
Ross: The Government as a Source of Union Power

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Just as successful as the Committee has been with the Attorney General, the author points out that the Committee has generally failed in its attempt to influence the Senate's role in the judicial selection process. Although the Committee, ever since its foundation, has regularly been invited to testify concerning the qualifications of the various candidates nominated by the President, the position of each Senator as the guardian over all lower judicial appointments in his state has seriously weakened the Committee's position. It is only where the Committee can produce clear-cut derogatory evidence relating to the candidate that it will be able to block confirmation of the nomination. As an example of the difficulty of blocking a nomination in the Senate, Professor Grossman details the A.B.A.'s unsuccessful fight to block the highly controversial nomination of Irving Ben Cooper for a federal judgeship in New York.

Possibly the most interesting chapter in Professor Grossman's book concerns his detailed study of the functioning of the Standing Committee on the Federal Judiciary. From painstaking research, he unfolds a clear-cut picture of who is appointed to the Committee, the Committee's decision-making apparatus and how it functions, and the basis behind the Committee's final judgment that a particular candidate is or is not qualified for the federal bench.

In the preface to his work, Professor Grossman states that his book will fulfill his objectives if it raises more questions than it answers. In this reviewer's opinion, the author has admirably succeeded in a most abstract and difficult area. Beyond question, the A.B.A.'s position in an almost completely partisan area is quite unique and unprecedented. Probably the most significant factor presented in Professor Grossman's study is that from the time of its inception, the A.B.A.'s Committee on the Federal Judiciary has found its greatest success in working within the existing framework of judicial selection rather than trying to make over the system according to its own political and social precepts. Although Professor Grossman presents a strong case supporting the A.B.A.'s position in the judicial selection process, the questions that he tries so hard to raise do persist. For example: how strong actually is the A.B.A. in the judicial selection process; how well has it succeeded in carrying out the original tasks for which it was created; does it truly represent the bar in the judicial selection process, and if not, what part should lawyers play in selecting judges; does the information on which the A.B.A. bases its ratings of "qualified" or "not qualified" clearly reflect the legal community's opinion about a particular candidate; and what role should "politics" play in the selection of judges. For any lawyer deeply interested in the workings of judicial selection, Professor Grossman's book, *Lawyers & Judges*, is heartily recommended as a most stimulating and thought provoking experience.

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The Government as a Source of Union Power. By PHILIP ROSS. Providence, R.I.: Brown University Press, 1965. Pp. 320. \$6.50.

The collective bargaining process, since it was injected into the labor-management relations area, has had both supporters and critics. Naturally, labor unions would support the process, and employers and employer organ-

izations would oppose the process. However, it has been made a matter of public policy. This is a fact of industrial life.

The collective bargaining process derives its life from the statutorily imposed duty to bargain. "[G]iven that it is in the public interest to promote collective bargaining, the evidence indicates that the appropriate and effective method of accomplishing the objective is through the establishment and enforcement of the duty to bargain."¹

Not all of the proponents and opponents of this public policy have been those directly involved in the process. Often, scholars who observe public policy make predictions that collective bargaining is failing, and worse, is a failure. Union-oriented scholars, however, assure the readers in their learned articles that the process is a success and is successful. Of late, it seems there have been more critics of the collective bargaining process whose enthusiastic condemnation may have been set off by recent decisions of the Supreme Court in this area, and some critics seem particularly gleeful that the wings of the N.L.R.B., the agencies set up for the policing of the collective bargaining process, have been trimmed by the highest court.

Mr. Harold Davey has stated this position as follows:

In summary, it can be said that the collective bargaining process is working and that the parties in the main give evidence of a genuine concern to make it work. This is not to say that the "creative" examples analyzed in the recent study by Healy and others, referred to earlier, are necessarily typical. Many companies and unions do not appear to be adopting creative or imaginative approaches to bargaining. In those cases where traditional or conventional bargaining still seems to be in vogue, this may be due to management concern over its cherished prerogatives or to union concern that it may be censured for going "beyond" bread-and-butter targets. It may also be due to the fact that the parties have not yet experienced any burning necessity to innovate or to depart from customary procedures and policies. Collective bargaining is a pragmatic business.²

Professors Wortman, Jr., and McCormick pointed out the following:

Today, however, as the scope of collective bargaining continues to expand, the task of defining what is or is not bargainable (or what is a management right) has become increasingly difficult. Since the interpretation of management rights has become an arbitrable issue, managerial prerogatives are again beginning to arise as an important issue in labor relations. As a result, many managers across the country are beginning to re-examine the rights which have been conceded to the union. These rights and privileges are not only being re-examined, they are being renegotiated at the bargaining table through management demands that they be changed or dropped.³

Professor Philip Ross set out in his book to review the development of the public policy which led to the establishment of the duty to bargain. He describes and analyzes the nature of this legal duty. He examines the effectiveness and consequences of this policy, and evaluates the merits of contemporary hostility to the duty to bargain.

Consequently, he begins with the history—the enactment of the Erdman Act, which in 1898 made it a crime for a federal carrier to discriminate

¹ ROSS, *THE GOVERNMENT AS A SOURCE OF UNION POWER* 264 (1965).

² Davey, *The Continuing Viability of Collective Bargaining*, 16 *LAB. L.J.* 111 (1965).

³ Wortman, Jr., & McCormick, *Management Rights and the Collective Bargaining Agreement*, 16 *LAB. L.J.* 195 (1965).

against its employees for their union activities. It seems it was not so considered until the National War Labor Board and other agencies in 1917, by executive order, established a national policy to promote collective bargaining. Of course, great impetus was added years later when in August, 1933, President Roosevelt approved the proposal of an N.R.A. Industrial and Labor Advisory Board to create a National Labor Board. This board had three members, with Senator Wagner as Chairman.

So, the author leads the reader through much history to show that there always was fertile ground from which a public policy, enforcing a duty to bargain between union and employer, could flower. In this historical narrative, the protagonists are shown to express many fears as to the effectiveness of the N.L.R.B. in policing this process, but as the author points out in summary, the premise of their arguments did not stand up.

The duty to bargain was a natural evolution of democratic society. In the beginning, employers refused to deal with the representatives of workers. This refusal was an effective brake on the growth of any labor union. The Commission of Industrial Relations in 1916 pointed out that this refusal rendered the union impotent, and by refusing to permit it to perform the functions for which it was created, rendered membership in a union of doubtful value.

It was found that the direct and proximate cause of the rioting, the looting and the killing of the striking miners in the Southern Colorado mines was the refusal of the operators to meet and confer with representatives of the workers. In other words, the situation and the times called for change in status. But many thought, at that time, that the mere compelling of the employer to confer with representatives of the workers would not guarantee acceptance of the propositions tendered. They could all be rejected out of hand.

Professor Ross finds it enigmatic that such scholar-professors as Taylor, Schultz, Coleman, Gregory, Cox, Dunlop and Northrup doubt the value of an employer statutory obligation to bargain. The author cites a statement by Dr. Clark Kerr who, as head of a committee investigating the duty to bargain, issued a report which stated that "[t]he efficacy of the process in achieving a more ambitious objective—to compel the parties to bargain in good faith—is at best doubtful."⁴ Probably the scholar's doubts stem from the dearth of knowledge of what happens after the parties have been ordered to bargain. One quotation puts it thus: "When the National Gadget Company is directed to bargain with the union of its employees, is the result one big happy family?"⁵

Professor Ross finds that most of the objections stem from an assumption that the employers would not obey the law and the courts would not confer compliance.

This premise does not stand up according to the author, because there was no massive defiance and no widespread evasion of legal responsibilities, and further, the rules set down under Board law and enforced by the courts

⁴ *Supra* note 1 at 5; citing from COMMITTEE FOR ECONOMIC DEVELOPMENT, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 81-82 (1961).

⁵ *Supra* note 1 at 7; citing from Brown, *The Impact of Some NLRB Decisions*, PROCEEDINGS OF THE 13TH ANNUAL MEETING OF IRRRA, publication no. 26, at 18-19 (1961).

proved to be workable, and employers and unions did adjust their behavior in consonance with public policy.

Presidents of the United States have probably habitually injected the authority of their office into labor situations in basic industries, particularly the steel industry. There was President Truman's action, and most recently, there was the more suave action of President Johnson. Many hold that this is an unwarranted interference with the theory and purpose of collective bargaining. This action would probably not be an inconsistency under Professor Ross' scheme.

If the book has an overriding thesis, it is that understanding of public policy in its influence upon behavior can best be reached by examining the specific way in which the law works. In other words, the prime method of approach has been empirical. The author confesses an uneasiness when confronted with generalizations about the behavior of unions and employers which are not only inconsistent with his experience but are not supported by probative evidence.

So, it can be said that a book under the title of *The Government as a Source of Union Power* may present a thesis which is not startling to anyone. Varying opinions have already been formed, and while the book may lead many horses to water, few will drink. The book expresses the author's reverence of the institution of collective bargaining and his respect for the N.L.R.B. which polices this area, and it is an excellent history of a facet of the large industrial relations area.

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The Death Penalty in America. Edited by Hugo Adam Bedau. New York: Doubleday, Inc., 1964. Pp. 584. \$1.95.

Periodically in our country, a great debate arises on an issue which deeply stirs the conscience of a significant part of our citizenry, numerically or intellectually. So it is with the great debate regarding the preservation or abolition of the death penalty for criminal offenses.

To assist in forming a rational, informed opinion on this subject, Hugo Adam Bedau has compiled an impressive anthology analyzing the problem of homicide. He states the arguments for and against the death penalty and marshals the statistical and sociological evidence which would affect one's decision. The anthology concludes with significant case histories in an attempt to graphically emphasize the human aspect of this debate.

"[T]he punishment of death is not cruel, within the meaning of that word as used in the Constitution," the Supreme Court has said.¹ Nevertheless, the Court has also acknowledged that the eighth amendment to the Constitution, which prohibits cruel and unusual punishment, is dynamic and not static in its meaning. In *Weems v. United States*,² the Court said, "time works changes, bringing into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth."³ The question is raised, focused and analyzed

¹ *In re Kemmler*, 136 U.S. 436 at 447 (1890).

² 217 U.S. 349 (1910).

³ *Id* at 373.