

# Reviews

Opinion of the Court. By *William Woolfolk*. New York: Doubleday & Company, Inc., 1966. Pp. 496. \$5.95.

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When the Book Review Editor of The Yale Law Journal asked me to review this book about a Supreme Court Justice, I thought he must be kidding. Anyone who knows me will tell you I don't know anything about law.\* But then the Editor explained to me about The Yale Approach. This Supreme Court Justice was both a pilot and a lawyer, and as far as Yale is concerned the first is at least as important as the second. Besides, the Book Review Editor promised to help me if I got stuck on legal questions. Well, the airline strike was on and I had plenty of free time, so he talked me into it.

This book is the story of an ex-fighter pilot, Paul Lincoln Lowe, who rises from the governorship of Nebraska to an active and influential role on the Supreme Court of the United States. On his way to the Court Lowe flies in and out of Burma several times, pauses for a few love affairs, and finally leads a fight to save the waters of the South Platte for Nebraska. This last battle is still raging when Lowe is appointed to the Court, and he considers staying in the provinces to finish the job. But after a talk with his wife, by whose standards "all greatness could be measured as social prestige" (and whom he will shortly divorce), he accepts the appointment.

The oath taking ceremony in the Justices' Conference room, and in the presence of Justice Edmunson whom Lowe had previously served as law clerk, naturally makes a big impression on Lowe. As he looks around the conference table he thinks, "Felix Frankfurter had sat here." (I called the Book Review Editor to ask about the significance of this reaction, but he just seemed to go to pieces.)

Lowe is not one to wait for the Court to convene to show what kind of judge he will be. Even before the Senate hearings on his nomination, he gives up all other forms of reading so that he can "read law." And at his first session, even before the arguments begin, he quickly calculates that the time given in open court to admitting

\* The reviewer served in the United States Army Air Forces during World War II. Since then he has held a bewildering succession of jobs and is currently flying out of Cambridge, Mass.—Ed.

attorneys to practice would consume three weeks of Court time per year. (It seems that the Harvard Law Review had recently proved that the Court didn't have enough time to do its work.)

Nonetheless, the Court seems to be a jolly place. When Lowe gets there, the Court has before it a case involving the legality of a Civil Service Commission hearing in which a government employee had been discharged on a finding of homosexuality based solely on affidavits, with no chance to cross-examine his accusers. Right off, one of the other Justices, advises him that everyone—Justices, secretaries, clerks and guards—have money in an office pool on whether Lowe will vote with Justice Edmunson or with Justice Shuler on the case.

It seems that Edmunson and Shuler are leaders of opposing factions on the Court. This Shuler is an interesting character, and pretty sharp. In the conference consideration of the Civil Service case he right away points out that the employee had not requested cross-examination at the time of the hearing, but only as an afterthought sometime later after he hired a lawyer, and that even if he had requested it earlier the Commission couldn't have granted it because it had no subpoena power. Shuler is, we are told later, "a brilliant tactician," with a "thin voice," who objects to dissenting opinions on denials of petitions for rehearing as unnecessary advertisement of the Court's disagreements, who thinks the Court is deciding a lot of things it has no power to decide, and "whose reputation for harassing lawyers was legendary." (When the Book Review Editor read this he said, "What do you mean, Frankfurter had been there? He's still there!")

Edmunson, leader of the liberal coalition, is a very different sort. He "succeeded in reconciling law and justice" and "searched for truths on the mountaintops and returned with commandments that benefited and protected those who lived on common ground." In the Civil Service case he brushes aside Shuler's nice legal points with the observation that, "We cannot tie our constitutional guarantees to a calendar or count them lost by a clock." On other occasions he advises Lowe that, "What we have to do is think through to the principles the Constitution stands for, lay them down alongside the present problem, and judge what should be done," and that when the Constitution says "Congress shall make no law abridging freedom of speech," it "means *no law*." (I thought this last statement was a pretty good clue about Edmunson, but when the Book Review Editor read this paragraph he groaned, "My God, Owen J. Roberts is still there too.")

Anyway, Lowe votes with Edmunson on the Civil Service case and on everything else that comes up while Edmunson is there. But that

isn't for long. Within two years Edmunson, an old man, is no longer capable of carrying his share of the load and the question is what is to be done about it. It seems that if he won't resign (he finally does) he can be removed by unanimous consent of the other Justices. (I hadn't known this before, and neither, when I asked him, had the Book Review Editor. I guess my friend from the *New York Times* is right—it's Harvard where they really teach the law.)

There are many other things to be learned from this book about how the Court and the Justices operate. For instance, when Lowe is assigned his first opinion—on the constitutionality of broadcasting music and commercials on a municipal bus—he has an awful time getting it written. He talks to his former law partner about it, tells him that Edmunson thinks the broadcasting should be invalidated as an invasion of privacy, but is not satisfied with the partner's advice that he write the opinion in accordance with Edmunson's views. Then he discusses it with the newspaper woman he will later marry and tells her that Shuler doesn't believe the Constitution forbids the broadcasting. She has a "practically visceral" reaction against such broadcasting and he finally writes an opinion outlawing it which is an "auspicious debut." (This lady, by the way, is a big help to Lowe in his work because she gets inspirational reactions "in the pit of her stomach." For instance, when he is wrestling with the constitutionality of a law forfeiting the citizenship of a naturalized citizen who went abroad to evade military service, he can't get past Shuler's argument that this is a proper exercise of the power of Congress to wage war. But when he puts the problem, and Shuler's position on it, to her, her reaction is that "It does seem to be just another way of punishing him." "*Punishment!*" Lowe exclaims, "The right answer to Waldo Shuler." And the case is promptly disposed of on the ground that Congress can't deal out punishment without due process of law.)

Probably the best insight on how the Court decides cases comes near the end of the book. The Edmunson faction, its leader ill, is beginning to lose ground. Justice Merriam, who has given it the crucial fifth vote, succumbs to Justice Shuler's argument that a school board can fire a Communist teacher because, while the Constitution guarantees the teacher's right to think and believe what he pleases, it does not guarantee his right to be a teacher. ("See?" said the Book Review Editor.)

Now the Court has before it the question of the constitutionality of the death sentence in a rape case. The defendant is represented by Lowe's former law partner and, on Lowe's advice, the lawyer has ar-

gued that imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. In conference the Court divides four ways. Justice Shuler and three others would uphold the death sentence. Edmunson, Lowe and one other are prepared to hold all capital punishment unconstitutional. The Chief Justice is willing to hold it unconstitutional in a rape case. Justice Merriam refuses to vote. After the conference, Lowe goes to Merriam and urges him at least to vote with the Chief Justice so that Edmunson can "leave us on a note of triumph." Merriam is finally persuaded, observing in admiration to Lowe that, "you may turn out to be a match for that fox Waldo Shuler." And Lowe writes a concurring opinion for the complete outlawing of the death penalty which, in his former partner's judgment, is "one of the landmark opinions."

The book concludes shortly after the resignation of Edmunson and near the end of Lowe's second term on the Court. But by now Lowe has charted his course. He has turned down the President's proposal to make him a "superambassador" to the world at large, despite the advice of a newspaper publisher friend that such a job is "the way up the ladder for any ambitious man." He has decided that he will stay on the Court, "which [is] becoming a battlefield where a part of the war for men's minds [is] being fought." He has decided also that Shuler's "vast knowledge," "divorced from a love of justice, resemble[s] cleverness more than wisdom." As we leave him he is reflecting upon a line from Edmunson's letter of resignation: "Everything we know is in process from one state to another and there is no intrinsic enduring value except the search for what is true."

This is a great book. Anyone who wants to find out how the Supreme Court really works should read it. I am grateful now to the Book Review Editor who is responsible for my reading it. But I don't believe he was of much help to me in writing this review.

VERN COUNTRYMAN

The Rand Corporation. By *R. L. R. Smith*. Cambridge: Harvard University Press, 1966. \$7.95.

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This book might have been written by a RAND employee.<sup>1</sup> In fact it practically was. Begun while Mr. Smith was working for the Office of the Secretary of Defense, it was assisted by a summer at RAND as a consultant and six months' employment at RAND after the manuscript was accepted as a Harvard dissertation but before it was completed as a finished book. After three months' leave of absence to polish his work, Mr. Smith returned to RAND where he is now a full-time employee.

All this is explained in the introduction of the book. The reader is not warned, however, that Mr. Smith's thesis adviser, Dean Don K. Price of the Harvard Graduate School of Public Administration, is a member of RAND's Board of Trustees—unless he happens to pick out the name in a later footnote. This is unfortunate; to quote Smith's own analysis, "RAND trustees have helped blunt attacks on RAND by virtue of the esteem critics have felt toward them personally." And graduate students are considerably more impressionable than critics.

It was Dean Price's Science and Public Policy Seminar at Harvard that financed Smith's book-polishing three month leave of absence from RAND, presumably as a kind of fig leaf against the criticism here aired. (As Smith puts it in his book in another connection: "In Government, avoiding the appearance of evil is often as important as avoiding the evil itself." An examination of the differences between the dissertation and the published book reveals that Smith became less shrill in attacking RAND's critics but that there was no evident softening of remarks about RAND.)

The upshot of all this is a totally friendly examination of RAND right down to a notion of Dean Price's ("federation by contract") that is friendly toward all RANDs. Virtually every aspect of RAND is defended in general if sometimes criticized mildly and constructively. (Its status) Rand is "probably unique among the advisory organizations in the range, depth, and general quality of its professional staff." (Its *raison d'être*) "Policy choices . . . have become so complex . . . that no sensible policy maker can operate without extensive research and analytical aids." (Its staffing) "A wide variety of professional skills is indispensable. . . ." (Its hierarchical location) ". . . utilization of expert ad-

<sup>1</sup> RAND, a non-profit research organization historically devoted to Air Force problems, has long been the most widely discussed of American "think tanks."

vice in the behavioral sciences will be positively influenced by location of the advisor outside the organization of whose procedures or policies he is suggesting innovation." (Its concept) "It is perhaps not too much to say that the relationship between RAND and the Air Force here presents something of a paradigm for a mutually beneficial sponsor-advisor arrangement." (Its independence) "Rand studies are the products of individuals, and reflect the variety of outlooks characteristic of a group of diverse talents." And, finally following Price, "Used properly, the advisory institution like RAND can contribute to sensible policy decisions and can help to maintain the dynamism of America's pluralist governing system."

Nevertheless, the book fully exposes to a careful reader the timidity of RAND; thus:

In a period of extreme external pressure, for example, it is not difficult to imagine that RAND management might attempt to control the publication by RAND researchers of unclassified articles in the open literature or seek to regulate closely the research staff's freedom to give speeches to academic, industrial and other non-RAND audiences.

Smith further testifies to "some informal feeling" that in recent years "management has gone about as far as it can legitimately go in overseeing the research staff's external contracts."

Again, Smith explains RAND's fear of answering Congressional inquiries for information:

The possibility of "end runs" around an executive sponsor to Congress could make for intricate and troublesome problems in the sponsor-advisor relationship. RAND is acutely, *perhaps overly*, conscious of the dangers of this tactic; it has strived to avoid any congressional contacts either at the staff or management level that would lessen sponsor confidence in the organization. (Emphasis added.)

How tame can you get?

RAND apologists always stress the importance of caution in dealing with the Air Force—especially in the past when RAND was weak. But it is common knowledge that RAND's caution has grown with its influence. Buried in a footnote, Smith says,

. . . it seems to be true that in recent years RAND publications have been subjected to more rigorous pre-publication criticism and review before being released to the client or public.

Evidently, RAND solicitude for its client's confidence has not been the product of weakness only.

Management justified its behavior, in part, by noting that the Air Force gave RAND better working conditions, "continuity of support,"

spared it “brochuremanship,” and made less difficult “scheduling work, assigning personnel to specific projects and meeting deadlines.” To advise at levels higher than the Air Force would: draw RAND “inevitably closer to the center of defense policy making”; probably require “fundamental changes in the organization’s character”; and raise “difficulties in gaining access to sensitive information.” It sounds like a woman kept by a suspicious old man explaining why she doesn’t think it worth while trying for a more attractive lover and why, most certainly, she has no intention of going back on the street.

The fact is that RAND’s association with the Air Force has been one of preference, not tactics—the preference of its leadership. Collbohm, who was President from the start until early this year, told the Holfield Committee in 1962 that he was against building up a diversified operation and that the Air Force had started “right out” with a “philosophy and policy as to how to handle the type of an organization that RAND is, that is practically perfect.” He thought it would be “very, very undesirable” for the country as a whole, if this relationship should be changed.

This was totally unnecessary. Surely after 1960, at least, RAND did not have to fear Air Force budget cuts; the head of their economics department, Charles Hitch, had become Comptroller of the Defense Department. McNamara himself knew immediately, through Hitch and others, how important RAND was and could be. From that time, surely, RAND management was revealed to be more than cautious but to have a loyalty to the Air Force that was not directly transferable to the Defense Department as a whole, or to the nation itself.

More important, partly because it has served the nation’s interest only through the Air Force’s interest, RAND has committed the important sin of thinking small. Notwithstanding all the drama of secrecy, war, generals, and cross-country plane trips, most RAND papers are not consonant with what should have been its high purpose of shaping national defense policy in gross and important ways. Groups devoted themselves to Aerodynamics, Fluid Mechanics, Applied Mechanics, Information Processing, Electronics, Guidance and Control, Human Engineering, Applied Mathematics, Meteorology, Navigation, and Nuclear Physics. In most of these cases the subject would not have been studied so intensively had RAND been attached to either of the other two services; this reveals the particularity of RAND’s perspective. There were never more than a substantial minority of RANDites considering either grand strategy, or its important elements (such as general systems analysis of defense problems). As has been stated often

enough, RAND spent far more time worrying about aerial refueling of bombers than about what their targets ought to be. Their thinking was far too often operational rather than strategic.

Smith mirrors RAND management in failing to recognize the relative bankruptcy of the policy of working from within. In so doing, both continue to parrot the standard RAND list of accomplishments which starts with intangibles, mentions dynamic programming and ends with Wohlstetter's strategic basing study. But obviously the central achievement of RAND was to supply Secretary McNamara with the men, the intellectual authority and confidence, and the analytical tools with which to remake Pentagon planning. Compared to supplying McNamara with his lieutenants and tools, RAND research, in and of itself, was very unimportant indeed. It turned out to be better, as far as RAND and the Air Force was concerned, to "beat em" rather than "join em." It was the end-run that succeeded big. From the pinnacle of higher authority, idea after idea was then forced upon services by former RANDites—ideas that would otherwise have been ignored despite years of the most sympathetic briefings from the most friendly of supporters. More important, the services themselves were also forced to go about their own business in a more sensible way. They had to change their own reports and style.

Obviously, "the name of the game" in defense is to offer one's advice at the highest possible effective level. Consider the nineteen fifties' "bases" study which noticed that western bases near the Soviet Union for the purpose of quick bomber attack were also near the Soviet Union from the point of view of Soviet surprise attack. To persuade the Air Force that its bombers might become vulnerable required what Smith calls a "saturation" campaign of briefings, Ad Hoc Air Force committees, reviews, interactions with on-going Air Force feuds over bomber procurement, pockets of resistance and all the rest. There is no cure for this sort of nonsense except authority at the top and RAND should have known it.

RAND's relations with the Air Force are now deteriorating under the impact of RAND interest in diversification. ("RAND and the Air Force find themselves in something of the position of an older married couple with the honeymoon over—yet without sufficient cause to consider a separation.") Only 70% of RAND work is now Air Force financed. The Air Force seeing RAND develop "an intimate advisory relationship" with the Office of the Secretary of Defense, is having "second thoughts" about its "confidential lawyer-client tie" with RAND. Some Air Force officers are said to be more "circumspect" in



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dealing with RAND, angry at RANDites who have been too zealous in selling their research to others, and wondering if they should continue to contribute a lion's share of RAND funds. Meanwhile, RAND's new President, Henry Rowen, is said to have been chosen for his ability to lead RAND into new directions including some as far outside defense problems as poverty and crime.

Perhaps RAND has a future consonant with its hopes and self-respect; perhaps not. But its own image of its past, faithfully reproduced in this book, is entirely too complacent. If there were indeed only one RAND, it had a responsibility to spend more of its time on the real issues and to fight for them not only in, but out of, the Air Force. Perhaps in the absence of the McNamara revolution, we might have considered RAND methods the only ones and their success the best possible. With it, however, one wonders if RAND circumscribed unnecessarily its goals and hopes and learned too easily to accommodate those it would influence.

JEREMY J. STONE†

*The Stuart Constitution, 1603-1688.* By *John B. Kenyon*. Cambridge: Cambridge University Press, 1966. Pp. 523. \$4.95.

*The Growth of Responsible Government in Stuart England.* By *Clayton Roberts*. Cambridge: Cambridge University Press, 1966. Pp. 466. \$13.50.

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The constitutional history of England in the seventeenth century is characteristically written in terms of revolutionary conflict. The Restoration era is a formless interlude and the events of 1688-89 a necessary epilogue. S. R. Gardiner is largely responsible for the emphasis on revolution and by default for the comparative neglect of the latter portion of the period. Emancipation from his grand conception of the Puritan Revolution has proceeded fitfully, while the masterful narrative completed by Firth and supplemented by his own classical collection of documents has furnished an unrivaled groundwork for all subsequent inquiry. No similar basic pattern exists for the reign of Charles II, and neither Macaulay nor Trevelyan ever dominated serious schol-

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arship on the last Stuart reigns as Gardiner did that on the first two and the Interregnum.

Two new titles, issued almost simultaneously by Cambridge University Press, add to a growing list of works which reject, in part or in whole, the themes of Gardiner and his followers. They are Professor J. P. Kenyon's *The Stuart Constitution* and Professor Clayton Roberts' *The Growth of Responsible Government in Stuart England*. Both emphasize fundamentally secular issues and evolutionary changes. Both relate the events of the first decades to later developments. Professor Roberts devotes two-thirds of his pages to the years after 1660.

Professor Kenyon's book is a collection of documents with an introduction and commentaries. It is a companion to the volumes of G. R. Elton and E. N. Williams entitled respectively *The Tudor Constitution* and *The Eighteenth Century Constitution*. He has chosen his documents admirably and thereby produced a volume which will place students of the period in his debt. More important is the historical analysis the documents are designed to illuminate.

The title may have been demanded in the interests of symmetry within the series. Professor Kenyon takes it seriously. That is to say, he makes no concessions to the traditional view of the seventeenth century as an era of constitutional collapse in which conflicting versions of what the constitution should be were refined into a new consensus only after civil strife had been consummated in revolution.<sup>1</sup> There was no revolution and there was consistent agreement on constitutional fundamentals. Most Englishmen whose opinion was worth consulting would have agreed in 1610 or in 1690. The "ancient government," which alone they would have supported, was a monarchy buttressed uniquely by the English law.<sup>2</sup> Its functions were to maintain order, to

1. Professor Roberts occasionally employs the idiom of revolution. See, e.g., CLAYTON ROBERTS, *THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND* 75, 118 (1966) [hereinafter cited as ROBERTS]. But he is manifestly not talking about Gardiner's "Puritan Revolution." Given the prevalence of the idiom, Professor Kenyon may be overly sanguine about the demise of the Gardiner school. See JOHN P. KENYON, *THE STUART CONSTITUTION* (1966) [hereinafter cited as KENYON]. He quite unfairly singles out one recent title as evidence of lingering traces of outmoded views. The book in question, W. B. MITCHELL, *THE RISE OF THE REVOLUTIONARY PARTY IN THE ENGLISH HOUSE OF COMMONS, 1603-1629*, merits criticism on other grounds. If titles are in question, to say nothing of underlying assumptions, there are more worthy targets. A revolutionary party could exist, though it never succeeded in bringing off a revolution. *But cf.* the following representative list: W. HALLER, *LIBERTY AND REFORMATION IN THE PURITAN REVOLUTION* (1955); P. HARDACRE, *THE ROYALISTS DURING THE PURITAN REVOLUTION* (1956); C. HILL, *THE CENTURY OF REVOLUTION* (1961); C. HILL, *INTELLECTUAL ORIGINS OF THE PURITAN REVOLUTION* (1964); V. PEARL, *LONDON AND THE OUTBREAK OF THE PURITAN REVOLUTION* (1961); H. TREVOR-ROPER, *SCOTLAND AND THE PURITAN REVOLUTION* (1963). Gardiner is by no means to be left to the historians of historiography.

2. Professor Kenyon calls the opponents of monarchy in the early seventeenth century "for the most part sturdy reactionaries."

be respectful of rights and to safeguard the nation from foreign injury or assault. Rulers were expected to be prudent, efficient, well advised, and wary of abuse of power. No substantial segment of the governing classes at the beginning of the century or at its end desired to overthrow the established order. There was equally little enthusiasm for significant changes in structure or for admission of new social classes to a share in the exercise of power. Radical notions appealed only to a few extremists like Eliot or to noisy religious minorities. The confusions of the Civil War created the opportunity for the articulation of republican and wildly democratic views. Ultra-absolutist views made their appearance as well. None of them took a firm hold, nor did they gain the same hearing in the upheaval of 1688. There were fewer advocates of truly radical positions in 1689 than in 1649 or 1629. To speak of revolution in such a context is to indulge an anachronism.

The Civil War, moreover, was not caused by zeal for religious reform. It was engendered primarily out of political conflicts, and "in the sphere of practical politics the disagreement essentially lay in how to operate a constitution of whose nature few had any doubts."<sup>3</sup> The most persistent problem concerned religion but not Puritan Reformation. On the contrary, it was the menace of Catholicism and the Counter-Reformation. The Stuarts could not be permitted the free exercise of traditional royal initiative in foreign affairs because they could not be trusted to support European Protestantism against Catholic threats. Indeed, there could be no assurance that they would not divert English resources to the uses of France, Spain or the Empire. At home the prospect that a court-connected ecclesiastical hierarchy might subvert the church by infiltration was no less terrifying. Until the accession of William and Mary, the Stuarts never succeeded in allaying the suspicion that they or their intimates designed a return to Rome led by an ardently pro-Catholic episcopate.<sup>4</sup> The King, therefore, must not have free access to the habiliments of war; his diplomacy must be carefully scrutinized and the clerical establishment must be policed.

No direct frontal attack on royal authority was ever launched to realize these aims. Men quarreled not with royalty but with abuses. Persuaded that Charles I would return to the practices to which they objected as soon as he felt free to do so, the most militant of his opponents at length chose to fight against the King although not against kingship. They continued to try to devise means to control the ruler,

3. KENYON 11.

4. *Id.* at 2, 3, 89, 190.

not to supersede him. In the meantime, they could not permit him to command the militia. Mounting hostility to papist innovations failed to find expression in reform legislation until war forced the most staunch defenders of the *status quo* to withdraw from parliament in defense of the King. Thus, the execution of Charles in 1649 marked the fulfillment of no revolutionary program either religious or constitutional. Even the governmental experiments of the Interregnum were notable for their restatement of the old ideal of a supreme magistrate administering government with the assistance of a new version of the privy council.<sup>5</sup> More remarkable was the composition of Cromwell's parliaments. The assembly nominated by the God-fearing congregations, known to posterity as the Barebones Parliament "contained a majority of 'normal' parliamentary gentry" who were more fearful of radical changes than they were ambitious to hold their places. There was an unusually high proportion of country gentry in the next parliament, a body so obstreperous that Cromwell felt forced to dissolve it before it had sat for the five full months stipulated in the Instrument of Government.<sup>6</sup>

The section of Professor Kenyon's book covering the period from the return of Charles II through the Revolution of 1688 is entitled "The Constitution Restored." The troublesome problems were the old ones: Catholicism, royal foreign policy and finance. Though all contributed to the removal of James II, the first was of paramount importance. That cause of controversy, at least, was soon to be laid to rest. The stubborn Catholicism of the Old Pretender destroyed any prospect of his succession in 1714 despite Queen Anne's family loyalties and her distaste for the House of Hanover. She would only countenance a Protestant on the throne. The Catholic threat ceased to be a political issue. What else was determined by the events of 1688-89 is less obvious.

Professor Kenyon employs a well chosen and strategically placed quotation from Halifax as a reminder that continuity and change are the essential ingredients of the constitution. "Without suiting itself to differing times and circumstances it could not live."<sup>7</sup> That basic assumptions about the nature and function of government in the Stuart age were similar to those prevalent in earlier centuries does not imply a static constitution. Growth and adaptation were constant. Because of

5. Cf. The Instrument of Government, 1653, and The Humble Petition and Advice, 1657. KENYON 342, 350.

6. KENYON 333, 334, 343.

7. *Id.* at 359.

the severity of political controversy in the seventeenth century the process of change was often turbulent; and continuity was violently ruptured by complete collapse during the Civil War and the Interregnum. The old system was so skillfully patched together at the Restoration, however, as to create the illusion that the constitution had merely been held in abeyance for nearly two decades.<sup>8</sup> The legislation approved by Charles I retained its force. That to which he had never consented, including the removal of the militia from royal control, was expunged from the statute book and insofar as possible from memory. It is inconceivable that the events of the most dramatically exciting years in England's history should have left no lasting imprint whatever on the constitution. The indelible traces were as slight as the deliberate efforts of men could make them.

The legislation of 1641 had stripped away the instruments through which Charles I was held to have abused his prerogative. It had abolished prerogative courts, especially Star Chamber and High Commission.<sup>9</sup> It had assured triennial meetings of parliament. It had abolished practices for supplementing royal revenue by revival and extension of ancient devices. Royal command over foreign affairs and over the military forces of the kingdom were unaffected. When Charles II and James II gave cause for a revival of the old fears of alliance with, or subservience to, continental Catholicism the old sources of conflict were starkly exhibited again. With James driven from the throne and the leaders of the nation more free than they had been for forty years to define the terms under which monarchy should operate, no specific limitation was placed on the most cherished prerogative rights. The attack upon the King's supremacy in dangerous areas was always furtive. His military powers were curtailed by rigorous fiscal policy.<sup>10</sup> The unique initiative in foreign policy was wrested from him by a long series of political maneuvers evading any direct challenge to his position.

This is an impressive case, put by no one heretofore so bluntly or so concisely as by Professor Kenyon. It may be objected that it gives inadequate recognition to the vastly altered relationship of crown and parliament; that is to say, King and Commons, by 1714. The answer is, of course, that the shift was the effect of the process of change operating through an entire century. It was the fulfillment of no grand de-

8. *Id.* at 192.

9. It has long been understood that these courts were not merely, or even primarily, instruments of oppression. Professor Kenyon calls attention to their solid services as well as to reasons for unpopularity. *Id.* at 117, 176.

10. *Id.* at 3.

sign. It was the end result of a variety of responses to a host of problems interacting in a fashion which no one could have designed. The one overwhelming requirement was for unity in a government whose disparate elements had been permitted to get so badly out of hand as to work at cross purposes with one another. "The natural bent of European government [in the seventeenth century] was toward enlightened despotism and centralization, which involved the sacrifice of the medieval estates or representative assemblies." The parliament at Westminster, says Professor Kenyon, may well have appeared to be following its counter-parts in France, Spain and Brandenburg into oblivion. It might in fact have done so had the Stuarts possessed "a paid bureaucracy in the provinces and a standing army."<sup>11</sup> Perhaps the ghost of Gardiner lurks behind his speculation. Parliaments were not inevitable opponents to royal centralism. Wentworth in Ireland and Lauderdale in Scotland learned how to make them the instruments of authority, as Professor Kenyon recognizes. The important point, however, is the unity of the government. It was achieved in England in the form of a King who worked perforce in accord with the leaders of parliament rather than in the form of a parliament which worked perforce in accord with the King. It is hard to imagine that it could have been otherwise.

I am content to agree with Professor Kenyon that the Puritan Revolution is a creation of historians, not a fact of history.<sup>12</sup> On the other hand, the breakdown of the 1640's was much more than a political failure. It is not to be explained primarily in terms of fear of Catholics or suspicion about foreign policy. The conflicts and dissension in and out of parliament indicated what the events of 1641 and 1642 were to prove: that there was no adequate constitution to provide the stable framework for mediation of political, religious, economic and other conflicts without resort to violence. The Civil War cannot be attributed simply either to the folly of Charles I or the ambition of his enemies. The job of patching the old system together, accomplished in 1660, was in many ways remarkable. But it left vital sources of tension unresolved. The threat of another dissolution was, therefore, never really removed until after 1714, although the memory of the Civil War was a powerful deterrent to excess. Some of the principal causes of conflict were settled in the early years of the Restoration and progress

11. *Id.* at 1. This is unlikely. There is no evidence that the Royalist program involved a permanent destruction of parliaments. Charles I, and certainly Strafford, looked forward to a time when they would be useful.

12. Cf. PETER LASLETT, *THE WORLD WE HAVE LOST* 158-62 (1965).

toward stability was rapid after 1689. Much as I admire Professor Kenyon's book, the authentic Stuart Constitution remains as elusive to me as the authentic Puritan Revolution.

Professor Roberts is concerned with a more limited theme, though it has broad implications for the whole history of the constitution. His title might be rephrased "The Rise and Decline of Impeachment," for this is, in effect, the story he tells in detail. He writes, too, of the development of mastery in the arts of parliamentary management, but for the most part his bulky volume is concerned with the fashion in which majorities in Commons in the seventeenth century brought to book royal ministers who displeased them. His epoch begins with the refusal of James I in 1610 to accede to a parliamentary request to attack his ministers. It closes in 1717 when the Earl of Oxford's trial demonstrated that impeachments were "unnecessary because the purpose for which they had been voted in the past—to make ministers responsive to the will of Parliament—had been achieved."<sup>13</sup> The parenthetical phrase is crucial, for though Professor Roberts also judges impeachments to have become obsolete and unjustifiable by 1715, verdicts on both obsolescence and justification hinge upon purposive use.

The history of impeachment is clearly outlined. First employed under the Stuarts to punish corruption, it shortly served as an instrument for assault upon ministers whose recklessness or design threatened the stability of the realm and the well-being of its most influential citizens. Frustration by Kings or Lords did not destroy the value of precedents. The great enemies of the Caroline Commons fell by other means; Buckingham to the assassin's knife and Strafford and Laud by acts of attainder. If impeachment failed to curb absolutism it became under Charles II effective in partisan conflict. The first Duke of Buckingham had engineered the impeachment of the Earl of Middlesex, only to have the implement he had employed turned furiously against him. His son headed the faction which brought about the impeachment of Lord Chancellor Clarendon. The enemies of the first Duke were persuaded that they were delivering the nation from a tyrant. The collaborators of the second Duke knew the prerequisites of the fallen minister and that vindictiveness assured accession to the position. Their success encouraged imitation.

The chief sufferer was the crown. Charles I and his father had contended that they, of right, should be arbiters not merely of the efficacy and wisdom of the acts of their servants, but of their legality as well.

13. ROBERTS 413.

George I confessed his inability to protect from the hostility of parliamentary majorities those ministers who had committed no offense whatever except to assist in the execution or administration of governmental policy. He may have been indulging a not unreasonable petulance when he described his ministers as being responsible to the nation. But he was quite accurate in saying that he could not protect them. Doctrines that seemed outrageous to Strafford and a majority of the Lords in 1641 were now accepted without question. By 1715 it had become clear that the King could not save his servants from parliamentary attack, either by royal pardon or by assumption of personal responsibility for policy and its execution. No more could royal servants find security in the anonymity of collective conciliar responsibility. The crown's freedom of action and its capacity to command allegiance had been substantially curtailed.

If no Stuart ruler surrendered authority without struggle, long run defeat at the hands of the politicians was inevitable. Impeachment, transformed from the buckler of liberty into the tool of faction, became discredited. In the meantime, however, more subtle political devices were utilized to maintain limitations on the independent prerogative. Men refused to serve with others whom they disliked, or to support, even tacitly, policies of which they disapproved. Their motives were mixed, but they were inclined to be swayed by prospects for future position or by ambition to humiliate potential political opponents rather than by concern for welfare of the state. Rulers, particularly after the revolution of 1688, preferred official families composed of men of diverse connections united in a common loyalty to the throne. They were frustrated by the politicians' insistence on working only with their friends. Thus royal freedom of choice and command on allegiance was further weakened, the more so in cases of men or cliques who possessed great influence with the Commons.

The effects, then, of the great conflicts of the early seventeenth century and the somewhat less inspiring political maneuvers of the post-Restoration era were a substantial circumscription of royal power and the establishment of ministerial accountability for conduct of public affairs. But does this constitute a growth of responsible government? To affirm that men who participated in unwise, unfortunate or unpopular decisions could be prevented by parliamentary pressure from continuing to serve the government is not to ascribe to parliament either a positive role in the formulation of policy or consistent control over the executors of policy. The question turns on viable definitions of the concept of responsibility.



As Professor Roberts phrases it, "I shall use 'responsible government' to mean all those laws, customs, conventions and practices that serve to make ministers of the King rather than the King himself responsible for the acts of government, and that serve to make these ministers accountable to Parliament rather than to the King . . . . In the thirteenth century the King assumed responsibility for the actions of government and the ministers of the King answered *to him* for their conduct. In the reign of Queen Victoria ministers of state assumed responsibility *for* what the government did, and answered *to Parliament* for the wisdom of it. The history of responsible government is the history of both these transformations."<sup>14</sup>

What was the relationship of the one hundred fifteen years following the accession of James I to this history? No one would argue that the process of transformation was in that time completed. Professor Roberts identifies 1841 as the terminal date. What then? Professor Roberts' rhetorical conclusion is unambiguous: "Given an island secured by a navy, given a Crown dependent on parliamentary revenues, given a people impatient of injustice and unhappy at constraint, given a succession of Kings inept at governing and insensitive to the wishes of their subjects, and given a race of politicians eager to secure office by proving that they could govern in the Commons, no other result could be expected than a struggle for the sceptre that would issue in the triumph of responsible government."<sup>15</sup> The crucial conditions presumably were fixed before the House of Hanover moved to England. The developments of the eighteenth and early nineteenth centuries were only incidental.

These conclusions may not seem obvious to the student of English politics in the Hanoverian era or to the student of Anglo-American institutions who recalls that the seventeenth century left no inescapable legacy of responsible government in the United States. To almost anyone living in Robert Walpole's generation it would have been incomprehensible that the history of the preceding century had determined the future in such a way. It must be noted, of course, that men rarely possess much foresight concerning the long-term effects of their own acts or those of their immediate forebears. It is important, nonetheless, that the ministers of George I were still the King's ministers and that no one whose opinion counted for much thought they should be anything else. Parliament might drive a man from power, but the favor

14. *Id.* at viii.

15. *Id.* at 446.

of the King was absolutely essential either to gaining or holding power. Royal favor might be bestowed for a variety of reasons. Not least among the talents gratifying to the King would be the capacity to manage parliament. This implied an awareness of the limits beyond which the Commons could not be led, as well as a mastery of the arts of cajolery, deception, jobbery and appeal to prejudice. Mid-eighteenth century ministers, like Carteret, could perhaps be somewhat cavalier about the pains taken to court the Commons. As a general rule, however, it was prudent, indeed necessary to make certain that no fears of national betrayal spread through the House. This meant cultivation and manipulation; it did not mean responsibility. On this point, I am sure Professor Roberts and I agree. Where we differ is on the question of the inevitable emergence of responsibility.

It is unfortunate that editorial decision has deprived us of an extension to the end of the Stuart era of Professor Kenyon's more impersonal institutional analysis. Exclusion of the reigns of William and Anne is hardly appropriate to an examination of *The Stuart Constitution*. He only remarks that whoever gained by the Revolution of 1688 "it was not the House of Commons."<sup>16</sup> It may be suspected that he would have found the essential features of the constitution in 1714 to be what he defined them as being in 1688. Challenges had been met; threats had been overcome; adjustments had been made. The old ruling class had fumbled and fought through to a *modus vivendi* with which it was almost entirely contented. Thereafter political controversy, religious dissent and all manner of competition could reach serious proportions without threatening the essential tranquility of the state. Some observers, perhaps mistakenly, could discern the lineaments of an almost perfect balance of power. At any rate, a drive for ultimate monopoly of all of the machinery of government appeared to be as remote as an overturn of the social order. Of that there were no premonitory signs at all.

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16. KENYON 4.

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