The Air Controllers and Strikes against the Government

Bernard D. Meltzer

“PATCO’s strike seems to have been not only a deliberate crime, but also a grave blunder, based on a miscalculation of the union’s power, the government’s resolution, and its contingency plan.”

On August 3, the Professional Air Traffic Controllers Organization (PATCO) launched the first completely nationwide strike in history against the federal government. That strike, and the administration’s stern response, have stirred larger issues: the role and limits of law and civil disobedience; the balance between compassion for individual offenders and the need for measures supporting the structure of law. Those issues seem also to be interwoven with basic and troubling questions as to the right policies for strikes in the public sector.

In the private sector, strikes, despite their costs, are generally accepted as necessary for a private bargaining system. The right to strike in the private sector is also a symbol of civil liberty—a symbol recently strengthened, for many, by the experience of Solidarity in Poland.

The prevailing policy against strikes by governmental employees thus generates doubts about the fairness, as well as the feasibility, of the prohibition. Why, some may ask, should strikes by air controllers, who work for the government, be criminal, while equally disruptive strikes by airplane pilots, who work for privately owned companies, be protected by law?

The answer lies in the sharply different framework for determining compensation in the private and public sectors. In the private sector, the bundle of employee benefits is shaped by two important economic elements: first, the employer’s countervailing power—for example, to lock out employees and to suspend operations, or to go out of business; and second, market forces reflecting the link among costs, prices, output, and employment. High wages, secured by the exercise of union power, may result in higher prices, which may lead to changes in methods of production, and replacement of high-cost suppliers with lower-cost foreign and domestic competitors. The effectiveness of such restraints has, of course, been questioned for some parts of the private sector in which collective bargaining (along with other factors, including managerial performance) appears to have contributed to the decline of formerly strong industries, such as steel and autos. But, in general, these market restraints serve to make the private sector quite different from the public sector.

In the public sector, such direct economic restraints are virtually inoperative. Many important services—for example, education and police protection—are free of price to the consumer. Furthermore, costs of services are typically buried in complex budgets, which taxpayers can rarely master. Consequently, in the public sector, budgetary and taxing decisions by legislatures, rather than market forces, are the dominant fac-

Mr. Meltzer is Distinguished Service Professor of Law and a 1937 alumnus of the Law School. These observations were prepared during the third week of the strike and appeared in the Chicago Tribune, September 6, 1981, except for several passages omitted there because of space constraints. Copyright 1981, Chicago Tribune. Used with permission.
tors in employee compensation. In making such determinations, legislatures respond to their constituents, including public employee unions. Frequently such unions, because they can “reward their friends and punish their enemies” at the ballot box, have substantial political leverage. Incidentally, such leverage in a democracy also serves to distinguish the situation of American unions from that of Solidarity.

It is true that recently the leverage of public sector unions has been reduced by constitutional restraints on the taxing power, such as Proposition 13 in California and Proposition 2½ in Massachusetts. Furthermore, taxpayers’ revolts, actual or threatened, are now encouraging budgetary restraint even when it is not constitutionally mandated. Nevertheless, citizens, through constitutional amendments or the political process, cannot achieve the same kind of pinpointed adjustments that are open to consumers under the price system. Constitutional or political limits on taxation may place a ceiling on public spending, but they do not enable the citizen to have tax expenditures directly reflect his judgment regarding the benefits of particular goods, or service publicly supplied, such as education, police protection, or welfare.

Reflecting and supplementing these differences between the public and private sectors is the traditional concern that strikes by public employees, because their services are usually essential, would inflict substantial harm on the community and would give those employees undue power.

Arguments for a blanket ban against public employee strikes have not, however, been universally persuasive, and a few states in our country, and many jurisdictions in Canada, allow some public employees to strike. Proponents of more limited strike bans suggest that the services of many public employees are not essential and that these employees should be permitted to strike.

But distinguishing between essential and nonessential employees would be difficult, indeed. For example, how should we here in Chicago classify strikes by schoolteachers or sanitation workers after a day, a week, a month? Furthermore, if only a small number of employees were considered nonessential and allowed to strike, the law might, as George Taylor said, be considered a hoax. Finally, if strikes by nonessential employees were lawful, a ban on strikes by essential employees would be more difficult to enforce. If groundskeepers or teachers, deemed nonessential, appear to be getting more because of strikes, police and fire fighters are also likely to be attracted to strikes—a more powerful weapon in their hands.

Whatever may be the right policy for public-employee strikes, the immediately dominating point is that the air controllers violated both the antistrike oath (which virtually all government employees take) and the federal law making it a crime to strike against the federal government. That point shaped the government’s pre-strike warnings of no amnesty, its tough response to the strike, and the widespread public support that emerged from the government’s action.

PATCO’s strike seems to have been not only a deliberate crime, but also a grave blunder, based on a miscalculation of the union’s power, the government’s resolution, and its contingency plan. Past practices of
both state and federal governments appear to have contributed to that miscalculation. The federal government had temporized with local “job actions” by air controllers, among other employees. State governments had tolerated even more extensive defiance of state antistrike laws and injunctions. Perhaps, PATCO had concluded from such toothless enforcement that the federal prohibition had been subject to de facto repeal and that the antistrike oath could be dismissed as an empty ritual.

That conclusion may have been tied to PATCO’s apparent conviction that its strike would bring air traffic to a virtual standstill, would plunge some airlines into bankruptcy, and would force the government to give in. Perhaps, PATCO also believed that the FAA’s unfairness and intransigence were so intolerable as to justify desperate measures.

Such charges of unfairness are, of course, common in labor-management disputes, particularly those involving illegal activity. There are special grounds for skepticism in this case. After all, PATCO President Robert Poli had found, or at least implied, that the FAA’s pre-strike proposal was worthy of submission for a vote by the membership. In addition, the Federal Labor Relations Authority has rejected, as unproven, the only charge of the FAA’s refusal to bargain in good faith, filed by PATCO after the strike.

Finally, PATCO has not explained why it did not go again to Congress—the ultimate arbiter of the controllers’ employment conditions—or why it did not make more use of the grievance procedure to protest alleged maladministration of the previous contract, or why it did not bring into play the statutory impassé procedures before confronting the government with a three-day ultimatum.

In this connection, it is significant that Mr. Poli, appearing before a congressional committee on September 30, 1980, voiced many complaints about the controllers’ working conditions but reaffirmed his previous declarations that there would not be a strike “next year.” He also said that he would recommend legislation, that PATCO’s strike fund would not be used until a strike was legal, and that any striking local would be placed in trusteeship.

Secretary of Transportation Drew Lewis has acknowledged that the controllers have legitimate grievances, but legitimate job grievances are staples of the human condition and not a justification for anarchy. Usually, they can be remedied if complainers are not in a hysterical hurry or are not using grievances as leverage for other ends. In short, it is quite doubtful that air controllers were so mistreated that their strike, although plainly illegal, might, in some sense, be said to be morally justified.

Indeed, to accept at face value such self-serving claims by any group of federal workers would trivialize the whole idea of civil disobedience. It would also result in the progressive repeal of the antistrike law, not by Congress, but by the very groups whose disruptive power Congress had sought to contain.

Respect for the mandate of Congress presumably lay behind the government’s response when PATCO, against strong warnings, flouted the antistrike law. That response was tough on PATCO, the strikers, and the country. The administration declined, as was its right, to bargain with the union while it was engaged in an unlawful strike and also petitioned for decertification of PATCO as the controllers’ bargaining representative. (An administrative law judge has endorsed the merit of the government’s petition.) The Department of Justice brought into play a whole arsenal of legal weapons—actions for injunctions, for contempt of court leading to fines and jail sentences, for attachment of union funds, and grand jury indictments. The government also discharged most of the strikers, and President Reagan declared them ineligible for future federal employment. (This declaration was within his discretion, but he apparently has authority to lift or narrow it.) The discharges, as well as the presidential ultimatum of only two days, have been criticized as unduly severe and hasty.

These measures naturally left in their wake personal tragedies for thousands of controllers. Furthermore, there were spillover effects on nonstriking employees, whose jobs have been curtailed or suspended because of reduced air operations. Finally, the country has suffered, and will continue to suffer, substantial costs and economic losses while new controllers are trained.

There have been suggestions that even now compassion and compromise could avoid further losses for the controllers and the country, presumably by a broad grant of amnesty to strikers. But it is by now hard to devise a formula that would accomplish those appealing purposes without serious damage to President Reagan’s credibility both here and abroad and to the antistrike law.

There is also a quixotic aspect to suggestions, such as that made by the *New York Times*, that the president, having shown his strength, should now show his compassion. If, however, the government’s position had been weak, there presumably would have been suggestions for “flexibility” in order to save the country from ruin. If both those views are accepted, the government, whether strong or weak, is in a no-win situation in trying not to undercut the antistrike policy through reemployment of strikers.

Reemployment of the strikers would also raise a cluster of thorny,
job-related difficulties. How much friction would there be between ex-strikers, strikebreakers, and replacements, and what would be the likely effects on the safety of the system? What of relative seniority rights? Plainly difficult issues of fair treatment for strike replacements and controller-trainees might be posed by the reinstatement of large numbers of ex-strikers. Nevertheless, the foregoing difficulties presumably would be manageable if there were a formula that would protect the general interest in the president’s credibility and the structure of law.

There have also been suggestions that once again we should look to the courts to get the controllers as well as the country off the hook. One suggestion is that the courts should invalidate the antistrike statute as repugnant to the Constitution.

This claim of unconstitutionality is, however, an empty one. Under the Supreme Court’s precedents, even private sector employees do not have a constitutionally protected right to strike. They do have a right as individuals to quit their jobs, but that right is not to be confused with concerted walkouts to get better terms. The public sector precedents also indicate that the federal antistrike law is constitutional; they do not suggest the anomalous result of giving governmental employees a constitutional right to strike that has not been recognized in the private sector.

Such constitutional protection would, moreover, run against the grain of our culture. The proscription against strikes by public employees has been retained by most states, although with indifferent enforcement. Furthermore, in 1955, when Congress reenacted the federal strike ban, all of the union leaders who testified endorsed it. Similarly, the Civil Service Reform Act of 1978 reaffirmed that strikes against the federal government would be unfair labor practices even though the antistrike policy had been questioned in congressional hearings. And earlier, President Franklin D. Roosevelt endorsed an antistrike policy with these still timely words: “I want to emphasize my conviction that militant tactics have no place in the function of any organization of government employees. . . . A strike of public employees manifests nothing less than intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking to the paralysis of government by those who have sworn to support it, is unthinkable and intolerable.”

The claim of unconstitutionality of the antistrike law has no basis in precedent, in history, or in the prevailing values of our society.

The administration now seems to be trying to dig beneath the legalities and to investigate and to correct deficiencies in the controllers’ working conditions (broadly conceived). It is good news that, for those purposes, the FAA recently established a highly qualified task force. It is too bad, however, that the panel does not seem to have a member specially identified with “labor” and knowledgeable about labor-management relations. Such a participant might improve communication between the administration and labor unions, both public and private. More specifically, he might well underscore these points: First, an antistrike policy is likely to impose very high social costs unless the employees involved generally understand that policy and consider it justified. Second, the existence of orderly channels for voicing employee concerns, as well as employee perceptions regarding the openness of those channels, will help achieve widespread employee acceptance of and compliance with a strike ban. Third, such compliance is, however, likely to be obstructed if members of the political establishment engage in blanket indictments of federal employees as lazy, overpaid, crooked red-tape artists—a general characterization that is, in my experience, wholly unjustified. Fourth, enforcing the federal antistrike law should not be viewed as an effort to undermine unions, in the public or private sector. On the contrary, such enforcement is wholly compatible with the law that protects unions while also seeking to safeguard the community—for instance, by providing for injunctions against private-sector strikes that create national emergencies.

That point about the community is sometimes lost because of a tendency in some quarters to convert lawless action into a “basic right” or a “civil liberty” if enough people engage in it. Naturally, the more lawbreakers there are, the harder it is for authority to protect society. But no elaborate argument is needed to show that villains do not become heroes just because there are lots of them.

The large number of controllers involved and the difficulties of replacing them bear on the costs and the feasibility of enforcing an antistrike policy in the public sector. In the aftermath of this strike, the short-term costs of such enforcement are painfully clear while its benefits are indirect, subtle, and long-term.

Nevertheless, public support for President Reagan’s decisive action appears presently to have strengthened the federal antistrike policy. But the situation is fluid, and if the costs increase significantly, cries of overkill and union busting will probably grow louder. Such charges, however, miss the mark insofar as they rely on the costs involved to justify reinstatement of the strikers.

Surely, the controllers should not be given absolution because they have inflicted the kind of damage that the antistrike law was designed to avoid. Furthermore, the defense of the antistrike policy, like the defense of the democratic system, will inescapably involve substantial costs.

To paraphrase Winston Churchill on democracy, that policy is far from perfect; it may be the worst form of policy, except for all those other forms that have been tried from time to time.