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LEGISLATION

Public Employee Labor Relations: Proposals for Change in Present State Legislation

I. INTRODUCTION

One of the most striking developments in labor relations during the past fifteen years has been the rapid increase of both employment and union organization in the public sector. In 1950, there were approximately 6 million public employees; today there are over 10 million, over three quarters of whom work on the state and local level.[1] It is estimated that 1.5 million of these government employees are members of various union organizations, a sixty per cent increase over the past ten years.[2]

As a result of this growth, public employees have increasingly sought and gained organizational and bargaining rights parallel to those enjoyed by their counterparts in the private sector. These advances are significant in light of the fact that government employees have been explicitly excluded from coverage under comprehensive federal and state legislation which guarantees private employees the rights of self-organization, collective bargaining, and participation in other concerted activities.[3] President Kennedy's 1962 Executive Order[4] has established a clear-cut, constructive policy for the federal government's dealings with its employees and their problems. At the state level, however, there remains the need for legislation designed to achieve similar ends.

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1. In 1950, 6,026,000 persons were employed by governments on the federal, state, and local levels. In 1965, the figure had risen to 10,051,000. State and local government employees accounted for 4,098,000 of the 1950 figure, as compared with 7,673,000 in the 1965 statistics. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1965 STATISTICAL ABSTRACT OF THE UNITED STATES 223 (Table No. 306) (1950 figures); 1966 *id.* 224 (Table No. 315) (1965 Figures).

2. Donovan, *Labor Relations in the Public Service: A Survey*, 14 IND. & LAB. REL. REP. CARD (March 1966). Some of the fastest growing unions today are those organizing in the public sector. See, *e.g.*, Wurf, *Unions Enter City Hall*, 48 PUB. MANAGEMENT 245 (1966), which states that the American Federation of State, County, and Municipal Employees (AFSCME) has a growth rate five times that of the American labor movement as a whole.

3. See, *e.g.*, Labor-Management Relations Act (Taft-Hartley Act) § 101, 61 Stat. 143 (1947), 29 U.S.C. § 152(2) (1964); MASS. ANN. LAWS ch. 150A, § 2(2) (1965). *But see* MINN. STAT. ANN. §§ 179.51-58 (Supp. 1965).

4. Exec. Order No. 10988, 27 Fed. Reg. 551 (1962). For an exhaustive study of labor relations in the federal service under this Executive Order, see VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE (1966).

Experience in private employment has demonstrated that effective collective bargaining is essential to meaningful labor relations. However, the development of collective bargaining in public employment has been impeded by a generally unfavorable public attitude toward government employee organizations, often reflected in judicial and legislative pronouncements.[5] The present trend is toward closing the gap between the public and private sectors, as evidenced by the recent prevalence of legislation guaranteeing public employees the right to organize.[6] Such a guarantee, however, requires legislative machinery which will promote and regulate effective collective bargaining in the public service without automatically eliminating all public employees' right to strike.[7] This note will examine and evaluate existing state legislation governing both public employee strikes and procedures for promoting effective collective bargaining in public

5. The legal approach to the public employee's right to organize extends from legislative denial to constitutional guarantee. *Compare* ALA. CODE § 55-317(2) (1953), *with* N.J. CONST. art. I, § 19. Alabama's Solomon Act provides that no public employee has the right to belong to a labor organization. The constitutionality of this provision was challenged in the state and federal courts over a period of five years, but the question was never conclusively decided. See Government and Civic Employees Organizing Comm. v. Windsor, 347 U.S. 901 (1954); *id.*, 353 U.S. 364 (1957); American Fed'n of State, County and Municipal Employees v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958) (question avoided on ground of no equitable jurisdiction). See also ABA SECTION OF LABOR RELATIONS LAW, PROCEEDINGS 145-47 (1958) (Report, Comm. on Law of Governmental Relations) [hereinafter cited as 1958 ABA]; 1959 ABA 112-13. Even in the absence of statutes some courts have been reluctant to endorse public employee unionism. Nutter v. Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741 (Dist. Ct. App. 1946) (legislature cannot bargain away its discretion). See also Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); Note, 55 COLUM. L. REV. 343, 349-50 (1955); Note, 75 HARV. L. REV. 391, 392-96 (1961).

A discussion of the legal and political theories underlying the opposition to public employee unionism is outside the scope of this note, but has been extensively treated elsewhere. See Note, 55 COLUM. L. REV. 343 (1955); Note, 75 HARV. L. REV. 391 (1961); Note, 33 U. CHI. L. REV. 852 (1966); Note, 1966 WIS. L. REV. 549. The various theories advanced include: (a) The benevolent nature of the government employer. (b) Unionized employees cannot perform their public duties impartially. (c) Public employee unions are apt to exert inimical political influence upon the government. (d) The terms of the government worker's employment are determined by the legislature. (e) Unions will increase the possibility of strikes against the government. (f) Legislatures and executive personnel cannot delegate the authority entrusted to them by the public. (g) Municipal charters do not authorize labor contracts.

The history of judicial and political antipathy to public employee unionism indicates that the soundest approach to the problem must involve enabling legislation which specifically declares the public employees' rights and the power of the various state agencies to enter into binding agreements with their workers.

6. See, *e.g.*, CAL. GOV'T CODE §§ 3500-08; MASS. ANN. LAWS ch. 149, §§ 178G-N (Supp. 1965).

7. Despite widespread legislative opposition, the strike has not disappeared from the public sector. From 1963 to 1965 there were 112 work stoppages in the public service involving 50,000 employees and resulting in the loss of 232,000 man-days. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1966 STATISTICAL ABSTRACT OF THE UNITED STATES 248 (Table 350).

employment, exposing inherent weaknesses and deficiencies in the regulatory scheme. It will then suggest a possible solution designed to cure the present defects.

II. THE RIGHT TO STRIKE

The right of public employees to strike against their government employer has been expressly denied both by legislative enactment and judicial decision. Under federal law,[8] a government employee who strikes, or even asserts the right to do so, may be guilty of a felony punishable by a 1000 dollar fine and one year's imprisonment. Although state antistrike statutes[9] provide less stringent sanctions,[10] they are similarly uncompromising in their absolute prohibition of strikes by public employees.

In the absence of statutes, most courts have articulated a vague public policy argument as a basis for denying the right to strike.[11] Against this bloc of nearly unanimous opinion, many commentators,[12] but only a few courts,[13] have voiced their dissent. At every level, discussion of the public employee's right to strike evokes emotional and

8. 69 Stat. 624 (1955), 5 U.S.C. § 118p-r (1964).

9. Sixteen states have statutes banning strikes by public employees: DEL. CODE ANN. tit. 19, § 1313 (1965); FLA. STAT. § 839.221 (1963); GA. CODE ANN. § 89-1301 (Supp. 1962); HAWAII REV. LAWS § 5-8 (Supp. 1965); MASS. ANN. LAWS ch. 149, § 178F (1965); MICH. STAT. ANN. § 17.455 (Supp. 1965); MINN. STAT. § 179.51 (1966); MO. ANN. STAT. § 105.530 (1966); NEB. STAT. § 48-821 (1960); N.Y. CIV. SERV. LAW § 108 (Condon-Wadlin Act); OHIO REV. CODE ANN. § 41117.02 (Baldwin 1965); ORE. REV. STAT. § 243.760 (1965); PA. STAT. ANN. tit. 43, § 215.2 (1964); TEX. REV. CIV. STAT. ANN. art. 5154c (1962); VA. CODE ANN. § 40-65 (1955); WIS. STAT. ANN. § 111.70 (Supp. 1966).

In addition to these laws which provide broad coverage of almost all state and local government employees, other states have legislated against strikes by specific classifications of employees. See, *e.g.*, CAL. LABOR CODE § 1962 (firemen); R.I. GEN. LAWS ANN. § 36-11-6 (1966) (policemen and firemen).

10. Generally, a striking employee will faee discharge and loss of employment rights. For a more thorough discussion of these statutes, see notes 34-50 *infra*, and accompanying text.

11. See, *e.g.*, City of Los Angeles v. Los Angeles Bldg. Trades Counell, 94 Cal. App. 2d 36, 210 P.2d 305 (Dist. Ct. App. 1949); Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957); Delaware River and Bay Authority v. International Organization of Masters, Mates & Pilots, 45 N.J. 138, 211 A.2d 789 (1965); City of Minot v. Loeal 74, General Drivers and Helpers Union, 142 N.W.2d 612 (N.D. 1966).

12. See, *e.g.*, Note, 55 COLUM. L. REV. 343, 363 (1955); Note, 75 HARV. L. REV. 391, 413 (1961); Note, 2 VAND. L. REV. 441, 450 (1949); Note, 1966 WIS. L. REV. 549, 582.

13. Local 266, IBEW v. Salt River Project, 78 Ariz. 30, 275 P.2d 393 (1954); Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905 (1960), 59 MICH. L. REV. 1260 (1961), 47 VA. L. REV. 338 (1961), 18 WASH. & LEE L. REV. 297 (1961); Board of Trustees v. Now, 9 L.R.R.M. 789 (Ohio C.P. 1941).

polarized responses.[14] It is in this context that one must view the treatment of the problem by our courts and legislatures.

A. *Grounds for Denying the Right To Strike*

The legal theory most frequently advanced for judicially denying the public employees' right to strike is the sacrosanct sovereignty of the government employer. In *Norwalk Teachers' Ass'n v. Board of Educ.*,[15] the Connecticut Supreme Court of Errors clearly defined the concept by portraying public employees as the government's agents, authorized to exercise some of the sovereignty delegated to the government by the people. The court held that breach of this agency relationship through a strike was a deliberate denial of government authority and a direct contravention of public welfare.[16] Other courts have extended the sovereignty concept to the point of labelling a strike by public employees as "treason."[17] This sovereignty theory has been sharply criticized by even the most steadfast advocates of a continued denial of public employees' right to strike.[18] It is argued that the term "rights of sovereignty" is singularly inappropriate in a system of representative democratic government responsive to the electorate.[19] Furthermore, there are indications that the cloak of sovereignty has been interposed as a justification for many unilateral and inequitable

14. President Woodrow Wilson denounced the 1919 strike of the Boston policemen as a "crime against civilization." 75 HARV. L. REV. 391 (1961). President Franklin D. Roosevelt called a strike by government employees "unthinkable and intolerable" because its aim was the "paralysis of government." Letter to Mr. Luther Steward, president of the Nat'l Fed'n of Fed. Employees, on Aug. 16, 1937, as quoted in Vogel, *What About the Rights of the Public Employees?*, 1 LAB. L.J. 612 (1950). Advocates of a contrary point of view have spoken out with no greater thoughtfulness or logic. A former official of AFSCME has said: "Behind almost every strike [of public employees] is the refusal of a short-sighted public official to meet and discuss with the public employee." Zander, *A Union View of Collective Bargaining in the Public Service*, 22 PUB. ADMIN. REV. 5, 6 (1962).

15. 138 Conn. 269, 83 A.2d 482 (1951).

16. *Id.* at 276, 83 A.2d at 485. In enjoining a strike by teachers, the court in City of Pawtucket v. Pawtucket Teachers' Alliance, 87 R.I. 364, 141 A.2d 624 (1958), held that the teachers exercised a portion of the sovereign government as agents of the state government under a duty to fulfill the will of the people by refraining from conduct—such as striking—that would make the schools less efficient. *Accord,* Board of Educ. v. Redding, *supra* note 11 (striking school janitors breach duty as agents to fulfill will of people); Port of Seattle v. International Longshoremen's Union, 52 Wash. 2d 317, 324 P.2d 1099 (1958), 34 WASH. L. REV. 216 (1959) (municipal immunity a basis for enjoining longshoremen's strike).

17. In City of Cleveland v. Division 268, Amal. Ass'n of St., & Elec. Ry. & Motor Coach Employees, 90 N.E.2d 711 (Ohio 1949), it was stated that the government was the servant of all the people and that a strike against the public by city transit workers was both a rebellion against the government and au attempt to destroy it. See also City of Los Angeles v. Los Angeles Bldg. Trades Council, *supra* note 11.

18. See REP. OF GOVERNOR ROCKEFELLER'S COMM. ON PUB. EMPLOYEE REL. 15, 17 (New York 1966) [hereinafter cited as TAYLOR REPORT].

19. *Id.* at 15.

labor decisions by government administrators.[20]

Closely related to the sovereignty theory is the notion that a strike is unnecessary against the benevolent[21] government employer whose primary motive is not profit,[22] but rather the protection and promotion of the public interest. Various aspects of this theory have been utilized to provide some justification for denying public employees the right to strike. One court stated that the acceptance of government employment entailed a necessary surrender of some civil rights.[23] Others have justified the specific surrender of the right to strike on the ground that the presence of this economic weapon would enable public employees to exert grossly disproportionate pressure on the government to the inevitable detriment of the public interest.[24] The argument of disproportionate power is usually buttressed by an assertion that this power is not needed by the government worker since he is more than adequately compensated by his benevolent employer—a claim that has been vigorously contested by various studies of the relative economic positions of public and private employees.[25] Similarly, the fact that governments are non-profit organizations cannot obscure the tremendous political pressure for economy in government—demands that cannot be expected to provide any upward influence upon the wage scales of public employees.

The reason advanced most frequently for denying public employees the right to strike is the inherent danger to public health and safety. Clearly a walk-out of either policemen or firemen poses an immediate threat to the physical well-being of any community; however, the courts are seldom faced with such clear-cut situations. Instead, they apply the health and safety rationale to enjoin strikes by longshoremen,[26] school janitors,[27] garbage collectors,[28] and transit workers.[29]

20. *Id.* at 17.

21. See City of Los Angeles v. Los Angeles Bldg. Trades Council, *supra* note 11 (fair treatment of public employees will be compelled by law).

22. See Board of Educ. v. Redding, *supra* note 11.

23. City of Los Angeles v. Los Angeles Bldg. Trades Council, *supra* note 11. See also City of Pawtucket v. Pawtucket Teachers' Alliance, *supra* note 16, which held that public employees surrender certain rights and privileges which if exercised would be inconsistent with the public interest.

24. Note, 75 HARV. L. REV. 391, 409 (1961).

25. See, *e.g.*, Donovan, *supra* note 2, at 3-4; Rains, *Collective Bargaining in Public Employment*, 8 LAB. L.J. 548 (1957) (job security); Note, 75 HARV. L. REV. 391, 409 n.111 (1961) (wages).

26. Port of Seattle v. International Longshoremen's Union, *supra* note 16.

27. Board of Educ. v. Redding, *supra* note 11. Here the danger to public health and safety was deemed acute when picket lines prevented the delivery of milk, bread and other food to the school cafeteria, and prevented repair of the school's leaking roof.

28. Donevero v. Jersey City Incinerator Authority, 75 N.J. Super. 217, 182 A.2d 596 (1962).

29. City of Detroit v. Division 26, Amal. Ass'n of St., & Elec. Ry. & Motor Coach

Nevertheless, in some instances protection of public health and safety is the most reasonable and realistic basis for a general legislative or judicial policy of prohibiting public employee strikes.[30]

In the absence of statutory guidance, courts have permitted a strike by public employees only by drawing a sharp distinction between the proprietary and governmental functions of the state. Although expressly rejected by the vast majority of courts,[31] this distinction was drawn by the Arizona Supreme Court, which held that employees could properly contract with and strike against a state agency engaged in the essentially *private* function of producing and distributing electrical power.[32] Most courts, however, if they do not dismiss the proprietary-governmental distinction by restricting its use to municipal tort liability, rely on the more general conclusion that *all* governmental activities are directed toward benefiting the public and any distinction between them is meaningless.

In addition to the specific theories outlined above, most courts have held that a strike by public employees is either illegal generally (even in the absence of statute) or against public policy.[33] When faced with this sweeping prohibition, it is difficult to examine the judicial reasoning with any degree of critical scrutiny. However, in light of the uniformly condemnatory attitude taken by legislators and other public officials on the issue of public employee strikes, the courts' near-uanimous hostility is understandable. If progress is to be made in developing a more realistic approach to the problem, it is likely to take place not through a complete lifting of the strike ban, but through a significant narrowing of current legislative prohibitions.

B. *Sanctions Against Striking Public Employees*

Present statutes specifically referring to public employee strikes

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Employees, 332 Mich. 237, 51 N.W.2d 228 (1952). In this case the court justified the denial of the right to strike to transit workers by saying that a failure to stand firmly would inevitably lead to strikes by policemen and firemen.

30. For a further discussion of the proper application of the health and safety test, see notes 53-58 *infra* and accompanying text.

31. See, *e.g.*, City of Los Angeles v. Los Angeles Bldg. Trades Council, *supra* note 11 (governmental-proprietary distinction held limited to tort liability); City of Cleveland v. Division 268, Amal Ass'n of St. & Elec. Ry. & Motor Coach Employees, *supra* note 17 (court refused to recognize distinction since relevant statute did not); Port of Seattle v. International Longshoremen's Union, *supra* note 16 (distinction held to apply to torts only).

32. Local 266, IBEW v. Salt River Project, *supra* note 13. Thirteen years before this case, an Ohio court held that employees in a municipally owned electric light and water plant had the right to strike for a wage increase since the city was operating in a proprietary capacity which put it on the same footing as any private corporation. Board of Trustees v. Now, *supra* note 13.

33. See, *e.g.*, Manchester v. Manchester Teachers Guild, *supra* note 11; City of

expressly prohibit them. Sixteen states forbid strikes by all public employees,[34] and at least two others have prohibited strikes by specific classes of public workers.[35] These statutes are generally enforced by a court injunction against the striking public employees.[36] In addition, the attorneys general of several states have written that the strike weapon should be denied to various public employees.[37]

The broadly prohibitory state statutes vary greatly in terms of sanctions provided. Some only deny the right to strike and do not include any disciplinary reprisals.[38] One state[39] follows the federal government's example,[40] and provides a fine up to 5,000 dollars and imprisonment up to one year. Most statutes, however, provide for immediate termination of the strikers' employment and forfeiture of any concomitant right.[41] Re-employment may be allowed[42] at the discretion of the employer, but it is normally limited by the following three conditions: (1) the employee's compensation cannot exceed that which he was receiving at the time of the strike; (2) pay raises are not granted until a certain time period has elapsed; and (3) the employee is on probation for a fixed duration after re-instatement, during which period he must serve without tenure and at the pleasure of his employer. Generally, the period without increased compensation ranges from one[43] to three[44] years, as does the probation period.

Minot v. Local 74, Ceneral Drivers & Helpers Union, *supra* note 11; City of Cleveland v. Division 268, Amal. Ass'n of St., & Elec. Ry. & Motor Coach Employees, *supra* note 17.

34. The states are: Delaware, Florida, Georgia, Hawaii, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Pennsylvania, Texas, Virginia and Wisconsin. For full citations to these statutes, see note 9 *supra.*

35. California and Rhode Island have statutes that refer specifically to policemen and firemen. For citations to these statutes, see note 9, *supra.*

36. City of Detroit v. Division 26, Amal. Ass'n of St., & Elec. Ry. & Motor Coach Employees, *supra* note 29 (injunction granted in strike against street railway system); City of Cleveland v. Division 268, Amal. Ass'n of St., Elec. Ry. & Motor Coach Employees, *supra* note 17, (city transit workers' strike enjoined). The use of the injunction as the key enforcement mechanism has been criticized on the ground that elected public officials are naturally reluctant to ask for it due to danger of a labor backlash in areas with significant union political strength. See Note, 1966 WIS. L. REV. 549, 551. A provision *requiring* a state official to initiate court action for injunctive relief would seem to obviate any such "political" difficulties. TAYLOR REPORT 43.

37. See, *e.g.*, OPS. ATT'Y GEN. N.M. No. 59-90, July 31, 1959; OPS. ATT'Y GEN. Wash., Nov. 19, 1958.

38. Delaware, Florida, Hawaii, Massachusetts, Oregon and Wisconsin. For citations to these statutes, see note 9 *supra.*

39. See Nebraska statute cited note 9 *supra.*

40. See Labor-Management Relations Act (Taft-Hartley Act) § 101, 61 Stat. 143 (1947), 29 U.S.C. § 152(2) (1964).

41. Georgia, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Texas and Virginia. For citation to these statutes see note 9 *supra.*

42. Ouly Texas has no provision for re-instatement.

43. See, *e.g.*, the Minnesota, Ohio and Virginia statutes cited note 9 *supra.*

44. See, *e.g.*, the Georgia and Pennsylvania statutes cited note 9 *supra.*

These severe sanctions, however, have been of questionable deterrent value[45] to the strikes they seek to prevent, and often will not be applied by a public employer primarily concerned with restoring to operation a particular service that has been interrupted. Moreover, where a certain amount of skill and training is required by the employee, an administrator is understandably reluctant to have his workers automatically discharged. Consequently, either the law is not invoked in situations where it is clearly applicable,[46] or if applied, its sanctions are not enforced.[47]

Continual failure to apply the law leads to general disrespect for the particular provision, thus further thwarting its very purpose. If antistrike laws are to remain vital, they must be revised to meet the realities of government-employee relations. As more effective mechanisms[48] are developed to help solve labor disputes in public service, the strike may become a less useful economic weapon. However, the threat of strikes will continue to exist, making it incumbent upon the state legislatures to improve antistrike statutes by re-shaping them in the spirit of reasoned dialogue between public employer and employee that is developing in other areas of public labor dispute settlement.[49] For example, the concept of automatic termination of employment should be reconsidered and steps should be taken for an orderly process of review[50] concerning the causes behind the employee's actions before he is subjected to the stringent sanctions now in force.

C. *Evaluation*

It is by no means settled that the present antistrike laws are satisfactory in terms of their broad extension to any and all public employees. At least one legislature has impliedly granted the right

45. See the work stoppage statistics in note 7 *supra*. One study has even purported to show that the average annual number of strikes by public employees in New York actually *increased* after passage of the antistrike law. Krislov, *Work Stoppages of Government Employees, 1942-59*, 1 Q. REV. OF ECON. & BUS. 87 (1961). See also Note, 55 COLUM. L. REV. 343, 360 (1955).

46. See Rosenzweig, *The Condon-Wadlin Act Re-Examined*, ILR Research, Oct., 1965, p. 3, at 5 (1965).

47. See, *e.g.*, N.Y. Times, Jan. 14, 1966, § 1, p. 30, col. 8 (none of 28,000 striking transit workers dismissed as required by New York statute; pay raise granted instead).

48. See Part III of this note.

49. *Ibid.*

50. The Michigan statute provides for a hearing within 10 days of the date of the strike, with the right to appeal any disciplinary action to a circuit court, which will determine whether the decision was supported by competent, material and substantial evidence on the whole record. MICH. STAT. ANN. § 17.455(6) (Supp. 1965).

to strike to municipal transit employees,[51] and many courts[52] have suggested that statutes permitting strikes by certain groups of public employees *may* legitimately be enacted. If and when such permissive statutes can be enacted, the legislatures should look to the aforementioned public health and safety test as a guideline for permitting strikes in the public sector.[53] A carefully drawn statute selectively denying the right to strike on the basis of clear and present threat to the public health and safety would assuage union dissatifaction by its limited coverage and mollify public fears with firm safeguards for the protection of public welfare.

In framing an antistrike statute the legislature should continue to deny the strike to policemen and firemen. Whether a test be defined in terms of "essentiality,"[54] or preservation of health and safety, none will argue that walk-outs of these public servants could realistically be tolerated. Similarly, it is generally agreed that a work stoppage in state-owned liquor stores and the like does not present a serious hazard to public health and safety. Presumably, such categories could be specifically excluded from coverage.

Beyond these initial uncomplicated judgments, however, the line of distinction becomes increasingly fine. The health and safety test is not easily applied to a strike of transit workers or junior-college teachers. In these situations it becomes necessary to study carefully the *degree* of danger threatened and the likelihood of injury to the public—two crucial factors which should be balanced against the employees' *need* of the power to strike in order to impress their just demands upon their superiors. Hopefully, it will become increasingly unnecessary to make such a determination as other methods develop[55] by which employees can make known their needs and grievances.

51. Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, *supra* note 13. Here the California Supreme Court construed a statute (CAL. PUB. UTIL. CODE, App. 1, § 3.6) granting transit workers in a municipally owned transit system the right to bargain collectively "and to engage in other concerted activities" as a grant of the right to strike. The court emphasized that this statutory language had consistently been interpreted to refer to permissible work stoppages in the private sector and that it therefore should be similarly applied to this public situation. Significantly, a recently enacted Louisiana statute provides that public transit workers may "engage in other concerted activities." LA. REV. STAT. § 23:890 (1965).

52. See, *e.g.*, Local 266, IBEW v. Salt River Project, *supra* note 13; Manchester v. Manchester Teachers Guild, *supra* note 11; Port of Seattle v. International Longshoremen's Union, *supra* note 16.

53. As indicated earlier, both the sovereignty theory and the governmental-proprietary dichotomy are largely irrelevant in the context of a discussion of strike rights of public employees.

54. Some advocates of selective antistrike legislation have asked for a differentiation on the basis of how essential the services involved are considered to be—both in terms of health and safety and in terms of widespread public inconvenience. Note, 55 COLUM. L. REV. 343, 362 (1955).

55. See Part III of this note.

In the foreseeable future, however, the courts or legislatures will be called upon to decide exactly which categories of public employees are to be granted the right to strike.

Perhaps the solution lies in distributing the decision-making burden between the legislature, the courts, and an administrative board.[56] The legislature might grant this "middle group" of employees[57] a qualified right to strike, subject to the discretionery power of the administrative board to petition the court for an injunction if, after a required period of time, a walk-out has proven dangerous to the public health and safety.[58] This limitation on the present, virtually unanimous denial of the right to strike should help clarify public service employee-employer relationships and convince the employee that his superior can no longer rely upon repressive legislation to justify a refusal to heed employee problems and grievances. No longer protected by the comfortable assumption that strikes cannot legally occur, the government employer will be forced to work toward developing effective solutions for impasses leading to work stoppage. Such an atmosphere will be conducive to serious negotiation, and the danger of strikes should be diminished, not increased, by this enlightened legislative and judicial approach.

III. Promotion and Regulation of Collective Bargaining

It cannot be over-emphasized that any system of effective labor relations must depend primarily upon collective bargaining as the dispute-settling mechanism. However, experience in private labor relations indicates that controversies are apt to arise in attempts to establish collective bargaining relationships. In addition, the paramount public interest in continuous government service demands an effort to provide a suitable framework which can assist bargaining parties unable to resolve their own conflicts. The problem areas in public employment will no doubt be the same as those in private labor relations, but the fundamental differences in the nature and purpose of the parties involved may often create unique aspects to the problems. In order to understand how these differences will affect the solutions devised, brief consideration must be given to relevant

56. The Public Employment Relations Board proposed in Part IV of this note would be the most logical body to perform this function.

57. The legislature is probably better equipped than the courts to compile a comprehensive list classifying the public employees who should be granted the qualified right to strike subject to judicial curtailment. The problem of an unforeseen group of employees improperly classified, or not classified at all, can be met by the power of injunction when an unanticipated threat to health and safety appears.

58. For a comparison of this suggestion to that employed by some public utilities, see Shestack, *The Public Employee and His Government: Conditions and Disabilities of Public Employment*, 8 Vand. L. Rev. 816, 833 n.76 (1955).

distinctions between the parties in public service and their counterparts in private industry.

It has been suggested that in substantial measure, these differences arise from disparity in purpose between the two types of employers.[59] Private business is profit motivated; it is in competition with other private enterprises, and its management is responsible primarily to its owners. On the other hand, the public enterprise faces little or no competition and exists solely for the purpose of providing services, its managers and funds being controlled by the public.

Perhaps the aspect of government most debilitating to effective labor relations is its inherent division of authority over working conditions and budgeting processes.[60] In the private sector, the employer often has broad discretion at the bargaining table;[61] but even when the necessary authority and discretion are granted the public employer, significantly different factors influence his exercise of that power. The private employer is limited by such economic factors as general business trends, wages and working conditions established by competitors, and the expectations of stockholders. The public employer, on the other hand, is restricted by prevailing tax policies and competing claims of other public agencies for a share of public funds.[62] These differences in the nature and purpose of the government employer have not been without effect upon the public employee.

Although many government enterprises resemble private commercial activities,[63] the public employee has traditionally been conscious of the service-oriented nature of his work. His early organizations

59. Smith & McLaughlin, *Public Employment: A Neglected Area of Research and Training in Labor Relations,* 16 IND. & LAB. REL. REV. 30 (1962).

60. TAYLOR REPORT 14 (1966). The extent of the problem is manifest in the bargaining procedure adopted by the city of Philadelphia. Under the Home Rule Charter a labor contract must be implemented by city council appropriation and civil service regulation. Thus all labor agreements must be approved by these bodies. Negotiations take place between a team of city executives including the finance director, labor relations consultant, personnel director, and managing director. At the same time a close liaison must be maintained with the executive branch including the civil service commission and the city council. The financial aspects of the agreement are transmitted to the council for approval by the mayor in his annual budgetary message. After approval has been granted by the civil service commission and the council, these bodies reduce the terms to ordinances and regulations, after which the contract is signed by the parties. See 1959 ABA 95-96. Because of these complicating factors negotiations can often consume as much as eight months out of every year. Rock, *Practical Labor Relations in the Public Service,* 18 PUB. PERS. REV. 73 (1957).

61. See TAYLOR REPORT 26.

62. See Smith & McLaughlin, *supra* note 59, at 33.

63. See Local 266, IBEW v. Salt River Project, *supra* note 13 (manufacture and sale of electric power); State *ex rel* Moore v. Julian, 359 Mo. 539, 222 S.W.2d 720 (1949) (municipally owned public utility); State v. Brotherhood of R.R. Trainmen, 37 Cal. 2d 412, 232 P.2d 857, *cert. denied,* 342 U.S. 876 (1951) (state-owned railroad).

are better characterized as professional associations than as unions.[64] Historically these organizations have not concerned themselves with attempts at collective bargaining, but have devoted much of their energy to membership recruitment and legislative representation.[65] The most significant characteristic of public employee associations is the inclusion of supervisory and, occasionally, even executive personnel in the membership—a situation wholly alien to unionism as it has developed in private industry.[66]

In spite of hostile public attitudes and a frequently unfavorable legal milieu, public employees have found it increasingly necessary, or desirable, to organize into associations and unions.[67] The generally hostile environment toward public employee unionism has given rise to peculiarities which must be considered in providing a workable legal framework which will both guarantee employee rights, and, by encouraging harmonious and continuous public service, be acceptable to the public at large.[68] The challenge confronting the states is that of serving the long-run public interest by devising realistic means of promoting collective bargaining. Thus, procedures must be developed for establishing the appropriate bargaining unit, determining the suitable range of bargaining subjects, certifying employee representatives, and resolving the issue of exclusive representation. In addition, effective provisions for resolving collective bargaining deadlocks must be devised. The remainder of this note will consider these problems and the range of solutions adopted by the states.

A. *Appropriate Unit Determinations*

Perhaps the area of private labor relations least applicable to the government employee's context is the concept of an "appropriate

64. See Krislov, *The Independent Public Employee Association: Characteristics and Functions*, 15 IND. & LAB. REL. REV. 510 (1962).

65. *Id.* at 511.

66. This fact has often generated considerable antipathy between these two types of public employee organizations. Unions generally consider these associations company unions. *Id.* at 519; Zander, *A Union View of Collective Bargaining in the Public Service*, 22 PUB. ADMIN. REV. 5 (1962). The associations in turn are often antagonistic toward unions; in fact many have constitutional provisions against affiliation with labor unions. Krislov, *supra* note 64, at 519.

67. See notes 1-5 *supra* and accompanying text.

68. In addition to the unique make-up of public employee associations, the hostile environment in which these organizations have developed has resulted in sensitivity to the semantical overtones of terms employed in private labor relations. See 1965 ABA 337, in which an 83-hour teacher strike in Hamtramek, Michigan was described by a union official as the longest single meeting in his union's history. The Taylor Report has suggested the term collective negotiations as a substitute for collective bargaining, TAYLOR REPORT 11, while the National Education Association prefers the term professional negotiations. See Donovan, *Labor Relations in the Public Service: A Survey*, 14 IND. AND LAB. REL. REP. CARD 3 (March 1966).

representative unit." Several unique aspects of public employment contribute to the difficulty posed by this problem. The determination of an appropriate unit may involve characterizing the word "employee," since statutory and constitutional provisions in some states exclude specific types of public employees from the operation of labor relations laws.[69] The question is further complicated by the existence of public employee associations with a broader membership base than that generally considered desirable in private industry, and by the division of authority among public employers.[70]

Basically, three approaches have developed to resolve the appropriate unit problem: (1) provision in the statute; (2) determination by the parties; and (3) determination by a labor board.

1. *Provision in the Statute.*—Wisconsin, the first state to allow public employees to select an exclusive bargaining representative,[71] provides in its basic labor statute which unit shall be appropriate. The legislation requires the Wisconsin Employment Relations Board to conduct an election upon petition by either the employee organization or the public employer "to show separately the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit."[72] However, the statute includes the proviso that whenever "the board finds that a proposed unit includes a craft" it shall exclude the craft unless the employees therein file a separate petition.[73] This procedure has resulted in over-fragmentation of some bargaining units which would probably not have occurred had the board been granted more discretion in selecting the appropriate unit.[74] Such a provision is advantageous, however, in that it promotes accurate determination of employee desires in every conceivable bargaining unit. The procedure protects employees in a small unit from being coerced into accepting a bargaining representative not of their choosing while allowing employees wishing to

69. Hutchinson v. Magee, 278 Pa. 119, 122 Atl. 234 (1923) (firemen); MICH. CONST. art IV, § 48 (civil service employees). See, *e.g.*, GA. CODE ANN. § 54-909 (1961) (police); MASS. ANN. LAWS ch. 149, § 178G (Supp. 1965) (police, elected officials and executive officers).

70. See notes 60-65 *supra* and accompanying text.

71. WIS. STAT. § 111.70 (Supp. 1966) was originally adopted in 1959. The second state was Connecticut in 1965 (CONN. GEN. STAT. §§ 7-467-77 (1966)); Michigan was third on July 23, 1965 (MICH. STAT. ANN. §§ 17.455 (I-16) (Supp. 1965)) and Massachusetts followed on Nov. 17, 1965 (MASS. ANN. LAWS ch. 149, §§ 178G-N (Supp. 1965)).

72. WIS. STAT. § 111.05(2) (1961). This is the same provision which is applicable to private labor relations and is incorporated by reference in WIS. STAT. § 111.70(4)(d) (Supp. 1966) which deals with collective bargaining units for public employees.

73. WIS. STAT. § 111.70(4)(d) (Supp. 1966).

74. See 1966 ABA 176.

combine with other divisions to register that preference. However, it should be noted that the resulting fragmentation may burden the public employer, forcing him to negotiate separately with several bargaining agents representing employees with common interests. The end result could be increased administrative costs and disparate results for employee units which are essentially alike.[75]

2. *Determination by the Parties.*—In 1961, California adopted a program for negotiations between public employees and public agencies which guarantees the employees' right to organize, and to "meet and confer" with their employers.[76] By the terms of the statute, the public agencies of the state and municipalities are authorized to prescribe reasonable rules and regulations for the administration of the act. This approach has the disadvantage of placing the ultimate power in one party.[77] It might be argued that such a procedure is flexible, allowing the parties to adapt their labor relations program to local needs. However, by vesting the employer with such power, the state devalues its recognition of the employees' right to determine conditions of employment. More equitable means of providing for variances in local needs must be sought.[78]

3. *Determination by a Labor Board.*—Most states which have adopted comprehensive programs for public employee relations have placed the matter of appropriate unit determination in the discretion of a labor board.[79] Three states have enacted provisions substantially similar to the National Labor Relations Act,[80] providing that the unit selected must assure employees the fullest freedom in exercising their rights.[81] Provisos state that law enforcement officers may not be represented by an organization affiliated with units representing other

75. The Wisconsin Employment Relations Board referred to the limitation upon its discretion to determine the bargaining units in two cases in which employees of divisions of the same department were allowed to establish separate bargaining units from the rest of the department. City of Kenosha, W.E.R.B. Dec. No. 7423 (Feb. 1966); City of Appleton, W.E.R.B. Dec. No. 7424 (Feb. 1966), cited in 1966 ABA 178.

76. CAL. GOV'T CODE §§ 3500-08.

77. Herrick, *Unions for Government Employees—Their Implications,* 15TH N.Y.U. CONF. ON LAB. LAW 129, 136 (1962).

78. For example, the statute might provide that in the event the parties agree as to the appropriate unit such agreement shall be binding. In the event the parties are unable to agree an independent labor board shall be vested with the authority to make the proper unit determination. See also note 90 *infra* and accompanying text.

79. See, *e.g.,* CONN. GEN. STAT. REV. § 7-471 (1966); MASS. ANN. LAWS ch. 149, § 178H(4) (Supp. 1965); MICH. STAT. ANN. § 17.455(13) (Supp. 1965); ORE. REV. STAT. § 662.435 (1965).

80. 49 Stat. 449, as amended, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

81. See MASS. ANN. LAWS ch. 149, § 178H(4) (Supp. 1966); MICH. STAT. ANN. § 17.455(13) (Supp. 1965); and ORE. REV. STAT. § 662.435 (1965).

employees, and that professional employees may not be included in a unit with non-professional employees unless the professionals approve such inclusion by separate vote.

Some states provide detailed criteria to guide the board in its determination of an appropriate unit. These criteria appear to have been developed with an awareness of the unique aspects of public employment. The Connecticut statute[82] provides that the labor board shall select a unit which insures employees the most complete freedom of association while grouping together employees who share a clear and identifiable community of interest. Uniformed and investigatory employees are in a separate unit and no professional employee can be included in a group with non-professional employees unless they specifically vote to be so included. In addition the statute outlines factors to be considered by the board in determining whether to include supervisors in a unit with subordinate personnel.[83] A grant of discretion to include supervisory personnel is sound, because often the reasons which have led to the traditional exclusion of supervisors are absent in public employment. No doubt, in private industry foremen and job supervisors perform many management tasks, but the inherent division of authority in public employment may deprive governmental supervisors of these powers. The result can be a greater community of interest between employees and their supervisors than between the supervisors and their employers. In addition many public employee associations have traditionally included supervisory personnel among their membership and these organizations are the natural parties to assume the role of labor relations representation. In the Minnesota enactment,[84] six considerations are set out for each appropriate unit determination. The labor board must consider: (1) the efficient administration of government; (2) the principles and coverage of position classification and compensation plans; (3) the history and extent of organization in the particular unit; (4) the occupational class and whether it includes administrative and supervisory personnel; (5) geographical location; and (6) the recommendations of the parties. Perhaps the soundest criteria are to be found in recent proposals for a public employment labor statute in New York. The Taylor Committee Report[85] suggests three basic considerations:

82. CONN. GEN. STAT. REV. § 7-471 (1966).

83. The board shall consider whether the supervisor: (1) performs management control duties such as scheduling, assigning, overseeing and reviewing of the work of their subordinate employees; (2) performs duties distinct and dissimilar to that performed by the other employees in the proposed unit; (3) exercises judgment in adjusting grievances and enforcing the collective agreement; and (4) establishes or participates in establishing performance standards. CONN. GEN. STAT. REV. § 7-473 (1966).

84. MINN. STAT. § 179.52 (1966).

85. TAYLOR REPORT 23-29, 32.

(1) the definition of the unit must correspond with a community of interest among employees; (2) the conditions of employment which the proposed unit wishes to negotiate must be conditions over which the administrator has discretion either to determine or to recommend to the determining body; and (3) the unit must be compatible with the effective fulfillment of the duty of service to the public shared by the employer and the employees.

The range of solutions either adopted or proposed in various states indicates the complexity of the problem. Several states suggest that community of interest must be considered in determining the unit, thus raising perhaps the most perplexing difficulty.[86] Employees in a particular unit may be subject to the same work rules and personnel practices, thus establishing a community of interest. They may also have a community of interest with other employees subject to the same political authority concerning wage plans, job classifications and retirement benefits. Also, a community of interest may exist among employees in terms of the collective bargaining relationships developed prior to the enactment of a labor statute.[87] Often these various communities of interest will indicate contradictory solutions to the appropriate unit question. The city of Cincinnati has attempted to solve this problem by providing for a system of shifting representative units.[88] For example, in discussions of departmental working conditions, each agency is normally considered the appropriate unit; however, during wage negotiations the unit is determined by city-wide job classification.

This system may be more suitable for municipal than for state employees, but it does suggest two important provisions that should be included in every basic labor statute. First, the problems likely to arise in individual situations will vary greatly, and can be most effectively faced by allowing for a case-by-case determination and by providing the decision-maker with discretion to select the most appropriate solution in each case. Second, each local government or political subdivision may have problems which are unique, and should be encouraged, through consultation with all interested parties, to develop local procedures which are consistent with the general policy of the basic labor statute.[89]

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86. See, *e.g.*, CONN. GEN. STAT. REV. § 7-473 (1966); TAYLOR REPORT 23-29, 32.

87. For example, New York is a state which has as yet failed to enaet comprehensive legislation dealing with public employee relations, yet collective bargaining has been developing in various areas in the state. The employees in New York City have had bargaining rights in substantial measure since 1954. See 1958 ABA 153 (Comm. on State Lab. Legis.); 1960 ABA 201.

88. See 1960 ABA 199.

89. See TAYLOR REPORT 31 which suggests such a solution. WIS. STAT. § 111.70 (Supp. 1966), also employs such an approach. The local procedures developed have

B. *Certification, Recognition and Representation*

Certification involves the decision of a labor board concerning the authenticity of an employee organization's claim that it represents a certain percentage of employees. An organization may be recognized by an employer without requiring board action; indeed, harmonious labor relations should be characterized by more recognitions than certifications. For the most part the problems in this area are quite similar to those encountered in private employment, and those states which have adopted comprehensive labor programs for public employees have closely followed the procedures of the National Labor Relations Board.[90] However, there is one major distinction between public and private employment with regard to recognition and certification problems. Most states deny public employees the right to strike,[91] and some require labor organizations specifically to disavow this right as a pre-condition to certification or recognition.[92]

A major issue inevitably arising in recognitional disputes is the extent of the employee organization's representation rights. Three alternative solutions to this problem of representative status have been developed: (1) proportional representation; (2) representation of members only; and (3) exclusive representation. Proportional representation is a unique solution apparently adopted in only one state, and there only in relation to school teachers.[93] The statute provides for a bargaining council membership. Each employee organization with members in the bargaining unit is granted representation on the council in the same ratio that its membership bears to the total number of employees belonging to labor organizations. This multi-organization system has been opposed on the theory that it results in raiding and other inter-union rivalries which detract from the main interests of both employer and employee.[94] Each employee organization may be more concerned with increasing its proportional

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been subject to careful supervision by the WERB to insure that they conform to the provisions of the basic statute. See 1964 ABA 378.

90. *Compare* 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. 149 (1964), *with* CONN. GEN. STAT. REV. § 7-471 (1966); MASS. ANN. LAWS ch. 149, § 178H (Supp. 1965); MICH. STAT. ANN. § 17.455 (12) (Supp. 1965); WIS. STAT. § 111.70 (Supp. 1966).

91. See notes 9-14 *supra* and accompanying text.

92. See, *e.g.*, FLA. STAT. ANN. § 839.221(2) (1965); 1960 ABA 193; TAYLOR REPORT 30.

93. CAL. EDUC. CODE §§ 13080-88. The legislation could provide a thorough test for traditional notions regarding the necessity of exclusive representation. However at the present time it is under strong criticism from the American Federation of Teachers and evidence to date on its operation is inconclusive. No bilateral written agreements of any consequence have been achieved. See 1966 ABA 151.

94. Spero, *Collective Bargaining in the Public Service*, 22 PUB. ADMIN. REV. 1, 3 (1962); TAYLOR REPORT 29.

representation than with responsible representation of the workers.

Representation of members only means simply that each organization negotiates conditions of employment solely for its own members. It is normally considered the alternative to exclusive representation. Under the concept of exclusive representation, the employee organization which gains a majority of all the employees in a bargaining unit is given both the right to be the exclusive agent of the employees for negotiations and the duty to represent equally all employees in the unit without regard to their membership in the organization. Since unionism among public employees is disfavored in many states, denial of exclusive representation may reflect the hope that unions will thereby be weakened.[95] Although seldom explicitly granted by statute,[96] exclusive representation has been frequently achieved in public labor relations.[97]

Employee organizations generally seek exclusive representation because it guarantees a certain degree of security. This security is not necessarily inconsistent with employer goals. Efficient public service demands harmonious labor relations; but a labor organization with uncertain status is more apt to make dramatic and unreasonable demands in an attempt to increase its membership, leading to disruptive labor disputes. However, by guaranteeing the union's security the employer is justified in placing greater responsibilities upon the employee organization. Certainly, if a state wishes to effectuate a no-strike policy, it must be willing to place major responsibility upon one employee organization for the conduct of all employees in the unit.[98]

It should be noted that opposition to exclusive recognition is on weak ground in public service. Whatever the situation in private industry, the government is not a profit-making organization and has a greater obligation to provide fair and equal treatment to its employees. Multi-representative negotiations have the double disadvantage of high administrative costs and unequal results for similar employees.

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95. Note, 75 HARV. L. REV. 391, 401 (1961).

96. *But see* CONN. GEN. STAT. REV. § 7-471 (1966); MASS. ANN. LAWS ch. 149, § 178H (Supp. 1965); MICH. STAT. ANN. § 17.455(11) (Supp. 1965); MINN. STAT. § 179.52 (Supp. 1966); WIS. STAT. § 111.70 (Supp. 1966).

97. In addition to the statutes cited in note 96 *supra*, exclusive recognition has been granted on an *ad hoc* basis in many bargaining agreements. See Roser, *Collective Bargaining in Philadelphia* in MANAGEMENT RELATIONS WITH ORGANIZED PUBLIC EMPLOYEES 103 (Warner ed. 1963); Heisel & Santa-Emma, *Unions in Cincinnati Government, id.* at 116; 1959 ABA 88 (N.Y.C.); Zander, *A Union View of Collective Bargaining in the Public Service*, 22 PUB. ADMIN. REV. 5, 7 (1962) (states that AFSCME entered into agreements for exclusive recognition in 214 state, county, and municipal jurisdictions in 1962).

98. TAYLOR REPORT 29.

Exclusive representation would tend to overcome both of these disadvantages.

C. *Appropriate Bargaining Subjects*

A determination of appropriate bargaining subjects is particularly difficult in public employee relations. The problem arises because many state laws determine for the parties what would otherwise be subjects of collective bargaining. A thorough discussion of the issue would entail an analysis of the various state laws and civil service commission regulations. Although the difficulty should be recognized, such an analysis is beyond the scope of this note.

D. *Unfair Labor Practices*

Several state enactments specify unfair labor practices,[99] closely resembling those set forth in the National Labor Relations Act.[100] All of these statutes delineate employers' unfair labor practices,[101] and ouly Michigan fails to include parallel provisions for employee organizations.[102] However, the Michigan statute defines collective bargaining in terms of a mutual obligation which seems to imply a requirement that both sides must bargain in good faith. It is desirable for any public-employee-relations statute to specify unfair labor practices. The statute should provide clear rules of conduct to promote harmonious relations between antagonistic forces. Perhaps the most important provision is the duty to bargain in good faith, and such a requirement should be made explicitly applicable to both parties rather than left unarticulated as in the case of the Michigan statute.

E. *Bargaining Deadlocks*

At the heart of any public employee labor statute are its provisions for resolving bargaining deadlocks. Regardless of how effectively collective bargaining operates, impasses are bound to occur. In any attempt to provide for the peaceful settlement of disputes, three fundamental problems are faced: First, a basic lack of collective bargaining experience, both on the part of employers and employees, will frequently contribute to major disagreements. Second, there

99. CONN. GEN. STAT. REV. § 7-470 (1966); MASS. ANN. LAWS ch. 149, § 178L (Supp. 1965); MICH. STAT. ANN. § 17.455(16) (Supp. 1965); WIS. STAT. § 111.70(3)(b) (Supp. 1966).

100. 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 148 (1964).

101. Both the Connecticut and Massachusetts statutes specify employee organization unfair labor practices, and Wisconsin prohibits unfair practices by employees and their organizations generally. See statutes cited in note 99 *supra*.

102. MICH. STAT. ANN. § 17.455(15) (Supp. 1966); 1966 ABA 144.

is the necessity of negotiating under the pressure of budget deadlines. In private industry the parties can agree to function under the old agreement until a new one is hammered out, but this alternative is seldom available in public employment, since the employer must be able to estimate his expenses for budget purposes. Third, division of employer authority necessitates seeking the approval of several officials before the agreement may be complete.[103]

Public employees have traditionally relied upon political pressure after impasse to force employers to accept their demands.[104] Although employee associations have generally made effective use of lobbying and other political pressures, these methods have proved insufficient to obtain all of their desired ends.[105] In addition, political pressure is more effective as a technique for obtaining long range programs than for the settlement of immediate and specific controversies. The range of alternatives available for impasse resolution extends from strikes to compulsory arbitration. For certain groups of public employees the strike cannot be considered a viable alternative;[106] thus one must examine other possibilities. At the opposite end of the continuum from the strike is compulsory arbitration. This solution has been urged by some public employee unions[107] and adopted in some statutes.[108] However, where collective bargaining is in the developmental stages there is a tendency to rely on arbitration in settling disputes rather than attempting to resolve differences at the bargaining table.[109] A better policy would be to seek a middle ground such as that presented in two alternatives developed by several states—*i.e.*, the alternatives of fact-finding and mediation.

Mediation differs fundamentally from compulsory arbitration in that arbitration is basically an attempt by a neutral party to thrust a solution upon the disputants, whereas mediation is an augmentation of the collective bargaining process under the guidance of an impartial party. A mediator attends the bargaining sessions and attempts to

103. See note 60 *supra* and accompanying text; Roser, *supra* note 97, at 114. Herrick, *supra* note 77, at 136, adds another problem to the list—the tendency of government to attempt to anticipate all problems with regulations with the result that relations can be inundated by technical rules.

104. See Smith & McLaughlin, *supra* note 59, at 37; Krislov, *supra* note 64, at 511.

105. Note, 1966 WIS. L. REV. 549, 560-62.

106. See note 54 *supra* and accompanying text.

107. See 1965 ABA 331; Wortman, *Collective Bargaining Strategies and Tactics in the Federal Service*, 15 LAB. L.J. 482, 489-90 (1964).

108. NEB. REV. STAT. §§ 48-801-823 (Supp. 1964). This statute empowers a special Court of Industrial Relations to arbitrate disputes between public employees and their employer in any public utility, or commercial enterprise which is owned or operated by the state of Nebraska or any political subdivision thereof. The decisions of this court are appealable to the supreme court of the state.

109. See Herrick, *supra* note 77, at 135, where it is pointed out that in one instance

aid the parties in reaching a voluntary solution. Emotions are apt to run high across the bargaining table, and the mediator can serve as a buffer between the parties. Furthermore, a neutral third party can help ease the disputants away from extreme positions by providing fresh insights into the conflict. Particularly in the area of public employment a mediator can bring to the bargaining table skill and diplomacy that the parties themselves may lack through inexperience. Several states have made mediation facilities available to disputants in public employment.[110] The Michigan provisions are of particular interest. The Michigan Labor Mediation Board has authority to invoke jurisdiction to mediate at the request of either party, and is granted subpoena power to compel the other party's attendance.

The most popular dispute-settling technique appears to be fact-finding[111]—a process closer to compulsory arbitration than mediation. Fact-finding is in reality a form of non-binding arbitration, involving a third party who holds hearings, makes findings of fact and recommendations for resolving the dispute. Its rationale appears to be either that the parties may be more likely to reach a voluntary agreement on a settled record of facts, or that publication of the facts and recommendations may crystalize public opinion, forcing the parties to reach agreement. Fact-finding is not inconsistent with mediation and may serve as a supplemental procedure in the event that mediation falters.[112]

Fact-finding statutes vary greatly in terms of the employee groups covered by the procedure. In only two states are all public employees

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in the federal service, where collective bargaining and compulsory arbitration were introduced simultaneously, four consecutive negotiations were followed by arbitration. See also Note, 1966 WIS. L. REV. 549, 560-62.

110. MICH. STAT. ANN. § 17.455(7) (Supp. 1966); MINN. STAT. § 179.52 (Supp. 1966); ORE. REV. STAT. § 662.435 (1965); WIS. STAT. ANN. § 111.70(4) (b) (Supp. 1966).

111. At least fourteen states have provided fact-finding procedures for all or part of their public labor force: CONN. GEN. STAT. REV. § 7-473 (1966); ILL. ANN. STAT. ch. 24, §§ 10-3-(8-11) (Smith-Hurd 1962); IOWA CODE ANN. §§ 90.15-.27 (Supp. 1965); ME. REV. STAT. ANN. ch. 26, §§ 980-92 (Supp. 1966); MASS. ANN. LAWS ch. 149, § 178J (Supp. 1965); MICH. STAT. ANN. §§ 17.455 (1-16) (Supp. 1965); MINN. STAT. ANN. § 179.521 (1966); N.Y. GEN. MUNIC. §§ 681-85 (1965); N.D. CENT. CODE § 34-11-(02-05) (1961); ORE. REV. STAT. § 342.470 (1965); ORE. REV. STAT. § 662.435 (1965); PA. STAT. ANN. tit. 43, § 215.1 (1964); R.I. GEN. LAWS ANN. §§ 28-9.1-(1-14), 28-9.2-(1-14) (Supp. 1965); WASH. REV. CODE ANN. § 28.72.060 (Supp. 1966); WIS. STAT. ANN. § 111.70(4)(c) (Supp. 1966).

112. See, *e.g.*, CONN. GEN. STAT. REV. § 7.473(b) (1966) which provides that fact-finding may not be instituted until mediation has failed. see Lazar, Lombardi & Seltzer, *The Tripartite Commissions in Public Interest Labor Disputes in Minnesota, 1940-1960*, 14 LAB. L.J. 419 (1963); Northrup, *Fact-Finding in Labor Disputes: The State's Experience*, 17 IND. & LAB. REL. REV. 114 (1963); Note, 1966 WIS. L. REV. 549, 566.

within the scope of the act,[113] and in only two others are all state government employees included.[114] Firefighters, police and teachers are most often included in such legislation, probably reflecting the political influence of these groups rather than the essential nature of their services.[115]

In general, the fact-finding statutes require that collective bargaining reach an absolute impasse before fact-finders may be appointed.[116] This is sound policy, since easily available fact-finding procedures would be subject to some of the same criticism as compulsory arbitration.[117] The Wisconsin procedures preliminary to opening the fact-finding hearing are lengthy, but the statistics of the Wisconsin Employment Relations Board indicate that the time is well spent. Of seventy-three petitions for fact-finding filed, thirty-five were settled by mediation prior to fact-finding, two were withdrawn, and two were dismissed for technical reasons. Of the remaining thirty-four, six were consolidated with other cases, making a total of twenty-eight fact-finding cases which advanced to the hearing stage.[118]

Although it is too early to make a thorough evaluation of the fact-finding statutes, their popularity indicates a certain degree of success. None have been repealed and some have been amended to correct deficiencies made apparent through experience.[119] However, parties resorting to fact-finding are in reality recognizing that collective bargaining has failed, and for this reason care must be taken that fact-finding is sparingly employed. The Wisconsin preliminary procedures appear well adapted to insure this result. By encouraging the parties

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113. N.D. CENT. CODE § 34-11-(02-05) (1961); PA. STAT. ANN. tit. 43, § 215.1 (1964).

114. MINN. STAT. ANN. § 179.521 (1966). On June 28 1966, the governor of Wisconsin signed the Wisconsin State Employee Act (WIS. STAT. ANN. §§ 111.80-92) which provides fact-finding for all state employees effective January 1, 1967, making that state the second to provide such facilities for state employees. See 1966 ABA 184; Krinsky, *Public Employment Fact-Finding in Fourteen States,* 17 LAB. L.J. 532, 533 (1966).

115. Krinsky, *supra* note 114, at 534. If the essential nature of the services rendered was the determining factor in coverage under a statute, one would not expect to find states where firemen are covered and policemen not, yet such is the case. See, *e.g.,* ILL. ANN. STAT. ch. 24, §§ 10-3-(8-11) (1962); IOWA CODE ANN. § 90.15-27 (Supp. 1965); and ME. REV. STAT. ANN. ch. 26, §§ 980-92 (Supp. 1966), all of which cover firemen but not policemen.

116. See, *e.g.,* WIS. STAT. ANN. § 111.70(4)(e) (Supp. 1966), which requires either that after a reasonable period of negotiation the parties continue to be deadlocked or that one of the parties refuses to negotiate in good faith before the procedures are available.

117. See notes 110-12 *supra* and accompanying text.

118. Stern, *The Wisconsin Public Employee Fact-Finding Procedure,* 20 IND. & LAB. REL. REV. 3, 5 (1966).

119. See, *e.g.,* WIS. STAT. ANN. § 111.70 (Supp. 1966). The procedure was created by L. 1961 ch. 663 and amended by L. 1963 ch. 87. In addition see note 114 *supra,* noting that a similar law was passed in 1966 covering state employees.

to make every effort at a compromise settlement through the assistance of a mediator, such procedure stimulates the development of mature collective bargaining techniques. At the same time fact-finding machinery is available as an additional safe-guard against disruption of the public service.

IV. CONCLUSION

In only a few states have public employees' rights received the proper legislative attention. Increased activity in the public sector makes it incumbent upon the states to develop reasonable and comprehensive legislation effectuating the rights of public employees while giving due consideration to the public interest. This legislation should include:

1. Positive recognition of the right to strike by employees in those areas of public employment where work stoppages do not present a direct threat to the public health and safety.

2. Specification of unfair labor practices including the failure to bargain in good faith.

3. Establishment of a Public Employment Relations Board with the following powers:

a. To conduct elections and certify exclusive employee representatives;

b. To determine the appropriate unit;

c. To investigate and remedy unfair labor practices;

d. To provide a combination of mediation and fact-finding facilities for the resolution of collective bargaining impasses; and

e. To determine when strikes endanger the public health and safety, and to petition the courts for injunctive relief.

The more equitable distribution of bargaining power resulting from permissive strike legislation will give the employees a stronger voice in determining the conditions of their employment. The responsible exercise of these rights requires the establishment of a Public Employment Relations Board in order to maximize effective collective bargaining and to minimize disruptions of governmental services.

Removal Of Federal Judges—Alternatives to Impeachment

Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.[1]

I. Introduction

Article II, section 4 of the Constitution provides that the President, Vice-President and civil officers of the United States may be removed on impeachment and conviction of treason, bribery, high crimes and misdemeanors. This provision is the Constitution's only express means for removal of federal judges from office.

The inadequacy of impeachment for the task of controlling the behavior of judges seems abundantly clear. President Jefferson described impeachment as a "bungling way of removing judges . . . an impracticable thing—a mere scare crow;"[2] in 1807 he predicted, "impeachment is a farce which will not be tried again."[3] Experience with impeachment,[4] and the recent case of *Chandler v. Judicial Council of the Tenth Circuit*,[5] have in large measure confirmed the validity of President Jefferson's opinions. Presently, there is considerable feeling that, in a system as large and as overburdened as the federal judiciary, a need exists for other procedures to deal with judges who are unfit for office through some fault of their own or through physical or mental disability.[6]

This article examines the inherent weaknesses both in the impeach-

1. 1. Bryce, The American Commonwealth 211 (1st ed. 1876).

2. 1. Warren, The Supreme Court in United States History 295 (1923).

3. Letter from President Jefferson to William Branch Giles, April 20, 1807, in II Jefferson, Writings 1191 (1904).

4. Simpson, Federal Impeachments (1916), comments on the inadequacies of impeachment which history had revealed through the early 1900's. Borkin, The Corrupt Judge (1962), comments on the inadequacy of impeachment which more recent history has revealed.

5. 382 U.S. 1003 (1966). This case was described by one writer as an "attempt to circumvent the inadequacies of the present removal methods." Comment, 13 U.C.L.A.L. Rev. 1385 (1966). For further discussion of this case see notes 17, 18 and 19 *infra* and accompanying text.

6. See *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., pt. 1 (1966), and Report of the Committee on the Removal and Discipline of Judges, Section on Judicial Administration, A. B. A. (1964) [hereinafter cited as ABA Committee Report].

ment probes and in current alternative statutory procedures, including constitutional and practical questions involved in establishing an effective statutory procedure to deal adequately with incompetent judges. Finally the article suggests possible means to remedy these existing weaknesses.

II. THE MISBEHAVING JUDGE

A. *Inadequacy of Impeachment*

Supreme Court Justices are so few in number and so often in the public eye that their misbehavior is readily susceptible to the impeachment process. But since impeachment is only available for rather serious misconduct,[7] it is too remote a remedy to insure the efficiency or honesty of inferior court judges.[8] For example, if a neglectful judge is constantly behind in his caseload, a censure from an official body might be appropriate, but impeachment is neither desirable nor available. History assures the judge in office that Congress will hesitate to proceed against him unless his misbehavior is severe,[9] and even if Congress decides to investigate a judge, its procedure is so slow and cumbersome that parties are forced to litigate before him long after his misbehavior has rendered him unfit for office.[10]

The impeachment procedure is unfair to the judges as well. Impeachment trials have not been free of either political bias or tactics which would be improper in a true judicial proceeding.[11] Furthermore, the legislative triers of an impeached judge have more pressing matters which consume their time, and therefore may be forced to acquit or convict the accused with only a superficial knowledge of the evidence presented.[12]

B. *Presently Available Alternatives*

Currently, two alternative statutory procedures are available to control misbehaving inferior court judges. One is aimed solely at the

7. SIMPSON, *op. cit. supra* note 4, at 30-60, 51.

8. Currently, there is provision for 442 inferior court judges: 84 Circuit Court of Appeals judges, 28 U.S.C. § 44(a) (1964), as amended, 80 Stat. 77 (1966); 337 district court judges, 28 U.S.C. § 133 (1964), as amended, 80 Stat. 77 (1966); 7 Court of Claims judges, 28 U.S.C. § 171 (1964), as amended, 80 Stat. 140 (1966); 5 Court of Customs and Patent Appeals judges, 28 U.S.C. § 211 (1964); 9 Customs Court judges, 28 U.S.C. § 251 (1964).

9. Only 8 judges have been impeached thus far. BORKIN, *op. cit. supra* note 4, at 198-99.

10. *Id.* at 633.

11. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 101-54 (1918).

12. In one impeachment trial at one point there were only three Senators on the floor to hear the proceedings. Time, March 16, 1936, p. 18.

removal of a judge who accepts a bribe;[13] however, since many acts other than accepting bribes render a judge unfit for office, this provision's narrow scope limits its utility.

A second procedure[14] authorizes the judicial council in each circuit to make orders for the administration of business in the circuit and requires the district judges promptly to carry these orders into effect. There is, however, no judicial council to make orders promoting the efficiency of judges of the Court of Claims, Customs Court, Court of Customs and Patent Appeals,[15] or of judges of the circuit courts themselves. Further, the scope of the council's order-making power is uncertain, and legislative history clearly indicates the judicial council caunot order a judge removed from office.[16]

Recently, the Judicial Council of the Tenth Circuit ordered District Judge Stephen J. Chandler to refrain from hearing cases.[17] The United

13. 18 U.S.C. § 201 (1964). This section of the code includes within it the provision which originally was 1 Stat. 117 (1790). 1 Stat. 117, which remained substantially intact until 1962, dealt only with judges who accepted bribes. See 18 U.S.C. § 207 (1954). In 1962 this provision on the bribery of judges was consolidated with the provision on the bribery of other governmental officers. S. REP. No. 2213, 87th Cong., 2d Sess. 7-8 (1962). Some commentators question whether the successful application of this provision results automatically in the removal of the guilty judge. See note 32 *infra.*

14. 28 U.S.C. § 332 (1964): "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

15. The Court of Claims and the Court of Customs and Patent Appeals are now definitcly article III courts. Glidden Co. v. Zdanok, 370 U.S. 530 (1962). Probably the same is true of the Customs Court. WRIGHT, FEDERAL COURTS 31 (1963).

16. "Some people have urged that the bill does not have teeth in it, that you really cannot do anything with a judge who will not decide cases. . . . At least, it does this: If, after all the admonition that may come from the circuit judges, a district judge still persists in neglecting his work . . . in an extreme case it would seem to me a perfectly just cause for the remedy and method of impeachment." Testimony of Harold Vanderbilt on the bill which was to become 28 U.S.C. § 332, which he helped draft. *Hearings on S. 188 Before a Subcommittee of the Senate Committee on the Judiciary,* 76th Cong., 1st Sess. 18 (1939).

17. On December 13, 1965, the Judicial Council made such an order to District Judge Stephen J. Chandler. Orders of the Judicial Council of the Tenth Circuit, *Matter of Chandler* (Special Session, Dec. 1965). Chandler requested the Unitcd States Supreme Court to stay this order. The majority refused to grant a stay on the ground that the order was only interlocutory. Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003 (1966). The majority found that the order was interlocutory because the Judicial Council indicated that Judge Chandler would receive a hearing at which he could be represented by counsel to contest the order. The Council issued this order. Order of the Judicial Council of the Tenth Circuit, *Matter of Chandler* (Special Session, Jan. 1966). On February 10, 1966, the Judicial Council cancelled the hearing because "no judge of the Western District of Oklahoma [Chandler] wishes to be heard. . . ." Order of the Judicial Council of the Tenth Circuit, *Matter of Division of Business in the Western District of Oklahoma* (Special Session, Feb. 1966). The Order of February, 1966 also restored all civil, bankruptcy, and criminal cases that had been assigned to him as of December 28, 1965, but

States Supreme Court declined to determine the judicial council's power to promulgate such orders;[18] however, a strong dissent urged that the judicial councils have no such disciplinary authority, and insisted that the sole disciplinary device is impeachment.[19] Furthermore, the lack of elementary procedural safeguards to protect the judge's rights casts doubt upon the validity of the order-making procedure as a disciplinary device. In effect, the judicial council used this provision as a basis for suspending a judge through a proceeding both instituted and decided by that council without affording the judge an opportunity to be heard. The *Chandler* case revealed one further weakness in the order-making provision. If a district judge does not wish to carry out the council's order, this provision supplies no sanctions with which the judicial council can enforce its demands. In such a situation, the only present sanction is impeachment.[20]

The inadequacies of impeachment and present alternative statutory methods indicate the need for an improved procedure dealing with misbehaving inferior court judges. Before any improvements can be suggested, however, it is necessary to consider whether the Constitution allows any alternative to impeachment.

C. *Constitutional Question*

Legal commentators have said that impeachment and conviction by Congress is the only constitutionally permissible method to remove a federal judge.[21] Under this theory the statute empowering a court to

made no provision for assignment of additional cases. On the order, thus modified, a petition for writ of prohibition or mandamus is still before the Supreme Court.

18. Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003 (1966). The majority did not reach a decision on the merits. See note 17 *supra.*

19. Justice Douglas joined Justice Black: "I think the Council is completely without legal authority to issue any such order . . . with or without a hearing . . . and that the Constitution forbids it." *Id.* at 1004.

20. See note 17 *supra.*

21. This statement was apparently first made by Alexander Hamilton in the Federalist papers: "The precautions for their [judges'] responsibility are comprised in the article respecting impeachments. . . . This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges." THE FEDERALIST No. 79, at 492-93 (Lodge ed. 1888) (Hamilton). While Hamilton's views on the Constitution are important, they are not decisive. The Supreme Court definitely rejected Hamilton's view that officers appointed by the President and Senate are only removable by the President and Senate. Myers v. United States, 272 U.S. 52 (1926).

This statement has also been made in several law review articles, notably Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684 (1913); Otis, *A Proposed Tribunal: Is it Constitutional?*, 7 U. KAN. CITY L. REV. 1 (1938); Note, 51 HARV. L. REV. 330 (1937). Only the Otis article, however, took the view that any other method of removal definitely would be unconstitutional. The Otis article relied on the Federalist statement, the constitutional provision that the House of Rep-

remove a judge for accepting a bribe is unconstitutional and only constitutional amendment can improve the present defective removal procedure.[22] There is, however, another theory that the Constitution, in addition to expressly providing for Congressional removal of a judge by impeachment and conviction, impliedly allows the judicial branch itself to remove a misbehaving judge.[23] There are two sound bases for this view.

First, at common law in England there were methods by which the executive, the legislature and the judiciary could remove judges.[24] In the United States, the basic constitutional doctrine of separation of powers would have prevented the use of these methods by the executive or the legislature if the framers had not provided otherwise by formulating the impeachment procedure. However, the absence of an express constitutional provision for executive removal of judges implies a rejection by the framers of this possibility. Likewise the framers impliedly rejected all methods of removal of judges by the legislature, *except* impeachment, since impeachment was the only method expressly provided. Yet, because the basic doctrine of separation of powers would not apply to prevent removal of judges by the judicial branch itself, the failure of the framers expressly to provide for this method of removal in the Constitution does not necessarily imply its rejection.

Second, the separation of powers concept stresses the independence of the three branches of government. Independence logically requires not only freedom from interference by the other branches but also freedom for each branch to perform those tasks assigned to it by the Constitution. James Madison recognized this truth when he argued the importance of strictly construing a legislative check on the execu-

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resentatives had the sole power of impeachment and the Senate had the sole power to try impeachments and the fact that "high crimes and misdemeanors" can be interpreted to cover practically all misbehavior. Finally, this statement is made in the ABA Committee Report, *supra* note 6. The Report's view is based mainly on the Otis article.

22. The ABA Committee Report, *supra* note 6, proposes such an amendment.

23. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. pts. 1-3 485, 723, 870 (1930). On three occasions bills based on this view have been introduced in Congress. H.R. 2271, 75th Cong., 1st Sess. (1937); H.R. 9160, 76th Cong., 3d Sess. (1940); H.R. 146, 77th Cong., 1st Sess. (1941). H.R. 2271 and H.R. 146 were favorably reported to the House, H.R. REP. No. 814, 75th Cong., 1st Sess. (1937); H.R. REP. No. 921, 77th Cong., 1st Sess. (1941), and passed the House, but failed in the Senate. H.R. 2271 and H.R. 146 received the approval of the ABA. 62 A.B.A. REP. 127 (1937); 65 A.B.A. REP. 78-80, 100 (1940).

24. Common law methods of removal were: Executive—Prior to the Act of Settlement most judges held office at the pleasure of the king. Legislative—Impeachment, address, bill of attainder. Judicial—Quo Warranto, Scire Facias. Shartel, *supra* note 23, at 881-83.

tive, since a broad construction would hamper the President in the preformance of his executive power.

> There is another maxim which ought to direct us in expounding the Constitution . . . . It is . . . that the three great departments of Government be kept separate and distinct; and if in any case they are blended, it is in order to admit a partial qualification, in order more effectually to guard against an entire consolidation. I think, therefore, when we review the several parts of this Constitution . . . we must suppose they [the departments] were intended to be kept separate in all cases in which they are not blended, and ought, consequently, to expound the Constitution so as to blend them as little as possible.[25]

Just as article II, section 1 vests in the President the executive power, article III, section 1 states:

> The judicial powers of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

At the time of the framing of the Constitution removing judges was a traditional exercise of the judicial power[26] and a removal procedure would seem clearly to fall within the constitutional definition of the judicial function—that is, hearing cases and controversies.[27] If Madison's observation may be extended to apply to the separation of the legislative and judicial branches, the doctrine of separation of powers would require a narrow construction of impeachment as a legislative check on the judiciary, and allow the removal of judges by the judicial branch in a proper judicial proceeding.[28]

On the other hand, the concept of separation of powers does not prevent Congress from conferring on a court, by statute, jurisdiction to conduct a proceeding to remove a judge. Outside of the relatively narrow original jurisdiction of the Supreme Court, the Constitution entrusts to Congress the task of determining, within specific guidelines,

25. 1 ANNALS OF CONG. 497 (1789).

26. Shartel, *supra* note 23, at 882-83.

27. U.S. CONST. art. III, § 2. A proceeding to remove a judge from office would be a case or controversy since it would involve a decision of controverted questions of law and fact and a controversy between the United States and an office holder over the title to an office.

28. If this construction of the Constitution were accepted, the power of the judicial branch would be more nearly co-ordinate with the power of the legislative and executive branches. Article I, § 5, provides that Congress may remove its own members and Myers v. United States, *supra* note 21, held that the President could remove members of the executive branch. One commentator has observed that as long as impeachment is the only way a judge can be removed, judges will be dependent on Congress and be forced to court congressional favor. SIMPSON, *op. cit. supra* note 4, at 73.

the jurisdiction of the federal courts. This principle has been accepted since it was first espoused in *Cary v. Curtiss*:[29]

> . . . the judicial power . . . although it has its origin in the Constitution, is . . . dependent for its distribution . . . upon . . . Congress, who possess . . . power of investing them [courts] with jurisdiction. . . .

Since the Constitution gives the legislative branch the task of conferring jurisdiction upon the courts, it would not be inconsistent to say that the separation of powers concept on the one hand indicates only a limited power in the legislature to remove a judge and a fuller power to remove in the judiciary, but on the other hand does not prevent the legislature from conferring upon the judiciary the jurisdiction to exercise this power.[30]

The members of the first Congress, including many framers of the Constitution, evidently believed the Constitution permitted removal of judges by the judiciary. They passed a law[31] which apparently[32] provided that a court could remove from office a judge who accepted a bribe.

The courts have never determined whether the Constitution per-

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29. 44 U.S. (3 How.) 236, 245 (1845); WRIGHT, FEDERAL COURTS 24 and cases cited SIMPSON, *op. cit. supra* note 4, at 24 n.26. Even in an area-rules of procedure—where some have contended that the Supreme Court had an inherent power, the Court has agreed that action by Congress is not an interference by the legislature in the judicial branch, Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) (Congress has undoubted power to regulate the practice and procedure of federal courts), despite Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). Such power in Congress is not so great as some apparently fear. See *e.g.*, Otis, *supra* note 21. Cougress is limited because it must confer jurisdiction on an article III court. For a general discussion of the requirements for an article III court, see WRIGHT, FEDERAL COURTS 24-32 and cases cited therein.

30. Compare: Madison saw no inconsistency in saying that the Congress could create an executive department which would aid the President in performing his executive function but could not limit the ability of the President to perform his executive function by limiting his power to remove members of that department. 1 ANNALS OF CONG., 496 (1789).

31. 1 State. 117 (1790) (now part of 18 U.S.C. § 201 (1964), provided: "Every judge of the United States, who . . . accepts . . . money, or other bribe . . . shall be fined and imprisoned at the discretion of the court, and shall be forever disqualified to hold any office of honor, trust, or profit under the United States."

32. ABA Committee Report, *supra* note 6, cites Burton v. United States, 202 U.S. 344 (1906), for the proposition that this "statute does 'not operate, *ipso facto*, to vacate the seat' of the convicted judge." However, *Burton* only held that a similar provision did not operate, ipso facto, to vacate the seat of a Senator for the reason that a Senator was not an officer under the United States Government. *Id.* at 369. A logical inference is that, had the Senator been an officer under the United States Government, the provision would have, ipso facto, vacated the Senator's seat. A judge is an officer under the government of the United States. U.S. CONST. art. II, § 4. *Burton* would, therefore, seem to be authority for the proposition that 1 Stat. 117 provided an alternative method of removing judges for accepting bribes.

mits a method of removal of judges other than impeachment.[33] However, the Supreme Court has determined that the express provision for impeachment does not prevent the President from removing civil officers within the executive department,[34] or judges from removing administrative officers within the judicial department.[35] If the Supreme Court were presented with a statute which provided a method whereby a judicial body could remove a judge from office for misbehavior, there would thus be a good basis for holding that statute constitutional.

D. *Constitutional Requirements for an Improved Alternative*

Assuming that the Constitution allows removal of judges by the judicial branch, it is necessary to explain more fully the constitutional requirements for such a proceeding. There are at least three such requirements.

First, the doctrine of separation of powers requires the proceeding for removal to be exclusively within the judicial branch.[36] This means, for example, that the attorney general could not be permitted to initiate a removal proceeding since such authority might provide him with the power to harass a judge with whom the executive disagreed politically. Such harassment would be an unconstitutional interference in the affairs of the judicial department.

On the same basis neither the Judiciary Committee of the House nor the House of Representatives itself could initiate such a proceeding. Impeachment is an exception to the overriding policy of separation of powers, and the express provision in the Constitution must be viewed not only as a grant of power to Congress but as a limitation on this power. The impeachment procedure was made somewhat cumbersome so that the legislative branch could not remove a judge simply because of his political views.[37] Therefore, to permit the House to initiate removal proceedings other than impeachment would allow it

33. Several decisions in dictum or dissent have stated that a federal judge could be removed only through impeachment and conviction. Chandler v. Judicial Council of the Tenth Circuit, *supra* note 18, at 1003 (dissent); Wingard v. United States, 141 U.S. 201, 203 (1891) (dissent); Clark v. United States, 72 F. Supp. 594 (Ct. Cl. 1947) (dictum).

34. Myers v. United States, *supra* note 21.

35. Reagan v. United States, 182 .U.S. 419 (1901); In the matter of Hennen, 38 U.S. (13 Pet.) 230 (1839).

36. Myers v. United States, *supra* note 21, at 116: "From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended. . . ."

37. Thus the framers rejected removal by address for the reason that "judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Gov." 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 429 (1911).

to participate in a proceeding somewhat less difficult than that expressly provided, thus defeating the policy behind the specific restriction embodied in the Constitution.

Second, because the proceeding should be exclusively within the judicial branch, only judges with good behavior tenure could preside.[38] Thus, laymen or attorneys, though allowed to function in an investigatory capacity, could not sit on a tribunal to determine a case.

Third, the proceedings for removal should have the fundamental requisites of a fair trial:[39] (a) the judge should have an opportunity to be fully informed of the nature of the charge in time to prepare to meet it; and (b) the judge with the aid of counsel, must be granted an opportunity fully to present his contentions to an unbiased tribunal.

E. *Desirable Features of an Improved Alternative*

Several states provide methods for removal of judges within the judiciary.[40] Experience in operating these state procedures suggests several other desirable features for an alternative method of removal for misbehavior.

For instance, one body should be empowered to investigate complaints and initiate charges; that body should have continuity. New York's Court on the Judiciary may be convened at the request of the chief judge of the court of appeals, the governor, the legislature, or a committee of the bar.[41] Though this court has been in existence since 1948 it has only been convened three times.[42] California's Commission on Judicial Qualifications investigates complaints, prefers charges, and sits as a continuing body.[43] For the period January

38. All judges of courts within the judicial branch hold office during good behavior. U.S. CONST. art. III, § 7.

39. Powell v. Alabama, 287 U.S. 45, 68 (1932); ICC v. Louisville & N.R.R., 227 U.S. 88, 93 (1913); The Reno, 61 F.2d 966, 968 (2d Cir. 1932).

40. Several states have procedures whereby judges may be removed by the judiciary for misbehavior or disability: ALA. CONST. art. 7, § 176; CAL. CONST. art. 6, § 10(b); ILL. CONST. art. 6, § 18; IND. CONST. art. 7, § 12; IOWA CODE ANN. §§ 605.26, 605.27, 605.28 (1949); N.Y. CONST. art. 6, § 22; OHIO REV. CODE ANN. § 2701.11 (Baldwin 1964); ORE. CONST. art. 7, § 6, ORE. REV. STAT. § 1.310 (1965); TEX. CONST. art. 5, § 1-a.

Other states have procedures whereby judges may be removed by the judiciary for misbehavior alone: LA. CONST. art. 9, §§ 4, 5; NEB. CONST. art. 3, § 17.

Still other states have procedures whereby judges may be removed by the judiciary for disability alone: ALASKA CONST. art. 4, § 10; COLO. CONST. art. 6, § 23; CONN. GEN. STAT. REV. § 51-49 (1958); HAWAII CONST. art. 5, § 4; MINN. STAT. ANN. § 490.04 (1958); MO. CONST. art. 5, § 27; UTAH. CODE ANN. § § 49-7-3, 49-7-4 (1953).

41. N.Y. CONST. art. 6, § 22.

42. Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117, 1125 n.32 (1966).

43. CAL. CONST. art. 6, § 10(b); Frankel, *supra* note 42, at 1128.

1, 1964 to December 31, 1965, action of the Commission caused the resignation or retirement of ten judges.[44] One can conclude that unless a continuing body is given sole responsibility for investigating complaints and initiating charges, the result will be only a slight improvement over a system limited to removal by legislative impeachment. Such a continuing body would have an additional advantage in that it could acquire skill in investigating misbehavior charges. This skill is a necessity in the light of another desirable feature—privacy.

The complaints to, and proceedings of, the investigating and charging body should be private in order to increase public confidence in, and respect for, the judiciary. If dissatisfied litigants are allowed to make the investigating body into a forum for public attacks on judges, the alternative method could severely injure the judiciary's public image. Experience shows that the public may believe even a groundless accusation if repeated often enough. Furthermore, privacy provisions would permit a lawyer to make complaints about a judge's conduct when otherwise he might hesitate through fear of alienating a judge before whom he must practice.[45] California provides that the proceedings of its investigating body shall be private until that body decides that removal is appropriate.[46] The body then makes a recommendation for removal to the California Supreme Court which conducts a public trial.[47] The privacy provision insures that only well-grounded complaints will be made public. On the other hand, there should be a provision for final judgment only after public trial to insure that the provision for privacy will not cause the judge's removal in a secret Star Chamber proceeding.

In addition, the court vested with final power to remove should also be vested with power to suspend pending the outcome of the proceedings. California made no express provision for suspension, but the state attorney general has ruled that the supreme court could suspend a judge whose removal had been recommended.[48] The utility of a suspension provision is obvious. There may be a delay between the initiation of judicial proceedings and final judgment concerning fitness, and litigants should not be forced to try their cases before a judge whose position is in doubt.

F. *Suggestions*

In light of the discussion of present federal procedures, require-

44. Frankel, *supra* note 42, at 1129.
45. Note, 41 N.Y.U.L. REV. 149, 179 (1966).
46. CAL. CONST. art. 6, § 10(b).
47. CAL. CONST. art. 6, § 10(6).
48. 41 OPS. ATT'Y GEN. 140 (1963).

ments of the Constitution and desirable features of state procedures, the following suggestions are made for consideration in drafting a statute to provide an improved alternative method for promoting the honesty and efficiency of inferior court federal judges.

The presently constituted judicial councils of the circuits should be empowered to investigate complaints of judicial misbehavior, to hold a hearing on the complaint, and to censure or recommend to the chief justice the removal of judges within the circuit. The judicial councils are particularly appropriate for this task since they meet regularly and carry out supervisory functions.[49] The provision for censure allows the council to proceed though it feels that the judge's misbehavior is not so severe as to require removal.

All proceedings before the judicial council should be confidential. This provision will protect the acquitted judge and the complaining party.

The judicial council should make a recommendation of removal to the chief justice, who would be empowered to suspend the accused judge. The chief justice would then appoint a previously uninvolved party to act as formal plaintiff[50] and would order the judicial council of another circuit to hold a trial de novo. This body would have the power to reverse, modify, or affirm the original council's decision. The trial would be public and would be presided over by judges who had not been involved in the investigation. The judicial council of another circuit appears the best body to conduct the trial, since the only other judicial body currently exercising a supervisory role, the Judicial Conference of the United States, would be unwieldy.[51]

The court should apply the "good behavior" standard of article III, section 1 of the Constitution in determining whether disciplinary action is necessary. Such a standard in effect would place in the judiciary the sole power to determine grounds for removal and censure. This power is consonant with judicial independence and would avoid an enumeration of grounds which inevitably would fail to be complete. The formal plaintiff should have the burden of proving by a preponderance of the evidence that the judge has violated the good behavior standard. The preponderance of evidence burden is thought more appropriate than the "beyond a reasonable doubt" burden because of the non-criminal nature of the hearing and the higher be-

49. 28 U.S.C. § 332 (1964).

50. The Chief Justice might appoint the attorney general or the solicitor general. Since these members of the executive branch would be acting at the instance of the Chief Justice, their action would not be called an interference by the executive branch in the affairs of the judicial branch.

51. 28 U.S.C. § 331 (1964). The Judicial Conference consists of 25 judges.

havorial standards to which judges are expected to conform.[52]

Appeal from the second judicial council's decision should lie to the Supreme Court. Appellate jurisdiction in the Supreme Court would further guarantee the fairness of the procedure and make certain that case law would develop a uniform definition of the good behavior standard.

The final order should extend no further than removal from office and disqualification to hold office. However, the removed judge should remain subject to punishment for his indictable offenses.

For the purposes of this statute, the Customs Court, the Court of Claims, and the Court of Customs and Patent Appeals should be included within the circuit of the Court of Appeals for the District of Columbia.

III. THE DISABLED JUDGE

A. *Inadequacy of Impeachment*

The disabled judge presents a different, though no less serious, problem than the misbehaving judge. A judge may fail to perform efficiently because of physical or mental disability or simply because he is senile; yet the disabled judge cannot be removed by impeachment.[53]

B. *Presently Available Alternative*

Currently there is available an alternative method of dealing with a disabled judge:[54] either a majority of the judicial council of the circuit (if the judge is a circuit or a district judge), or the chief judge or the Chief Justice of the Supreme Court (if the judge sits on the Customs Court, Court of Claims, or Court of Customs and Patent Appeals) may certify the judge's disability to the President. The President may then appoint another judge to the court on which the disabled judge sits. The disabled judge remains in office and receives the salary of his office, but loses his seniority.

52. See ABA, CANONS OF JUDICIAL ETHICS (1924). Canon 4 provides: "A judge's official conduct should be free from impropriety and the appearance of impropriety . . . and his personal behavior . . . should be beyond reproach." Moreover such a standard will avoid problems which might occur if the court applied the beyond-reasonable-doubt burden. The removing judicial tribunal might be satisfied that a preponderance of the evidence established need for removal, but a subsequent jury would not be satisfied beyond a reasonable doubt that the judge's behavior was criminal. The removed but subsequently acquitted judge could not validly ask for reinstatement because of the difference in burden of proof requirements. For obvious reasons the same considerations are not applicable to the removal of a disabled judge. See note 70 *infra* and accompanying text.

53. Impeachment lies ouly for treason, bribery, high crimes and misdemeanors. U.S. CONST. art. 2, § 4.

54. 28 U.S.C. § 372(b) (1964).

This provision places the responsibility for taking action on judges who are closest to the disabled judge.[55] These judges are naturally hesitant to take such a step, and the provision has apparently been used only once and then at the request of the district judge.[56] Furthermore, the provision does not spell out the method whereby the responsible judges are to determine the degree of disability. There is no requirement for a hearing or for examination by a physician. A final difficulty is that Justices of the Supreme Court are not subject to this provision.[57]

C. *Constitutional Question*

As stated above, it appears that the express provision for removal of judges by impeachment and conviction may not prevent a procedure whereby the judiciary itself removes judges who misbehave. The provision for good behavior tenure indicates, however, that a judge can never be removed for physical or mental disability, since this disability occurs through no fault of his own.[58] It seems agreed that disabled Justices of the Supreme Court cannot constitutionally be removed.[59] There is, however, substantial basis for the view[60] that the Constitution permits a judicial body to remove a disabled inferior court judge so long as the judge's salary is continued.

An increasingly expansive interpretation of the protections afforded by due process[61] may require the removal of disabled judges.[62] Due process of law demands that litigants in the courts have a fair trial,[63]

55. *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 9 (1966).

56. *Id.* at 10.

57. 28 U.S.C. § 372(b) (1964), says "judge who is eligible to retire under this section. . . ." If Supreme Court Justices had been intended to be amenable to this provision, the words would have been "judges or justices who . . . ." Compare 28 U.S.C. § 371 (1964).

58. Hamilton seems to have thought that this was the case. "The want of a provision for removing the jndges on account of inability has been the subject of complaint. But . . . such provision would . . . be more liable to abuse than calculated to answer any good purpose." THE FEDERALIST No. 79, at 493 (Lodge ed. 1888) (Hamilton). Yet Hamilton's view was ambiguons for he continues ". . . insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification." *Ibid.*

59. Major, *Why Not Mandatory Retirement for Federal Judges?*, 52 A.B.A.J. 29 (1966).

60. Shartel, *supra* note 23; Comment, 13 U.C.L.A.L. REV. 1385 (1966).

61. Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 355 (1963). Though these cases involved the right to counsel under the sixth amendment, due process requires that criminal cases be tried in accordance with the specifications of the fifth and sixth amendments. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 170 (10th ed. 1948).

62. Comment, *supra* note 60.

63. *In re* Murchison, 349 U.S. 133 (1955).

but it is doubtful that a mentally disabled judge could assure this. Further, though appeal is available, the time and expense of this method are two practical reasons why the possibility of appellate correction probably would not cure the due process defect of such a trial. One writer has suggested that it may be a denial of due process even to assign a disabled judge to a case, if there is knowledge that the judge is not capable of conducting a fair trial.[64]

Moreover, the concept of the "public well-being" indicates that there are historical precedents for removal of the disabled judge. In England, office holders with good behavior patents were apparently subject to a prerogative[65] of the sovereign to remove where governmental convenience required, if the sovereign did not take away the emoluments of office. In the United States public offices generally may be abolished with the consequent removal of the office holders where the "well-being of the public" demands.[66]

In light of this principle and the requisites of due process it would seem that the prerogative to remove a disabled judge, based upon considerations of public well-being, would be lodged somewhere in the sovereign and the only question is the location of that prerogative. The doctrine of separation of powers would prevent its location in the executive or the legislature, but not in the judiciary.

Under the above constitutional theory, when a judge is disabled so that he cannot perform the duties of his office, the judge is subject to removal by judicial proceeding if the proceeding does not take away the emoluments of office. Thus a mandatory retirement statute in which Congress set the retirement age would not be a constitutional solution to the problem since Congress has no power to remove a judge for disability. On the other hand, under this theory, Congress could empower the Supreme Court to set a mandatory retirement age for judges. Whether such a mandatory retirement statute would be a satisfactory solution is another question.[67]

64. Comment, *supra* note 60.

65. *Walter, C.B. of the Exchequer,* 6 FOSS, JUDGES OF ENGLAND 210 (1966); and *Archer, C.J. of the Common Pleas, 7 id.* at 51-53.

66. Crenshaw v. United States, 134 U.S. 99, 104 (1890). Twice Congress has debated the question whether, under the Constitution, Congress had power to abolish judgeship when it abolished the inferior courts to which these judgeships belonged. 11 ANNALS OF CONG. 510-986 (1802); 48 CONG. REC. 7992-8002 (1912). This question, however, is to be distinguished from the question involved here—whether, under the Constitution, the judiciary could be empowered to remove disabled judges.

67. It is submitted that such a mandatory retirement statute would not be a satisfactory solution since it is difficult to set an age which would be right for every judge. Justice Holmes was still alert at 85. On the other hand judges, like other humans, are likely to be incapacitated from causes other than old age.

D. *Constitutional Requirements and Desirable Features of an Improved Alternative*

As with removal for misbehavior the Constitution requires that the procedure for disability removal be entirely within the judicial branch and grant the judge a fair hearing. The procedure would, of course, allow the parties to produce medical evidence at the hearing. A judge removed in this fashion could not be deprived of his salary.[68] In addition, the features of privacy, the power to suspend, and a single continuous body for investigation are desirable.[69] To avoid the appearance of a criminal proceeding, privacy should be extended to cover the entire procedure, unless the judge himself requests a public trial. Experience with the present disability provision indicates that the power to initiate the procedure for disability removal should be placed in a body of judges other than those judges closest to the disabled individual.

E. *Suggestions*

In light of the above discussion, the following suggestions are made for consideration in the drafting of a statute to replace the current statute dealing with the disabled judge.

The Chief Justice should be empowered to appoint judges to a commission which conld initiate a proceeding of the judicial council of the circuit in which the judge sits to remove a judge who becomes permanently disabled from performing his duties. Specific provision should be made that a judge cannot be removed for disability unless competent medical testimony establishes, beyond a reasonable doubt, that the judge is permanently disabled from performing his duties.[70] The judge's salary should continue after disability removal.

In addition to removal, the council and court should be empowered to retire the disabled judge from regular active service, but with the proviso that he be permitted to remain available for appointment to hear occasional cases.[71] All proceedings for disability removal, including those before the courts as well as the council should be private, unless at a certain stage the judge should request public

68. Evans v. Gore, 253 U.S. 245, 252-55 (1920). In holding that a judge holding good behavior tenure was not subject to income tax on his salary the Court said: "the primary purpose of the prohibition against diminution [of salary] was not to benefit the judges, but . . . to promote . . . independence. . . . Such being its purpose, it is to be construed . . . not restrictively, but in accord with its spirit and the principle on which it proceeds."

69. GAL. CONST. art. 6, § 10(b), is available to handle the disabled judge, too.

70. In cases of disability, where there is no question of fault, the judge should be given the benefit of the higher standard of proof. See note 52 *supra* and accompanying text.

71. Compare 28 U.S.C. § 371(b) (1964).

trial. In all other respects the procedure should be the same as the procedure suggested above by which a judge is removed for misbehavior.

IV. CONCLUSION

Impeachment is an inappropriate method for dealing with the removal and discipline of judges who misbehave. It also cannot be used to remove mentally or physically disabled judges. Yet in a system as large and as industrious as the federal judiciary the need to insure that the judges are honest, efficient and competent is obvious. The problem is not new. Statutory alternatives have been proposed to promote judicial honesty and efficiency and to treat the physically or mentally disabled judge. These alternative methods, however, have not proved effective.

Though the question has never been decided by the courts and is not free from doubt, there is a good basis for the view that the Constitution allows statutory procedures whereby the judiciary itself could deal with both the misbehaving and disabled judge. Any such alternative statutory procedure, however, must take into account the requirements of the Constitution and should take into account the experiences of the states which have such procedures.