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Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers

Bernard D. Meltzer[†] and Cass R. Sunstein^{††}

On August 3, 1981, the Professional Air Traffic Controllers Organization ("PATCO") launched the first completely nationwide and undisguised strike in history against the federal government. President Reagan, true to his word,¹ ordered the discharge of striking controllers who had not returned to work within a two-day grace period.² Up to the time of this writing, the Administration has rejected all suggestions for a general amnesty. Its position has been that the strikers, by violating federal law³ and their no-strike oath,⁴ have forfeited their jobs with the Federal Aviation Administration ("FAA") forever.⁵

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Finally, we have been helped by other air traffic controllers, strikers and nonstrikers, and by participants in, or close observers of, the events discussed below. In particular, we thank Edward Curran, of the Federal Aviation Administration, for improving our sources of information and perspective.

Naturally, no one who helped us is responsible for any errors that appear below.

¹ See President's Statement Concerning Air Traffic Controllers Strike, 17 WEEKLY COMP. PRES. DOC. 845 (Aug. 3, 1981).

² See DAILY LAB. REP. (BNA) No. 151, at D-1 (Aug. 6, 1981) (statement of Donald J. Devine, Director of the Office of Personnel Management ("OPM")).

³ 5 U.S.C. § 7311 (1976).

⁴ This oath is required by 5 U.S.C. § 3333 (1976) and includes the following: "I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or an agency thereof." See *United States v. Greene*, 697 F.2d 1229, 1233 n.6 (5th Cir. 1983).

⁵ The Reagan Administration fluctuated as to whether the strikers were to be barred only from federal air traffic controllers' jobs or from *all* federal employment, and if so, for how long. Compare DAILY LAB. REP. (BNA) No. 151, at D-1 (Aug. 6, 1981) (statement of

This strike and the government's unusually stern response have stirred large issues, involving the role and limits of law in dealing with labor-management relations, the scope and exercise of executive discretion with respect to strikers, and the soundness of current mechanisms governing labor relations in the public sector. These concerns reflect an undercurrent of renewed doubt about the wisdom of blanket proscriptions of strikes by public employees. In the past such doubts had worked together with fear of political and economic reprisals from unions and other opponents of anti-strike laws to eviscerate enforcement of the proscription. Enforcement had, in fact, been so lax and erratic as to approach a de facto recognition of "illegal" public employee strikes as a regular part of the negotiating process.⁶ Although this breakdown was more pervasive in local government, it had occurred in the federal sector as well and had even involved past job actions by air controllers.⁷ De-

Donald J. Devine, Director of OPM) with *Oversight of the Air Traffic Controller Situation: Hearings before the House Comm. on Post Office and Civil Service*, 97th Cong., 1st Sess. 52-54 (1981) (statement of J. Lynn Helms, FAA Administrator) [hereinafter cited as *October 1981 Hearings*]. On December 9, 1981, President Reagan announced that strikers would be immediately eligible for employment in any branch of the federal government except the FAA. President's Statement Concerning Air Traffic Controllers, 17 WEEKLY COMP. PRES. DOC. 1364 (Dec. 9, 1981). For an accompanying explanation by Secretary of Transportation Drew Lewis, see [July-Dec.] Gov't Emp. Rel. Rep. (BNA) No. 942, at 51-52 (1981).

The Administration also wavered over whether the "perpetual" ban against reemployment of strikers as controllers was by law mandatory or was discretionary and reversible in the future. (This question is discussed in detail *infra* notes 272-76 and accompanying text.) Compare DAILY LAB. REP. (BNA) No. 151, at D-1 (Aug. 6, 1981) (Devine's statement that permanent bar was discretionary and reversible) with *October 1981 Hearings*, *supra*, at 53 (Helms's qualified statement that permanent bar was mandatory). The House Committee's chairman, Representative Ford, also urged that the ban was discretionary. *Id.* at 57. For Devine's later efforts to reconcile the apparent conflict within the Administration, see *Air Traffic Control Revitalization Act of 1981: Hearings on H.R. 5038 before the House Comm. on Post Office and Civil Service*, 97th Cong., 1st & 2d Sess. 123 (1981-82) [hereinafter cited as *1981-82 Hearings*].

The government softened or clarified its reactions in other ways. The FAA agreed to reinstate strikers who showed that they were harassed into joining the strike. See [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 926, at 12 (1981). Similarly, the Defense Department lifted a ban on military enlistment by the striking controllers. See N.Y. Times, Dec. 11, 1981, at A32, col. 4. Finally, the FAA waived discipline of strikers who had returned to work within the President's 48-hour grace period. See [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 926, at 12 (1981); Chicago Tribune, Feb. 23, 1982, at 2, col. 3.

⁶ See Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 462-63 (1971).

⁷ See MANAGEMENT AND EMPLOYEE RELATIONSHIPS WITHIN THE FEDERAL AVIATION ADMINISTRATION 73 (Mar. 17, 1982) [hereinafter cited as JONES REPORT], prepared by a task force designated by Secretary of Transportation Drew Lewis and FAA Administrator J. Lynn Helms. That report was prepared by Lawrence M. Jones (Chmn.), David G. Bowers, and Stephen H. Fuller, assisted by the Institute for Social Research and McKinsey & Company, Inc. The *Jones Report* is reprinted in *1981-82 Hearings*, *supra* note 5, at 399. For a

spite a series of unusual warnings from the three branches of government, PATCO and its members may have concluded that once again a strike would not cost any of them their jobs for long.⁸

We propose to examine the particulars of the PATCO affair, with the hope of getting a better idea of both its roots and its larger implications for federal labor policy. We proceed as follows. In part I, for general background, we explore the considerations underlying the prevailing ban on public sector strikes. In part II, we discuss the peculiar circumstances of the PATCO strike and the government's response. In part III, we discuss a cluster of legal problems raised by the strike: the history and constitutionality of the statutory provisions, the extent of the President's discretion to discharge and rehire strikers, and the problems of selective prosecution raised by the policies of the Department of Justice. In concluding, we venture some more general observations on the PATCO affair and its implications for labor relations in the public sector.

I. PUBLIC EMPLOYEE STRIKES: THE LEGAL SETTING

We begin with a description of elements of the received wisdom justifying existing labor policies in the private sector. We stress the word "description," for it is not our purpose to scrutinize the rationale for private sector policies. We propose, instead, to accept the validity of those policies and to explore the justifications for the wholly different policies that prevail in the public sector with respect to the right to strike.

In the private sector, unions are generally regarded as indispensable for a private negotiation system⁹ that both redresses the "unequal bargaining power" postulated for the individual em-

more detailed examination of prior job actions, see Comment, *The Legal Consequences of a Deliberate Air Traffic Controller Slowdown*, 8 N. Ky. L. REV. 155 (1981); see also PATCO v. Federal Labor Relations Auth., 685 F.2d 547, 585 n.81 (D.C. Cir. 1982) (court actions resulting from PATCO's 1970 "sick-out").

* During poststrike hearings, Representative Ford spoke of a form of equitable estoppel, from the "Government's own previous action" regarding illegal strikes, which might have led a fence-sitting controller "to believe that he could demonstrate his unhappiness for a reasonable period of time." *October 1981 Hearings*, *supra* note 5, at 58-59.

* See generally F. TANNENBAUM, A PHILOSOPHY OF LABOR (1951); Cox, *The Uses and Abuses of Union Power*, 35 NOTRE DAME LAW. 624, 624-27 (1960); Meltzer, *Some Introductory Observations, Symposium on Labor Union Power and the Public Interest*, 35 NOTRE DAME LAW. 595, 596-97 (1960) and references contained therein; Summers, *Past Premises, Present Failures, and Future Needs in Labor Legislation*, 31 BUFFALO L. REV. 9, 9-14 (1982).

ployee¹⁰ and that simultaneously gives employees a voice in the formulation and administration of the web of rules surrounding the workplace.¹¹ It might, of course, be possible to administer such a system without recognizing a right to strike. But despite their costs, strikes are generally accepted as the necessary motive power for such a system, for if strikes were not permitted, unions would lack the power to accomplish the purposes for which they were created. As some economists would put it, unions, like other cartels, could not achieve their purposes without the power concertedly to withhold supply in order to support the prices (or wages) they demand. Finally, unions independent of the government, equipped with a right to strike, have become an important symbol of civil liberty.¹²

In the United States, the values, rules, and rhetoric related to strikes have been markedly different in the public sector: the prevailing policy prohibits strikes by all public employees.¹³ As applied to employees of the federal government, this policy is reflected in a number of statutory provisions, one of which makes strikes by employees of the federal government a crime.¹⁴ On the surface, there is a paradoxical element in these differing policies

¹⁰ See, e.g., S. REP. NO. 573, 74th Cong., 1st Sess. 3 (1935) (reporting S. 1958, 74th Cong., 1st Sess. (1935)), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2302 (1949). S. 1958, introduced by Senator Wagner, after minor amendments became the original National Labor Relations Act. For evaluations of the bargaining power rationale, see B. MELTZER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 56-57 (2d ed. 1977) (notes 2 and 3). For expressions of increasing concern about the social costs of stoppages in the private sector, see references in *id.* at 1075.

¹¹ See generally Freeman & Medoff, *The Two Faces of Unionism*, PUB. INTEREST, Fall 1979, at 69.

¹² During the period discussed here, that symbol was enhanced by the dramatic career of Solidarity in Poland. Indeed, President Reagan himself has written, "I . . . continue to be a strong believer in the rights of unions, as well as in the rights of individuals. I think we have the right as free men to refuse to work for just grievances: the strike is an unalienable weapon of any citizen." R. REAGAN WITH R. HUBLER, WHERE'S THE REST OF ME? 138 (1965).

There are, of course, important qualifications on the right to strike even in the private sector, extending, for example, to strikes violating no-strike pledges, see *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), and strikes causing national emergencies, see *United Steelworkers v. United States*, 361 U.S. 39 (1959) (*per curiam*). See *infra* note 24 and accompanying text.

¹³ See G. ABOUD & A. ABOUD, THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT 17-36 (2d ed. 1982); Note, *Statutory and Common Law Considerations in Defining the Tort Liability of Public Employee Unions to Private Citizens for Damages Inflicted by Illegal Strikes*, 80 MICH. L. REV. 1271, 1271-72 (1982); J. Baird & J. Leavall, *Strike Litigation and Remedies in the Public Sector* 1-2 (unpublished manuscript, presented at the annual meeting of the ABA Section of Labor and Employment Law, Aug. 11, 1982) (on file with *The University of Chicago Law Review*).

¹⁴ See *infra* notes 187-92 and accompanying text.

for private and public employment. The government protects the right of private employees to strike while denying that right to its own employees. What accounts for this disparity in treatment? More particularly, why should strikes by air controllers, who happen to work for the government, be a criminal offense while equally disruptive strikes by airplane pilots, who work for privately owned companies, are protected by law?¹⁵ We generalize and explore that question, first, because it forms an important part of the backdrop for the federal antistrike law that dominated the PATCO affair, and, second, because of its crucial importance to claims of the unconstitutionality of that law that surface from time to time.

Three basic arguments are said to justify the prohibition on strikes by public employees: the first invokes notions of sovereignty; the second relies on the assertedly essential nature of services performed in the public sector; and the third draws upon the different roles of market forces in the private and public spheres.

In condemning public sector strikes, an earlier tradition relied heavily on the sovereignty of the public employer and on the related idea of illegal delegation of authority.¹⁶ The first notion was that the government, as sovereign, had plenary power to control the terms on which its employees worked; the second was that an unlawful delegation of power would be involved if the government accorded to its employees and unions the authority to dictate terms of employment. The notion of unlawful delegation cannot, of course, be sustained today.¹⁷ Furthermore, the "sovereignty" rationale was, in this context, a question-begging term that identified the government's power but did not speak to the question of how it should be exercised in a representative democracy.¹⁸ But before

¹⁵ A massive railway or airline strike would not necessarily be illegal under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), but experience suggests that the likelihood of congressional intervention to avert or end a stoppage of all or a substantial part of either industry would be strong. For a summary of such legislation, see Roukis, *Should the Railway Labor Act Be Amended?*, 38 ARB. J. 16, 16-17 (1983). Even though such direct intervention has involved railways rather than airlines, large scale airline stoppages might well invite similar intervention.

¹⁶ See G. ABOUD & A. ABOUD, *supra* note 13, at 5-7; NEW YORK GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 12-13 (1966) ("Taylor Committee") [hereinafter cited as TAYLOR REPORT], summarized in [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 135, at D-1 (1966); H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 36-39 (1971).

¹⁷ See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).

¹⁸ H. WELLINGTON & R. WINTER, *supra* note 16, at 37-38. But see Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974), for a vigor-

those criticisms did their work, four Presidents had delivered sweeping condemnations of public employee strikes that reflected the now largely discredited simplicities of the notion of sovereignty. Such statements—by Presidents Woodrow Wilson,¹⁹ Calvin Coolidge,²⁰ Herbert Hoover,²¹ and Franklin D. Roosevelt²²—became celebrated ingredients of the antistrike rhetoric and were invoked long after the foundations of the sovereignty claim had been undermined.

The second justification for the ban on public employee strikes starts with the recognition that public employees frequently perform services that are properly regarded as essential.²³ Strikes by

ous defense of the idea of sovereignty and of the position that sovereignty is incompatible with both compulsory bargaining and the right to strike in the public sector.

¹⁹ “[A]n intolerable crime against civilization” was President Wilson’s characterization of the 1919 Boston Police Strike. Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 604, 612 (1950) (quoting President Wilson).

²⁰ “There is no right to strike against public safety by anybody anywhere at any time,” declared then-Governor Coolidge when he refused to reinstate the Boston policemen who had struck in 1919. *Id.* (quoting then-Governor Coolidge).

²¹ While campaigning for the presidency in 1928, Herbert Hoover said

“the government by stringent civil service rules must debar its employees from their full political rights as free men. It must limit them in the liberty to bargain for their own wages, for no government employee can strike against his government and thus against the whole people. It makes a legislative body, with all its political currents, their final employer and master. Their bargaining does not rest upon economic need or economic strength but on political potency.”

S. SPERO, *GOVERNMENT AS EMPLOYER* 6 (1948) (quoting N.Y. Times, Oct. 23, 1928, (quoting H. Hoover)).

²² In a 1937 letter to the president of the National Federation of Federal Employees, President Roosevelt said

“A strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it[,] is unthinkable and intolerable.

“. . . [P]articularly I want to emphasize my conviction that militant tactics have no place in the function of any organization of government employees.”

Vogel, *supra* note 19, at 612 (quoting letter from Franklin Roosevelt to the President of the National Federation of Federal Employees (Aug. 16, 1937)).

²³ There is a considerable controversy regarding the feasibility of distinguishing between “essential” and “unessential” services, either at the outbreak of strikes or after particular strikes have continued for a time, with the result that services initially unessential might become essential as the strike continues. Strikes by teachers, sanitation workers, or mailers of welfare checks come to mind. See generally H. WELLINGTON & R. WINTER, *supra* note 16, at 190-201; Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 948-56 (1969); Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly?*, 67 MICH. L. REV. 971, 988-90 (1969); Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 432-40 (1970); Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 376-78 (1972).

If “nonessential” employees were granted the right to strike, it might well be more diffi-

public employees could therefore inflict substantial harm on the community; obvious examples include a strike by urban police or firefighters, or by defense department employees during a national emergency. One could also include an extended strike by those entrusted with providing subsistence benefits to the indigent, at least if the beneficiaries could not obtain credit or other assistance during the strike. In view of the injury flowing from stoppage of such services, allowing strikes could subject public officials to strong pressures for quick settlement, give undue power to some or all public employees, and bear heavily on vulnerable citizens. The distinction between public and private employees under this view is justified not by question-begging notions of sovereignty or by outmoded conceptions of delegation, but by functional considerations relating to the nature of the tasks performed in the public and private spheres.

To a substantial extent the argument from essential services has force; the obvious difficulty is that it is overbroad. Federal employees often perform important services, but some of their work plainly is not essential; indeed, most citizens have a list of government services that would not be missed—to put their view mildly. Surely, in the general run of cases, no catastrophe would result if employees of the American Battle Monuments Commission were permitted to go on strike. Perhaps, then, the most that can be said for the argument is that many public employees do perform essential services; what is basically involved is a continuum from more to less essential, without generally accepted criteria for deciding where on that continuum different services, in different locales, and in different time frames should be located. These considerations suggest that any distinction between essential and nonessential services might be too ill-defined and troublesome to be worthwhile. The argument, however, does not adequately support a blanket proscription on public employee strikes any more than the difficulties of applying the national emergency limitation on private sector strikes²⁴ warrants their complete prohibition.

cult to enforce a strike ban against "essential employees," for they might believe that other employees were improving their relative position through strikes and that the denial of the strike weapon to "essentials" was unfair. This perception of unfairness would, of course, be strengthened if particular distinctions between "essential" and other activities appeared to be arbitrary. On the other hand, the widespread flouting of a blanket ban may, under present circumstances, encourage essential employees, such as police and firefighters, to resort to strikes, as has increasingly been the case.

²⁴ See Labor Management Relations (Taft-Hartley) Act §§ 206-210, 29 U.S.C. §§ 176-180 (1976). These provisions ultimately authorize an injunction if a strike or lockout, actual

The third justification for the strike ban was highlighted in the 1950's and 1960's, as local governments responded to sharp increases in the numbers²⁵ and militancy²⁶ of public employee unions by establishing task forces charged with proposing suitable policies. The resulting reports examined what appeared to be the special characteristics of public employee labor relations and considered the applicability of private sector policies to public employees. Among the most influential reports was that issued in 1966 by the New York Governor's Committee, under the chairmanship of George W. Taylor.²⁷ That report, and the more extensive commentaries²⁸ that followed, argued that the proscription of public employee strikes was justified by virtue of the different forces that determined compensation and the level of services in the private and public sectors, respectively.

In the private sector, the employee benefits embodied in col-

or prospective, will "imperil the national health or safety." *Id.* § 206, 29 U.S.C. § 176 (1976). Those terms and their application involve considerable uncertainty. See the opinions in *United Steelworkers v. United States*, 361 U.S. 39, 42 (per curiam), 47 (Frankfurter & Harlan, JJ., concurring), 65 (Douglas, J., dissenting) (1959); Jones, *Toward a Definition of "National Emergency Dispute,"* 1971 Wis. L. Rev. 700, 710. See *supra* note 12 and accompanying text; *infra* note 51 and accompanying text.

²⁵ See EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT 336 (1976); B. MELTZER, *supra* note 10, at 50-51; Bowman & Morlan, *Revised projections of the U. S. economy to 1980 and 1985*, MONTHLY LAB. REV., Mar. 1976, at 9.

²⁶ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REP. NO. 437, WORK STOPPAGES IN GOVERNMENT, 1973 (1975); B. MELTZER, *supra* note 10, at 53 (Table 13).

²⁷ TAYLOR REPORT, *supra* note 16. The Taylor Committee's recommendations were summarized in [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 135, at D-1 (1966). In addition to Chairman Taylor the committee consisted of E. Wight Bakke, David L. Cole, John T. Dunlop, and Frederick H. Harbison. See also ILLINOIS GOVERNOR'S ADVISORY COMMISSION ON LABOR-MANAGEMENT POLICY FOR PUBLIC EMPLOYEES, REPORT AND RECOMMENDATIONS (1967) (agreeing with Taylor Committee that public employee strikes should be unequivocally prohibited), *reprinted in* [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 184, at D-1 (1967). *But cf.* GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYEE LAW OF PENNSYLVANIA, REPORT AND RECOMMENDATIONS (1968) (advocating that public employees, except for policemen and firemen, be given a limited right to strike), *reprinted in* [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 251, at E-1 (1968); REPORT TO GOVERNOR ROMNEY BY THE MICHIGAN ADVISORY COMMITTEE ON PUBLIC EMPLOYEE RELATIONS (1966) (although agreeing with the continuance of the no-strike policy, the Committee questioned the validity of this approach), *reprinted in* [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 181, at F-1 (1967). See generally Smith, *State & Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 893-94 (1969). For a more recent challenge to the public-private distinction—precipitated by the recent PATCO strike—see Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055 (1982).

²⁸ See, for example, Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969), the reply of Burton & Krider, *supra* note 23, and the authors' rejoinder in H. WELLINGTON & R. WINTER, *supra* note 16, and Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970).

lectively bargained agreements are shaped by two important elements. The first is the employer's countervailing powers to assume the costs of a (long) strike, to lock out, to eliminate high-cost operations or to shift them to other plants or other firms, or to close down completely. The second consists of market forces that create direct links among an employer's costs, prices, output, and employment. The power of these market restraints varies with the ease of substituting other products and other suppliers when costs and prices in a particular firm or industry rise. But in general, higher wages secured by the exercise of collective power tend to result in higher prices and lower production and employment. That prospect will often temper wage demands and concessions in the private sector.

Such market restraints are not, of course, effective in all parts of the private sector. Indeed, in some organized industries, such as steel and autos, their ineffectiveness, along with managerial deficiencies, appears to have contributed to the erosion of market positions. As a general rule, however, these constraints, registering consumer choices, make the private sector significantly different from the public sector. Indeed, even when the ineffectiveness of market restraints permits the union to impose high labor costs, such costs may cause employers to change production methods or to replace high-cost production with lower-cost foreign or domestic supplies.

In the public sector, no such direct and sharply focused constraints operate through the price mechanism.²⁹ The consumer receives many important services—for example, education, police, and fire-protection—without directly paying for them.³⁰ Further-

²⁹ It is true, of course, that public employers, in the longer run at least, cannot meet their needs unless public pay reflects private compensation standards—the market provides some protection against unduly low compensation. H. WELLINGTON & R. WINTER, *supra* note 16, at 18. The effectiveness of these forces may be blunted when a group of employees has developed skills suitable only for public employment. With respect to such employees, an employer, private or public, may be viewed as having strong monopsony power. That power is limited, however, by the costs to the employer in training the employees involved. As a result there is a joint employee-employer interest in not destroying job-specific skills, which presumably will be reflected in compensation. The air traffic controllers, because of the high training costs incurred by the government, illustrate the high costs to an employer of losing job-specific skills—at least where the jobs involved are not over-manned. Moreover, even in such circumstances, economic criteria or use of the cheapest feasible wage scale will be qualified because public sector activities are not dominated by a desire for monetary profits. Government is thus less likely to exploit whatever market power it may have. *Id.* On the other hand, government, because of political impediments to raising revenue and compensation, may be more sluggish in adjusting to upward wage pressures.

³⁰ When a state-owned facility (such as an electric plant or a subway) charges a price for its services and pays its own way, its wage-setting, in contrast to wages for price-free

more, the costs of such services are typically buried in complex budgets, which taxpayers can rarely master. Budgetary and taxing decisions by legislatures—which are products of public policy, rather than market forces—are the dominant factors, at least in the short run, in determining the level of public employee compensation.³¹

In making such policy decisions, legislatures must respond to their constituencies, including public employee unions, consumers of particular services, and taxpayers. Although taxpayers are the largest constituency, their interests qua taxpayers are typically more diffuse than the concentrated interests of public employees and of consumers of particular public services, who may also be taxpayers. The result is that labor unions, with the sharply focused interests of a narrow bloc, frequently have a louder voice than larger and more diffuse constituencies.³² Even though union leverage may seem limited in a particular situation, its existence is likely to make legislators more forthcoming. If the right to strike were granted to public employee unions, there would be a substantial risk of conferring on such unions undue power over the budget—power that would be constrained neither by market forces nor by countervailing political forces.³³

To say this is not to deny that there are restraints in the public sector that resemble those in the private sector. Thus public employees might be restrained by the prospect of lost wages by virtue of strikes, lockouts, or contracting out. Similarly, the fear of

services, will be more directly subject to market forces. But even as to revenue-producing publicly owned operations, various subsidies, sometimes from several layers of government, may cushion the impact of market forces.

³¹ H. WELLINGTON & R. WINTER, *supra* note 16, at 27.

³² This phenomenon is, of course, familiar in administrative law. See generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982); cf. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (suggesting that as a rule, regulation is “acquired” by powerful interest groups and is designed and operated primarily for their benefit).

³³ It has been suggested that the notion of an unfair advantage conferred by legalization of strikes has been undermined by evidence of public employers’ recent and significant refusals to capitulate to the demands of unions permitted to strike. See Olson, *The Use of the Legal Right to Strike in the Public Sector*, 33 LAB. L.J. 494, 495 (1982). Such evidence is, however, far from convincing. The legality of a strike, among other pressures, is presumably a factor in the original demands and ultimate sticking points of both unions and employers. The refusal of an employer to accept the union’s demand—which may be higher because of legal strike power—does not help us measure that power. Previously, employers in the private sector, when they faced unions with admittedly great power (for example, steel and autos), sometimes refused to capitulate. We will not here attempt to be more precise about “power” in this context. For further discussion, see Meltzer, *supra* note 9, at 597-601.

unemployment caused by increased labor costs and declining tax revenues might restrain the ultimate demands of public unions. And competition among various well-organized groups will provide something of a check on the possibility that the budget will be captured by any particular faction. But such restraints operate more crudely and diffusely than private market restraints. Where many citizens view a service as important but do not pay for it directly, a particular union may be able to maintain high wages while, in effect, imposing economies on areas more insulated against citizen pressure and union power.³⁴

Taxpayers may also seek to escape from unwanted costs by resort to "exit" as well as "voice."³⁵ But the adjustment costs of exit, for example, of moving from New York City to Vermont or Texas, usually appear to be much greater than those involved in switching from a higher- to a lower-cost product.³⁶ For this reason the potential restraint of "exit," even when combined with "voice," is typically much less effective than private market restraints.³⁷ And in the federal sphere, the exit route is not realistically available for most citizens.

Under this view, the prohibition on strikes by public employees is justified on the ground that such a right would give undue power to a private faction over the public budget. The concern about such imbalances of power reflects a desire to protect the institutions of a representative democracy³⁸ against the power of narrow interest groups,³⁹ many of which could bring vital governmen-

³⁴ Compare H. WELLINGTON & R. WINTER, *supra* note 16, at 1, setting forth this epigraph: "'If the city has \$2 billion a year for the bums on welfare, how come they have no dough for us?'" (quoting a New York City fireman quoted in N.Y. TIMES, Dec. 27, 1970, § 4, at 1, col. 1). See also *id.* at 27 n.45 (newspaper account of state urban aid funds, originally authorized for helping the poor, diverted to salary increases for firemen and police after a strike).

³⁵ See generally A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

³⁶ Burton, *Public Sector Unionism: An Economic Perspective*, *Gov't UNION REV.*, Spring 1982, at 26, 39.

³⁷ *Id.*

³⁸ See Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, *Gov't UNION REV.*, Winter 1980, at 5. But see Cohen, *Does Public Employee Unionism Diminish Democracy?*, 32 *INDUS. & LAB. REL. REV.* 189 (1979).

³⁹ Similar, but now quaint, concerns were expressed by Disraeli in the debate over an amendment to the "Representation of the People Bill" (the Reform Bill of 1867), 30 & 31 *Vict.*, ch. 102, that would have extended the franchise to public revenue officers. He observed that they already exerted an influence "which must be viewed with great jealousy." He asked: "But what would be the position of affairs if these persons—so numerous a body—were invested with the franchise?" He intimated that "the result would be that there would be an organization illegitimately to increase the remuneration they received from their services"—a remuneration which, in his opinion, was based upon a just estimate. 188

tal services to a halt.

The foregoing arguments are not without their difficulties. First, the central distinction between "economic" power, which is crucial in the private sector, and "political" power, which is crucial in the public sector, is not clear-cut.⁴⁰ Thus, executive intervention or abstention in private bargaining situations⁴¹ may affect the shape of private collective bargains; similar consequences may arise from legislation, such as minimum wages, tariffs, and regulation restricting new entrants and facilitating the passing on of increased costs to consumers. Even if the distinction between "economic" and "political" power could be clearly drawn, it does not tell us why the use of one form of power should be permissible and the other proscribed.⁴² The exertion of political power by interest groups is a familiar part of the political process.⁴³ Public sector strikes designed to affect action by legislatures or administrators might therefore be viewed as conventional "political" action no different in principle from lobbying.⁴⁴ With lobbying, political power is affected by the intensity, numbers, and wealth of the groups involved. With strikes, influence is a function in part of a group's power to disrupt essential services as well as its ability to enlist the aid of other entities, public and private. To be sure, strikes are, at least in the short run, more disruptive than lobbying. But in a community that protects strikes in the private sector, despite their disruptive potential, it is not self-evident why one form of power—lobbying and some kinds of campaign contributions—is

PARL. DEB. (3d ser.) 1033-34 (1867). The amendment was lost, *id.* at 1036, but a similar provision carried the following year, 1868. See 193 *id.* at 389-410 (1868).

Gladstone, although supporting the enfranchisement, made a statement not wholly irrelevant to the PATCO affair, given the large queue of applicants for air traffic controller jobs:

"What, he asked, was the Civil Service of this country? It was a service in which there was a great deal of complaint of inadequate pay, of slow promotion, and all the rest of it. But, at the same time, it was a service which there was an extraordinary desire to get into. And whose privilege was it to regulate that desire? That of the Members of that House . . ."

H.R. MEYER, *THE BRITISH STATE TELEGRAPHS* 98 (1907) (quoting Gladstone).

⁴⁰ See Burton & Krider, *supra* note 23, at 428-30.

⁴¹ Extrastatutory, as well as statutory, executive involvement in large-scale private sector disputes is not infrequent. See, e.g., M. MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* (1977); U.S. DEP'T OF LABOR, *COLLECTIVE BARGAINING IN THE BASIC STEEL INDUSTRY* 203 (1961).

⁴² See Burton & Krider, *supra* note 23, at 428-32.

⁴³ See generally A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); G. McCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); D. TRUMAN, *THE GOVERNMENTAL PROCESS* (2d ed. 1971); Stigler, *supra* note 32.

⁴⁴ Burton & Krider, *supra* note 23, at 430.

permitted while strikes are completely proscribed.

Such criticisms suggest that the differences in checks on collective power and the role of "politics" in the two sectors are in the end not bright lines but matters of degree.⁴⁵ Moreover, the effects of strikes, or other forms of private sector self-help, on the processes of governmental decision making depend on the character and perceived importance of the work, the size and the alliances of particular bargaining units, and the social and political context of the public employer involved. It is therefore difficult to evaluate the argument from differential market forces in the abstract. Nonetheless, the argument does suggest that there are significant differences, even if of degree, between the private and public sectors and that these differences provide a more than plausible basis for the prohibition on public employee strikes. When the argument from those differences is linked with that from essential services, we believe that a persuasive case can be made in favor of the prohibition, at least if labor-management institutions in the public sector appear to provide a reasonable accommodation of the interests of public sector employees.

Empirical studies suggest that such accommodation has been achieved, at least with respect to wages and fringe benefits. Such studies do not suggest that public compensation suffers by comparison with private compensation; indeed, the compensation of federal employees appears to be higher than that of private counterparts.⁴⁶ And when the focus shifts to so-called "noneconomic"

⁴⁵ See H. WELLINGTON & R. WINTER, *supra* note 16, at 32; Kaden, Book Review, 81 YALE L.J. 772, 778 (1972) (reviewing H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* (1971)).

⁴⁶ Inter-sector comparisons are, of course, complicated by the difficulty of finding "comparable" jobs and of weighing pertinent qualitative differences. See Munnell & Connelly, *Comparability of Public and Private Compensation: The Issue of Fringe Benefits*, NEW ENG. ECON. REV., July-Aug. 1979, at 27, 29.

These difficulties aside, almost all studies find that on the average wages and fringes at the federal level are higher than in the "comparable" private position. See, e.g., S. SMITH, *EQUAL PAY IN THE PUBLIC SECTOR: FACT OR FANTASY* 68 (1977); Mitchell, *The Impact of Collective Bargaining on Compensation in the Public Sector*, in PUBLIC-SECTOR BARGAINING 118, 123 (B. Aaron, J. Grodin, J. Stern eds. 1979). One study found, however, that in 1961 there was a wage disadvantage at the higher federal levels (GS-7 through GS-15). Stelluto, *Federal Pay Comparability: Facts to Temper the Debate*, MONTHLY LAB. REV., June 1979, at 18, 26. Furthermore, another study concluded that compensation of state and local government employees, although showing wide variations, was overall somewhat lower than that of private counterparts. See Mitchell, *supra*, at 123-24.

With respect to public sector strikes and representative government, it should be observed that an impressionistic study of New York City highlights that collective bargaining, coupled with strikes (albeit illegal ones) by public employees, not only contributed to the city's fiscal crises but also basically altered the nature of public services and the functions of

considerations, such as protection of employees against arbitrary actions and procedures, the protections furnished in the public sector measure up to private counterparts.⁴⁷

Analytical distinctions between the two sectors do not, however, address an imponderable factor—perceptions that the “right to strike” in the public sector, as in the private sector, is a fundamental right that free societies recognize and only oppressive governments deny.⁴⁸ The acceptance of that premise leads to a set of related arguments to the effect that the right to strike, as the mark of a free society, should not be denied unless a strike would substantially injure paramount interests of the larger community; even then strikes should not be prohibited without a strike substitute, that is, a neutral dispute-settling mechanism, such as some form of arbitration.⁴⁹ Critics of a blanket proscription concede that there may be difficulties in distinguishing between more essential and less essential activities; they urge, however, that manageable distinctions⁵⁰ are available, that such distinctions do not pose essentially greater difficulties than those in the private sphere,⁵¹ and that, in any event, the application of such distinctions will cause fewer problems than a blanket no-strike approach. The complete prohibition of public sector strikes, the argument continues, must be viewed as an oblique undercutting of the idea of union representation and collective negotiations in the public sector and in the private sector as well.⁵² In addition, whatever the analytical justifi-

the mayor, the city council, and the agency heads. See K. AULETTA, *THE STREETS WERE PAVED WITH GOLD* 45-51, 59-62, 66-68, 185-86 (1980).

⁴⁷ Protections in the public sector against unwarranted discipline were achieved through civil service reform, even before such protections became staples of private sector collective agreements. See generally R. DWOSKIN, *RIGHTS OF THE PUBLIC EMPLOYEE* (1978); Note, *Federal Employment—The Civil Service Reform Act of 1978—Removing Incompetents and Protecting “Whistle Blowers,”* 26 WAYNE L. REV. 97 (1979). Statutory protections are now reinforced by constitutional protections. See *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). Furthermore, on the federal level employees have, in general, been well protected. See R. DWOSKIN, *supra*; Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942 (1976); Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973).

⁴⁸ See R. REAGAN WITH R. HUBLER, *supra* note 12, at 138; Little, *Arbitrating Public Employment Disputes*, 68 A.B.A. J. 1100, 1100 (1982).

⁴⁹ Little, *supra* note 48, at 1101-03.

⁵⁰ Burton & Krider, *supra* note 23, at 432-38.

⁵¹ See *id.*; see generally *United Steelworkers v. United States*, 361 U.S. 39 (1959) (per curiam); *United States v. International Longshoremen’s Ass’n, Local 418*, 335 F. Supp. 501 (N.D. Ill.), *application for emergency relief denied*, 78 L.R.R.M. (BNA) 2801 (7th Cir. 1971); Labor Management Relations (Taft-Hartley) Act §§ 202-210 (as amended), 29 U.S.C. §§ 172-180 (1976).

⁵² Kaden, *supra* note 45, at 779-80.

cation for such a proscription, it may well not work. It may, as a formal matter, make strikes illegal but it does not really stop them.⁵³ For once organization exists,⁵⁴ strikes will break out, at least where a union has power; strikes are likely to produce economic gains for the strikers, and the moral acceptability of strikes in general may dilute the deterrent force of strike prohibitions. A paper prohibition against strikes, which is not enforced or is enforced most capriciously, will, it is urged, breed disrespect for law.

Later, we shall look more closely at the claim that the right to strike by public employees is perceived by them and the general society as involving a basic civil right and that it is ostrich-like to disregard that perception in formulating public policy.⁵⁵ For immediate purposes it is enough to note that the deterrent effect of a prohibition on public employee strikes is significantly influenced by the seriousness of the commitment both to the values underlying that prohibition and to the rule of law.

Those values appear to have retained their vitality in most states; only a few states have rejected the prevailing blanket prohibition of public sector strikes.⁵⁶ To be sure, cynics may say that

⁵³ Some commentators have suggested that there is no empirical support for the idea that there is any connection between the amount of strike activity (on the state and local level) and the particular public policies in force, including strike prohibitions. See J. BURTON & C. KRIDER, *THE INCIDENCE OF STRIKES IN PUBLIC EMPLOYMENT* 171 (1975) (illegal strikes may be shorter). But other investigators have found that mechanisms that in fact operate as strike substitutes, such as arbitration, can effectively reduce strikes. See C. OLSON, J. STERN, J. NAJITA, J. WEISBERGER, *STRIKES AND STRIKE PENALTIES IN THE PUBLIC SECTOR* 127-28, 151-52, 362-67, 373-78 (1981). But these findings are guarded with caveats about the dangers of extrapolation to states without much union organization. Furthermore, these findings rest on data regarding only the number, and not the duration, of strikes. It seems likely, however, that the illegality of a strike will tend to shorten it because pressure will be generated not only by the loss of services, but also by the additional political costs and legal risks inherent in continued law-breaking. In any event, proclamations about the irrelevance of antistrike policies, among other public policies, involve the usual risk of self-fulfilling prophecies.

Both the percentage of employees striking and the duration of strikes have been much lower in the public than in the private sector. See B. MELTZER, *supra* note 10, at 52-53 (Tables 12-13); U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1981, at 414 (102d ed. 1981); U.S. DEP'T OF LABOR, *HANDBOOK OF LABOR STATISTICS* 429-32 (1980).

⁵⁴ See PUBLIC SERVICE RESEARCH COUNCIL, *PUBLIC SECTOR BARGAINING AND STRIKES* (6th ed. 1982).

⁵⁵ See *infra* notes 226-31 and accompanying text.

⁵⁶ As of January 1, 1982, only nine states (Alaska, Hawaii, Idaho, Minnesota, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin) explicitly allow strikes in the public sector, and each of those states places significant limits on the right to strike. See U.S. COMPTROLLER GENERAL, GAO REP. NO. FPCD-82-49, *COMPARISON OF COLLECTIVELY BARGAINED AND ADMINISTRATIVELY SET PAY RATES FOR FEDERAL EMPLOYEES* 18-19, 28-29 app. V (1982); *Summary of State Labor Laws*, GOV'T EMPL. REL. REFERENCE FILE (BNA) 51:501

the preservation of the strike prohibition is a charade—the preservation of a symbolic code despite (or because of) the awareness that it will not be obeyed. But something more appealing and fundamental seems to be at work: a regard for the idea of public service, of reciprocal obligations between the people and those who serve them, and a preference for legislative dialogue, no matter how imperfect, to economic and political warfare. Similarly, Congress, albeit with much sparser legislative debate than occurred in some states, has maintained an absolute prohibition against all strikes by federal employees and has sought to enforce it by severe sanctions. It is against this background that the PATCO affair occurred.

II. THE PATCO AFFAIR

A. Preliminaries

Almost from its formation in 1968, PATCO showed a willingness to resort to self-help, in the form of slow-downs and strikes, to remedy its stated grievances. The details of such job actions need not detain us.⁵⁷ It is enough for our purposes to note several basic points. First, the criminal law was apparently not invoked against offenders. Second, the executive branch did not maintain that federal employees engaging in “strikes”⁵⁸ would be ineligible for continued employment in their regular jobs; indeed the administrative sanctions against PATCO and against individual controllers were

(1981).

It would be an oversimplification to infer from legislative failures to lift strike-prohibitions the existence of a solid consensus in favor of the prevailing antistrike policy. Legislative efforts to change that policy must overcome a cluster of differences, including those between urban and rural areas, those among public sector unions regarding both the soundness of such legislation and the impact of existing political arrangements on their members, and differences between employing units and legislative units, resulting from home-rule limitations. Cf. Derber, *Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor's Commission, 1966-67*, 21 *INDUS. & LAB. REL. REV.* 541, 552-58 (1968). Those factors, along with the difference between the abstract appeal of a no-strike policy and the concrete pressures to settle a particular strike, may help to explain an apparent paradox, that is, unions' inability to eliminate a blanket strike ban despite their power to extract significant gains from negotiations, with or without a strike.

⁵⁷ See generally Comment, *supra* note 7.

⁵⁸ “Strike,” as used in the federal antistrike law, has been defined so as to include slow-downs and other forms of concerted withdrawal of services falling short of a full-fledged strike. See *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.) (per curiam), *aff'd mem.*, 404 U.S. 802 (1971); Kheel, *Strikes and Public Employment*, 67 *MICH. L. REV.* 931, 935 (1969); Wortmann, *Collective Bargaining Tactics in Federal Civil Service*, 15 *LAB. L.J.* 482 (1964); Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 *MICH. L. REV.* 260, 263-65 (1969).

relatively mild.⁵⁹ Third, such sanctions were followed by progressively stronger and more overt union pressures.⁶⁰ Fourth, PATCO's job actions, though falling far short of a full stoppage, demonstrated its capacity to inflict substantial losses on the airlines and the community at large.⁶¹ Finally, the unlawful conduct of air traffic controllers produced not only prospective injunctions and contempt actions against PATCO,⁶² but also judicial admonitions concerning both PATCO's duty to obey⁶³ the antistrike law and the Attorney General's duty to enforce it.⁶⁴

Despite those admonitions, PATCO's local at Chicago's O'Hare airport mounted another challenge to the antistrike law approximately one year before the 1981 nationwide strike. The local presented its demands, labeled them "nonnegotiable," and

⁵⁹ For example, 67 controllers were fired for engaging in 1970 in a threatened sickout, which was designed to bring about immediate recognition of PATCO and restoration of its dues check-off. (The FAA had previously terminated the check-off and denied recognition to PATCO because of the two-day sickout in 1969, responsibility for which PATCO disclaimed.) Those fired had been reinstated by 1972. See *Miller v. Bond*, 641 F.2d 997 (D.C. Cir. 1981); Comment, *supra* note 7, at 159-66.

⁶⁰ See Comment, *supra* note 7, at 166-72.

⁶¹ See generally *id.*

⁶² Cases resulting from the 1970 sick-out include *Air Transp. Ass'n v. PATCO*, 313 F. Supp. 181 (E.D.N.Y.) (preliminary injunction against strike coupled with order barring discipline by the government against returning strikers, pending further order of the court), *vacated in part sub nom. United States v. PATCO*, 438 F.2d 79 (2d Cir. 1970) (restraint on discipline by government vacated, one judge dissenting), *cert. denied*, 402 U.S. 915 (1971). *Contra United States v. Moore*, 427 F.2d 1020 (10th Cir. 1970) (restraint on discipline by government upheld, one judge dissenting). Additional cases resulting from the 1970 sick-out are collected in *PATCO v. Federal Labor Relations Auth.*, 685 F.2d 547, 585 n.81 (D.C. Cir. 1982).

In 1978, another job action by PATCO led to the decision in *Air Transp. Ass'n v. PATCO*, 453 F. Supp. 1287 (E.D.N.Y.) (ordering PATCO to pay the Association \$25,000 for each day of a four-day violation of the permanent 1970 injunction, the penalty stipulated in a prior decree), *aff'd*, 594 F.2d 851 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). This contempt action led to a ruling that the 1970 injunction was prospective and applied to future strikes triggered by controversies quite different from those leading to that injunction. 453 F. Supp. at 1291-92.

⁶³ See *Air Transp. Ass'n v. PATCO*, 453 F. Supp. 1287, 1293-94 (E.D.N.Y.), *aff'd*, 594 F.2d 851 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979).

⁶⁴ "It is also the sworn duty of the Attorney General to enforce these laws but for reasons not fathomable by this Court they have apparently yet to initiate any investigative or enforcement proceedings." *Id.* at 1293 n.8. In a letter to Langhorne Bond, then FAA Administrator, the Justice Department explained that it had a "long-standing policy" not to "preliminarily initiate criminal prosecution" under 18 U.S.C. § 1918 (1976) and that the sudden introduction of criminal penalties into a labor dispute would be unwise. The Justice Department also apparently felt that a criminal prosecution for the 1978 slow-down would have been an unfair surprise—as the first prosecution in the then 23-year history of the antistrike statute. See Letter from Philip B. Heymann, Assistant Attorney General, to Langhorne M. Bond (Sept. 22, 1978) (on file with *The University of Chicago Law Review*).

threatened a "withdrawing of enthusiasm" by the controllers unless the FAA, within ten days, granted those demands or proved that they would be implemented.⁶⁵ The nature of the demands suggested that the O'Hare local was either bluffing or seeking to test the government's will, for the local's deadline was obviously too short for these extraordinary demands, which only Congress could grant or (realistically) promise. When the FAA's Regional Administrator asked for more time, the local accelerated its own ten-day deadline. By August 15, 1980, more than 600 private and commercial planes had experienced delays of over thirty minutes during a twenty-one hour period, causing considerable loss and inconvenience to the airlines and to the public.⁶⁶

Legal action was eventually instituted against the slow-down, and the U.S. Court of Appeals for the Seventh Circuit held that it had authority to enjoin strikes by federal employees.⁶⁷ On the same day the U.S. District Court for the Eastern District of New York denied PATCO's petition for a vacatur of that court's 1970 injunction against strikes,⁶⁸ concluding that the passage of Title

⁶⁵ This ultimatum was alleged in the government's petition for a preliminary injunction, August 17, 1980, in the federal district court; another allegation was that Richard Scholz, the president of the O'Hare local, had demanded, by a letter dated July 30, 1978, that the O'Hare tower immediately raise the grade of each of its controllers and grant each of them a tax-free bonus of \$7500. See *United States v. PATCO*, 653 F.2d 1134, 1136 & n.1 (7th Cir.), cert. denied, 454 U.S. 1083 (1981). This demand for tax-free status seemed a perverse kind of "public relations"; the controllers, by seeking a privileged status under the tax laws, would scarcely make friends with other workers, who already felt the burden of their own taxes and had frequently been reminded of them in the ongoing presidential campaign.

Poli, PATCO's President, later explained this demand by claiming that the bonus had been suggested in 1978 by FAA managers, in order to attract controllers to O'Hare, apparently not a magnet because of its high traffic volume. See *Air Traffic Control: Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 20, 26 (1980) (statement of Robert Poli) [hereinafter cited as *September 1980 Hearings*].

⁶⁶ See *United States v. PATCO*, 653 F.2d 1134, 1136 (7th Cir.), cert. denied, 454 U.S. 1083 (1981).

⁶⁷ *Id.* at 1140, *rev'g* 504 F. Supp. 432 (N.D. Ill. 1980). The trial court, in dismissing a petition for a temporary injunction, had relied primarily on the ground that Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, tit. VII, §§ 701-703, 92 Stat. 1191-218 (codified at 5 U.S.C. §§ 5596(b)(1), 7101-7135, 7211 (Supp. V 1981)), by making strikes by federal employees unfair labor practices, had divested the federal courts of injunctive jurisdiction. On appeal, a concurring judge, although acknowledging the sparse guidance provided by either the language or history of the Act, concluded from the legislative history that Congress, by the Civil Service Reform Act, had not intended to alter either the preexisting strike prohibition or the preexisting sanctions, including injunctions, against unlawful strikes. 653 F.2d at 1143-44 (Crabb, C.J., concurring). *Accord* *United States v. Martinez*, 686 F.2d 334 (5th Cir. 1982); *Air Transp. Ass'n v. PATCO*, 667 F.2d 316 (2d Cir. 1981).

⁶⁸ See *supra* note 62.

VII of the Civil Service Reform Act of 1978⁶⁹ (the "1978 Reform Act") had not divested the court of jurisdiction to protect the integrity of its prior order.⁷⁰ Referring to newspaper stories indicating that PATCO was "on the very eve of another threatened strike,"⁷¹ the district court renewed its earlier warning regarding the duty of PATCO's members to refrain from striking.⁷²

B. Antecedents to the Strike of August 1981

In this section we propose to describe briefly PATCO's two apparently contradictory strategies: first, the build-up of rank-and-file support for a strike; second, substantially contemporaneous assurances to members of Congress, among others, that the union would obey the antistrike law.

In September of 1980, a House subcommittee began hearings, prompted by FAA Administrator Langhorne Bond's public charges that PATCO planned to call a strike in the spring of 1981.⁷³ The FAA's witness gave evidence supporting that charge⁷⁴ and stressed that the union primarily was seeking higher pay—for example, as much as pilots earned (over \$100,000).⁷⁵ He added that the union had advised its members that a strike could halt air transportation and that the government would be helpless.⁷⁶

⁶⁹ 5 U.S.C. § 7105 (Supp. V 1981).

⁷⁰ *Air Transp. Ass'n v. PATCO*, 516 F. Supp. 1108, 1111-13 (E.D.N.Y.), *aff'd*, 667 F.2d 316 (2d Cir. 1981).

⁷¹ *Id.* at 1109, 1111.

⁷² *Id.* at 1113.

⁷³ *September 1980 Hearings*, *supra* note 65, at 1 (statement of Rep. James M. Hanley).

⁷⁴ The FAA's first witness, Raymond J. Van Vuren, Director of Air Traffic, gave evidence of highly organized planning for a strike, including a strike "subsistence" fund, created on a national level by PATCO in May 1978. *Id.* at 3-5. The FAA had charged that PATCO's establishment of that fund was an unfair labor practice, but the Federal Labor Relations Authority ("FLRA") dismissed that charge, noting that the fund had not been used. *In re Professional Air Traffic Controllers Organization*, Case No. 22-09583 (CO), *described in* Letter from Alexander T. Graham, FLRA Washington Regional Director, to Edward V. Curran (April 30, 1979), *aff'd* by FLRA in Letter from FLRA to Edward V. Curran (Jan. 25, 1980) (copies of both letters are on file with *The University of Chicago Law Review*). See JONES REPORT, *supra* note 7, at 5, *reprinted in 1981-82 Hearings*, *supra* note 5, at 407. Van Vuren testified that "the primary goal [of the strike] is money." *September 1980 Hearings*, *supra* note 65, at 5. He quoted from a "recent" Seattle Center PATCO newsletter, stating, *inter alia*: "'Our power stems from one, and only one, source. That is our ability to withhold our services en masse, thereby halting the air transportation system of this country.'" *Id.*

⁷⁵ See *September 1980 Hearings*, *supra* note 65, at 5 (statement of Raymond Van Vuren, FAA). PATCO President Poli acknowledged that PATCO was seeking pay comparable to that of pilots. *Id.* at 22 (statement of Robert Poli, PATCO).

⁷⁶ *Id.* at 5 (statement of Raymond Van Vuren, FAA).

The FAA's witness also described the agency's countermeasures:⁷⁷ personal warnings (after a 1978 New York slow-down) that future illegal actions would be subject to criminal prosecution,⁷⁸ contingency plans for running the air traffic system despite a strike,⁷⁹ and efforts through past and proposed expenditures⁸⁰ to respond to grievances by modernizing equipment and reducing overtime.⁸¹ According to the FAA's witness, an important step toward the union's goal was "ultimately getting out from under the Civil Service system and working in a quasi-governmental corporation with a legal right to strike."⁸²

Robert Poli, PATCO's President, challenged this testimony about strike plans and reaffirmed his statement "on two separate occasions before the Congress that this organization is not going to strike next year,"⁸³ that the strike fund would not be used when strikes were illegal,⁸⁴ and that the national would place any striking local in trusteeship.⁸⁵ Nevertheless, Poli also gave contraindications. He observed that his elevation to the presidency reflected his greater readiness to strike;⁸⁶ he castigated the FAA's handling of air traffic controllers and stated that he would seek legislation in order to obtain higher pay and fringe benefits as well as reduced working hours.⁸⁷ Replying to a question, he suggested that Con-

⁷⁷ *Id.* at 5, 6, 10, 11 (statement of Raymond Van Vuren, FAA).

⁷⁸ *Id.* at 6 (statement of Raymond Van Vuren, FAA).

⁷⁹ *Id.* (statement of Raymond Van Vuren, FAA). Later, presumably in part as a demonstration of its resolve to resist a strike, the FAA was to publish, and to request comments on, its comprehensive Draft National Air Traffic Control Contingency Plan for Potential Strikes and Other Job Action by Air Traffic Controllers. 45 Fed. Reg. 75,100 (1980).

⁸⁰ *September 1980 Hearings, supra* note 65, at 3-8 (statement of Raymond Van Vuren, FAA).

⁸¹ *Id.* at 8 (statement of Raymond Van Vuren, FAA).

⁸² *Id.* at 5 (statement of Raymond Van Vuren, FAA).

⁸³ *Id.* at 19 (statement of Robert Poli, PATCO).

⁸⁴ *Id.* at 21-22 (statement of Robert Poli, PATCO).

⁸⁵ *Id.* at 20 (statement of Robert Poli, PATCO).

⁸⁶ *Id.* at 15 (statement of Robert Poli, PATCO). Poli had become president in 1980 after PATCO's executive board had accepted the resignation of his predecessor, John Leyden, but not Poli's resignation as vice president. See *TIME MAGAZINE*, Aug. 17, 1981, at 14, 18.

⁸⁷ *September 1980 Hearings, supra* note 65, at 19 (statement of Robert Poli, PATCO). He maintained that the FAA had authority to discuss salaries as a basis for recommendations to Congress but lacked authority to discuss a separate pay structure outside the general compensation system. *Id.* at 22. Poli agreed with Van Vuren that salary and its equivalents would be the main issue, *id.* at 23, and that reducing regular hours from 40, *id.* at 25, and a return to the status quo ante in their retirement system (apparently a reference to the early retirement and second career training program that is provided for at 5 U.S.C. §§ 3381-3385 (1976), but has been unfunded since 1979) would also be important, *September 1980 Hearings, supra* note 65, at 25.

gress's greatest contribution to avoiding a crisis would be to lend a sympathetic ear to PATCO's future proposals for better conditions and equipment.⁸⁸

For several reasons, the likelihood of a strike appeared to have decreased with the election of President Reagan, whom PATCO had endorsed.⁸⁹ First, although Drew Lewis, the President's appointee as Secretary of Transportation, during his confirmation hearings had strongly opposed an illegal strike, Poli praised the Secretary for having acknowledged strike rumors and having agreed to look at the union's demands.⁹⁰ Second, the President had exempted air controllers from a federal hiring freeze.⁹¹ Finally, on February 10, 1981, President Reagan met at the White House with President Poli and other union leaders.⁹² During that "cordial" meeting, the President had promised to solicit the opinion of Poli, among others, on his forthcoming budget cuts.⁹³

Shortly after, and perhaps because of, these sympathetic conversations, PATCO presented substantial demands to the FAA for more money, fewer hours, better retirement benefits, and improved cost of living adjustments.⁹⁴ On February 3, 1981, Representative Clay introduced a bill in the House that would have substantially satisfied PATCO's demands.⁹⁵ The proposed statute would have broadened the controllers' right to bargain by making it coexten-

⁸⁸ *September 1980 Hearings, supra* note 65, at 24 (statement of Robert Poli, PATCO). Although disavowing any strike threat, another witness, Lawrence Cushing, President of the National Association of Air Traffic Specialists Station, echoed Poli's criticism of the FAA's labor management relations and condemned in particular its handling of people and its deliberately dilatory bargaining tactics. *Id.* at 29, 30 (statement of Lawrence Cushing). He did, however, praise the FAA, under Mr. Bond, for automating the flight service system. *Id.* This testimony showed plainly that other federal employees were watching PATCO's tactics and the government's response, with a view to assessing the government's resolution as well as the payoff from strikes, actual and threatened.

Incidentally, "air traffic control specialists/station" work in flight service stations rather than towers or en-route centers. Flight service stations have no air traffic control functions, that is, they do not separate aircraft from one another. Their primary mission is to provide private pilots with weather briefings, suggested routes, indications of turbulence and icing, and related information. They also assist lost or disoriented pilots and provide navigational and other help to pilots in emergencies.

⁸⁹ See [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 894, at 8 (1981).

⁹⁰ See *Aviation Daily*, Feb. 13, 1981, at 229.

⁹¹ [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 898, at 5 (1981); see *id.* at 42 (text of Office of Management and Budget memorandum concerning the federal hiring freeze).

⁹² [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 900, at 11 (1981).

⁹³ *Id.*

⁹⁴ JONES REPORT, *supra* note 7, at 128-29, reprinted in *1981-82 Hearings, supra* note 5, at 530-31.

⁹⁵ H.R. 1576, 97th Cong., 1st Sess. (1981). See 127 CONG. REC. H349 (daily ed. Feb. 3, 1981).

sive with mandatory bargaining in the private sector and could also have been construed as granting the controllers a right to strike.⁹⁶ The Clay bill therefore proposed, with respect to air traffic controllers, a substantial departure from the 1978 Reform Act.⁹⁷

The Clay bill, which apparently had been drafted with PATCO's help,⁹⁸ was introduced shortly before the scheduled beginning of negotiations for a renewal of the PATCO-FAA agreement, which was to expire on March 15, 1981.⁹⁹ In the ensuing negotiations, PATCO quickly meshed its bargaining position with the bill so that PATCO's crucial demands tracked the provisions of the bill.¹⁰⁰

Those demands were so far above the level of government compensation that a labor-management looseleaf service abandoned its customary blandness in describing them as reminiscent of the model agreements that sometimes serve as the opening rite of private sector bargaining.¹⁰¹ The union's demands generated legal as well as financial problems. Under the 1978 Reform Act, the FAA could not properly agree to such demands because they went beyond the scope of bargaining provided by law.¹⁰² Even the formula adopted by the FAA in order to avoid the statutory limitations—that it could negotiate only over what provisions it would

⁹⁶ See H.R. 1576, 97th Cong., 1st Sess., § 5(a) (1981). This construction would have been based on the bill's granting the controllers the right not only to "bargain collectively" but also "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* Cf. *State v. Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974) (construing a Montana provision similar to § 5(a) of H.R. 1576 as granting public employees the right to strike); *Labor Management Relations (Taft-Hartley) Act*, §§ 7, 13, 29 U.S.C. §§ 157, 163 (1976). At a hearing on April 30, 1981, Poli stated that he did not interpret "concerted activities" as encompassing the right to strike but reaffirmed his advocacy of that right. See *Oversight on Grievances of Air Traffic Control Specialists: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 97th Cong., 1st Sess. 24-25 (1981) [hereinafter cited as *April 1981 Hearings*].

⁹⁷ See *supra* note 67.

⁹⁸ See *April 1981 Hearings*, *supra* note 96, at 18; *Aviation Daily*, Feb. 5, 1981, at 177; *DAILY LAB. REP. (BNA)* No. 148, at AA3 (Aug. 3, 1981).

⁹⁹ [Jan.-June] *Gov't Empl. Rel. Rep. (BNA)* No. 905, at 11 (1981).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 12.

¹⁰² Secretary Lewis listed "pay, any change in the present system of payment, retirement benefits, a change in annual and sick leave accruals, the 32-hour workweek, and changes in health and life insurance benefits" as beyond the scope of bargaining. *April 1981 Hearings*, *supra* note 96, at 13. Although employees have the right to bargain collectively with respect to "conditions of employment," 5 U.S.C. § 7102(2) (Supp. V 1981), any items specifically governed by statute, as are those enumerated by Secretary Lewis, are not covered by "conditions of employment," *id.* § 7103(a)(14)(c).

support for submission before the Congress¹⁰³—raised tensions under the limiting statutory policy.¹⁰⁴ Although the several purposes of the Clay bill are speculative, the bill never appeared to have much potential for contributing to a strike-free settlement.¹⁰⁵ Indeed, some PATCO members apparently considered the bill to have been still-born and a strike virtually inevitable.

That belief is reflected in a set of minutes of a meeting of the Sacramento Valley Cluster,¹⁰⁶ held on April 30, 1981. The minutes, which are set forth in the margin,¹⁰⁷ are important, for they reflect

¹⁰³ *October 1981 Hearings*, *supra* note 5, at 42. Several committee members charged that FAA Administrator Helms had himself "broke[n] the law" by bargaining over matters reserved for Congress and that he had been a hypocrite by maintaining that the controllers' violation of the law barred their reinstatement following their discharge. *Id.* at 36-40. *But cf. id.* at 39-40. (Representative Wolf, suggesting Helms would have been damned if FAA had not negotiated wages and now is being damned because he had). Helms explained that Representative Howard, Chairman of the Public Works Committee, had requested Helms and Secretary Lewis to "get into it" despite Helms's emphasis on his lack of authority to negotiate wages. *Id.* at 41.

¹⁰⁴ Such agreed-upon recommendations, even though explicitly subject to legislative approval (and rejection), would have placed enormous pressures on Congress to approve them and would, if rejected, have fed strike fever and helped to make a strike morally more acceptable to the employees and the public. Furthermore, such agreed-upon recommendations could have served as a basis for demands by other unions and groups. These considerations suggest that such recommendations regarding nonmandatory items put pressure on both the federal antistrike policy and the policy in favor of centralized determination of compensation. The situation facing the public sector "employer" is, accordingly, distinguishable from that facing a party willing to go beyond "mandatory items" in private sector bargaining.

¹⁰⁵ On the surface, the bill gave some legitimacy to a prohibitively expensive set of PATCO bargaining demands. It may have whetted the appetite of some controllers for dramatic gains when such gains would have collided with the budget-cutting thrust of national policy. On the other hand, controllers may have dismissed the bill as a gesture by a friend on the Hill, with little effect, except perhaps to deepen their cynicism about the legislative process—their substitute for a strike under existing law. They could, of course, point to the bill and claim that they had asked Congress to discharge its responsibility and that Congress's inaction left them no alternative but to strike. Furthermore, because the bill could have been construed as exempting controllers from the strike ban, *see supra* note 96 and accompanying text, the bill may have helped to undermine the foundation of that ban at a time when the ban could not be repealed but might be nullified, "in the streets."

¹⁰⁶ A "cluster" consisted of a group of air traffic controllers in a particular region, constituted solely for strike purposes. The entire country had been broken down into regions, each with its own cluster. The cluster regions were wholly strike-oriented and independent of the structure of both the FAA and PATCO. The clusters' leaders were known as "choir boys." We have been advised by a former air traffic controller that communication among clusters throughout the country was excellent.

¹⁰⁷ These minutes, we have been advised, were produced in the course of discovery in the action between the Air Transport Association ("ATA") and PATCO, which led to the opinion in *Air Transp. Ass'n v. PATCO*, 516 F. Supp. 1108 (E.D.N.Y.), *aff'd*, 667 F.2d 316 (2d Cir. 1981). The minutes first fix the location of the cluster's strike hall, and then read, in part, as follows:

NEGOTIATIONS UPDATE

The negotiations broke off on April 28. Two (2) polarized positions exist and there is

the attitudes of the participants and present such a sharp contrast to the no-strike pledge given by Mr. Poli to a congressional committee on the same day.¹⁰⁸ The obvious conclusion is that the Sacramento cluster (as well as PATCO) was indeed interested in striking, that the participants were aware of statutory limitations on the FAA's bargaining authority, and that, perhaps because of past practices by the executive branch, the participants were unaware of, or unconcerned with, potential sanctions against strikes.

As already indicated, on April 30, 1981, the day of the Sacramento Valley Cluster meeting, a subcommittee of the House Committee on Post Office and Civil Service held hearings on the air controllers matter. These hearings in part confirmed the Sacramento minutes by highlighting the large financial spread between the government and PATCO.¹⁰⁹ President Poli's testimony once again seemed both to disclaim any strike plans and to hint at the possibility of a strike.¹¹⁰

no possibility of resolving items through negotiations. On one hand, PATCO has made its demands, and can't withdraw. FAA is boxed in by law, and can't negotiate. Salary demands, work hours and retirement benefits are restricted by law.

LEGISLATION

Subcommittee hearing due to start April 30. There is a very slim possibility legislation will pass the Reagan-controlled Congress, especially in light of Reagan's economic policies. There is a slim chance to get it passed through the House. Chances in Republican Senate almost impossible. Even if legislation were to pass it would take 12-18 months to pass. No way PATCO membership will wait that long. *We must give them cause to pass this legislation.*

Congress can move in an emergency situation. In 1970, when the postal workers went out on strike, Congress passed legislation in 3 days. *Probably the only way we will get anything is "in the streets."*

Minutes of Sacramento Valley Cluster Meeting 1 (Apr. 30, 1981) (on file with *The University of Chicago Law Review*) (emphasis added). The rest of the minutes was concerned with PATCO's plans for achieving its demands "in the streets."

¹⁰⁸ See *April 1981 Hearings, supra* note 96, at 17 (statement of Robert Poli, PATCO).

¹⁰⁹ Secretary Lewis estimated that PATCO's proposals would cost \$1.1 billion in the first year; President Poli estimated a total of \$1.7 billion for three years. *Id.* at 8 (statement of Drew Lewis, Department of Transportation ("DOT")), 24 (statement of Robert Poli, PATCO). Furthermore, the Office of Management and Budget ("OMB") expressed the Reagan Administration's opposition, "as a matter of principle," to the pay proposals, urging consideration of them as part of the Administration's overall pay reform proposal, H.R. 3140. *Id.* at 7 (statement of Rep. Oskar quoting letter from OMB to House Committee).

¹¹⁰ Poli stated: "I will say again, we are not planning a strike, but I will say . . . there is a certain unrest among the membership of our organization." *Id.* at 17 (statement of Robert Poli, PATCO). Rank-and-file controllers in the audience strengthened those intimations by indicating that a strike was a serious possibility. See [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 911, at 13-14 (1981). Earlier, at about the time bargaining with the FAA began, Poli acknowledged in an interview that strikes against the federal government were prohibited but claimed "the only illegal strike is an unsuccessful one." *Aviation Daily*, Feb. 5, 1981, at 177 (quoting R. Poli).

From late in April until the strike in August of 1981, negotiations were accompanied by developments that alternately raised and lowered strike fears. On the basis of the evidence we have examined, we cannot be certain whether any of the actions ostensibly directed at achieving a strike-free settlement were, in fact, part of a charade disguising different purposes: for PATCO, the nullification of the strike ban or of the restrictive federal framework for bargaining; for the government, the goading of PATCO into a self-destructive strike. The last charge, made by PATCO after the strike,¹¹¹ does not, however, appear to have any evidentiary support. The Administration seemed to be turning square corners as the negotiations reached their climax and denouement.

PATCO, by contrast, lurched from the confrontational to the conciliatory and back. It is not clear whether these shifts reflected tactical posturings by the leadership or the difficulties the leadership faced in seeking to maintain a steady course when many of its constituents were so deeply discontented that they were willing to strike even in defiance of the law. Nevertheless, the last chapter of the negotiations in the spring and summer of 1981 suggests that PATCO's leadership was bent on striking unless the government substantially met its demands. On April 28, 1981, after approximately thirty-seven bargaining sessions, some assisted by federal mediators, PATCO and the FAA suspended negotiations.¹¹² A chorus of strike threats followed. At the union's convention May 22-25,¹¹³ its executive board disclosed that it had fixed June 22 as the date for "possible" strike action.¹¹⁴

These events prompted the FAA to instruct supervisors to remind each controller that a strike would violate federal law.¹¹⁵ The union countered by confirming June 21 as the deadline for beginning strike preparations, noting that it too had advised its members that a strike would be illegal and that PATCO itself, contrary

¹¹¹ *October 1981 Hearings*, *supra* note 5, at 182.

¹¹² [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 916, at 7 (1981); see [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 915, at 18 (1981).

¹¹³ [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 916, at 7 (1981).

¹¹⁴ [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 915, at 18 (1981). The membership, although not formally endorsing a June 22 deadline, enthusiastically supported the executive board's report. *Id.* Poli is quoted as having told the convention, "If they [FAA] do not come to their senses, I vow to you that the skies will be silent. . . . By midnight of June 21, if we have not received something to present to the members, I will order the countdown to begin immediately." *Id.* (quoting R. Poli). Poli had previously advised an FAA representative of his intention to announce a strike date. *October 1981 Hearings*, *supra* note 5, at 177-78.

¹¹⁵ [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 916, at 7 (1981).

to Helms's charge, would not seek to evade any responsibility.¹¹⁶ Helms sent a personal letter to each controller's home, describing the "ramifications" of a strike.¹¹⁷ Although these warnings built a record, they scarcely reduced strike fears, which heightened during June. Travelers, shippers, and railroads changed plans and prepared for a strike.¹¹⁸ The instability produced by the overhanging threat itself undercut one of the purposes behind the antistrike policy—maintaining public confidence that vital services would not be interrupted. And the instability could in turn be traced, at least in part, to past executive leniency with respect to "job actions" by the air traffic controllers.

Early in June, the suspended negotiations resumed but soon collapsed after PATCO rejected an FAA offer.¹¹⁹ A last minute settlement was, however, reached on June 22, at 5:30 A.M., ninety minutes before the strike deadline.¹²⁰ In the face of that settlement, both sides took steps ostensibly aimed at supporting the newly reached agreement and averting a strike. President Poli endorsed the agreement and announced that he would recommend¹²¹ and work for¹²² ratification by PATCO's members. The White House, presumably seeking to encourage ratification, endorsed the agreement and threatened reprisal against a strike.¹²³

Poli's acceptance of the settlement may have been prompted by the outcome of a telephone poll, which showed that seventy-five percent of the members supported a strike, less than the eighty percent an earlier resolution had prescribed for a strike call.¹²⁴

¹¹⁶ *Id.*

¹¹⁷ *October 1981 Hearings, supra* note 5, at 60. Helms indicated that the controllers might have been confused by the union's advice—even though they had been warned by the government "numerous times" in advance. *Id.* at 61-63. Whatever the source of the confusion, a small and thoroughly unscientific sampling (by these authors) of controllers, strikers and nonstrikers, and union officials close to the scene indicated that the strikers had believed that they would be back at work in several days.

¹¹⁸ [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 944, at 5-6 (1982).

¹¹⁹ [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 918, at 10 (1981).

¹²⁰ *Id.* at 9. The Department of Transportation estimated the benefits involved would cost \$40.3 million during the first year of a 3¾ year agreement. *Id.* Poli in general terms disputed that estimate. *October 1981 Hearings, supra* note 5, at 178. In any event, the package was far slimmer than the union's opening demand. *See supra* note 109.

¹²¹ [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 918, at 9 (1981).

¹²² *See October 1981 Hearings, supra* note 5, at 66.

¹²³ Deputy White House Press Secretary Larry Speakes referred to the "'generous wage offer,'" described the legal arsenal that the Reagan Administration would use against strikers, and warned that the President will "not 'tolerate an illegal strike.'" [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 918, at 11 (1981) (quoting L. Speakes).

¹²⁴ [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 920, at 16 (1981). Poli later explained that he accepted the settlement because Lewis assured him that if he did there would be no

Rank-and-file opposition soon surfaced, however, and the settlement crumbled. On July 2, the nine members of PATCO's executive board, which included President Poli, who abstained,¹²⁵ unanimously resolved to ask that the members "overwhelmingly reject" the settlement.¹²⁶ This resolution was announced to a cheering, strike-chanting meeting of some 500 local leaders. There, Poli himself received a standing ovation, after being "forgiven" by the board for his prior endorsement of the package, in view of the surrounding circumstances.¹²⁷ This resolution complained generally that the proposed settlement "does not address . . . fundamental issues."¹²⁸ But the two important missing elements appeared to have been a reduction in the work week and a separate higher pay schedule.¹²⁹ In the ratification vote, 13,495—95.3%—voted against the settlement.¹³⁰

After the failure of ratification, fifty-five Senators and fifteen Representatives sought to avert the approaching work stoppage. In similar letters sent to the FAA for countrywide distribution to controllers, they described the rejected settlement as fair, reminded the controllers of the sanctions against strikes by federal employees, promised to encourage the President to "use the full force of the law," and warned that Congress would not be "receptive to any demands negotiated by force."¹³¹ At a press conference on July 31, however, Poli rejected the proposal and warned that there would be an immediate strike vote for authorization of a strike to begin at 12:01 A.M. on Monday, August 3, unless a settlement was reached.¹³² Shortly thereafter, PATCO rejected the government's

action taken against wildcat strikers. See *October 1981 Hearings*, *supra* note 5, at 179 (statement of Robert Poli, PATCO). The accuracy of a report of the later strike vote was not free from doubt. See *infra* note 132.

¹²⁵ *October 1981 Hearings*, *supra* note 5, at 179 (statement of Robert Poli, PATCO).

¹²⁶ [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 920, at 16 (1981).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 923, at 5 (1981). Poli, after noting but not explicitly denying charges that he had encouraged a no vote, made this somewhat hazy statement: "The vote of the membership of this organization was 95 percent of the members rejecting that contract. I don't think that Bob Poli had to go around the country and preach to the members to reject it. That is the story of what happened on June 22." *October 1981 Hearings*, *supra* note 5, at 179.

Soon after this rejection, Representative Clay introduced H.R. 4332, which was essentially the same as H.R. 1576, see *supra* notes 95-98 and accompanying text, except for the deletion of both the two top grades of pay and the language implying a right to strike. See H.R. 4332, 97th Cong., 1st Sess. (1981); 127 CONG. REC. H5430 (daily ed. July 30, 1981).

¹³¹ [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 923, at 6 (1981).

¹³² *Id.* at 5. Poli, in reply to a question from Representative Derwinski, testified that he

request that negotiations continue for a week¹³³ and allowed only three days to work out a substitute for an agreement whose development had taken six months.¹³⁴

A substitute agreement did not emerge during the three days stipulated by PATCO. And so at dawn on August 3, 1981, the strike began, with approximately 13,000 of the 16,400 controllers in the bargaining unit participating.¹³⁵

C. The Immediate Responses to the Strike

On the same day, President Reagan, reminding the strikers of their oaths, gave them forty-eight hours—until August 5, 11:00 A.M.—in which to return to work or be discharged.¹³⁶ Approximately 1200 controllers returned to work after that warning.¹³⁷

To deal with recalcitrants, the government quickly activated a formidable set of weapons against PATCO, its officers, and individual controllers. In a short period beginning on August 3, the Department of Justice filed actions for temporary restraining orders or injunctions in sixty federal courts.¹³⁸ The Justice Department obtained civil and criminal contempt citations, and it threatened criminal prosecutions.

Secretary of Transportation Drew Lewis announced on August 5 that “‘the strike is over’”¹³⁹ and began to send dismissal letters.¹⁴⁰ These steps, together with the President’s ultimatum of August 3, transformed the legal situation. Having declared the strike ended and, what was more important, having discharged the strikers, the government itself prevented individual controllers

had no documentation of the strike votes of June 22 and August 3, but that if the compilations that had been made were still available, he would provide them. *See October 1981 Hearings, supra* note 5, at 181. Poli did not provide any compilations for Representative Derwinski. Letter from Joseph A. Fisher, Minority Staff Director for the House Comm. on Post Office and Civil Service, to Roy B. Underhill (Aug. 19, 1982) (on file with *The University of Chicago Law Review*). Letters by these authors to PATCO concerning the compilations have gone unanswered.

¹³³ *October 1981 Hearings, supra* note 5, at 63-64 (statement of J. Lynn Helms, FAA).

¹³⁴ *Id.* at 66 (news release by Sec. Lewis).

¹³⁵ [July-Dec.] Gov’t Empl. Rel. Rep. (BNA) No. 924, at 5 (1981).

¹³⁶ President’s Statement Concerning Air Traffic Controllers Strike, 17 WEEKLY COMP. PRES. DOC. 845 (Aug. 3, 1981).

¹³⁷ *See PATCO v. United States Dep’t of Transp.*, 529 F. Supp. 614, 615 (D. Minn. 1982).

¹³⁸ *See PATCO v. Federal Labor Relations Auth.*, 685 F.2d 547, 551 n.5 (D.C. Cir. 1982); *United States v. PATCO*, 524 F. Supp. 160, 163 n.2 (D.D.C. 1981).

¹³⁹ *United States v. PATCO*, 524 F. Supp. 160, 164 (D.D.C. 1981) (quoting Sec. Lewis).

¹⁴⁰ *See* [July-Dec.] Gov’t Empl. Rel. Rep. (BNA) No. 924, at 46 (1981), for a sample letter.

from going back to work in accordance with court decrees. Consequently, in imposing sanctions for civil or criminal contempt, courts could properly use August 5, the date of Secretary Lewis's announcement, as the time when legally significant defiance of the prior injunctions against the strikes ended.¹⁴¹

The Department of Transportation ("DOT") also adopted a strict position. It rejected fact finding, mediation, or bargaining with PATCO so long as President Poli did not give a back-to-work order.¹⁴² In addition, the Department petitioned for, and ultimately secured, PATCO's decertification as the controllers' bar-

¹⁴¹ United States v. PATCO, 524 F. Supp. 160, 164-65 (D.D.C. 1981).

Even though PATCO and other contemnors could no longer engage in a practically significant compliance with the back-to-work order, their conduct might have violated other provisions of the temporary restraining order. The court, although acknowledging this point, declined to impose fines for "collateral activities," such as picketing, after finding that they had not substantially interfered with air traffic or with controllers wishing to go back to work. *Id.* at 164 n.5. The court did not mention, however, that for some time after the Secretary's announcement, strike related activities continued and that PATCO—which had started the strike—had not declared it ended. *See, e.g.*, R. Poli, Presidential Update (Sept. 25, 1981) (addressed to "Brothers and Sisters," *id.* at 1, providing a status report, and stating "[a]s the strike continues," *id.* at 4) (on file with *The University of Chicago Law Review*); *see also* R. Poli, Presidential Update (Oct. 8, 1981) (addressed to "Dear Brothers and Sisters" and stating "I cannot tell you that the strike will end soon . . ." *Id.* at 1) (on file with *The University of Chicago Law Review*). Nor did the court consider whether an unequivocal announcement by PATCO ending the strike might have brought full air control service closer by leading to a resumption of fruitful negotiations, the return of controllers eligible for reinstatement, or some form of amnesty for the others. *Cf. Adams v. Smith*, No. NY075281F0424, slip op. at 6 (U.S. Merit Systems Protection Bd., N.Y. Reg. Off. Oct. 14, 1982), upholding discharge of controllers who would have been allowed to return to work had they exercised their option to do so sometime after August 6 and noting that neither the union's going out of existence nor its abandonment of the strike (presumably before the expiration of the option) had been shown. The Department of Justice apparently did not invite the court to explore such labor-relations considerations. The Department instead conceded that its request for a preliminary injunction was concerned primarily with matters collateral to the ending of the strike—interference by picketing after August 5, and possible dissipation of the "Controllers Benefit Fund." (See *infra* note 157 for discussion of this fund.) The court denied any relief, for lack of proof of irreparable injury. *United States v. PATCO*, 524 F. Supp. at 162-63. In the end, the court, principally on the basis of its reasoning about the ending of the strike, limited PATCO's civil-contempt fine to \$750,000 and Poli's to \$2000—for violating the temporary restraining order for two days, ending on August 5. *Id.* at 165. Essentially the same reasoning was adopted in *United States v. PATCO Local 504*, 112 L.R.R.M. (BNA) 3196 (10th Cir. 1983), vacating fines imposed for civil contempt.

The varying results of requests for injunctions against picketing in other courts are summarized in [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 925, at 11 (1981).

¹⁴² [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 924, at 5 (1981). The Administration was not required to bargain, even within the sphere of mandatory bargaining, while PATCO was engaged in an illegal strike. *See* 5 U.S.C. § 7103(a)(2)(B)(v) (Supp. V 1981) (excluding from the definition of "employee" any striker); 5 U.S.C. § 7103(a)(4)(D) (Supp. V 1981) (excluding from the definition of "labor organization" an organization that participates in a strike).

gaining representative.¹⁴³

There was widespread public support for the Administration's unyielding position.¹⁴⁴ Two elements seem to have been crucial for that support. First, the strike appeared to lack much moral content. The salaries and working conditions of the strikers scarcely generated sympathy among a public conscious of high levels of inflation and unemployment. Moreover, the strikers had not only defied the law but also, as constantly emphasized by the Administration, had broken their oath; they had done so after Poli's approval of a proposed agreement undercut their claim that their basic goal had not been money but the safety of the system and elimination of working conditions destructive of safety and the health of the controllers. Finally, the strike had directly challenged a President, who, having survived assassination, was at the peak of his popularity, which had been achieved in part because of his campaign against government spending.¹⁴⁵

¹⁴³ PATCO v. Federal Labor Relations Auth., 685 F.2d 547, 551 (D.C. Cir. 1981). On August 3, 1981, in response to an FAA charge filed that day, the FLRA Regional Director issued a complaint against PATCO, alleging strike activity prohibited by 5 U.S.C. § 7116(b)(7) (Supp. V 1981) and seeking revocation of PATCO's certification under the 1978 Reform Act. PATCO v. Federal Labor Relations Auth., 685 F.2d at 552. See *id.* for a detailed description of the procedure involved. Furthermore, the opinion describes the differences reflected in the three opinions by the FLRA members, issued on October 22, 1981, with respect to the extent of the FLRA's discretion to withhold decertification of a union in wilful violation of the strike prohibition. *Id.* at 554-55. Chairman Haughton's conditional dissent apparently invited, without success, PATCO to retreat.

¹⁴⁴ On October 6, the FAA Administrator claimed that his mail was running 1000 to 1 in support of the Administration's handling of the strike. *October 1981 Hearings, supra* note 5, at 59 (statement of J. Lynn Helms, FAA). Furthermore, a Gallup poll, taken shortly after the strike began and published in *Newsweek*, found that 57% approved of President Reagan's handling of the strike, and 67% thought the strike was wrong. *A Newsweek Poll: Support for the President*, NEWSWEEK, Aug. 17, 1981, at 21. A Harris poll published in the *New York Times* found that 51% opposed the strike while 69% thought President Reagan had a right to fire the strikers. *N.Y. Times*, Aug. 21, 1981, at A18, col. 6.

Editorials in the major newspapers were strongly antistrike. The *Washington Post* characterized the strike as a "wildly misconceived venture that deserves the government's extraordinarily severe response." *Washington Post*, Aug. 4, 1981, at A14, col. 1. The *New York Times* referred to the strike as an attempted "holdup." *N.Y. Times*, Aug. 4, 1981, at A14, col. 1. Editorials in *The Wall Street Journal* and the *Chicago Tribune* also disapproved of the strike. *Wall St. J.*, Aug. 6, 1981, § 1, at 22, col. 1; *Chicago Trib.*, Aug. 5, 1981, § 1, at 22, col. 1. An unscientific sampling of newspapers across the country showed overwhelming support for the Administration's position. See 12 EDITORIALS ON FILE 886, 886-95 (1981).

Not all newspapers that endorsed the initial discharge of the strikers agreed with President Reagan's continuing hard-line stance against rehiring any of the strikers. *Id.*

¹⁴⁵ Poli himself offered some of these reasons in his "post-mortem" of the strike. See Poli, *A PATCO Post-Mortem: Why the Controllers' Strike Failed*, *N.Y. Times*, Jan. 17, 1982, at F3, col. 2.

The second factor behind public support for the Administration was its capacity to keep the planes flying. Under the DOT's contingency plans, supervisors, military controllers, and nonstriking controllers assumed the responsibilities of the strikers. Traffic was, of course, substantially reduced, but the national average of arrivals and departures approached seventy-five to eighty percent of prestrike levels by October 1981.¹⁴⁶ Although PATCO and others, here and abroad,¹⁴⁷ raised questions about safety, the FAA had taken extra precautions to decrease the risk of accidents.¹⁴⁸ A prudent concern for safety called for caution during the adjustment to a new operational situation; political considerations pointed in the same direction. An accident attributable to air controller error, regardless of its true cause, not only would have involved substantial political costs but also would have put pressure on the Administration to soften its opposition to the reinstatement of the strikers. No such accident occurred.

It was this combination of moral appeal and operational effectiveness that contributed to the Administration's quick success. As we have seen, the initial reactions of influential newspapers to the Administration's position was, on the whole, positive.¹⁴⁹ To be sure, representatives of organized labor, both here¹⁵⁰ and abroad,¹⁵¹

¹⁴⁶ The impact on particularly busy airports, such as O'Hare (Chicago), was much more severe. Furthermore, carriers tended to concentrate reductions on smaller equipment, hence the number of passengers was reduced less than the number of departures. Finally, a precise quantification of strike effects was complicated by the changes in service patterns attributable to deregulation. See Memorandum from Office of Economic Analysis to Civil Aeronautics Board, *The Impact of the PATCO Job Action: August through October* (Feb. 5, 1982), reprinted in *Status of and Future Plans for the FAA's Air Traffic Control System* (pt. 2): *Hearings Before the Subcomm. of Gov't Activities and Transportation of the House Comm. on Gov't Operations*, 97th Cong., 2d Sess. 178 (1982) [hereinafter cited as *1982 Hearings*]; Memorandum from Office of Economic Analysis to Civil Aeronautics Board, *The Impact of the PATCO Job Action: November through March* (July 16, 1982) (on file with *The University of Chicago Law Review*).

¹⁴⁷ See *October 1981 Hearings*, *supra* note 5, at 131, 134, 162-63, 174, 206; *PATCO's Spotty Aid Abroad*, *Bus. Wk.*, Aug. 31, 1981, at 86; *N.Y. Times*, Aug. 11, 1981, at A22, col. 1.

¹⁴⁸ See *Status of and Future Plans for the FAA's Air Traffic Control System* (pt. 1): *Hearings Before the Subcomm. on Gov't Activities and Transportation of the House Comm. on Gov't Operations*, 97th Cong., 1st Sess. 10 (1981) (statement of J. Lynn Helms, FAA) [hereinafter cited as *September 1981 Hearings*]. The National Transportation Safety Board, while agreeing that the strike had not led to unsafe conditions, emphasized that the stress and fatigue of the curtailed work force could eventually become a hazard. See NATIONAL TRANSPORTATION SAFETY BOARD, SPECIAL INVESTIGATION REPORT: AIR TRAFFIC CONTROL SYSTEM 32-33 (Dec. 8, 1981), reprinted in *1981-82 Hearings*, *supra* note 5, at 147, 180-81.

¹⁴⁹ See *supra* note 144.

¹⁵⁰ DAILY LAB. REP. (BNA) No. 151, at AA-3 (Aug. 6, 1981); [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 924, at 12 (1981).

reacted negatively. But their opposition seemed essentially ritualistic, except for some short-lived interference by controllers in other countries.¹⁵² By October, PATCO appeared to lack leverage that it could exert directly to save its members' jobs or its own existence as an organization.¹⁵³

D. The Strike: Looking Backwards

PATCO and many of its members had obviously miscalculated when they had gambled that their power would force the Administration to capitulate to some or all of the union's demands. We propose to explore the elements that entered into PATCO's miscalculation. Such an exploration may yield more general lessons about public administration and policy while cautioning against extravagant inferences from this melancholy business.

1. *The Unanticipated Nature of the Government's Response.* PATCO apparently counted on a continuation of the government's prior unwillingness to enforce the antistrike law vigorously. These expectations had a somewhat plausible basis. As we have seen, prior job actions, including those by the controllers, had not resulted in massive discharges and replacements.¹⁵⁴ The leniency of the past may have reflected a fear of the controllers' capacity to cripple air transportation. The previous calculus had been transformed, however, by a cluster of factors: the government's strike plans; overmanning of the air control system, both among rank-and-file and supervisors; and the availability of military personnel as replacements.¹⁵⁵ In addition, the new administration looked to

¹⁵¹ DAILY LAB. REP. (BNA) No. 235, at A-3 (Dec. 8, 1981) (Soviet delegate to Freedom of Association Commission of the International Labor Organization assailed the U.S. government's "repression" of the strikers); see N.Y. Times, Nov. 11, 1981, at 10, col. 1.

¹⁵² See *PATCO's Spotty Aid Abroad*, *supra* note 147, at 86.

Poststrike proponents of compassion toward the discharged controllers relied on past governmental leniency as evidence of the government's lack of "clean hands." For example, Representative Ford suggested that the Administration was being inconsistent with past practice, which had suggested that an air controller "could demonstrate his unhappiness for a reasonable period." *October 1981 Hearings*, *supra* note 5, at 59. He immediately disclaimed any suggestion that striking against the government was not a serious offense. *Id.*

¹⁵³ PATCO also had problems with money. Faced with \$150 million in fines, PATCO filed for reorganization on Nov. 25, 1981. N.Y. Times, Nov. 26, 1981, at A20, col. 1. On July 2, 1982, \$40 million dollars in debt, PATCO filed for bankruptcy. N.Y. Times, July 3, 1982, at 7, col. 1.

¹⁵⁴ See Comment, *supra* note 7.

¹⁵⁵ For a summary of this shift as described by Langhorne M. Bond, FAA Administrator under President Carter, see Francke, *FAA's Finest Hour . . .*, J. ATC, Jan.-Mar. 1982, reprinted in *1981-82 Hearings*, *supra* note 5, at 386. For a thorough discussion of the use of

new constituencies and reflected changes in the national mood that worked against the continuation of past leniency towards or "appeasement" of those who had broken the antistrike oath and the law. The unsuccessful response of the Carter Administration to the dreadful dilemma of the Iranian hostages invited strong action against lawbreakers, for both domestic and international reasons. Finally, the issues raised by an unlawful strike against the federal government and by a violation of the federal oath of office were well suited to the communication skills of President Reagan.

PATCO's leaders and its members appear, both before and immediately after the strike, to have been oblivious to such considerations. Certainly, some of their rhetoric must be discounted as the posturing that precedes strikes. But the strike itself and subsequent conversations with controllers suggest that PATCO and its supporters believed their own confident statements that a strike would cripple the system and inflict incalculable damage on the economy.¹⁵⁶ PATCO appears to have realized before the strike that some of its striking members might forfeit their jobs, but PATCO also appears to have counted on their indispensability, which would force the government to grant amnesty to almost all strikers. For the few who might sacrifice their jobs, PATCO sought to establish extraordinary protection through a fund designed to replace income lost by discharged air controllers.¹⁵⁷ The anticipated governmental leniency toward most strikers, combined with PATCO's promised economic safety net for the others, naturally tended to undercut one of the deterrents to striking in 1981.

military forces to replace striking public employees, see Jacobs, *The Role of Military Forces in Public Sector Labor Relations*, 35 INDUS. & LAB. REL. REV. 163 (1982).

¹⁵⁶ See *April 1981 Hearings*, *supra* note 96, at 14 (statement of Robert Poli, PATCO); [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 911, at 13 (1981); JONES REPORT, *supra* note 7, at 9, reprinted in *1981-82 Hearings*, *supra* note 5, at 411; Magnuson, *Turbulence in the Tower*, TIME, Aug. 17, 1981, at 14, 20 (quoting a Houston controller as saying: "Where are they going to get 13,000 controllers and train them before the economy sinks? The reality is, we are it. They have to deal with us."); Chicago Trib., Aug. 20, 1981, § 1, at 15, col. 4 (column by former PATCO local president suggesting PATCO expected leniency from the government, on the basis of PATCO's success in the 1970 sick-out); [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 928, at 7 (1981) (Poli acknowledges that the strike "is taking us longer than we thought" but claims that the aviation industry "needs us desperately").

¹⁵⁷ See *supra* note 74. PATCO, a corporation, filed for bankruptcy on July 2, 1982. In the bankruptcy proceedings, this fund was held to be available for PATCO's creditors. See *In re PATCO*, 112 L.R.R.M. (BNA) 2156 (Bankr. D.D.C. 1982). Dismissing several technical difficulties, the court found the benefit fund to be an express trust but concluded that its purpose, to provide benefits to participants in an illegal strike, was repugnant to public policy and could not properly be effectuated. Similarly, considerations of public policy, as well as the clean hands doctrine, required that the fund remain as a union asset instead of being returned to the members whose dues had created the fund.

2. *Pre-election Conduct of the President.* The conduct of candidate Ronald Reagan and his staff might also have contributed to PATCO's willingness to strike. In connection with a successful bid for PATCO's support in the 1980 election, Governor Reagan, in a highly publicized letter dated October 20, 1980,¹⁵⁸ referred to the deplorable state of the nation's air traffic control system and noted that he had been "thoroughly briefed" by his staff that "too few people working unreasonable hours with obsolete equipment [has] placed the nation's air travellers in unwarranted danger." He pledged that "my administration will work very closely with you to bring about a spirit of cooperation between the President and the air traffic controllers," and promised remedial action.¹⁵⁹ Realists could dismiss all this as campaign oratory, but not without some additional denigration of the political process, on which federal employees are especially dependent—in the absence of a right to strike. It would not have been implausible for some controllers to have read into Reagan's generalities a promise of a quid pro quo when and if he became President. The controllers may have expected to reap extraordinary rewards without a strike for having broken ranks with most of organized labor and supported candidate Reagan.

In any event, some of those negotiating with PATCO have privately described its unusual unresponsiveness to claims that the government's "bag was empty," and have ascribed that attitude to the union leaders' belief that the President would somehow redeem his campaign pledge.¹⁶⁰ Perhaps, alternatively, PATCO's leaders expected that if they did strike, the Reagan Administration would help protect the jobs of the strikers and the representative status of their union or, at a minimum, that the President himself would stay above the battle—possibly conciliating, but not becoming

¹⁵⁸ This letter appeared as part of an advertisement in the *New York Times*. N.Y. Times, Aug. 16, 1981, at 69, col. 1.

¹⁵⁹ *Id.*

¹⁶⁰ Supporting this belief may have been a letter from Richard Leighton, PATCO's general counsel, to Michael Balzano, labor contact for candidate Reagan, setting forth Leighton's understanding of agreements reached with the Reagan campaign organization. See Letter from Richard J. Leighton to Michael Balzano, Ph.D. (Oct. 20, 1980). That letter stated that if elected, Reagan would give PATCO a voice in the choice of a new FAA Administrator and allow PATCO a "reasonable opportunity" to persuade the Reagan Administration to support any future legislation concerning the air controllers, including legislation giving PATCO bargaining rights like those of the postal workers and a limited right to strike. See *Aviation Daily*, June 23, 1981, backs of pp. 290-92. Both Balzano and Leighton later tried to minimize the significance of that letter. See *Aviation Daily*, July 1, 1981, at 1-2. Leighton even wrote a letter in the form of a brief to Attorney General William F. Smith, disclaiming any law-breaking. See *Aviation Daily*, July 6, 1981, backs of pp. 18-23.

their most effective adversary. Finally, by agreeing that PATCO's primary goal was not money but the promotion of public safety and humane working conditions, candidate Reagan conceivably may have helped persuade some controllers of the moral justification for an illegal strike.¹⁶¹

3. *The Role of Representative Clay.* Representative Clay may also have helped raise strike fever. At PATCO's 1980 National Convention, according to a newsletter distributed in 1980 to PATCO members, Clay provided guidelines for ruthless self-seeking:

"Your plan must be one which completely revises your political thinking. It should start with the premise that you have no permanent friends, no permanent enemies, just permanent interests. It must be selfish and pragmatic. You must learn the rules of the game and learn them well:

"Rule No. 1 says that you don't put the interest of any other group ahead of your own. *What's good for federal employees must be interpreted as being good for the Nation.*

"Rule No. 2 says that *you take what you can, give up only what you must.*

"Rule No. 3 says that *you take it from whomever you can, whenever you can, however you can. . . . If you are not prepared to play by the rules then you have not reached the age of political maturity and perhaps you deserve everything that's happening to you*"¹⁶²

4. *Job-related Grievances.* Finally, good faith dissatisfaction with salaries and working conditions was an important factor in the ultimate strike decision. Indeed, it is doubtful that thousands of controllers, without a genuine sense of grievance, would have

¹⁶¹ It is true that by the middle of June the President's staff had disavowed any pre-election deal, see *Aviation Daily*, July 1, 1981, at 1, and that the President and his men, as the strike came closer, gave clear notice to the strikers of the Administration's ultimate response. By then, however, the union leadership may have been insensitive to such signs, for strike momentum was so strong that the leadership could abort a strike without loss of face and power only by reporting significant government concessions.

¹⁶² PATCO Local 301, Chicago Center, PATCO News 8 (1980) (quoting Representative Clay (emphasis added)) (on file with *The University of Chicago Law Review*). Mr. Clifton von Kaan, President, National Aeronautic Association, referred to that advice in his testimony on April 30, 1981, before the Subcommittee on Compensation. See *April 1981 Hearings*, *supra* note 96, at 39. Von Kaan added: "Now the PATCO President has told the Congress in carefully chosen words that unless the controllers have their way they will wreak more havoc on the public and the air transport system because the only illegal strike is an unsuccessful one." *Id.*

broken their oaths and taken the risks posed by striking.¹⁶³ The controllers were, after all, paid well relative both to other government personnel and to the general public. Many of them had had military service and viewed themselves as patriotic Americans. They had supported a candidate whose rhetoric reflected the values of patriotism and of the middle classes, into which they seemed comfortably to fit. They did not seem to be the stuff out of which wholesale civil disobedience came without some sense of grievance that apparently lent some moral justification to their conduct. True, moral indignation may have been in part a cover for a pervasive human desire to obtain more pay for less work.¹⁶⁴ But the events objectively viewed and our discussions with air controllers suggest to us that the sense of dissatisfaction was deep and genuine, whether or not it was justified. Furthermore, there was some basis for dissatisfaction—which should not, however, be confused with justification for the strike. Indeed, for more than a decade, various task forces have expressed concern over justifiable disaffection among the air controllers and unsatisfactory relationships between labor organizations and the FAA management.¹⁶⁵

¹⁶³ See JONES REPORT, *supra* note 7, at 1, 10-11, 18-20, 38, 39, reprinted in 1981-82 Hearings, *supra* note 5, at 403, 412-13, 420-22, 440, 441 (noting that controllers, strikers as well as nonstrikers, enjoy their work but nonetheless have a negative attitude toward their job).

A recurring debate between PATCO and the FAA has concerned the stress involved in the controllers' work and the resulting incidence of "burnout." PATCO has maintained that controlling air traffic is uniquely stressful, and that claim has been the backbone of its arguments for special treatment. See *April 1981 Hearing*, *supra* note 96, at 15-16, 17-18. Studies on this issue, although finding some significant differences between the health of air controllers and that of the general population, do not provide strong support for PATCO's claim. See Staten & Umbeck, *Information Costs and Incentives to Shirk: Disability Compensation of Air Traffic Controllers*, 72 AM. ECON. REV. 1023 (1982); R. Rose, C. Jenkins, & M. Hurst, *Air Traffic Controller Health Change Study* (1978) (FAA Office of Aviation Medicine Report No. AM-78-39) [hereinafter cited as Rose Report]; R. Smith, *Stress, Anxiety, and the Air Traffic Control Specialist* (1980) (FAA Office of Aviation Medicine Report No. AM-80-14).

¹⁶⁴ The Jones report concluded: "PATCO . . . usurped the 'concern for people' role and considered itself sufficiently powerful to conduct an illegal strike on August 3, 1981." JONES REPORT, *supra* note 7, at 1, reprinted in 1981-82 Hearings, *supra* note 5, at 403. That report also indicated that managers, sharing the controllers' desires for congressional authorization of better equipment and more staff, had "not so subtly encouraged" prior job actions and the concessions won. *Id.* at 8, reprinted in 1981-82 Hearings, *supra* note 5, at 410.

¹⁶⁵ See, e.g., AIR TRAFFIC CONTROLLER CAREER COMMITTEE REPORT (1970) [hereinafter cited as CORSON REPORT], reprinted in 1981-82 Hearings, *supra* note 5, at 545.

Although that report noted that the job demands made on controllers are present in some other jobs, it concluded that controllers' work is distinctive in the "concentration and intensity of such demands." *Id.* at 11, reprinted in 1981-82 Hearings, *supra* note 5, at 571. See JONES REPORT, *supra* note 7, at 5-6, reprinted in 1981-82 Hearings, *supra* note 5, at 407-08.

The *Jones Report* is the latest and most completely documented statement pointing to managerial deficiencies as a factor in the 1981 strike. Although methodological questions might be raised about that report,¹⁶⁶ it has, for several reasons, an immediate significance that is independent of such questions. First, it appears to be the umpire's call in a highly charged and complex controversy. Since the umpires were picked by the government, one would scarcely expect them to call the "close ones" against the government. Their criticisms of management thus tend to have considerable force. Second, the *Jones Report* echoes, and is reinforced by, earlier criticisms of labor-management relations.¹⁶⁷ Third, the report has been circulated among the working controllers. Its conclusions regarding autocratic and insensitive management are likely to become an important background for future employee relations and for appraisals of the system's safety and the need for reinstating some of the fired strikers. Finally, the report is likely to be-

The Corson Committee had been appointed by Secretary of Transportation Volpe, in response, *inter alia*, to the threatened breakdown of essential service attending "job actions" in 1968 and 1969. See CORSON REPORT, *supra*, at 2-3, 106-07, *reprinted in 1981-82 Hearings, supra* note 5, at 562-63, 666-67. Its charge was a broad one, and it considered not only pay and "burnout," but also tension and conflict between controllers and management. *Id.* at 2-3, 8-9, 25, 97-109, *reprinted in 1981-82 Hearings, supra* note 5, at 562-63, 568-69, 585, 657-69. In short, as stated in the *Jones Report*, "the [1981] confrontation . . . had been brewing for many years" during which the dissatisfactions of both controllers and managers not only fed on each other but also were exacerbated by the adversarial atmosphere created by PATCO's prior job actions and by its harassment of dissident controllers as well as uncooperative managers. JONES REPORT, *supra* note 7, at 9-11, *reprinted in 1981-82 Hearings, supra* note 5, at 411-13. That report also warned that if the 1981 strike is not to be repeated, the FAA "will have to drastically change its management style." *Id.* at 42, *reprinted in 1981-82 Hearings, supra* note 5, at 444.

¹⁶⁶ For example, although the response to the questionnaire was only 48%, the standard requirement of a follow-up was not carried out. (The possibility of a sampling error seems to have been substantially reduced, however, for a comparison of the sample and FAA data indicated that the sample had the same demographic characteristics as the prestrike controller work force. See JONES REPORT, *supra* note 7, at 14-16, *reprinted in 1981-82 Hearings, supra* note 5, at 416-18.) Furthermore, a survey conducted soon after a strike where strikers have been replaced may be particularly susceptible to distortion, because of great stress for some controllers and a sense of special accomplishment on the part of others. Finally, the report's criticisms of employee-management relationships might also be discounted on the ground that such criticisms are practically standard in any study of bureaucratic structure. See, e.g., NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, EVALUATION OF THE UNITED STATES POSTAL SERVICE 84-93 (1982). Incidentally, an informal and unscientific sampling by the authors of strikers and working controllers and their supervisors, employed in several different regions, has indicated, as might be expected, sharp disagreement as to whether the *Jones Report's* picture of the working environment before and after the strike was accurate, too negative, or too rosy.

¹⁶⁷ See, e.g., CORSON REPORT, *supra* note 165, at 8-9, 97, *reprinted in 1981-82 Hearings, supra* note 5, at 568-69, 657.

come a factor in the legislative reassessment not only of a compensation package for controllers, but also, and more broadly, of the existing structure of collective bargaining for government employees. These considerations presumably have influenced the FAA's decision not to challenge details of the report but to promise action designed to improve working conditions and relations between controllers and supervisors. The FAA's reaction¹⁶⁸ to the *Jones Report* will be seen by some as giving support to PATCO's claims that a strike was necessary to protect the morale and health of the controllers and the safety of the system.¹⁶⁹

E. Second Thoughts About Amnesty

Even before the issuance of the *Jones Report* on March 17, 1982, there were proposals from both the press¹⁷⁰ and Congress¹⁷¹

¹⁶⁸ In an interview approximately one year after the strike, FAA Administrator Helms accepted the questioner's premise that relations were poor and then described remedial action, including the establishment of a four-year university training program for supervisors and of a human-relations policy committee under his chairmanship. See *U.S. News & World Rep.*, Aug. 9, 1982, at 51. Mr. Helms also declared:

"As for complaints of stress, I just do not believe controllers have been grossly overworked. Before the strike began, I was shocked to find that our average controller was actually directing planes only 4½ hours each day.

"Most of the stress talked about is episodic stress—where some event occurs."

Id.

A newspaper story suggested that at some facilities poststrike cooperation was being replaced by prestrike hostilities and frictions, that some controllers were being forced to work excessive overtime, and that the increased work loads on a smaller number of controllers threatened safety. The FAA challenged these charges. See *Wall St. J.*, Oct. 4, 1981, at 1, col. 1.

¹⁶⁹ We will return to the *Jones Report* in our concluding observations. See *infra* note 316 and accompanying text.

¹⁷⁰ The *Chicago Tribune* urged President Reagan to begin rehiring penitent strikers, *Chicago Trib.*, Aug. 20, 1981, at 14, col. 1, while the *New York Times* urged rehiring on the government's terms, *N.Y. Times*, Aug. 30, 1981, at E16, col. 1. Even loyal supporters of the President suggested rehiring some strikers. See, for example, the remarks of Representative Kemp and the essay by William Safire reprinted in 127 *CONG. REC.* E5666-67 (daily ed. Dec. 8, 1981).

¹⁷¹ The day after the strike began, Representative Conyers, challenging the distinction between public and private employees as a "fiction," introduced H.R. 4375, 97th Cong., 1st Sess. (1981), a bill giving all federal employees, including postal workers, the same right to strike enjoyed by employees in the private sector. See 127 *CONG. REC.* H6009 (daily ed. Aug. 4, 1981). To facilitate the Administration's resolution of the impasse, that bill made the grant of the right to strike retroactive to January 1, 1981. *Id.* Similarly, on December 16, 1981, Representative Jeffords introduced H. Res. 309, 97th Cong., 1st Sess. (1981), calling on President Reagan to lift his ban on rehiring the strikers. See 127 *CONG. REC.* H9929 (daily ed. Dec. 16, 1981). On October 2, 1981, 37 House Democrats sent a letter to President Reagan asking him to reopen negotiations with PATCO. 127 *CONG. REC.* E4690 (daily ed. Oct. 7, 1981). The most complete proposal was Representative Ford's bill, which would have permitted selective rehiring of fired controllers. See H.R. 6310, 97th Cong., 2d Sess. § 3 (1982);

for relaxation of the Administration's policy against reinstatement of the ex-strikers. Such proposals implicated a complex range of considerations: compassion for individual strikers, their moral and legal accountability, and the interests of nonstrikers; the welfare and safety of the air transportation industry and of other firms and employees injured by its contraction; the costs of training new controllers; the credibility of the President; and the deterrent effect of the antistrike law. It is to these matters that we now turn.

First, a sense of compassion supported an end to the serious losses already suffered by many strikers, the unoffending firms, and their workers injured by the strike's spillover effects. Curtailment of traffic had, moreover, inflicted costs and inconvenience on some established carriers¹⁷² and inhibited competition from new ones. Finally, training of replacement controllers would be a long and expensive proposition.¹⁷³ Amnesty would substantially reduce all of those losses.

The pleas for compassion had an obvious appeal. The government had, after all, treated the strikers with unprecedented severity.¹⁷⁴ In a society that depends on plea bargaining (and concomi-

H.R. REP. No. 560, 97th Cong., 2d Sess. 9, 14, 16, 18, 23, 24 (1982). Helms and Lewis later charged that this bill was a dilatory tactic against the Administration's bill, H.R. 5038, 97th Cong., 1st Sess. (1981), which would have given the working controllers approximately the same terms agreed to on June 22, 1981, but rejected by the PATCO membership. See [July-Dec.] Gov't Empl. Rel. Rep. (BNA) No. 978, at 9-10 (1982).

¹⁷² See *September 1981 Hearings*, *supra* note 148, at 259-60.

It has been suggested that the strike served as a cover for the reinstatement of regulation. See *October 1981 Hearings*, *supra* note 5, at 113, 183-84; Thayer, *Strike Means Friendly Skies for Airlines*, *THE ATLANTIC*, Dec. 1981, at 14, 18-19. But there is no evidence to indicate that the FAA's contingency plan, which originated during the Carter Administration, was drawn with an eye to undermining deregulation. Furthermore, the strike's effects on various airlines were so uneven as to militate against a broad consensus in favor of re-regulation through allocation of reduced flights. See *AVIATION WEEK & SPACE TECH.*, Aug. 10, 1981, at 14, 14-17; *id.*, Aug. 17, 1981, at 18, 20-23. See also Memorandum from Office of Economic Analysis to Civil Aeronautics Board, *supra* note 146, reprinted in *1982 Hearings*, *supra* note 146, at 178.

¹⁷³ Administrator Helms suggested that \$160,000 was the total cost of training one full-performance controller, reflecting both salary during training and expected attrition. See *October 1981 Hearings*, *supra* note 5, at 29, 31, 33-34. He also predicted air traffic would reach prestrike levels in 21 months. *1981-82 Hearings*, *supra* note 5, at 353. *But see* H.R. REP. No. 560, 97th Cong., 2d Sess. 8-12 (1982) (view that it would take longer). Ten months after the strike, traffic reached 90% of prestrike levels. See *Chicago Trib.*, Aug. 3, 1982, at 3, col. 1.

¹⁷⁴ By early March 1983, the regional offices of the Merit Systems Protection Board (MSPB) had completed the almost 11,000 appeals by air controllers fired as a result of the strike and had reversed the FAA and ordered reinstatement of only 295 controllers. The FAA has claimed a higher number of reversals (350); neither agency could explain the discrepancy. The FAA had rehired 120 of those reinstated and was considering whether to rehire the rest or appeal the reinstatement orders to the Board's Washington Office. An

tant light sentences for first offenders) to clear its docket of cases involving violent crimes, a permanent bar against federal reemployment as air controllers seemed to lack proportionality. It was also suggested that the strikers' offense—engaging in a strike—could be closely likened to a civil liberty in a free society.¹⁷⁵ In any event, usually influential voices urged that the President, having shown his strength, should now show his compassion.¹⁷⁶

A counterpoint against such pleas was, of course, the adverse impact that reemployment of the strikers could have on the morale of the nonstriking controllers, harmony in the work place, and the efficiency and safety of the system. Operations in the face of strikes, legal or illegal, typically generate strong feelings as well as serious risks of violence, a point frequently neglected in public discussions. Although the air controllers' strike had been free from massive violence, there were special reasons for concern that amnesty would lead to a high level of tension in air control facilities. The resentment of the strikers would no doubt be deep because of the unequivocal character of both their miscalculation and their defeat. That defeat was even more embittering because some strikers saw nonparticipation as a "stab in the back" by those who would have shared the benefits of victory. Nor would such resentment have been eased by the sense of righteousness that is likely to be felt by those who, after resisting group pressure, obey the law and by those who defy it on the basis of their perception, real or pretextual, of some higher law.

These speculations were reinforced by more concrete and perhaps more compelling considerations. There were claims that opponents of the strike had been not only vilified but also subjected to harassment that had endangered air traffic.¹⁷⁷ Furthermore, proponents of the strike, when they had expected to cripple air travel and to gain a quick victory, had made it clear that they would

additional 125 controllers had been reinstated as a result of an internal FAA review of its firing procedures, thus bringing the total already reinstated to 245. See *Aviation Daily*, Mar. 4, 1983, at 27. These figures obviously suggest that the Reagan Administration has so far successfully maintained its original hard-line stance against the strikers.

¹⁷⁵ See Magnuson, *supra* note 156, at 18 (ACLU's position); *Chicago Sun-Times*, Aug. 9, 1981, at 2, col. 1; *cf.* *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 885 (D.D.C.) (per curiam) (Wright, J., concurring), *aff'd mem.*, 404 U.S. 802 (1971).

¹⁷⁶ *N.Y. Times*, Aug. 30, 1981, § 4, at 16, col. 1. *But cf.* *N.Y. Times*, July 28, 1982, at 28, col. 1 (seemingly accepting the government's replacement of strikers, but arguing for "tough-minded reforms" in air traffic safety).

¹⁷⁷ See Skirlick, *Why One PATCO Man Didn't Strike*, *Fed. Times*, Nov. 1, 1981, at 1; *infra* note 180 and accompanying text.

hound nonstrikers out of the controllers' profession.¹⁷⁸ One court had indeed found that during a prior job action, harassment by a PATCO local had compromised the control function and inflicted substantial pecuniary and psychological damage on a maverick controller.¹⁷⁹

It was not clear how extensive or durable the frictions between strikers and nonstrikers would be. But in the months after the strike, there was special concern that those frictions might preclude the "cooperation, coordination, and trust" among air controllers necessary for safe operations.¹⁸⁰ That consideration, along with a background of animosities, helps explain why a Roper poll showed that fifty-eight percent of the working controllers opposed rehiring any strikers under any conditions.¹⁸¹ The obvious conclusion is that compassion for the strikers collided directly with concern for both safety and the sentiments of those controllers who had faithfully discharged their responsibilities to the government during and after the 1981 strike.

There were two other considerations touching the President in a special way. He and his subordinates, in trying to avert the strike, had warned that strikers would lose their jobs as air control-

¹⁷⁸ See Minutes of Sacramento Valley Cluster, *supra* note 107, at 4, which stated:
END OF STRIKE POLICY:

Any non-striking member or non-member who goes to work during the strike will not be welcome in the ATC profession. Peer pressure will be exerted upon them when the strike is over to the extent that they will be forced out of the profession, in a maximum of 3 years. If they get tired of the pressure and try to go to another facility, their name will be forwarded to the new facility and it is highly unlikely that that person will ever complete a training program at another facility.

¹⁷⁹ *Anthan v. PATCO*, 521 F. Supp. 1, 8 (E.D. Mo. 1980), *vacated in part*, 672 F.2d 706 (8th Cir. 1982).

¹⁸⁰ FLIGHT SAFETY FOUNDATION, A SAFETY APPRAISAL OF THE AIR TRAFFIC CONTROL SYSTEM 15 (1982), *reprinted in 1981-82 Hearings, supra* note 5, at 247, 267. The Foundation, at the request of the FAA, had reviewed poststrike air safety and, for reasons much like those set forth in the text, had recommended against the rehiring of air controllers for work in the towers. The Foundation, a private group, had based its report on a survey by a 16-member task force, made up of officials from the Air Force, National Aeronautics and Space Administration, and private safety groups. *Id.* at 1-2, *reprinted in 1981-82 Hearings, supra* note 5, at 253-54; see Wall St. J., Feb. 8, 1982, at 20, col. 5.

¹⁸¹ See [Jan.-June] Gov't Empl. Rel. Rep. (BNA) No. 957, at 9 (1982). By contrast, only 10% indicated that the striking controllers should be rehired unconditionally, with the remainder favoring rehiring under certain conditions. For the latter group, whether a striker had "actively favored the strike" appeared to be the most important factor regarding reinstatement. See B. Roper, Chairman, The Roper Organization, Inc., Testimony before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 97th Cong., 1st Sess. 12, 22-23 (Mar. 25, 1982) (on file with *The University of Chicago Law Review*) [hereinafter cited as Roper Poll]. Mr. Roper's testimony also included unsolicited statements from controllers, illustrating the diverse opinions and intense feeling generated or exposed by the strike. *Id.* at 15-17, 19-21, 30-39.

lers—forever.¹⁸² The law, it was urged, left him no alternative. Discharge was plainly within his discretion. Whether he also had authority to grant amnesty is a question explored below.¹⁸³ Even if such power existed, its exercise would have involved some cost to presidential credibility. To be sure, some had urged that the President's direct involvement was unfortunate in that it had locked him in and destroyed his capacity for conciliation.¹⁸⁴ It was also said that his two-day ultimatum followed by mass discharges had been too severe and hasty.¹⁸⁵ But whatever the wisdom or practical significance¹⁸⁶ of those steps, they had been taken, and a shift, especially a quick one, to a softer stance would have involved costs to the future credibility of the President. Nevertheless, such shifts are not new to presidents in general and President Reagan in particular. It was not merely consistency but also operational factors that had to be weighed. And there was one additional question, which we discuss below, involving the extent to which the law confined presidential discretion.

III. THE LEGAL IMPLICATIONS

A. The Strike Ban: Historical and Constitutional Considerations

The prohibition against strikes by federal employees is currently contained in three statutory provisions. The most important, 5 U.S.C. § 7311,¹⁸⁷ bars from federal employment any person

¹⁸² See President's Statement Concerning Air Traffic Controllers Strike, 17 WEEKLY COMP. PRES. DOC. 845 (Aug. 3, 1981).

¹⁸³ See *infra* notes 245-76 and accompanying text.

¹⁸⁴ See Isaacson, *From the Editor: President Reagan's Handling of the PATCO Strike: Boldness with (or without) Wisdom?*, 7 EMPL. REL. L.J. 343 (1981); Bus. Wk., Aug. 17, 1981, at 26; Wall St. J., Dec. 29, 1981, at 21, col. 3.

¹⁸⁵ See Isaacson, *supra* note 184, at 343-45; Magnuson, *supra* note 156, at 18 (quoting Lane Kirkland, AFL-CIO President, as calling Reagan's action "harsh and brutal overkill").

¹⁸⁶ The present authors agree with close observers of the events surrounding the 1981 strike who have told us that the momentum behind the strike and the confidence of the strikers were so strong that the extension of the ultimatum for another day or so would not have made much difference in the number of those returning to work. These conjectures aside, a longer ultimatum might have avoided criticism that the President acted hastily. The President's simple appeal to the controllers' duty under their oath and the law was incompatible with any extended ultimatum. Strictly speaking, the oath was broken by the shortest strike, but not even the President adopted that inflexible approach. For possible explanations of the length of the ultimatum, see *infra* text following note 270.

¹⁸⁷ An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

- (1) advocates the overthrow of our constitutional form of government;
- (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

who participates in a strike, asserts the right to strike against the government, or is a member of a government employee organization that asserts that right. This section also bars federal employment of those who advocate overthrow of constitutional government. The second provision, 18 U.S.C. § 1918,¹⁸⁸ makes violations of 5 U.S.C. § 7311 a felony.¹⁸⁹ The third provision, 5 U.S.C. § 7116,¹⁹⁰ declares striking by a labor organization to be an unfair labor practice. In addition, 5 U.S.C. § 7120(f)¹⁹¹ provides for decertification of a union that engages in a strike; 18 U.S.C. § 2,¹⁹² the accessory provision, makes it unlawful to aid or abet anyone in violating the statutory prohibition.

1. *History.* The current prohibitions evolved from a casual 1946 appropriation rider into a more elaborate and durable body of

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

5 U.S.C. § 7311 (1976). The proscription against "assertion" of the right to strike has been invalidated. *See infra* note 241.

¹⁸⁸ 18 U.S.C. § 1918 (1976) provides in pertinent part: "Whoever violates the provisions of section 7311 of title 5 [see *supra* note 187] . . . shall be fined not more than \$1,000 or imprisoned not more than one year and a day, or both."

¹⁸⁹ Anyone who violates 5 U.S.C. § 7311 (1976) is guilty of a felony and is subject to a term of imprisonment not to exceed one year.

It has been suggested that this provision does not in fact make striking itself a criminal offense, but only the act of "accept[ing]" or "hold[ing]" a federal position during participation in a strike. Under this view, there is no violation of § 7311, and hence of § 1918, if a striker has been discharged; in such a case, the striker does not accept or hold a position with the federal government. But this is an excessively literal interpretation of the statute, one that would both make the criminal provision—§ 1918—practically meaningless and frustrate the purposes made clear by the legislative history. *See infra* notes 193-235 and accompanying text. The intent of Congress was to ensure that federal employees who have gone on strike would be subject to criminal sanctions; that intent would be defeated if the criminal provision could be invoked only against current federal employees. This conclusion is reinforced by our conclusion that a mandatory discharge requirement covers those found to have been on strike. *See infra* notes 246-71 and accompanying text.

¹⁹⁰ 5 U.S.C. § 7116(b) (Supp. V 1981) provides:

For purposes of this chapter, it shall be an unfair labor practice for a labor organization—

. . . .

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity

¹⁹¹ 5 U.S.C. § 7120(f) (Supp. V 1981).

¹⁹² 18 U.S.C. § 2 (1976).

legislation, the first piece of which was passed in 1955 and the last in 1978. The original rider,¹⁹³ which was added on the Senate floor,¹⁹⁴ barred the payment of salaries or wages to "any person who engages in a strike against the Government of the United States" and carried a penalty of one year's imprisonment, a \$1000 fine, or both.¹⁹⁵

In 1947, Congress added a similar provision as section 305 of the Taft-Hartley Act.¹⁹⁶ Section 305 made it unlawful for federal employees to strike and provided that any federal strikers would be discharged from federal employment, forfeit any civil service status, and be ineligible for reemployment for three years.¹⁹⁷

In 1955, a new provision, the forerunner to the current statutes,¹⁹⁸ was added as a single section, 5 U.S.C. § 118p.¹⁹⁹ The sponsor of that provision, Representative Bennett, presented it as an uncontroversial codification and consolidation of existing law, noting that similar provisions had been included in most appropriation bills since 1946.²⁰⁰ The accompanying House report also expressed a clarifying and consolidating purpose.²⁰¹ According to that

¹⁹³ See Pub. L. No. 79-419, § 201, 60 Stat. 262, 268-69 (1946).

¹⁹⁴ 92 CONG. REC. 6945-46 (1946). The amendment was agreed to without discussion, the only comment being that the amendment was "in the usual form." *Id.* at 6946 (statement of Sen. Hayden).

¹⁹⁵ Third Urgent Deficiency Appropriation Act, Pub. L. No. 79-419, § 201, 60 Stat. 262, 268-69 (1946). The same language appeared in subsequent appropriations bills. See H. REP. NO. 1152, 84th Cong., 1st Sess. (1955), *incorporated in* S. REP. NO. 1256, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2873.

¹⁹⁶ Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 305, 61 Stat. 136, 160 (1947), *repealed by* Act of Aug. 9, 1955, Pub. L. No. 84-330, § 4(3), 69 Stat. 624, 625.

¹⁹⁷ *Id.* The Taft-Hartley provision was designed to be "a permanent part of the law instead of having it tacked onto appropriations bills," 93 CONG. REC. 6441 (1947) (remarks of Sen. Taft), but antistrike riders continued to be added until 1955, see *To Prohibit the Employment by the Government of Persons Who are Disloyal, Hearings on H.R. 617 and H.R. 6590 Before the House Comm. on Post Office and Civil Service*, 84th Cong., 1st Sess. 6-8 (1955) [hereinafter cited as *1955 Hearings*].

¹⁹⁸ 5 U.S.C. § 7311 (1976); 18 U.S.C. § 1918 (1976).

¹⁹⁹ Act of Aug. 9, 1955, Pub. L. No. 84-330, 69 Stat. 624 (codified as amended at 5 U.S.C. § 7311 (1976); 18 U.S.C. § 1918 (1976)) ("An Act to prohibit the employment by the Government of the United States of persons who are disloyal or who participate in or assert the right to strike against the Government of the United States, and for other purposes") (originally codified at 5 U.S.C. § 118p (1964)).

²⁰⁰ *1955 Hearings*, *supra* note 197, at 4-8. Representatives of the Department of Justice stated that, in practice, all government employees were already required to affirm that they would not strike against the government. *Id.* at 27 (statement of Harold Koffsky); letter from William P. Rogers, Department of Justice, to Representative Murray (Apr. 25, 1955), *reprinted in* H.R. REP. NO. 1256, 84th Cong., 1st Sess. 3-4 (1955), *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2873, 2875-76.

²⁰¹ H.R. REP. NO. 1152, 84th Cong., 1st Sess. 1 (1955), *incorporated in* S. REP. NO. 1256,

report, the relevant provisions of more narrowly focused statutes, such as the Taft-Hartley Act, were "repeated" in the legislation.²⁰² There was no explanation of why the more explicit language of the Taft-Hartley Act was not adopted or, more particularly, why the three-year ban on reemployment was dropped—a question to which we return below.²⁰³

The 1955 statute was passed with only modest comment on the merits of federal antistrike policy; the discussion concentrated on the bill's "security" and "loyalty" provisions.²⁰⁴ The legislators' general attitude toward the enactment was captured by a statement of the chairman of the Committee on Post Office and Civil Service: The provision would "protect the Government against those who would destroy it. . . . [This bill] involves the subject of disloyalty to our country, and you are punishing a person, giving him a year and a day in jail, which is very little for a man who has betrayed the Nation and its liberties."²⁰⁵ Strikers were thus to be given the same treatment as those who advocated the overthrow of constitutional government.

There was little further discussion of the no-strike provisions until Congress undertook to supplant previously effective executive orders²⁰⁶ by comprehensive legislation for federal labor-management relations. In the committee hearings and debates that preceded the enactment of Title VII of the Civil Service Reform Act of 1978,²⁰⁷ the no-strike provisions of federal law for the first time attracted considerable congressional discussion.

Title VII was the product of several years of extensive discussion and compromise, much of which centered on the problem of

84th Cong., 1st Sess. 1 (1955), *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2873, 2873.

²⁰² *Id.* at 2, *incorporated in* S. REP. NO. 1256, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2873, 2874.

On the consolidating purpose of the 1955 provision, see *id.* at 1-2, *incorporated in* S. REP. NO. 1256, 84th Cong., 1st Sess. 1 (1955), *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2873, 2873.

²⁰³ See *infra* text following note 273.

²⁰⁴ See 101 CONG. REC. 10,765-66, 12,299 (1955).

²⁰⁵ 1955 *Hearings*, *supra* note 197, at 12 (statement of Chairman Tumulty).

²⁰⁶ For examples of such orders, see Exec. Order No. 11,491, 3 C.F.R., 1966-1970 Comp., at 61, *reprinted in* SUBCOMM. ON POSTAL PERSONNEL AND MODERNIZATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 96th Cong., 1st Sess., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1244 (1979) [hereinafter cited as LEGISLATIVE HISTORY]; Exec. Order No. 10,988, 3 C.F.R., 1959-1963 Comp., at 521, *reprinted in* LEGISLATIVE HISTORY, *supra*, at 1211.

²⁰⁷ Pub. L. No. 95-454, tit. VII, §§ 701-703, 92 Stat. 1191-217 (codified at 5 U.S.C. §§ 7101-7135, 7211 (Supp. V 1981)).

federal employee strikes. We offer a brief outline of the pertinent history as background for the subsequent consideration of the impact of the antistrike provisions on the strikers' eligibility for reinstatement and reemployment.

In 1977, Representative Clay introduced a bill providing for a federal labor-management relations system.²⁰⁸ The bill sought to expand the scope of collective bargaining for federal employees to encompass pay practices, hours, lay-offs, promotions, and government rules and regulations.²⁰⁹ Most of these items had been specifically excluded from bargaining under previous executive orders.²¹⁰ Although the bill outlined more flexible procedures for resolving impasses,²¹¹ it retained the existing policy, making strikes unfair labor practices.²¹² H.R. 1589, a similar labor-management relations bill introduced by Representative Ford,²¹³ delineated an even broader scope for collective bargaining, proposed an alternative procedure for settling impasses based on the Canadian system, and included a limited right to strike.²¹⁴

During the relevant hearings, there was extensive testimony on the appropriate scope of collective bargaining and the provision of compulsory arbitration as a strike substitute.²¹⁵ Furthermore,

²⁰⁸ H.R. 13, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 121. See *Improved Labor-Management Relations in the Federal Service, Hearings on H.R. 13 and H.R. 1589 before the Subcomm. on Civil Service of the House Committee on Post Office and Civil Service* (pt. 1), 95th Cong., 1st Sess. 1-2 (1977) (statement of Representative Clay) [hereinafter cited as *1977 Hearings*].

²⁰⁹ H.R. 13, 95th Cong., 1st Sess. § 7103(11), (13) (1977), reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 127, 128.

²¹⁰ See, e.g., Exec. Order No. 11,491, § 12, 3 C.F.R., 1966-1970 Comp., at 861, 868-69, reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 1251-52.

²¹¹ Section 7117 of the bill outlined in some detail a variety of procedures for resolving impasses. H.R. 13, 95th Cong., 1st Sess. § 7117 (1977), reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 158-60.

²¹² *Id.* § 7115(b)(7), reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 152.

²¹³ H.R. 1589, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 183.

²¹⁴ Section 7 of H.R. 1589 set forth an impasse resolution procedure that included compulsory mediation and fact finding with advisory recommendations. *Id.* § 7, reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 207. Recommendations were to be binding upon consent of the union. *Id.* § 7(b), reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 208. Section 9 guaranteed the right to strike in certain circumstances but allowed injunctions in case of danger to public health and safety. *Id.* § 9, reprinted in LEGISLATIVE HISTORY, *supra* note 206, at 13. See *1977 Hearings, supra* note 208, at 102-05 (statement of Representative Ford). This scheme is essentially equivalent to the Canadian system. See Ponak, *Public-Sector Collective Bargaining*, in UNION-MANAGEMENT RELATIONS IN CANADA 343 (J. Anderson & M. Gunderson eds. 1982).

²¹⁵ See, e.g., *1977 Hearings, supra* note 208, at 13-15 (statement of Kenneth Meiklejohn, AFL-CIO), 31-32 (statement of Kenneth Blaylock, American Federation of Government Employees), 107-11 (statement of Vincent Connery, National Treasury Em-

several federal union leaders supported the legalization of strikes. Nevertheless, conscious of the controversial nature of such proposals, they expressed their willingness to table that question in the interest of reaching a consensus on a new statute.²¹⁶

In 1978, two civil service bills (H.R. 11280²¹⁷ and S. 2640²¹⁸) were introduced to include Title VII, a codification of the then existing labor-management relations provisions.²¹⁹ After extensive debate, accompanied by concessions to the Administration, Title VII, as enacted, kept the scope of mandatory bargaining narrow and reaffirmed the antistrike policy.²²⁰

Rather than weakening the antistrike policy, Title VII added several provisions that reflect continued legislative opposition to federal employee strikes. First, as we have noted, section 7116(b)(7) declared strikes to be unfair labor practices, subject to the remedial authority of the Federal Labor Relations Authority ("FLRA").²²¹ Second, section 7120(f) provides that upon finding a violation of section 7116(b)(7), the FLRA "shall . . . revoke" the union's certification as exclusive representative.²²² Third, section 7103 provides that strikers are not "employees" under the statutory definition of that term²²³ and that organizations that participate in "the conduct of a strike against the Government" are not "labor organizations" under the Act.²²⁴ Finally, Title VII provided a new antistrike tool, namely, interim injunctions at the request of the FLRA.²²⁵

ployees Union).

²¹⁶ See, e.g., *id.* at 14-15 (statement of Kenneth Meiklejohn, AFL-CIO), 35 (statement of Kenneth Blaylock, American Federation of Government Employees), 140-41 (statement of John Leyden, PATCO). Mr. Leyden of PATCO, however, did imply that failure to pass any labor-management relations legislation would so frustrate workers that there might be strikes: "[Y]ou're going to see repeats of what happened in the Postal Department in 1970. The work force that we represent today is not willing to sit back" *Id.*

²¹⁷ H.R. 11280, 95th Cong., 2d Sess. (1978).

²¹⁸ S. 2640, 95th Cong., 2d Sess. (1978).

²¹⁹ See LEGISLATIVE HISTORY, *supra* note 206, at 372, 494.

²²⁰ *Id.* at 1.

²²¹ See *supra* note 190.

²²² 5 U.S.C. § 7120(f) (Supp. V 1981).

²²³ *Id.* § 7103(a)(2)(B)(v).

²²⁴ *Id.* § 7103(a)(4)(D).

²²⁵ *Id.* § 7105(g)(3). These various antistrike provisions were only one part of the comprehensive statutory scheme designed to govern labor-management relations in the federal sector. See generally Coleman, *The Civil Service Reform Act of 1978: Its Meaning and Its Roots*, 31 LAB. L.J. 200 (1980); Cooper & Bauer, *Federal Sector Labor Relations Reform*, 56 CHI.-KENT L. REV. 509 (1980); Note, *supra* note 47. That scheme, embodied in Title VII, also establishes the FLRA (the public sector counterpart of the National Labor Relations Board), defines management and labor rights in collective bargaining, and includes proce-

2. *Constitutionality of the Antistrike Provision.* The constitutionality of the antistrike provision has been challenged on two grounds: first, that the prohibition is an unwarranted invasion of the "fundamental right" to strike; second, that the statutory language is impermissibly vague.²²⁶

The first challenge is based on the following substantive due process argument.²²⁷ The right to strike, like the right to privacy,²²⁸ has achieved the status of a "fundamental" right, especially in view of the role of labor unions in promoting "desirable" or "fair" employment conditions.²²⁹ This argument is said to derive support from the Court's recognition of a first amendment right, in the private sector, to organize and choose representatives.²³⁰ Any infringement of such a right is invalid unless justified by a compelling state interest.

The claim that the right to strike in the public sector is fundamental for constitutional purposes seems to us to lack any justification in history, precedent,²³¹ or the interests at stake. History

dures for certifying unions, settling bargaining impasses, and hearing unfair labor practice charges and grievances.

²²⁶ See *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.) (per curiam), *aff'd mem.*, 404 U.S. 802 (1971).

²²⁷ An equal protection argument can also be advanced, challenging the distinction between the treatment of private employees, who are permitted to strike, and public employees, who are not. This distinction is subject to rational basis scrutiny unless a so-called fundamental right is implicated. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127. For reasons discussed *infra* text accompanying notes 231-41, no fundamental right that would give rise to heightened scrutiny, see *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), is involved, and the distinction is rational.

²²⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²²⁹ See *supra* notes 9-12 and accompanying text.

²³⁰ See *Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. CIO*, 307 U.S. 496 (1939). Courts have recognized the constitutional right of public employees to join a union, as distinguished from the right to strike or indeed to "bargain" collectively. See *Lodge 1858, Am. Fed'n of Gov't Employees v. Paine*, 436 F.2d 882, 894 n.72 (D.C. Cir. 1970) (dicta); *Orr v. Thorpe*, 427 F.2d 1129, 1131 (5th Cir. 1970); *American Fed'n of State, County, & Mun. Employees v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969).

²³¹ See *UAW Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259 (1949), where the Court voiced this view even with respect to the private sector: "[T]he state constitutionally could prohibit strikes and make a violation criminal. . . . The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining. . . ." See also *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.) (per curiam) (upholding statute prohibiting strikes by federal employees), *aff'd mem.*, 404 U.S. 802 (1971). But see *id.* at 885 (Wright, J., concurring) (noting that the validity of the antistrike statute under the fifth amendment is "a very difficult" question); *School Comm. v. Westerly Teachers Ass'n*, 111 R.I. 96, 105-06, 299 A.2d 441, 446 (1973) (Roberts,

certainly provides no support for that contention; although the statutory prohibition on federal employee strikes is relatively recent, the right of private employees to strike at common law was, at best, qualified. Moreover, this common law right emerged only during the second half of the nineteenth century with the decline of an ill-defined doctrine of criminal conspiracy and the rise of a test focusing on the propriety of union ends and means.²³² As a matter of federal law, the right was first given legal protection throughout the private sector by statutes enacted during the 1930's.²³³ Subsequently, even the statutory right to strike in the private sector has been subject to considerable qualification.²³⁴ Statutorily-created interests have been treated as constitutionally protected for purposes of procedural due process,²³⁵ but no case has treated such a right as fundamental for purposes of substantive due process.²³⁶ If education, welfare, and employment are not fundamental as a matter of substantive due process,²³⁷ one cannot easily conclude that the right to strike against the government is constitutionally protected. Not all important interests receive substantive protection under the due process clause.

C.J., dissenting) (concluding that public employees have a constitutionally protected right to strike); Hanslowe & Acierno, *supra* note 27, at 1066-78 (offering a "case" that supports a right to strike by public employees).

For a discussion of traditional approaches to the difficult problem of identifying "fundamental" rights, see Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981). In this discussion we proceed along the conventional doctrinal lines. Nevertheless, we realize that the "fundamental rights approach" is potentially so open-ended as to caution against dogmatic predictions.

²³² See *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926); *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 882 (D.D.C.) (per curiam), *aff'd mem.*, 404 U.S. 802 (1971); B. MELTZER, *supra* note 10, at 1-36.

²³³ For a brief history of these statutes, see B. MELTZER, *supra* note 10, at 29-32.

²³⁴ For examples of qualifications, see *UAW Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 258-60 (1949).

²³⁵ See *Stewart & Sunstein*, *supra* note 32, at 1255-67.

²³⁶ Thus, for example, the holding in *Goldberg v. Kelly*, 397 U.S. 254 (1970), that there is a right to a hearing before deprivation of a statutory right to welfare benefits, does not mean that it would be impermissible to abolish welfare altogether. See *Harris v. McRae*, 448 U.S. 297 (1980); *Dandridge v. Williams*, 397 U.S. 471 (1970). *But cf.* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (suggesting constitutional recognition for right to subsistence).

²³⁷ See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education is not a fundamental right). *But cf.* *Plyler v. Doe*, 102 S. Ct. 2383 (1982) (suggesting that deprivation of education may give rise to heightened scrutiny under the equal protection clause). See also *Harris v. McRae*, 448 U.S. 297 (1980) (welfare); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (employment). On the inquiry in general, see Brest, *supra* note 231; *Stewart & Sunstein*, *supra* note 32, at 1245-46.

Since the right to strike is not "fundamental," the prohibition must be upheld unless it is not rationally related to a legitimate state interest—a highly deferential test.²³⁸ We have outlined a justification for the prohibition that would readily satisfy that test.²³⁹ Indeed, the more conventional explanations, invoking the peculiar importance of governmental functions, are sufficient, even though the prohibition is overinclusive in relation to those explanations. For the same reason, an equal protection attack on the distinction between public and private employees should fail,²⁴⁰ and there is no basis for first amendment protection under the "symbolic speech" cases.²⁴¹

²³⁸ See *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

²³⁹ See *supra* notes 13-56 and accompanying text. In 1951, Professor Cox suggested that a strike prohibition, at least in the private sector, raises serious questions under the thirteenth and fourteenth amendments. See Cox, *Strikes, Picketing, and the Constitution*, 4 VAND. L. REV. 574 (1951). As Professor Cox recognizes, however, a thirteenth amendment attack has been foreclosed by the cases, *id.* at 575-76, on the ground that the employee's right to change employers or to suspend services individually or collectively does not carry with it a right to undertake collective action in order to alter the conditions of employment. See, e.g., *UAW Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 251 (1949); *Western Union Tel. Co. v. International Bhd. of Elec. Workers, Local 134*, 2 F.2d 993, 994 (N.D. Ill. 1924), *aff'd*, 6 F.2d 444 (7th Cir. 1925).

We need not here pursue the questions under the due process clause that a blanket ban on private-sector strikes might raise. See Cox, *supra*, at 580-81. For reasons discussed in the text, a ban on strikes in the public sector would not raise such due process issues.

²⁴⁰ The statute has in fact been upheld as constitutional in a variety of cases. See, e.g., *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.) (*per curiam*), *aff'd mem.*, 404 U.S. 802 (1971).

²⁴¹ The framework is set out in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which suggests that a restriction on expressive conduct will be upheld

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

We have explained why the anti-strike prohibition serves a substantial governmental interest. That prohibition, moreover, is unrelated to the suppression of free expression, since the government is not attempting to use the strike prohibition to single out particular views for suppression. Cf. *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) (upholding application of NLR secondary boycott provisions to longshoremen's refusal to load and unload ships engaged in trade with the Soviet Union). The part of the *O'Brien* test that speaks to whether "the incidental restriction . . . is no greater than is essential to the furtherance" of the government's interest, 391 U.S. at 377, might be viewed as raising harder questions with respect to nonessential government services. There, a total prohibition might seem overbroad. But, as we have suggested, the government's interest might be best explained as a response to the different role of market forces in the public and private spheres. Moreover, this aspect of the *O'Brien* test appears quite lenient. See Ely, *Flag Desecration: A Case Study in the Role of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-85 (1975). For earlier cases declining to protect strikes as "symbolic speech," see *UAW Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 251-52 (1949); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*,

Those who attack the antistrike statute as "void for vagueness"²⁴² claim that the term "participate" is ambiguous. That argument, however, is weak. The executive branch has understood the term to refer to the actual refusal, in concert with others, to provide services to the employing agency.²⁴³ That interpretation is sufficiently clear and, in addition, prevents application of the statute to activities protected by the first amendment.²⁴⁴

B. The Question of Presidential Discretion

There was considerable public discussion of whether the antistrike statute required the President to discharge strikers or whether it granted him discretion over that matter.²⁴⁵ Similarly, once striking controllers have been discharged, may the President later rehire them? These questions are quite difficult under the statute, for a literal reading seems at odds with ordinary principles of executive discretion and also with what is perhaps the more appealing view of congressional purposes. We first discuss the problem of discharge and then that of rehiring. We conclude somewhat tentatively that the President is required to discharge all those found to have been strikers, but that he has discretion both to invoke civil service procedures for discharge and to rehire discharged strikers.

1. *Discharge.* At first glance, Congress seems to have answered the question of presidential discretion unambiguously. The statute provides that a person "may not accept or hold a position in the

335 U.S. 525 (1949); *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1949).

The provision of the statute that bars "assertion" of the right to strike has been invalidated as violating first amendment rights. *Police Officers' Guild v. Washington*, 369 F. Supp. 543 (D.D.C. 1973); *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969), *cert. dismissed*, 400 U.S. 801 (1971); *Stewart v. Washington*, 301 F. Supp. 610 (D.D.C. 1969). This result seems correct after *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See *infra* notes 294-96 and accompanying text.

²⁴² See generally Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

²⁴³ See *supra* note 58.

²⁴⁴ For cases rejecting a vagueness attack, see *United States v. Greene*, 697 F.2d 1229, 1233 (5th Cir. 1983); *United States v. Amato*, 534 F. Supp. 1190, 1199 (E.D.N.Y. 1982).

²⁴⁵ The question of discretion probably received most explicit attention in the President's statement that, "Now, in effect, what they did was terminate their own employment by quitting." 17 WEEKLY COMP. PRES. DOC. 869 (Aug. 13, 1981). See also the President's Statement in 17 WEEKLY COMP. PRES. DOC. 904 (Aug. 17, 1981) that "I don't think there was any choice but to do what we've done. Public employees cannot strike against the public." Nevertheless, it is not clear from the latter statement whether there was not "any choice" because of lack of discretion to choose differently or because of lack of justification for a different exercise of "discretion."

Government of the United States" if he "participates in a strike . . . against the Government of the United States."²⁴⁶ Plainly, a statutory declaration that a person "may not hold" a position is a declaration of his ineligibility binding in general on the executive. Accordingly, the statute is mandatory and suggests an unqualified ban on federal employment of any participant in a federal strike.

Furthermore, two aspects of the legislative history support a literal interpretation. First, the 1955 legislation, as we have observed, was intended to incorporate previous provisions that were more specifically focused. In particular, the Taft-Hartley Act, an antecedent provision, contained an unambiguous discharge requirement. In relevant part, that Act provided that any "individual employed by the United States . . . who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years."²⁴⁷ The pertinent committee reports on the 1955 version of the no-strike provision state that the new consolidated statute would "repeat[]" the Taft Hartley provision.²⁴⁸ A plausible, if not irresistible, inference is that, like the Taft-Hartley provision, the 1955 statute was intended to be mandatory.

Second, in its 1955 form the antistrike provision was initially included in an enactment entitled, "An Act to *prohibit* the employment."²⁴⁹ Although such captions appear to lack legal force, that title would imply that the prohibition against continued employment is mandatory. The 1955 statute said that "no person shall accept or hold office or employment in the Government of the United States,"²⁵⁰ and the change to the current language was said not to involve any substantive change.²⁵¹ The pertinent report explicitly states that the "words 'may not' are used in a prohibitory sense, i.e., 'is not authorized to' and 'is not permitted to.'"²⁵²

²⁴⁶ 5 U.S.C. § 7311 (1976). On the procedural requirements for discharge of federal employees, see *Arnett v. Kennedy*, 416 U.S. 134, 142-46 (1974); 5 U.S.C. §§ 7513, 7521, 7543 (Supp. V 1981).

²⁴⁷ Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 305, 61 Stat. 136, 160 (1947), *repealed by* Act of Aug. 9, 1955, Pub. L. No. 84-330, § 4(3), 69 Stat. 624, 625.

²⁴⁸ See generally H.R. REP. No. 1152, 84th Cong., 1st Sess. 2 (1955), *incorporated in* S. REP. No. 1256, 84th Cong., 1st Sess. 1 (1955), *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2873, 2873-74; *supra* note 202 and accompanying text.

²⁴⁹ Act of Aug. 9, 1955, Pub. L. No. 84-330, 69 Stat. 624, 624 (codified as amended at 5 U.S.C. § 7311 (1976)) (emphasis added).

²⁵⁰ *Id.* § 1.

²⁵¹ S. REP. No. 1380, 89th Cong., 2d Sess. 19-21 (1966).

²⁵² *Id.* at 20.

Nevertheless, past executive practice and judicial decisions suggest that the problem of discretion is not so easily resolved. First, administrative practice reveals that the executive has sometimes interpreted the statute to permit, but not require, dismissal. In the 1970's, for example, controllers participated in a "sick-out" and failed to report to duty for about a month. Agency guidelines fixed a sliding scale of penalties, from a one-day suspension without pay for each day of participation in the strike to removal, which was reserved for those employees who led or encouraged others to strike.²⁵³ There is thus an administrative interpretation that section 7311 grants discretion to the FAA Administrator over whether and when to discharge a striker.

Pertinent judicial decisions appear to conflict. A recent decision of the Ninth Circuit involving the Postal Service suggests that the statutory language must be taken literally.²⁵⁴ Other courts have found the matter less clear. One district court, in 1970, enjoined the controllers from continuing to strike, but simultaneously barred the FAA from failing to reinstate those who returned to work.²⁵⁵ On appeal, the Second Circuit vacated the injunction against the FAA, but declined to answer whether the statute required discharge.²⁵⁶ And in a recent decision ordering strikers to return to work, the Seventh Circuit suggested that an injunction was the "only remedy available to the Government."²⁵⁷ The court concluded that termination was not required, noting that such a requirement would have prevented the FAA from furnishing the public with a critical service, thus perversely producing the very result the statutory provisions were designed to prevent.²⁵⁸ This analysis is consistent with other decisions enjoining strikers and directing them to return to work.²⁵⁹

²⁵³ See *Henson v. United States*, 321 F. Supp. 122, 125 (E.D. La. 1970).

²⁵⁴ See *American Postal Workers v. United States Postal Serv.*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1183 (1983). In that case, a postal worker had been discharged by the Postal Service because of participation in a strike. The union initiated proceedings before an arbitrator, who ordered reinstatement, pointing to mitigating circumstances that made the discharge unduly severe. *Id.* at 1283. The district judge denied enforcement on the ground that the arbitrator had ordered the service to perform an unlawful act. *Id.* at 1282. Without substantial discussion, the court of appeals affirmed on the ground that section 7311 precluded reinstatement. *Id.* at 1286.

²⁵⁵ See *Air Transp. Ass'n v. PATCO*, 313 F. Supp. 181 (E.D.N.Y.), *vacated in part sub nom. United States v. PATCO*, 438 F.2d 79 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

²⁵⁶ 438 F.2d at 82 n.3.

²⁵⁷ *United States v. PATCO*, 653 F. 2d 1134, 1141 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

²⁵⁸ *Id.*

²⁵⁹ See, e.g., *Henson v. United States*, 321 F. Supp. 122 (E.D. La. 1970). Note also that

It is manifestly arguable that the administrative interpretation and other aids to construction foreclose a literal reading of the statute that would deny discretion to the executive. We believe, however, that there are substantial difficulties with that argument. The statutory language is unambiguous, and its history tends to suggest that the words were intended to mean what they say. The administrative practice is, of course, entitled to deference, but it is not so consistent and of such long standing as to justify the conclusion that there has been congressional acquiescence in that interpretation.²⁶⁰

We acknowledge the force of two arguments against a literal interpretation, one from legislative purposes, the other from executive discretion. The first argument, which the Seventh Circuit accepted, is that a literal interpretation is at war with the underlying reason for the statute, since it would require the executive to discharge all strikers and might, *pro tanto*, obstruct the discharge of government responsibilities. The Seventh Circuit relied on this argument when it suggested that discharge is not feasible in light of the primary purpose of the antistrike provision, which is to ensure that government services are not interrupted.²⁶¹ Indeed, to say that the discharge provision is mandatory might seem to deprive the executive of a principal weapon for enforcing that provision—a back-to-work injunction.

But there are several responses. First, the argument from statutory purposes depends on approaching the strike after, rather than before, the fact.²⁶² Congress could reasonably have believed that a blanket bar to employment of strikers and the certainty of dismissal would provide an effective prophylactic against federal employee strikes. Second, to say that the executive must discharge strikers is not to say that the executive may not also seek injunctive relief against a strike; the injunction would ban threatened strikes, and it is that remedy that Congress wished to preserve. Finally, it may be possible to say that the executive must discharge

in *Miller v. Bond*, 641 F.2d 998 (D.C. Cir. 1981), the court discussed the decision of the FAA to suspend rather than dismiss striking controllers, and treated that decision as unobjectionable.

²⁶⁰ *Haig v. Agee*, 453 U.S. 280 (1981), was an unusual case in which the Court found congressional acquiescence in executive practice. But in general, the mere fact that Congress might have been made aware of executive practices is not sufficient to justify a new reading of the statute.

²⁶¹ *United States v. PATCO*, 653 F.2d at 1134, 1141 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

²⁶² *Cf. Easterbrook, Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) (discussing *ex ante* perspective of criminal law).

all persons found administratively to have engaged in a strike and that the executive may also obtain a court order requiring preservation of the status quo—through an injunction that all strikers return to work—until the administrative procedures for discharge have run their course. Thus, the availability of an injunctive remedy against actual or threatened strikes is not inconsistent with a literal reading of the statutory language. And to the extent that a mandatory discharge requirement has harsh consequences in a particular situation, Congress is free to furnish a remedy.

The argument from executive discretion relies on the traditional prerogatives of the prosecutor, who has broad authority, rooted in principles of separation of powers, to initiate civil and criminal proceedings.²⁶³ We do not believe, however, that a genuine separation of powers question is raised by a literal reading of the statute. Undoubtedly, Congress can bar the President from employing in the executive branch persons who have engaged in particular unlawful conduct.²⁶⁴ To be sure, courts are often reluctant to interpret congressional enactments as intruding on the usual discretion of the executive. The most obvious example is that of prosecutorial discretion in the criminal area, where statutory enactments that public prosecutors “shall” undertake prosecutions are understood to be permissive, not mandatory.²⁶⁵ But such decisions are understandable in light of well-established traditions of executive immunity from judicial supervision in the area of criminal prosecutions.²⁶⁶ No such traditions apply to executive failure to enforce administrative schemes. In such cases, clear statutory limitations result in the narrowing of executive decision.²⁶⁷ The anti-strike provision is, we believe, more closely analogous to these administrative schemes, for there is no longstanding history to temper a natural reading of the statutory prohibition.

Indeed in this context there do not appear to have been explicit claims of executive discretion based on an articulated legal

²⁶³ See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-80 (2d Cir. 1973). For a caustic criticism of such results, see K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 28.00-4, at 616-19 (1976).

²⁶⁴ In *Myers v. United States*, 272 U.S. 52 (1926), the Court adopted its most expansive interpretation of the extent to which article II protects the President in the supervision of the executive branch. Even in that case, however, the Court made clear that the Constitution authorizes Congress to enact provisions governing the hiring and firing of civil servants. See *id.* at 160.

²⁶⁵ See, e.g., sources cited *supra* note 263.

²⁶⁶ See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

²⁶⁷ See, e.g., *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

argument. Instead, the executive appears to have swept occasional stoppages under the rug—an approach that is ambiguous because in an imperfect world it is as consistent with the absence of discretion as with its presence. In short, the pertinent executive responses have been too sporadic, too ambiguous, or too recent to constitute a firm practical construction limiting the meaning of the 1955 provisions.

What we have said so far suggests that once federal employees have been determined to be strikers, discharge is mandatory under section 7311. But this does not suggest that the executive has no discretion to decide whom it should subject to proceedings to determine who has participated in the strike. The constraint of limited resources is a classic basis for prosecutorial discretion, and activation of the civil service mechanism for discharge can itself be quite costly. Here, unlike in the recent context of deciding whether to discharge those found to be strikers, traditions of executive discretion are well established. Thus, for example, the executive may decline to initiate administrative proceedings with a view toward discharge if it believes that the employee in question did not participate in the strike or that the limited nature of such participation²⁶⁸ justifies initiating proceedings against certain categories of violators but not others.

To a substantial degree this approach grants the executive discretion over enforcement of the no-strike provision, but without authorizing him to retain those found to be strikers. Nevertheless, the executive may not effectively nullify the statute by entirely defaulting in enforcement.²⁶⁹ The line between a complete default and bringing discharge proceedings against a limited number of employees engaging in a strike will not always be clear. But the basic distinction is well established,²⁷⁰ and we do not doubt that workable standards can be developed for identifying a substantial prosecutorial default.

The position that discharge is mandatory may seem to cast doubt on the legality of a grace period, such as the two days al-

²⁶⁸ On this rationale, we believe that the executive may be permitted to decline to initiate proceedings against those who have struck for extremely brief periods.

²⁶⁹ See *WWHT v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); *Stewart & Sunstein*, *supra* note 32, at 1267-89. To say this is not to say, however, that there necessarily would be a judicial remedy for failure to enforce the discharge requirement or that anyone would have standing to argue in favor of such a remedy.

²⁷⁰ See *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973).

lowed by President Reagan. But the grace period should, we believe, be viewed as a means of exercising the discretion that the executive does have to determine whether particular workers have been on strike. A brief grace period furnishes an objective standard that contributes to determinations of whether strike activity has occurred.²⁷¹ The grace period was thus a reasonable means of implementing the discharge requirement.

In short, we conclude that the President is required to discharge all those who have been reliably identified as having been on strike, but that he has broad discretion in selecting the employees to be subjected to the identification procedures, that is, the discharge mechanisms of civil service. To be sure, this form of discretion might be exercised or manipulated so as to nullify the mandatory aspects of the antistrike law, but we believe that such efforts at nullification could usually be identified despite the awkward issues of degree involved.

2. *Rehiring.* The question remains whether it would be lawful to rehire those fired for striking. That question implicates a further problem: whether the statutory language should be understood to suggest that once someone has participated in a strike, he is thereafter barred from "accepting" federal employment. We believe that such an interpretation should be rejected and that the prohibition on federal employment should apply only to the period in which the strike activity is taking place. We acknowledge that there is some awkwardness in distinguishing between discharge and rehiring. We believe, however, that the different results are justified by the language, history, and purposes of the relevant provisions.

The 1955 statute, like the current version, used the present tense—"participates" in a strike²⁷²—suggesting that the prohibition on employment applies, and is limited, to the period in which the strike activity occurs. The statute is not written in the terms of a permanent ban on employment; the phrase "has participated" would be suited for that purpose.

The foregoing interpretation would be subject to a charge of excessive literalism if it were based on the statutory language alone, but our conclusion derives support from the legislative history and structure. The Taft-Hartley Act itself required only a

²⁷¹ Compare *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972).

²⁷² Act of Aug. 9, 1955, Pub. L. No. 84-330, § 1(3), 69 Stat. 624, 624 (codified as amended at 5 U.S.C. § 7311 (1976)).

three-year, not a permanent, ban.²⁷³ There is no indication that Congress intended the 1955 consolidated legislation to convert that temporary ban into a permanent one. Such a drastic conversion should not be inferred from congressional silence. If no such change is to be inferred, the 1955 statute must be interpreted either as implicitly carrying over the three-year ban or as giving the executive discretion to determine the time for any rehiring. Of the two possibilities, the second is preferable. It would be strange indeed for Congress to retain a three-year ban without saying so. In the absence of any express reference to that period, the statute is best understood as giving the executive discretion in deciding when the striking employees should be rehired.

Moreover, an interpretation that bars rehiring former strikers must also comprehend a bar against rehiring former advocates of the overthrow of constitutional government or former members of organizations that advocate such overthrow. It will be remembered that section 7311, which contains the prohibition on employing strikers, applies equally to ban federal employment of those who advocate overthrow of constitutional government or are members of organizations that do so.²⁷⁴ An interpretation that would impose a permanent ban seems implausible and, with respect to former "advocates," would also raise serious constitutional questions.²⁷⁵

Finally, we believe that it is an important virtue of this solution, based on admittedly uncertain statutory language and history, that it effectively accommodates the various purposes underlying the no-strike policy. The executive has discretion to take action against those persons who appear to have engaged in strike activity. Once an administrative determination is made that an employee did strike, discharge is mandatory. After discharge, the executive may rehire the striker. To be sure, the possibility of rehiring may to some degree undermine the deterrent force of the no-strike policy.²⁷⁶ But such strikers will lose seniority, and mandatory discharge, together with the apparently strong possibility that the striker would not be rehired, should serve as a powerful disincentive to unlawful strikes.

²⁷³ Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 305, 61 Stat. 136, 160 (1947), repealed by Act of Aug. 9, 1955, Pub. L. No. 84-330, § 4(3), 69 Stat. 624, 624; see *supra* text accompanying note 247.

²⁷⁴ 5 U.S.C. § 7311 (1976).

²⁷⁵ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁷⁶ See *supra* notes 262-63 and accompanying text.

C. Selective Prosecution and the Air Controllers

Of the approximately 13,000 air controllers who participated in the strike, the Department of Justice prosecuted only seventy-eight under the provisions of 18 U.S.C. § 1918(3).²⁷⁷ The Department's policy called for prosecution of certain "strike leaders." The stated basis for that policy was that it would both maximize the deterrent value of prosecution and facilitate the gathering of proof.²⁷⁸ That approach, however, raises difficult questions of prosecutorial discretion and selective prosecution.

It is well settled that prosecutors need not initiate proceedings against all offenders and have considerable discretion in allocating scarce prosecutorial resources among competing enforcement demands.²⁷⁹ The unusual degree of judicial deference in this context is attributable to the "polycentric"²⁸⁰ character of prosecutorial decisions: courts are institutionally ill-equipped to evaluate and improve such executive allocations of limited resources.²⁸¹ The function of judicial review is much more easily performed with respect to initiatives already undertaken, for in such cases courts generally can test the legality of the particular enforcement actions without having to evaluate an agency's overall enforcement scheme.²⁸²

Notwithstanding this tradition of deference, courts have barred prosecutors from singling out a target for prosecution on the basis of such impermissible considerations as race, religion, or a desire to penalize or deter the exercise of a constitutional right.²⁸³ If such executive encroachment on constitutionally protected interests were permitted, the doctrine of prosecutorial discretion could shield decisions intended to discourage the exercise of constitutional rights. Because of such concerns, it is hardly sur-

²⁷⁷ 18 U.S.C. 1918(3) (1976). These figures, together with other facts discussed below, are taken from *United States v. Amato*, 534 F. Supp. 1190, 1193 (E.D.N.Y. 1982). We do not focus here on proceedings brought in criminal contempt, but the same basic framework would apply.

²⁷⁸ 534 F. Supp. at 1194.

²⁷⁹ See generally Easterbrook, *supra* note 262; Vorenberg, *supra* note 266.

²⁸⁰ The term, coined by Michael Polanyi a generation ago, see M. POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* 171 (1951), was, of course, first applied to legal problems by Lon Fuller, see Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978).

²⁸¹ See Stewart & Sunstein, *supra* note 32, at 1210-11, 1269-71.

²⁸² In some cases, of course, courts may be compelled to undertake similar review to ascertain whether enforcement action was "arbitrary" under the Administrative Procedure Act, 5 U.S.C. § 706 (1976).

²⁸³ See, e.g., *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). For general discussion, see L. WEINREB, *CRIMINAL PROCESS* 614-47 (3d ed. 1978); Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651.

prising that courts have not permitted the difficulties surrounding judicial supervision of enforcement activities wholly to immunize enforcement decisions against judicial review.²⁸⁴

This approach, although useful in dealing with heavy-handed prosecutorial intrusions on constitutionally protected interests, does not take one very far when the application of usually permissible criteria for selection involves unusual risks of chilling effects. Two different categories of cases illustrate both the usefulness and limits of the approach in question. In selecting violators for prosecution under the tax laws, it is clear that the government may not indict only those who spoke out against Republican candidates. Similarly, it would be impermissible, in enforcing the selective service laws, to prosecute only those who expressed opposition to welfare policy. But under current law the executive may single out violators who have been most vocal in their resistance to the law whose violation is in question. The cases have drawn a distinction between an impermissible penalty on a constitutional right and a proper effort to use scarce prosecutorial resources economically and to maximize the deterrent value of punishment by bringing suit against the most visible violators.²⁸⁵ The difference is that in the latter situation, the statements that are the catalyst for prosecution facilitate identification of violators and are directly related to the underlying illegality.²⁸⁶

The distinction may be illustrated by cases upholding the propriety of singling out for prosecution those selective service evaders who have been especially vocal in opposing the selective service laws. It is, however, impermissible to single out those who have opposed the reelection of an elected official.²⁸⁷ To be sure, even in the former case there is likely to be a chilling effect on the exercise

²⁸⁴ See *Marshall v. Jerrico*, 446 U.S. 238, 249 (1980); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²⁸⁵ See, e.g., *United States v. Greene*, 697 F.2d 1229, 1234-35 (5th Cir. 1983); *United States v. Amon*, 669 F.2d 1351, 1355-57 (10th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *United States v. Rice*, 659 F.2d 524, 526-27 (5th Cir. 1981); *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.) (noting that proper prosecutorial considerations, "such as deterrence of widespread tax evasion, will inevitably lead to the prosecution of numerous protest violators"), *cert. denied*, 454 U.S. 1126 (1981); *United States v. Rickman*, 638 F.2d 182, 183 (10th Cir. 1980); *United States v. Stout*, 601 F.2d 325, 328 (7th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Johnson*, 577 F.2d 1304, 1307-09 (5th Cir. 1978); *United States v. Ojala*, 544 F.2d 940, 943-45 (8th Cir. 1976); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). *But see infra* note 290 and accompanying text.

²⁸⁶ This argument is most forceful in the context of outspoken opponents of the no-strike law; there, the "fit" between the goal of deterrence and the persons prosecuted is quite good. The fit is less perfect with respect to union leaders.

²⁸⁷ See *supra* note 285 and accompanying text.

of first amendment rights. But in such cases, that effect is an "incidental" consequence of a legitimate effort to maximize the use of scarce prosecutorial resources. By contrast, in the latter case the deterrent consequence is not incidental at all, and the decision reflects a naked effort to penalize the expression of a particular point of view.

In presenting this distinction, we do not mean to suggest that it is immune from attack. The consequence of a prosecutorial policy directed at vocal opponents of existing law will be to deter free speech. Consequently, there is room for argument that such a consequence is sufficient reason to reformulate existing doctrine. Indeed, there are signs of strain on that doctrine in recent cases involving prosecutorial discretion.²⁸⁸ But with respect to the prosecution of air controllers, the question under existing law is whether the Justice Department's decision to prosecute strike leaders involved an impermissible penalty on the exercise of their constitutional right to hold union office or to speak out in favor of the strike. That question is, in turn, closely related to those raised in recent cases involving prosecution of tax protesters and vocal selective service violators, where arguments based on selective prosecution generally have failed.²⁸⁹ Nevertheless, several courts have condemned the Department's decisions with respect to the air controllers' strike as unconstitutional selective prosecution.²⁹⁰

The arguments in support of the asserted unconstitutionality of the government's prosecution policies assume two alternative forms. First, it is claimed that the prosecutorial decisions were

²⁸⁸ See *United States v. McDonald*, 553 F. Supp. 1003 (S.D. Tex. 1983) (invalidating prosecution of union leaders); *United States v. Paisley*, Cr. 81-196 PHX-CLH (D. Ariz. Nov. 12, 1981) (order). See also *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (suggesting that discipline is invalid if it would not have been imposed but for the exercise of constitutional rights). For analogous cases under the Taft-Hartley Act, see *NLRB v. South Cent. Bell Tel. Co.*, 688 F.2d 345 (5th Cir. 1982) (NLRA, as amended, violated by more severe discipline for union officials, as such, for their participation in "wildcat strikes"), *cert. denied*, 103 S. Ct. 1768 (1983); *Consolidated Coal Co.*, 263 N.L.R.B. No. 188, 111 L.R.R.M. (BNA) 1205 (1982); Note, *Discriminatory Discipline of Union Representatives for Breach of Their "Higher Duty" in Illegal Strikes*, 1982 DUKE L.J. 900; Comment, *Disparate Treatment of Union Stewards: The Notion of Higher Responsibilities to the Employment Contract*, 43 OHIO STATE L.J. 379 (1982). See also *Strobeck v. Illinois Civil Serv. Comm'n*, 70 Ill. App. 3d 772, 388 N.E.2d 912 (1979) (upholding selective discipline of participants in public employee strike). Cf. *Metropolitan Edison Co. v. NLRB*, 103 S. Ct. 1467 (1983) (prohibiting disparate treatment of union officials as such under Taft-Hartley Act).

²⁸⁹ In almost all such cases, arguments based on selective prosecution have failed. See *supra* note 285.

²⁹⁰ See *United States v. McDonald*, 553 F. Supp. 1003 (S.D. Tex. 1983); *United States v. Haggerty*, 528 F. Supp. 1286 (D. Colo. 1981).

based on the defendants' status as union leaders. There is some factual support for this claim. Some time before the strike (February 1981), the Justice Department, after exploring the selection of potential targets for prosecution, prepared a list composed predominantly of union leaders.²⁹¹ There was also evidence that the pertinent lists explicitly designated the targets as union representatives. Thus it might be suggested that even if it were permissible to prosecute only those who encouraged the strike, the Department did no such thing: it prosecuted union representatives, who may or may not have been strike leaders. The second contention is that a decision to prosecute those, such as strike leaders, who have argued in favor of the strike, is tantamount to a decision to penalize those who have exercised their first amendment right to speak freely.

With respect to the first contention, the critical issue is whether it is invidious to prosecute on the basis of union leadership. Some district courts have concluded that it is.²⁹² These courts reasoned that union representatives were not necessarily strike leaders and that the Department's policy operated to single out those in union posts regardless of actual advocacy of the strike. But the matter is not so simple. It is not altogether clear why the government may not conclude that, if a strike ultimately occurs, the target of prosecution should be leaders of the union, not because they are necessarily responsible for the unlawful action and not in order to penalize union activities, but because such prosecutions would have unusually high deterrent value. Union leaders who have in fact engaged in the strike are by their example especially likely to have encouraged widespread violation of the law. Apart from deterrence, the government may reasonably believe that those in a position of trust and authority—union leaders—are more culpable if they break the law. A related argument is one from exemplary punishment: the executive may choose to single out for prosecution those whose punishment will receive the most attention, thus alerting potential violators to the possibility of criminal sanctions. If this is the basis for prosecution, it may not be invidious.²⁹³

²⁹¹ *United States v. Haggerty*, 528 F. Supp. 1286, 1293 (D. Colo. 1981). Of the over 72 persons originally named for investigation, only 31 were clearly identified as present PATCO local officials. This suggests that the government was not directing its enforcement efforts at union officials alone.

²⁹² See *United States v. McDonald*, 553 F. Supp. 1003 (S.D. Tex. 1983); *United States v. Haggerty*, 528 F. Supp. 1286 (D. Colo. 1981).

²⁹³ This result is a natural product of the argument *supra* text accompanying notes 279-89.

The second argument—that the government's policy imposes an impermissible penalty on the exercise of the right to freedom of speech—is also unpersuasive. There is a threshold question as to whether a first amendment right is genuinely at stake. *Brandenburg v. Ohio*²⁹⁴ bars proscription of advocacy “of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁹⁵ Undoubtedly, the abstract statement that striking is necessary, or that public employees have some abstract “right” to strike, is protected by the first amendment.²⁹⁶ Also protected are general statements that employees should go on strike at some time in the future or that a strike would eventually be desirable.²⁹⁷ One does not lose first amendment protection merely because the unlawful conduct that was advocated actually occurred.²⁹⁸ In some cases, however, statements by union leaders may well fall in the unprotected class. Such unprotected speech would include specific and concrete suggestions that strike action be taken in the immediate future, under circumstances in which it was likely that strike action would in fact ensue.²⁹⁹ In such cases, the relevant statements are unprotected under *Brandenburg*, and the selective prosecution problem is easily resolved.

Even if the first amendment precludes pro-strike statements from being made criminal in and of themselves, selective prosecution of those who have assumed positions as leaders in encouraging strike activity should not be treated as an impermissible penalty on the exercise of a constitutional right. The decision to prosecute those who have both struck and encouraged a strike serves a deterrent function and in addition operates to bring the force of the law against those most responsible for unlawful activity.³⁰⁰ If the reason for singling out strike leaders was strike deterrence (a value

²⁹⁴ 395 U.S. 444 (1969).

²⁹⁵ *Id.* at 447. See generally Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RESEARCH J. 645; Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982); Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151 (1975).

²⁹⁶ See, e.g., *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 881 (D.D.C. 1971) (per curiam), *aff'd mem.*, 404 U.S. 802 (1971).

²⁹⁷ Cf. *Hess v. Indiana*, 414 U.S. 105 (1973) (advocacy of unlawful demonstration protected under first amendment).

²⁹⁸ See *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3434 (1982). *Brandenburg* itself provides for an inquiry into likelihood rather than the actual occurrence of the event.

²⁹⁹ See Greenawalt, *supra* note 295, at 771-72; *supra* text accompanying note 295.

³⁰⁰ See *United States v. Phillips*, 525 F. Supp. 1, 7-8 (N.D. Ill. 1981).

specifically reflected in the statute involved), the selectivity was not unlawful. And if the reason for singling them out was that their status made them appear to bear a heavier degree of moral responsibility for the illegal behavior, the criterion for choice also appears legitimate. There appears to be an insufficient basis for concluding that an invidious standard of selection lay behind the targeting of strike leaders.³⁰¹

In large part, the crucial consideration appears to be the verbal formulation of the government's conduct. Is the government's decision to prosecute those who have led and thus have spoken in favor of the strike based on a desire to penalize the exercise of rights of free speech, or is it instead an effort to maximize the deterrent value of punishment—when the deterrent value would be increased because those prosecuted have spoken out in favor of the strike? In the cases, the distinction is accepted and treated as critical.³⁰² To be sure, a governmental decision to prosecute those who have spoken out in favor of the strike will deter the exercise of first amendment rights. The decisive question, however, is not whether there will be such an effect; instead it is whether the chilling effect is the objective or is merely an incidental consequence of a permissible decision. In sum, a claim that selective prosecution is penalizing the exercise of first amendment rights is untenable when the claim is based on speech that counsels the crime itself.

CONCLUSION

Unquestionably, the PATCO affair ended in victory for the federal antistrike policy. For several reasons, however, the victory is a qualified one. First, the law was enforced against many citizens who appeared to reject its moral basis.³⁰³ Second, enforcement was inevitably a costly matter for the striking air traffic controllers, PATCO, the air transport industry, and the country.³⁰⁴ Further-

³⁰¹ See *United States v. Greene*, 697 F.2d 1229 (5th Cir. 1983); *United States v. Amato*, 534 F. Supp. 1190 (E.D.N.Y. 1982); cases cited *supra* note 285.

³⁰² We acknowledge that like all tests turning on motivation, this approach may raise troublesome questions in litigation—questions going to efforts to establish impermissible purposes on the part of executive officials.

³⁰³ Authentic claims of moral justification in connection with illegal strikes, among other contexts, are, of course, difficult to distinguish from claims advanced in order to rationalize law-breaking or motivated by love of money or power rather than by moral outrage. To be sure, the controllers appeared to have their share of legitimate grievances. See *supra* notes 163-69 and accompanying text. But there is no evidence to suggest that their mistreatment was so serious that their plainly illegal strike was in some sense morally justified. Indeed, such a suggestion trivializes the whole idea of civil disobedience.

³⁰⁴ See *supra* notes 172-73 and accompanying text. Some observers maintained that

more, it developed its own set of contradictions arising from the barring of strikers from jobs as controllers but the lifting of the exclusion from all other federal positions.³⁰⁵ Third, as these costs, particularly those incurred by the strikers, sunk in, some of those who had initially supported the Administration's stern response began to waver.³⁰⁶ Sharp questions surfaced about the antistrike policy³⁰⁷ and indeed the whole range of current mechanisms governing labor relations in the public sector.³⁰⁸ The PATCO affair thus calls for renewed consideration of the appropriate response of the executive to actual or threatened strikes and, more generally,

PATCO's strike had damaged the whole labor movement by exposing its lack of solidarity and muscle. Labor leaders, however, tended to dismiss such assessments, arguing that the Administration's draconian response would encourage organization and militance. See Lublin, *The Air Strike's Effect on Organized Labor*, Wall St. J., Aug. 18, 1981, at 32, col. 3. Such conjectures are difficult to evaluate; unions in both the private and public sector have been subject to such strong pressures from a weak economy and tight public budgets that it is especially difficult to isolate the longer term significance of this strike.

Other observers saw the strike as a potentially beneficial warning of the risks to the community posed by public-employee unionism and strikes, as a watershed event, with the government finally enforcing the law against a power-hungry and greedy union. See, e.g., Kilpatrick, *The Air Traffic Controllers: They Struck a Blow for Tyranny*, 23 NAT'L REV. 1132, 1157 (1981). But, once again, the inferences from the strike varied with the observer; some read it as a warning about the risks and fragility of a "discriminatory" antistrike policy in a culture generally treating strikes as exercises of an important civil liberty.

³⁰⁵ See *supra* note 5.

³⁰⁶ 127 CONG. REC. E5797 (daily ed. Dec. 11, 1981) (Representative Oberstar); see N.Y. Times, Dec. 6, 1981, § 4, at 22, col. 1; *supra* note 170 and accompanying text. But cf. N.Y. Times, July 28, 1982, at 28, col. 1 (seemingly accepting the government's replacement of strikers, but arguing for "tough-minded reforms" in air traffic safety).

³⁰⁷ See, e.g., Shapiro, *Federal Unions: Let Them Strike or Get Rid of Them*, Washington Post, Aug. 23, 1981, at C1, col. 1.

³⁰⁸ Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135, 7211 (Supp. V 1981), drew on the rhetoric and the enforcement machinery applied to the private sector by the National Labor Relations Act, see 5 U.S.C. §§ 7101, 7104, 7118, 7121 (Supp. V 1981). At the same time, Congress built a large potential for frustration into Title VII. By maintaining a narrow scope for mandatory bargaining, Congress not only sanctioned the use of this complex machinery for only trivial issues (the so-called "parking lot" syndrome), but also restricted the items that could be used as trade-offs. See D.M. McCabe, *Mediation and Labor-Management Relations in the Federal Government*, 151-52, 197 (unpublished manuscript, 1980) (available from the Labor-Management Services Administration and Federal Mediation and Conciliation Service, U.S. Dep't of Labor, Washington, D.C.). By also maintaining the strike ban, Title VII removed an important pressure against protracted bargaining. Observers have marked these two departures from the private model as significant sources of frustration. Nevertheless, deep-seated adversary relationships, ill-trained and adversarial supervisors and employees, and neglect of day-by-day flexible accommodation between them will, of course, not be remedied solely by changes in the legal framework. Thus, serious problems persist in the Postal Service despite the expansion of mandatory bargaining for postal employees, the new procedures for impasse resolution, and the other changes provided in 1970 by the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended at 39 U.S.C. §§ 101-5605 (1976 & Supp. V 1981)). See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 166, at 88-93.

of appropriate structures governing labor relations in the public sector.³⁰⁹

We believe that under current law, the President's responsibilities required him to respond to PATCO's challenge by measures that necessarily involved high costs and that were not substantially different from those ultimately adopted. On the basis of the available evidence, moreover, we conclude that the enforcement program adopted by the Department of Justice was legally unobjectionable. There is no serious constitutional objection to the antistrike provision. Furthermore, the prosecution policies should not be held to contravene constitutional doctrines governing selective prosecution.

At the same time, we realize that if the federal antistrike policy can be maintained only by a succession of such costly measures, it is likely to be changed, *de facto* if not *de jure*. If the fate of the strikers and PATCO, along with personnel reforms, does not deter violations of the existing law, stronger pressures on the existing policy will result. As things now stand, an illegal strike confronts an administration with uncomfortable choices. If an administration responds vigorously, it risks criticism because of the human and social costs immediately involved. If it temporizes, it risks criticism for not doing its duty, for allowing an erosion of a legislative mandate, and for encouraging further illegalities and their attendant costs. In either event, it is vulnerable to criticism for creating a labor relations atmosphere in which normally law-abiding citizens are led to violate their oaths and obligations to their government.

Concerns about such potential costs and about the antistrike policy as a whole have led to proposals for a federal bargaining system that comes closer to the private sector model.³¹⁰ Such a system might include either the right to strike or alternative devices for resolving impasses, including various forms of arbitration.³¹¹ Although we are conscious of the difficulties raised by the current antistrike policy, we have not been persuaded that its abandon-

³⁰⁹ Various positions on the framework established by Title VII are set forth in *A Symposium: Labor Relations in the Public Sector*, 21 *CATH. U.L. REV.* 493-638 (1972); *Symposium: Labor Relations in the Public Sector*, 67 *MICH. L. REV.* 891-1082 (1969).

³¹⁰ See, e.g., Burton & Krider, *supra* note 23, at 437-38. Recent legislative proposals include H.R. 13, H.R. 1589, and H.R. 9094, all introduced in 1977 during the first session of the Ninety-fifth Congress. They are reprinted in *LEGISLATIVE HISTORY*, *supra* note 206, at 121, 183, 235.

³¹¹ See generally *ARBITRATION ISSUES FOR THE 1980's*, at 68-108, 241-301 (J. Stern & B. Dennis eds. 1982); Rehmus, *Varieties of Final Offer Arbitration*, *ARB. J.*, Dec. 1982, at 4, and a series of related articles for the survey *Interest Arbitration in the Public Sector*, *ARB. J.*, Dec. 1982, at 4, 7-31.

ment and the adoption of the proposed alternatives would be significant improvements on the existing policy. There is inevitable awkwardness in assimilating the public sector to the private sector model. Of crucial importance are three general factors: (1) the importance of many kinds of governmental services, and the difficulty of distinguishing between those services in terms of their importance; (2) the different role of market pressures in the private and public sectors; and (3) the concern, deriving from the separation of powers, about the adverse impact that strikes and third party determinations of salaries and other important elements of compensation would be likely to have on Congress's discharge of its responsibilities for raising and spending money. We do not, however, endeavor to examine here the many proposals that have been made for reforming the structure of labor-management relations in the public sector. Instead, we briefly invite attention to several general considerations that have been underscored by the PATCO affair—those that seem especially important for the achievement of sounder federal labor relations and that are likely to increase worker satisfaction and effectiveness. These considerations take on added significance under the existing federal antistrike policy.

First, employees are much more likely to comply with that policy if they understand and accept its rationale. Such understanding frequently will require education that is more positive than antistrike oaths and supporting criminal sanctions. The PATCO affair makes clear that the failure of employees to sense the distinctive features of the public sector is likely to undercut the moral force of the antistrike policy and, as a consequence, to reduce the likelihood of compliance.

Second, politicians must not use "bureaucrats" as scapegoats for the failures of national policy, and especially those failures for which Congress or high-level executive officials bear primary responsibility. Such rhetoric tends to intensify ill will on both sides and is likely both to add to the strains on the antistrike policy and to undermine morale and loyalty.

Finally, legislators, agency administrators, and supervisors at every level must understand that the corollary of an antistrike policy should be responsive administration.³¹² The foreclosure of the strike weapon in the federal sector, contrasted with its actual and

³¹² After this was written, Secretary Lewis, upon resigning from the DOT, said that changing the "very, very antiquated people practices" at the FAA would be a major problem for his successor, and predicted it would take five years. *Wall St. J.*, Feb. 7, 1983, at 19, col. 3.

symbolic status in the private sector, invites claims of second class citizenship, discrimination, and indifferent supervisors shielded by the strike prohibition. It is thus especially important to promote responsiveness to government employees through other mechanisms.³¹³ These mechanisms include, of course, better training of supervisors and careful consideration of arrangements that will expand the participation of employees and enlist their ingenuity in solving the problems of the workplace.

We acknowledge that there are reasons to be wary of the strong tendency to overstate what can be accomplished by more effective channels for participation and more effective labor relations in general.³¹⁴ Nevertheless, several observations may sharpen the relevance of our general remarks to the air controllers particularly and the public sector generally. The first is anecdotal; it concerns a newly assigned head of a regional air traffic controllers' facility who, concerned that the facility had degenerated into a "country club," had sought overnight reform by unilateral action. The result was, to Washington's initial bewilderment,³¹⁵ that the air controllers at the facility who had not been expected to honor the 1981 strike call did so, and overwhelmingly.

The second consists of the importance of taking seriously the recommendations of task forces appointed because of job action or other apparent crises. Such recommendations frequently seem to be accepted when made and then gather dust until the next crisis when they are recycled by another task force. Naturally, we appreciate the usefulness of task forces both as lightning rods and as

³¹³ For suggestions designed to alleviate antagonisms in the Postal Authority, see NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 166, at 89-93. These suggestions, although conventional, appear equally pertinent with respect to air traffic controllers. See generally JONES REPORT, *supra* note 7, reprinted in 1981-82 Hearings, *supra* note 5, at 399.

³¹⁴ See I. BERG, M. FREEDMAN & M. FREEMAN, *MANAGERS AND WORK REFORM* 142-70, 205-20 (1978).

³¹⁵ The source of this anecdote is an FAA official in Washington. A controller who struck while employed at the facility involved also described the new head as given to unilateral action.

There seems to be little question that the facility needed change; employees apparently slept during working hours and went home before their shift ended. These deviations from the official work schedule seem to have been related to overmanning of the facility. Our point is not to condone such departures in the work schedule. Rather, it is that Washington did not seem to realize that difficulties existed at the facility and that their primary source was overmanning. Similarly, the new regional head seemed to have ignored the familiar difficulties inherent in instant and unilateral reform of established bad practices. To be sure, sometimes "shock treatment" by a new head may be warranted, and we are not presuming to pass judgment on the tactics involved. But there seems at least to have been a failure of communication between Washington and the field.

sources of relatively disinterested and expert advice. But surely the oversight mechanisms in the agencies and Congress, after determining the merits of findings and recommendations, should, by periodic inquiries and reports, show to all concerned, and especially the employees, that the recommendations were seriously evaluated and given life, day by day, unless good cause for not doing so is shown.³¹⁶

The third point relates to the conduct of public officials who question the antistrike prohibition as a matter of principle or have important constituents who oppose that prohibition and who expect at least a show of support by elected officials. It is critical for such officials to remember that when strike fever is high, the union hall is scarcely an appropriate forum for supporting an impending strike or (what may be interpreted as the same thing by the audience) the immediate repeal of the strike prohibition. That forum is especially ill-suited if an official glosses over either the legal obligation imposed by existing statutes or the risks to those who defy the law. The usual obligations of elected officials are even more insistent when a politician remains a risk-free spectator while using rhetoric that may encourage others to mount the barricades and eventually to face serious consequences.

Indeed, the guidelines with which we conclude would presumably have been widely accepted, at least as abstractions, before the PATCO strike. As we have seen, that strike raises difficult issues with respect to labor relations policy and the proper conduct of federal unions and officials. Above all, however, this melancholy episode is probably best regarded as a reminder, like most minor and major tragedies after the event, of the high costs of disregarding the obvious.

³¹⁶ The FAA requested the Jones Committee to review the Agency's labor-relations performance, one year after the release of the Committee's report. The Committee concluded that there had been "a significant start" in improving conditions. *N.Y. Times*, Apr. 1, 1983, at 6, col. 1 (midwest ed.) (quoting unnamed source). That conclusion was apparently based on conversations with the new Secretary of Transportation Elizabeth Dole and FAA Administrator Helms, and not on conversations with air controllers. *Id.* See *Gov't Empl. Rel. Rep.* (BNA) No. 1008, at 784 (Apr. 11, 1983).