty*, 353 F. Supp. 1363 (M.D.N.C. 1973), *aff'd sub nom. Brennan v. Hyatt Realty*, No. 73-1869 (4th Cir., filed January 10, 1974), the manufacture of state license plates and their sale was held not to come within the Fair Labor Standards Act coverage:

> "The employees in the present case do not produce goods *for commerce*. The various items and information they handle is done pursuant to their duty to collect taxes. *** The scheme set up by the State to collect its taxes has primarily intrastate influence." 353 F. Supp. at 1374 (emphasis in original).

In describing the State function of tax collection, the Court stated:

> "Tax money is not a good under the Act. Using the most general term in the definition of 'goods', tax monies are not 'articles or subjects of commerce' (29 U.S.C. §203(i)). They are a quantity derived from a power unique to the State. As such, they are the product of a very local, intrastate activity." 353 F. Supp. at 1372.

c. Appellee's regulations under the Act violate the Fifth Amendment's Due Process requirements.

The Appellee and his Wage and Hour Administrator have not promulgated new regulations, suited to the unique nature of Government, for the bulk of State and City employees, except for regulations covering police and fire personnel, 39 Fed. Reg. 44141 (Dec. 20, 1974) which were published 6 working days before their effective date.[87]

1) The regulations in effect as of December 31, 1974 do not take into account the peculiar nature of Government, in violation of Due Process.

Especially where criminal penalties are imposed, the failure of a statute[88] or regulation[89] to inform "what the [Government] commands or forbids" has been held to violate Due Process. "No one may be required at peril of life, liberty or property to speculate as to the

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[87]These regulations, and enforcement of the Act against States and Cities and the effective date of certain parts of the 1974 Amendments, have been stayed by this Court until further order of Court. Nos. A-553 and A-556, Stay Order issued Dec. 31, 1974, and extended by the Court, Jan. 13, 1975.

[88]See *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Winters v. New York*, 333 U.S. 507, 515; *United States v. Harriss*; 347 U.S. 612, 617; *Lambert v. California*, 355 U.S. 225, 227-230.

[89]See *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674.

meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453.

The 1974 Amendments and the Regulations thereunder promulgated by the Secretary violate the Fifth Amendment requirement of Due Process. The Fair Labor Standards Act, which is in its entirety applied to States and Cities by the 1974 Amendments, contains both civil penalty provisions[90] and criminal penalties.[91]

The Act is necessarily broad and general in its language. To "provide a practical guide to employers and employees as to how the office [the Secretary's Administrator of the Wage and Hour Division] representing the public interest[92] in its enforcement will seek to apply it." *Skidmore v. Swift & Co.*, 323 U.S. 134, 138, Regulations have been promulgated. These regulations now comprise one 691-page volume of the Code of Federal Regulations. These regulations are 85%

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[90]"Liquidated damages" are provided by Section 16(b), 29 U.S.C. § 216(b) in an amount equal to back wages, for violation of the minimum wage or overtime provisions of the Act.

[91]Sec. 16(a), 29 U.S.C. § 216(a) provides criminal penalties for willful violations of the minimum wage or overtime provisions of the Act.

[92]The very language of *Skidmore* shows the irrationality and unconstitutionality of applying the Act to State and local Government: the Administrator of Wages and Hours, in enforcing the 1974 Amendments, must purport to represent the "public interest" while interpreting an Act which usurps personnel decision-making from locally elected State and City officials. In the name of the "public interest", a non-elected Federal employee in Washington is empowered by the 1974 Amendments here challenged to impose his views on the citizens of 50 States and 18,000 municipalities in derogation of the decisions of the elected officers of those Governments.

inapplicable to States and Cities. (Pritchard Deposition at 121-123, App. 167-69).

Police and fire personnel are actually disadvantaged by the special regulations covering them. Under 29 C.F.R. §553.15, sleeping and eating time must be included as hours worked where a shift of exactly 24 hours is assigned; for employees other than police and fire personnel, sleeping and eating time is deducted from hours worked where a shift of exactly 24 hours is assigned. 29 C.F.R. §785.21.[93] Since a shift of exactly 24 hours is by far the most common for fire personnel (Pritchard Deposition at 169, 170-71, App. 201-03), the "special treatment" accorded City and State Governments costs State and local taxpayers even more money, without a rational basis.

2) The police and fire personnel regulations, designed for States and Cities, were published 6 business days before their effective date, making compliance impossible in violation of Due Process.

Appellee's regulations covering terms and conditions of employment of State and local police and fire fighters which were printed in the Federal Register of December 20, 1974, allowed such an unreasonably short time as to make compliance by State and local governments impossible. No State or local Government could possibly receive and act upon those regulations in the some six business days allowed over the Christmas holidays. This Court can take judicial notice that few

[93]This section is one of the regulations promulgated with industry in mind, and automatically made applicable to States and Cities by the 1974 Amendments.

State and local Governments could have received these regulations by mail in the time Defendant provided. To give the notices, to hold the hearings, and to take the law and budget actions required by State and local law within the time allowed is clearly impossible. To assess and act upon the shocking reversal by the regulations of customary practices as to sleep and meal time requires State and local Government law and budgetary changes of vast impact.

These regulations have a "ripple" controlling effect beyond police and fire fighters on the whole of local government employee terms and conditions, a matter of difficult and enormous troubles in that 85% of local budgets are made up of employee salaries. (Pritchard Deposition at 125-26, App. 170-71).

In this Case, it cannot be said that the Act does not greatly affect State and City operations. Paragraphs 44-72 of the Complaint, (App. 27-36) show the fiscal impact on States and Cities of the Act, based on 25 of 18,000 Cities and 10 of the 50 States; Deposition Exhibits 1-36, 38-48 (App. 311-565, 568-587), add the fiscal impact on more States. The totals of those expert estimates are: $57,000,000 in first year costs for only the 25 Cities and 10 States, with a $200,000,000 estimate of first year increased costs for all firemen, and an expert informed estimate of over one billion dollars in 1975 in increased costs.

The majority of increased costs resulting from the Amendments do not flow from the Act's basic mandates regarding minimum wages and maximum hours. The greater portion of the budget-breaking fiscal impact projected for this federally dictated policy stems from the generalized regulatory provisions under the

Act and the Act's history of application to private enterprise. When these policies collide with the diversity of State and local Government practices, the result is to force additional costs upon those Governments. This result is illustrated by examples given in the Complaint in the areas of compensatory time off (Complaint ¶¶49, 66; App. 29-30, 35), flexible scheduling practices (Complaint ¶¶49; App. 29-30) employment of student interns (Complaint ¶¶49, 60; App. 29-30, 33-34), police and fire training (Complaint ¶¶56, 69-70; App. 32, 35-36), availability of "reserve" policemen (Complaint ¶57; App. 32-33) and paid volunteers (Complaint ¶28, App. 21) institution of affirmative action programs (Complaint ¶59, App. 33) computation of payrolls (Complaint ¶63, App. 34) membership on volunteer boards and commissions (Complaint ¶65, App. 34-35) and joint employment (Complaint ¶¶29, 46; App. 22, 29)

4. In No Case Other Than *Maryland v. Wirtz* Has Federal Usurpation Of State And City Government Operation Been Upheld In Derogation Of The Fundamental Constitutional Protection Of Constitutional Federalism And That Case Was Wrongly Decided.

Maryland v. Wirtz, 392 U.S. 183, is the only Decision to uphold Federal power to control and regulate State and City Government governmental functions by calling them commerce. For the reasons set forth here and, in greater detail, *supra* at pages 26-29, it is respectfully urged that *Wirtz* was wrongly decided and should be overruled. The majority in *Wirtz* rejected the reasoning of the dissent by Mr. Justice Douglas, concurred in by Mr. Justice Stewart that " . . . Congress could under today's decision declare a whole state an 'enterprise' affecting

commerce and take over its budgeting activities." (392 U.S. at 196 footnote 27). Yet that is precisely what Congress did in the 1974 Amendments here challenged.

The opinion of a divided Court in *Wirtz* did not address itself to the question of this case, whether a Federal act which irreparably harms States and Cities in conflict with valid, fair and reasonable State and City laws and policies for the operation of States and Cities can have a rational basis. The opinion in *Wirtz* is neatly divided into consideration of two principal challenges to the 1966 amendments to the Fair Labor Standards Act. The Court, at 392 U.S. 188-193, considered the rationality of the "enterprise concept" as applied to all employees, including those of the private sector. There is no discussion here of rationality of the "enterprise concept" as applied to the facts of the case, that is, as applied to States. The majority opinion, at 392 U.S. 195-199, then considered whether the Tenth Amendment to the Constitution could stand in the way of "the Federal Government, when acting within a delegated power," 392 U.S. at 195. The missing logical connective, of course, is whether the power is rationally delegated and the Federal Government can rationally act within the delegated commerce power when it takes action usurping State governmental power and dictates to States and Cities the extent of essential Government services. The opinion of the divided Court in *Wirtz* treated this connective, the essence of the instant Case, only cursorily. In doing so, the Court found facts and enunciated law which are not here controlling. The Court found with respect to the challenge there:

> "The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages

> are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate." 392 U.S. at 193.

The vast new Federal records, and reports and decisions required by the Act of States and Cities and the restructuring of State and local employment practices from State and City to Federal control, are enormously costly. Governor Askew of Florida estimates an annual $800,000 for new "Federally mandated record keeping costs under the Act" for his State. (Defendant's Ex. 43 to Byrley Deposition and Complaint ¶37; App. 575-576, 25)

Appellee offers no estimate of the total cost which application of the Act and Regulations will impose as to other State and City employees. The Senate Committee Report on the Act estimated a first year cost of $128,000,000 and a second year cost of $162,000,000. (S. Rept. No. 300, 93d Cong., 1st Sess. 26 (1973)). The House Report estimated an absurd first year cost of $250,000 for the Federal Government and an equally absurd $3,000,000 per year as the cost for the next 5 years. (H.R. Rept. No. 913, 93d Cong., 2d Sess. 41 (1974)).

That the dissent was correct and the majority wrong about the danger of the Congress declaring an entire State Government an "enterprise" and thereby assuming power to virtually draw up each State's budget is clear. That is exactly what has happened under the 1974 Amendments. And while the Congress made no credible

study of the cost impact of these Amendments to State and local Government, this Brief demonstrates that the cost impact is enormous. The majority's reliance in *Wirtz* upon a *de minimis* impact from the 1966 amendments was also erroneous when considered against the facts of record herein that salaries are 80 to 85% of City budgets. (Pritchard Deposition at 125-26, App. 170-71).

Under these circumstances *Wirtz* is not controlling and in fact *Wirtz* should be expressly overruled. The Court did not consider the impact of the 1966 amendments on the entire constitutional scheme of Federalism, including the many other recognitions in the Constitution of that system of Government apart from and in addition to the Tenth Amendment.

A close examination of the cases relied upon by the majority opinion in *Wirtz,* 392 U.S. at 193-199, shows that no case cited by the Court involved a challenge to Federal interference with State or City Government operations. Each case cited dealt either with situations where the interest of the Federal Government was held superior to the interest of the States in regulating private industry, or with situations where a State was held to be directly engaged in commercial competition with a particular private industry. Neither situation is present in this Case; without case support applicable to this Case, *Wirtz* stands alone, and cannot govern this Case.[94]

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[94]On a related point, *Wirtz*, 392 U.S. at 195 n.26 cites two cases (one concerning the National Labor Relations Act and one concerning the Fair Labor Standards Act applied to private industry) to support the point that "engagement of an enterprise in interstate commerce may consist of importation [of goods

The principal case support[95] for the rejection in *Wirtz* of the argument for application of the Tenth Amendment was found in *Sanitary District v. United States,* 266 U.S. 405, 426,[96] and *United States v. California,* 297 U.S. 175, 181-183, 183-185.[97]

Sanitary District enjoined the withdrawal by a political subdivision of a State from Lake Michigan of water for sewage carriage in amounts greater than authorized by the Secretary of War. That decision cannot be read without reference to the treaty power and the conduct of foreign relations by the Federal Government.[98] Despite the Court's dictum to the

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from outside the State]." The Fair Labor Standards Act case, *Wirtz v. Hardin & Co.*, 253 F. Supp. 579 (N.D. Ala. 1964) *aff'd*, 359 F.2d 792 (5th Cir. 1966), found insufficient evidence that "some employees regularly receive groceries and produce from points outside the State of Alabama," 253 F. Supp. at 586 and doubted the plaintiff "intended to press [this] allegation of the complaint." 253 F. Supp. at 586.

[95]See Appellee's Motion to Affirm at 18-19.

[96]Treated in *Wirtz*, 392 U.S. at 195-196.

[97]Treated in *Wirtz*, 392 U.S. at 197-199.

[98]So, the war power must be considered an essential factor in the holding of *Case v. Bowles*, 327 U.S. 92, 101, cited in *Wirtz*, 392 U.S. at 195, as rejecting the existence of a "general" doctrine implied in the Federal Constitution that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." The Court in *Case*, 327 U.S. at 102, found essential to the war power, congressional regulation of sales and rents (there, sale of timber from State-owned lands); the intention of the Federal statute was seen to be the coverage of "sales of commodities by states." 327 U.S. at 100.

contrary, 266 U.S. at 426, the decision does not hold the commerce power a sufficient grant of Federal power to interfere with State governmental operations.

More importantly, *Sanitary District* involved the power of the Federal Government to prohibit interference by States with interstate commerce (there, navigable waterways). The rational basis for legislation supporting that goal is much more apparent than the connection in the amendments upheld in *Wirtz* between State Government and commerce. So, here, States do not interfere with commerce or with any interstate activity, as by erecting trade barriers or inhibiting interstate travel; they merely pay some 11,000,000 employees wages to perform Government services intrastate.

United States v. California upheld the requirement of certain safety devices under the Federal Safety Appliance Act to a State-owned railroad serving a wharf. Implicit in that holding, however, is the finding that "the larger part of [the cars transported on the state-owned railroad] has its origin or destination in states other than California." 297 U.S. at 181-182. The Court in *Wirtz* did not find that State-owned schools and hospitals produced either goods or services with destinations in other States; certainly the District Court below in this Case did not find any such activity.

Beyond its lack of consistency with the holding and effect of *Wirtz* (in serving the Congress as an imprimatur for interference with State and City Governement operations)[99] *California* is even less applicable to this case than it was in *Wirtz*. In *Wirtz*,

[99]See H.R. Rept. No. 913, 93d Cong., 2d Sess. 6-7 (1974).

392 U.S. at 198, the Court cited *California* as "controlling" and proceeded to conclude:

> "[This Court] will not carve up the commerce power to protect enterprises *indistinguishable in their effect on commerce from private businesses*, simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-199 (emphasis added).

In this Case, the District Court has found, under Rule 56, Fed.R.Civ.P.,[100] that States and Cities here are not in serious competition with other States and Cities or with private businesses.

It is respectfully submitted that a take-over or swallowing up of control over State and local governmental powers which those Governments have exercised since the founding of our Nation is much more serious than the Court there recognized.

Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, reaffirmed the prevention of labor disputes which burden interstate commerce as a rational basis for Federal labor legislation. The facts of *Santa Cruz* indicate that an actual dispute arose; the Court's recounting of it makes clear its industrial setting, always involving other industries shipping the same goods down the "stream of commerce":

> "The immediacy of the effect of the forbidden discrimination against these warehousemen is strikingly shown by the findings of the Board. When the men found themselves locked out because of their joining the union, they at once formed a picket line and this was maintained with such effectiveness that eventually 'the movement

[100]Opinion of the District Court below, App. 650.

> of trucks from warehouse to wharves ceased entirely.' The teamsters refused to haul, the warehousemen at the dock warehouses declined to handle, and the stevedores between dock and ship refused to load, petitioner's goods. These became, in the parlance of the men, 'hot' cargo. Petitioner says that this was an unlawful conspiracy of those sympathizing with its discharged warehousemen, but it was the discrimination against them which led directly to the interference with the movement from the plant and elicited the support so effectively given.
>
> It would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce." 303 U.S. at 468-469.

See also, *NLRB v. Fainblatt*, 306 U.S. 601, 604; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34; *United States v. Darby*, 312 U.S. 100, 123.

The statement in *Jones & Laughlin*, 301 U.S. at 36, that "burdens and obstructions [are] not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce", and that "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control," 301 U.S. at 37, must be read with the next sentence:

> "*. . .the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects*

upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. at 37. (emphasis added)

The impact of the totality of the Act upon State and local Governments by the Federal Government and the higher purposes of Federalism of the Constitution were not adequately considered or evaluated in *Wirtz*. It is urged that when these impacts are considered and those higher purposes are applied, *Wirtz* will be found to have been wrongly decided. See *supra* pages 26-30.

5. The 1974 Amendments Also Violate the Eleventh Amendment, An Essential Element in the Constitutional Scheme of Federalism.

The origins and evolution of the Eleventh Amendment, well known to this Court, further indicate a conviction on the part of the Founding Fathers, the early Congresses and this Court to recognize the unique status of the States under the Constitution. Thus, as early as the constitutional ratification by the States, Hamilton expressed the concept that sovereign State Governments, no less than the National Government, should remain immune from suit absent their consent:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in

> the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article on taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on this conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?" THE FEDERALIST No. 81.

A judicial attempt to deny this inherent governmental right of the States in *Chisholm v. Georgia*, 2 Dall. 419, was met with the swift, overwhelming adoption of the Eleventh Amendment.[101] Since its enactment, the scope of the Amendment has been broadened by Court interpretation to grant a State immunity from suit brought against it in Federal Courts by its own citizens as well as those of another State. *Hans v. Louisiana*, 134 U.S. 1, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, *Employees v. Missouri Public Health Dept.*, 411 U.S. 279.

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[101] See *New Hampshire v. Louisiana*, 108 U.S. 76,88.

In *Employees*, this Court refused to apply the doctrine of implied consent articulated in *Parden v. Terminal R. Co.*, 377 U.S. 184, to governmental operations. In barring the employee back pay suits sought under the 1966 Fair Labor Standards Act amendments, this Court stated:

> "Thus we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."
>
> * * *
>
> "It is one thing, as in *Parden*, to make a state employee whole; it is quite another to let him recover double against a state. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly." 411 U.S. at 285, 286.

In spite of the above *caveat*, continued congressional indifference to the unique role of State Governments in our Constitutional structure is manifested in the 1974 Amendments to the Act.[102] Congress has now explictly granted a cause of action by any employee against a public agency for back pay and liquidated damages, thus allowing State employees to sue States without their consent. Such retroactive damage suits are

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[102]By amending the Portal to Portal Act of 1974, in the 1974 Amendments here challenged, Congress legislatively overruled this Court's decision in *Employees* by a provision which "suspends the statute of limitations to preserve rights of actions of State or local government employees which would otherwise be barred as a result of the Supreme Court's decision." S. Rept. No. 690, 93d Cong. 2d Sess. 27 (1974). See also H.R. Rept. No. 913, 93d Cong. 2d Sess. 45 (1974).

violative of the Eleventh Amendment as construed in *Edelman v. Jordan*, 415 U.S. 651.

The new Amendments also authorize the Secretary of Labor, without restrictions, to bring suits on behalf of employees for back pay and liquidated damages. This legerdemain allows use of the Secretary's position as an official of the Federal Government to funnel employee damage suits around the Eleventh Amendment's assurance of sovereign immunity. This is similar to calling government commerce! It is clear that such a tactic cannot be upheld when, under the Eleventh Amendment, preservation of a State's sovereign immunity "is to be determined not by the mere titular parties but by the essential nature and effect of the proceeding as it appears from the entire record". *Ex Parte New York*, 256 U.S. 490, 500.

Cases upholding the Federal Government's power to bring suit against a State have done so only where States had violated the constitutional rights of their citizens and Congress had the power to authorize judicial actions to end such violations. *United States v. Mississippi*, 380 U.S. 128; *Louisiana v. United States*, 380 U.S. 145. In distinction, the States here are depriving no one of constitutional rights. On the contrary, the States are carrying out the efficient performance of their constitutionally mandated governmental powers by providing fair and reasonable terms and conditions of employee employment.

CONCLUSION

Because the 1974 Amendments to the Fair Labor Standards Act, Pub. L. No. 93-259, cannot under the Commerce Clause abrogate the system of Federalism provided in the entirety of the Constitution, this Act and these Amendments cannot constitutionally be applied to States, political subdivisions of States and Cities. These 1974 Amendments violate the principle of Federalism embodied throughout the Constitution, and violate the Fifth, Tenth and Eleventh Amendments. The Appellee's regulations, under the Act and under the 1974 Amendments' changes to the Act, violate the Fifth Amendment. The Order of the District Court below must be reversed with directions to grant the declaratory and permanent injunctive relief prayed for in the Complaint.

Respectfully submitted,

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APPENDIX

1974 AMENDMENTS TO FAIR LABOR STANDARDS ACT, PORTAL TO PORTAL ACT OF 1947, AND AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Public Law 93-259
93rd Congress, S. 2747
April 8, 1974

An Act

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fair Labor Standards Amendments of 1974.

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974". 29 USC 203 note.

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201–219). 52 Stat. 1060.

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6(a)(1) is amended to read as follows: 80 Stat. 838.

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;". 29 USC 206.

INCREASE IN MINIMUM WAGE RATE FOR NONAGRICULTURAL EMPLOYEES COVERED IN 1966 AND 1974

SEC. 3. Section 6(b) is amended (1) by inserting ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974" after "1966", and (2) by striking out paragraphs (1) through (5) and inserting in lieu thereof the following: 86 Stat. 373. 20 USC 1681.

"(1) not less than $1.90 an hour during the period ending December 31, 1974,

"(2) not less than $2 an hour during the year beginning January 1, 1975,

"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

"(4) not less than $2.30 an hour after December 31, 1976."

88 STAT. 55

INCREASE IN MINIMUM WAGE RATE FOR AGRICULTURAL EMPLOYEES 88 STAT. 56

SEC. 4. Section 6(a)(5) is amended to read as follows:

"(5) if such employee is employed in agriculture, not less than—

"(A) $1.60 an hour during the period ending December 31, 1974,

"(B) $1.80 an hour during the year beginning January 1, 1975,

"(C) $2 an hour during the year beginning January 1, 1976,

"(D) $2.20 an hour during the year beginning January 1, 1977, and

"(E) $2.30 an hour after December 31, 1977."

INCREASE IN MINIMUM WAGE RATES FOR EMPLOYEES IN PUERTO RICO AND THE VIRGIN ISLANDS

SEC. 5. (a) Section 5 is amended by adding at the end thereof the following new subsection: 63 Stat. 911. 29 USC 205.

Infra.
63 Stat. 915;
75 Stat. 70.
29 USC 208.

"(e) The provisions of this section, section 6(c), and section 8 shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this Act in the same manner as the minimum wage rate for employees employed in a State of the United States is determined under this Act. As used in the preceding sentence, the term 'State' does not include a territory or possession of the United States.".

80 Stat. 839.
29 USC 206.

(b) Effective on the date of the enactment of the Fair Labor Standards Amendments of 1974, subsection (c) of section 6 is amended by striking out paragraphs (2), (3), and (4) and inserting in lieu thereof the following:

"(2) Except as provided in paragraphs (4) and (5), in the case of any employee who is covered by such a wage order on the date of enactment of the Fair Labor Standards Amendments of 1974 and to whom the rate or rates prescribed by subsection (a) or (b) would otherwise apply, the wage rate applicable to such employee shall be increased as follows:

"(A) Effective on the effective date of the Fair Labor Standards Amendments of 1974, the wage order rate applicable to such employee on the day before such date shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

88 STAT. 56
88 STAT. 57

"(B) Effective on the first day of the second and each subsequent year after such date, the highest wage order rate applicable to such employees on the date before such first day shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

In the case of any employee employed in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the increases prescribed by this paragraph shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage rate is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

Ante, p. 56

"(3) In the case of any employee employed in Puerto Rico or the Virgin Islands to whom this section is made applicable by the amendments made to this Act by the Fair Labor Standards Amendments of 1974, the Secretary shall, as soon as practicable after the date of enactment of the Fair Labor Standards Amendments of 1974, appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates, which shall be not less than 60 per centum of the otherwise applicable minimum wage rate in effect

under subsection (b) or $1.00 an hour, whichever is greater, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate recommended by the special industry committee shall (A) be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation, but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1974, and (B) except in the case of employees of the government of Puerto Rico or any political subdivision thereof, be increased in accordance with paragraph (2)(B).

"(4)(A) Notwithstanding paragraph (2)(A) or (3), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(A) or (3) of this subsection, shall, on the effective date of the wage increase under paragraph (2)(A) or of the wage rate recommended under paragraph (3), as the case may be, be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher. 88 STAT. 57

"(5) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a) or (b) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under such subsection shall apply to such employee. 88 STAT. 58

"(6) Each minimum wage rate prescribed by or under paragraph (2) or (3) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate."

(c)(1) The last sentence of section 8(b) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the following: "except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage."

Infra. 63 Stat. 915; 69 Stat. 711. 29 USC 208. Ante, p. 55. Ante, p. 56.

(2) The third sentence of section 10(a) is amended by inserting after "modify" the following: "(including provision for the payment of an appropriate minimum wage rate)".

69 Stat. 712; 72 Stat. 948. 29 USC 210.

(d) Section 8 is amended (1) by striking out "the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry" in the first sentence of subsection (a) and inserting in lieu thereof "the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)", (2) by striking out "the minimum wage rate prescribed in paragraph (1) of section 6(a)" in the last sentence of subsection (a) and inserting in lieu thereof "the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)", and (3) by striking out "prescribed in paragraph (1) of section 6(a)" in subsection (c) and inserting in lieu thereof "in effect under paragraph (1) or (5) of section 6(a) (as the case may be)".

75 Stat. 70.

FEDERAL AND STATE EMPLOYEES

"Employer."
52 Stat. 1060;
80 Stat. 830.
29 USC 203.

SEC. 6. (a) (1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

"Employee."
80 Stat. 832.
88 STAT. 58
88 STAT. 59

(2) Section 3(e) is amended to read as follows:

"(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

80 Stat. 378.

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

"Industry."
52 Stat. 1060.

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

75 Stat. 65;
86 Stat. 375.

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

80 Stat. 831;
86 Stat. 375.

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

(B) by striking out "or" at the end of paragraph (3), 80 Stat. 831.

(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or", 29 USC 203.

(D) by adding after paragraph (4) the following new paragraph:

"(5) is an activity of a public agency.", and

(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

(6) Section 3 is amended by adding after subsection (w) the following: "Public agency."

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.". 52 Stat. 1060; 39 Stat. 832.

(b) Section 4 is amended by adding at the end thereof the following new subsection: 75 Stat. 66. 29 USC 204.

"(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.". 29 USC 216.

(c)(1)(A) Effective January 1, 1975, section 7 is amended by adding at the end thereof the following new subsection: 52 Stat. 1063; 80 Stat. 842. 29 USC 207.

"(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours". Effective date. Supra.

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours". Effective date.

88 STAT. 61

Effective date. Ante, p. 60.

(D) Effective January 1, 1978, such section is amended—

(i) by striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) by striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days".

75 Stat. 71; 80 Stat. 837. 29 USC 213.

(2)(A) Section 13(b) is amended by striking out the period at the end of paragraph (19) and inserting in lieu thereof "; or" and by adding after that paragraph the following new paragraph:

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);".

Effective date. Supra.

(B) Effective January 1, 1975, section 13(b)(20) is amended to read as follows:

"(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or".

Studies. 29 USC 213 note.

(3) The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.

Supra.

Publication in Federal Register.

(d)(1) The second sentence of section 16(b) is amended to read as follows: "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.".

52 Stat. 1069; 75 Stat. 74. 29 USC 216.

Statute of limitation, suspension. 61 Stat. 87. 29 USC 255.

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judg-

Supra.

ment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16". 61 Stat. 89. 29 USC 260.

DOMESTIC SERVICE WORKERS

SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce." 52 Stat. 1060; 63 Stat. 910. 29 USC 202.

(b)(1) Section 6 is amended by adding after subsection (e) the following new subsection: 80 Stat. 841. 29 USC 206.

(f) Any employee--

"(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or 64 Stat. 492; 68 Stat. 1078. 42 USC 409.

"(2) who in any workweek—

"(A) is employed in domestic service in one or more households, and

"(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b)." Ante, p. 59.

(2) Section 7 is amended by adding after the subsection added by section 6(c) of this Act the following new subsection: Ante, p. 60.

"(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a)."

(3) Section 13(a) is amended by adding at the end the following new paragraph: 75 Stat. 71; 80 Stat. 838. 29 USC 213.

"(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

(4) Section 13(b) is amended by adding after the paragraph added by section 6(c) the following new paragraph: Ante, p. 61.

"(21) any employee who is employed in domestic service in a household and who resides in such household; or".

RETAIL AND SERVICE ESTABLISHMENTS

SEC. 8. (a) Effective January 1, 1975, section 13(a)(2) (relating to employees of retail and service establishments) is amended by striking out "$250,000" and inserting in lieu thereof "$225,000". Effective date. 80 Stat. 833.

(b) Effective January 1, 1976, such section is amended by striking out "$225,000" and inserting in lieu thereof "$200,000". Effective date.

(c) Effective January 1, 1977, such section is amended by striking out "or such establishment has an annual dollar volume of sales which is less than $200,000 (exclusive of excise taxes at the retail level which are separately stated)". Effective date.

TOBACCO EMPLOYEES

SEC. 9. (a) Section 7 is amended by adding after the subsection added by section 7(b)(2) of this Act the following: Supra.

88 STAT. 63

"(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

"(1) is employed by such employer—

"(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

"(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

"(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.".

Repeal. 75 Stat. 71; 80 Stat. 838. 29 USC 213.

(b) (1) Section 13(a)(14) is repealed.

(2) Section 13(b) is amended by adding after the paragraph added by section 7(b)(4) of this Act the following new paragraph:

Ante, p. 62.

"(22) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco; or".

TELEGRAPH AGENCY EMPLOYEES

Repeal.

SEC. 10. (a) Section 13(a)(11) (relating to telegraph agency employees) is repealed.

Supra.

(b) (1) Section 13(b) is amended by adding after the paragraph added by section 9(b)(2) of this Act the following new paragraph:

Ante, pp. 55, 60.

"(23) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under paragraph (2) of subsection (a) with respect to whom the provisions of sections 6 and 7 would not otherwise apply, who is engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month, and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(23) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

(3) Effective two years after such date, section 13(b)(23) is repealed. Repeal; effective date.

SEAFOOD CANNING AND PROCESSING EMPLOYEES

Ante, p. 63.

SEC. 11. (a) Section 13(b)(4) (relating to fish and seafood processing employees) is amended by inserting "who is" after "employee", and by inserting before the semicolon the following: ", and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 75 Stat. 71. 29 USC 213.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(4) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(c) Effective two years after such date, section 13(b)(4) is repealed. Repeal; effective date.

NURSING HOME EMPLOYEES

SEC. 12. (a) Section 13(b)(8) (insofar as it relates to nursing home employees) is amended by striking out "any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" and the remainder of that paragraph. 80 Stat. 833.

(b) Section 7(j) is amended by inserting after "a hospital" the following: "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises". 80 Stat. 842. 29 USC 207.

HOTEL, MOTEL, AND RESTAURANT EMPLOYEES AND TIPPED EMPLOYEES

SEC. 13. (a) Section 13(b)(8) (insofar as it relates to hotel, motel, and restaurant employees) (as amended by section 12) is amended (1) by striking out "any employee" and inserting in lieu thereof "(A) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is", (2) by inserting before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed", and (3) by adding after such section the following: Supra.

> "(B) any employee of a hotel or motel who performs maid or custodial services and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

(b) Effective one year after the effective date of the Fair Labor standards Amendments of 1974, subparagraphs (A) and (B) of section 13(b)(8) are each amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-six hours". Effective date.

(c) Effective two years after such date, subparagraph (B) of section 13(b)(8) is amended by striking out "forty-six hours" and inserting in lieu thereof "forty-four hours". Effective date.

(d) Effective three years after such date, subparagraph (B) of section 13(b)(8) is repealed and such section is amended by striking out "(A)". Repeal; effective date.

(e) The last sentence of section 3(m) is amended to read as follows: In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an 80 Stat. 830. 29 USC 203.

88 STAT. 65

amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.".

SALESMEN, PARTSMEN, AND MECHANICS

80 Stat. 836. 29 USC 213.

SEC. 14. Section 13(b)(10) (relating to salesmen, partsmen, and mechanics) is amended to read as follows:

"(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

"(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or".

FOOD SERVICE ESTABLISHMENT EMPLOYEES

SEC. 15. (a) Section 13(b)(18) (relating to food service and catering employees) is amended by inserting immediately before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, such section is repealed.

BOWLING EMPLOYEES

Effective date.

SEC. 16. (a) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(19) (relating to employees of bowling establishments) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(b) Effective two years after such date, such section is repealed.

SUBSTITUTE PARENTS FOR INSTITUTIONALIZED CHILDREN

Ante, p. 63.

SEC. 17. Section 13(b) is amended by inserting after the paragraph added by section 10(b)(1) of this Act the following new paragraph

"(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

"(A) who are orphans or one of whose natural parents is deceased, or

"(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or".

EMPLOYEES OF CONGLOMERATES

SEC. 18. Section 13 is amended by adding at the end thereof the following: 52 Stat. 1067; 71 Stat. 514. 29 USC 213.

"(g) The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).". Ante, p. 55. Ante, p. 59.

SEASONAL INDUSTRY EMPLOYEES

SEC. 19. (a) Section 7(c) and 7(d) are each amended— 80 Stat. 835. 29 USC 207.

(1) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks", and

(2) by striking out "fourteen workweeks" and inserting in lieu thereof "ten workweeks".

(b) Section 7(c) is amended by striking out "fifty hours" and inserting in lieu thereof "forty-eight hours".

(c) Effective January 1, 1975, sections 7(c) and 7(d) are each amended— Effective date.

(1) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks", and

(2) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks".

(d) Effective January 1, 1976, sections 7(c) and 7(d) are each amended— Effective date.

(1) by striking out "five workweeks" and inserting in lieu thereof "three workweeks", and

(2) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks".

(e) Effective December 31, 1976, sections 7(c) and 7(d) are repealed. Repeal; effective date.

COTTON GINNING AND SUGAR PROCESSING EMPLOYEES

SEC. 20. (a) Section 13(b)(15) is amended to read as follows: 80 Stat. 835.

"(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or".

(b)(1) Section 13(b) is amended by adding after paragraph (24) the following new paragraph: Ante, p. 65.

"(25) any employee who is engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(25) is amended—

Ante, p. 66. (A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

Effective date. (3) Effective January 1, 1976, section 13(b)(25) is amended—

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

Ante, p. 66. (c)(1) Section 13(b) is amended by adding after paragraph (25) the following new paragraph:

"(26) any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(26) is amended—

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

(3) Effective January 1, 1976, section 13(b)(26) is amended— Effective date.

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty"; Ante, p. 67.

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

LOCAL TRANSIT EMPLOYEES

SEC. 21. (a) Section 7 is amended by adding after the subsection added by section 9(a) of this Act the following new subsection: Ante, p. 62.

"(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

(b)(1) Section 13(b)(7) (relating to employees of street, suburban or interurban electric railways, or local trolley or motorbus carriers) is amended by striking out ", if the rates and services of such railway or carrier are subject to regulation by a State or local agency" and inserting in lieu thereof the following: "(regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 80 Stat. 836. 29 USC 213.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(3) Effective two years after such date, such section is repealed. Repeal; effective date.

COTTON AND SUGAR SERVICES EMPLOYEES

SEC. 22. Section 13 is amended by adding after the subsection added by section 18 the following: Ante, p. 66.

"(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who— Supra.

"(1) is employed by such employer—

"(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

"(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

"(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cot tonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

"(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.".

Ante, p. 68.

OTHER EXEMPTIONS

Repeal. 80 Stat. 836. 29 USC 213.

SEC. 23. (a)(1) Section 13(a)(9) (relating to motion picture theater employees) is repealed.

(2) Section 13(b) is amended by adding after paragraph (26) the following new paragraph:

Ante, p. 67.

"(27) any employee employed by an establishment which is a motion picture theater; or".

Repeal. 75 Stat. 71; 80 Stat. 838.

(b)(1) Section 13(a)(13) (relating to small logging crews) is repealed.

(2) Section 13(b) is amended by adding after paragraph (27) the following new paragraph:

"(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.".

(c) Section 13(b)(2) (insofar as it relates to pipeline employees) is amended by inserting after "employer" the following: "engaged in the operation of a common carrier by rail and".

EMPLOYMENT OF STUDENTS

80 Stat. 842. 29 USC 214.

SEC. 24. (a) Section 14 is amended by striking out subsections (a), (b), and (c) and inserting in lieu thereof the following:

"SEC. 14. (a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

Ante, p. 55.

"(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special

certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

Ante, p. 56.

80 Stat. 839.
29 USC 206.

"(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

"(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

"(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

"(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

"(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

"(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establish-

ment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

"Student hours of employment." For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term 'student hours of employment' means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

"(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

Ante, p. 56.

80 Stat. 839. 29 USC 206.

"(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

Regulations.

"(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

"(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed four, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed four—

"(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

"(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

"(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate."

(b) Section 14 is further amended by redesignating subsection (d) as subsection (c) and by adding at the end the following new subsection: Ante, p. 69.

"(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws." Ante, pp. 60, 68.

(c) Section 4(d) is amended by adding at the end thereof the following new sentence: "Such report shall also include a summary of the special certificates issued under section 14(b)." 52 Stat. 1062; 69 Stat. 711. 29 USC 204. Ante, p. 69.

CHILD LABOR

SEC. 25. (a) Section 12 (relating to child labor) is amended by adding at the end thereof the following new subsection: 52 Stat. 1067; 63 Stat. 917. 29 USC 212.

"(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."

(b) Section 13(c)(1) (relating to child labor in agriculture) is amended to read as follows: 80 Stat. 834. 29 USC 213.

"(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee— Supra.

"(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5), 80 Stat. 833. Ante, p. 56.

"(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

"(C) is fourteen years of age or older.".

(c) Section 16 is amended by adding at the end thereof the following new subsection: 52 Stat. 1069; 71 Stat. 514. 29 USC 216.

"(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness Penalty.

of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

"(1) deducted from any sums owing by the United States to the person charged;

"(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

"(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

52 Stat. 1068. 29 USC 215.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States

80 Stat. 384.

Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9a)."

48 Stat. 582; 53 Stat. 581.

SUITS BY SECRETARY FOR BACK WAGES

63 Stat. 919; 80 Stat. 844. 29 USC 216.

SEC. 26. The first three sentences of section 16(c) are amended to read as follows: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary."

Ante, pp. 55, 68.

ECONOMIC EFFECTS STUDIES

Ante, p. 72.

SEC. 27. Section 4(d) is amended by—

(1) inserting "(1)" immediately after "(d)",

(2) inserting in the second sentence after "minimum wages" the following: "and overtime coverage"; and

(3) by adding at the end thereof the following new paragraphs:

"(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such

Ante, p. 72.

Ante, p. 66.

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employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976. Report to Congress.

"(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.". Reports to Congress. Ante, p. 69.

AGE DISCRIMINATION

SEC. 28. (a)(1) The first sentence of section 11(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630(b)) is amended by striking out "twenty-five" and inserting in lieu thereof "twenty". 81 Stat. 605.

(2) The second sentence of section 11(b) of such Act is amended to read as follows: "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.".

(3) Section 11(c) of such Act is amended by striking out ", or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance".

(4) Section 11(f) of such Act is amended to read as follows:

"(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.". "Employee."

(5) Section 16 of such Act is amended by striking out "$3,000,000" and inserting in lieu thereof "$5,000,000". 29 USC 634.

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as sections 16 and 17, respectively.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section: 29 USC 633.

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in 29 USC 633a.

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section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Reports.

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

"(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions.

"(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

"(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

"(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

EFFECTIVE DATE

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-913 accompanying H.R. 12435 (Comm. on Education and Labor) and No. 93-953 (Comm. of Conference).
SENATE REPORT No. 93-690 (Comm. on Labor and Public Welfare).
CONGRESSIONAL RECORD, Vol 120 (1974):
Feb. 28, Mar. 5, 7, considered and passed Senate.
Mar. 20, considered and passed House, amended, in lieu of H.R. 12435.
Mar. 28, Senate and House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 15:
Apr. 8, Presidential statement.

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