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TO UNIONIZE, BARGAIN COLLECTIVELY,
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THE LEGAL RIGHTS OF FEDERAL EMPLOYEES
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DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
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By

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***

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CHAPTER I

THE PROBLEM

Background of the Problem

In recent years considerable attention has been directed toward unionization in the public sector. Three basic factors have contributed to this attention: (1) a steady increase in the size and importance of governmental functions, (2) a rapid rise in the size of the labor force in public employment, and (3) the noticeable spread of unionization and attendant activities in the public sector.

The 20th century is witnessing a rapid change in the state of technology, knowledge, and environment. Government, under these circumstances, plays a dual role as a regulator of economic and social activity and as a producer and consumer of a significant part of the nation's final output of goods and services. This growth in governmental activities and responsibilities has resulted in a vast increase in the number of public employees.

The number of civilian public employees at all levels in the United States rose to a record 12,091,000 in April, 1968. Of this figure, 2,881,919 (24.2 percent) were federal employees. A continuing steady rise in public employment is anticipated by several studies. Moreover, according to these studies, new jobs in the public sector will
continue to be largely oriented toward professional, technical, and other high-grade white collar occupations.

The growing role of government in the total economy, and the resultant expansion of the public labor force have created personnel problems. Among the more critical problems has been the absence of sound and appropriate criteria by which public employees could participate with management in making decisions affecting their wages, hours, and conditions of employment.

The Lloyd-La Follette Act, passed in 1912, represented the first official endorsement of the right of public employees to organize into unions for the purpose of participating in personnel decisions. However, among the critical limitations of this act were these two: (1) it covered only postal employees and (2) it did not facilitate the right to bargain collectively in any meaningful way.

The historical struggle of public employees (similar to the private employee struggle) on political and economic fronts was basically directed toward gaining official recognition of the right to unionize, bargain collectively, and, hopefully, to strike if necessary to gain their ends.

Eventually a nationwide official program for public employees was promulgated by Executive Order 10988 issued by President John F. Kennedy on January 17, 1962. This legal document has had some effect on the growth of unions in the public sector. There are no comprehensive statistics on the public employee union membership, but by the end of 1966, exclusive representation agreements covered 1,054,000
employees, as compared with only 19,000 members in 1961. It is also estimated that there were 59 unions in the public sector in 1964 with total membership amounting to 1,453,000 employees. Of this figure, 35 unions are affiliated with the AFL-CIO; the remaining 24 are unaffiliated.

Statement of the Problem

It appears that Executive Order 10988 has had an effect on the growth of unionization in the public sector. However, it seems to have had little effect on the attitude of public officials and Supreme Court members particularly with regard to the right to bargain collectively and strike. This conservative attitude probably has its roots in the history of unionization in the public sector.

The sovereignty of the state is the basic theory upon which public officials and Supreme Court members have built barriers of legalism. The right of public employees to organize into unions has been opposed on this and several other grounds. It was argued first that such employees have no need to organize because their wages, hours, and working conditions are established by the government which aims to compensate its employees fairly. It is further argued that when unionized public employees are called upon to act officially in matters affecting the interests of organized labor, their union allegiance will jeopardize the impartial performance of their duties. More important, it is asserted that whenever public employees organize, their capacity to strike increases.
The major legal barrier to public employee unionism is based on the notion that there is no legitimate subject matter for collective bargaining with department heads or other administrative officials since public employees must pursue legislative channels for wage increases and other improvements in their status. In other words, public employees have adequate opportunities to achieve their goals through legislation and are assured of fair treatment because of the benevolent nature of their government employer.®

The search for providing machinery that deals effectively and constructively with a public employee strike is the most crucial problem in public service industrial relations. Sovereignty of the state is usually the basis for denying this right. It is held that:

In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. . . . [Governmental employees] are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government. . . .

In sum, the chief justification for denying to public employees the right to unionize, bargain collectively, and strike is the sovereignty of the public employer. However, commencing in the early 1960's many of the legal barriers have been subjected to criticism. Certain state laws and some public officials have contributed toward creating a favorable climate in this regard.
In a memorandum of June 22, 1961, President Kennedy stated his belief that:

The right of all employees in the Federal Government to join and participate in the activities of employee organizations, and to seek to improve working conditions and the resolution of grievances should be recognized by management officials at all levels in all departments and agencies. The participation of Federal employees in the formulation and implementation of employee policies and procedures affecting them contributes to the effective conduct of public business. We need to improve practices which will assure the rights and obligations of employees, employee organizations, and the executive branch in pursuing the objective of effective labor-management cooperation in the public service.\(^\text{10}\)

The Task Force on Employee-Management Cooperation appointed by President Kennedy concluded that "certain of the ground rules which Congress has laid down for employee-management relations in the private economy should be carried over to the Federal Government in order to assure that the public interest and the interests of individual employees are protected."\(^\text{11}\) Executive Order 10988 of 1962 followed closely the eventual recommendations made by this Task Force.

Since the issuance of this executive order, a limited number of books have been published concerning several aspects of unionization in the public sector. Several articles in various periodicals have discussed certain dimensions of this subject. Supreme Court decisions, legal opinions of the Attorney General, opinions of other public officials, and state laws have contributed in shedding further light on different issues of unionization in the public sector. However, accumulated evidence indicates that:

**First:** No clear-cut legal answer has been given by the Supreme Court or other legal authority concerning the right of public employees
to unionize and bargain collectively.

Second: No definite answer has been given to the right to strike among public employees. Theoretically, it is prohibited, but practically it is a real phenomenon. The situation has reached an impasse.

Given this situation, it becomes important to raise certain legal and theoretical questions. These questions can be grouped into two broad areas as follows:

1. The first area deals with the appropriateness of the provisions of Executive Order 10988 in the light of three basic factors:

   A. The evolutionary change in state laws enacted after 1962 which might be considered a function of the changing climate of government as a whole.

   B. The trend in Supreme Court decisions toward increasing liberalism particularly with regard to the right to unionize and bargain collectively.

   C. The validity of the notion that since several years have elapsed since its passage, Executive Order 10988 might require "reconsideration" of its provisions in view of changing philosophical and ideological principles which possibly should be adopted to improve labor-management relations in the public sector.
2. In the light of answering the above questions, the second area of study will deal with the possible need for "new" or supplementary legislative principles covering federal employees.

The Purpose of the Study

The main purpose of this study is to evolve and propose operational principles which might be incorporated into federal legislation and eventually into state and local statutes. These principles will focus only upon the right of federal employees to unionize, bargain collectively and strike. The adoption of such principles, it is expected, will lead to greater labor-management cooperation and hence more efficient performance in the public sector.

This objective is based on the assumption that a problem does exist in the public sector because of the legal barriers that inhibit the right of public employees to unionize, bargain collectively, and strike. If this assumption is correct, a favorable climate for cooperation might materialize as public employees are afforded greater opportunity to participate in decisions that affect their economic welfare and everyday work lives.

Methodology

This research represents an attempt to study the legal rights of public employees to unionize, bargain collectively, and strike at the federal level. It is based upon two interconnected themes. The first represents a descriptive study of unionization in the public sector. Thus, an attempt is made to describe, analyze, and evaluate the evolution
of the above rights in the public sector from the last quarter of the 19th century to the period immediately prior to the issuance of Executive Order 10988 on January 17, 1962.

The second theme is exploratory in nature. It deals with the present legal status of the right of public employees to unionize, bargain collectively, and strike at the federal level. The materials which are analyzed are: (1) Executive Order 10988, (2) pertinent Supreme Court decisions handed down since 1962, and (3) legal opinions issued by the Attorney General's office since the passage of Executive Order 10988. An analysis of legal opinions, it is anticipated, may reveal weaknesses and strengths in current legislation.

The three documents cited above will serve as the main source of information in this study. However, other sources of information will be obtained from documents published by the President's Task Force on employee-management relations in the federal civil service and its supplementary and subsequent documents. In addition, valuable information is contained in documents, bulletins and reports released by governmental agencies and departments. Finally, the existing literature bearing on the study under consideration will provide relevant information.

Definition of Terms

Certain terms are used throughout this study. These terms are defined as follows:

**Public employee organization** refers to any organization, agency, or representative committee in which employees participate for the pur-
pose of dealing with public employers concerning wages, hours of work, and conditions of employment.

Collective bargaining is a process of mutual participation by management and employees by which the terms of employment are determined and contained in a negotiated and signed agreement. It is a continuing process of communication between the two parties during its negotiation, administration, interpretation and enforcement.

Strike. The language of the Taft-Hartley Act of 1947 can be considered as instructive in arriving at a definition of which would be considered a strike. Accordingly, Section 501(a) of this act defines a strike as follows:

The term "strike" includes any strike or other concerted stoppage of work of employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.12

Public sector refers to the federal, state and local governmental departments and agencies which consist of legislative, judicial and executive branches. Included among federal agencies are Housing and Urban Development Interior, Post Office, St. Lawrence Seaway Development Corporation and Tennessee Valley Authority.13

Public employees are those wage and salaried employees who are working with and in such agencies and institutions noted above. For the purpose of the study, the analysis will be focused on the part of the civilian employees who are working in the executive branch of the United States federal government. Accordingly, the legislative and judicial branches are excluded.
Principles refer to fundamental generalizations or propositions which may command, forbid, permit, encourage, maintain or protect the human conduct and behavior. For example, one principle in the area of public employee relations might be that it is desirable to close the gap between private and public sector with regard to the terms of employment. One of the most significant terms of employment is the creation of adequate and sound grievance machinery.

Limitations of the Study

The most important limitation of this study lies in the fact that it focuses its attention on the analysis of the legal documents and materials given above (p.8). The right to unionize, bargain collectively, and strike will be analyzed only at the federal level. Accordingly, no attempt is made:

1. To study the right of public employees to unionize, bargain collectively, and strike at state and local levels. It should be noted, however, that the ultimate principles that are proposed in this study should also be applicable to these levels of government.

2. To study day-to-day problems of employee-management relations in the public sector. However, the proposed principles, it is expected, might close the gap between the legal provisions and their practical application and thereby create a favorable climate for daily problem solving.

3. To cover the area of labor-management relations in the private sector except as applicable principles may be derived from this sector.
Assumptions of the Study

The most important and general assumption is that the philosophical and ideological principles of the United States public policy with regard to labor-management relations are moving toward increasing liberalism. The prevailing change in the labor policy is toward a growing demand for achieving a scale of balance between public employees rights and the rights of their counterpart in the private sector.

The second general assumption is that the role of federal and state laws, court decisions, and other administrative bodies at the federal, state, municipal and local level have, and will have, significant and major influence on the development of industrial relations system in the public sector.

In the light of the above two general assumptions, three subsequent assumptions are given:

1. The right of public employees to organize into unions seems to be an extension of their rights as individual citizens to participate in economic, social and political decisions that may influence their destiny.

2. The right to bargain collectively seems to be a rooted and accepted institution in the American system. The prevailing attitude change indicates that granting public employees a voice in the determination of the conditions under which they work would promote better managerial techniques and make for more efficient government operations.

3. Available evidence indicates the ineffectiveness of no-strike legislation. It is believed that granting the right to strike might
help to protect working conditions from deteriorating to the point where a decision has been made for strike action.\(^\text{15}\)

**Previous Research**

Beginning in the early 1930's, a number of studies began to penetrate some aspects of employer-employee relations in the public sector.\(^\text{16}\) An early comprehensive study was conducted by a committee of the Civil Service Assembly.\(^\text{17}\) The study was intended to provide a framework of basic principles in the area of public employment relations. However, it seems that this study provided a focus of inquiry too narrow to permit examination of the fundamental issues inherent in public employee-management relations.

Recently a series of related monographs on public labor relations was published by the Public Personnel Association. A brief statement is necessary for each of these monographs.

**Monograph One:**

For the purpose of widening the area of understanding and narrowing the zone of disagreement in employer-employee relations in the public sector, Warner published a book dealing with this subject in 1963.\(^\text{18}\) This book consists of a number of essays, statements, and illustrative documents. The data were collected mainly from public officials, consultants, union representatives, and academic authorities.

**Monograph Two:**\(^\text{19}\)

This study examined the significant aspects of management relations with organized employees. It covers management prerogatives, role of
communication, grievance procedures, impact of union and association activities on merit system concept and other related matters. The stated purpose of this study is to provide practical answers which might aid public sector management to deal with day-to-day problems in labor-management relations.

Monograph Three:

This study, conducted by Warner and Hennessy, seeks:

1. To project the impact of collective bargaining on personnel administration as well as on public administration in general.

2. To explore the use of devices for arbitrating disputes as an alternative to strike.

The authors of this study regard the relationships between public management and employee organizations as a constantly changing phenomenon. This dynamic phenomenon assumes new proportions, takes on new meaning, creates new attitudes, and results in new practices. This situation illustrates persistent need for examining many of the policy issues created by these changes and by conflicting notions about collective bargaining.

There has also been a number of articles written on the subject of labor relations in public service. Professor Hanslowe, for example, points out that the current efforts of public employees to organize and engage in collective bargaining pose difficult problems of public policy and administration for government at all levels—federal, state, municipal, and local. His study represents an attempt to examine the development of these current activities and the legal dimensions of the problems.
A study made by Godine was initially written as a doctoral dissertation and reprinted in 1967. It represents an analytical investigation of the potential of collective employee action in the public service. The basic objective of the study in the author's words was to:

\[\ldots\] ascertain the extent to which the civil service may be accorded a measure of functional recognition without impairment of the inalienable duty of a representative government to retain ultimate control over the administrative machinery created for the accomplishment of public purposes.

The stated conclusion of Godine's study is that collective determination of the conditions of employment in the public service places upon employees a responsibility for maintaining a degree of compliance with regulations in the formulation of the decisions affecting their working lives.

Another study made by Heisel and Hallihan was prepared to serve a dual audience: (1) government officials and (2) representatives of employee organizations. Critical questions are discussed such as the determination of an appropriate bargaining unit, negotiable subjects, management prerogatives, bargaining procedures, writing the agreement, and other related questions. The practicality of this book is based on day-to-day labor-management relations. Thus, it is essentially directed at the practitioners.

An additional study made by Vosloo has contributed to the practical sphere of collective bargaining in federal service. The study concerns the thinking, events and societal forces precipitating and molding the official policy and the institutional framework associated
with the "New Era" in employee-management relations in the United States federal service, which was introduced by Executive Order 10988. In fact, this study was an attempt:

1. To relate the phenomena described to some generic questions associated with the surrounding organizational and political framework.

2. To explore the development of the new program for public employee labor relations in comparison to its counterpart in the private sector, and within the context of judgmental criteria deriving from the concept of the sovereignty principle, the system of separation of powers, the exercise of employee rights in relation to democratic ideology, and the implications of employee participation in terms of public management function.

Vosloo concluded that despite the fact that the new program was profoundly conditioned by the special goals and needs of government, its operating premises appear to be utilized for the molding of employee interests, the collective presentation of their demands, the settlement of individual grievances, and for creating cooperative efforts on both sides—employee representatives and public management.

Unpublished Dissertations

There are also two unpublished dissertations pertaining to labor relations in the public sector. The first by Nesbitt examines the question of whether public employee labor unions can exist and grow within the context of the merit system. Nesbitt focuses upon the Department of the Interior, the Tennessee Valley Authority, and various
state and county experiences, as well as the "Little Wagner Act of New York City." Nesbitt's most significant finding is that collective bargaining is feasible and beneficial with the merit system. However, the study indicates that some of the aspects of collective bargaining come in conflict with basic merit practices. This occurs when public employee unions seek to establish extreme union security measures such as the closed-shop and union-shop.

The second dissertation, prepared by Hazard, is concerned with the current legality of collective bargaining between public school teachers and school boards in the fifty states, and the implications of the law for public school administration. The author comes to some basic conclusions. Among them are:

1. The role of the public school administration will probably change as formal negotiation procedures force the teachers and the board into clear-cut positions on educational issues.

2. Teachers probably will participate more widely in the formulation of policy that affects the conditions of employment, including the totality of educational planning.

3. Teacher-board negotiation will continue to be widespread. Formal negotiation procedures require intelligent, responsible participation by all parties.

Contributions of the Study

A number of published and unpublished studies have contributed in shedding light on some aspects of unionization in the public sector. Most, however, are limited in scope and focus of inquiry.
The contribution of the study under consideration is that it represents the first full-scale study of the legal rights of federal employees to unionize, bargain collectively, and strike. Its basic inquiry focuses upon the developmental changes that have been taking place in employee-management relations in the public sector at the federal level. The study also focuses its attention on the recent attitude changes and improved climate as evident in Supreme Court decisions. These factors should be taken as sufficient evidence for requiring "reconsideration" of the legal provisions of Executive Order 10988.

It is a matter of principle that if law becomes impractical in its daily application, it must either be amended or a new law be substituted. The acceptability of this principle leads to a conclusion that the elapsing of several years since passage of Executive Order 10988 and the net product of its daily application, which has proved impractical, have created a need for reconsideration of its major provisions. If this is the case, our research contribution will be made in the form of principles that may be adopted in appropriate legislation at the federal level and would be aimed at removing barriers of legalism that presently inhibit effective industrial relations in this sector.

Organization of The Study

The study is organized in the following manner:

Chapter I, as noted, defines the problem, provides assumptions,
makes a brief review of previous research, and indicates the contribution of this study.

Chapter II is devoted to describing, analyzing, and evaluating the historical evolution of the legal rights of federal employees to unionize, bargain collectively and strike.

Chapter III presents a critical analysis and evaluation of the provisions of Executive Order 10988 with regard to the rights of federal employees indicated in Chapter II.

Chapter IV analyzes and evaluates the evolutionary changes in (1) certain state laws enacted after the issuance of Executive Order 10988, (2) Supreme Court decisions, and (3) pertinent legal opinions of the Attorney General made since 1962. This will include a review of the recent literature and its implications bearing on the main subject of the study under consideration.

Chapter V is a summary of the study and its major findings. Certain principles are generated and provided which might be incorporated into a "New Federal Law." Appendices of relevant materials and a bibliography conclude the study.
CHAPTER II

AN HISTORICAL ANALYSIS OF THE LEGAL RIGHTS
OF FEDERAL EMPLOYEES TO UNIONIZE,
BARGAIN COLLECTIVELY, AND STRIKE

The main objective of this chapter is to provide an historical summary of the evolution of the legal rights of the federal employees to unionize, bargain collectively, and to strike. This summary covers the period from the last quarter of the 19th century to just prior to the issuance of Executive Order 10988 signed by President John F. Kennedy on January 17, 1962.

Hostility Toward Public Employee Unionism

Federal legislative, executive, administrative, and judicial levels have shaped the legal framework of unionism at the federal level. The environment in which federal employee unionism has lived is documented by laws, rules, and written statements made by public officials during the 19th century and the present century. To a large extent this hostile environment has been based upon the theory of the sovereignty of the state.

Despite the existence of this hostile environment, federal employee unionism was able to break through and achieve some progress
including improvements in federal management.¹ Four basic methods are used by federal employees to achieve their goals. They are: (1) legislative tactics usually taking the form of petitioning Congress, lobbying, and pressure through affiliation with the general labor movement; (2) administrative methods which generally consist of resolutions, written petitions, open letters, personal interviews and consultation, and personal contacts with public officials; (3) publicity which was adopted to "educate Congress directly and also to create a favorable background among citizens generally,"² and (4) political or electoral activities. The history of public employee union movement has witnessed the capability of such unions in defeating Congressional members who intended to deprive public employees of their right of self-defense.³

The Doctrine of Sovereignty

The sovereignty of the state represents a foundation upon which the Supreme Court and governmental authorities have tried to prove that the public sector has a distinct character as compared with the private sphere. The doctrine of sovereignty has been defined as the ultimate and final source of legal authority within the state. The state is sovereign because it gives orders to all and receives orders from none.⁴

This doctrine is not a stated provision of the United States Constitution. However, it is embedded in English common law and was adopted by American courts, especially in the 17th and 18th centuries.⁵ The doctrine was subjected to many explanations and interpretations by intellectuals throughout Europe.
The literature of the 18th century discusses the theories of sovereignty in the form of the struggles fought by the American people against the British Crown. The diversity of sovereignty theories left a general confusion in the behavior pattern of many people everywhere in the years to come. However, basic fundamental questions have been posed in order to shed light on the intrinsic nature of sovereignty of government. Specifically, on what ground does government claim the right to be obeyed? What are the reasons why it is not always obeyed?

In an attempt to answer these questions philosophers have provided basic ideological concepts and explanations. These are classified as follows: The Coach-Driver Concept, the Concept of Divine Right, the Transmission Concept, the Undivided Loyalty Concept, and the Uniqueness of Government Concept.

Under the Coach-Driver Concept, the government is hired and paid by those whom he drives—the people. The government, which consists of "men in power", is delegated by those who selected it to fulfill definite missions. Accordingly, government derives its power and authority from all the people. In short, this concept reduces the role of government to that of a leader without authority.

The basic ideological principle on which this concept is founded is that the citizen ought to obey himself alone, and that the leadership only exercises authority derived from those who hired it.
It is beyond the scope of our study to evaluate and criticize the "Coach-Driver" Concept. However, it is essential to note that this theory:

... did not play a decisive part in the early ages of American democracy; the concept of natural law was then too strong to allow the voluntarism of such a theory to unfold its consequences and reveal its principles ... it never won in America the same position of unquestioned supremacy ... 8

The Concept of Divine Right represents the Christian faith.9 The central philosophy of the Christian faith indicates that God became man, and before he left the world he founded a society designed to maintain his life in men.

The extremity of this concept maintains not only that the power of the "king" is derived from God, but that the designation of the king is effected divinely.10 Accordingly, leaders of the state have power and authority which come to them as a result of their designation as divine leaders or rulers.

The Transmission Concept was introduced by St. Thomas Aquinas and advanced by others.11 It maintains that the power and authority with which they make laws for themselves belong primarily to the people and that:

... if and when power lies in the hands of a distinct person this person has the character of one who substitutes for the people.12

This concept was developed by St. Robert Bellarmine when he wrote on the subject of sovereignty in temporal society in the 19th century.13
The intrinsic principles of this concept, as it was given by Bellarmine, were expressed by Yves R. Simon as follows:

The people, in whom political authority resides primarily, would not have the right to retain and to exercise for itself the authority which resides primarily in it. Just as the nature of a society demands that there be political authority, so it would demand that political authority be intrusted to the hands of a distinct governing personnel.\(^\text{14}\)

The Undivided Loyalty Concept represents a fourth interpretation of the sovereignty doctrine. The basic principle of this concept asserts that government employees must owe unquestioning loyalty and obedience to the state, for to disobey the state is to disobey the will of the people.\(^\text{15}\)

The central validity of this concept lies in the notion that the decisions made by the public through their representatives must be accepted and carried on by the public employees. Consequently, the primary responsibility of government employees is based on an obligation of loyalty to the public and its representatives.

This concept leads to the conclusion that public employees are required to display the same complete allegiance and obedience that is demanded from soldiers. Based upon this concept, public employee unionism may "threaten to divide loyalty and to put employees in a position of hostility to the state as employer."\(^\text{16}\) Thus, it was concluded that:

The public must be freed from [the public employee unions'] insidious influence, for the reason that they are demoralizing the spirit of honesty and loyalty that constitutes sincerity in the service of the people.\(^\text{17}\)

The extreme interpretation of undivided allegiance was based upon the soldier analogy of government employees.\(^\text{18}\) Accordingly there is an
equality of obligation and unquestioned obedience on the part of military forces and civilian government employees. The United States Supreme Court has supported this interpretation on several occasions.\textsuperscript{19}

The Uniqueness of Government Concept represents another theoretical argument for sovereignty of the state. It refers to the idea that government is responsible for the safety, health and defense of the community as a whole. Accordingly, it must have the right to take whatever steps are necessary to prevent any action by the few which might threaten the continuous flow of goods and services to the total society.

The central validity of this concept is based on the notion that it is the public sector which bears upon every aspect of society's life and protects the individual and his family directly, affecting not only his work but also his leisure, income, expenditures, security, safety, schooling, health, housing, and transportation. The natural result of the logical ideology of this statement is that any "threat" to the continuity and quality of these functions would affect the welfare of the entire society.\textsuperscript{20} Within the framework of the above concept, it was feared that providing the right to unionize would lead to militant activities which would inhibit the performance of these functions.

The Sovereignty Doctrine in Practice

The first decade of the present century witnessed a persistent opposition to the right of public employees to unionize, bargain collectively, and strike. Government authorities attempted to bridge the gap between the theoretical elements of the sovereignty doctrine and its
various practical interpretations indicated in the preceding section. These practical interpretations took the form of Presidential rules and Supreme Court decisions. Legislative action did not come to light until 1912. There were only two statutes of general application before the 1960's. The first of these was the Lloyd-La Follette Act of 1912. The second was Section 305 of the Taft-Hartley Act of 1947.

The central legality of Presidential rules and Supreme Court decisions was based on the notion that public employee unions had no proper place in the government sphere. The right or freedom to strike was out of the question and represented long standing legal policy in the public realm. Because the government, as pointed out, was considered the only source and wielder of unquestioned rules and regulations, presidential orders played a decisive role in crippling public employee unionism. Moreover, administrative officials, by using the provisions of these orders, began to interfere with any attempt of their employees to join "unfavorable" organizations. The net outcome was unrest, defiance, and threat of militant activities.

Presidential actions: The Gag Rules

To implement the sovereignty doctrine, three executive rules, which have been called the "gag orders," were issued between 1902 and 1909 in an attempt to stop "creeping unionism" in the federal sector. The first two orders were issued by President Theodore Roosevelt; while President William Howard Taft issued and further elaborated the third.

The main reason for issuing the gag rules was the presidential conclusion that activities of public employee unions, particularly on
the political front, were improper actions.\textsuperscript{24} Practical experience had taught public employees that "political pressure" was highly significant in achieving their objectives. Instead of relying upon the "pleasure of legislative friends," public employees "played politics" through unionized efforts in an attempt to exert pressure on politicians.\textsuperscript{25} The increase in political activities on the side of public employees, however, created a hostile attitude which culminated in the gag rules of 1902, 1906, and 1909.

The Post Office Department was the main division of the public sector which was subjected to these rules. These orders were received as a "warning slip" to all government employees who might seek to participate with management in the decisions affecting their work lives. The relevant proviso of the first order reads as follows:

\begin{quote}
All . . . employees . . . are forbidden either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence . . . in their own interest any other legislation . . . either before Congress or its Committee, . . . or under which they serve, on penalty of dismissal from the government service.\textsuperscript{26}
\end{quote}

Immediately before the issuance of the second executive order in 1906, President Theodore Roosevelt made a basic change in the Civil Service Rules so as "to permit the President or the head of a department to remove employees without notice."\textsuperscript{27} As a result, the federal employee had a choice between losing his job or acceding.

The three executive orders prohibited federal employees or their unions from conducting any form of political activity in an attempt to achieve their objectives. Moreover, it was a violation for any union
representative to meet personally with Congressional members for the purpose of discussing the pay system. As a result, federal employees were isolated from the highest administrative authorities. The only contact employees could make was through the immediate head of the appropriate department. Hence, the success or failure of public employees depended entirely upon the consent and pleasure of public officials in different departments.

The common experience of the federal employees and their unions taught them that even an attempt to obtain legislative achievements could do little good unless public officials dropped their hostile attitude. More important, they realized that public officials could interpret laws so as to twist them out of their meaning in violation of the intent of those who made them.28

Under these circumstances, public employees sought means to escape and to follow certain courses of action. They tried to achieve their objectives by three main channels:

1. Affiliation with the outside (private sector) labor movement to obtain strength and results. The goal of affiliation was "to guarantee freedom from official domination."29

2. Affiliation with the outside labor movement, which is based on unity of effort and solidarity, as a way of exerting vigorous political pressure. The aim of voting power was "to punish enemies and reward friends."30

3. Use of publicity and direct dealing with Congressmen as a short run means for getting immediate response to public employee demands.
The increase in militancy was the natural outcome of the discontent and reaction resulting from the issuance of the gag rules. Affiliation with the general labor movement was selected to facilitate the use of group power not only to "kill the gag rules," but also to achieve the legal right to unionize, bargain collectively, and strike.

**Lloyd-La Follette Act of 1912**

The new courses of action undertaken by public employees culminated in the passage of the Lloyd-La Follette Act of 1912. For the enactment of this piece of legislation the federal employees were heavily indebted to the American Federation of Labor. The relevant provisions state that:

Membership in any . . . labor organization of postal employees not affiliated with any outside organization imposing an obligation or duty on them to engage in any strike or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said postal service, or the presenting by any such person or groups of persons of any grievance . . . to Congress or any member thereof shall not constitute or be cause for reduction in rank or compensation or removal . . . from said service. The right of persons employed in civil service of the United States either individually or collectively, to petition Congress, or any member thereof, to furnish information to either House of Congress or to any committee or member thereof, shall not be denied or interfered with.

The Lloyd-La Follette Act was the first significant legislation and covered federal employee unionism from 1912 to just prior to the issuance of Executive Order 10988, signed by President Kennedy, in 1962.
This act was restricted to federal employees and unionism in the Post Office. However, it has been widely regarded as containing the guiding public policy at least in the federal service.\textsuperscript{34}

Legally speaking, the basic rights which have been provided and protected by this act are: (1) The right to organize for mutual aid and protection, (2) The right to join or refrain from joining employee organizations, (3) The right to affiliate with the general labor movement under certain restrictions, and (4) The right of federal employees individually or through their unions to petition Congress.

Certain basic restrictions have been imposed by this act. The legal prohibition of militant activities were asserted, and the right to be affiliated with the general labor movement was not permitted if the outside organization imposed an obligation or duty upon public employees to engage in any strike, or proposed to assist them in any strike, against the United States.

Despite the above restrictions, the effect of the Lloyd-La Follette Act was the ending of the legal restriction on the right of federal employees to be affiliated with the labor organizations outside the public sector.\textsuperscript{35}

\textbf{Supreme Court Attitudes}

Various Supreme Court decisions also contributed significantly in shaping an unfriendly legal climate regarding the rights of public employees to unionize, bargain collectively, and strike.
The legal impossibility of introducing collective bargaining was asserted by the Supreme Court on several occasions. The attitude of the courts was typified in the following decision in 1946:

There is an abundance of authority . . . which condemns labor union contracts in the public service . . . It is declared that [the giving of this preference to unions and their members] in whatever form, involve an illegal delegation of disciplinary authority, or of legislative power, or of the discretion of public officers; that such contract disables them from performing their duty; that it involves a divided allegiance; that it encourages monopoly; that it defeats competition; that it is detrimental to the public welfare; that it is subversive of the public service; and that it impairs the freedom of the individual to contract for his own services . . .

Within the above legal framework, it was ruled that there is no legal grant of power in the hand of public officials to delegate authority because this power is created and possessed by the whole people. In addition, the relationship between public employees and sovereign state is bound by laws and regulations. Accordingly, collective bargaining, if theoretically accepted, would be impossible to apply in practice.

It should be noted that a sizeable proportion of court decisions were rendered at the state level. A judicial decision, in 1951, asserted:

In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law . . . [governmental employees] are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose.
Many of the decisions rendered at the state level could be considered as landmark opinions which have influenced not only the development of laws at the state level but also legal public policy in general. In addition, these decisions have helped administrative officers shape their operational decisions with respect to labor-management relations at the federal level.

The right to strike was almost universally deemed unlawful. It was subjected to various legal procedures: (1) government seizure, (2) classifying such strikes as felonies, (3) dissolving any union that strikes, (4) fining strikers with or without imprisonment, or (5) making unions or union leaders liable for any damage caused by a strike.

Besides the attitudes expressed by Supreme Court members, federal legislation put the strike in the channel of illegality. The Lloyd-La Follette Act of 1912 asserted this point and the Taft-Hartley Act of 1947 reaffirmed it. The legal prohibition is explicit in the later act which was amended in 1955. It reads in part:

No person shall accept or hold office or employment in the Government of the United States or any agency thereof, including wholly owned Government corporations, who . . . (3) participates in any strike or asserts the right to strike against the Government of the United States or such agency . . .

Any person who violates section 1 [above] of this Act shall be guilty of a felony, and shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.
Changing Attitude

A change in the legal climate in both the private and public sectors occurred during the New Deal era of the 1930's and the following years. Government officials, especially at the federal level and Supreme Court members, became more "sympathetic" with the objectives of public employees and their unions. As a result, legislation dealing with labor and management relations shifted toward the abandonment of the doctrine of the absolute power of the sovereign state. The authoritarian approval of sovereign control "appears to be merging into something akin to cooperative determination of personnel policy."\textsuperscript{40}

The new direction of public policy started with a statement made by President Franklin D. Roosevelt:

\textellipsis Organization of Government employees has a logical place in Government affairs. The desire of Government employees for fair and adequate pay, \textellipsis and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry.\textsuperscript{41}

Less than five years before making the above statement, President Franklin D. Roosevelt opposed public employee organizations and their means of collective bargaining. He stated that:

All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service \textellipsis The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual decisions with government employee organizations.\textsuperscript{42}

The development of promotive policy was accompanied by a noticeable decline in official opposition to the rights of public employees to unionize and negotiate collectively. In addition, collective bargaining,
as usually understood, was considered as one solution to labor problems in the public sector. The right to unionize shifted from the state of "permissible without rules" to protection as a right. The Federal Personnel Manual states that every department or agency:

... must expressly recognize the right of employees to join or refrain from joining employee organizations without interference, coercion, restraint, or fear of discrimination or reprisal...

... [R]ecognition of the human factor in achieving a high level of production... requires... protecting the right of employees to organize, join, or refrain from joining lawful organizations of their choice... 43

Despite the preceding development, it is reported that government "still wears a royal crown set with the jewel of sovereignty." 44

The only positive grant public employees won during the 1950's was a letter signed by R. Siciliano, Special Assistant of President Dwight D. Eisenhower for Personnel Management. However, this letter was limited by the fact that it only "encouraged" government administrators to review their policies to make sure that governmental agencies provide "Means for communication and employee participation in order to achieve effective interchange of information and ideas between individuals and groups at all levels." 45

In addition to this situation, federal legislation emphasized the exclusion of public employees from its coverage. Consequently, their rights to unionize, bargain collectively, and to strike lagged far behind their counterpart in the private sphere.
Summary

The leading theory advanced against federal employees' right to unionize, bargain collectively, and strike was the sovereignty of the government as an employer. Various theoretical interpretations and a variety of practical considerations have been derived from this theory to build the barrier of legalism. Presidential actions and judicial decisions have contributed significantly to putting this theory into effect. As a result, public policy toward federal employees was shaped and operated within this theory.

Despite the fact the legal as well as the practical climate began to change in the late 1950's, the sovereignty theory was carefully considered and recognized in articulating Executive Order 10988 of 1962. As a result, federal employees' rights have lagged behind their counterpart in the private sector.

At this state of analysis, it may be suggested that the rights of federal employees can be summarized as follows:

1. The right to unionize is legally guaranteed and protected by the Lloyd-La Follette Act of 1912. However, this right is limited in form and scope.

2. The right to bargain collectively was deemed inappropriate. Consequently, no legislative action has been made to grant such right.

3. The right to strike has never been part of public policy at the federal level. It was clearly opposed by the executive, judicial, and legislative branches of government.
CHAPTER III

A LEGAL ANALYSIS AND EVALUATION OF
EXECUTIVE ORDER 10988

The principal objectives of this chapter are twofold: (1) to determine the legal status of Executive Order 10988, and (2) to provide an analysis and evaluation of federal employees' rights to unionize, bargain collectively, and strike as articulated by this order.

Emergence of Executive Order 10988

President John F. Kennedy issued Executive Order 10988 on January 17, 1962. It was the outgrowth of a task force established by the President in his memorandum of June 22, 1961. The basic provisions of the order are employee rights, recognition of employee unions, unit determination, scope and form of employee participation, management prerogatives, grievance and appeal channels, advisory arbitration, implementation responsibility, and coverage.1

Executive Order 10988 represents the outgrowth of a long struggle by public employees allied with their counterpart in the private sector. Public employees have long been subjected to a "second-class treatment" compared with those in the private sector. As a result, not only did they become interested in "bread and butter" matters but also in seeking equal justice and equal opportunity.
Executive Order 10988 was an initial response to public employees' discontent and frustration. It was a presidential declaration that the human side of employee relationships should be developed in government machinery. Hence, employee participation based on mutual cooperation was stressed in the order. The introduction of new human devices may be based on the notion that government as a huge social system needs basic behavioral changes in employment relations if the Government is to succeed in keeping the democratic process intact. The Government, as the administrative hand of the society at large, should demonstrate the most appropriate idealism of cooperative and efficient management. The concept of government as a social system requires consideration of new dimensions of leadership, communication, and motivation.

Within this general framework, Executive Order 10988 initiates a new era in employee-management relations at the federal level. Prior to 1962 there was no clear-cut public policy to govern officials representing government agencies in their dealings with representatives of federal employee unions. The significance of this order was stated as follows:

It represents the first government-wide official employer policy on collective employee representation under which a wide variety of arrangements for cooperation and consultation prevail under a mandatory regulation. It spells out a clear-cut policy on the right of employees to organize, to have their organizations accorded official recognition, to be consulted in the establishment of personnel policies and procedures, and, under specified conditions, to negotiate agreements with agency management on working conditions.
A long-planned legislative strategy used from 1949 through 1961 by public-employee unions affiliated with the general labor movement contributed significantly to the passage of the order. The essential effort behind the increasing support was provided by unions already established in the Post Office Department. Shortly before his election to the presidency, John F. Kennedy wrote a letter to the postal union stating:

I should think that a Democratic 87th Congress with Democratic leadership from the White House could deal effectively with a proposal [that deals with rights of federal employees to deal collectively with the federal agencies in which they are employed].

John F. Kennedy fulfilled his promise after he became President by appointing a task force to study the issue of unionization at the federal level and "to make recommendations to the President by November 30, 1961." He provided the task force with guidelines and operational views to be followed in making recommendations. In his memorandum of June 22, 1961, he stated his belief that:

The right of all employees in the Federal Government to join and participate in the activities of employee organizations and to seek to improve working conditions and the resolution of grievances should be recognized by management officials at all levels in all departments and agencies. The participation of federal employees in the formulation and implementation of employee policies and procedures affecting them contributes to the effective conduct of public business . . . We need to improve practices which will assure the rights and obligations of employee organizations, and the executive branch in pursuing the objective of effective labor-management cooperation in the public service.

Union efforts were originally conducted to secure a favorable legal stand in the form of enacting a new law or an amendment to the
Lloyd-La Follette Act of 1912. The objective was to provide "employees of the Federal Government the same rights and privileges which private employers are required by statute to extend to the employees of private industry." This would guarantee and provide a positive opportunity to participate in the formulation of policies and practices which affect the federal employee's welfare. However, the various versions of "Rhodes-Johnson Bills," which were introduced in Congress from 1949 through 1961, were reduced to a "program" limited in its form, scope, and substance.⁹

The essential arguments expressed by public authorities relative to enacting legislation granting federal employees the right to unionize and bargain collectively were based on the lack of necessity of the proposed legislation for two reasons: (1) the existence of orderly grievance machinery, and (2) the feeling that the entire subject of the proposed legislation could best be regulated by administrative decisions within the executive branch.¹⁰ As a result, the proposed new law or amendment was reduced to a possible "executive order" which might deal with the subject.

The general approach of union spokesman in seeking a "new law" or an "amendment to the Lloyd-La Follette Act of 1912 was "one of mildness, humility, and sweet reasonableness."¹¹ This was clear in a hearing given by George Meany when he stated:

Federal employee organizations . . . are not seeking the same kind of collective bargaining in which unions engage in private industry, the objective of which is a bilateral agreement with respect to specific working conditions.¹²
As a result, legal effort was changed from enacting a federal law to the preparation of an executive order preceded by a survey to be undertaken by a special task force. The task force members and its mission were established by President John F. Kennedy on June 22, 1961.

The task force mission was characterized as an "extensive study" and its recommendations were "constructive" for initiating and advancing a new approach to labor and management relations at the federal level based on positive participation and mutual cooperation. President Kennedy expressed his approval by making a decision to prepare an executive order (10988) to put the recommendations into effect.

Despite the legislative achievement and the success in implementing its basic policies, the order is not being supported, maintained, or upheld by the judicial branch. Because the sovereign status of the federal employer was acknowledged and carefully safeguarded in the order, its form and scope are seriously limited. As a result, its legal applicability suffers from questions of constitutionality and achievement of the federal unions' objectives are seriously diminished.

The Constitutionality of Executive Order 10988

Recent court decisions create serious doubts with respect to the constitutionality of the order. Its provisions were not considered to be reviewable or to be enforceable by the courts. Furthermore, those provisions were reduced to a mere expression of policy rather than a basic charter of rights equivalent to the existing labor legislation in the private sector.
In 1965, the District of Columbia Court issued a decision which would seem to create a critical doubt with respect to the constitutionality of the order or at least would hinder its implementation. This decision was upheld by the Court of Appeals and the Supreme Court denied certiorari.

The subject of this case arose when the Post Office Department established a rule requiring that more than 60% of the employees eligible to vote must actually vote in an election aimed at an exclusive representation. Hence, exclusive recognition would be denied if a union received less than this proportion of eligible employees.

The above rule, initiated by the Post Office Department, was made within the legal framework of Executive Order 10988 and was endorsed by the Civil Service Commission and disseminated to federal agencies pursuant to the Commission's responsibility to assist the agencies in carrying out the policies of the order.

The Post Office Department refused to invoke its discretionary action in this case. Its legal justification was that the union had obtained less than the required 60% of eligible employees' votes. As a result, the union sued the Post Office Department on the grounds that although it had received 57.07% of the eligible employees' votes, the agency could reduce the 60% requirement in special circumstances.

The Court of Appeals which upheld the decision of the Federal District Court challenged the constitutionality of the order as an essential ground for its decision. Basically, the ground rules established indicated that the provisions of Executive Order 10988 were not
judicially enforceable. Accordingly, the union's only remedy was an appeal to the President because "[P]olicing the faithful execution of Presidential policies by Presidential appointees" is not the function of the judicial branch of government. The Court said that the President did not undertake to create a role for the judiciary in the implementation and enforcement of the order.

This argument raises the question of the separation of powers. This doctrine comprises one of the great structural principles of the American constitutional system. From this doctrine, certain legal concepts have been found: First, the three functions of government are reciprocally limiting; second, each department should be able to defend its characteristic functions from intrusion by either of the other departments; third, none of the departments may abdicate its powers to either of the others. This last concept has almost completely disappeared as a viable principle of American constitutional law.

As a matter of constitutional rule, the executive power of the President insures that the laws are faithfully executed by others. This presidential duty, however, has been carried out through a broad range of actions and thus has become without definable lines. Accordingly, the executive power of the President has become multidimensional, and has expanded along almost every dimension. In fact, this role has become a power of quasi-legislation.

Relating to this development, it has been stated that:

[the] function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree.
But . . . there are fields which are common to both [Congress and President] in the sense that the Executive may move within them until they shall have been occupied by legislative action . . . This situation results from the fact that the President is the active agent, not of Congress, but of the nation. He is . . . deriving all his power from [the people] and responsible directly to them.22

The significant accession to presidential power in recent years has been signaled by the breakdown of a great structural principle of the American Constitutional System—the doctrine of Separation of Powers. As a result Congress has found it convenient to aggrandize the executive role of the President by delegating to him the power to supplement its measures by legislative actions called "administrative regulations".23 Furthermore, it marked the breakdown of the corollary principle that the legislature may not delegate its power.

The liberal idealism of the Separation of Powers has been adopted by some of the Supreme Courts in certain cases. As a general rule, the courts saw executive orders issued by the President of the United States as the equivalent of statutes.24 In other cases, the courts have authorized judicial review of executive orders in general.25

Despite these developments, the fact remains that Executive Order 10988 is entirely silent on the question of judicial review. This represents a legal gap in the content of the order which may give the judicial branch a legal motive for reviewing the order. If we grant the validity of this argument, the implementation and enforcement of the order would be losing its legal defense and the discretionary frontier of the federal management would be broadened.
In the Manhattan-Bronx case previously cited, the Court stated also that Executive Order 10988 was an expression of the President's desire to improve federal employee-management relations and it can be withdrawn by the President at will. This argument was followed in other recent cases.26

In N.F.F.E. v. Nitze, the Court, relying on the Manhattan-Bronx decision, viewed the order as a statement of policy directed to federal agencies and not as the equivalent of legislation. The Court affirmed that federal agencies were directed to implement the order, but they were given a large area of discretion in the formulation of rules and regulations. A review of the provisions of Executive Order 10988 attests the broad discretion granted to public authorities in employment relations at the federal level.

Sovereignty Theory: An Evaluation

On the basis of available evidence, Executive Order 10988 was created and articulated within the conceptual framework of the sovereignty of the State.27 Granting the validity of this statement attests to the need to evaluate the legal status of this theory and its effect on federal employees' rights to unionize, bargain collectively, and strike.

The Immunity Issue of Sovereignty Theory

The traditional theory of sovereignty maintains that the state is immune from suit without its prior consent.28 The classical
justification is based on the notion that "there can be no legal right as against the authority that makes the law on which the right depends."\(^{29}\)

Sovereign immunity, formulated in the middle of the nineteenth century, was shortly found unsatisfactory by many nations, and has been subjected to widespread criticism by courts and scholars.\(^{30}\) Moreover, the historical justifications for this doctrine have failed to provide adequate support for its validity. The Supreme Court of Illinois delineated the immunity rule as "unjust, unsupported by a valid reason, and [having] no rightful place in modern-day society."\(^{31}\)

The adoption of the "restrictive immunity" concept has been suggested and partly applied as a partial solution to "absolute immunity". In fact, the restrictive principle is based on the assumption that the absolute doctrine cannot be ignored.\(^{32}\) However, it may be seen as a partial response to the principle of legality.

Sovereign immunity in its absolute sense has proved to be in contradiction to the emergent principle of legality. This principle, which requires that the state as well as its citizens be subject to the rule of law, is based in large part on considerations of equity and justice. The growing acceptance of this principle made it possible to recognize two basic rights: (1) the individual can enforce substantial legal rights against the state in the courts; and (2) the state is legally responsible for its acts before the courts:

\[\ldots\] the widespread and increasing practice on the part of [government] of engaging in commercial activities makes necessary a practice which will enable persons doing business with [it] to have their rights determined in the courts.\(^{33}\)
Once bound by contract, the parties should be able to act in reliance on their mutual obligations and promises and must create genuine shared expectations in fulfilling them.

The transformation from absolute to restrictive sovereignty, which is based on equity and justice considerations, made it possible to waive sovereign immunity and to establish constructive public policy in the area of employee-management relations. The state, having the power and authority to do so, may enter into a binding agreement with its employees with respect to wages, hours, and working conditions. If the government elects to do so by allowing public employees "to act in concert" through negotiation, with the objective of reaching an agreement, its legal right "to repudiate any of collective agreements at any time and for any reason" should be relinquished.

On the basis of evidence, "there is now a trend, at the state level, toward authorizing collective negotiations with government employee organizations, or even mandating them, when the employees involved so desire." Similar developments have been taking place in certain federal agencies beyond the scope of Executive Order 10988.

In summation, the sovereign immunity doctrine seems to be moving toward more liberalism by giving the individual citizen the right to sue the government for actions it might take. Implicit in this seems to be the approach that it would not be illegal or impossible for the union, as the "elected representative" of employees, to ask the court for redress on behalf of the employees. In fact, unions were long denied
the right to bring suit in their own name. The rule was changed to facilitate suits by unions on behalf of their members.

The Duality Feature of Sovereign State

The Sovereignty Theory has been called a fiction—a legal statement that a fact exists which is known not to exist. The deceptive-ness of this legal device, it has been argued, lies in its failure to differentiate between the government as sovereign and as an employer. In its latter capacity the government merely hires people to perform services.

Federal government functions can be divided into two different types: (1) sovereign or political functions, and (2) proprietary functions. The sovereign functions include legislative, executive, and judicial activities. The second includes activities performed where the government owns, manages, and operates commercial enterprises in a manner similar to the private sector. Those who are performing the sovereign as well as proprietary functions have been technically called public employees.

From the standpoint of their individual functions, three main groups of public employees should be distinguished. The first constitutes the legislative branch and judicial divisions which are covered by the federal constitution. The executive branch represents the second group consisting of persons who come under the Civil Service Act of 1883 which uses the merit system as a basis for appointments. Wage, hours,
and other working conditions of these groups are basically determined by the Classification Act of 1923. 40

The third group of persons in the federal government is made up of those who are neither appointed by the President nor covered by the Civil Service Act. Wages, hours, and other working conditions of this group are determined by what has been termed a "quasi contract", usually on the basis of prevailing conditions in the market.

Unlike those who work in the legislative and judicial branches, the groups of persons who come under the Civil Service Act and "quasi contract" have no right to their positions and a voice in participating in making decisions affecting their work lives. They represent the majority of federal government employees and perform the major portion of governmental functions. 41

On the basis of this analysis, the proprietary nature of governmental activities was given great weight in court decisions. 42 The courts stated that those who were working in a proprietary division were entitled to enter into collective bargaining, as it is used in private sector, with management. 43 Furthermore, the judicial decision upheld their right to strike "unless prohibited from doing so by legislation." 44

At this stage of analysis, it might be tentatively proposed that in the area of establishing employee-management relations policy, a distinction should be made between those who are "appointed" and those who are "hired". The area of "appointment" should be limited to include only (1) those who are appointed by the President "by and with the advice and consent of the Senate", (2) those whose appointment Congress
has been vested by law "in the President alone, in the courts of law, or in the heads of departments".\(^{45}\)

The remaining groups are those that come under the Civil Service Act and those who are treated as though covered by proprietary or business contracts. These two groups can hardly be characterized as "privileged classes".

If the thesis of the duality feature of government retains its validity—or at least its vitality—and the distinction between those who are "appointed" and those who are "hired" is accepted, the sovereignty theory may lose its vitality. Consequently, an attempt to equate the rights of the "unprivileged class" of public employees with those of their counterparts would be desirable if not imperative.

It seems inevitable that the general trend of events, ideas, and practices is toward recognizing the desirability of uniformity in the right of public and private employees, and trying to balance that desirability against the public interest in maintaining the welfare, health and safety of society. The theoretical as well as the practical justification for this trend may be based on the idea that fairness to government employees in the struggle for a share in social as well as economic advantages demands that they be given rights corresponding to those held by employees in the private sphere. This tendency was initiated by the "Standards of Conduct and Code of Fair Labor Practices" issued by President Kennedy in May, 1963.\(^{46}\) The intent of this executive supplement seems to be the creation of closer identity between the rights enjoyed by private and public employees.\(^{47}\)
The Right to Unionize

Section 1(a) of Executive Order 10988 states that:

Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty of reprisal, to form, join and assist any employee organization or to refrain from any such activity.

Thus the right of federal employees to organize themselves into unions is guaranteed and protected. This right, it should be noted, includes the freedom to "combine" for mutual aid and protection. 48

The right to unionize is usually construed to include the right to join or assist organizations composed of groups of employees in defending their mutual interest in matters of wage, hours, and working conditions. Executive Order 10988 accepts this interpretation and asserts the right of federal employees to join—or assist—any employee organization.

As a matter of interpretation, the right to unionize should include the right to formulate and take actions free from any restrictive interferences by public authorities as long as the unionized group acts in conformity with the law. 49 Thus, the order states that "The exercise of, the right . . . to form, join and assist any employee organization" will be free and without fear of penalty and reprisal.

The protection of the right or freedom to unionize should also include freedom "not to unionize" or freedom from compulsory unionism. Compulsory unionism does not appear to exist in free enterprise economic systems. 50 Accordingly, it is an unlawful action by the employer if he takes any account of the union membership of his employees or exercises
any pressure in the direction of joining or not joining a union. Within this legal interpretation, Executive Order 10988 states that the federal employees have the right to refrain from forming, joining, or assisting any union without "interference, restraint, coercion, or discrimination" practiced by any governmental agency "to encourage or discourage membership in any employee organization."

In summation, the legal foundation of the right or freedom to unionize is a fundamental component of the freedom to form and join or to not join unions, even if no collective bargaining is contemplated or legally provided. This principle is merely an extension of the individual rights already established by the Constitution and upheld by the Supreme Court decisions.

Management Neutrality and Individual Rights

The principle of "management neutrality" was legally initiated and assured by the order to create an environment of democratic behavior on the public management side. This requires that management maintain a posture of neutrality toward its employees in joining or not joining employee unions. Section 1(a) puts this principle into its legal dimension by stating that "no interference, restraint, coercion or discrimination by public authorities is practiced . . . to encourage or discourage membership in employee organization." More important, it was reported that management should not include a policy statement encouraging employees to unionize or join unions since this policy action would not be consistent with the posture of management neutrality.
It should be noted that the principle of management neutrality is one aspect of union democracy which was initiated by the Taft-Hartley Act of 1947 and advanced by the Landrum-Griffin Act of 1959. It was introduced in an attempt to create and secure democratic attitudes and to assure that forming or joining employee unions must be initiated by the employees themselves.

Executive Order 10988 is an attempt to establish the principles of group identity and group action through unionized effort based on the majority rules. But this legal initiation is not intended to de-emphasize the democratic rights of the individual employee. Accordingly, the individual rights are protected such as (1) the right to join or not to join a union, (2) the right to be represented even if he is not a member of the union, (3) the right to bring matters of personal concern to the attention of the agency officials, (4) the right to any procedural benefits the individual would have in the absence of an exclusive recognition, and (5) the right to invoke the arbitration procedures only with the consent of the aggrieved employee.

Union Recognition

Executive Order 10988 invites participation at the federal level of unions which have met certain requirements. The first of these requirements is that the union must be a lawful organization. The legal conditions of a lawful organization require that it must (1) not assert the right to strike, (2) not assist or participate in any strike, (3) not impose a duty or obligation to conduct, assist or participate in
any strike, (4) not advocate the overthrow of the constitutional form of the government, and (5) be free of corrupt or undemocratic influences which are inconsistent with the purposes of the order.

It should be noted that these requirements constitute "continuous obligations" on the side of the federal union if it is to be considered as a lawful organization. The absence of one or more of these obligations would entitle the appropriate agency to take whatever action may be necessary to withdraw union recognition.

The second basic requirement indicates that the primary purpose of any federal union should be "the improvement of working conditions among federal employees"—as employees. Federal employee unions may be "pure organizations" which consist only of federal employees or "mixed organizations" which include public and private employees.

Finally, unions representing federal employees must not discriminate in terms or conditions of membership because of race, color, creed, or national origin. This represents a fundamental principle of union democracy in the private sector in protecting individual workers against organizational actions taken by unions. President Kennedy in his memorandum of June 22, 1961, emphasized nondiscrimination as one of the fundamental conditions for union recognition.

Degree of Union Recognition

In the private sector, "the majority rule" is the only legal principle which creates an obligation on the side of the employer to
confer and negotiate with representatives of the certified union as the exclusive bargaining unit.\textsuperscript{61} Section 9(a) of the Taft-Hartley Act of 1947 states that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .

The majority rule principle has been considered as the only fair and workable basis for selecting representatives.\textsuperscript{62} The Supreme Court has sustained this principle and its consequences. It was stated that when "the majority rules, . . . individual advantages of favor will generally in practice go in as a contribution to the collective result."\textsuperscript{63}

In the private sector also, union recognition may be obtained through either voluntary action by management or by the National Labor Relations Board.\textsuperscript{64} In both cases the principle of union recognition is based on the majority rule backed by the law. As a general rule, union recognition is lost either by business mortality or an NLRB decertification election.

Instead of providing one "degree" of union recognition based on the majority rule and constituting an "exclusive bargaining unit," Executive Order 10988 creates three legal levels of recognition: Informal, formal, and exclusive.\textsuperscript{65} The reasons for initiating different levels of union recognition were based on the notion that "[i]n Government . . . the varied development of employee-management relations among agencies and within agencies, the inherent limitations on
collective bargaining in the public service, and the established federal policies and practices in employee consultation combine to make differentiation in levels of dealing desirable."

The informal union recognition is provided by the order as follows:

Section 4(a) an agency shall accord an employee organization, which does not qualify for exclusive or formal recognition, as representative of its member employees without regard to whether any other employee organization has been accorded formal or exclusive recognition.

Accordingly, informal recognition gives federal employee unions the right to be heard on matters of interest to its members. However, management is legally free to make decisions not to seek the views of the unions. In fact, this level of recognition is simply an extension of the long established practice of accepting and receiving employee views without legal obligation on the side of federal management.

Formal recognition of a union can be obtained when (a) no other employee organization is qualified for exclusive recognition as representative of employees in the unit, (b) it is determined by the agency that the employee organization has a substantial and stable membership of no less than ten percent of the employees in the unit, and (c) the employee organization has submitted to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of objectives.

If the requirements of an exclusive union recognition do not exist, formal recognition may be granted to more than one employee
union. At the national level a union may be granted formal recognition when it has a sufficient number of members or of locals to warrant such recognition regardless of the ten percent requirement. However, granting this recognition is entirely within the judgment of the agency.

Under this form of recognition, the employee union has a legal right to be consulted orally or in writing on matters of interest to its members. As a general rule, federal management has a positive obligation to seek the views of the unions from time to time. In fact, formal recognition is the effective step toward an "affirmative willingness" on the side of federal management to deal with federal employee unions. The spirit of affirmative willingness to cooperate with such unionization requires that "after employees have organized and clearly manifested their wish to deal collectively with management according to the level of recognition to which they are entitled, there must be a willingness on the part of management to deal with the organizations on matters within their discretion as required by the order." An employee union qualifies for exclusive recognition when (a) it has a stable membership of at least ten percent in an "appropriate unit", (b) it has been designated or selected by a majority of the employees of such unit as their representative, and (c) it has submitted to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives.71

There are two basic distinctions between formal and exclusive recognitions. The first is that the union must be eligible for formal recognition and more than fifty percent of the employees of the unit
must demonstrate their desire to be represented by this union. The second basic distinction is that according exclusive recognition will entitle the union "to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." The federal employee union in the above case has a legal right to speak for all the employees of the unit and to "be given the opportunity to be represented at discussions . . . concerning grievances, personal policies and practices, or other matters affecting general working conditions of employees in the unit".

**Appropriate Unit Determination**

In the private sector the law directs the National Labor Relations Board to establish the appropriate unit for collective bargaining in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Taft-Hartley Act of 1947, amended by the Landrum-Griffin Act of 1959. In practice, the National Labor Relations Board is given wide discretion in drawing appropriate boundaries of bargaining units.

Granted an exclusive bargaining right, the union becomes the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. The union is required to make an honest effort to serve the interests of all of those
members, without hostility to any, and its powers are subject always to complete good faith and honesty of purpose in the exercise of its discretion.

In the public sphere, there is no stated legal rule with respect to what criteria can be used in determining the appropriate unit of recognition. The fact is that Executive Order 10988 did not create an independent agency similar to the National Labor Relations Board. As a result, the determination of the appropriate representative unit is in the hands of the appropriate governmental agency.

The United States Civil Service Commission provides guidelines which may be used by the federal agencies so as to make a rational decision with respect to unit structure. Community of interest was considered the most single important factor in determining the appropriate representative unit. Craft and industrial status were cited as actual indicators of the community of interest among groups in the federal sector.

As a general rule, any appropriate unit should include individuals who share similar characteristics such as skills, working conditions, common supervision, physical location or function. Within this unstated legal dimension, the appropriate agency has the right to demarcate with flexibility on such standards as growth of unions, eligibility of membership in the union, community of interest, geographical convenience, occupational differences, functional or departmental coherence, and other similarities. The degree of the common features of
any group is justification for that group to deal collectively with management through a single voice.

The community of interest of professional employees is protected under Executive Order 10988 by the requirement that this group need not be included in exclusive representing units unless they express their desire to do so. On the other hand, these groups are not necessarily excluded from units of recognition by virtue of their occupation. In fact, professional employees have the right to form or join unions of their own in which they can have the three forms of recognition that may be accorded any bona fide employee union.

The Right to Bargain Collectively

The practical considerations of the collective bargaining process indicate that there must be three basic stages: (1) the organization stage in which both sides must have the responsibility as well as the right to establish viable representation arrangements, (2) the negotiation stage which implies the requirement to bargain in good faith—both sides must be willing and ready to listen to reason and to have their minds sufficiently open to modify their position on the basis of evidence, and (3) the administration and enforcement stage which emphasizes the importance of grievance machinery—the way of day-to-day living with the agreement.

It has been stated that the kind of "collective dealings" authorized by Executive Order 10988 was not really the collective bargaining provided by the Taft-Hartley Act of 1947. The debate surrounding the Rhodes-Johnson Bill, which was aimed at giving to public
employees negotiating rights similar to those granted to their counter-
part in private sector, continued for twelve years. The many attempts
to achieve its passage were unsuccessful. Generally speaking, Executive
Order 10988 has diminished bargainable issues to a minimum.

Section 8(d) of the Taft-Hartley Act describes collective bar-
gaining in the following way:

... to bargain collectively is the performance of the
mutual obligation of the employer and the representative
of the employees to meet at reasonable times and confer
in good faith with respect to wages, hours, and other
terms and conditions of employment, or the negotiation
of an agreement, or any question arising thereunder, and
the execution of a written contract incorporating any
agreement reached ... but such obligation does not
compel either party to agree to a proposal or require
the making of a concession ... 

Fifteen years after the passage of the Taft-Hartley Act, fed-
eral employees found themselves not on a comparable level with their
counterpart in the private sector with respect to the right to bargain
collectively. This provision of Executive Order 10988 is the best evi-
dence to this statement:

When an employee organization has been recognized as the
exclusive representative of employees of an appropriate
unit it shall be entitled to act for and to negotiate
agreements covering all employees in the unit ... The
[governmental] agency and such employee organization ... 
shall meet at reasonable times and confer with respect to
personnel policy and practices and matters affecting work-
ing conditions ... 31

In its recommendations of the necessity of establishing a
"policy for Employee-Management Cooperation in the Federal Service,"
Task Force members stated that the introduction of collective bargaining
as usually used in the private sector would raise the issue of the
sovereignty of the government and that the government could not bargain away any of its sovereignty. To put this statement into effect, Executive Order 10988 did not introduce collective bargaining in its full sense into federal employment relations. As a result, the principle of cooperation between equals in the collective bargaining process neither secured nor protected, and the right to strike was prohibited. In short, under the notion of "the paramount importance of the public interest", the organization stage of collective bargaining was the only step that was relatively established by the order. The negotiation and administration steps were and are still in their primitive developmental stage.

Form and Scope of Union-Management Dealings

One of the most rewarding facets of the new "Employee-Management Cooperation" program was the granting of official recognition to federal employee unions. The intent was to make a basic change in the situation of these unions by encouraging responsible "dealings" between management and employee groups. The two practical techniques of union-management dealings were consultation and negotiation. The use of these methods depends entirely upon the degree or level of recognition granted.

Consultation

Consultation, as the name implies, means that management consults with employees or their representatives in order to get them to think about issues and to contribute their ideas before making a decision. It is one form of employee participation in the decision-making process.
The practical formality of federal employee union consultation may take the form of "a meeting with management officials, discussions with supervisors, or presenting views to management" on matters that affect the working lives of federal employees. Accordingly, public officials consult with union representatives on the formulation and implementation of "personnel policies" which affect those who are covered in the unit.

Three basic limitations have been imposed by Executive Order 10988. The first was that union-management consultation should be within the administrative discretion of public officials and to the extent to which personnel authority is delegated in the agency. Second, the consultation should be only on "personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirement." Third, the final authority of making decisions in the field of personnel policies should rest with management.

For purposes of illustration, matters that might in a given situation be appropriate for consultation include grievances, pay policies and implementations, dues check, promotion, tours of duty, supervision, leave scheduling, job classifications, work assignment, working conditions, and employee development and growth. The consultation on such matters within the legal boundaries explained above should not imply reaching an agreement between management and union representatives. The principle of consultation serves to promote face-to-face communication between the two sides.
Within this general framework, certain matters are reserved for management decision. Section 7 of Executive Order 10988 states:

... Management officials ... retain the rights, ... (a) to direct employees of the agency, (b) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees, (c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted; ...

With the intention of giving agency officials a broader zone of freedom to act, the order states that management has the right "to take whatever action may be necessary to carry out the mission of the agency in situations of emergency." 88

Negotiation

Negotiation is an advanced stage of the collective bargaining process. It implies that both parties will make proposals and counterproposals and be prepared to back them up with solid reasons and pertinent evidence. 89

Exclusively recognized federal employee unions are entitled to act for and negotiate agreements on personnel policies or practices affecting all employees in the unit of recognition. 90 Public officials are required to meet with union representatives and confer with the objective of reaching agreement on such matters "so far as may be appropriate subject to law and policy requirements."

Certain matters are reserved for public official decisions. In addition to the content of section 7 of Executive Order 10988 mentioned
earlier, section 6(b) states:

In exercising authority to make rules and regulations relating to personnel policies and practices and working conditions, agencies shall have due regard for the obligation imposed by this section, but such obligation shall not be construed to extend to such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work.

In addition to the above limitations imposed on negotiable issues, Executive Order 10988 put legal restrictions on the administration and enforcement stages of union-management agreement. Section 7(1) states:

In the administration of all matters covered by the agreement, officials and employees are governed by the provisions of any existing or future laws and regulations, including policies set forth in the Federal Personnel Manual and agency regulations, which may be applicable, and the agreement shall at all times be applied subject to such laws, regulations and policies.

It should be noted that the limitations imposed on the negotiation and administrative stage are "applicable to all supplemental, implementing, subsidiary or informal agreements between the agency and the organization." 91

Grievances and Appeals

Executive Order 10988 introduced grievance machinery into federal government as a humanistic method. It is a means by which an employee "without jeopardizing" his job, can express a complaint about his work or working conditions and obtain a fair hearing through progressively higher levels of management.
Executive Order 10988 states that agreement negotiated with exclusive representatives of employees "may contain provisions . . . concerning procedures for consideration of grievances". Grievance procedures, it should be noted, should conform to Civil Service Commission standards and should not diminish any rights otherwise available to any employee in the absence of an agreement.

It is desirable for analytical considerations, to distinguish between "grievance" and "appeal" (adverse action). The latter method refers to a request by an employee for reconsideration of an agency decision to make an adverse action against him. Executive Order 10988 provides advisory arbitration provisions which may be incorporated in the agreement and extend only to the "interpretation" of existing agreement or policy.

In addition to the function of interpreting the existing agreement or policy, the Executive Order facilitates the use of an arbitrator for only two additional functions: (1) to conduct an investigation to determine the appropriate unit, and (2) to conduct elections or otherwise determine whether an employee union represents a majority of the employees in a unit. It should be noted that advisory arbitration is the only technique provided by the order and as a result the agency is free to accept or reject the decision made by the arbitrator.

The Right to Strike

The legal status of the right of public employees to strike is relatively clear. It has never been part of the rights of the public employees.
It is uniformly held by legislative action that a strike by public employees is illegal and enjoinable. Section 305 of the Taft-Hartley Act of 1947 states that:

It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned government corporations to participate in any strike. Any individual, . . . who strikes, shall be discharged immediately from his employment, and shall not be eligible for reemployment for 3 years by the United States or any such agency.94

This provision was replaced by a clearer and sharper assertion contained in a statute enacted in 1955 (Public Law 330, 84th Congress) which makes it a felony, punishable by up to a $1,000.00 fine and a year and a day in jail, for federal employees to strike or assert the right to strike or knowingly belong to an organization that asserts such rights.95

The executive order recognized the illegality of strikes by federal employees and excluded from the definition of "employee organization" a union asserting the right to strike against the government. Section 2 states that:

Such term [employee organization] shall not include any organization (1) which asserts the right to strike against the government . . . or any agency thereof, or to assist or participate in any such strike, or which imposes a duty or obligation to conduct, assist or participate in any such strike, or (2) which advocates the overthrow of constitutional form of government . . .

In addition to legislatures, court decisions almost uniformly deny public employees the right to strike.96 The major theory advanced against the right of public employees to strike is the sovereignty of the governmental employer. The Supreme Court members have denied the
right to strike on the ground that:

-- it obstructs or impedes the governmental function. 97
-- it violates the authority of government. 98
-- it threatens the public health safety, 99 and welfare. 100
-- it destroys the nation's prestige by actions taken by the few. 101

Grounds for denying the right to strike have been advanced by several presidents of the United States. Presidents Woodrow Wilson, Calvin Coolidge, and Herbert Hoover all issued statements which in effect held that a strike by public employees amounted to insurrection. 102 Similar lines of thought were expressed by Presidents Franklin D. Roosevelt and Lyndon B. Johnson. The latter stated that he would seek legislation to curb strikes which "threatened irreparable damage to the nation's interest." 103

Summary

Executive Order 10988 was a presidential response to frustration and restlessness on the part of federal employees. It is an attempt to initiate behavioral devices in federal employment relations by means of participation and two-way communication between federal employees and public authorities. Accordingly, the order expressly provides for freedom of organization and varying degree of bargaining rights and obligations.

Federal employee unions allied with the general labor movement contributed to the passage of Executive Order 10988. The long planned legislative strategy conducted by these unions was aimed to enact a new
law or an amendment of the Lloyd-La Follette Act of 1912. The main objective was to have the same rights enjoyed by their counterpart in the private sphere. However, the general position of union spokesmen and the opposition expressed by public authorities contributed to the reduction of the proposed law or amendment to an executive order.

Two major legal deficiencies are inherent in Executive Order 10988: (1) the sovereignty theory which was considered in articulating the rights and obligations provided by the order, and (2) the interpretation of negotiable matters.

As was indicated earlier, the conceptual as well as the practical considerations of ideas, events, and practices provide evidence that the sovereign is not absolute, not all-powerful, and not always right. In short the sovereignty theory is losing its vitality, or at least its viability in public employment relations.

Closely related to the sovereignty theory, is the doctrine that "delegated" powers cannot be delegated. This doctrine has been rejected in its absolute sense in the area of public employment relations. In short, the delegation of powers is legally permitted as long as the limits of the delegation are fixed according to the inherent necessities of government coordination.

The scope of bargaining has been diminished considerably by Executive Order 10988. The most notable limitations are: (1) the matters which fall within the "discretion" and "policy" of the appropriate agency, (2) any existing and future rules, regulations and laws should take precedence over any negotiated agreement, (3) the right of
management officials to make decisions is retained to cover almost every conceivable area of employee-management relations, and (4) wages, and hours are eliminated since the law is considered the only source and wielder of these issues.

Aside from the legal limiting restrictions, available evidence indicates that public officials still use their rule-making power in the area of employment relations.\textsuperscript{104} Again, the scope of collective bargaining depends, to a considerable extent, upon the favorable attitude of the head of the public agency. Even when an agency is in favor of conducting meaningful agreement, bargaining over topics left to their discretion has definable lines drawn by the existing rules, regulations and laws.\textsuperscript{105}

Closely related to the scope of collective bargaining in the federal sector is the Merit System principle which is the foundation of the Civil Service System. The Task Force stated that:

Collective dealing [in the federal sector] cannot vary [the principles of the Civil Service System]. It must operate with their framework.\textsuperscript{106}

It has been argued that collective bargaining is incompatible with the Civil Service System.\textsuperscript{107} However, a comprehensive study provides evidence that in the federal government agencies have succeeded in developing highly advanced collective bargaining practices within the structure of the spirit and actual structure of the merit system:

In the federal government, agencies with over 90 percent of the personnel in the classified service were singled out for just this reason.\textsuperscript{108}
The feasibility of meaningful collective bargaining within the merit system structure has been demonstrated by the experience of the Tennessee Valley Authority, and Department of the Interior. The compatibility of collective bargaining and the merit system civil service was confirmed in the language of the Task Force recommendation.

The sovereignty of the state which is considered as the leading theory in establishing the legal barrier to the right to strike, seems to be losing its validity or at least its vitality.

On the basis of evidence, anti-strike laws have generally proven unsuccessful or ineffective. The effectiveness of penalties such as imprisonment or discharge is questionable. The facts reveal that public employees can and do strike, and it can be said that there is a breakdown of respect for law or the absence of justice in the law. If this is the case, the right to strike should be granted, or laws making it illegal must be enforced, or workable alternatives be provided. The selection of one method, or a combination of more than one, should be aimed to serving the interests of the public, the governmental employer, and the public employee unions.

Perhaps the most critical problem with respect to Executive Order 10988 is its constitutionality. Granting the validity of what has been ruled by the judicial front, there would be serious doubts as to whether its provisions would be reviewable by the judicial branch. If this is the case, it would seem that, as a principle, federal employee-management relations should be established on a "statutory basis" not by "presidential executive action". Enacting a federal law in the area of federal
employee relations was the basic objective of such groups since 1949. Their goal was to provide federal employees the same rights and privileges which private employers are required by statute to extend to employees of the private sector.
CHAPTER IV

THE EMERGING LEGAL PATTERN OF THE
RIGHT TO UNIONIZE, BARGAIN
COLLECTIVELY, AND STRIKE

The purpose of this chapter is to deal with the evolutionary changes in the legal rights of public employees to unionize, bargain collectively, and strike. This will cover the period immediately after the issuance of Executive Order 10988 of 1962. These changes will be analyzed in the light of (1) Supreme Court decisions, (2) certain state laws enacted after the issuance of Executive Order 10988, and (3) pertinent legal opinions of the Attorney General made since 1962. This will include a review of recent literature and its implications bearing on the subject of this study.

Court Decisions

It should be noted at the outset that a large number of court decisions have been made at the state level. Despite the fact that these decisions are not laws, they constitute a legal influence on court attitudes and state legislation. Moreover, they may be used as guidelines by public officials in shaping their decisions in the area of labor relations in public employment in general.
On the basis of evidence, the majority of court members seem to recognize that an attempt to draw an exact analogy between the public sector and the private sphere may be misguided and inappropriate. Three distinct functional areas seem to be retained by and vested within the government: (1) external defense requiring armed forces, (2) internal protection and security requiring policemen, and (3) fire protection. These functional areas seem to be beyond the capacity of private sector.¹

There is general agreement that these vital areas should be treated separately with respect to the rights to unionize, bargain collectively, and strike. These limitations may be justified on the ground that since those who are engaged in these activities are responsible for the protection of persons and property and the preservation of public order, the government must command their undivided loyalty. However, failure to afford a reasonable outlet for grievances which can provide for orderly communication and participation in the settlement of these grievances seems more dangerous to maintenance of essential public services than any possible conflict of loyalty. However, some Supreme Court members see that the right to unionize and bargain collectively in the last two areas is a vital adjunct of operating public service.

Accordingly, the Supreme Court of New Hampshire stated that city police commissioners did not surrender municipal sovereignty when they entered into a bargaining agreement with a union representing city policemen.²

Beyond this line of demarcation, the Supreme Court members began to exhibit notable tendencies to veer from the traditional front obstructing the rights of public employees to unionize, bargain
collectively, and strike. However, there are distinct variations in the theoretical foundations upon which the courts build their opinions. As a general rule, the principle of public interest represents the paramount factor in protecting, restricting, or prohibiting the legal rights to unionize, bargain collectively, and strike.

Within this general legal attitude, an examination of Supreme Court decisions made after the issuance of Executive Order 10988 provide evidence of the guaranteeing and protecting of certain rights. The general legal trend seems to be moving toward closing the gap between the rights of public employees and their counterpart in the private sphere. In fact, some Supreme Court members began to interpret the rights of public employees through the language of labor laws existing in the private sector. This seems to be based on the evolving fact that there is a marked similarity or close identity between employment relations problems in both sectors.

The principle of guaranteeing the right of self-organization and the protection of exercising it is recognized. The intent is not only clear from the language of Supreme Court decisions, but also from judicial history itself.

The principle that employees must be legally and practically free to join or not to join organizations without jeopardizing or imperiling their employment is recognized. It is required as an essential right to the establishment of any meaningful program of employer-employee relationship. Accordingly, it was held that public authority must reinstate employees who were discharged because of union
A decision issued in 1969 made it clear that if municipal employers discharged two employees because they joined a union, such action deprived the employees of their rights to association under the first and fourteenth Amendments of the United States Constitution and entitled them to recovery under the Civil Rights Act of 1871.\(^5\)

The right to bargain collectively and to make collective agreements with public authorities is recognized. In addition, if collective agreement has been reached, it would be reviewable and enforceable by the courts as a contract between two parties. This is not only attested to in recent court decisions but also in judicial history.

The principle of authorizing governmental agencies to enter into collective bargaining relationships has been recognized even in the absence of specific statutory authorization.\(^6\) This principle resolves the question that entering into collective bargaining with employee union representatives is incompatible with sovereignty. If this is the case, public officials may not need a legislative provision to have more authority to enter into negotiation with representatives of employees.

Some Supreme Court decisions indicate a movement toward authorizing collective bargaining as an acceptable democratic device in the determination of wages and salaries. By entering into collective negotiations, the government is using a different medium, collective bargaining, in the exercise of delegated powers. Accordingly, it is legally reasonable to state that the process of collective data by means of collective negotiation may assist to the establishment of fair wage and salary determination.\(^8\)
Some Supreme Court members seem to be moving toward a positive answer on the question of the right of public employees to strike. The decisions issued in this direction are limited in number and scope, but they reveal the changing attitude and philosophy of legal public policy.

Some Supreme Court members began to veer from the principle of "absolute" to "partial" illegality of the right to strike. Instead of denying the legal right to strike to "all" public employees, the new principle authorizes this right to "some" of them. The distinction between those who may have the right to strike and those who may not represents the dividing line of thought among Supreme Court members. However, the protection of public health and safety test has become the main issue with respect to the right to strike:

It is . . . obvious to all . . . that prohibition against the right to strike must always prevail in certain instances, that is, armed forces, police, fire and other security sections of governmental activity.9

Basically, three main approaches have been used by courts. The traditional approach suggests that all public employees should not have the right to strike. As was indicated, this represents an earlier and possible archaic approach.

The governmental proprietary distinction suggests that a distinction should be made between governmental and proprietary nature of public sector.10 On the basis of this distinction, the right to strike may be granted to those who are engaged in the proprietary activities. Those who are engaged in governmental activities should not be granted the right to strike.
The theoretical justification given is that there is a distinctive similarity between the proprietary activities in the public sector and those existing in the private sphere. This situation attests to the fact that those who are engaged in operations similar to businesses in the private sector may have the same rights including the right to strike. In addition, proprietary activities are usually managed similar to private businesses and no civil regulations or rules may exist to restrict the authority of public officials to enter into free collective bargaining with organized groups.

The governmental proprietary distinction has been rejected by many courts. The essential legal justification of rejecting this approach is that all governmental services, whether they are governmental proprietary in nature, are performed for the benefit of society at large. In addition, it was argued that certain proprietary functions may provide vital or essential services to the community.

The functional approach has been advocated to meet the argument against the governmental proprietary distinction approach. This approach is based on the principle that a distinction should be made between essential and "non-essential" governmental activities that affect public health and safety. Accordingly, the right to strike should be limited only in operations where continuous governmental service is essential for the public health and safety. Those who are engaged in non-essential activities may have the right to strike.

However, this approach may be subjected to some limitations. The practical problem may be the determination of what is essential and
what is not. The more immediate problem is which authority is better equipped to determine what services are sufficiently important to public health and safety. As a result, the courts have become preoccupied with theoretical issues and thus the practical side of the problem remains.

On the basis of available evidence, it would appear that any strike in any sector of the public service may directly or indirectly endanger public health and safety. Moreover, some strikes in the private sector may constitute a serious and immediate threat to public health and safety.

A liberal trend toward legalizing the right to strike is already in motion. The principle of the "interpretation" of existing laws can be used in permitting such right. The rule adopted is that if the legislature's intention is to grant this right directly or indirectly, the court must see that public employees may lawfully exercise it.

Accordingly, in California the Court states that the term "to engage in concerted activities" written in the statute permits public employees to strike by interpretation. The term "to engage in other concerted activities" was written in the statutes of Louisiana in 1965. More important, some Supreme Court members held that the right to strike may be granted to enable public employees to gain equal treatment which is not guaranteed by statute. This provides evidence that most public employees can hardly be categorized as "privileged classes."

Under the principle of interpretation, the term "other concerted activities" has been construed to include the right to picket and to
boycott. Accordingly, it was held that unlike concerted activities by firemen or others engaged in the protection of society, picketing does not of itself contain an inherent threat to public safety.\textsuperscript{15}

The principle that going on strike does not constitute a crime has been upheld by the courts. In New York, the court said:

\textit{Public employees and unions which represent them are not entitled, as a matter of right by virtue of statutory and constitutional provisions, to trial by jury in criminal contempt proceeding for alleged violation of Taylor Law of New York...}.\textsuperscript{16}

This legal directive attests that anti-strike legislation that imposes penalties may actually encourage strikes rather than prevent them. More important, it is a matter of legal principle that no law can force people to work when they do not want to without imposing punishment on their body.

\textbf{State Legislation}

The legal bulwark of the rights of public employees to unionize, bargain collectively, and strike is quite variable at the state level. The safest generalization one might make is that the legal situation at the state level ranges from the prohibition of the right to unionize to mandating collective bargaining under certain conditions. The right to strike is prohibited, either expressly by statute or by judicial decisions, in all fifty states.\textsuperscript{17}

It is beyond the scope of this study to review and analyze all state laws in this regard. Accordingly, hypothetical examples of certain state legislations should suffice to achieve the basic objective of this study.
As of January 1, 1968, twenty-seven states have authorized some form of collective bargaining for some or all state employees. The number of states moving in this direction seems to be growing. Moreover, the absence of action in the remaining states does not necessarily signify that collective bargaining is illegal, but rather that no legal action has been taken in this regard.

California, Connecticut, and New York may be considered among the leading states having advanced evolutionary legal change in the area of public employee-management relations. In these states, the right to unionize is legally secured and protected and the right to bargain collectively is legalized on mandatory basis. They can be considered as representatives of other states in changing attitudes, philosophies and procedures of public policy.

A recent development in labor and management relations has taken place in California through the Meyers-Milias-Brown Act in 1968. In its preamble, the act states:

It is the purpose . . . to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment . . . It is also the purpose . . . [to provide] a uniform basis for recognizing the right of public employees to join organizations of their own choice and be presented by such organization . . .

The principal provisions of this act can be expressed as follows:

1. The rights of public employees to form, join, and participate in the activities of the organizations of their own choosing are
Neither public agencies nor employee unions should interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of these rights.²¹

2. The right to negotiate collectively is protected and secured.²² The representatives of the governing body should "meet and confer in good faith" regarding wages, hours, and other terms and conditions of employment with the "formally acknowledged" union.²³

3. The scope of bargainable issues covers, but is not limited to, wages, hours, and other terms and conditions of employment. These bargainable issues should go through the legal channels of existing state laws, ordinances and rules which may establish and regulate the merit or civil service system.

4. The impasse-resolving mechanism is provided in the form of advisory mediation selected by a mutual agreement between the parties concerned.²⁴ When agreement is reached with or without the assistance of this impartial third party, it should be embodied in "a written memorandum" for determination by the governing body or its statutory representative.

It should be noted that the act provides broad powers to public agencies to act in adopting "reasonable" rules and regulations for the resolution of disputes involving wages, hours and other terms and conditions of employment.²⁵ The bilateral principle is adopted in this case by requiring the public agency to consult in good faith with employee union representatives on such matters.
It is patently clear that the concept of "meet and confer" no longer is limited to the receipt of employee union suggestions followed by a unilateral determination of policy by the public agency. Instead, the Meyers-Milias-Brown Act places on both management and employee union representatives an affirmative obligation to act in concert, negotiate collectively, and to endeavor to reach a written agreement regarding wages, hours, and other terms and conditions of employment.

It is also clear that this statute represents an attempt to reduce the legal gap of employee-management programs in both sectors, private and public. There is a marked similarity between the language of some sections of this act and some sections of the Taft-Hartley Act of 1947. This represents one of the basic goals of public employee unions that has been sought for a long time.

The evolutionary legal change in Connecticut has its origin in a leading judicial decision issued in 1951.26 On the basis of an extensive report made in 1965 by an eleven member commission, the Municipal Employee Relations Act was issued.27

The principal provisions of this act are:

1. Public employees have the protected right to unionize for the purpose of collective bargaining.

2. The status of exclusive recognition based on the majority principle is secured and the union which is granted representation recognition has the legal right to negotiate for all employees in the unit.

3. Public officials have the obligation to bargain collectively with the exclusive representative of employees in an appropriate unit.
4. The "good faith" principle in collective bargaining negotiation is imposed on both sides as a mutual duty to reach agreement.

5. Mediation, voluntary arbitration, and fact finding are available in the event of an impasse in bargaining.

6. The feasibility of collective bargaining within the merit system has been partially resolved by the statute. Accordingly, when an agreement reached requires legislative action to meet the economic demands, public representatives should submit a request for the necessary action to the appropriate legislative body. In case this request is rejected, the matter is returned to the bargaining table for renegotiation. However, if the legislative body has approved the collective bargaining agreement, and in case of conflict between this agreement and any existing laws, charters, ordinances, or regulations, the former prevails.

Two significant legal principles have been introduced by this statute into the area of public employment relationships. The first is the principle of bargaining in good faith. The central legal commitment of this principle is the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement.

The second main principle developed by the statute is that collective bargaining and the merit civil system are not incompatible. Accordingly, the introduction of unionization and the practice of collective bargaining may be in the interest of the merit system or at least not in conflict with it.
The strike of public school teachers in the city of Buffalo in 1947 resulted in the enactment of the Condon-Wadlin Act in the same year. The legal significance of the act was in its punishment aspect. It imposed drastic penalties against those who:

... fail to report to duty, willfully absent themselves from position, stop work, or abstain in whole or in part from the full faithful and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions or compensation, the rights, privileges, or obligations of employment.

From 1947 to 1966 the punitive measures of the 1947 Act proved to be negative and unworkable. On January 1, 1966, a massive strike by transit workers took place in New York City, and demands were made that something be done to prevent recurrence of such disruption in any sector of the public service.

On January 15, 1966, Governor Rockefeller appointed the "Governor's Committee on Public Employee Relations." The central mission of this committee was to make recommendations for legislation designed to protect the public against the disruption of vital public service by illegal strikes, but also to protect the rights of public employees.

On March 31, 1966, a document containing a considerable number of recommendations was submitted to the Governor at Albany. On April 2, 1967, new legislation was passed to replace the twenty year old Condon-Waldin Act. This new law was christened "The Taylor Law." A review of the report submitted to the Governor shows that the law, as finally passed, incorporated its recommendations.
The central legal modification of the new law was focused upon diminishing punitive measures and establishing machinery in the event of collective bargaining impasses. The significant features of this law may be summarized as follows:

1. The creation of a State Public Employment Relations Board to solve union representation disputes and provide mediation and fact-finding help in breaking contract deadlocks between public employees and public agencies.

2. A fine of $10,000 or one week dues, whichever is less, against any public employee union for every day it stays on strike.

3. A penalty depriving a striking union of its dues check-off privileges for a maximum of eighteen months, after the strike.

4. A flexible system of nonmandatory penalties against individual strikers under which each striker could receive anything from a reprimand to a dismissal.

The law represents an attempt to establish procedures for union recognition, grievance arbitration, and contract negotiation as comprehensive as in the private sector. In fact it quoted many facets of existing laws in the latter sector. Accordingly, it prescribes elaborate devices for settling disputes over "economic demands" through recommendations by impartial fact-finders if direct negotiations and mediation breakdown.

It should be noted also that the legal significance of this act represents a gradual diminishing of punishment in cases of strikes by public employees. This reflects the changing phenomenon in the central
attitude and philosophy of public policy makers in the area of employer-employee relations. If this trend continues, it would only be a matter of time before the legal gap between public employees' rights and the rights of those who work in the private sector is diminished further.

Another legal feature is included in this act. There is a gradual shift in imposing penalties from the individual striker to the union as an institution. Instead of having the inflexible system of mandatory penalties against individual strikers imposed by the Condon-Wadlin Law of 1947, the new law attempts to create a flexible system of nonmandatory punitive measures. Accordingly, the legal responsibility of strike action would essentially fall on the shoulders of public employee unions. In fact, the law penalizes not the individual striker but the union treasury.

The Opinions of Attorney Generals

Unfortunately, there are no comprehensive decisions made by the Attorney General at the federal level regarding the right of federal employees to unionize, bargain collectively, and strike. In a personal letter to the author of this study, Mr. Leon Ullman, Deputy Assistant Attorney General, U. S. Office of Legal Counsel, states:

We can advise you . . . that the attorneys General have not rendered any formal opinions in this area . . .

However, the Attorney Generals at the state level have expressed their legal opinions on several occasions. The following excerpt may provide a typical example of the old, all-too-common attitudes toward the
rights of public employees to unionize, bargain collectively, and strike:

... we are not too well indoctrinated in sociological theories of togetherness and [we have the] notion that public employees are paid from appropriations made by the sovereign, and when the appropriation is enacted the process of bargaining has no place...

... We never thought that it was necessary for an outside organization to look after public employees. We simply do not have strikes... because the employees know that this would not be tolerated.33

Despite this "old-fashioned and archaic" attitude, a developing liberal idealism has begun to emerge in recent years.

The Attorney General of the State of California held that the absence of legal provisions in determining the way to deal with employee representatives legalizes the action of public officials in entering into negotiation with the former. In his words, he rules that:

[A] local hospital district has broad powers to contract and it is empowered to contract with the labor union since there is no law requiring it to use some other method of dealing with its employees.34

The legal possibility of public agencies entering into collective bargaining was stated as a legal principle in 1966. The Attorney General ruled that State College Auxiliary organizations, even if viewed as "quasi public corporations," may enter into collective bargaining agreements with a union representing its employees.35 In that sense, it was stated that:

... the statutory authority to contract set forth in the most general terms conferred the authority to bargain collectively upon housing authorities and hospital districts.36

The Attorney General of the State of Idaho stated that municipalities have the power to enter into collective bargaining agreements
if they desire to do so and if no local ordinance forbids it. In Indiana, the Attorney General issued a legal opinion stating that unless otherwise forbidden by statute, state and local public officials are authorized to consult with representatives of their employees concerning wages, hours, and working conditions.

The Attorneys General of several states have issued legal opinions that the strike weapon should be denied to public employees. This line of thought seems to be based on the general negative answer of the right to strike expressed by Presidents of the United States and Supreme Court decisions.

Review of the Literature

A number of articles and books have been published dealing with various aspects of the legal rights of public employees to unionize, bargain collectively, and strike. However, no comprehensive critical evaluation of these rights has been conducted at the federal level to show where the weaknesses are and to suggest remedies.

The main purpose of this section is to review the major issues discussed in the existing literature bearing on the subject under consideration. This review is intended to shed light on the most obvious weaknesses of Executive Order 10988 with regard to the above rights and may provide clues for suggested remedies.

The similarity of employment relations between public employees and their counterpart in the private sector has been noted in three recent reports submitted by advisory groups to the Governor of three states. An excerpt from the Illinois Commission's report is
representative of the others:

... public employees, like their counterparts in private industry, are dependent upon their employment for their economic well-being, have a real interest in the conditions under which they employed, and in some cases strongly desire the opportunity to participate in determining their wages and working conditions. In this respect, there are close similarity between employment in public agencies and in private industry.

These three reports, submitted by experts in public employment relations across the nation, attest to the fact that arbitrary or unreasonable treatment of employees is not limited to the private sector. They also provide evidence that public employees are subject to similar vicissitudes of employment insecurity. As a result, public employees have reacted to their employment conditions in a way similar to their counterpart in the private sector. They have joined into organizations to have their voice heard and act in concert through collective will. In short, the assumption that public employees are a privileged class has lost its validity or at least its viability.

The assumption that the law should be the only source and wielder of wages, hours, and working conditions also seems to be losing its viability. State laws provide evidence that prior negotiation over wages between public agencies and their employee representatives can provide invaluable assets to the legislatures who might make the ultimate decisions. More important, wages, and hours, which have never been part of the negotiable package, have become mandatory matters in some leading states. In short, the collective bargaining process might become the main source and wielder of wages, hours, and working conditions in the foreseeable future. This possibility is made feasible by
the fact that Congress has the power to delegate more authority to public agencies in the area of the decision-making process.

Under this situation, several published studies have suggested the possibility of the introduction of collective bargaining at the federal level as it is usually used in the private sector. Since Executive Order 10988 does not provide the principal requirements of this process, it is being subjected to severe criticism. Even those who participated in bringing this order into existence have become its critics. The most notable areas of criticism discussed were (1) union recognition, (2) scope of bargaining, and (3) the right to strike.

Union Recognition

The existence of three different levels of union recognition represents a legal gap in the procedural channel in employer-employee relations at the federal level. As was reported:

In some instances, management has utilized the no-run-off election regulation to grant informal or formal recognition to the unions involved rather than exclusive recognition to one of them.

This represents managerial tactics and strategies to sustain the minority unions in order to weaken the majority one. If this is the case, the bargaining right is reduced to the level of consultation.

On the basis of evidence, the exclusive bargaining representative should be the sole agent in the determination of the bargaining unit. It is considered as the keystone of any sound, workable system of mutual relationship in the collective bargaining process. More important, exclusive representation tends not only to enhance
administrative efficiency, but also to increase the responsibility as well as the power of the representative unit.

Practical experience has shown that an organization having exclusive representation status should spread its voice over all employment in the unit. On the other hand, it is legally bound to represent fairly each employee in that unit, whether or not he is a member of the organization. In certain federal agencies, exclusive representation status represents the central ingredient and is a well-proven method in labor-management relations. Accordingly, it was reported that:

The Post Office Department has . . . seven exclusive units . . . Next . . . the Department of Defense [has] 536 exclusive bargaining units, . . . The total number of exclusive units is 1,197 covering 1,064,736 employees, with 615 negotiated agreements, covering 918,311 employees.\(^{42}\)

The procedural legal rule of granting exclusive representation has been criticized by many writers.\(^ {43}\) Granting this level of recognition requires one of two things:\(^ {44}\) (1) The union must obtain a majority vote of at least 60 percent of the eligible voters in an election, or (2) it must receive an absolute majority of those eligible to vote.

As was indicated in chapter three of this study, the above majority-rule formula was the critical issue in case. It was used as a "sovereign decision" against the postal union to destroy its right to an exclusive unit.

The Taft-Hartley Act of 1947 determines the majority rule has been met if more than 50 percent of the employees express their wishes. This rule proved a workable principle for sound decision-making. It
has widespread use in government, industry, unions, and social organizations.

Once the scope of the representative unit has been determined, the majority rule may be decided by a secret ballot election. The workable procedural rules of such matters as the timing of the election, eligibility to vote, and charges and challenges arising out of the election may be established by an independent agency.

On the basis of available evidence, it would not be appropriate to determine majority representation status on the basis of the "authorization card rule" rather than by an election. Serious reservations have been expressed in published studies about the reliability of card checks as factual indicators of employee preference. Experience in the private sector afford ample evidence that the cards are frequently ambiguous and may have been signed for purposes other than to designate the union as the seeking representative.

It might be suggested that either the public agency or the employee union should insist upon the election principle as a matter of right. Preference is suggested to provide this principle as the only legal channel to assure the fullest freedom of the employees in expressing their actual wishes. This proviso would contribute significantly to reduce the possibility of conflict and charges and challenges that might arise out of using the "card check rule."

Scope of Bargaining

The scope of collective bargaining at the federal level seems to be limited to these matters:
1. Terms and conditions which have no direct fiscal implications

2. Terms and conditions which are within managerial discretion

3. Terms and conditions which are not fixed or regulated by laws, regulations and rules

Budgetary constraint seems to be used by public officials as an excuse for eliminating many economic demands across the negotiating table. In addition, Executive Order 10988 is completely silent on the question of wages as an issue among negotiable matters. In fact, one of the major factors for restlessness is that public employees recognize the obvious difference between their rewards and benefits and those received by their counterpart in the private sphere. Thus, a negotiable demand of a wage increase depends entirely upon the budgetary appropriation available. If this is the case the "meaninglessness" of collective negotiation is inevitable.

Evidence is being accumulated that the "budgetary constraint excuse" prevents public employees from gaining "reasonable" demands. In addition, it serves to frustrate employees on the one hand and paralyzes the hands of public representatives to make decisions on the other. A public official has declared:

One cannot bargain with an empty pocketbook. We publicly declared . . . that we were unable to make an adequate offer to meet the legitimate requirements of our [employees] and appealed urgently for funds.

When this is the case, a bargaining impasse is an inevitable consequence. Moreover, the strike as a last resort, might be justified
on an acceptable ground that even "reasonable demands" could not be made. The declaration of public officials of not having sufficient funds to meet "the legitimate demands" could be justifiable grounds for a strike of public employees.

The existence of many departmental regulations and rules prior to Executive Order 10988 has had serious affect on the scope of bargainable issues. Public officials tend to refuse to discuss a particular issue on the grounds that it has already been answered by federal regulations. Moreover, they may contend that some union demands are not relevant because they are in violation of regulations.

The scope of bargaining is also being affected by the existence of inter-departmental variations of rules and regulations. As a result, public representatives seem to experience some degree of uncertainty as to the latitude which may be exercised across the negotiating table. More important, public officials fear violating these rules and regulations which may be promulgated by higher echelons of authority.

The elimination of "wages" and other economic matters as negotiable issues seems to be a legal gap in Executive Order 10988. This exclusion seems to be based on three considerations: (1) That wages and salaries are determined by legislation—the Classification Act of 1923, (2) budgetary implications and limitations, and (3) the fact that public officials neither know nor have the authority to make decisions on how much money they will have the following fiscal year.
The wage issue—including other related matters—is one of the major areas of bargaining under the Taft-Hartley Act of 1947. In the private sector, almost all contract negotiations pivot upon two main areas: (1) wages, and issues which may be directly related to wages; (2) employee benefits, or economic fringe supplements to the basic wage rate.52

On the basis of evidence, wage negotiation in public sector does play an important role in labor relations and represents the thorny factor in union demands.53 Accordingly, it tends to increase the possibility of conflict substantially.

The assumption that wage issues are not negotiable has been widely repudiated. Some federal agencies have been negotiating on wages since 1948.54 A growing number of state legislatures make wage negotiations mandatory. This reflects the fact that public employees are striving for two aims: (1) the introduction of wage packages into the scope of bargaining; and (2) the right to negotiate economic issues through positive participation based on a sufficient authority to make binding decisions on both sides. The absence of such authority on the side of public management may result in destructive consequences.

Strikes

The paramount issue of public interest represents the foundation upon which the right to strike seems to be prohibited, limited, or granted. In fact, public interest is the most frequently cited basis of opposition to proposals aimed at limiting or reducing public
management's responsibility for efficient, economical, and timely action. Accordingly, the right to strike is usually discussed in relation to public interest which must be protected from actions taken by the few.

Public employee strikes are often in the news. Their frequency is surprising in view of the fact that not only are such strikes illegal, but also because they are seen as constituting a far greater interruption of essential goods and services. However, public employees do strike in many sectors of the economy. As was reported:

... the nine-day strike of unionized municipal garbage collectors ... turned Fun City into a playground for rats and vermin.

... the city-owned subways and buses stopped running for 12 days, the public schools shut down for three weeks, welfare workers stopped ministering to the poor, nurses and doctors in the municipal health centers walked out, and even the cops and firemen made threatening noises at the public they were sworn to protect.

This situation has given rise to a widespread concern about employee-governmental relations and a practical determination that they should be restricted in a way which will conserve vital public interest. Available evidence indicates that there is a co-existence of opposite and conflicting approaches to the right to strike by public employees. However, this ambivalence has shed some light on the legal as well as the practical channels through which the public interest can be protected against interrupted flow of goods and services.

As was indicated earlier, Supreme Court members have adopted three different approaches with respect to the right to strike. They are: (1) The traditional approach; (2) the proprietary-governmental
distinction approach; and (3) the functional approach. Some writers in recent years have attempted to provide new answers to the right to strike question. Basically, their attempts are based upon the functional approach adopted by many courts. However, they may open new avenues to the question of the right to strike in public employment.

Under a new approach to strikes in public employment, Professor Jack Stieber suggests that government policy toward concerted public union activities including strikes should take into account two factors: (1) The nature of the public service provided; and (2) the effect of these activities upon the public interest.57

Accordingly, governmental activities or services should be classified into three categories. The first represents the services which cannot be given up for even the shortest period of time. This category would include only police, fire protection, and prisons. The right to strike should be prohibited for these groups, and compulsory arbitration would be the substitute factor for the right to strike.

The second group of activities represent those which can be interrupted for a limited period of time, but not indefinitely, such as hospitals, public utilities, sanitation, and schools. The right to strike should be granted to those who are engaged in these activities. However, this right should be made subject to injunctive relief through the courts when they begin to threaten the health, safety or welfare of the community.58

The third group of services represent those in which work stoppages can be sustained for extended periods without serious effects on
the community. These services are those which do not fall into either of the above classifications. The right to strike should be granted to those who are engaged in these activities on the same basis in the private sector.

The practical justification given to back up this approach is that the classification of governmental activities into categories does not represent an insurmountable barrier to legislation that would distinguish between prohibited and permissible stoppages. This is an administrative question which can be answered by government agencies, and particularly by the National Labor Relations Board. In addition, the nature of the service and its effect upon the public interest represent sound criteria for the adjudication of this administrative problem.

Another approach suggested by some writers under the name "the nonstoppage strike," can be developed similar to that proposed for private industry. This approach, as it was developed, shares with the last one the idea that a distinction should be made between primary or essential and secondary, or nonessential, functions of public sector. However, on the basis of this distinction, the right to strike should legally be prohibited in the former and permitted in the latter. Those employees who are engaged in primary functions should be given an effective strike substitute.

The central idea of the substitution for strike for those who are engaged in the primary function can be expressed as follows:

Upon [a declaration of a nonstoppage strike based on the vote principle] the agency would withhold 30 percent of the workers' wages and 30 percent of the agencies management salaries, and the agency or department would commit
from its budget an amount equal the first two. Such sums would be held in trust by the agency or other designated party.60

What would follow is one of two things. If a negotiated agreement were reached within ninety days, all funds should be returned to the contributors.

If no agreement were reached within ninety days, all funds would be given to certain public or private nonprofit research organizations as determined by appropriate public authorities. Accordingly, research funds would be available to conduct studies in the areas of public concern, and thus benefits would accrue to society at large.

In case of an actual strike, the nonstoppage strike provision should have sufficient penalties to deter labor.61 The justification of these penalties is the inducement of the parties to make sincere efforts toward prompt settlement. In addition, the basic objective of the nonstoppage strike approach is to keep public goods and service flowing and thus protect the public interest. Moreover, those who are engaged in primary activities are given an effective strike substitute and this would gain a sense of dignity, freedom, and equality consistent with the highest ideals of the individual's worth in a democratic society.

It should be noted that there are common opinions shared by those who advocate the right to strike for certain public employees. They are: (1) That effective preventive measures should be developed for all public employees to reduce the possibility of conflict between the parties concerned and to deal with a negotiation impasse. These
include mediation, fact finding, and voluntary arbitration; (2) that
genuine and meaningful negotiation cannot be satisfactory unless there
is some effective pressure which can be used to bring about compliance
with demands; (3) that the sovereignty theory is losing its ground as
a legal barrier to the right to strike in public employment; (4) that
with a few exceptions, activities of the public sector are not suffi-
ciently different from those in the private sphere; and (5) that the
legislative branch or other government agencies can answer the ques-
tion of classifying governmental activities into essential and non-
essential categories guided by public health, safety, and welfare
considerations.

Classifying governmental activities into categories as a basis
for granting, restricting, or prohibiting the right to strike has ser-
ious limitations. These limitations might affect the adequacy and
effectiveness of all above approaches to the question of strikes. Any
approach to the question of strikes in public employment should be de-
veloped not only to affect the "manifestation" of parties' tension but
also to deal constructively with the "sources" of conflict.

The essential-nonessential approaches, including those which
were projected from within, have been criticized as unpersuasive and
fatuous. It can be said that all governmental activities are of
vital importance to the public health, safety, and welfare—directly
or indirectly.

Difficulty is encountered in defining the term essential, or
primary, and nonessential, or secondary, functions as a basis for
granting or prohibiting the right to strike. In fact, some writers attempt to define the essentiality of governmental service as those of which would threaten the health or safety of the public. Others use the public inconvenience term as a basis for defining the essentiality of governmental activities. The question of who is better equipped to make a work classification of governmental activities represents another factor in the inadequacy and ineffectiveness of these approaches. It was suggested that lawmakers can effectively distinguish public employees who can be allowed to strike and those who cannot. At least one Supreme Court accepted this idea:

The legislature is better equipped to investigate such matters [the effect of a strike on public health and safety] extensively and fully with respect to each . . . function.

However, the legal justification may be criticized on the ground that court can more accurately determine whether there is danger to the public health and safety on a case-by-case basis.

Because of the never-ending discussion of the above issue, it can be said that no single branch or agency in government seems to be capable of effectively classifying the great number of services, particularly at the state and local level. However, the possibility of determining the "length" of the strike and the "type" of service provided might justify the position of classifying governmental activities. But the length of any strike could hardly be determined or predicated in advance. In addition, the impossibility of classifying governmental
activities as an administrative matter is recognized by the Governor's Committee on Public Employee Relations in 1966.67

It was estimated that only 1,300,000 (out of 12,019,000 in April, 1968) are engaged in activities that are nonessential or secondary in the sense that their interruption for an extended period would not affect the health, safety, or welfare of the society.68 If this is the case, granting the right to strike to these employees would create new struggles on the side of the majority. The majority would attempt to secure inclusion within the privileged category and, accordingly, would start an intense and never-ending controversy. Moreover, political pressures would be intensified on the side of the unprivileged group to secure inclusion.

Summary

On the basis of evidence, the evolving legal changes with respect to the rights to unionize, bargain collectively, and strike, may weaken or even destroy, the basic assumptions upon which these rights were legally denied.

The assumption of a sovereign employer in the governmental sector has been widely modified, if not wholly abandoned. In addition, the sovereign immunity of the state has been characterized as unjust and unsupported by any valid reason. Not only can the individual sue the government but also unions as a legal representative of their members.

The assumption that governmental functions are unique in the sense that their interruption may create catastrophic consequences
seems to be losing its solid ground. This may only be valid in the armed forces, police, and firemen. Accordingly, the multiplicity of overlaps as well as the responsibilities between the private and public sectors make the distinction between them unrealistic. The fact is that the continuity of governmental functions depends entirely upon a cooperative continuity of operations of public and private sectors.

The assumption of the absence of the profit motive is repudiated on the ground that it is compensated for by three factors: (1) The constant pressures for governmental economy; (2) the arbitrary authoritarian decisions made by politicians and administrative officials; and (3) the motivated factors which create a strong desire on the part of public officials for advancement that may result from outstanding agency records. Under these situations, they may behave in much the same way as do private managers.

The assumption that the law is the only source and wielder of wages, hours, and working conditions, seems to be losing its viability. There is a growing number of state legislations making negotiation on such matters mandatory. Accordingly, the "law" of collective bargaining is beginning to be an accepted measurement in public employment relations. This is based on the fact that public employees strongly desire the opportunity to participate in determining their wages, hours and working conditions.

As the matter stands, it is usually recognized that the process of bargaining can be used as an effective method of bringing before the appropriate legislative body accurate information and data to be used as
a fair basis to make the final determination. This auxiliary-consultative function of collective bargaining seems to be replaced by a free-responsible one in the foreseeable future.

Under this situation, the closing of the gap between the rights enjoyed by those who are engaged in the private sector and their counterpart in the governmental sphere is becoming desirable or even imperative. Accordingly, the transferability of the principles adopted by labor laws in private sector represent a fundamental evolutionary legal change in state legislation. Moreover, Supreme Court members usually interpret public employees' rights as they do in the private sector. In short, the emerging pattern seems to be a gradual movement toward granting public employees the same rights enjoyed by those in the private sector. There is accumulating evidence that public employment relationships will become more formal, more structured, and more the outcome of joint participative action from within the collective bargaining process.

The emerging legal features of the right to unionize, bargain collectively, and strike can be summarized as follows:

1. The right to unionize is legally moving toward a guaranteed and protected position for "all" public employees at all levels of government. This movement is toward a position free from any interference, restraint, or coercion of public management.

2. The right to join or not to join unions seems to be guaranteed and protected without interference, restraint, or coercion on the part of public management.
3. The right to unionize is protected for the purpose of collective bargaining. The trend seems to be toward a position that it is feasible and desirable to transfer collective bargaining as practiced in the private sphere into the governmental sector. Accordingly, these principles have been adopted: (a) The principle of the majority rule in the union representation unit, (b) the principle of exclusive representation as the sole method for bargaining with public authorities, (c) the principle of negotiating in good faith as provided by section 8(5) of the Taft-Hartley Act of 1947, (d) wages as a bargainable issue within the scope of collective bargaining process.

4. Attempts are being made to provide constructive substitutive devices for the right to strike. The most notable ones are mediation, fact-finding with the power to make public recommendations, and voluntary arbitration. The ultimate objective of these attempts may be to insure that public employees will have no need to strike.

5. Despite the sweeping negative answer to the right to strike, there is a general tendency to justify that right, at least in certain governmental activities, when all available and peaceful means of settling differences have been tried. However, it is doubtful that this restrictive tendency will continue. Accordingly, the right to strike seems to be moving toward a position of acceptance as a right of all public employees except three types of services: (a) the armed forces; (b) police; and (c) firemen.

The universal legal as well as the practical justification for these exceptions may be based on the fact that they perform unique
functions, and the interruption of these functions may create catastrophic consequences in the community. In addition, they have commonly waived the right to strike, recognizing the exceptional character of their functions. However, the preventive substitute measures for the right to strike should be sufficiently effective to make strikes unnecessary.
CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

The main objective of this chapter is twofold: (1) To summarize the main issues explored in the preceding chapters, and (2) to state the conclusions by providing the proposed legal principles that are related to the original areas of the study.

Summary

The intent of this study is to develop and propose operational principles which might be incorporated into a new federal law and eventually into state and local statutes. These principles focus only upon the rights of federal employees to unionize, bargain collectively, and strike. The adoption of such principles, it is expected, will lead, among other things, to greater labor-management cooperation and hence to more efficient performance in the public sector.

These principles will be derived from two interconnected bases. The first is the evolution of the legal rights of public employees to unionize, bargain collectively, and strike from the last quarter of the 19th century to the period immediately prior to the issuance of Executive Order 10988 on January 17, 1962. The second basis is the present legal status of these rights at the federal level.
The evolving and proposed principles seem to be desirable, if not imperative, in the light of three basic considerations: (1) The evolutionary change in state laws enacted after the issuance of Executive Order 10988 in 1962, (2) the trend in Supreme Court decisions and legal opinions issued by the Attorney General's office since the passage of this order, and (3) the developing ideas, attitudes, events, and practices explored in current literature.

This study is expected to validate the notion that since several years have elapsed since its passage, Executive Order 10988 requires reconsideration of its provisions in view of changing philosophical and ideological principles which should be adopted to improve labor-management relations in the public sector. The possibility of incorporating these evolving principles into a new federal law will be proposed.

Three main factors have contributed to a considerable degree toward unionization in the public sector: (1) A steady increase in the size and importance of governmental functions, (2) a rapid rise in the size of the labor force in public employment, and (3) the noticeable spread of unionization and attendant activities in the public sector.

The growing role of government in the total economy and the resultant increase in the number of public employees have created personnel problems. The critical problem has been the absence of sound and workable criteria by which public employees could participate with management in making decisions affecting their wages, hours, and conditions of employment.
Historically, public employees have reacted to their problems similarly to their counterpart in the private sphere. They have joined organizations speaking for them in a collective voice and acting for them in concert. Their struggle on political and economic fronts was basically directed toward gaining legal recognition of the right to unionize, to bargain collectively, and hopefully, to strike if necessary to accomplish their objectives.

Public employees have been subjected to a strongly hostile climate from federal legislative, executive, administrative, and judicial levels. To a considerable extent this hostile environment has been based upon the theory of the sovereignty of the state. It has been used as a legal and practical justification for denying to public employees the right to unionize, bargain collectively, and strike.

Despite the existence of this hostile environment, federal employee unionism was able to break through and achieve some progress. Four basic methods were used to achieve their objectives. They were: (1) Legislative tactics usually taking the form of petitioning Congress, lobbying, and pressure through affiliation with the general labor movement, (2) administrative methods which generally consisted of resolutions, open letters, and personal contacts with public officials, (3) publicity which was adopted to educate Congress directly and also to create a favorable background among citizens generally, and (4) political and electoral activities.

The historical struggle of federal employees in political and economic fronts culminated in the passage of the Lloyd-La Follette Act of
1912. For the enactment of this act federal employees were indebted to the American Federation of Labor. This act was the first significant legal action which covered federal employee unionism from 1912 to just prior to the issuance of Executive Order 10988 of 1962.

The basic rights which have been provided and protected by the Lloyd-La Follette Act were: (1) The right to unionize for mutual aid and protection, (2) the right to join or refrain from joining employee organizations, (3) the right to affiliate with the general labor movement under certain restrictions, and (4) the right of federal employees individually or through unions to petition Congress.

Certain restrictions have been imposed by this act upon public employee unions. The legal prohibition of strike activities was asserted, and the right to be affiliated with the general labor movement was not permitted if the outside organization imposed an obligation or duty upon them to engage in any strike, or proposed to assist them in any strike, against the United States. In addition, it did not facilitate the right to bargain collectively in any meaningful way.

A change in the legal climate occurred during the New Deal era of the 1930's and the following years. Presidential policy, and some Supreme Court members became more sympathetic with the objectives of public employees and their unions. The development of such policy was accompanied by a decline in administrative opposition to the rights of public employees to unionize and negotiate collectively.

However, these developments were limited in form and scope. Consequently, the rights of public employees to unionize, bargain
collectively, and strike lagged far behind their counterpart in the private sphere.

Eventually a nationwide official program for federal employees was promulgated by Executive Order 10988 issued by President John F. Kennedy on January 17, 1962. The passage of this order stimulated a rapid growth of public employee unions and their members comparable to a similar expansion in the private sector subsequent to passage of the Wagner Act of 1935.

A long-planned legislative strategy used from 1949 through 1961 by public-employee unionism affiliated with the general labor movement brought this order into being. The unionized efforts were originally conducted to secure a favorable legal stand in the form of enacting a new law or an amendment of the Lloyd-La Follette Act of 1912. However, the general approach of union spokesmen and public officials' opposition have contributed to reduce the legal action to an executive order.

Despite its serious limitations in form and scope, Executive Order 10988 might be considered a turning point in the area of unionization in the public sector. It laid much of the groundwork for more legislative development in the years to come. The potentiality of this development seems to be based on the fact that the order marks the transition in public employee relations from a public policy of opposition to one of acceptance of unionism and collective bargaining.

Executive Order 10988 was an initial response to public employees' frustration and discontent. It is an attempt to establish a consistent public policy and uniform activities with respect to labor-management
relations at the federal level by a unified code. This policy seemed to be aimed at achieving constructive relationships by means of granting greater participation that may contribute to the development of employee-management cooperation. The preamble of the order attests to this fact.

The basic provisions of Executive Order 10988 are employee rights, recognition of employee unions, unit determination, scope and form of employee participation, management prerogatives, grievance and appeal channels, advisory arbitration, implementation responsibility, and coverage. The order is supplemented by "Standards of Conduct for Employee Organizations" and a "Code of Fair Labor Practices." The objective is to secure a uniform and effective implementation of the policies, rights, duties, and responsibilities established by the order. In short, the order and its subsequent supplements seem to be designed to be utilized for the articulation of employee interests, the collective presentation of their demands, the settlement of individual grievances, and for creating cooperative efforts on both sides.

Within the scope of the present study, Executive Order 10988 guaranteed and protected the following rights:

1. Federal employees have the right to join or not to join any lawful organized group. This includes the right to participate in the management of the organization and to act for it in a representative capacity except where such participation and activities would result in a conflict with official duties.

2. The right to join or not to join unions is protected and guaranteed without interference, restraint, coercion, or discrimination
practiced by any governmental agency to encourage or discourage membership in any employee organization.

3. Federal employees have the legal right to form unions for the purpose of improving the working conditions of their members. These unions should be lawful in the sense that they must (a) not assert the right to strike, (b) not assist or participate in any strike, (c) not impose a duty or obligation to conduct, assist, or participate in any strike, (d) not advocate the overthrow of the constitutional form of the government, and (e) be free of corrupt or undemocratic influences which are inconsistent with the purposes of the order.

4. Three types of legal union recognition are provided: informal, formal, and exclusive.

Informal recognition permits the union so recognized to present its opinions and views on matters directly affecting its own members. However, there are no restraints or obligations upon the agency to seek the views of the union regarding the formulation of personnel policies.

Formal recognition is granted with the existence of three requirements: (a) No other employee organization can meet for exclusive recognition as representative of employees in the unit, (b) the employee organization has a substantial and stable membership of no less than ten percent of the employees in the unit, and (c) the employee organization has submitted to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of objectives.
As a general rule, formal recognition is an effective step toward an affirmative willingness on the side of management to seek the views of the union. This is a right of consultation with appropriate officials about personnel policies and working conditions. However, certain limitations have been imposed by Executive Order 10988: (a) Granting this recognition is entirely within the judgment of the agency, (b) it is a management prerogative to grant recognition to more than one union, (c) the agency is not required to negotiate an agreement with the employee union, and (d) the consultation with management should be within the discretion of public officials as required by the order.

Exclusive recognition may be granted when (a) a union has a stable membership of at least ten percent in an appropriate unit, (b) it has been designated or selected by a majority of the employees of such unit, and (c) it has submitted to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives.

Exclusive recognition will entitle the union to negotiate agreements covering all employees in the unit. The union has a legal right to be given the opportunity to discuss with public management representatives certain issues concerning grievances, personnel policies, and practices.

Certain limitations have been imposed by the order: (a) The appropriate agency has a broad zone to make decisions regarding the appropriate unit for purposes of exclusive recognition and whether an employee union represents the majority of the employees in such a unit,
(b) the scope and form of negotiable issues stated in sections 6 and 7 of the order are diminished to include almost every conceivable economic and technical matter.

5. The right to negotiate collectively is granted to the exclusive union representative. This union and the governmental agency have the right as well as the duty to meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions.

The form and scope of negotiable issues have been diminished under the paramount ideology of the sovereignty theory, the principle of delegation of powers, as well as the public interest. As a result, negotiable issues were limited or subjected to: (a) Those matters within the discretion and policy of the appropriate agency, (b) any future rules, regulations, and laws which should take precedence over any negotiated agreement, (c) the decisions that management may make in almost every conceivable area of employee-management relations, (d) the existing laws such as the Civil Service Act, the Classification Act, the Veterans Reference Act, and the Performance Rating Act.

6. The right to strike is made illegal under section 2 of Executive Order 10988. In addition, under the Code of Fair Labor Practices, employee organizations are prohibited from calling or engaging in a strike or any related activities. Moreover a no-strike pledge given in the form of an affidavit should be signed by federal employees as a condition of employment.
The leading theory advanced against federal employees' right to strike is the sovereignty of the governmental employer. Accordingly, from 1912 until the present the right to strike has been made illegal by three laws: (1) The Lloyd La-Follette Act of 1912, (2) the Taft-Hartley Act of 1947, and (3) Public Law 330 of 1955. Under Public Law 330 an unlawful strike by federal employees is classed as a crime. Federal employees could be fined and sent to jail if they commit any of three acts: (1) going on strike, (2) asserting the right to strike, or (3) knowingly belonging to an organization that asserts a strike.

Executive Order 10988 has been subjected to a critical legal examination and evaluation in recent years. Not only has it serious legal deficiency in its provisions, but it also suffers from critical doubt regarding its constitutionality.

Recent court decisions have created serious doubts with respect to the constitutionality of the order. Some Supreme Court members feel that its provisions are not reviewable or enforceable by the courts. Furthermore, these provisions are reduced to a mere expression of policy rather than a basic charter of rights equivalent to the existing labor legislation in the private sphere.

Despite the existence of some Supreme Court cases that have authorized judicial review of executive orders in general, the fact remains that Executive Order 10988 is entirely silent on the question of judicial review. Furthermore, federal agencies are directed to implement the order by granting them a large area of discretion in the formulation of rules and regulations. A review of the provisions of the order
attests to the broad discretion of public authorities in employment relation at the federal level.

The sovereignty of the government employer has been used as a leading legal barrier to grant federal employees the same rights enjoyed by their counterpart in private sector. As a result, Executive Order 10988 was carefully framed and shaped within the boundary of this theory. Consequently, the right to bargain collectively suffered from its ineffectiveness and the right to strike lost its existence.

However, some of the judicial branch members began to evince notable tendencies to veer from the traditional concept of the sovereignty theory which obstructed federal employees' right to participate with management in making decisions by means of a collective voice through collective will.

In short, several years after the issuance of Executive Order 10988, sovereign immunity has been proved to be no absolute, not all-powerful, and not always right. Consequently, the traditional movement against the flow of public employee rights is being modified, although not entirely abandoned. This liberal movement would entitle the individual citizen or the union to which he belongs to sue the Government before court and ask for redress.

The sovereignty theory has been called a fiction—a legal statement that a fact exists which is known not to exist. The deceptiveness of this legal device lies in the failure to differentiate between the Government as sovereign and as an employer. Public management
in performing the designated functions acts and behaves in a similar fashion as private management does.

This duality feature of government may make it desirable, if not imperative, to establish the public employees' rights in the absence of the sovereignty domination. This purification seems to be a movement in fact. Judicial and legislative branches seem to be leaning toward aligning public and private employment in the field of labor relations. Some states have brought them to almost parallel positions. Others have made movements in that direction. This trend of closing the gap between the public and private sector is asserted by many writers.

The withdrawal of sovereignty theory out of the area of employee-employer relations would push the right to unionize and bargain collectively to mature stages. More important, the legal prohibition of the right to strike would not be justified on theoretical considerations. Consequently, the legal right to strike is to be based on its consequences on the public interest and not on the status of the employer. Accordingly, the sum total of what has been written on the subject indicates the right to strike should be illegal if it is expected to bring direct, immediate, certain, and serious danger to a primary interest of the community.

In short, there is a growing responsible and authoritative attitude which doubts the efficacy of absolute illegality of the right to strike. The trend seems to advocate a limited right to strike, depending upon whether the services are deemed essential, or non-essential, or depending upon whether the public health, safety, and welfare is
endangered. However, as was indicated earlier, a differentiation between essential and non-essential governmental services would be subject to an intense and never ending argument as to be administratively impossible. In addition, if this approach is to be viewed as a long-run public policy, all Government employees would receive the same rights as their counterpart in the private sector.

Conclusion

On the basis of evidence presented in this study, and the relevant arguments bearing on the main subject under consideration, the general conclusion is reached that closing the gap between the rights of public employees and their counterpart in the private sphere has become desirable, if not imperative. The practical background of this conclusion is based on the fact that the United States Government is growing in its size and function as an employer. It has, and will, continue as a major source of a vast variety of employment. In addition, government functions cover nearly every conceivable occupation and type of employment.

In the light of available evidence, Executive Order 10988 as it stands does not provide the operational principles by which federal employees can participate collectively in making decisions that affect their working lives. Despite the fact that the right to unionize is relatively guaranteed and protected, federal employee representatives are granted the right to ask rather than to demand, and to petition rather than to negotiate.
Between 1962 and 1969, Executive Order 10988 has been tested numerous times in reality on the federal employment relations front. Its practical application in various occasions across the nation provides clear evidence that it imperatively requires reconsideration of its provisions.

It is evident that the major objectives of Executive Order 10988, stated in its preamble, are designed to achieve constructive relationships by means of granting greater participation that may contribute to the development of mutual cooperation between equals. However, its provisional content is clearly articulated to diminish the rights of federal employees and their chosen unions to a minimum. Under the theoretical conservatism of sovereignty and the traditional supremacy of managerial authority, the right to bargain collectively suffers from its insignificance and the right of strike loses its existence.

In short, the ideological principles of a democratic management such as "participation," "communication," or "cooperation," have been adopted in theory and have lost their effectiveness in reality. Accordingly, there is a legal gap between the ideological objectives stated in the preamble of Executive Order 10988 and its provisions with respect to the right to bargain collectively and strike. To overcome this deficiency, the traditional assumptions upon which these rights are built should be removed. In fact, the judicial decisions and state legislation issued after 1962 have contributed significantly to fill this gap. In addition, several published studies have added evidence attesting to the
evolutionary change in the ideas, events, and practices of federal employee-management relations.

Judging by the evidence presented in the preceding chapters and granting the validity of the related arguments, it seems inevitable that Congress should enact a new law dealing with federal employment relations. The provisional principles of this law should be guided and articulated within the framework of the evolutionary changes that have occurred after the issuance of Executive Order 10988. The emerging legal feature is toward granting public employees the same rights enjoyed by their counterpart in private sector. However, certain reservations might be necessary in order to tailor these principles to public employment relations.

Within this general framework, accumulating evidence suggests that the right to unionize, bargain collectively, and strike in the private sector are not demonstrably or inherently incapable of a transitional process to the public sphere. Instead of letting the theory of sovereignty die hard and the law develop slowly, Congress must respond swiftly to the type and degree of change in a free system if democratic idealism is to be developed. If this is the case, the fact is that Congress has the power and authority to bring the transitional process into its finality.

The ideological principles of democratic government as liberty and equality established by the Constitution have been confirmed by Congress in the National Labor Relations Act of 1935. The Congress declared it to be the national labor policy to grant employees the right
to unionize and bargain collectively through representatives of their own choosing, including the right to engage in concerted activities to defend their legitimate objectives. In fact, this national policy of labor and management relations was designed to be exercised between equals. This piece of legislation was declared constitutional by the Supreme Court in a five to four decision in 1937.\textsuperscript{1}

In the public sector, the same national policy began to receive a more and more hospitable reception and acceptance in various jurisdictions since 1962. As was indicated, several recent court decisions and state legislatures brought public and private employment relations almost parallel. In fact, there is close similarity, if not identity, between the philosophy of Executive Order 10988 expressed in its preamble and the preamble of the National Labor Relations Act of 1935. The fact is that the legal provisions of employment relations in the private sector have been used as a sizable fund of valuable and transferable experience in the interpretation and application of employees' rights in the public sector.

In the light of these evolutionary changes bringing the equality of rights between public employees and their counterpart in the private sector into existence requires that the rights of the former be determined by a Congressional law and not by executive order. The legal as well as the practical justification can be stated as follows: (1) It is of vital importance to fill the constitutional gap inherent in Executive Order 10988 explored by recent court decisions, (2) the enforceability of collective bargaining agreements by courts should be
guaranteed and protected by Congress in a stated provision, (3) equality of rights in both sectors requires securing and protecting them by equivalent legislative action, (4) the historical pattern of national policy attests to the fact that labor-management relations should be regulated by Congressional law, and (5) the supremacy of a Congressional legislative enactment will reduce the opposition and resistance of public officials to a minimum and consequently give them a legal support for a lawful delegation of authority.

It should be noted that the enactment of a new law was the original demand of public employee unions. However, this demand was reduced to an executive order limited in its form and scope. Accordingly, securing and protecting their rights by Congressional act will remove the psychological shadow of second-class treatment.

Granting the validity of this argument, the proposed new law should contain legal principles which have been developed and advanced by the liberal front of legislative and judicial branches. These principles can be developed as follows.

The Right to Unionize

The right to join or not to join a union is an unquestionable right based on the principle of liberty rooted in the Constitution. However, this right can be constrained, but only upon a constitutional basis.

The right to join or not to join a union side by the side with the right of public employees to unionize are relatively protected and
guaranteed by Executive Order 10988. No additional legal requirements are needed in the proposed new law. However, it is hoped that these rights would be adopted in all states including those which prohibit them to some or all of their employees. According to the supersession principle, it might be desirable to legislate these rights universally in the proposed federal law. In this case, state legislation will not be enforced if it prohibits these rights.

On the basis of evidence, the determination of the appropriate bargaining unit based upon the community of interest has gained a favorable assessment from different jurisdictions. The appropriate bargaining unit should be determined by a secret ballot election and not by authorization cards. These two principles should be incorporated in the proposed new law.

A new board should be established under the name of Federal Employment Relations Board (FERB) to deal with the implementation and enforcement of the new policy. This new board should be: (1) An independent agency, (2) established by Congress, and (3) consisted of neutral and impartial members with a high degree of qualifications. In short, the new federal agency may be established similar to the National Labor Relations Board existing in the private sector. The duties and responsibilities of the federal agency will be similar to the NLRB particularly in the areas of: (1) The determination of the appropriate bargaining unit, (2) the eligibility to vote and standards for electioneering, (3) election procedures, (4) the mechanics of representation, and (5) unfair labor practices. The board should be guided by NLRB
rules and standards to the extent that they may be appropriate in federal employment relations.

On the basis of evidence, the principle of exclusive recognition based on the majority rule should be adopted in the proposed new law as the sole method of representation. The majority rule principle has been considered as the only fair and workable method for selecting representatives. The principle of exclusive recognition has proved to be the safest way of representing employees fairly and adequately.

The Right to Bargain Collectively

The illusion of collective bargaining can be expressed in six factual considerations: (1) The lack of legal authority in the hands of public management to bargain with employee representation unit, (2) the existence of laws, regulations and rules that should take precedence over the negotiated agreement, (3) the subjection of the negotiated agreement to any future laws, regulations and rules which might be in conflict with this agreement, (4) the wide range of managerial prerogatives, (5) the narrow scope of negotiable matters, and (6) the possibility of the lack of available funds to meet the reasonable demands agreed upon by the two sides.

On the basis of evidence, the removal of these barriers will materialize the ideological principles of responsible participation, two-way communication, and mutual cooperation between equals. More important, these behavioral factors will contribute significantly to diminishing the causes or motives of conflict to a minimum in public employment relations.
Accordingly, the right to bargain collectively should legally be authorized on a mandatory basis. Sufficient delegated authority to public management representatives should be made legal by Congress. No constitutional or legal barriers seem to exist for expanding this authority adequately enough to push the right to bargain collectively into mature stage.

Granting adequate authority to public management representatives to make final decisions across the bargaining table will create a viability, and finality in the collective bargaining process. Failure to make adequate provisions for public officials in the area of employee-management negotiation would create destructive consequences if Congress passes legislation contrary to an agreement's terms.

The administrative enforceability of collective bargaining agreements should be secured and protected by law. This requires legal provisions that establish the precedence of the agreement over existing and future laws, regulations, and rules in case of conflicting application. Failure to do so will render the negotiated agreement illusory.

The scope of bargainable issues should be extended to include economic matters including wages. As was indicated, the theory that wages and related factors are exclusively within the province of the legislature has lost its viability. The feasibility of responsible collective bargaining within the merit system structure has been demonstrated by the experience of the Tennessee Valley Authority and the Department of the Interior. Moreover, the Merit System principle has
been accepted by federal employee unions as a basis to work with, rather than against it.

Economic issues including wages have been included in a growing number of states' legislative acts. The inclusion of wage and salary issues has been established on a mandatory basis. If this is the case, sufficient and available funds should be in existence to meet the agreed-upon economic issues by the two sides. In order to meet this requirement, it is highly desirable to coordinate the collective bargaining process with the calendar of the legislative and budget year. However, the two bargaining sides should have sufficient time to reach agreement. But it is strongly required that the authority and power of public management representatives should be the equivalent of legislative decisions. This means that the submission of the agreement to the legislative branch will be required only as an automatic procedure of legislative ratification.

Right to Strike

On the basis of evidence, the sovereignty theory has been widely repudiated by the liberal front in several jurisdictions. The first United States Supreme Court recognized the absence of any theoretical support of sovereign immunity within a democratic society. More important, there is persuasive empirical evidence that other jurisdictions in other nations have not found the need for governmental immunity in order to be strong and to operate efficiently. In short, sovereignty theory has been characterized as unjust and unsupported by any valid reason.
Granting the validity of this liberal movement, the sovereignty theory has lost its stand as a barrier to bring the right of public employees and their counterpart in the private sphere into equality. Accordingly, the right of public employees to strike should be based on its consequence on public health, safety, and welfare and not on the status of the government as an employer.

On the basis of evidence, the latest developments indicate that the imminent threat to health, safety and welfare of the community should be the standard for prohibiting public employee strikes, otherwise the right to strike should be granted. At the same time, it was proposed that it is highly desirable to develop problem-solving procedures to operate as preventive devices, not only during the life of the agreement but also for the conflict arising from negotiating new ones. Voluntary arbitration with compulsory decisions and fact finding with public recommendations are the most widely accepted "security valves" in the public sector.

What is required is that these measures should be adequate to insure that public employees will have no need to resort to strike. The adequacy and effectiveness of the problem-solving machinery is to be weighted against the actual and potential harmful effects on public health, safety, and welfare, and the orderliness and continuity of furnishing of goods and services by the public sector.

A distinction should be made between a dispute arising from the interpretation or the application of a collective bargaining agreement and a dispute arising from negotiating a new agreement. Grievance
machinery through escalating levels of responsibility should be set up to deal with the first type of dispute. Instead of advisory arbitration granted by Executive Order 10988, the grievance system should end with an impartial arbitrator for final and binding decisions. The behavioral-administrative side of sound grievance machinery system requires:

1. Ready access to the procedure,
2. Simplicity and ease of understanding of the mechanics of the procedure,
3. Freedom from fear or reprisal of any form,
4. Availability of aid and counseling from the parties concerned,
5. Availability of review of adverse decision, and
6. Prompt consideration for making decisions.

Grievance machinery should be ended with an impartial third-party arbitrator who has the power and authority to render a final and binding determination. This voluntary arbitration with compulsory decision should be authorized on a mandatory basis in the proposed new law. The authorization of grievance arbitration should require its inclusion in the collective bargaining agreement.

The second type of dispute that arises from negotiating a new agreement represents the most immediate cause for a strike in public sector. As was indicated, the principle of making the right to strike less imperative represents the current evolving policy on the part of state legislatures. The movement is directed toward the creation of alternatives to the right to strike which is legally prohibited. However, strikes occur. Despite gubernatorial prohibitions of the strike, public employees not only continue to go on strike, but do so with increasing frequency.
On the basis of evidence, increasing the size of fines, extending jail sentences, or decisive use of injunctions did not bring peace to the government sphere. More important, the principal objective of protecting the public health, safety, and welfare is not likely to be achieved by the Draconian nature of anti-strike measures set by law.

As security valves, it is highly desirable to use voluntary arbitration with binding decisions or fact-finding with recommendations in a negotiation impasse. A wide and favorable assessment has been made to these two preventive devices by judicial and legislative branches and by several studies. If this is the case, the proposed new law should develop and encourage them in theory as well as in practice.

Pushing collective bargaining into its mature stages, and the existence of "security valves" might make the strike unnecessary. However, the strike is an unavoidable event with the fact that collective bargaining is a process involving people having diverse and conflicting interests. Moreover, the historical experience in both public and private sectors attests to the fact that impasse devices can hardly be considered as final solutions to negotiating deadlocks.

Accordingly, the right to strike has been based on the equality of bargaining strength that exerts pressure on the other side to negotiate in good faith. Granting this right would enable public employee representatives to resist any unilateral power of the paternatistic attitude of government.

The theoretical justification of the right to strike seems to be rooted in the Constitution of the United States. By means of legal
interpretation, two principles can be given to justify this right. They are the property and liberty principles stated in the First and Fourteenth Amendments.

The central point in these two principles is that there is no legal obligation arising on the side of the employer to keep an employee, and no legal obligation on the part of this employee to continue at work. The legal justification of withholding work is based on the principle of liberty which indicates that a "free" employee is working at will with the reciprocal liberty of the employer to dismiss him. Moreover, the employee can lawfully change his "will" and not to continue working without punishment inflicted upon his body.

Within this constitutional framework, the employee provides his time, effort, and loyalty to the employer at will and his employment relation depends entirely upon his expectancy. He expects to have the good will of his employer and the latter retains the right to dismiss him. The employee's expectation can be translated, among other things, in terms of his being offered reasonable or proper treatment, a fair wage, and sound machinery for redress of grievances. Therefore, the employee has a legal right to withhold his services if the employer does not keep up with these expectations.

In short, the employee has a constitutional right to work or discontinue work without punishment inflicted on his body. Within this legal framework, it can be stated that the right to strike is a peaceful manifestation of dissatisfaction on the side of the individual employee protected and guaranteed by the constitution.
Granting the validity of this argument, the transferability of the right to strike from the individual citizen as an employee to the organized group to which he belongs can be justified on the same legal ground. The introduction of unionization into the public sector by Executive Order 10988 has a plethora of evidence demonstrating its usefulness in representing and speaking for public employees. Public employee unions, as lawful organizations, have the right to protect and defend their members by peaceful means. As a peaceful tool, collective bargaining has been designed to be practiced between equals. It came into existence to insure the attainment of fair treatment, good wages, and sound machinery for the redress of grievances.

Despite its cardinal objective of reaching agreement peacefully, collective bargaining is an alternative to but not a complete substitute for the strike. Accordingly, the strike, as an integral part of the bargaining process, is the right of organized groups in a lawful organization.

The constitutional justification of the right to strike in the private sector is well established by the judicial branch. The Supreme Court of the United States in successive decisions equated strike action and peaceful picketing, unattended by violence, coercion, or unlawful conduct to an aspect of free speech protected and guaranteed by the first amendment. Moreover, the fourteenth amendment has been considered as constitutional justification against any attempt to enjoin peaceful picketing for a lawful objective.
Available evidence indicates that this development is reconcilable with the public employment. Accordingly, the growing body of responsible and authoritative opinion, including the Supreme Court members, has ruled that peaceful picketing by public employees is permissible first amendment conduct. Moreover, recent developments have more or less eliminated the automatic issuance of an injunction enjoining a strike of public employees.

Aside from the theoretical justification, the right of public employees to strike should be justified on practical considerations. Having accepted the validity of rejecting the sovereignty as a barrier of legalism to the right to strike, the issue should be based on the consequence of strike on the public health, safety, and welfare.

Taking the thesis of public interest as the principal foundation of granting, limiting, or prohibiting the right to strike would bring the private and public sectors under the same principles or rules. The supremacy of public health, safety, and welfare would be endangered by any strike at any time, in any sector of the economy. However, the nature of service and the length of strike may be the only criterion to measure its degree and effect. Accordingly, accumulated evidence suggests that the distinction between both private and public sectors has become without validity. This justifies the principle that the right to strike in public employment should be based upon the consequence of the strike and not upon the status of the employer.

As was indicated in the preceding chapters, certain considerations have been used but proved impractical. Among them are: (1) The
ineffectiveness of anti-strike legislation, (2) the impracticality of fines or jail sentences despite the size of the former and the extent of the latter, (3) the failure of using government by injunction principle, (4) the reluctance of public officials to use punitive measures against public employees because of political repercussions.

Granting the validity of these arguments, the right to strike can legally be granted without jeopardizing or threatening the paramount factors of public health, safety, and welfare. However, the right to strike should be subjected to certain restraints:

1. The right should be granted to all public employees except to policemen and firemen for the reasons stated in chapter four. However, these two areas should have the same rights stated and proposed in this chapter with respect to the right to unionize and bargain collectively. In addition, fact-finding with public recommendations and voluntary arbitration with binding decisions should be legislatively authorized not only in the area of interpreting the existing agreement but also in negotiating new ones.

2. The objective or purpose of the strike by any public employees except in the above two areas should be lawful, to wit, increasing wages, reducing hours, or improving working conditions.

3. The strike should be used as a last resort when all available and peaceful legal means of settling differences have been earnestly tried.
The right to strike of public employees, if legally granted, to be used as a last resort may require the following suggested principles:

First: Having authorized the power of legislative decisions to the governmental representatives and having insured available funds to meet reasonable demands, the negotiation stage between the both sides should be ended at a fixed time, say 15 days prior to the budget submission date. Despite the proposed principle that the submission of the agreed-upon terms is only for automatic procedural ratification, the appropriate legislative body has the power and authority to make the final decision if it is in favor of all unions demands. In this case, there would be no conflict between governmental representatives and the legislative body for two reasons: (1) Both represent the government and (2) the legislative body possesses a higher legislative authority and power than governmental representatives who act as delegates of the former.

Second: A conflict may be in existence in all or in part of the negotiating issues as a result of the decision made by governmental representatives and confirmed by the appropriate legislative body. In this case, the legislative body should authorize both representatives of government and union to select through their own choosing an outside third party arbitrator. A third impartial party should be selected or appointed by the Federal Employment Relations Board to act as chairman. This tripartite board should have the authority and power to make final and binding decisions.
Third: If there was any failure on the part of the government to put the tripartite board award into effect by its fixed deadline, public employees should have the right to go on strike which can be decided by a secret ballot election supervised by the proposed Federal Employment Relations Board.

If the union members refused to ratify and/or abide by the award, the legislative body has the legal right to take two legislative actions: (1) The award be enacted into legislation and (2) the appropriate court should be asked to impose punitive measures against the union. It is desirable for these measures to be inflicted upon the union as an institution and not upon the individual members or union leaders. The sanctions would be decided by courts on a case-by-case basis and thus, not to be incorporated into legislation.

The foregoing proposed principles should gain a favorable reception if democratic idealism is to be secured and sustained. Democracy might be considered the worst form of government until one compares it with other alternatives. The right to strike, to be used as a last resort, should be granted when all democratic principles have been intensively and earnestly tried between equals. Accordingly, when the government as an employer refuses to abide by an impartial decision, it is hard to state that the threat of public health, safety, and welfare is caused by public employee unions. In addition, society cannot entirely divorce the legitimate rights of more than twelve million employees from the public interest.
Strikes will continue to occur if public employees are not granted equality of rights with their counterpart in the private sector. Congress must complete the historical process by transferring the principles adopted in the private sector to the public sphere, if the ideals of democracy are to be shared with public employees.

Recommendations

The available evidence indicates that the public sector lacks historical as well as empirical research in the area of employee-management relations. The most immediate needs for further research seem to be:

1. Historical studies are needed to assess employee-management relations in various federal agencies since the issuance of Executive Order 10988. Research may be designed to answer certain questions. Among these are: (a) What is the impact of Executive Order 10988 on the attitude and behavior of public officials? (b) Has the employee-management relations improved since 1962? (c) Where do such relations differ among various agencies or even within a single agency? (d) What factors contribute to good relations?

2. Empirical research is needed to assess the values and contributions of the findings of the behavioral sciences in the area of public employee-management relations. It is of public concern that certain concepts such as participation and two-way communication would maximize efficiency and productivity in the public sphere.
Research should be designed to fill the gap between theoretical understanding of such concepts and their application in reality. It seems apparent that such studies may prove that the development of behavioral science concepts in the public sphere may reduce employee dissatisfaction and minimize conflict.

3. Empirical studies are needed to assess the effectiveness of dispute-resolving methods as preventive devices in the public sector. Of particular importance, research should be directed toward fact-finding with public recommendations and voluntary arbitration with compulsory decisions.

The basic objective of these studies may be to test their experiences in various public agencies and to permit the analysis of conditions for failure or success. Such studies should yield solid answers to many theoretical questions in public employee-management relations.
A growing number of nations have recognized that the foundation for the solution of labor problems in the public sector must include a legal framework which guarantees public employees the same rights and protections as their counterparts in the private sector. However, attempts are being made to discover effective institutional modification in order to balance the public policy goals of a continuing flow of goods and services to the general public and the increased participation of public employees in decisions that affect their working lives. Accordingly, the principle of public health, safety, and welfare has become the dominant factor in granting, restricting, or prohibiting the right to strike in the public sector.

The right to strike is legally granted to public employees in many nations throughout the world. Among them are Australia, Austria, Belgium, England, Denmark, Finland, France, Germany-Federal Republic, India, Netherlands, Norway, Sweden, and Switzerland.¹ In these nations the right to strike is legally granted for use as a last resort after every available legal mean to settle the dispute has been earnestly
tried. The most notable excepted categories who were deprived of this right are policemen, firemen, and armed forces.

Perhaps the most significant recent changes with respect to the right to strike occurred in Canada and Sweden. However, attention should be directed to the right to strike in France which is guaranteed on Constitutional grounds. Despite this, the emphasis will be based on the legal environment in these three nations as they depict the liberal front in the area of public employment relations. As a general rule, the legal principles adopted in the other countries are basically similar, if not identical.

Canada

The Canadian governmental labor relations legal environment increasingly demonstrates the disappearing dichotomy between the public and private sectors. Saskatchewan was an early pioneer having extended full rights to unionize, bargain collectively, and strike to public employees as early as 1944. Other jurisdictions have followed this legislative pattern. Recent legislative progress includes the enactment of the federal Public Service Staff Relations Act of 1967, and the Quebec Labour Code of 1964.

Constitutional jurisdiction over labor relations in Canada rests primarily with the provinces rather than the Federal Government. Instead of establishing a comprehensive legal code in the area of public employee-management relations, the ten Provinces in Canada enacted separate statutes to cover different classes of public employees. Canadian legislation has taken many forms, been often amended,
and greatly expanded in recent years. The legal as well as the practical justification may be, in part, the reflection of the evolution of public employee union militancy. Therefore, the emphasis was directed to create a balance between the public interest and private freedom of action. On the other hand, the diversity of legislation attests to the fact of the existence of a variety of political philosophies and socio-economic environments throughout the nation.

Despite the fact that provincial authorities have assumed the responsibility for settling disputes, both federal and provincial governments intervened cooperatively to provide conciliation services. The Canadian cooperative experience seems likely to perform outstanding peace-keeping environment in the public sector.

Three jurisdictions in Canada can be considered as having the greatest evolutionary progress in public employment relations. They are the Federal Government sector, Saskatchewan and Quebec Provinces.

Generally speaking, all provinces are obviously moving in the same direction by borrowing from the private sector the principles of the right to unionize, bargain collectively, and strike and setting them into a legal framework for public employees. The intent seems to be to insure private and public employees the same treatment under a comprehensive legal application.

Federal Government

The Public Service Staff Act of 1967 gives federal employee unions a choice of two methods of dispute settlement. Upon certification, a bargaining agent representing public employees is required to
elect between arbitration and strike as a method of achieving objectives in case of a dispute with a public employer.

The act of 1967 also established the Public Service Staff Relations Board to act as a permanent and independent agency to deal with public employee relations disputes. If the union elects the strike option, the dispute can be expected to be settled mainly by voluntary conciliatory services. However, the board has empowered, even prior or during the conciliatory effort, to designate those employees or classes of employees whose duties and services are necessary in whole or in part to the health, safety, and welfare of the public. In this case, no employee who is so designated will be permitted to strike.

The act of 1967 also established a permanent independent tripartite Arbitration Tribunal to deal with public employment disputes. Where the union selects arbitration as a method of settling future disputes, the federal act carefully specifies for this agency the criteria for decision-making in diagnosing, selecting alternatives, and settling the conflicting issues. Equally significant, an independently paid research bureau has been established under the supervision of the PSSRB to provide accurate statistical data both to the parties and to the Arbitration Tribunal which may enhance the quality of both agreement and decision-making processes in settling differences.

Saskatchewan

The province of Saskatchewan was an early pioneer having extended full rights to unionize, bargain collectively, and strike to
public employees as early as 1944 by the Trade Union Act.\textsuperscript{6} There are a number of other acts covering certain categories of public employees. They are the Public Service Act of 1965, Fire Department Platoon Act of 1965, School Act of 1965, the Town Act of 1965, City Act of 1965, and the Essential Service Emergency Act of 1966.\textsuperscript{7}

Thus Saskatchewan joined the ranks of other provinces which had provided special legislative treatment for the maintenance of essential services. However, it does not treat public employees differently from those who are in private sphere in respect to the obligations imposed.

Final and binding arbitration may be agreed to by the parties to the agreement over the meaning, application, or violation of the collective bargaining provisions. In case of a threat, or an actual strike, the appropriate governmental body is empowered to determine its effect on public health and safety and to make binding and final decisions accordingly.

\textbf{Quebec}

The Quebec Labour Code of 1964 simply brings public employees within the ambit of the general labor relations legislation existing in the private sector.\textsuperscript{8} All public employees are covered by the act except the Provincial Police Force. The right to strike is granted with the exclusion of policemen and firemen.

With the exception of policemen and firemen, the act provides for postponement of actual strikes which may endanger the public health and safety for up to 80 days, presumably until available conciliatory
means are exhausted. In this respect, the act established the Labour Relations Board to act as a third and impartial party whose primary duty is to settle disputes by final and binding awards.

The general code of Quebec represents an advanced step toward a distinction between essential and nonessential governmental activities. The Quebec Civil Service Act of 1965, complementing the Labour Code, places upon public employee unions the obligation to make necessary arrangements to insure the maintenance of continuing operation of the essential services as a condition precedent to the right to strike. In addition, power is vested in the judicial branch to enjoin a strike of public employees performing essential services.

Following Montreal's experience, the Province of Quebec public employment relations are handled by the labor relations office established in 1965 rather than the Civil Service Commission. This office, acting as an impartial agency, has received a favorable assessment in its implementing of public policy programs in the area of public employment relations.

France

In France, the right to strike is granted to public employees by the Constitution of the Fourth Republic of 1946. In fact, the Constitution states in its preamble that "the right to strike is recognized subject to laws which regulate it." Laws were passed which made the right of strike for policemen and security agents illegal. However, for
the majority of other public employees no legislation has been passed concerning the right to strike.

The absence of any legal prohibition of the right to strike has been construed as a freedom to strike. The Conseil d'Etat (the Constitutional Court) ruled that the right to strike in the public sector is guaranteed by the 1946 Constitution. However, the government always has the power and authority to take every necessary step to prevent or stop any strike harmful to the public health, safety, and welfare.

A notable change took place in July, 1963, in regulating actual strikes by requiring that each strike must be preceded by a notice. This notice must: (1) Contain the reasons for resorting to a strike, (2) be given by the trade union organization or organizations most representative at the national level, in the craft, enterprise, establishment, or service concerned, (3) reach the appropriate governmental authorities five clear days before the beginning of the strike, and (4) mention the place, the date, and the hour of the planned strike as well as its duration, limited or unlimited.

It is important to state that the Conseil d'Etat plays a vital role to guarantee that the government does not exercise its power and authority in an arbitrary or abusive manner. In effect, the impartiality of the Conseil d'Etat has been the foundation and guarantee of the effective functioning of the French administration.
In Sweden, an attempt was made to equate the rights of public employees with those of their private counterparts, and the legal system of employee-management relations has been changed dramatically in this direction. A significant legal change became effective on January 1, 1966, designed to make the right to strike by public employees legal.

The scope of the Swedish law is broad enough to include all public employees without exception. However, policemen and firemen seem to have especial contractual arrangements that guarantee the continuity of their services.

The fundamental evolving legal change in public employment relations in Sweden is twofold:

1. The decision-making process is placed in the hands of the union as an institution. In this case, the duties and responsibilities stated by law are to be executed and performed by those who have the power and authority to do so.

2. The role of leadership is to be confirmed and emphasized. Accordingly, decision-making should be centralized in union leaders. In this case, the power and authority should be kept in the hands of the central organization's leaders since they are more responsible as well as better informed as to relevant conditions than are local union leaders.
The legal necessity for granting the right to strike seems to be based on certain factors:

1. The ineffectiveness of the punitive measures set by law was evidently clear. Despite different Draconian measures, the power of the Swedish government had diminished to the extent that it became too weak to insure balance by the early 1960's. On the other hand, unions demonstrated the ability to go on strike despite the uncertainty of the size and severity of penalties.

2. The absence of any guidelines as to what could be bargained about, and the broad public management prerogatives. This situation has led to frustration and restlessness of public employees across the nation.

3. The absence of sound problem-solving machinery to settle public employment disputes. This situation has received considerable attention from judicial and legislative branches toward establishing a proper structured and functioning grievance system in the public sector.

In this respect, it was concluded that fairness to government employees in the struggle for a share in social advantages demands that they be given rights corresponding to those held by employees in the private sector.16

The new Swedish legal system in public employee relations set certain limitations on the right to strike. They are: (1) Using the strike as a matter of right should be tied explicitly to the legal boundary of the bargainable issues; (2) going on strike should be based on group decisions not on individual employee actions. This means that
the right to strike is granted to the union as an organized group and should be decided by it.

Summary

The ideological principles that can be derived from the evolutionary legal changes in many nations are based on the theory of closing the gap between employee relations in both private and public sectors. The general trend is to discard the constitutional and political mythology of the sovereignty theory. In this respect, legislatures have borrowed from the private sector the principles of the right to unionize, bargain collectively, and strike and tailored them into a legal framework for public employees.

The growing universal conviction is to find a permanent balance between the public interest and the reservation of the democratic ideology of private freedom of action. Governmental intervention to protect public health, safety, and welfare which might be threatened by actions taken by few is a matter of right in the hands of public authorities. Government, as the supreme authority and the administrative hand of society, seems not to need special legislation in order to intervene.

Foreign experience in public employee relations legislation shows a trend towards a broader operational definition of public interest disputes. It this is the case, the concept of public interest would be involved in a great number of disputes which can only be protected by further governmental intervention.
There is accumulating evidence that it is difficult, if not impossible, to draw a line of demarcation between essential and nonessential governmental services. Neither the executive sector nor the judicial branch are infallible in determining the impact of a strike upon the public health, safety, and welfare.

However, there is an almost uniform tendency to treat policemen, firemen, and armed forces by special and separate legislation. Moreover, under the broad definitional boundary of public interest, the trend is to enact special statutes for certain sections of the economy. Among them are public utility services, hospital and medical services, and educational sectors. The list of public interest sectors might be extended to include a large segment of public activities.

As the matter stands, compulsory arbitration is available for police and fire department employees and with increasing frequency for hospital, public utilities employees, and teachers. The trend is to classify other governmental activities in the same category in case of bargaining impasses.

As a general rule, the most common problem-solving procedure is voluntary arbitration with compulsory decisions. In terms of institutional arrangements, arbitration is to be conducted by tripartite boards with the broadest possible mandate to gather evidence and to make final and binding awards.

Despite the fact that the concept of public interest is gaining undefinable lines of demarcation, a conclusion has been reached that granting the right to strike to be used as a last resort can be in the
interest of society in preserving peace. Granting this right would establish a socio-psychological balance of human rights in both private and public sectors. In case of abuse or misuse of this right by public employees will bring about two main factors to act as a peace-keeping mechanism: (1) Government intervention by means of the executive, administrative and judicial authorities, and (2) public interest groups who may mobilize their efforts and pressures in favor of government decisions for the settlement of public employee relations disputes.

The Canadian experience attests to the fact that granting the right to strike has produced two favorable results: (1) A diminishing number of strikes in the public sector, and (2) a willingness of public employees to settle their disputes by means other than strike, particularly by an outside impartial third party who has the power to make final and binding decisions.

In this respect, government intervention to settle a dispute in the public sector relies heavily on community group pressure and opinion which may have a direct effect on legitimizing the final outcome of public employment relationships. The principal justification is that the public which consists of the taxpayers pay twice in case of actual strike—first in inconvenience and later in increased costs. Consequently, public interest groups are expected to play a vital role not only in shaping the dispute settlement but also in presenting views which may be integrated into the public employment relations policy.
WHEREAS participation of employees in the formulations and implementation of personnel policies affecting them contributes to effective conduct of public business; and

WHEREAS the efficient administration of the Government and the well-being of employees require that orderly and constructive relationships be maintained between employee organizations and management officials; and

WHEREAS subject to law and the paramount requirements of the public service, employee-management relations within the Federal service should be improved by providing employees an opportunity for greater participation in the formulation and implementation of policies and procedures affecting the conditions of their employment; and

WHEREAS effective employee-management cooperation in the public service requires a clear statement of the respective rights and obligations of employee organizations and agency management:

1Federal Register, Friday, January 19, 1962, pp. 551-556.
NOW, THEREFORE, by virtue of the authority vested in me by the Constitution of the United States, by section 1753 of the Revised Statutes (5 U.S.C. 631), and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.

Section 1(a) Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity. Except as hereinafter expressly provided, the freedom of such employees to assist any employee organization shall be recognized as extending to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress or other appropriate authority. The head of each executive department and agency (hereinafter referred to as "agency") shall take such action, consistent with law, as may be required in order to assure that employees in the agency are apprised of the rights described in this section, and that no interference, restraint, coercion or discrimination is practiced within such agency to encourage or discourage membership in any employee organization.

(b) The rights described in this section do not extend to participation in the management of an employee organization, or acting as a representative of any such organization, where such participation or
activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of an employee.

Section 2. When used in this order, the term "employee organization" means any lawful association, labor organization, federation, council, or brotherhood having as a primary purpose the improvement of working conditions among Federal employees, or any craft, trade or industrial union whose membership includes both Federal employees and employees of private organizations; but such term shall not include any organization (1) which asserts the right to strike against the Government of the United States or any agency thereof, or to assist or participate in any such strike, or which imposes a duty or obligation to conduct, assist or participate in any such strike, or (2) which advocates the overthrow of the constitutional form of Government in the United States, or (3) which discriminates with regard to the terms or conditions of membership because of race, color, creed or national origin.

Section 3(a) Agencies shall accord informal, formal or exclusive recognition to employee organizations which requests such recognition in conformity with the requirements specified in sections 4, 5 and 6 of this order, except that no recognition shall be accorded to any employee organization which the head of the agency considers to be so subject to corrupt influences of influences opposed to basic democratic principles that recognition would be inconsistent with the objectives of this order.

(b) Recognition of an employee organization shall continue so long as such organization satisfies the criteria of this order applicable to such recognition; but nothing in this section shall require any agency
to determine whether an organization should become or continue to be recognized as exclusive representative of the employees in any unit within 12 months after a prior determination of exclusive status with respect to such unit has been made pursuant to the provisions of this order.

(c) Recognition, in whatever form accorded, shall not—

(1) preclude any employee, regardless of employee organization membership, from bringing matters of personal concern to the attention of appropriate officials in accordance with applicable law, rule, regulation, or established agency policy, or from choosing his own representative in a grievance or appellate action; or

(2) preclude or restrict consultations and dealings between an agency and any veterans organization with respect to matters of particular interest to employees with veterans preference; or

(3) preclude an agency from consulting or dealing with any religious, social, fraternal or other lawful association, not qualified as an employee organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members, when such consultations or dealings are duly limited so as not to assume the character of formal consultation on matters of general employee-management policy or to extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees.
Section 4(a) An agency shall accord an employee organization, which does not qualify for exclusive or formal recognition, informal recognition as representative of its member employees without regard to whether any other employee organization has been accorded formal or exclusive recognition as representative of some or all employees in any unit.

(b) When an employee organization has been informally recognized, it shall, to the extent consistent with the efficient and orderly conduct of the public business, be permitted to present to appropriate officials its views on matters of concern to its members. The agency need not, however, consult with an employee organization so recognized in the formulation of personnel or other policies with respect to such matters.

Section 5(a) An agency shall accord an employee organization formal recognition as the representative of its members in a unit as defined by the agency when (1) no other employee organization is qualified for exclusive recognition as representative of employees in the unit, (2) it is determined by the agency that the employee organization has a substantial and stable membership of no less than 10 per centum of the employees in the unit, and (3) the employee organization has submitted to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of objectives. When, in the opinion of the head of an agency, an employee organization has a sufficient number of local organizations or a sufficient total membership within such agency, such organization may be accorded formal recognition at the national level, but such recognition shall not
preclude the agency from dealing at the national level with any other employee organization on matters affecting its members.

(b) When an employee organization has been formally recognized, the agency, through appropriate officials, shall consult with such organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that are of concern to its members. Any such organization shall be entitled from time to time to raise such matters for discussion with appropriate officials and at all times to present its views thereon in writing. In no case, however, shall an agency be required to consult with an employee organization which has been formally recognized with respect to any matter which, if the employee organization were one entitled to exclusive recognition, would not be included within the obligation to meet and confer, as described in section 6(b) of this order.

Section 6(a) An agency shall recognize an employee organization as the exclusive representative of the employees in an appropriate unit when such organization is eligible for formal recognition pursuant to section 5 of this order, and has been designated or selected by a majority of the employees of such unit as the representative of such employees in such unit. Units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned, but no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized. Except where otherwise
required by established practice, prior agreement, or special circum-
stances, no unit shall be established for purposes of exclusive recog-
nition which includes (1) any managerial executive, (2) any employee
engaged in Federal personnel work in other than a purely clerical capa-
city, (3) both supervisors who officially evaluate the performance of
employees and the employees whom they supervise, or (4) both professional
employees and nonprofessional employees unless a majority of such pro-
fessional employees vote for inclusion in such unit.

(b) When an employee organization has been recognized as the
exclusive representative of employees of an appropriate unit it shall be
entitled to act for and to negotiate agreements covering all employees
in the unit and shall be responsible for representing the interests of
all such employees without discrimination and without regard to employee
organization membership. Such employee organization shall be given the
opportunity to be represented at discussions between management and
employees or employee representatives concerning grievances, personnel
policies and practices, or other matters affecting general working con-
ditions of employees in the unit. The agency and such employee organi-
zation, through appropriate officials and representatives, shall meet
at reasonable times and confer with respect to personnel policy and
practices and matters affecting working conditions, so far as may be
appropriate subject to law and policy requirements. This extends to the
negotiation of an agreement, or any question arising thereunder, the
determination of appropriate techniques, consistent with the terms and
purposes of this order, to assist in such negotiation, and the execution
of a written memorandum of agreement or understanding incorporating any agreement reached by the parties. In exercising authority to make rules and regulations relating to personnel policies and practices and working conditions, agencies shall have due regard for the obligation imposed by this section, but such obligation shall not be construed to extend to such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work.

Section 7 Any basic or initial agreement entered into with an employee organization as the exclusive representative of employees in a unit must be approved by the head of the agency or any official designated by him. All agreements with such employee organizations shall also be subject to the following requirements, which shall be expressly stated in the initial or basic agreement and shall be applicable to all supplemental, implementing, subsidiary or informal agreements between the agency and the organization:

(1) In the administration of all matters covered by the agreement officials and employees are governed by the provisions of any existing or future laws and regulations, including policies set forth in the Federal Personnel Manual and agency regulations, which may be applicable, and the agreement shall at all times be applied subject to such laws, regulations and policies;

(2) Management officials of the agency retain the right, in accordance with applicable laws and regulations, (a) to direct employees of the agency, (b) to hire, promote, transfer, assign, and retain
employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees, (c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the Government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted; and (f) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

Section 8(a) Agreements entered into or negotiated in accordance with this order with an employee organization which is the exclusive representative of employees in an appropriate unit may contain provisions, applicable only to employees in the unit, concerning procedures for consideration of grievances. Such procedures (1) shall conform to standards issued by the Civil Service Commission, and (2) may not in any manner diminish or impair any rights which would otherwise be available to any employee in the absence of an agreement providing for such procedures.

(b) Procedures established by an agreement which are otherwise in conformity with this section may include provisions for the arbitration of grievances. Such arbitration (1) shall be advisory in nature with any decisions or recommendations subject to the approval of the agency head; (2) shall extend only to the interpretation or application of agreements or agency policy and not to changes in or proposed changes in agreements or agency policy; and (3) shall be invoked only with the approval of the individual employee or employees concerned.
Section 9 Solicitation of memberships, dues, or other internal employee organization business shall be conducted during the non-duty hours of the employees concerned. Officially requested or approved consultations and meetings between management officials and representatives of recognized employee organizations shall, whenever practicable, be conducted on official time, but any agency may require that negotiations with an employee organization which has been accorded exclusive recognition be conducted during the non-duty hours of the employee organization representatives involved in such negotiations.

Section 10 No later than July 1, 1962, the head of each agency shall issue appropriate policies, rules and regulations for the implementation of this order, including: A clear statement of the rights of its employees under the order; policies and procedures with respect to recognition of employee organizations; procedures for determining appropriate employee units; policies and practices regarding consultation with representatives of employee organizations, other organizations and individual employees; and policies with respect to the use of agency facilities by employee organizations. Insofar as may be practicable and appropriate, agencies shall consult with representatives of employee organizations in the formulation of these policies, rules and regulations.

Section 11 Each agency shall be responsible for determining in accordance with this order whether a unit is appropriate for purposes of exclusive recognition and, by an election or other appropriate means, whether an employee organization represents a majority of the employees.
in such a unit so as to be entitled to such recognition. Upon the re-
quest of any agency, or of any employee organization which is seeking
exclusive recognition and which qualifies for or has been accorded
formal recognition, the Secretary of Labor, subject to such necessary
rules as he may prescribe, shall nominate from the National Panel of
Arbitrators maintained by the Federal Mediation and Conciliation Ser­
vice one or more qualified arbitrators who will be available for employ­
ment by the agency concerned for either or both of the following pur­
poses, as may be required: (1) to investigate the facts and issue an
advisory decision as to the appropriateness of a unit for purposes of
exclusive recognition and as to related issues submitted for considera­
tion; (2) to conduct or supervise an election or otherwise determine
by such means as may be appropriate, and on an advisory basis, whether
an employee organization represents the majority of the employees in a
unit. Consonant with law, the Secretary of Labor shall render such
assistance as may be appropriate in connection with advisory decisions
or determinations under this section, but the necessary costs of such
assistance shall be paid by the agency to which it relates. In the
event questions as to the appropriateness of a unit or the majority
status of an employee organization shall arise in the Department of La­
bor, the duties described in this section which would otherwise be the
responsibility of the Secretary of Labor shall be performed by the
Civil Service Commission.

Section 12 The Civil Service Commission shall establish and
maintain a program to assist in carrying out the objectives of this
order. The Commission shall develop a program for the guidance of agencies in employee-management relations in the Federal service; provide technical advice to the agencies on employee-management programs; assist in the development of programs for training agency personnel in the principles and procedures of consultation, negotiation and the settlement of disputes in the Federal service, and for the training of management officials in the discharge of their employee-management relations responsibilities in the public interest; provide for continuous study and review of the Federal employee-management relations program and, from time to time, make recommendations to the President for its improvement.

Section 13(a) The Civil Service Commission and the Department of Labor shall jointly prepare (1) proposed standards of conduct for employee organizations and (2) a proposed code of fair labor practices in employee-management relations in the Federal service appropriate to assist in securing the uniform and effective implementation of the policies, rights and responsibilities described in this order.

(b) There is hereby established the President's Temporary Committee on the Implementation of the Federal Employee-Management Relations Program. The Committee shall consist of the Secretary of Labor, who shall be chairman of the Committee, the Secretary of Defense, the Postmaster General, and the Chairman of the Civil Service Commission. In addition to such other matters relating to the implementation of this order as may be referred to it by the President, the Committee shall advise the President with respect to any problems
arising out of completion of agreements pursuant to sections 6 and 7, and shall receive the proposed standards of conduct for employee organizations and proposed code of fair labor practices in the Federal service, as described in this section, and report thereon to the President with such recommendations or amendments as it may deem appropriate. Consonant with law, the departments and agencies represented on the Committee shall, as may be necessary for the effectuation of this section, furnish assistance to the Committee in accordance with section 214 of the Act of May 3, 1945, 59 Stat. 134 (31 U.S.C. 691). Unless otherwise directed by the President, the Committee shall cease to exist 30 days after the date on which it submits its report to the President pursuant to this section.

Section 14 The head of each agency, in accordance with the provisions of this order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles under section 14 of the Veterans' Preference Act of 1944, as amended. Each employee in the competitive service shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be processed in an identical manner to that provided for appeals under section 14 of the Veterans' Preference Act. Any recommendation by the Civil Service Commission submitted to the head of an agency on the basis of an appeal by an employee in the competitive service shall be complied with by the head of the agency. This section shall become effective as to all
adverse actions commenced by issuance of a notification of proposed action on or after July 1, 1962.

Section 15 Nothing in this order shall be construed to annul or modify, or to preclude the renewal or continuation of, any lawful agreement heretofore entered into between any agency and any representative of its employees. Nor shall this order preclude any agency from continuing to consult or deal with any representative of its employees or other organization prior to the time that the status and representation rights of such representative or organization are determined in conformity with this order.

Section 16 This order (except section 14) shall not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency, or to any office, bureau or entity within an agency, primarily performing intelligence, investigative, or security functions if the head of the agency determines that the provisions of this order cannot be applied in a manner consistent with national security requirements and considerations. When he deems it necessary in the national interest, and subject to such conditions as he may prescribe, the head of any agency may suspend any provision of this order (except section 14) with respect to any agency installation or activity which is located outside of the United States.

JOHN F. KENNEDY

THE WHITE HOUSE,
January 17, 1962
No. 10988
Memorandum for the Heads of Executive Departments and Agencies

On January 17, 1962, I issued Executive Order No. 10988, which gives effect to a new and affirmative Executive Branch policy looking toward participation by employee organizations in the formulation and implementation of personnel policies affecting the well-being of Federal employees. If this policy is to be truly effective, not only must the Executive agencies carry out their duties in a manner consistent with the terms and spirit of Executive Order No. 10988, but the employee organizations must also conduct their own affairs in a way which will promote orderly and constructive relationships with management officials and satisfy their inherent commitments to high standards of ethical and democratic conduct.

It is, therefore, in the public interest to require that such organizations adhere to standards of conduct which will insure the administration of their internal affairs in a manner consistent with this


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public trust, while at the same time recognizing their right to inde­
pendence in the internal management of their affairs.

Accordingly, there is hereby prescribed, pursuant to Executive
Order 10988, for application by all agencies subject to the Order, the
Standards of Conduct for Employee Organizations and the Code of Fair
Labor Practices in the Federal Service. They are designed to assist in
securing the uniform and effective implementation of the policies,
rights, and responsibilities described in the Order. The Standards and
Code will assist in the implementation of the Order by fixing more defi-
nitely the responsibility of employee organizations and agencies, pro-
viding more detailed criteria for the protection of rights secured under
the Order and establishing procedures in both of these areas which will
assure a necessary measure of uniformity within the Executive Branch of
the Federal Government.

In keeping with the spirit and intent of the Executive Order to
promote cooperation in the conduct of relationships between agencies and
employee organizations in the Federal service, it should, of course, be
emphasized that primary reliance must be placed on informal settlement
of differences and disputes by discussions between the parties. The pro-
cedures provided in the Standards and Code are intended to supplement
such informal discussions and procedures, not to replace them.

This memorandum, including the Standards of Conduct for Employee
Organizations and the Code of Fair Labor Practices, will be published in
the Federal Register.

JOHN F. KENNEDY
Standards of Conduct for Employee Organizations and Code of Fair Labor Practices

Section 1.1 Purpose and Scope. These Standards of Conduct for Employee Organizations and the Code of Fair Labor Practices in Employee-Management Cooperation in the Federal Service are issued pursuant to Executive Order No. 10988. Their purpose is to assist in securing the uniform and effective implementation of the policies, rights and responsibilities described in the Order by fixing more definitely the responsibilities of employee organizations and agencies, providing more detailed criteria for the protection of rights secured under the Order, and establishing procedures in both of these areas which will assure a necessary measure of uniformity within the Executive Branch of the Federal Government.

Section 1.2 Definitions.

(a) "Order" means Executive Order No. 10988.

(b) "Agency," "employee organization," and "employee" have the same meaning as in the Order.

(c) "Agency management" includes the agency head, and all management officials and representatives of management having authority to act for the agency on any matters relating to the implementation of the agency employee-management cooperation program as established under the Order.

(d) "Recognition" means recognition which is or may be accorded to an employee organization pursuant to the provisions of the order.
Section 1.3 General Responsibilities of the Civil Service Commission. The Civil Service Commission, in accordance with the provisions of section 12 of the Order, shall be responsible for the dissemination of information with respect to the Standards of Conduct and Code of Fair Labor Practices, and shall insure an adequate exchange of information between agencies as to its application and enforcement.

Part A

Standards of Conduct for Employee Organizations

Section 2.1 Application. The provisions of this Part are applicable to all agencies subject to the provisions of the Order and to all employee organizations accorded recognition under the Order.

Section 2.2 Standards of Conduct. No agency shall accord recognition to any employee organization unless the employee organization is subject to governing requirements, adopted by the organization or by a national or international employee organization or federation of employee organizations with which it is affiliated or in which it participates, containing explicit and detailed provisions to which it subscribes calling for the following:

(a) The maintenance of democratic procedures and practices, including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participation in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings;
(b) The exclusion from office in the organization of persons affiliated with Communist or other totalitarian movements and persons identified with corrupt influences;

(c) The prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(d) The maintenance of fiscal integrity in the conduct of the affairs of the organization, including provision for accounting and financial controls and regular financial reports or summaries to be made available to members.

Section 2.3 Adoption of Standards. No agency shall deny, suspend, or withdraw recognition by reason of any alleged failure to adopt or subscribe to standards of conduct as provided in section 2.2 of this Part unless it has first notified the organization and the national or international organization with which it is affiliated of such alleged deficiency and has afforded the organization a reasonable opportunity to make any amendments or modifications or take any action that may be required. In the event that any question arising under any provision of section 2.2 is not resolved in a mutually acceptable manner, the agency shall consult with the Secretary of Labor prior to making a final determination that an organization has failed to comply with such provisions.
Section 2.4 Procedure for Denial, Suspension or Withdrawal of Recognition.

(a) An employee organization which has adopted or subscribed to standards of conduct as provided in section 2.2 of this Part shall not be required to furnish other evidence of its freedom from influences described in section 3(a) of the Order unless (1) the agency has cause to believe that the organization has been suspended or expelled from or is subject to other sanction by a parent employee organization or labor organization or federation of such organizations with which it had been affiliated because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by section 2.2 of this Part, or (2) recognition in any form has been denied, suspended, or withdrawn by any other agency pursuant to this Part or section 3(a) of the Order and such denial, suspension, or withdrawal remains in effect, or (3) there is reasonable cause to believe that the organization, notwithstanding its compliance with section 2.2, is in fact subject to influences such as would preclude recognition pursuant to the Order.

(b) In any case where additional evidence is required pursuant to (1), (2), or (3) of subsection (a) of this section, the agency shall not deny, suspend, or withdraw recognition on the basis of the exception stated in section 3(a) of the Order unless it has afforded the employee organization an opportunity to present to the agency such reasons or considerations as it has to offer relating to why recognition should not be denied, suspended, or withdrawn. If this opportunity is requested, the
agency shall promptly hold a hearing. Upon request the agency shall make available to the employee organization for use in the hearing a concise and accurate summary of the facts on which the agency intends to rely in reaching its decision, together with a statement of the reasons for the agency action. In lieu of a summary statement, the agency may make available to the employee organization the entire report of the agency investigation. In any dispute over the accuracy or sufficiency of information so provided, the final determination shall be made by the agency head. The employee organization shall have an opportunity to be present at the hearing, to be represented by counsel, and to offer such oral and documentary evidence as may be relevant to the issue or issues in controversy. Any determination to deny, suspend or withdraw recognition shall be made in writing by the agency head.

(c) The agency may consult with the Secretary of Labor before instituting any proceedings pursuant to clause (3) of subsection (a) of this section and shall consult with the Secretary of Labor prior to taking any final action with respect to the denial, suspension, or withdrawal of recognition.

(d) Where an agency determination denying, suspending or withdrawing recognition of an employee organization is made in accordance with subsections (b) and (c) of this section after consultation with the Secretary of Labor, any other agency may thereafter deny, suspend or withdraw recognition as to such employee organization or subordinate affiliate thereof without regard to the procedures prescribed in subsection (b) if such other agency has afforded such employee organization
or subordinate affiliate thereof an opportunity to present such reasons and considerations as it may have to offer as to why such prior determination should not be followed, and such agency, on the basis of such submission and after consultation with the Secretary of Labor, finds that further procedures are unnecessary.

Section 2.5 Effective Dates.

(a) The provisions of this part, other than section 2.4(b) and (c) as hereinafter provided, shall become effective immediately. No later than 6 months from such effective date, each agency shall adopt such permanent procedures as may be necessary to implement this Part. Insofar as may be practicable and appropriate, agencies shall consult with representatives of recognized employee organizations in the formulation of such procedures. Copies of any implementing regulations shall be made available to recognized employee organizations upon request.

(b) Prior to the adoption of such permanent procedures, in making determinations under the Order with respect to employee organizations which seek or have been accorded recognition, no agency shall deny, suspend or withdraw such recognition on the basis of the exception stated in the Order except in accordance with procedures conforming as nearly as possible to the requirements of section 2.4(b) and (c) of this Part.
Part B

Code of Fair Labor Practices

Section 3.1 Application. The provisions of this Part are applicable to all agencies subject to the provisions of the Order and to all employee organizations accorded recognition under the Order.

Section 3.2 Prohibited Practices.

(a) Agency management is prohibited from:

(1) Interfering with, restraining or coercing any employee in the exercise of the rights assured by Executive Order No. 10988, including those set forth in section 1 of the Order;

(2) Encouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, promotion or other conditions of employment;

(3) Sponsoring, controlling or otherwise assisting any employee organization, except that an agency may furnish customary and routine services and facilities pursuant to section 10 of the Order where consistent with the best interests of the agency, its employees and the organization, and where such services and facilities are furnished, if requested, on an impartial basis;

(4) Disciplining or otherwise discriminating against any employee because he has filed a complaint or given testimony under the Order or under the Standards of Conduct for Employee Organizations or Code of Fair Labor Practices;

(5) Refusing to accord appropriate recognition to an employee organization qualified for such recognition;
(6) Refusing to hear, consult, confer or negotiate with an employee organization as required by the Order.

(b) Employee organizations are prohibited from:

(1) Interfering with, restraining or coercing any employee in the exercise of the rights assured by Executive Order No. 10988, including those set forth in section 1 of the Order:

(2) Attempting to induce agency management to coerce any employee in the enjoyment of his rights under the Order;

(3) Coercing or attempting to coerce, or disciplining, any member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his discharge of his duties owed as an officer or employee of the United States;

(4) Calling or engaging in any strike, work stoppage, slowdown, or related picketing engaged in as a substitute for any such strike, work stoppage or slowdown, against the Government of the United States;

(5) Discriminating against any employee with regard to the terms or conditions of membership because of race, color, creed, or national origin.

(c) No employee organization which is accorded exclusive recognition shall deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership, but nothing contained in this subsection shall preclude an employee organization from enforcing discipline in accordance with
procedures under its constitution or bylaws which conform to the require-
ments set forth in section 2.2 (a) of the Standards of Conduct for Em-
ployee Organizations.

Section 3.3 General Procedures for Enforcement.

(a) Each agency shall provide fair and adequate procedures for
the filing, investigation, and processing of complaints of violations of
section 3.2 which will cover all cases, except as provided in subsection
(c) of this section, whether initiated by employees, an agency, or an
employee organization, as follows:

(1) In cases initiated by an employee or several employees with
the same complaint, in which the matter in issue is subject to an appli-
cable grievance or appeals procedure within the agency, such procedure
shall be the exclusive procedure used.

(2) All cases not covered by subsection (a) (1) and (c) of this
section shall be processed under procedures which shall include provi-
sions for the informal resolution or adjustment of complaints where pos-
sible; for the designation of an impartial hearing officer or panel of
such officers; and, in cases where it appears that there is substantial
basis for a complaint and the matter is not informally adjusted, for an
opportunity for a hearing before a hearing officer or panel of such offi-
cers upon notice, for the right to be represented by counsel, and for
findings of fact, or for findings of fact and recommendations, by such
officers or panel. Such procedures shall not, however, be available for
the rehearing of issues processed under the provisions of the Standards
of Conduct or Section 11 of the Order. In performing the function
provided for in this subsection, hearing officers shall be responsible
directly to the agency head.

(b) Hearings held pursuant to subsection (a) (2) shall be
informal, but rights of confrontation and cross-examination shall be
preserved so far as may be necessary for the development of the facts,
and the findings of fact or findings of fact and recommendations of the
hearing officer or panel shall be based upon the record developed in
the hearing. Copies of such findings of fact or findings of fact and
recommendations shall be made available to the parties. In any pro­
ceeding under this section, the complainant or respondent shall be
entitled to receive a concise and accurate summary of the facts relating
to the complaint, and upon which the agency intends to rely, together
with a statement of the reasons for the agency's action. The agency
may, in lieu of a summary statement, make available to the complainant
or respondent the entire report of the agency's investigation of the
complaint. In a case in which the complainant or respondent is pro­
vided with a summary statement, the hearing officer shall have the
right, upon request, to examine the entire record in such case, including
all data gathered pursuant to an investigation, to determine that summary
is fair and accurate.

(c) Cases involving any strike, work stoppage, slowdown or
related picketing engaged in as a substitute for any such strike, work
stoppage or slowdown, shall be covered by such procedures and subject
to such remedies and sanctions consistent with law as the agency head
determines to be appropriate to the situation without regard to the limitations of this section or section 3.4.

Section 3.4 Final Decision and Notice. All final decisions shall be in writing and shall be furnished to the organization and the national or international organization with which it is affiliated. Such decisions shall include a statement of the findings and reasons in support of the decision. If the decision is that agency management has engaged in a prohibited practice, the agency shall immediately take necessary action in accordance with the decision to remedy the violation. If the decision is that an employee organization has engaged in a prohibited practice, the agency head shall notify the employee organization of the existence of such violation and request appropriate corrective action. Failure of an employee organization to comply with such request after the date on which it becomes effective shall be grounds for the withholding or suspension of recognition until the violation has been remedied, or for the withdrawal of recognition until the violation has been remedied, or for the withdrawal of recognition in appropriate cases as determined by the agency head.

Section 3.5 Effective Date.

(a) The provisions of section 3.2 of this Part shall be effective immediately. No later than six months from such effective date, each agency shall adopt permanent procedures to implement this Part. Insofar as may be practicable and appropriate, agencies shall consult with representatives of employee organizations in the formulation of
such procedures. Copies of any implementing regulations shall be made available to recognized employee organizations upon request.

(b) In making determinations under section 3.2 prior to the adoption of such permanent procedures, agencies shall as nearly as possible conform to the basic procedural requirements of this Part, and in no case where an opportunity for hearing, or a final notice as described in section 3.4, is required under this Part shall an agency withhold, suspend, or withdraw recognition without an opportunity for such hearing or without such a final notice.
FOOTNOTES

CHAPTER I


17Civil Service Assembly, Committee on Employee Relations in the Public Service, Gordon R. Clapp, Chairman, Employee Relations in the Public Service (Chicago: C. S. A. of the U. S. and Canada, 1942).


23Ibid., p. xii.


CHAPTER II


3Sterling D. Spero (1924), op. cit., pp. 270-274.


Eldon Lee Johnson, op. cit., p. 8.

Cited by Sterling D. Spero (1924), op. cit., p. 213.


Sterling D. Spero (1924), op. cit., pp. 111-112.

27 Sterling D. Spero (1924), op. cit., p. 113.


29 Sterling D. Spero (1924), op. cit., p. 294.

30 Lewis Mayers, op. cit., pp. 549, 574.

31 Ibid., p. 555.


34 Kurt Braun, op. cit., pp. 110-111; and Eldon Lee Johnson, op. cit., pp. 33-34.

35 Sterling D. Spero (1924), op. cit., p. 181.


It should be noted that some federal agencies have initiated an advanced labor-management policy which includes the right to bargain collectively. See: Wilson R. Hart, op. cit., pp. 84-115.

CHAPTER III

1 William B. Vosloo, op. cit., pp. 68-75.
4 The National Federation of Postal Clerks and the National Association of Letter Carriers, ibid., pp. 57-59.
6 William B. Vosloo, op. cit., p. 59.
7 U. S. Civil Service Commission, 1962, op. cit., p. 1.01.
8 William B. Vosloo, op. cit., p. 46.
10 For arguments to support this view, see: U. S. Congress, Senate, Hearings on S.3593 before the Senate Committee on Post Office and Civil Service, 84th Congress, 2d Session, 1956, p. 125 (hereinafter cited as 1956 Hearings).
13 U. S. Civil Service Commission, 1962, op. cit., p. 3.01.
15 William B. Vosloo, op. cit., p. 158.

18Section 13(b).

19In a New York City Post Office.


21Edward S. Corwin, ibid., p. 168.


27William B. Vosloo, op. cit., p. 158.


31Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 216, 218, 221, 11 Cal. Rptr. 89, 92, 93, 95, 359, p. 2d 457, 460, 461, 463 (1961). Cited in Kurt L. Hanslove, op. cit., p. 19. However, six cases involving sovereign immunity questions have been decided by the Supreme Court since 1962, and all six upheld the government's claim of immunity. See: Joel Forkosch, op. cit., pp. 4-10.

32Sovereign Immunity and Execution, op. cit., p. 890.

33In a letter from Jack B. Tate, the Acting Legal Advisor to the State Department to the Attorney General. Cited in ibid, p. 891.

35Kurt L. Hanslowe, op. cit., p. 20.


38Kurt Braum, op. cit., pp. 89-117.

39Ibid., p. 94.


41President William Howard Taft made the statement that "all" public employees are "privileged class" enjoying short hours, good pay, little work, long vacations, liberal sick leaves, fixed and certain salaries unaffected by economic depression. This is not true in the light of above analysis. See: Sterling D. Spero (1924), op. cit., pp. 30-31.


43Daniel P. Sullivan, op. cit., p. 382.


45Edward S. Corwin, op. cit., pp. 74-76. It should be noted that by the Act of June 25, 1958, first, second, and third-class postmasters are brought under the Civil Service Act of 1883, although their initial appointment continues to be by the President and Senate. Ibid., p. 75.


47Joel Forkosch, op. cit., p. 1.

48Kurt Braum, op. cit., p. 69.

49Ibid., pp. 30-31.

As a result, the Closed Shop or the Union Shop are considered inappropriate in the federal government.


It should be noted that supervisors and other public officials have the right to join public employee unions which might include rank and file employees. Section 1(a) of Executive Order 10988.

Section 1(a).
Section 6(b).
Section 3c(1).
Section 8(a).
Section 8(b).
Section 2.

U. S. Civil Service Commission, 1962, op. cit., p. 5.05.


Irving Bernstein, op. cit., p. 103.


Section 3(a).
Section 4(b).
Section 5(a).

U. S. Civil Service Commission, 1962, op. cit., p. 5.08.
William B. Vosloo, op. cit., p. 104.

Section 6(a).


Section 6(b).

Section 6(b).

Beal and Wickersham, op. cit., pp. 138-152.


General Drivers, Warehousemen & Helpers, Local Union No. 89 v. C. W. More et. al. (No. 18), 375 U. S. 335, 11 L. Ed. 2d 370, 84 Sup. Ct. 363, red den 376 U. S. 935, 11 L. Ed. 2d 655, 84 Sup. Ct. 697.

U. S. Civil Service Commission, 1962, op. cit., p. 5.15.

Ibid., pp. 5.15-5.19.

U. S. Civil Service Commission, 1962, op. cit., pp. 102-1.03.

Section 6(b).

U. S. Civil Service Commission, 1962, op. cit., p. 1.03.


Section 6(b).


Section 7.


Section 7.

Section 8(a).


Public Law 330 repealed Section 305 of the Taft-Hartley Act which had made three punishments to those who participate in a strike; (1) an immediate removal from the job, (2) loss of status, and (3) a 3 year bar against reemployment.


Ibid., p. 381.

Ibid., p. 381.

Herbert Hoffman, op. cit., p. 156.

Ibid., p. 154.

Kurt L. Hanslowe, op. cit., p. 37.

U. S. News and World Report, "Growing Trend: Strikes Against Government," Vol. 60, No. 4, January 24, 1966, pp. 84-86. The message given by the President was issued in the wake of the 12-day Transport Workers Union Strike in New York which cost the city an estimated $750 million.
CHAPTER IV


105 Donald H. Wollett, "The Public Employee at the Bargaining Table," Labor Law Journal, Vol. 8, No. 1, January, 1964, p. 9. The scope of bargaining is limited to: (1) terms and conditions which have no fiscal implications and are within the local manager's discretion, (2) allocation of resources within prescribed budgetary limitations, and (3) joint recommendations which might be acted upon at a higher level. Ibid., p. 10.


108 Murray Bernard Nesbitt, op. cit., p. 279.


111 Harold S. Roberts, op. cit., p. 18.


1 There are some functions that might be retained in the public sector such as postal service and railways. However, private postal service could be established and alternative transportation is in existence.


City of Fort Smith v. Arkansas State Council No. 38, AFSCME, AFL-CIO, et. al., No. 5-4736 (October 21, 1968); McLaughlin v. Tilendis, 398 P.2d 287 (7th Cir. 1968).


State Board of Regents v. United Packinghouse Workers Local 1258 (1968); International Brotherhood of Electrical Workers v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965).

Schecter v. County of Los Angeles, 258 A.C.A. 489, 495 (1968).


This approach was initiated by some Supreme Court members. International Brotherhood of Electrical Workers v. Salt River Project, 78 Ariz. 30, 275 P.2d 393 (1954); Board of Trustees v. Now,J9L.R.R.M. 789 (Ohio C.P. 1941); International Brotherhood of Electrical Workers, Local 611 v. Town of Farmington, 60 L.R.R.M. 2001 (N.M. Sup. Ct. 1965).


Daniel P. Sullivan, op. cit., p. 378.

City of Rockford v. Local No. 413, International Association of Firefighters, et. al., No. 68-54 (September 23, 1968).

17 It should be noted that a number of bills have been introduced in state legislatures which would grant the right to all or at least a limited group of public employees, but none have been enacted. Arnold S. Lander, "Trends in Labor Legislation for Public Employees," Monthly Labor Review, Vol. 83, No. 12, December, 1960, pp. 1293-1296.


19 Kurt L. Hanslowe, op. cit., p. 50.

20 This Act has become effective on January 1, 1969.

21 Sections 3506 and 3508.

22 Section 3505.

23 The Act defines "meet and confer in good faith," as the mutual obligation personally of both sides to meet and confer in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement.

24 Sections 3501(e) and 3505.2.

25 Section 3507.

26 Norwalk Teachers' Association v. Board of Education, 138 Conn. 269, 83 A.2d 482 (1951). The decision held that teachers had the right to unionize for collective bargaining purposes. On the side of public officials, the decision authorized them to enter into agreements with the representatives of the employees.


29 Civil Service Law Section 108 et. seq.

30 For more detail about the effort made to enact new legislation during the period of the 1960's, see: Kurt L. Hanslowe, op. cit., pp. 73-103.

32 A Letter from Mr. Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, March 18, 1969.


37 The legal opinion was based on Section 50-901, Idaho Code which gives municipalities the power to "contract and be contracted with." Cited in Richard S. Rubin, *op. cit.*, p. 17.


40 Letter of January 17, 1964, from J. W. Macy, Jr., to President Lyndon B. Johnson, Government Employment Relations Report, No. 21, February 3, 1964, p. c.1. Mr. J. W. Macy was acting as Civil Service Commission Chairman and had drafted the order.


43 Max S. Wortman, Jr., *op. cit.*, p. 486.

45 Irving Bernstein, op. cit., p. 137.

46 Donald H. Wollett, op. cit., p. 10.


48 The wage increase, then, can be obtained either by persuading property owners to vote for an additional millage levy or by lobbying at the legislative level for additional aid. Donald H. Wollett, op. cit., p. 10.

49 Cited in Robert W. Neirynck, op. cit., p. 76.

50 Max S. Wortman, Jr., op. cit., pp. 485-489.

51 Ibid., p. 485.

52 Arthur A. Sloane and Fred Witney, Labor Relations (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1967), p. 235. Two other areas have been mentioned: (1) Institutional issues, dealing with the rights and duties of employers and unions; and (2) administrative classes such as work rules and job tenure.

53 Robert W. Neirynck, op. cit., p. 76.

54 Donald H. Wollett, op. cit., p. 10.

55 U. S. Civil Service Commission, 1962, op. cit., pp. 4.01-4.02.


58 It should be noted that statutes protecting employees in the private sector from injunctions usually are held to be inapplicable to public employees. Petrucci v. Hogan, 5 Misc. 2d 480, 27 N.Y.S.2d 718 (Sup. Ct. 1941).

H. L. Fusilier and Lawrence L. Steinmetz, op. cit., p. 34.

Ibid., p. 34.

Donald H. Wollett, op. cit., p. 12.


H. L. Fusilier and Lawrence L. Steinmetz, op. cit., p. 32.


Governor's Committee on Public Employee Relations, New York, op. cit., p. 18.

Jack Steiber, op. cit., p. 70.

CHAPTER V


This section is adopted from: John R. Commons, Legal Foundations of Capitalism (New York: The Macmillan Company, 1924), pp. 283-312.


APPENDIX A


2 Daniel P. Sullivan, op. cit., pp. 144-169.

3 H. W. Arthurs, op. cit., pp. 63-64.

4 Daniel P. Sullivan, op. cit., pp. 149-162.

5 Section 68.

6 The Act was consolidated in 1965, by Ch. 287, R.S.S., and amended by Ch. 83 of the Statute of 1966.


8 Quebec Labour Code, Ch. 141, R.S.O. (1964), as amended by Ch. 50, 13-14, Eliz. 11 (1965). In addition to this principal Act, there are the Provincial Civil Service Act of 1965, Transportation Act of 1964, and Hospital Act of 1964.

9 According to Section 75 of the Quebec Civil Service Act, the right to strike was suspended until January 31, 1966.

10 Daniel P. Sullivan, op. cit., p. 152.

11 Marc Somerhausen, op. cit., p. 6.

13Marc Somerhausen, op. cit., p. 7.

14Rene H. Mankiewicz, op. cit., p. 96.


16Ibid., p. 862.


Clapp, Gordon R. *Employee Relations in the Public Service*. Chicago: Civil Service Assembly of the United States and Canada, 1942.


and Andrews, John B. *Principles of Labor Legislation.* New

Cox, Archibald, and Bok, Derek C. *Cases on Labor Law.* New York: The

Cullinan, Gerald. *The Post Office Department.* New York: Frederick A.

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