Collective Bargaining: The Exclusion of "Confidential" and "Managerial" Employees

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I. INTRODUCTION

In *NLRB v. Hendricks County Rural Electric Membership Corp.*, the United States Supreme Court held that the "labor nexus" standard employed by the National Labor Relations Board (NLRB or Board) in determining whether employees are excluded from collective bargaining units because they are "confidential" employees has a reasonable basis in the law. The Court affirmed the NLRB’s long-standing policy of narrowly defining "confidential" employees as those employees "who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations." In the majority’s eye, not all employ-
ees working in a confidential capacity or possessing access to confidential or other sensitive information pertaining to their employers must be excluded from coverage under the National Labor Relations Act (NLRA or Act), irrespective of whether such information involved labor relations matters.

The Court also determined that the subsequent passage of the Labor Management Relations Act (LMRA or Taft-Hartley Act) did not indicate any desire on the part of Congress to broaden the scope of the Board's "confidential employee" category. It noted the Taft-Hartley Act's express inclusion within its coverage of "professional employees," a class often privy to confidential information. The Court found the Board had limited the "confidential employee" category to those employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations or who have regular access to confidential information concerning anticipated changes which may result from collective bargaining. The Court concluded the Board's policy was "rooted firmly in the Board's understanding of the nature of the collective bargaining practice and Congress' acceptance of that practice."

In a separate opinion concurring in part and dissenting in part, Justice Powell (joined by Chief Justice Burger and Justices Rehnquist and O'Connor) agreed that an employee's possession of "proprietary or nonpublic business information" did not, in and of itself, mandate his or her exclusion from the protection of the NLRA as "confidential." However, Justice Powell maintained that the majority's endorsement of the Board's "labor nexus" test tended to "obliterate the line between management and labor" which, he contended, was a sharp division intended by Congress.

4. 454 U.S. at 190-91. The Court reversed the holding of the United States Court of Appeals for the Seventh Circuit that "all secretaries working in a confidential capacity, without regard to labor relations, [must] be excluded from the Act." 603 F.2d 25, 30 (7th Cir. 1979) (emphasis in original), relying upon NLRB v. Bell Aerospace Co., 416 U.S. 267, 283-84 n.12 (1974).
6. 454 U.S. at 181.
8. 454 U.S. at 184-85.
10. 454 U.S. at 190.
11. Id. at 192 (Powell, J., concurring in part and dissenting in part).
when it passed the Taft-Hartley Act. He further argued that the "supervisory," "confidential" and "managerial" exclusions from the NLRA were specifically designed to maintain this division, and that the evolution of these exclusions by the Board and the courts indicated that "employees who by their duties, knowledge or sympathy were aligned with management should not be treated as members of labor." While not rejecting the "labor nexus" test for "confidential" employees outright, Justice Powell stated that the standard was merely one means of identifying those employees "aligned with management." He termed the majority's view of that standard as overly narrow and "antithetical to any common-sense view or understanding of the role of confidential secretaries" and, by clear implication, of other "confidential" employees. Justice Powell distilled the essence of the minority's view as follows:

After today's decision, labor must accept into its ranks confidential secretaries who are properly allied to management. And these confidential employees who are privy to the daily affairs of management, who have access to confidential information, and who are essential to management's operation may be subjected to conflicts of loyalty when the essence of their working relationship requires undivided loyalty. The basic philosophy of the labor relations laws, the expressed intent of Congress, and the joint desire of labor and management for undivided loyalty all counsel against such a result.

This article considers whether the letter and spirit of the NLRA exclude from its coverage as "confidential" or "managerial" all employees who are purportedly closely aligned with management or

12. Id. Justice Powell also contended that the majority opinion was inconsistent with the Court's decision in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), in which the Court excluded all "managerial" employees from the coverage of the Act regardless of whether or not they had a "labor nexus." 454 U.S. at 193 (Powell, J., concurring in part and dissenting in part).

13. 454 U.S. at 193 (Powell, J., concurring in part and dissenting in part). Justice Powell cited the following Board decisions excluding employees aligned with management from collective bargaining units comprised of rank-and-file employees: AFL-CIO, 120 N.L.R.B. 969 (1958) (employees "who formulate, determine, and effectuate an employer's policies"); Denver Dry Goods, 74 N.L.R.B. 1167 (1947) (employees who have "interests ... more closely identified with those of management"); Burke Brewery, Inc., 54 N.L.R.B. 1061 (1944) (employees who "are on an intimate relationship with officers of the company"); Freiz & Sons, 47 N.L.R.B. 43 (1943) (employees "closely related to management").

14. 454 U.S. at 193 (Powell, J., concurring in part and dissenting in part). Justice Powell also disagreed with the Board's theory expressed in its decision that "confidential" employees might be afforded certain rights under the Act even if they were to be excluded from the right to engage in collective bargaining. Id. at 197-98 (Powell, J., concurring in part and dissenting in part). The majority declined to take a position on this issue. Id. at 185 n.19.

15. Id. at 197 (Powell, J., concurring in part and dissenting in part).

16. Id. at 199-200 (Powell, J., concurring in part and dissenting in part).
who have access to confidential business information, regardless of any "labor nexus." Part II traces and analyzes the legislative history and development of the underlying policies sought to be advanced by these exclusionary categories. Part III summarizes the development of the "managerial" employee exclusion and the role of that exclusion in determining the status of the "management-aligned" employee. Part IV considers the implications of the holding of Hendricks County and of Justice Powell's separate opinion in light of the background and purpose of these exclusions from the NLRA.

It is the authors' conclusion that determining an employee's eligibility for coverage under the Act on the basis of factors other than objective job content and the authority carried by the job introduces a loyalty standard into the field of labor relations that has no place under the basic philosophy of the federal labor laws. This is especially true with respect to a class of employees whose exclusion from collective bargaining is premised upon mere access to information.

In addition, the exclusion of "management-aligned" yet not authentically "managerial" employees from the coverage of the Act would undermine the very foundation of those laws. Employees, to the maximum extent feasible, should be free to choose whether to engage in self-organization and collective bargaining or whether to refrain from such activity. The majority in Hendricks County, by applying a narrow construction to the categorical exclusion of "confidential employees," adopted the correct approach to the issue of the Act's coverage in view of the goals of the collective bargaining process, and of the purposes sought to be achieved by the Act.

It is in a sense unfortunate that the majority opinion merely held that the Board's "labor nexus" test had a "reasonable basis in law" without a fuller discussion of what that basis is in view of the policies sought to be achieved by the Act. This article will attempt to provide a fuller understanding of the rationale supporting the Board's standard.

II. BACKGROUND OF THE "CONFIDENTIAL" EMPLOYEE EXCLUSION

A. Scope of the Term "Employee" under the Act

The basis for the Act is the fundamental right of employees to freely form, join or assist labor organizations and to engage in collective bargaining and other so-called "protected concerted" activi-
ties. The balance of the Act generally concerns the definition of those rights and the mechanism for their enforcement.

In drafting the Act, Congress recognized the need to describe the class of "employees" to be afforded its protections and, conversely, the need to describe that class which, by virtue of its status with respect to employers, was to be deemed beyond its reach. From the outset, Congress adopted the approach of casting the net of the Act widely, and of excluding only certain narrowly defined persons from its coverage. In its original form, the Act broadly termed an "employee" as "any employee," without mention of any exclusions for "supervisory," "confidential," or "managerial" employees, or for any employees who might be deemed to fall within a "decision-making" role. Indeed, the only exclusions set forth as categorical

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17. Section 7 of the Wagner Act stated in its original form as follows:

Employees shall have the right to self-organization, to form, join or assist in labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.


Section 1 of the Wagner Act, id. at ch. 372, §1, 49 Stat. at 449-50 (1935), also indicates that the underlying purpose of the Act was to curtail abuses and injury to interstate commerce stemming from the denial by employers of the right of employees to freely choose to engage in organizational activity, bargaining and associated pursuits, and explicitly stated that the Act was designed to afford employees the opportunity to freely exercise those rights if they so chose.

18. This fundamental purpose was acknowledged by the Court in its affirmation of the Act's constitutionality in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937):

[I]n its present application, the statute goes no further than to safeguard the right of employees to self organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by a competent legislative authority.

[C]ollective action would be a mockery if representation were made futile by interference with freedom of choice. Hence, the prohibition of Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."

Id.


The term "employee" shall include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor disputes or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but
exceptions from its coverage concerned two specific occupational categories—agriculture and domestic-service workers—and persons having an immediate *familial* relationship to the employer. Congress placed all other employees, presumably including supervisors and employees who might be construed to be members of management, within the coverage of the Act.

In *NLRB v. Hearst Publications, Inc.*, the Supreme Court considered the scope of the term "employee" and reasoned that it could not be read in an overly technical sense, but must be considered in light of the incidents of the employment relationship and the basic purposes of the Act. The Court further recognized that the policies underlying federal labor legislation and the remedies afforded by that legislation were designed to address fundamental disparities of power and other problems inherent in the employee-employer relationship. Consequently, the technical labels used to characterize the relationships in particular cases were rejected as determinative of the Act's coverage.

In order to resolve any remaining doubt, the Court declared that the term "employee," as defined in section 2(3) of the Wagner Act,

shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse. . . .

Id.

21. *Id.* at 124-25. The Court stated:

Congress was not seeking to solve the nationally harassing problems with which the statute deals by solutions only partially effective. It rather sought to find a broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization and collective bargaining for the industrial strife which prevails where these rights are not effectively established. Yet only partial solutions would be provided if large segments of workers about whose technical legal position such local differences exist should be wholly excluded from coverage by reason of such differences. Yet that result could not be avoided, if choice must be made among them and controlled by them in deciding who are "employees" within the Act's meaning. Enmeshed in such distinctions, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives.

*Id.* at 125.

22. *Id.* at 129. The Court also stated:

[T]he broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts, rather than technically and exclusively by previously established legal classifications.

*Id.* (footnote omitted).
Confidential and Managerial Employees

“must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. Where all the conditions of the relation require protection, protection ought to be given.”

The Hearst Court referred any fashioning of limitations on the scope of the term “employee” to the expertise of the Board, given the Board’s familiarity with the nuances of various employment arrangements and of the purposes and operation of the collective bargaining process. Terming this task one of “specific application of a broad statutory term,” the Court held that the Board’s determination as to which persons are, or are not, “employees” must be upheld on review if it had “warrant in the record” and a “reasonable basis in law.” This was the precise standard employed by the Court thirty-seven years later in reviewing the Board’s definition of “confidential” status in Hendricks County.

Two decisions of the United States courts of appeals from this period illustrate the liberal interpretation generally given to the term “employee.” In Phelps Dodge Corp. v. NLRB, the Second Circuit, in ruling that certain strikers retained their employee status under the Act, stated that “the definition of employee in the NLRA is very broad and should not be narrowed to make abortive the remedial purposes of the statute.”

In North Whittier Heights Citrus Ass’n v. NLRB, the Ninth Circuit considered the scope of the “agricultural laborer” exclusion from the Act’s definition of “employee.” The court found the “common denominator” among the three exclusions from the definition of “employee” was that, “there never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining.”

North Whittier suggested two important factors for measuring the proper coverage of federal labor laws: first, the employee’s need for the rights and protection afforded by those laws, irrespective of the employee’s formal relationship to the employer; and second, the

23. Id. See also NLRB v. Texas Natural Gasoline Corp., 253 F.2d 322 (5th Cir. 1958).
25. Id. See also Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491-92. In Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941), the Supreme Court noted that the Board had “broad discretion” to determine appropriate bargaining units under section 9 of the Act.
26. 113 F.2d 202 (2d Cir. 1940), modified on other grounds, 313 U.S. 177 (1941).
27. 113 F.2d at 205.
28. 109 F.2d 76 (9th Cir.), cert. denied, 310 U.S. 632, reh’g denied, 311 U.S. 724 (1940).
29. Id. at 80.
particular purpose to be served by those laws in furthering the rights of employees to collectively bargain or to refrain from bargaining.

B. Emergence of the "Confidential" Employee Exclusion Under the Act

The "confidential" and "managerial" exclusions under the Act were developed entirely by the Board in its administration of the Act as these exclusions were not expressly provided for in the Act. The notion that employees performing "confidential" duties or having access to confidential business records should be properly excluded from rank-and-file collective bargaining units dates back almost to the date of the Board's creation. A number of early Board cases excluded purportedly "confidential" employees from bargaining units without further inquiry into the nature and extent of their "confidential" duties, often by stipulation of the employer and the union. In these early decisions, the distinction between "confidential" and what subsequently became "managerial" status, or the bases upon which "confidential" status were premised, was often quite unclear. However, the distinction evolved once the

30. See, e.g., Bohn Aluminum Brass Corp., 47 N.L.R.B. 1229 (1943) (employment and personnel department employees excluded from unit due to their access to their employer's confidential personnel records); Bendix Aviation Corp., 47 N.L.R.B. 43 (1943) (expediters excluded from unit on ground that they "are closely related to management"); Chrysler Corp., 36 N.L.R.B. 157 (1941) (confidential secretaries excluded on the basis of lack of community of interest with bargaining unit composed of clerical employees, "their work being of confidential nature or consisting of creative rather than clerical work"); E.P. Dutton Co., 33 N.L.R.B. 761 (1941) (excluded all confidential secretaries to executives from bargaining units on the grounds of their "close connection with management"); Sloss-Sheffield Steel & Iron Co., 32 N.L.R.B. 710 (1941) (clerical employees at general executive offices excluded as "confidential" by stipulation); Western Union Tel. Co., 30 N.L.R.B. 679 (1941) (private secretaries to metropolitan traffic manager and to chief clerk/superintendent excluded from industrial bargaining unit due to performance of "confidential" duties); Menasco Mfg. Co., 28 N.L.R.B. 1190 (1940) (clerical employees who "sometimes perform confidential or semi-confidential work excluded from bargaining unit comprised of production and maintenance employees 'in accordance with usual practice' "); Pacific Am. Fisheries, Inc., 28 N.L.R.B. 244 (1940) ("bookkeeper" who functions as "virtually independent officer manager" excluded as both "confidential" and "supervisory"); Wilson & Co., 26 N.L.R.B. 1353 (1940) (department clerks excluded from unit on grounds that they are "part of management" and that they have access to all of the employer's payroll and other confidential records); Agwilines, Inc., 12 N.L.R.B. 366 (1939); Southern Pacific Steamship Lines, 8 N.L.R.B. 1263 (1938); S. Blechman & Sons, Inc., 4 N.L.R.B. 15 (1937) (Board held that it would be "anomalous" to include "employees whose duties are of a confidential nature" within a bargaining unit when the union agreed to their exclusion and where such employees were influential in a former "company union" found to be employer-dominated in violation of section 8(2) of the Wagner Act).
Board began to give greater consideration to just what sort of “confidential” duties merited exclusion of an employee from a bargaining unit.

From the start, the Board indicated that the Act’s coverage extended to employees who did not fit within the stereotypical rank-and-file industrial worker concept and who might even possess certain links to management. In Chrysler Corp., one of its first decisions, the Board rejected the employer’s contention that automotive design engineers should be exempt from the Act’s coverage on the basis of their alleged “personal relationship” to management.

Following its determination that the degree of skill, training and expertise inherent in a position did not necessarily impinge upon the incumbent’s status as an “employee” under the Act, the Board extended that reasoning to embrace employees in possession of confidential business information. The first indication that “confidential” status was to be strictly limited to employees performing labor relations and personnel functions or to employees possessing access to employer information in those particular areas was in the Board’s decision in Brooklyn Daily Eagle. There, the Board drew a sharp distinction between secretaries whose confidential duties included subjects relating to union-management relations and those whose duties did not, excluding the secretaries to the managing editor and editor of the newspaper from the bargaining unit.

In contrast, the Board included within the bargaining unit the sec-

31. 1 N.L.R.B. 164 (1936).
32. Id. at 169-70, stating:

According to the Act, the term “employee” includes “all employees.” The nature of the work done by the engineers is quite clear by the record. It is true that this work requires a considerable degree of skill and more or less imagination. There is nothing, however, peculiarly personal in the relationship between the Company and its many hundred engineers. They are in no sense executives. The engineers have need for organized strength in common with all wage earners. This is their own opinion as shown by the impetus to organization provided by a wage cut uniformly suffered. We can find no reason for differing with them.

Id. See also Willy’s Overland Motors, Inc., 9 N.L.R.B. 924 (1938); Allis Chalmers Mfg. Co., 4 N.L.R.B. 159 (1937).
33. 13 N.L.R.B. 974 (1939).
34. Id. at 986. The Board stated that:

Their work is of a confidential nature. We take notice of the fact that in negotiating and in other dealings concerning grievances, the interests of a union and the management are ordinarily adverse. The nature of a personal secretary’s work is such that much of the confidential material pertaining to the management passes through his or her hands. We believe that the management should not be required to handle such material through employees in the unit represented by the union with which it is dealing. . . .

Id. (emphasis added).
retaries to the advertising manager, the classified advertising manager, and the circulation manager, finding that they performed "ordinary secretarial work." In a footnote, the Board distinguished its prior holding in *Indianapolis Times Publishing Co.* in which it had included secretaries to the newspaper's circulation and advertising managers in the bargaining unit because "these managers are not at the top of the hierarchy which has the ultimate power of management and duty to deal with the union." Thus, the "labor nexus" standard for determining "confidential" status was born, and its purpose defined.

This standard was further elaborated on by the Board and the courts in the years prior to the passage of the Taft-Hartley Act. In *Bull Dog Electric Products Co.*, the Board included engineers within an "overall" bargaining unit despite their access to certain of the employer's confidential records. The Board's discussion emphasized the fact that this aspect of the engineers' duties did not affect their status as "employees" for purposes of the entirely unrelated matter of collective bargaining as to their own wages, hours and conditions of employment.

Also, in *Warner Brothers Pictures*, the Board held that the employer had advanced no convincing reason for excluding employees of its legal, trust, and tax departments from a bargaining unit comprised of office employees.

The Board routinely applied this standard in numerous cases over the ensuing years whenever it was required to distinguish be-

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35. *Id.* at 987. There was no evidence that their work was confidential in the sense that the work of the secretaries to the heads of the newspaper was confidential. *Id.*

36. 8 N.L.R.B. 1256 (1936).


38. 22 N.L.R.B. 1043 (1940).

39. *Id.* at 1046.

40. 35 N.L.R.B. 739 (1941).

41. *Id.* at 744, stating:

While all the employees in such departments undoubtedly have access to certain information which may be considered "confidential," the record indicates that the same is true of the vast majority of the employees in the . . . office. We have recently held that employees must have access to confidential information which relates directly to the problem of labor relations if they are to be excluded from the unit, and that the possession of important information is of itself not sufficient to justify deprivation of the right to collective bargaining. *Id.* at 744 (emphasis added), citing *Creamery Package Mfg. Co.*, 34 N.L.R.B. 108 (1941), in which the Board included fourteen office employees who possessed access to the employer's financial records not directly relating to labor relations within a bargaining unit while excluding one stenographer whose access to confidential information included labor relations matters.
tween employees possessing access to confidential labor-relations matters and personnel files in the regular course of their duties and employees possessing access to other forms of confidential information. The common thread throughout these cases was that the allegedly "confidential" employees occupied "functionary" rather than "management" positions. The "confidential" category included only those employees who performed labor-relations functions or had access to labor-relations information as part of their regular duties, so as to override their natural community of interest with other, non-confidential and non-supervisory employees. Although in most instances the unions argued for inclusion of alleged "confidential" employees within the bargaining unit and the employers contested their inclusion, the reverse was also true on occasion.

Time-study employees were found to be an appropriate bargaining unit in Ford Motor Co. There, the Board further narrowed the scope of the "confidential" exclusion and, in addition, distinguished these employees from those deemed "managerial" or "executive":

We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be "managerial," in that they express and make operative the decision of management.

We have also excluded from units of rank and file employees persons who in the regular course of their duties have access to confidential data bearing directly upon the employees' labor relations, designating them as "confidential." However, upon reappraisal, we are of the opinion that this definition is too inclusive and needlessly precludes many employees from bargaining collectively together with other workers having common interests. Consequently, it is our intention to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations.

The Ford Motor Co. standard was applied by the Board in numerous subsequent cases, and the Supreme Court in Hendricks County, termed Ford Motor Co. only a slight refinement of the Board's earlier rulings on the subject. The true significance of

42. Many of the cases were noted in Hendricks County, 454 U.S. at 179 n.11.
44. 66 N.L.R.B. 1317 (1946).
45. Id. at 1322 (footnote omitted).
46. Hendricks County, 454 U.S. at 180-81, 188-89. Presumably, virtually all employees
Ford Motor Co., however, lies in its theory, not in its application. The Board discerned the sharp distinction between “confidential” and “managerial” employees in terms of the power to direct the operations of the employing enterprise. It assigned the “managerial” label to employees possessing such power and the “confidential” label to employees not possessing it. Mere access to information absent an active role in assisting “managerial” personnel was insufficient to exclude employees from the Act’s coverage. The Board also emphasized the need not to spread the “confidential” umbrella too broadly in order to avoid excluding too many workers from the rights of self-organization and collective bargaining. These considerations loom large in any discussion of the purpose of these exclusions from “employee” coverage under the Act.

The Board’s approach was considered in two cases prior to the passage of the Taft-Hartley Act. In NLRB v. Poultrymen’s Service Corp., the Third Circuit upheld the Board’s inclusion of three office employees in a bargaining unit over the employer’s objection that they had regular access to confidential business information which did not relate to labor relations. The court stated that “[p]ossession of confidential business information is of itself insufficient to justify deprivation of the right of collective bargaining.” In NLRB v. Armour & Co., the Tenth Circuit upheld the formation of a bargaining unit consisting of plant clerks, despite their access to confidential information and their involvement in fact-finding for the employer with respect to certain types of grievances. The court reiterated the Board’s standard, stating, “[t]he term ‘employee’ was not used by the Congress as a word of art. It is to be given a broad and comprehensive meaning. It takes color from its surroundings and should be read in the light of the mis-

who satisfied the Board’s earlier standards for “confidential” status would, in the course of their duties, also be assisting managers whose overall responsibilities included labor-relations functions.

47. 66 N.L.R.B. at 1322.
48. Id.
49. 138 F.2d 204 (3d Cir. 1943).
50. Id. at 211. Poultrymen’s Service Corp. also originated the theory that exclusion of a “confidential” employee from a bargaining unit does not deprive such an employee of other benefits conferred by the Wagner Act. Although it would appear to be a strained construction of the Act to include certain persons within its coverage for certain purposes and to exclude them for others, this issue was not relevant to the determination in Hendricks County, and was deliberately avoided by the Court. Hendricks County, 454 U.S. at 185 n.19. See also Justice Powell’s dissent, id. at 197-99 (Powell, J., concurring in part and dissenting in part).
51. 154 F.2d 570 (10th Cir. 1945).
chief to be corrected and the end to be attained." Thus, the law respecting "confidential" employee status was developed by the time of the passage of the Taft-Hartley Act.

C. **Effect of the Taft-Hartley Act Upon the Statutory Definition of "Employee"**

Although the Taft-Hartley Act brought about significant revisions to the federal labor laws, it did not alter the basic thrust of the NLRA—that employees should be free to organize, form, join or assist labor organizations and to bargain collectively. Indeed, many of the changes enacted in the Taft-Hartley Act were designed specifically to enhance employee free choice and to preclude coercion in the exercise of this right. As previously noted, the definition of the term "employee" for purposes of the NLRA's coverage is crucial to this aim since a restrictive definition would necessarily deprive much of the workforce of the opportunity to avail themselves of the protections afforded by the federal labor laws. Thus, it is remarkable that following an extended debate over this subject, Congress made relatively few additions to the exclu-

52. Id. at 574 (footnote omitted).

53. The following revisions made by the Taft-Hartley Act are significant in this regard: (1) the addition to section 7 of the rights of employees to refrain from any or all "concerted activities" protected by the Act, 29 U.S.C. § 157 (1976 & Supp. V 1981); (2) the revisions to section 8(a)(3) rendering illegal the "closed shop" and restricting the right of employers to discriminate against employees for non-membership in labor organizations, id. at §158(a)(3) (1976); (3) the addition of sections 8(b)(1)(A) and 8(b)(2) to the Act, prohibiting labor organizations from restraint and coercion with respect to employee exercise of those rights guaranteed to them by section 7, and from causing or attempting to cause employees to discriminate against employees in order to encourage or discourage membership therein, id. at §§ 158(b)(1)(A), (b)(2) (1976); (4) the addition to section 9(a) permitting employees to adjust grievances with their employers on an individual basis provided that the bargaining representative is afforded the opportunity to be present at the adjustment, id. at § 159(a) (1976 & Supp. V 1981); (5) the addition of a provision in section 9(b) permitting professional employees to avoid being included within a bargaining unit containing non-professional employees absent a specific vote for such inclusion, id. at § 159(b) (1976 & Supp. V 1981); (6) the refinement of section 9(c) dealing with the secret-ballot selection of employee representatives, and, in particular, mandating such an election upon a finding by the Board that a question of representation exists, providing for the decertification of employee bargaining representatives, id. at § 159(c) (1976 & Supp. V 1981); (7) addition of section 9(e), authorizing referenda to determine employee wishes with respect to establishment or deauthorization of "union shop" agreements, id. at §159(e) (1976 & Supp. V 1981); and (8) the addition of section 14(b) of the Act permitting states to enact laws barring the establishment of "union shops" (so-called "right to work" laws), id. at § 164(b) (1976).

While the policy implications brought about by these and other provisions of the Act have long been the subject of debate, the ostensible thrust of the Act in maximizing employee discretion as to whether or not to engage in activities protected thereunder is clear.

54. See supra text accompanying notes 19-25.
ions from the definition of “employee” in the Taft-Hartley Act. Specifically, those additions related to supervisory personnel and independent contractors. Little discussion was held respecting other exclusions and, at the finish, the Taft-Hartley Act did not include any specific exclusion of “confidential”—or even “managerial”—employees from the definition of “employee.”

Prior to the passage of the Taft-Hartley Act, “managerial” employees occupied the identical position under the law as that of “confidential” employees. They were often, but not uniformly, excluded from the Act’s coverage by application of Board policy, even though they were not specifically excluded by statute. However, while the Board invariably excluded “supervisory” employees (particularly those possessing the power to hire and fire) from bargaining units composed of rank-and-file employees, it evolved a policy of permitting many supervisors, particularly plant foremen, to organize into separate bargaining units.

55. 29 U.S.C. § 152(3) (1976 & Supp.V. 1981). The status of independent contractors under the labor laws is beyond the scope of this article inasmuch as this category comprises situations in which the employer-employee relationship is absent. This article concerns certain exclusions from the coverage of and protections afforded by such laws in situations where such a relationship does exist.

56. The Board excluded “managerial” employees from bargaining units in numerous cases prior to 1947. The early development of the “managerial” category is treated more fully in Part IIIA of this article, infra at text accompanying notes 115-190.

57. Prior to the passage of the Taft-Hartley Act, the Board’s protection in this respect often varied depending upon the level within the supervisory hierarchy occupied by the supervisory group in question. “Higher” supervisory officials, particularly those with the power to hire and fire, were often excluded from organizing altogether, on the grounds that they were “managerial” personnel. See, e.g., Pursglove Coal Mining Co., 71 N.L.R.B. 1455 (1947); Union Stockyards of Omaha, Ltd., 68 N.L.R.B. 770 (1946); First Nat’l Stores, Inc., 68 N.L.R.B. 539 (1946); Essex Wire Corp., 66 N.L.R.B. 1384 (1946); Doughnut Corp. of Am., 66 N.L.R.B. 1231 (1946); Indus. Paper Stock Co., 66 N.L.R.B. 1185 (1946); Columbia Mach. Works, Inc., 66 N.L.R.B. 1020 (1946); Ludlow Typograph Co., 66 N.L.R.B. 1009 (1946); Libby Owensford Glass Co., 65 N.L.R.B. 1088 (1945); Standard Nut & Bolt Co., 60 N.L.R.B. 771 (1945); Armour & Co., 60 N.L.R.B. 758 (1945); Cons.Vultee Aircraft Co., 60 N.L.R.B. 525 (1945); Seattle Drum Co., 60 N.L.R.B. 440 (1945); Sylvania Elec. Products, Inc., 59 N.L.R.B. 1298 (1944); Imperial Elec. Co., 59 N.L.R.B. 150 (1944); Radio Corp. of Am., 58 N.L.R.B. 271 (1944); Linde Air Prod. Co., 57 N.L.R.B. 1463 (1944); Crosley Corp., 56 N.L.R.B. 1722 (1944); Cramp Shipbuilding Co., 52 N.L.R.B. 309 (1943); General Motors Corp., 51 N.L.R.B. 457 (1943); Murray Corp. of Am., 51 N.L.R.B. 94 (1943); Boeing Aircraft Co., 51 N.L.R.B. 67 (1943); United States Cartridge Co., 50 N.L.R.B. 358 (1943). Yet, in a surprisingly large number of pre-1947 cases, the Board took the view that certain “minor” supervisors (particularly foremen) could lawfully bargain in separate units even if they possessed some influence over hiring, discipline, and discharge, or over the handling of employee grievances on behalf of management. See, e.g., Jones & Laughlin Steel Corp., 71 N.L.R.B. 1261 (1946); Sinclair Ref. Co., 69 N.L.R.B. 970 (1946); Int’l Harvester Co., 69 N.L.R.B. 926 (1946); Wheeling Steel Corp., 69 N.L.R.B. 208 (1946); General Cable Corp., 68 N.L.R.B. 660 (1946); Carnegie Illinois Steel Corp., 67 N.L.R.B. 1238 (1946); Am. Locomotive
In *Packard Co. v. NLRB,* the Supreme Court upheld the Board's certification of a bargaining unit comprised of several levels of plant foremen. During consideration by Congress of the Taft-Hartley Act the following year, *Packard* sparked the first debate concerning the loyalty owed by so-called "agents of management" to their employers. Significantly, this debate focused almost exclusively upon the problems raised by *Packard* with respect to the organization of first-line supervisors and, incidentally, upon the breadth of the "supervisory" category. Virtually none of the debate addressed the question of the status of the "confidential" or "managerial" employee. It is not surprising that the outcome of the Board's certification of a bargaining unit comprised of several levels of plant foremen. During consideration by Congress of the Taft-Hartley Act the following year, *Packard* sparked the first debate concerning the loyalty owed by so-called "agents of management" to their employers. Significantly, this debate focused almost exclusively upon the problems raised by *Packard* with respect to the organization of first-line supervisors and, incidentally, upon the breadth of the "supervisory" category. Virtually none of the debate addressed the question of the status of the "confidential" or "managerial" employee. It is not surprising that the outcome of
the congressional deliberations produced a blanket exclusion of supervisors from the protection of the Taft-Hartley Act without mention of the other categories. Specifically, a clause was added to section 2(3) of the NLRA excluding from the definition of "employee" "any individual employed as a supervisor." The statutory definition of "supervisor," a subject of much congressional contention, was finally incorporated as a new section of the Taft-Hartley Act:

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This definition is identical to that contained in the original Senate version of the Taft-Hartley Act as reported from the Senate Labor and Public Welfare Committee, with the sole exception of the phrase "or effectively to recommend such action." The equivalent provision in section 2(12) of the House version of the Act, as reported from the House Education and Labor Committee and as passed by the full House was much more extensive and specifically provided for the inclusion of both "confidential" and "managerial" personnel.
The House version of the term "supervisor" explicitly included supervisors, managers, and "confidential" personnel. The House's proposal would have expanded the definition of "confidential employee" beyond that established by pre-1947 Board precedent, and explicitly would have struck down the Board's development of its "labor nexus" standard. By excluding from the Act all employees of labor relations, employment and personnel departments (regardless of actual job responsibilities), all time-study employees, and all employees with access to confidential business information (irrespective of whether such information concerned personnel or labor relations matters), the House version would have excluded precisely those types of employees that had consistently been included by the Board within bargaining units whenever a claim was raised as to their alleged "confidential" status. However, this version did not survive the joint House-Senate Conference Committee's deliberations. The Conference Committee reported section 2(11) with exactly the language that was later enacted and is presently contained in the Taft-Hartley Act.

The statement of the House Managers appended to the Conference Report and a substantially identical summary inserted by Senator Taft into the Congressional Record (both of which were cited by the majority in Hendricks County) provide the only clues as to the thinking of that Committee on this point; and those clues have a puzzling aspect to them. Apparently, both Senator

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64. Id. at § A(i).
65. Id. at §§ A(ii), B.
66. Id. at §§ B, C.
67. See supra text accompanying notes 30-52.
68. See supra note 42.
69. 454 U.S. at 184-85 and nn.15 & 19.
70. The Statement of the House Managers provided as follows with regard to "supervisors":

Supervisors—As heretofore stated, both the House bill and the Senate amendment
Taft and the House Managers operated under the same misunderstanding—that the Board had been excluding from coverage by the Act all “confidential” employees regardless of their “labor nexus.” As is apparent from an examination of the Board’s decisions up to that time, this conclusion was mistaken because the Board’s “confidential” employee exclusion was narrower than they supposed. Language supporting the views of the House Managers and Senator Taft was contained in the House version of the Taft-Hartley Act, but was stricken by the Conference Committee. If the House Managers and Senator Taft had actually intended that the Board continue its then current practice in these areas, they would have endorsed the relatively narrow “labor nexus” standard for “confidential” exclusion and the Board’s pre-1947 development of the “managerial” exclusion on a case-by-case basis.

Both the majority and the dissent in Hendricks County relied on this statutory history in their decisions. The majority felt that the

excluded supervisors from the individuals who are to be considered employees for the purposes of the Act. The House bill defined as “supervisors,” however, certain categories of employees who were not treated as supervisors under the Senate amendment. These were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel, (B) labor relations personnel, policy and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of “supervisor” to individuals generally regarded as foremen and persons of like or higher rank.

The conference agreement, in the definition of “supervisor,” limits such terms to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor-relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment . . . applicable with respect to professional employees will cover many in this category.

H.R. CONF. REP. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 35 (1947). Senator Taft’s summary on this point was identical except for a comment that, “there was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors.” 93 Cong. Rec. 6599.

71. The initial House Report on H.R. 3020 made a similar error where it stated that “[m]ost of the people who would qualify as ‘confidential’ employees are executives and are excluded from the Act in any event.” H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947). No two categories of employees could be more dissimilar than “confidential” and “executive” employees.

72. See supra text at notes 17-29.

73. See supra text at notes 115-190.
deletion of section 2(12) of the House version of the Taft-Hartley Act was intended as a concession to the Senate's intent not to exclude all employees who have access to employer confidential business information from the Act. The dissent, alternatively, contended that the deletion of section 2(12) was premised solely upon the belief that the provision was unnecessary, and that the Board's then prevailing policy would operate to exclude all "confidential" employees, regardless of labor nexus. Both points of view overstated the reliability of the Taft-Hartley's legislative history, and neither considered the true nature of the legislative history on this point.

Congress concerned itself almost exclusively with foremen and other supervisors, and considered "confidential" and "managerial" employees only in a perfunctory manner and with a fundamentally erroneous assumption of the state of the law. If any conclusion may be drawn from the events which led to the passage of the Taft-Hartley Act, it is that Congress never did come to grips with the status of these employees and that no firm consensus was reached as to their inclusion or exclusion from the Taft-Hartley Act. However, given the failure of Congress to enact section 2(12) of the House version, and the eventual passage of statutory language expressly excluding only true "supervisors," the subject matter of Packard Co. v. NLRB, the best conclusion that can be drawn is that Congress left the status of "confidential" and "managerial" employees unchanged. In other words, the determination of whether "confidential" and "managerial" employees came under the Act was left entirely to the process of case-by-case adjudication by the Board without statutory standards.

D. Development of the "Confidential" Employee Exclusion After the Taft-Hartley Act

Following the passage of the Taft-Hartley Act, the Board continued to apply the "labor nexus" standard as set forth in Ford Motor Co. and its other pre-Taft-Hartley Act rulings on "confidential" employees. Although application of the standard became more

74. Hendricks County, 454 U.S. at 184 and n.16.
75. Id. at 193 (Powell, J., concurring in part and dissenting in part).
77. 66 N.L.R.B. 1317 (1946).
78. The Board has applied the prevailing standard in many post-1947 decisions without extended explanation. For a representative sample, see, e.g., N.L.R.B. v. Los Angeles New Hospital, 640 F.2d 1017 (9th Cir. 1981); Union College, 247 N.L.R.B. 531 (1980);
frequent and routinized, it was adapted and refined to fit varying situations. Most of the cases were of no particular import beyond their particular factual contexts, although a few merit comment.

For example, the Board ruled that secretaries who participate in the bargaining process, such as those who assist an employer's labor bargaining team, or who assist management officials participating in the formulation of labor contract proposals, come squarely within the definition of "confidential" status. However, such status would not extend to front-line managers and to their secretaries where their participation in the collective bargaining and contract administration process was limited to the making of routine administrative decisions implementing a collective bargaining agreement or to the initial-step handling of routine grievances. In addition, the Board refused to extend "confidential" status to

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79. Firestone Synthetic Latex Co., Div. of Firestone Tire & Rubber Co., 201 N.L.R.B. 347 (1973); Nat’l Cash Register Co., 168 N.L.R.B. 910 (1967). In Low Bros. Nat’l Market, Inc., 191 N.L.R.B. 432 (1971), the Board ruled that a clerical employee was “confidential” because of her participation in numerous aspects of the company’s labor relations at the request of counsel for the union representing the company’s store clerks; preparation of data and charts used by company counsel in a Board proceeding; handling of all correspondence between the company manager, labor relations counsel, the store clerks’ union and the Board. The fact that no other employee assisted the manager in this respect was a significant factor in the Board’s determination.

80. In Holly Sugar Corp., 193 N.L.R.B. 1024 (1971), the Board (Chairman Miller dissenting in part) held that secretaries to factory managers and to agricultural managers who “police the day-to-day administration of the contract governing the plant employees” were not “confidential” because their bosses did not “formulate, determine, and effectuate management policies with regard to labor relations.” Id. at 1025 (citing B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956)).

employees who assisted persons whose roles in labor relations were strictly advisory or who were consulted from time-to-time for information bearing upon labor relations policies but who did not play any role in the actual formulation or implementation of those policies. Furthermore, access to or assistance in the preparation of personnel or statistical data relating to the employer's workforce records or to confidential financial information or trade secrets unrelated to the employer's labor relations policies did not suffice to exclude a person from the Act. Consequently, the Board's policy

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82. Thus, in Holly Sugar Corp., the Board said that the fact that the company's factory managers and agricultural managers were consulted by corporate officials prior to the commencement of collective bargaining negotiations did not constitute sufficient reason to designate their secretaries as "confidential." In Flintkote Co., 217 N.L.R.B. 497 (1975), project engineers were deemed not to be "confidential" in spite of their responsibilities in connection with assisting plant managers, since those responsibilities concerned the provision of technical advice, i.e., "helping to increase efficiency and to solve various production problems," and had little or nothing to do with labor relations. *Id.* at 499. In Weyerhauser Co., the Board included several secretaries within a bargaining unit despite the fact that their bosses were consulted by corporate officials with respect to wages and personnel matters for the purpose of developing "approaches" to collective bargaining and other labor relations matters. 173 N.L.R.B. at 1173. In Consolidated Papers, Inc., 179 N.L.R.B. 165 (1969), the Board included within a bargaining unit a secretary whose boss prepared and oversaw, among other matters, salary data, pay scales, and quality control information, and made recommendations in those subject areas to the company's Industrial Relations Department, stating that these duties might "entail the reporting of factual data and recommendations which may ultimately have an impact on employment conditions but do not in themselves constitute labor relations policy." *Id.* at 166. See also Vulcanized Rubber & Plastics Co., 129 N.L.R.B. 1256 (1961); American Radiator & Standard Sanitary Corp., 119 N.L.R.B. 1715 (1958); Westinghouse Elec. Corp., 89 N.L.R.B. 8 (1950); Eastern Corp., 116 N.L.R.B. 329 (1956).

83. Thus, in RCA Communications, Inc., 154 N.L.R.B. 34 (1965), the Board included a payroll clerk within a bargaining unit in spite of the fact that she prepared payroll records, maintained sick leave, absentee, lateness and vacation reports, and was required to inform her employer of instances of excessive absenteeism or tardiness. In Hampton Roads Maritime Ass'n, 178 N.L.R.B. 263 (1969), and Pacific Far East Line, 174 N.L.R.B. 1168 (1969), timekeepers were held not to be "confidential" employees on the grounds that the information to which they had access had nothing to do with labor relations matters, and that they did not participate in the formulation or implementation of their employer's labor relations policies. In Ladish Co., 178 N.L.R.B. 90 (1969), the Board held that employees having access to personnel records and to other information that, if brought to the attention of management, could lead to discipline of fellow employees, could not be deemed "confidential." See also Air Express Int'l Corp., 245 N.L.R.B. 478 (1979); Beatrice Foods Co., John Sexton & Co. 224 N.L.R.B. 1341 (1976); KOWB Radio, 222 N.L.R.B. 530 (1976); General Dynamics Corp., Convair Aerospace Div., 213 N.L.R.B. 851 (1974); Victor Indus. Corp. of Cal. 215 N.L.R.B. 48 (1974); Trans World Airlines, Inc., 211 N.L.R.B. 733 (1974); R.H. Macy Co., Inc., Davison Paxson Co., 185 N.L.R.B. 21 (1970); Budd Co., 154 N.L.R.B. 421 (1965); Westinghouse Elec. Corp., 138 N.L.R.B. 778 (1962); Swift & Co., 129 N.L.R.B. 1391 (1961); Dorhrmann Commercial Co., 127 N.L.R.B. 205 (1960); Dinkler-St. Charles Hotel, 124 N.L.R.B. 1302 (1959); Great Lakes Pipe Line Co., 88 N.L.R.B. 1370 (1950), all of which deny "confidential" status with respect to employees having access to personnel records, financial
did not extend "confidential" status solely on the basis of an employee's access to or compilation of information, unless that information directly pertained to bargaining strategy, proposals formulated for collective bargaining or other materials clearly within the ambit of their employer's labor relations; even then, that status was not invariably conferred.  

Under the "labor nexus" standard, an employee's "confidential" duties must constitute a regular and necessary component of his or her duties. Employees who performed "confidential" work on an

information or information impacting upon the competitive position of their employers on the grounds of an insufficient "labor nexus." See also Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C., 253 N.L.R.B. 450 (1980); and Stroock & Stroock & Lavin, 253 N.L.R.B. 447 (1980) (in which the Board asserted jurisdiction over clerical and support staffs of the law firms denying allegations that such staffs were, by definition, "confidential").

84. This pattern is clearly demonstrated by an examination of those cases in which the Board did exclude employees from bargaining units as "confidential," virtually all of which contained findings that the disputed employees either actively participated in the formulation and implementation of labor relations policies or had regular access to corporate officials who did. See, e.g., Compton Hill Medical Center, 251 N.L.R.B. 1547 (1980) (excluding secretaries to department heads who, as members of a hospital's administrative counsel, formulated labor relations policies and determined management proposals and strategies during contract negotiations); South Carolina Educ. Ass'n, 240 N.L.R.B. 542 (1979) (excluding the personal secretary to a union employer's associate executive director who served on three occasions on the employer's bargaining team—twice as chief negotiator—and who had full and regular access to the employer's bargaining proposals and strategies); Prince Gardner, Div. of Swank, Inc., 231 N.L.R.B. 96 (1977) (excluding a personnel assistant and a personnel department receptionist who worked closely with the employer's personnel manager who, in turn, had full charge of the employer's day-to-day labor relations activities, and who had full access to his records); Stouffer's Cincinnati Inn, 225 N.L.R.B. 1196 (1976) (excluding the secretary to the hotel's general manager who served as overall supervisor of the hotel staff and set their wages and fringe benefits); Connecticut Light & Power Co., 222 N.L.R.B. 1243 (1976) (excluding the secretary to the district manager who compiled and submitted data used in formulating labor relations policies, served on the employer's collective bargaining committee, and handled second-step grievances). See also Southern Maryland Elec. Coop., 220 N.L.R.B. 979 (1975); West Chem. Prods., Inc., 221 N.L.R.B. 250 (1975); Litton Fin. Printing, 216 N.L.R.B. 380 (1975); Chico Community Memorial Hosp., 215 N.L.R.B. 821 (1974); General Truck Drivers, Local 692, 209 N.L.R.B. 1144 (1974); Bank of Am. Nat'l Trust & Savings Ass'n, 196 N.L.R.B. 591 (1972); Moore-McCormack Lines, Inc., 181 N.L.R.B. 510 (1970); Nat'l Cash Register Co., 168 N.L.R.B. 910 (1967) (pertaining to the private secretaries to the employer's division managers); Ed's Foodland of Springfield, Inc., 159 N.L.R.B. 1256 (1966); Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521 (1964); ACF Indus., Inc., 145 N.L.R.B. 403 (1963); Vulcanized Rubber & Plastics Co., 129 N.L.R.B. 1256 (1961) (pertaining to secretaries to the controller, personnel manager, research manager, and plastics division manager); Katz Drug Co., 123 N.L.R.B. 1615 (1959); Threads, Inc., 121 N.L.R.B. 1507 (1958); Eljer Co., 108 N.L.R.B. 1417 (1954); Ohio Steel Foundry Co., 92 N.L.R.B. 683 (1950). The Board has even denied "confidential" status to employees in a few cases where their involvement in confidential labor relations matters was limited to typing memoranda and letters. See, e.g., United States Postal Serv., 232 N.L.R.B. 556 (1978) and NLRB v. Los Angeles New Hosp., 640 F.2d 1017 (9th Cir. 1981).
occasional, substitute, or "overflow" basis, and those who might inadvertently overhear or transmit confidential labor relations information were not deemed to be "confidential." Indeed, the Board was remarkably consistent in applying a strict "labor nexus" standard to a virtually innumerable array of differing fact situations involving the alleged "confidential" status of different groups of employees.

The Board intentionally adopted an extremely restrictive approach to the application of "confidential" status in an apparent effort not to exclude employees from bargaining units absent a clear showing of need for the exclusion. The grounds for this approach are apparently that the "confidential" exclusion operates in derogation of the statutory rights of such employees to organize and collectively bargain and, thus, that exclusion ought to be applied as sparingly as possible. The Board has never wavered from this approach.


The terms "formulate, determine and effectuate" are to be used "in the conjunctive." Weyerhauser Co., 173 N.L.R.B. 1170, 1172 (1968).

The Board's Ford Motor Co. policy was reaffirmed in unmistakable terms in B.F. Goodrich Co.:

Since the early Ford Motor Company case, in which definitions theretofore accorded the term "confidential employees" were reexamined, the Board has consistently excluded from bargaining units as confidential employees persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. Although announcing its intention in the Ford Motor Company case to limit the term "confidential" so as to embrace only such employees, the Board has, from time to time since that decision, expanded its views as to what constitutes a confidential employee by designating as "confidential," for example, secretaries to persons involved in the handling of grievances and cashiers having access to labor relations policy data. Upon further reexamination of our holdings in the instant connection, we are still of the opinion expressed in the Ford Motor Company case that any broadening of the definition of the term "confidential" as adopted in that decision needlessly precludes employees from bargaining collectively together with other employees sharing common interests. Consequently, it is our intention herein and in future cases to adhere strictly to that definition and thus to limit the term "confidential" so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.

115 N.L.R.B. at 724 (footnotes omitted).

See supra note 83. The Board's decision in Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C., 253 N.L.R.B. 450 (1980), some 24 years later, elaborated on the consequences
The "labor nexus" standard escaped serious judicial scrutiny for a quarter-century following its inception. Very few decisions on the subject were rendered by the courts during this period, and these involved merely the Board's application of the standard to particular employees in specific factual contexts. However, the standard itself came under fire in three separate federal circuits.

In *NLRB v. Wheeling Electric Co.*, the Fourth Circuit overturned a finding of the Board that an employer had violated section 8(a)(1) of the Act by discharging a "confidential" secretary who had refused to report for work during a strike. The court rejected the Board's view that the secretary had engaged in protected concerted activity under the Act by refusing to cross a picket line. It held that the clear intent of Congress was to not afford

of abandoning the policies announced in *Ford Motor Co.* and *B.F. Goodrich Co.*, as follows:

[D]iscarding the Board's consistently applied definition of "confidential employees" as those individuals who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations, to redefine them as those individuals who have access to secret information would have far-reaching results. A confidential business information standard, even if limited to information that constitute "trade secrets," would deprive of protection under the Act every employee who has access to . . . "[a]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers."

Clearly, such a definition would vitiate collective organization by large numbers of both white and blue-collar employees already organized, since many, in the normal course of their duties, have access to such information. Moreover, the future impact of this broader standard would be incalculable. The Bureau of Labor Statistics has projected that, by 1990, the economy will have created nearly 20 million new jobs, well over half of which will be in white-collar occupations. In the white-collar category, clerical employees, which includes bank tellers, bookkeepers, cashiers, secretaries, and typists, are the fastest growing group. Many of these new workers would have access to confidential information in the broader sense. As a consequence, in future years, a rapidly growing percentage of workers in the work force would be deprived of rights under the Act. If Congress intended a result so revolutionary, we believe that it would have said so expressly.

253 N.L.R.B. at 456-57 (footnotes and citations omitted).

89. NLRB v. Los Angeles New Hosp., 640 F.2d 1017 (9th Cir. 1981) (upholding Board determinations that challenged employees were not "confidential"); Union Oil Co. v. NLRB, 607 F.2d 852 (9th Cir. 1979) (upholding Board determination); Westinghouse Elec. Corp. v. NLRB, 398 F.2d 669 (6th Cir. 1968) (upholding Board determinations that challenged employees were not "confidential"); NLRB v. Quaker City Life Ins. Co., 319 F.2d 690 (4th Cir. 1963) (overruling Board's determination that challenged employee was not "confidential"); NLRB v. Swift & Co., 292 F.2d 561 (1st Cir. 1961). See also NLRB v. Allied Prod. Corp., Richard Bros, Div., 548 F.2d 644 (6th Cir. 1977), in which the courts strongly defended the use (if not the particular application) of the "labor nexus" standard.

90. 444 F.2d 783 (4th Cir. 1971).
"confidential" employees any of the protections of the Act.\textsuperscript{91}

On its face, the Fourth Circuit's decision addressed only the question sidestepped by the majority opinion in Hendricks County,\textsuperscript{92} i.e., whether a "confidential" employee enjoys the protection of the Act in addition to the right to belong to a labor organization. However, the Fourth Circuit chose to go one step further by holding that the legislative history of the Taft-Hartley Act somehow evidenced the intent of Congress to include "confidential" employees within the category of "supervisors."\textsuperscript{93} This approach runs contrary to the actual course of that legislative history which, as has already been noted,\textsuperscript{94} evidenced anything but a clear intent. Rather, it showed a lack of serious attention to the "confidential" employee, a split within both houses of Congress as to the proper scope of that category, and a decision to avoid treating the issue by way of specific statutory language in favor of permitting the Board to develop the law in this area.

The greater significance of the Fourth Circuit's decision, however, lies in its apparent rejection of the Board's emphasis upon the actual duties performed by "confidential" employees with respect to assisting persons who formulate and implement labor relations policies, and its substitution of an emphasis upon the subjective loyalty, which the court deemed "confidential" secretaries owe their employers.\textsuperscript{95}

This approach was also endorsed by the Seventh Circuit in its decision in Peerless of America v. NLRB,\textsuperscript{96} in which it was held

\begin{itemize}
  \item \textsuperscript{91} Id. at 786. The court explicitly disagreed with the determination of the Fifth Circuit in NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970) (presenting the same issue).
  \item \textsuperscript{92} 454 U.S. 170 (1981).
  \item \textsuperscript{93} 444 F.2d at 785.
  \item \textsuperscript{94} See supra text and accompanying notes at 62-73.
  \item \textsuperscript{95} 444 F.2d at 788. The court stated that:
    A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot "plight her troth" with the unit. Indeed, it seems more consistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act. Management is entitled to security of its confidential information and may insist upon the loyalty of those employees who have access to it. For this reason, confidential employees cannot be granted the protection afforded ordinary employees under the Act. Like supervisors, "such loyalty cannot be secured if [they] are psychologically allied with, or subject to the pressures of their union on behalf of, the rank-and-file."
    \textit{Id.} (citations omitted).
  \item \textsuperscript{96} 484 F.2d 1108 (7th Cir. 1973).
\end{itemize}
that a confidential secretary was by definition a "supervisor" and thus not an "employee under the Act."97 The Eighth Circuit faced a similar situation in NLRB v. North Arkansas Electric Cooperative,98 where an employer's refusal to reinstate a "managerial" employee who had failed to remain neutral in a union organization campaign was overturned.99 The North Arkansas court implied that the "confidential employee" category could conceivably be broadened to include persons other than those "working in labor relations, personnel and employment divisions," i.e., that a "labor nexus" was not necessarily a prerequisite to "confidential" status.100

The growing skepticism of the courts toward the Board's approach to "confidential" status reached its peak in Hendricks County,101 which represented the first direct assault on the Board's development of the law in this area. At issue in Hendricks County was the attempt by an employer to discharge the general manager's personal secretary for signing a petition calling for the reinstatement of an injured employee, dismissed for engaging in an activity that was admittedly protected by section 7 of the Act.102 The Board, utilizing its "labor nexus" standard, initially ruled that the employer's discharge of the secretary had violated section 8(a)(1)

97. Id. at 1112.
98. 446 F.2d 602 (8th Cir. 1971).
99. Id. at 607. The court relied heavily upon two statements contained in the House Report accompanying the original House version of the Taft-Hartley Act: the statement that "most of the people who would qualify as 'confidential' employees are executives and are excluded from the Act in any event" and the assertion that "the bill . . . excludes from the definition of employee persons holding positions of trust and confidence whose duties give them secret information." Id. at 606. As noted earlier, the former assertion was based on a clear misunderstanding of the status of "confidential" employees before and since; and the latter statement refers to a provision of the House bill that was subsequently stricken by the House-Senate Conference Committee. This case does not directly bear upon the status of "confidential" employees since it involved "managerial" employees. However, the court did take the opportunity to discuss the basis and extent of the exclusion of "supervisory," "confidential," and "managerial" employees from the coverage of the Act. In particular, the court read the legislative history of the Taft-Hartley Act as indicating the following intent of Congress:

It is apparent that in passing the Labor-Management Relations Act of 1947, Congress understood that persons working in labor relations, personnel and employment division and as confidential employees had theretofore been treated as "outside the scope of the Act," and that it was the intention of the conferees [that] this practice be continued under the 1947 amendments.

Id. at 607.
100. Id. at 610.
102. Id.
of the Act, specifically rejected the argument that the secretary was "confidential," and ordered her reinstatement with back pay.\textsuperscript{103}

The Seventh Circuit, however, by a two-to-one majority, reversed the Board's determination and held that the Board's application of the "labor nexus" standard was erroneous.\textsuperscript{104} The court relied heavily upon the legislative history of the Taft-Hartley Act and upon the United States Supreme Court's decision in \textit{NLRB v. Bell Aerospace Co., Division of Textron, Inc.}\textsuperscript{105} in advancing the view that all confidential secretaries (the word "confidential" denoting the title conferred by the employer rather than the legal definition developed and applied by the Board) were excluded from the Act's coverage, not merely those working for individuals engaged in labor relations.\textsuperscript{106} The court ruled that the secretary must be deemed "confidential" if "'by the nature of her duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors or to employees generally for use in the interest of the employer.'"\textsuperscript{107} The matter was remanded to the Board for a determination of the affected employee's status under its broader "confidential" exclusion.\textsuperscript{108}

On remand, the Board ruled that the employee was not "confidential," even under the Seventh Circuit's new criteria, and reinstated its earlier order.\textsuperscript{109} The employer again appealed to the Sev-

\textsuperscript{103.} Id. at 1618. The Board characterized the employer's reasons for her discharge, apart form her signing of the petition, as "pretextual." \textit{Id.}

\textsuperscript{104.} Hendricks County Rural Elec. Membership Corp. v. \textit{NLRB}, 603 F.2d 25 (7th Cir. 1979), \textit{rev'd}, 454 U.S. 170 (1981). The court did agree with the Board's finding that the employee's signing of the petition at issue constituted the reason for her discharge, and that such activity was "protected" by the Act. In this respect, the court took note of the administrative law judge's finding that "the petition was motivated in part by the employees' desire to promote their own future well-being should they be faced with a similar misfortune." \textit{Id.} at 27.

\textsuperscript{105.} \textit{Id.} at 29-30.

\textsuperscript{106.} 603 F.2d at 30. Judge Bonsal, in dissent, argued that the affected employee was "not a 'confidential secretary' and was covered by the Act." \textit{Id.} (Bonsal, J., dissenting).

\textsuperscript{107.} 603 F.2d at 30 (quoting H.R. 3020, 80th Cong., 1st Sess., § 2(12)(c) (1947)).

\textsuperscript{108.} \textit{Id.}

\textsuperscript{109.} 247 N.L.R.B. 498 (1980). The Board's disagreement with the Seventh Circuit's formulation of its expanding "confidential" exclusion could not have been more apparent. At the outset, the Board explicitly confined the Seventh Circuit's standard to the status of "the law of this case only." The Board's subsequent analysis dealt almost entirely with the extent of the affected employee's involvement with labor relations and personnel matters. It made only two findings with respect to her "confidential" duties in other areas: that she did not maintain secret or classified papers or documents, and that the record did not contain evidence of any confidential duties performed by her in non-labor relations or personnel
enth Circuit, and a two-to-one majority determined that the Board had failed to properly apply the court's standards. The court refused to enforce the Board's order. This decision, together with the companion case of Malleable Iron Range Co. v. NLRB, was reviewed by the United States Supreme Court.

The Seventh Circuit's decision and Justice Powell's dissenting opinion in Hendricks County were both grounded on the same theoretical base—Congress had intended a broader "confidential employee" exclusion than had been developed by the Board and the policies advanced by the Supreme Court in Bell Aerospace. The relevant legislative history does not bear out this contention. These decisions have also confused the purpose of the "confidential" exclusion with that of the entirely distinct "managerial employee" exclusion. The "managerial" category's history and purpose are vastly different from those of the "confidential" category, and an examination of the "managerial" exclusion is essential to an understanding of the proper scope of the Act's coverage.

III. THE "MANAGERIAL" EMPLOYEE EXCLUSION

A. Evolution of the "Managerial" Employee Exclusion

Bell Aerospace decided an issue involving "managerial" employees analogous to the "confidential" employees issue treated in Hendricks County. In Bell Aerospace the Court held that all
"managerial" employees, not merely those working in the field of labor relations or those whose participation in a labor union would give rise to a conflict of interest with their job responsibilities, are excluded from the Act.\textsuperscript{117} The majority opinion was written by Justice Powell, the author of the dissenting opinion in Hendricks County. Both of Justice Powell's opinions were premised upon the similarity in the form of the questions posed: What is the proper breadth of these two employee categories excluded from the Act's protection? However, the similarity between the issues addressed by those cases and the policy implications raised by them ends there.

Bell Aerospace involved a group of employees whose characteristics, interests and need for the protections afforded by the Act were strikingly different from those of the employees in Hendricks County. In Bell Aerospace a union attempted to organize a bargaining unit composed of buyers and assistant buyers in the employer's purchasing department. The employer challenged the union's effort on the ground that the affected employees were part of its "managerial team," citing their discretion in selecting the company's suppliers, drafting bid invitations, evaluating submitted bids, negotiating prices and terms of purchase, and preparing purchase orders. A majority of the Board ruled that the buyers might be "managerial" employees, but were nevertheless covered by the Act in the absence of a specific showing that their organization would unavoidably create a conflict of interest \textsuperscript{118} with the duties of their employment. The Board called the employer's allegations of such conflict unsupported conjecture.\textsuperscript{119}

The employer subsequently petitioned the Board for reconsideration of its decision in view of the Eighth Circuit's intervening decision in NLRB v. North Arkansas Electric Cooperative.\textsuperscript{120} The

\textsuperscript{117} 416 U.S. at 289 (1974). Bell Aerospace also determined that the Board might properly determine whether certain employees are "managerial" by case-by-case adjudication and that it need not utilize a quasi-legislative rulemaking process. Id. at 294. For a discussion of this issue, see Note, NLRB Policymaking: The Rulemaking—Adjudication Dilemma Revisited in NLRB v. Bell Aerospace, 29 U. MIAMI L. REV. 559 (1975).

\textsuperscript{118} 190 N.L.R.B. 431-32 (1971). The Board rejected the employer's contention that unionization of the buyers would create a conflict of interest between their role as union members and their role as the employer's representative as "unsupported conjecture." It said the employer could establish general directions within which the buyer's discretion could be confined. Id. The Board relied in part on its decision in North Arkansas Electric Coop., 185 N.L.R.B. 550 (1970), which held that "managerial" status did not necessarily preclude employees from the Act's coverage. See infra note 138.

\textsuperscript{119} 190 N.L.R.B. at 432.

\textsuperscript{120} 446 F.2d 602 (8th Cir. 1971). The court held that "managerial" employees as a
petition was denied by the Board, based on its view that the "managerial" exclusion should extend only to those "managerial" employees whose duties and responsibilities either (1) pertained to the formulation and implementation of labor relations policies or (2) necessarily involved determinations that could lead to conflicts of interest. The employer then refused to bargain with the affected employees, and the Board issued a bargaining order.

The Second Circuit denied enforcement of the Board's order on the ground that the Board had applied an overly narrow "managerial" standard. The Court held that "managerial" status was applicable to all employees who participated in the formulation, determination, and implementation of the employer's policies exercising discretion and independent judgment in that connection, regardless of labor relations involvement or potential conflicts of interest. The case thus presented an issue of the propriety of the "labor nexus" and "conflict of interest" tests in determining "managerial" status.

Justice Powell's majority opinion was, to a large degree, both a parallel and a precursor to his Hendricks County dissent. He noted that a considerable number of early Board decisions had excluded certain groups of employees deemed "managerial" (most prominently, buyers and expediters) from rank-and-file bargaining units on the theory that they were "closely related to management;" that they were empowered to make commitments on behalf of their employers; or that they exercised considerable discretion in the formulation, determination, and effectuation of management policy.
He also placed great reliance upon the legislative history of the Taft-Hartley Act, reaching the conclusion that Congress had intended the uniform exclusion of "managerial" employees from the Act. In view of the focus of that legislative history upon "supervisors" rather than upon the somewhat different class of persons generally within the executive hierarchy (a class which received very little congressional attention in 1947), this reliance may have been overstated. Finally, Justice Powell noted that since the passage of the Taft-Hartley Act, the Board had almost invariably excluded "managerial" employees, i.e., those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," from the Act, and that various courts of appeals had upheld this exclusion.

Justice Powell explicitly linked his reasoning to both "confidential" and "managerial" employees. In footnote twelve to his Bell Aerospace opinion, he commented that "confidential" employees were excluded from the Act's coverage, regardless of "labor nexus." His opinion cited the portion of the House Report attached to the House's version of what subsequently became the Taft-Hartley Act which stated that "[m]ost of the people who would qualify as 'confidential employees' are executives and are excluded from the Act in any event." Justice Powell's dicta was heavily relied upon by the Seventh Circuit in both of its Hendricks County opinions, but rejected by the Supreme Court in Hendricks County.

Justice White's concurring and dissenting opinion in Bell Aerospace bore a strong resemblance to Justice Brennan's majority opinion in Hendricks County. Both opinions supported the application of a "labor nexus" test to "managerial" status. Thus, while Justice Powell found support in the congressional debates and with the issue of whether such employees could organize into separate bargaining units.

126. 416 U.S. at 283-84.
127. See supra text accompanying notes 53-72.
128. 416 U.S. at 286 (quoting Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947)).
129. See 416 U.S. at 288-89 and cases cited therein.
130. Id. at 283-84 n.12.
131. Id. See also supra note 71 and accompanying text.
132. 603 F.2d 25, 28-29 (7th Cir. 1979); 627 F.2d 766, 768-69 (7th Cir. 1980). Judge Cudahy, in his dissent to the latter opinion, criticized the court's attempt to "build a whole new body of law about 'confidential employees' uninvolved in labor relations on the footnote dicta of Bell Aerospace." Id. at 771.
133. 454 U.S. at 186-87.
134. 416 U.S. at 295 (White, J., concurring in part and dissenting in part).
committee reports for his broad view of the "managerial" exclusion, Justice White cited the lack of any statutory "managerial" exclusion, the narrowness and precision of the "supervisory" exclusion contained in section 2(11) of the Taft-Hartley Act, and the Act's inclusion of professional employees under section 2(12) (many of whom exercised at least some functions that could be deemed "managerial") for his view that Congress intended the "managerial" exclusion be applied more narrowly. Justice White also noted that prior to 1947 the Board had never held "managerial" employees to be excluded from the Act altogether. Rather, it had only addressed the narrower issue of whether such employees possessed sufficient community of interest with rank-and-file employees to appropriately be included within those collective units.135

A lengthy discussion on the legislative history of the Taft-Hartley Act's exclusion of "supervisors" followed, with Justice White declaring that Congress had rejected any specific exclusion for "managerial" employees by adopting the narrower Senate exclusion which was limited to true "supervisors." He declared that: (1) the Board had never excluded "managerial" employees as a class from the Act's coverage and (2) Congress had not directed that such a blanket exclusion be made.136 Finally, Justice White noted that in only two cases since the passage of the Taft-Hartley Act had the Board held that employees aligned with or acting as representatives of management could not organize even into separate bargaining units137—a position which he deemed overruled by the Board's application of the "labor nexus" standard in North Arkan-  

135. 416 U.S. at 299-300. Justice White took the position that the Board's likely position on the broader issue of the ability of "managerial" employees to organize ab initio was uncertain, particularly given the vacillation shown by the pre-1947 Board with respect to the question of whether "supervisors" were "employees" under the Act and whether they could therefore lawfully organize into separate collective bargaining units. Id. at 300.

136. Id. at 302-03. Justice White also noted that the dissenting opinion of Justice Douglas in Packard Co. v. NLRB, 330 U.S. 485 (1947), had specifically referred to persons acting for management in the formulation and execution of labor relations policies. 416 U.S. at 307. Packard was the decision that played such a prominent role in spurring congressional action in 1947 to amend the Wagner Act "to include a specific exclusion of supervisors." While his contention might be somewhat overstated, it cannot be doubted that the emphasis placed upon supervisors in the 1947 congressional debates—and particularly potential conflicts between their roles as such and their membership in labor organizations—indicated that Congress was indeed most concerned about the status of persons exercising supervisory and/or managerial authority in the labor relations area as opposed to other areas of business decisionmaking. Id. at 307-08.

Justice White contended that the Board's application of a "labor nexus" standard to "managerial" status had a reasonable basis in law and should therefore not be disturbed by the courts. This was exactly the reasoning employed by Justice Brennan with respect to his application of the "labor nexus" standard to "confidential" status in Hendricks County. By adopting similar approaches in defending the Board's application of that standard in


Justice White's contention on this point is well-founded. In North Arkansas Electric Coop., the Board held that an "electrification advisor" who often spoke for management in customer relations matters, but who did not participate in the formulation, determination, or effectuation of policy with respect to employee relations matters, was an "employee" under the Act. The Board drew a very precise distinction between the exclusion of such employees from collective bargaining in toto and their exclusion from specific bargaining units:

[T]he "managerial employee" category is Board-created, not established by the Act. In our representation case proceedings, individuals found to fall within that category have been consistently excluded by the Board from bargaining units of other types of employees. But typically in those cases, our concern has been whether certain nonsupervisory employees have a sufficient community of interest with the general group or class of employees constituting the bulk of a unit so that they may appropriately be considered a part thereof. Where the interests of certain employees seem to lie more with those persons who formulate, determine, and oversee company policy than with those in the proposed unit who merely carry out the resultant policy, we have held them to be excluded, and have commonly referred to such excluded persons as "managerial employees," without ever having attempted a precise definition of that term.

Our lack of clear definition has evoked some judicial criticism...

This lack of definition may be inherent in the difficult process which we face constantly in evaluating "community of interest" in many kinds of unit determinations. Since, however, in representation cases "community of interest" is the principal determinant, our decisions in those cases are not genuinely relevant to the issue here. An employee may not have the requisite community of interest with other employees to be included with them in a proposed unit, and yet clearly be an employee entitled to the protection of the Act as a Section 2(3) "employee." On the other hand, some persons we have traditionally excluded as "managerial" might more accurately have been termed "employers" within the definition of Section 2(2), which defines employers as including "any persons acting as an agent of an employer."

In this case, we have been called upon to determine whether a given individual is to be considered as a Section 2(3) "employee" or a Section 2(2) "employer." As we have explained above, the fact that he may be a "managerial employee" for purposes of determining his exclusion from a given bargaining unit may well not assist us materially in making this kind of determination.

We do not in this initial consideration wish to attempt an inflexible comprehensive definition, for we are of the view that a definition must be evolved on a case-to-case basis. However, it is relevant, we believe, to focus our attention upon whether the employee here had either real or apparent authority to speak as an "employer" in a labor relations or employee relations context.

185 N.L.R.B. 550 (1970) (footnotes omitted). Enforcement was denied by the Eighth Circuit. See supra note 120.

139. 416 U.S. at 311 (White, J., dissenting).

140. See supra notes 1-10 and accompanying text.
both instances, Justices White and Brennan failed to discern the very substantial differences between the "confidential" and "managerial" groups and did not consider whether better law—and better labor relations policy—might have resulted had they applied different standards to each of these groups. This, of course, is the mirror image of the very same shortcoming presented in Justice Powell's opposition to the application of the "labor nexus" standard to both of these groups of employees.

The difficulty in adopting a uniform approach to both "confidential" and "managerial" classifications lies in the divergent development of the law respecting the status of "managerial" employees and the status of "confidential" employees. This distinction, in turn, rests upon the fact that these two categories represent groups of employees whose authority and interests are very different. As already discussed, the Board took an extremely firm and consistent stance on the scope of the "confidential" category almost from the first instance, and has consistently maintained that stance to the present day. Furthermore, neither the Board nor the courts have ever seen any need to raise the possibility of "confidential" employees organizing into separate units; those employees were either included within rank-and-file bargaining units or excluded from collective bargaining altogether. In contrast, the Board and the courts rather consistently assumed that employees who were highly placed within the managerial-executive "hierarchy" were excluded from the coverage of the Act as a matter of policy, if not by statute,\(^{141}\) while exhibiting a marked inconsistency towards defining the scope of this "managerial" category. This vacillation was particularly pronounced during the pre-Taft-Hartley period (paralleling a similar tendency during this period with respect to the collective bargaining rights of supervisors).\(^{142}\) In the following years, the

\(^{141}\) International Ladies' Garment Workers' Union v. NLRB, 339 F.2d 116 (2d Cir. 1964); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320 (1947).

\(^{142}\) 416 U.S. at 277. At first, the Board excluded supervisors from rank-and-file bargaining units. See, e.g., Mueller Brass Co., 39 N.L.R.B. 167 (1942); Ingalls Iron Works Co., 29 N.L.R.B. 156 (1941); Richardson Co., 4 N.L.R.B. 835 (1938); Ontario Knife Co., 4 N.L.R.B. 29 (1937). The Board then reversed course, defined supervisors to be "employees," and permitted them to organize into separate bargaining units. Godchaux Sugars, Inc., 44 N.L.R.B. 874 (1942); Union Collieries Coal Co., 41 N.L.R.B. 961 (1942), supplemental decision, 44 N.L.R.B. 165 (1942). Furthermore, the Board permitted supervisors to belong to bargaining units if consistent with bargaining history, see, e.g., Curtiss-Wright Corp., 33 N.L.R.B. 490 (1941); American Oak Leather Co., 32 N.L.R.B. 247 (1941); Certain-Teed Prods. Corp., 28 N.L.R.B. 915 (1941); Gulf Public Serv. Co., 18 N.L.R.B. 562 (1939), or if their supervisory authority was found to be "minor." Union Collieries' Coal Co., 41 N.L.R.B. 961 (1942); Alabama Dry Dock & Shipbuilding Co., 39 N.L.R.B. 954 (1942); Consolidated
The scope of the "managerial" category became better defined and, almost invariably, that category did not include a "labor nexus."

The Board clearly intended to exclude a category of employees from rank-and-file units solely on the basis of their close relationship to management rather than on specific job responsibilities or access to particular kinds of information relating to labor relations. For example, in *Freiz & Sons*, the Board excluded expediters from a rank-and-file bargaining unit because the employees' tasks in expediting completion of orders, assuring adherence to production time schedules, and monitoring work until final completion and shipment evidenced their close relationship with management.

In *Burke Brewery, Inc.*, the Board excluded from a bargaining unit an employee who held general responsibility for corporate records and occupied the combined positions of office manager, head bookkeeper and secretary to the company president. The Board determined that this employee's interests and functions...
were more closely allied to those of management than they were to those of bargaining unit employees, although he did not act in any supervisory capacity or play any role in or possess confidential knowledge of his employer's labor relations.146

In *J.L. Brandeis & Sons, Inc.*,147 the Board excluded from a bargaining unit of sales clerks an assistant in a department store's merchandise department who possessed no supervisory functions. The Board stated that in the performance of his duties, the assistant was carrying out management functions and was associated almost entirely with other management representatives.148 Several other cases involved buyers, whom the Board tended to exclude on the grounds that they possessed the authority to commit their employers' funds.149

However, it was not until its decision in *Ford Motor Co.*150—the very same decision that firmly established the "labor nexus" test for determining "confidential" status—that the Board first enunciated any sort of uniform standard for determining "managerial" status, or indeed any theory underlying the existence of that category. The Board stated that, "[W]e have customarily excluded from bargaining units of rank-and-file workers executive employees who are in a position to formulate, determine, and effectuate management policies. These employees we have considered and still deem to be 'managerial' in that they express and make operative the decisions of management."151

The Board then ruled the "labor nexus" test was applicable to "confidential" employees,152 drawing a sharp distinction between that category and the "managerial" category to which no "labor nexus" requirement applied.153 It also drew an even more crucial distinction—"managerial" employees were "executives" who "formulate, determine and effectuate management policies"—clearly, a powerful group whose exclusion from collective bargaining was pre-

146. *Id.* at 1062.
147. 54 N.L.R.B. 880 (1944).
148. *Id.* at 885.
149. Most of these instances concerned the exclusion of buyers from office/clerical bargaining units. *See*, e.g., Electric Controller & Mfg. Co., 69 N.L.R.B. 1242 (1946); Barrett Div., Allied Chem. & Dye Corp., 65 N.L.R.B. 903 (1946); Aluminum Co. of Am., 61 N.L.R.B. 1066 (1945) (senior account clerks and aides to the credit manager with "power to make financial commitments on behalf of his employer" excluded); Inland Steel Container Co., 56 N.L.R.B. 138 (1944); Hudson Motor Car Co., 55 N.L.R.B. 509 (1944).
151. 66 N.L.R.B. at 1322.
152. *Id.*
153. *Id.*
mised upon their proximity to the top of the corporate hierarchy and their authority over corporate decision-making and operational strategy. "Confidential" employees, on the other hand, were relatively low-level employees far from the center of corporate power, whose exclusion from collective bargaining was to be premised upon access to information or providing assistance to a specific subset of "managerial" employees—those operating in the labor relations area. The Board has generally continued to maintain these crucial distinctions between the two categories, and all of its decisions excluding employees from collective bargaining on the basis of their general "alignment with management" have involved "managerial" employees who exercised at least some degree of corporate decision-making authority, independent of established policy.

In *Palace Laundry Dry Cleaning Corp.*, the Board refused to exclude store managers from a bargaining unit stating:

> The determination of "managerial," like the determination of "supervisory" is to some extend necessarily a matter of the degree of authority exercised. We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as "managerial" employees, executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and have excluded such managerial employees from bargaining units... We believe that the Act, as amended, contemplates the continuance of this practice.

The Board in *A.S. Abell Co.* refused to exclude editorial and news department employees on the grounds that those employees were bound to follow their employer's "body of doctrine" and did not set that "doctrine." In this case the Board clearly enunciated the view that a managerial employee's duties in formulation and determination of management policy necessarily indicates a significant degree of decision-making authority.

Parts managers were included in a bargaining unit of parts department employees over the employer's objection in *Kitsap County Automobile Dealers Ass'n*. Although the employer argued that their functions in making minor purchases on his behalf and setting prices and discounts from auto parts in accordance

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155. *Id.* at 323 n.4.
156. 81 N.L.R.B. 82 (1949).
157. *Id.* at 84.
158. *Id.* at 83-84. See also, Suburban Newspaper Pubs., Inc. 226 N.L.R.B. 154 (1976); Bulletin Co., 226 N.L.R.B. 345 (1976).
with "price books" conferred "managerial" status upon these parts managers, the court reasoned that:

The fact that an employee may make purchases on behalf of, or otherwise commit the credit of, his employer does not in all circumstances, conclusively confer managerial status upon such employee. . . . Furthermore, the fact, as here, that employees exercise some discretion in carrying out their responsibilities and do not work under close immediate supervision, likewise does not compel a finding that the employees are managerial. The determination of an employee's "managerial" status depends upon the extent of the exercise of his discretion. The routine performance by an employee of largely predetermined policies does not warrant finding him to be managerial. . . . However, in the instant case, the authority of the parts department employees to "formulate and effectuate" policy is, as noted above, limited generally by company policy and trade customs, which they do not determine.160

In Brotherhood of Locomotive Firemen & Enginemen161 the Board included in a bargaining unit of office employees a "promotion director" who coordinated the employer's membership drives and insurance sales programs and an assistant chief clerk who spent his time answering correspondence and adjusting internal disputes on the grounds that their functions were firmly established within the bounds of established policy rather than as a matter of the free exercise of their own discretion. The Board's comment respecting the "promotion director" is instructive:

A managerial employee must formulate, determine, and effectuate an employer's policies, but as indicated above, the promotion director clearly functions within the well-defined limits of the Employer's predetermined policy. The Board has long held that an occasional policy recommendation which an employee may make is not enough to create managerial status.162

Three recent Board decisions involving employees of television stations further demonstrate the Board's policy to limit the "man-

160. Id. at 934.
162. Id. at 1527-28, citing Westinghouse Elec. Corp., 122 N.L.R.B. 391 (1958) and AFL/CIO, 120 N.L.R.B. 969 (1958). See also Westinghouse Elec. Corp., 138 N.L.R.B. 778 (1962) (senior internal auditor who merely analyzed operations established pursuant to pre-existing management policies included in unit); Yale & Towne Mfg. Co., 135 N.L.R.B. 926 (1962) (standards engineers and data analysts who set job standards and applied them in potential grievance situations included in unit); Iowa Indus. Hydraulics, Inc., 169 N.L.R.B. 205 (1968) (sales engineers whose job in designing and selling hydraulic cylinders required considerable technical and professional skill not "managerial" where their authority in formulation and effectuation of management policies was strictly limited); Westinghouse Elec. Corp., 163 N.L.R.B. 723 (1967), enforced, 424 F.2d 1151 (7th Cir. 1970), cert. denied, 400 U.S. 831 (1970) (lead and assistant engineers held to be "professional" rather than "managerial" employees).
The "managerial" category to employees who participate in actual policymaking. In *Westinghouse Broadcasting Co. (WBZ-TV)*, the Board determined that producer-directors were not "managerial" employees in spite of their highly responsible positions with the station. Finding their involvement in station management policies or financial affairs subject to the strict control and advance approval of the station's managers, the Board concluded these employees were not "managerial" because their discretion in executing their assignments could not exceed the bounds of policy determined by others. In *Golden West Broadcasters—KTLA*, the Board reached the same conclusion with respect to a station's "directors" (department heads). While the Board acknowledged the considerable discretion enjoyed by these employees with respect to matters of artistic judgment, it nevertheless ruled their subordination to station management policy set by others precluded their exclusion from a bargaining unit based upon alleged "managerial" status. Finally, in *Post-Newsweek Stations of Florida, Inc.* the Board again denied "managerial" status to producer-directors on similar grounds.

In *Simplex Industries, Inc.*, the Board summarized the post-*Bell Aerospace* determinant of "managerial" status as follows:

> The Supreme Court and the Board, in determining managerial status, weigh the facts elicited to determine whether or not the persons at issue are involved in the formulation, determination, and effectuation of management policies by expressing and making operative the decisions of their employer, and whether they have discretion in the performance of their job duties independent of their employer's established policies.

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164. Id. at 125.
166. Id. at 762.
168. Id., concluding that:

[It does not appear that a producer/director could initiate a major policy or programming change, nor authorize the expenditure of new funds, without prior approval. His range of discretion is limited in all significant respects by station policy, external regulations, current production practices, and the necessity of obtaining approval, prior to initiation and substantial alteration in the station's programming.]

*Id.*

170. Id. In *Simplex*, the Board found a credit manager who established and reviewed lines of credit for corporate customers, a buyer who was primarily responsible for the company's raw materials purchases and a transportation manager who was responsible for all of the company's receipt and distribution of incoming raw materials and outgoing finished products to be "managerial." See also *Westinghouse Elec. Corp.*, 236 N.L.R.B. 1290 (1978).
In addition to those employees who helped formulate managerial policy or operated with virtually unfettered discretion outside the constraints of policies established by others, the Board continued to confer "managerial" status upon buyers and other employees who possessed the effective authority to commit the employer financially, apparently on the belief that this authority "allied them with management."\(^{171}\) This, of course, is not at odds with the limitation of managerial status to those employees placed at a high rank within the corporate hierarchy.

Prior to the *North Arkansas Electric* and *Bell Aerospace* decisions, the courts rarely addressed the question of the "managerial" employee, and, while particular determinations of the Board may have been criticized, the operative legal standard for "managerial" status was not challenged. Thus, in *NLRB v. Swift & Co.*,\(^{172}\) the First Circuit sustained a determination including a stenographer in an office/clerical bargaining unit, rejecting the contention that she was "confidential" or "managerial." The Board declared that she "has nothing to do with formulating or determining company pol-

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ickey or managing, to any great extent certainly, the work of others. Nor does she have access to confidential information with respect to labor matters.”

In *International Ladies Garment Workers' Union v. NLRB*, the Second Circuit upheld the Board's ruling that union business agents were not “managerial” employees, stating that “while the task of a business agent is one that requires considerable skill and judgment, the Board was clearly warranted in finding that they are more concerned with the day-to-day routine of industrial organization, following policy rather than establishing it.” The Court of Appeals for the District of Columbia in *Retail Clerks International Ass'n v. NLRB* criticized the Board for “not having developed clear standards for determining what is a managerial employee,” but it upheld the Board’s determination in a similar situation. It held that the union’s business representatives did not perform work that would necessarily involve them in conflicts of

173. 292 F.2d at 564.
175. 339 F.2d at 123, citing AFL, 120 N.L.R.B. 969 (1968).
176. 366 F.2d 642 (D.C. Cir. 1966). This case is interesting because of the court’s finding that a “two-strand” test of “managerial” status had been applied by the Board:

The Board has not developed clear standards for determining what is a managerial employee; there seem, however, to be two tests. The first is whether, even if they do not supervise other workers, their position with the employer presents a potential conflict of interest between the employer and the workers, e.g., employment interviewers who have authority in hiring. . . . This strand of the managerial employee test is often phrased in a more conclusory manner, i.e., that the employee is closely related to or aligned with the management; such a determination, however, also seems to turn on the possibility of a conflict of interest arising, e.g., timekeepers and expediters, Bendix Aviation Corp., 47 N.L.R.B. 43 (1943); an office manager and record keeper who has no confidential information about other employees, Burke Brewery, Inc., 54 N.L.R.B. 1061 (1944).

The Board also excludes from the protection of the Act, as managerial employees, “those who formulate, determine, and effectuate an employer’s policies,” . . . and those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer’s established policy, Eastern Camera and Photo Corp., 140 N.L.R.B. 569, 571 (1963) (store managers who could set prices are not managerial). The rationale for this Board policy, though unarticulated, seems to be the reasonable belief that Congress intended to exclude from the protection of the Act those who comprised a part of “management” or were allied with it on the theory that they were the one from whom the workers needed protection.

366 F.2d at 644-45.

The “conflict of interest” test had been mentioned by the Board in very few cases. See, e.g., New England Tel. & Tel Co., 90 N.L.R.B. 639 (1950). However, it never achieved true recognition until the Board attempted to impose it as an additional requirement for “managerial” status apart from the established requirement that such employees formulate, determine, and effectuate policy. This additional requirement, of course, later became a focus of controversy in both *North Arkansas Electric Cooperative, Inc.,* and *Bell Aerospace.*
interest between themselves as union members and their employment as union representatives, and that they were not policy-making officials of the International Union. In Illinois State Journal-Register v. NLRB, the Seventh Circuit, while again criticizing the Board for lack of clarity as to the applicable "managerial" standard, held that the employer's district circulation managers were "employees" within the meaning of the Act and not "managerial." It noted both the absence of similar potential conflicts and that:

While the district man has various responsibilities, they are minor in nature and not tantamount to those of an employee who formulates, determines, and effectuates his employer's policies. The scope of his authority in the area of significant management policy is limited in nature and as the Regional Director aptly notes, "the discretion and initiative which these man [sic] are expected to exercise fall within relatively unimportant areas." The record contains evidence indicating that in the few areas where the district man appears to have some discretion in the performance of his job and to have some semblance of policy authority the Company effectively circumscribes such discretion and limits such authority.

The court further held that the power to make recommendations does not warrant precluding one from representation as a managerial employee.

In Continental Insurance Co. v. NLRB, the Second Circuit held that insurance adjusters who were involved in managerial

177. 366 F.2d at 645.
178. 412 F.2d 37 (7th Cir. 1969), enforcing 171 N.L.R.B. 130 (1968).
179. 412 F.2d at 44. The court in Illinois State Journal-Register, Inc., followed the same "two-strand" approach used in Retail Clerks (supra n.175) and further confirmed that the "conflict of interest" test for "managerial" status was, indeed, a "labor nexus" standard, i.e., that for such a conflict of interest to arise, an allegedly "managerial" employee must be involved in his or her employer's labor policies to an extent necessary to suggest the likelihood of the existence of such a potential conflict. 412 F.2d at 41-42. Neither Justice Powell nor Justice White made mention of this aspect of the decision in the Bell Aerospace opinions, even though it would appear to have been directly overruled by Justice Powell's opinion. Neither Illinois State Journal-Register, Inc., nor Retail Clerks, clarified whether the two "strands" were to be viewed as alternative tests for "managerial" status, or whether they were to be viewed in conjunction with one another. Later, in North Arkansas Electric Cooperative and Bell Aerospace, the Board chose the approach of viewing both "strands" as prerequisites for "managerial" status, an approach never used by the courts.

180. 412 F.2d at 42. The court noted in this connection top management's ultimate authority (and ability to overrule the decisions of district circulation manager) on: (a) initiating discount policies; (b) initiation and design of circulation campaigns; (c) subdivision of circulation districts; (d) establishing delivery routes; (e) pledging the employer's credit; and (f) retention and termination of newscarriers.

181. Id. at 42-43.
policymaking were not "managerial" employees despite their ability to pledge their employer's credit in amounts up to $2,500. And, in *Westinghouse Electric Corp. v. NLRB*, the Seventh Circuit enforced a Board ruling that field engineers who were mostly mechanical engineers sent by the employer to various customers' jobsites to provide technical advice and instruction on the installation and use of its products were "professional employees" rather than "supervisors" or "managerial" employees.

The most strongly contested question of "managerial" status that has arisen in the post-*Bell Aerospace* period is the issue of whether college and university faculty operating under a "shared-governance" system could be excluded from collective bargaining as "managerial." Neither the Board nor the courts have retreated from the position that policymaking authority is a necessary prerequisite for such status. The issue focuses on whether or not the authority granted to faculty to determine the institution's educational and administrative policy with respect to matters such as curricula, admissions and hiring is sufficient to invest them with "managerial" status. The basic approach to this issue by the courts has been a case-by-case examination of the authority of faculty in each particular institutional setting.

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183. 424 F.2d 1151 (7th Cir. 1970), enforcing 171 N.L.R.B. 1239 (1968). The court employed the "two-strand" test originally set forth in *Retail Clerks, supra* n.176, in a conjunctive sense and found that these employees did not satisfy either "strand."

184. 424 F.2d at 1155. The court stated that:

While the engineers here exercise a certain amount of independent judgment, it is district or area managers who effectively set and carry out management policy. Only minor on-the-job changes from the original plans are permitted without approval from headquarters. The lead engineers' authority to pledge the company's credit is limited to relatively small and routine purchases. We find substantial evidence on the record as a whole to support the Board's finding that the responsibilities of the engineers are not managerial.

*Id.* at 1158.


186. This approach was best summarized by the First Circuit in NLRB v. Wentworth, 515 F.2d at 556-57:

Wentworth contends that the Act should not be read to include college faculty among the ranks of workers in the industrial world who are "employees" under the Act. An educational institution's goals of teaching and advancing knowledge are said to be so closely dependent upon each faculty member that the trustees and adminis-
In *NLRB v. Yeshiva University*, a divided United States Supreme Court overruled the use of this approach and termed the entire full-time faculty of the university "managerial" rather than "professional." However, it did so based upon what it perceived to be the unconventional structure of authority in a "mature" private university as opposed to that more generally prevailing in an industrial setting. Its decision was based upon factors unique to the university setting and more specifically the power exercised by

tration, who have ultimate authority, as a matter of course delegate to the faculty or its representatives varying amounts of authority and influence over educational policy and the government of the institution. This relationship is said to stand in contrast to the normal adversarial positions of employees and a monolithic management, and is illustrated by the rarity of faculty strikes which might disrupt commerce. Collective bargaining by an exclusive faculty bargaining agent under the rules of the Act will supposedly result in the erosion of academic freedom and meritocratic value, and in the substitution of adversarial attitudes for traditional collegiality and shared responsibility.

We do not take Wentworth's views lightly, and were we a legislature, we might read a different result. But we are unable to convince ourselves that all faculties of all private nonprofit institutions of higher learning in the nation are so situated as to fall outside the ranks of "employees" under the Act. Given wide differences in terms of service and responsibility, the focus must be upon each particular institution.

The court then concluded that under facts as given, the Wentworth Institute faculty was not "managerial":

On the record in this case, the Board was entitled to find that neither the Wentworth faculty nor its committees possess substantive authority. The structure is hierarchical, and there is no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters other than the scheduling of exams, classes, and other such routine matters. The two individuals included in the unit who come closest to satisfying the definition of managerial employees would be the two faculty members at the College who spent part time assisting with planning. However, there is insufficient evidence indicating responsibility on their part over matters of substance to compel a finding that they are managerial employees.

*Id.* at 557. Prior to 1980, the Board almost invariably took the position that university faculty were "professional employees" under section 2(12) of the Act and were not "managerial" on the grounds that their institutional authority was "collegial and advisory" only and not exercised on behalf of the employer. It also took the position that final authority for decision making in a university setting rested with boards of trustees. *See New York University*, 221 N.L.R.B. at 1149.

187. 444 U.S. 672 (1980). The lineup in *Yeshiva* was consistent with that of *Bell Aerospace and Hendricks County*: Justice Powell favored a broad reading of the "managerial" exclusion and Justice Brennan, in dissent, advanced a narrow construction of the exclusion. The Board had directed an election within a bargaining unit comprised of all full-time faculty of the university, 221 N.L.R.B. 1053 (1975), and had issued a bargaining order upon the University's refusal to bargain with the union certified as the faculty's bargaining representative as a result of the election. 231 N.L.R.B. 597 (1977). However, the Second Circuit denied enforcement of that order because of what it perceived to be the faculty's "managerial" status. 582 F.2d 686 (2d Cir. 1978).

188. 444 U.S. at 680.
Confidential and Managerial Employees

The Court did not alter in any manner the scope of the "managerial" exclusion as developed and its restriction to those employees possessing a share of power to direct the employer's enterprise. Instead, it sought merely to apply that exclusion to a rather sensitive situation involving elements of both policymaking authority and professional status. The Court clearly did not intend its Yeshiva decision to portend a broadening of the generally applied "managerial" exclusion as established in Bell Aerospace or even as that decision was applied to professional employees or universities as a group.¹⁸⁹

¹⁸⁹. The following excerpts from Justice Powell's decision emphasize the extent to which such factors were relied upon by the court:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

444 U.S. at 686.

¹⁹⁰. Id. at 689-90. The Court stated:

We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managers.

B. "Confidential" and "Managerial" Status Contrasted

Given this history of the "managerial" exclusion, the stark distinction between the evolution and purpose of that exclusion and that of the "confidential" employee exclusion becomes readily apparent. The Board adopted a clear, firm stance on what "confidential" status entailed, and maintained that stance consistently. The standard adopted was easy to apply, since most employees who play any significant role in the labor relations area can be readily identified. Its approach was backed by the courts of appeals, with the exception of three cases, which called for a departure from the established analysis in favor of a broader definition of "confidential" status. In Hendricks County, the Supreme Court rejected this broader view of "confidential" status in favor of the Board's established and stricter "labor nexus" approach.

The situation confronting the Supreme Court in Bell Aerospace was almost exactly the opposite. The application of a standard for determining "managerial" status has been anything but clear and definitive, due to the difficulty inherent in making any objective assessment as to which employees within an executive hierarchy really play a significant role in the "formulation, determination, and effectuation of management policy." This is particularly true with respect to professional or highly-skilled technical personnel. Most often, the only way to make such a determination has been to consider whether or not the disputed and allegedly "managerial" employees possessed a community of interest with the remainder of the bargaining unit, a task which even the Board has admitted is very difficult. Yet, the Board has applied at least two consistent elements in all "managerial" determinations: (1) the power to shape or, at the very least, to influence management policy (or, alternatively, to act on behalf of the employer); or (2) the power to commit the employer's financial resources at his or her discretion, independent of fixed guidelines or policies shaped and administered by other persons.

The Board has encountered trouble only when it attempted (as in North Arkansas Electric and Bell Aerospace) to apply an additional "conflict of interest" requirement for "managerial" status, requiring a finding of an irreconcilable conflict between the employee's duties and membership in a labor organization. The conflict of interest requirement has been mentioned on very few previ-

191. See supra notes 89-99 and accompanying text.
ous occasions, and has been employed by the courts as a standard to be used only alternatively to or in conjunction with the Board's primary standard. In *Bell Aerospace*, the Supreme Court addressed, and rejected, the "conflict of interest" requirement. However, in *Hendricks County*, the Supreme Court rejected a challenge to the Board's traditional "labor nexus" test for "confidential" status, and not merely to the unrelated conflict of interest requirement.

The rationale and policy implications behind the disparate historical and legal evolution of the "confidential" and "managerial" exclusions from the Act's coverage, regrettably, received comparatively little attention from either the majority or the minority opinions in both *Bell Aerospace* and *Hendricks County*.

There are two fundamental and closely related differences between the "confidential" and "managerial" exclusions. The first concerns the *raison d'etre* of each category itself. The "confidential" employee is excluded from collective bargaining because he or she assists persons who perform "managerial" functions in the labor relations area, and thereby gains knowledge of matters concerning his or her employer's labor relations policies that may not be appropriate to share with the collective bargaining representative. This is the one and only determinant of "confidential" status. Contrary to the opinion of Justice Powell (as expressed in both his *Bell Aerospace* majority opinion and his *Hendricks County* dissent), "confidential" employees are not properly considered to be "agents" of "management," nor is their exclusion from collective bargaining premised upon any particular "duty of loyalty" that they may owe to their employers. The exclusion is based upon these employees' access to confidential information which, if freely divulged to the labor organization representing their fellow employees, would provide them with an unfair and unwarranted advantage over their employers. Since the type of confidential information at issue is solely labor relations related, the imposition of a "labor nexus" standard is appropriate.

Stated alternatively, the "confidential" exclusion exists in order: (a) to forestall potential upsets in the balance of power between unions and management that might otherwise occur were unions to have free access to management's confidential labor relations data;

193. See *supra* notes 176-79 & 183 and accompanying text.
194. 416 U.S. at 268-95.
195. 454 U.S. at 192-200.
and (b) to permit employers to trust that employees having access to such information would not feel pressure to disclose its contents to the union.\footnote{196} The "managerial" exclusion is based upon the status and the degree of authority of the "managerial" employee within the employer's executive structure rather than upon any set of specific functional responsibilities performed by the employee or upon his or her access to particular information. The "managerial" concept is more nebulous and more subjective than the "confidential" concept since its application to particular cases depends upon the degree to which the affected employee's job responsibilities as a whole identify him or her as a member or agent of "management" as opposed to "rank and file."\footnote{197} While it is wholly inappropriate to speak of "confidential" employees as being "aligned with management" or as "owing a duty of undivided loyalty" to management, it is perfectly appropriate for such standards to be applied to purportedly "managerial" employees. Indeed, "managerial" status has been virtually defined by these admittedly subjective guidelines. Furthermore, since "managerial" authority may be exercised within an organization in many areas other than labor relations, a "labor nexus" standard for determining that authority would be.

\footnote{196}{The refusal of the Board and the courts to broaden the "confidential" category to include employees with access to confidential business information in non-labor relations areas indicates the specificity of the purpose of this category, as well as the fact that "confidential" status was not meant to embrace all employees who might be in a position to misuse confidential information to their employer's detriment.}

\footnote{197}{The "supervisory" employee's position is quite akin to that of the "managerial" employee in this respect. Although the statutory definition of "supervisor" contained in section 2(11) of the Act, and the case law on "supervisory" status may utilize certain indicia as evidence of supervisory status, it is clear that that status depends ultimately upon an overall assessment of the degree of authority the purported "supervisor" exercises with respect to day-to-day work activities and the employment status of his or her fellow employees. Supervisors are just as surely "agents of management" as are "managerial" employees whose authority is exercised in areas other than the front-line administration of personnel policy. Stated otherwise, supervisors have been excluded by statute from collective bargaining based upon what Congress viewed in its deliberations over the Taft-Hartley Act as an irreconcilable conflict between the role of a supervisor in the areas of evaluation and discipline of employees and the obligations owed by fellow union members toward one another. See, e.g., H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., supra n.71, at 7, 13-15; S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 4-5; Remarks of Rep. Hartley, 93 Cong. Rec. at 3533, Extension of Remarks of Sen. Wiley, 93 Cong. Rec. at 1099; Remarks of Sen. Ball, 92 Cong. Rec. at 5146. However, the strong degree of opposition from the congressional minority to the blanket exclusion of supervisors from labor organizations representing their subordinates reflected a recognition that even supervisors may have interests divergent from those of management when their own wages, hours and conditions of employment are involved. See, e.g., House Minority Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 71-72; Remarks of Rep. Javits, 93 Cong. Rec. at 6450; Remarks of Sen. Pepper, 93 Cong. Rec. at 4490.}
The second, and even more apparent, difference between the "confidential" and "managerial" groups derives from the nature of the employees generally included. "Confidential" employees are invariably members of the rank-and-file, exercising virtually no influence over management policy and possessing virtually no control over their wages, hours, and conditions of employment. The vast majority of "confidential" employees are found in secretarial and clerical positions, or in jobs such as timekeeper, payroll clerk or personnel assistant. These employees cannot be said to have any "community of interest with management" and their exclusion from collective bargaining thus cannot be said to be based upon an "alignment with management" and, in fact, has been accomplished in spite of the lack of any such "alignment." "Managerial" employees, however, occupy positions such as buyers, division managers, and project engineers. This category would also include corporate officers who, although drawing salaries and benefits from their employers, cannot be truly considered as "employees" in the practical sense of the term. "Managerial" status has been, quite deliberately, premised upon the degree of power which such persons can exercise within their respective organizations, which, in many cases, extends to the power to influence their own wages, hours and conditions of employment. Thus, "managerial" status is, by definition, dependent upon the degree to which a particular employee is "aligned with management." Indeed, it indicates that that employee is part of management itself.

The distinction between the definitions of the "confidential" employee, who is most certainly a "subordinate," and the "managerial" employee, who is just as certainly a "superior," reflects the following axiom: The availability of the protections and rights afforded by the Act as respects any particular employee ought, insofar as possible, to depend directly upon the power of that employee to influence his or her employer's policies in general, and his or her own status, perquisites, pay, and working conditions in particular. Thus, the seemingly arcane delineations of these two categories of employees excluded from the Act raise issues central to the Act's very purpose. An understanding of the connection to that purpose is crucial to a grasp of the subject.

198. See supra notes 42 and 78 and cases cited therein.
IV. THE PUBLIC POLICY OBJECTIVES OF THE “CONFIDENTIAL” AND “MANAGERIAL” EXCLUSIONS

There are two methods by which statutory rights may be effectively weakened or vitiated, by legislative amendment or by judicial or administrative construction. The first is to limit the means by which those rights may be exercised and enforced or to place the invocation of those means beyond the ability of the average citizen. The other is to limit the class of persons to which those rights may be made available. The force of a system of laws may be blunted or even immobilized by the creation of large classes of persons barred from the protection afforded by the statutes, particularly when the excluded classes may be exposed to the very abuses that those laws were designed to alleviate.

The NLRB’s very raison d’etre has been to provide workers with a peaceful and lawful means to redress the imbalance of economic power that would otherwise exist were workers required to deal with employers on an individual basis. The framers of the Act specifically intended that its coverage be measured by this aim. Furthermore, they presumptively extended the Act to all workers not specifically excluded by statute who were in need of the protections afforded by self-organization and collective bargaining in order to achieve a more equitable balance of economic power between employer and employee.

Although section 1 of the Act speaks of removing impediments to production or safeguarding commerce from “injury, impairment or interruption,” the Act’s ultimate goal was to relieve the causes of labor-management strife by addressing its primary root cause: worker inability to exercise sufficient influence over often intolerable wages, hours and conditions of employment through peaceable dealings with employers on an individual basis. Congress mandated that workers be afforded the right to organize and bargain collectively in order to provide sufficient checks upon what had hitherto been a stacked labor-market “deck” in favor of employers. Professor Wellington described this reasoning and its implications as follows:

Equality does not exist between the employer and the individual worker. The employer it is argued has the power to unilaterally set the wages, hours and terms and conditions of employment. When workers organize and bar-

200. Id.
gain collectively, they have the power that comes from numbers. It is a power which offsets or countervails that of the employer, often itself a collectivity of individual investors in the corporate form.\textsuperscript{201}

Professor Wellington further noted the non-economic consequences of the imbalance of bargaining power in that market:

\[T\]he plainly economic terms of the employment contract represent only one important criterion in judging its fairness. The conditions under which a man works also must figure importantly; and before unions, these conditions sometimes were physically frightful and administratively arbitrary. The foreman often was possessed of management power. There was little in the way of grievance procedure; there were few rules governing layoffs or promotions; administration was in the foremen’s discretion. And since the foreman could discharge at will and hire by whim, he, as might be expected, frequently used his power for personal gain or private revenge. The stories are endless.\textsuperscript{202}

These employer abuses were the clear, though unstated, target of the Act, and their alleviation remains the cornerstone of federal labor policy today. Regardless of its reputation in some circles as an “anti-union” law, the passage of the Taft-Hartley Act did not change this fact. The thrust of the Taft-Hartley Act was to add the alleviation of certain abusive practices by labor unions to the then-established goals of federal labor policy, and to impose responsibilities upon unions comparable to those imposed by the Wagner Act upon employers, not to undermine the institution of collective bargaining.\textsuperscript{203}

\textsuperscript{201} H. WELLINGTON, LABOR AND THE LAW 27-28 (1968).
\textsuperscript{202} Id. at 32.
\textsuperscript{203} 29 U.S.C. §§ 151-187 (1976 & Supp. V 1981). This is best exemplified by the fact that the Taft-Hartley Act did not amend the already-existing provisions of section 1 of the Wagner Act (29 U.S.C. § 151 (1976)), but instead added the following paragraph to that section:

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

\textit{Id.}

Section 1 of the Labor Management Relations Act itself indicated nothing that could be viewed as a reversal by Congress of the recognition of the factors that had prompted it to protect the right to organize and collectively bargain:

Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other, and,
Charles O. Gregory and Harold Katz have articulated a second motivation for the passage of the Act: the protection of labor unions as entities and their organizational activities from interference and coercion on the part of employers. At the time of the Act's passage, industrial warfare between unions seeking to establish themselves and employers seeking to prevent just that had been escalating—particularly in the industrial union sectors where the emergent Congress of Industrial Organization (CIO) was soon to battle both employers and its established rival in the labor movement, the American Federation of Labor (AFL). Gregory and Katz see the Act as an attempt to end, or at least restrain, that warfare by removing employers from the fight entirely.

By limiting the ability of employers to interfere with employee free choice in the decision of whether and, if so, whom to select as their bargaining representative, Congress sought to achieve the dual aims of protecting the long-term integrity of the unions, whose role was central to the collective bargaining process and of achieving the hitherto elusive goal of labor peace in what was then above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other to protect the rights of the public in connection with labor disputes affecting commerce. 29 U.S.C. § 151(b) (1976 & Supp. V 1981).

Clearly, the intent of the Taft-Hartley Act was to impose certain responsibilities and restraints upon both sides of the bargaining table and did not call into question the need for or the legitimacy of those rights which Congress had recognized a dozen years earlier.


205. Id. at 224. This is best illustrated by their discussion of the difference between the purpose of that Act and the Norris-LaGuardia Act:

Taken at its face value, the National Labor Relations Act was fundamentally different from the Norris-LaGuardia Act because it pledged the government to aid employees in securing independent organization, free from employer interference. The anti-injunction statute, on the other hand, had simply removed the judicial restrictions on the freedom of organized labor to impose unionism on employers by means of coercive economic self-help. Until the NLRA became law, the federal government regarded union organizational campaigns as economic struggles between unions and employers, with practically no holds barred, except for violations of the Sherman Act. In the NLRA, however, Congress virtually ordered employers to stop resisting the spread of unionism, telling them that the desire of their employees to organize was none of their business and to keep their hands off. This, quite obviously, was an epoch-making step in itself, especially since the NLRA placed no restrictions on the freedom of unions to exercise economic pressures on these same employees, whenever they saw fit to do so.

Id.
a very weak economy.

The employer activities prohibited by the Act as unfair labor practices reflect both of these ends. Its prohibition of employer interference with the right to organize and collectively bargain, employer discrimination against workers seeking to join (or to avoid joining) labor unions, and employer retaliation against workers seeking relief or otherwise participating in the Act's enforcement process reflect the specific intent to safeguard employees availing themselves of the Act's protections from exposure to employment-threatening repercussions. Its prohibitions against employer domination of and interference with the internal affairs or finances of labor unions and against employer refusals to bargain with labor unions were designed to protect the integrity of unions as entities from attacks through employer tampering or from undermining through employer refusals to deal. Finally, the Act created an independent agency to interpret and enforce the labor laws and the administrative and judicial processes to enforce them. Congressional intent from the start has been to ensure that the Act would foster an effective countervailing force to the power of employers in the labor market.

The aim of the Act is to permit all employees, insofar as is possible, to take the opportunity to utilize its provisions in furtherance of their labor relations interests. Although particular employees may choose not to follow that course (either by inaction or by affirmative vote), the Act is designed to provide them with the freedom to make that choice without interference from or coercion by their employers or by unions seeking to represent them. It is for this reason that Congress and the Supreme Court have decreed

212. The addition of union unfair labor practices to the Act by the Taft-Hartley amendments did not indicate any congressional retreat from its aim. Indeed, prohibitions on labor union activities such as insistence upon the "closed shop," 29 U.S.C. § 158 (b)(4) (1976), inducement of employer discrimination of workers, 29 U.S.C. § 158 (b)(2) (1976), refusal to bargain with employers, 29 U.S.C. § 158 (b)(3) (1976), exaction of excessive or discriminatory union dues in "union shop" arrangements, 29 U.S.C. § 158 (b)(5) (1976), and engagement in certain forms of recognitional picketing, 29 U.S.C. § 158 (b)(7) (1976), were intended to further that aim; i.e., to safeguard employee free choice with respect to activity protected by the Act from union interference, just as the National Labor Relations Act was intended to do so with respect to employer interference.
that a liberal construction be given to the Act generally and to the scope of its coverage in particular.\textsuperscript{213} The reasoning behind this approach is simple. The Act’s remedial purpose is to correct certain imbalances of power and resulting abuses in labor-management relations that would likely exist in its absence and to provide effective means for doing so through unionization, collective bargaining and the Act’s own enforcement procedures. Virtually all employees may potentially be in need of the Act’s protection in at least certain respects because virtually all employees possess at least some individual or collective interests at variance with those of their employers insofar as their wages, hours and conditions of employment are concerned. With relatively few exceptions, this will hold true regardless of the title or particular job responsibilities of any specific employee, precisely because its root causes lie in the status of the employee \textit{per se} and not in the nature of the particular employment.

There is no single issue of greater potential significance in federal labor law than the definition of “employee” coverage under the Act, for all of the protections and remedies offered by the Act are of absolutely no value to an employee who cannot satisfy that definition. The consistent message on this issue, from the Board and the majority of courts that have considered this issue, is that a strong presumption in favor of coverage exists and will control absent proof of clearly overriding factors indicating that preclusion of coverage in a particular instance will serve the goals of national labor-management relations policy.

Section 2(3) of the Act begins with the phrase that “the term ‘employee’ shall include any employee” and then enumerates certain, specific exceptions.\textsuperscript{214} The only instance of congressional reconsideration of the scope of the definition of “employee” resulted in the rejection of a strong effort to expand the scope of those exceptions substantially (except for supervisors) in favor of permitting the Board and the courts to determine guidelines.\textsuperscript{215} Those guidelines demonstrate that employee coverage under the Act is based primarily upon an employee’s potential need for that coverage to protect his or her labor relations interests, unless a specific and convincing reason overrides that need.

The imposition of a “management-alignment” or “employee loy-

\textsuperscript{213} See supra text accompanying notes 17-29.
\textsuperscript{215} See supra text accompanying notes 53-78.
“loyalty” test as apparently urged by several members of the Supreme Court would substantially undercut the Act’s effectiveness and would be inimical to its policy aims. Furthermore, such a standard would contradict the Act’s very intent. Congress specifically intended to eliminate the notion that an employee (or group of employees) somehow evidenced “disloyalty” to their employers by engaging in unionization, collective bargaining or other “protected concerted activities.” It did so by drawing a strict separation between employee activity in that sphere and the underlying relationship between employer and employee, and by forbidding employers from demanding or improperly inducing employees to evidence their “loyalty” or their “alignment” by refraining from “protected concerted activity.” Furthermore, the Act does not purport to alter in any manner the obligation of every employee to act in his or her employer’s best interest with respect to matters beyond the Act’s scope, such as job performance, maintenance of confidentiality as to trade secrets and the like. In this sense, every employee owes a duty of loyalty to management and can be said to be “aligned with management.” However, these obligations are in no way connected with the right of any employee to engage in lawful activity in pursuit of his or her labor relations interests. The “confidential” and “managerial” exceptions to the Act’s coverage have not been, and should not be, based upon such standards.

Justice Powell’s assertion in Hendricks County that “the ‘labor nexus,’ . . . is antithetical to any common sense view or understanding of the role of confidential secretaries”\(^{216}\) reflects a misunderstanding of the underlying purpose of the Act. While confidential secretaries might perform certain job tasks not required of non-confidential secretaries, the labor relations interests of the two groups are in most cases virtually identical. Confidential secretaries are most certainly “employees” and just as prone to dissatisfaction over their wages, hours and conditions of employment or unjust discipline as are other secretaries. They are often just as powerless to correct the sources of that dissatisfaction on an individual basis as other secretaries would be. Allowing such secretaries to engage in “protected concerted activity” under the Act would in no way compromise or divide their “loyalty” to management precisely because management does not and should not have the right to demand that “loyalty” from them any more than they have the right to demand it from any other employee. The basis of

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\(^{216}\) 454 U.S. at 197.
the "labor nexus" based "confidential" exclusion is entirely unrelated to "loyalty" or to "management alignment." It is premised upon the unfair advantage that labor unions would obtain in collective bargaining or contract administration were they to have access to management's confidential labor-relations information or strategy through members who have access to such information, particularly when management would not have reciprocal access to the union's confidential data or strategy. It is in this sense that the "confidential" exclusion attempts to avoid potential "fifth-columns" in labor relations.

The same reasoning applies to the refusal of the Board and most reviewing courts to extend the "confidential" category to employees having access to their employers' confidential business information unrelated to labor relations and personnel matters. Access to such information in and of itself does not change those employees' potential need for the protections and remedies afforded by the federal labor laws. Their invocation of those protections and remedies would not affect their "alignment with management" or their duty of "loyalty" towards management by reason of their access to such information and corresponding obligation to prevent its divulgence. Since this information would not, except in a very indirect sense, deal with material relevant to matters of interest to the union in its representative capacity, the employee's access to it cannot be said to relate to his or her labor relations activities or interests. Of course, such an employee might be in a position to injure his or her employer's interests by disclosing confidential business information to competitors, the media or other unauthorized third-party sources; however, he or she would be in a position to so do regardless of union membership or activity. The proper sanction in that case would be the discipline or discharge of the wrong-doing employee and not the exclusion of that employee from the Act's coverage on a spurious "confidential" or "management alignment" theory.

Certain of these considerations also apply to allegedly "managerial" employees. As already noted, this category covers employees who either formulate, determine and implement management pol-

217. The union involved most likely would be entitled to such information on request in any case, if it pertained to its responsibilities as bargaining representative in the areas of collective bargaining and contract administration (Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979); NLRB v. Acme Indus. Co., 385 U.S. 432 (1967)), or if it raised a claim in collective bargaining of financial "inability to pay," NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).
icy, or can make financial commitments on its behalf, i.e., those employees who exercise organization power and who possess a large measure of discretion in the performance of their duties.  

While the cases on "managerial" status may occasionally speak of a "closer alignment of interest with management than with fellow employees," the "managerial" employee is better described as a part of management itself and, thus, not really an "employee" at all in the practical sense of the term, or, in the sense in which this term was used in section 2(3) of the Act.  

The management employee's position within the employer's organization and the degree of responsibility that necessarily carries can be said to remove any sense of identification with the employee ranks and, correspondingly, calls into serious doubt the need of such employees to utilize the provisions of the Act as the vehicle for asserting whatever individual labor relations related interests they may possess at variance with those of their employer. The importance of the "managerial" employee to the organization which he or she serves also enhances the employee's individual bargaining power vis-a-vis the employer on matters affecting wages, hours and working conditions. It also provides to such employees at least some degree of relief from the imbalance of power in the general labor market. Finally, and most pertinent to the purposes and policy aims of the Act, "managerial" employees comprise precisely that group from which true "employees" need the protection that unionization and collective bargaining would provide.

Strict limits have been, and should be, placed on the scope of the "managerial" exclusion in order to avoid undue removal of large numbers of true "employees" from the Act's coverage. This is the true significance of the specific statutory inclusion of "professional employees," many of whom from time to time exercise functions which are arguably "managerial," within the Act. By so do-

218. See supra text accompanying notes 115-190.

219. 29 U.S.C. § 152(3) (1976). The "managerial" employee might conceivably be viewed as a person "acting as an agent of an employer" under section 2(2) of the Act, (29 U.S.C. § 152(2) (1976)), although this contention has not been dealt with by any reported decisional law.

220. Section 2(12) of the Act defines "professional employee" as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher
ing, Congress clearly intended to remove the intellectual quality of the employee's work, the educational prerequisites for the work, the means by which work output is measured, the degree of judgment and discretion exercised by the employee in the performance of his work (except with respect to the management of the employer's enterprise itself) as factors by which an employee's eligibility for coverage under the Act would be determined. This is only proper since these factors have little to do with whether the "professional" employee possesses, as an employee, labor relations interests potentially at variance with those of his or her employer and the power to resolve those variances on an individual basis.

The possible untoward consequences of an overly broad "confidential" or "managerial" exclusion are quite obvious. These include attempts by employers to spread arguable "confidential" or "managerial" work as thinly as possible in order to exclude the maximum possible number of employees from bargaining units; the manipulation of these exclusionary categories to fit particular employees, who for personal reasons only may not wish to join bargaining units to which they clearly belong, or, more frequently, to pay otherwise legitimately required dues or fees to labor unions pursuant to "union shop" or "agency shop" agreements; and the potential use of promotions to relatively low-level management slots as a "carrot" (or the threat of the denial of promotional opportunities as a "stick") to induce upwardly mobile employees to avoid unionization. The outcome would be the inappropriate and undesirable deprivation with respect to large numbers of employees of a choice to which they should be entitled by law—the right to choose whether or not to engage in "protected concerted activity" under section 7 of the Act. A substantial gutting of the effec-

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Section 9(b) of the Act, first proviso, which mandates separate organization of "professional" employees unless a majority of the "professional" contingent votes for inclusion in a bargaining unit containing "non-professional" employees is a far more appropriate recognition of those factors unique to "professional" status than would be their partial or total exclusion from the Act's definition of "employee." 29 U.S.C. § 159(b) (1976).

tiveness of that Act and of the effectiveness of labor unions as the chosen representatives of employees choosing to exercise their rights under that Act would necessarily result.

Hendricks County quashed, at least for the present, and albeit in a rather offhanded way, the danger of an overly broad “confidential” exclusion. The analogous danger has not yet been addressed sufficiently by the courts with respect to “managerial” employees. Although Bell Aerospace’s rejection of the “labor nexus” standard in this context was proper in view of the purpose of the “managerial” exclusion, the risk of extending the application of this exclusion to other inappropriate situations continues. In fact, due to likely changes in the structure of the workforce and in the design and content of many jobs, these controversies are likely to increase, particularly in two areas.

The first involves professional employees who occupy advisory roles with respect to organizational policy or who play a minor part in decision making, particularly in institutional settings utilizing “collegial” or other patterns of decision making not in accordance with traditional hierarchical models generally prevailing in industry. These employees may, indeed, play an important part in formulating certain aspects of policy and in implementing personnel

222. For an excellent recent commentary on the need for redefinition of the “managerial” exclusion in view of changes in the work force and the introduction of new concepts of organizational decision making in American industry in a “nonpyramidal” direction (including employee participation therein), see Note, Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion, 56 N.Y.U. L. REV. 694 (1981). The author argues for the adoption of a revised standard for the “managerial” exclusion as applied to ostensibly “non-managerial” professional or highly skilled “technical” employees who exercise certain “managerial” functions (and contribute to the making of “managerial” decisions) by reason of the tapping of their expertise by management.

The Note proposes that after determining that an employee does exercise some managerial authority, the Board should further inquire:

(1) Are the employee’s primary duties nonmanagerial? If so,
(2) Does the employee exercise managerial functions as part of a group without having substantial determinative authority individually? Or,
(3) Does the authority stem from an employee’s nonmanagerial activities?
Id. at 731 (footnotes omitted).

The Note correctly points out that as the structure of more and more enterprises becomes less “pyramidal” (i.e., flatter at the top) and as the distribution of decision-making authority within these enterprises is broadened, collective governance may become a more widespread phenomenon, even in so-called “traditional” manufacturing settings. Employees operating under such a system may possess a share of “managerial” authority, albeit quite diluted by the participation of others similarly situated. The Board’s determinations in the future may therefore become less concerned with the issue of on what side of the “managerial” fence a particular employee will fall and more concerned with the placement of that “fence” at a particular point on the continuum of policy-making influence with the affected enterprise.
decisions through the mechanism of “peer review,” particularly in education, nursing or similar services where the confluence between policy and standards of professional practice is greatest. Yet, even these institutions generally retain a hierarchical administrative structure with the power to effectively set pay scales and personnel policies, often with little or no input on the part of the institution’s professional staff. Thus, despite the influence of that staff in many areas of decision-making, it is doubtful that is members can be considered as occupying a non-employee status with respect to labor relations matters affecting them. Although the Supreme Court addressed this issue with respect to certain university faculty in *Yeshiva University*, it is evident that we have not heard the last of this issue, and the matter of collective bargaining rights of employees at the intersection of “professional” and “managerial” roles will certainly receive future judicial and legislative scrutiny.

The second area involves unionized employees whose collective bargaining representatives may play a role in management through such vehicles as representation on boards of directors, joint labor-management “productivity” committees and so-called “quality circles” comprising members of both labor and management. Although still in their embryonic stages, these trends may have tremendous potential impact on the future of collective bargaining by blurring certain of the factors dividing the two sides of the bargaining table. Furthermore, the impact of these trends are being and will be felt throughout the American industry, not merely in a relatively limited set of professional-service institutions such as universities and hospitals. An overly broad approach to the application of the “confidential” and “managerial” exclusions, based upon such an unwarranted “loyalty” or “managerial alignment” standard such as that suggested by Justice Powell in his *Hendricks County* dissent is the wrong approach to take. A narrower approach, with a firm presumption in favor of “employee” coverage absent convincing reasons why coverage should not be afforded in

223. See supra notes 187-90 and accompanying text.
224. See Note, Managerial Employee: A Label in Search of A Meaningful Definition, 48 U. CIN. L. REV. 435 (1979), for a good discussion with respect to the application of the managerial exclusion to professional and middle management employees.
particular cases, is essential to prevent the effectiveness of the Act from being nibbled away by those exclusions.

V. CONCLUSION

The fundamental premise of the Taft-Hartley Act is that employees be permitted to elect whether or not to engage in organization, collective bargaining, and other "protected concerted activities." The effectiveness of the Act heavily depends upon the breadth of persons covered by it. An unwarranted restriction of that coverage will seriously undermine the Act's vitality and hinder the attainment of its policy objectives. The NLRB and the great majority of the courts have ruled that a liberal interpretation of the Act's definition of "employees" be followed, and that employees are covered absent convincing considerations compelling a contrary result. This is as it should be, for if an employee is for any reason not covered by the Act, he or she is by definition barred from the exercise of those rights and remedies afforded by its provisions.

The three most widely applicable exceptions to the Act's coverage pertain to supervisors, and "confidential" and "managerial" employees. Supervisors are excluded from the Act by express language, with the rationale for that exception based upon the role of supervisors as management's front-line enforcement arm in the area of management's personnel policy, the inevitable and direct conflict between that role and membership in the union representing the employees supervised, and severe doubts as to whether unions representing supervisors can truly retain their independence from those representing rank-and-file employees.

"Confidential" employees have been excluded by Board policy because their duties in the area of labor relations would, were they union members, inevitably place them in a position where they might be required to divulge confidential management data and strategy to the union. This would lead to a significant upset in the balance of power in collective bargaining, which the Board and the courts have viewed as an adverse effect outweighing the considerations in favor of affording union membership and bargaining rights to these employees.

"Managerial" employees have been excluded by Board policy be-

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227. See supra notes 57-76, 197 and accompanying text.
228. See supra text accompanying notes 194-96.
cause of the power they wield and exercise on behalf of their employees as well as their ability to function without close supervision and independence from strict adherence to policy guidelines set forth and administered by others. Their exclusion is based upon the fact that they are part of management itself, i.e., the very group that the Act seeks to protect "employees" from, and upon their relatively greater bargaining power as individuals vis-a-vis employers with regard to matters concerning their own wages, hours and conditions of employment.\(^2\)

The notion that "management alignment" or the "undivided loyalty" which an employee owes to management should act as a factor in and of itself in determining an employee's rights under the Act is foreign to the language and spirit of the Act and should be decisively rejected. An employer does not have the right to demand or expect "loyalty" from its employees with respect to "protected concerted activity" as defined by the Act, regardless of the "loyalty" that the employees may owe to the employer in other areas of their relationship. Indeed, the Act's very existence and literal terms refute the notion that an employee's availment of its protections and remedies constitutes a "disloyal" act or that organized employees need be feared as potential "fifth columnists." Furthermore, the Act covers all "employees" unless specifically excepted by statute or well-established Board policy. It does not create an excluded class of employees "allied" with management (indeed, a congressional attempt to do so in 1947 was rejected), and such a class should not be create by the courts. If an employee is part of the decision-making apparatus of management and therefore clearly without semblance of a "community of interest" with employees, the "loyalty" or "alignment" will be implied as an integral part of that status and he or she will be excluded from the Act as "managerial" or, if appropriate, as "supervisory."

"Confidential" employees are merely assistants to persons performing "managerial" roles in the labor relations area. They are by definition not part of management and must be considered part of the "employee" force. It is not the proper function of the courts to determine who employees should be "aligned" with at the bargaining table for purposes of determining whether or not they can participate in the bargaining process. Any attempt by the courts to do so would usurp the provisions of the Act that clearly leave that decision up to the employees themselves.

\(^{229}\) See supra text accompanying notes 197-198.
The Supreme Court in *Bell Aerospace* and *Hendricks County* did not contradict the Board's long-established policy of limiting exceptions to the Act's coverage to those situations presenting objective considerations dictating that the presumption of coverage be overridden. Their decisions do not support introduction of exceptions based upon subjective factors such as "loyalty" or "alignment." Although the Court did not sufficiently elaborate upon its reason for applying a "labor nexus" test to "confidential" employees but not to "managerial" employees, the rationale is evident. "Confidential" status is based upon an employee's access to an employer's information and strategy disclosure of which to a union would unduly harm the employer's collective bargaining position. Thus, "confidential" status exists in those instances where the information and strategy to which the employee has access will affect personnel and labor relations matters which would inevitably be of direct interest to the union. It is for this very specific reason that the "confidential" exclusion has not been extended to employees having access to business information which, although confidential, is of marginal or no relevance to collective bargaining between the employer and the union.

"Managerial" status, on the other hand, is not necessarily related to the "managerial" employee's labor relations functions since the authority and discretion exercised by "managerial" employees need not be confined to areas with a "labor nexus." That standard makes no sense with respect to "managerial" status. The basis for the exclusion of "managerial" employees from the Act's coverage has no relation to the particular function which defines the area within which an employee works because it derives from the status and power exercised by that employee within the employer's organizational hierarchy, the lack of a "community of interest" with true "employees" and the consequent dilution or elimination of that employee's need for the Act's protection.

New forms of labor-management cooperation, the likelihood of increased participation by labor unions in certain "managerial" decisions of employers and changes in the structure and composition of the labor force will necessitate a reexamination of issues related to the extent of the coverage of the Act. This article has argued against a view of the Act as a means of choosing the roster of opposing teams in combat and in favor of a broad construction of its coverage based upon the underlying need which the Act was meant to fulfill—the need for employees to have an influential voice in determining their wages, hours and conditions of employment. As
long as that need continues, and as long as the chosen instrument with which to meet it continues to be unionization and collective bargaining, that broad coverage must continue.