Book Reviews

Michael W. Balfe
Michael A. Weinstein
Paul C. Brophy

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Book Reviews


Great Court-Martial Cases is a fascinating account of 12 military trials which changed the course of military justice and in some instances of the nation itself. The carefully selected cases start with the trial of Major General Benedict Arnold in 1779 and end with that of Lieutenant William L. Calley, Jr. in 1971. Until the Freedom of Information Act of 1967,¹ the transcripts of these cases were not available to the general public so the book presents for the first time accounts based on the records of the trials of such notables as General George Custer, General William (Billy) Mitchell, and Sergeant Matthew C. McKeon.

The discussion of each case is preceded by a prologue to place it in the context of its time, and followed by an epilogue to place it in the context of history and jurisprudence. This unusual format gives the book continuity and points out certain similarities in trials which span a period of almost two hundred years.

Students of history will be interested in learning some of the heretofore unreported details of the trial which may have caused Benedict Arnold to become a traitor.

In 1807 the United States Naval ship, the Chesapeake, was attacked by a British warship. When Commodore James Barron surrendered the ship because the Chesapeake’s guns could not be made operable in time to fight back, he was tried by a United States Naval court-martial, convicted, and suspended from the Navy for five years. In 1968 Captain Lloyd Bucher found his ship, the Pueblo, in almost identical circumstances. The Pueblo, which was not itself a warship and had only two machine guns aboard, was surrounded by armed North Korean warships. Although Captain Bucher surrendered and the ship and the men were taken prisoner, the United States Navy did not even reprimand Bucher for doing so. Mr. DiMona points out how the change in public sentiment from 1807 to 1968 toward “giving up the ship to the enemy” was the real reason for the difference in the outcome of these cases.

† Former reporter for the Washington Post and writer of television news and documentaries.

Few people realize that the legendary hero of the Little Big Horn, General George Custer, was convicted of what amounted to an ordinary AWOL and was suspended from his rank of Major General for a year.

In 1956 Sergeant Matthew C. McKeon took his marine recruits on a night march into the swamps of Parris Island. When some men were drowned and others injured public indignation over the incident became so great that the Marine Corps made public statements condemning Sergeant McKeon's training procedures. His court-martial established that those procedures were very typical of established marine training at the time.

In 1967 Captain Howard Levy, a dermatologist, was tried for refusing to teach medical procedures to Green Berets because he considered them combat troops rather than medics. Until that trial, the question of whether there was any freedom of speech in the military was largely unresolved. Although it is still not entirely resolved, Mr. DiMona points out that in the aftermath of that trial more was done to define the parameters of that right in the military context than ever before.

Without question the most controversial court-martial in American history was that of Lieutenant William Calley. Mr. DiMona's coverage of the case and its aftermath are interesting and pertinent.

The basic theme running through the book is that military justice is subject to one outstanding flaw, which is command influence. Command influence is the evil unique to military justice whereby the results of judicial proceedings are improperly influenced by a person or persons superior in military rank to the judge or jury or both. The problem of command influence arises from the dilemma created by the need, on the one hand, for the military to use its judicial machinery to assist in maintaining strict discipline and by the objective, on the other hand, of providing a system which insures justice and protects the rights of persons subject to the system. While command influence has been a problem in the administration of military justice during some periods of time and in some commands, it was identified years ago by the military itself and by the Court of Military Appeals as something that had to be eliminated from the system and numerous steps were taken to do so. The Military Justice Act of 19692 (UCMJ) topped off these efforts by establishing a military judiciary which is almost entirely independent from the rest of the military. Since then most defense counsel in military cases have considered it a dead issue and have not even bothered to raise it.
Mr. DiMona concludes his book by saying:

But the aftermath of the [Calley] trial showed that the system is still not perfect, still does not work, and perhaps can never function consistently until the factor of command influence is eliminated.³

Mr. DiMona's preoccupation with command influence permeates his book to the extent that the reader is left with the impression that it is still a major problem and that until it is solved there can be no justice in courts-martial. In actuality, under the present system the possibility of command influence has been practically eliminated. Since it has not been completely eliminated, Congress should amend the UCMJ to provide for an independent judicial system in the military somewhat along the lines suggested by Senator Birch Bayh in a recent proposal.⁴ Such a change would eliminate the appearance as well as any remaining possibility of command influence. But by indicating that there is no justice in courts-martial, DiMona himself does a grave injustice to a system which has in many respects been far ahead of the federal and state criminal justice systems in safeguarding the constitutional rights of defendants and in other respects. To name a few examples, the military provided defense counsel and paid the expenses of conducting the defense whether or not the defendant was indigent long before the United States Supreme Court concluded in Gideon v. Wainwright⁵ that indigent persons accused of serious crimes were entitled to have defense counsel appointed and paid for by the sovereign. Likewise, the court-martial system required that a defendant be warned of his rights before being interrogated by the police before Miranda v. Arizona⁶ extended the same protection to civilian defendants.

Great Court-Martial Cases presents perhaps for the first time accounts based on the trial transcripts of some of the most significant courts-martial in the history of the United States in interesting and very readable form. It will make enjoyable reading for any student of history, of the military, or of criminal justice even if the author's preoccupation with one issue tends to undermine the accuracy of some of his conclusions.

Michael W. Balfe*

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Hanna Pitkin’s widely acclaimed, *The Concept of Representation*, which was first published in 1967, has been recently reissued in a paperback edition. Upon its initial publication, the book attracted scholarly notice as a thorough historical and analytical treatment of the idea of representation, and as an excellent example of the strengths and weaknesses of ordinary language philosophy. Perhaps after the passage of five years, marked by the appearance of deep political conflicts, militant radical movements espousing notions of representation at variance with liberal orthodoxy, and a return to ambitious speculative political philosophy, Pitkin’s work requires reconsideration from the viewpoint of the present public situation.

For the reader who has followed ideological transformations in the United States over the past five years, the most striking characteristic of Pitkin’s work will be its faithful reflection of the consensus liberalism of the early 1960’s and its adherence to the assumptions of structural-functional social science. Despite the author’s claim that she is illuminating “the single, basic meaning of representation,”¹ her discussion has a distinct ideological bias. According to Pitkin, the historical problem underlying contemporary confusions about the meaning of representation is the decline of widespread belief that political questions have correct answers which can be found. While for Edmund Burke there were objective and identifiable interests which a representative had an obligation to promote, in the contemporary era “political questions are inevitably controversial ones without a right answer, interests are the interests of someone who has a right to help define them, and no reliable elite group exists in society.”² Pitkin’s analysis of the concept of representation can be understood as an attempt to revive the notion that representatives should promote the objective welfare of their constituents, and to make this notion acceptable to the contemporary mind. She implies that in the absence of such a concept, representation becomes a matter of satisfying subjective preferences, which may in turn be manipulated by appeals to irrational motivations.

† Professor of Political Science, University of California (Berkeley).
2. Pitkin 189.
Pitkin fails in her enterprise, because she does not provide content to the concept of public interest. She states only that when a representative acts in a manner contrary to the wishes of his constituents, he is obligated to explain his conduct to them. She does not state what would constitute a good reason for deviating from constituent preference, except the claim that the constituent would agree with the representative if he only had more information. This kind of claim would not seem to take care of differences between representatives and constituents about desirable ends, but would only apply to debates about appropriate means. Despite these problems, however, Pitkin is prepared to defend current representative governments. Recognizing widespread constituent apathy, misinformation, and value conflicts she argues:

Political representation is primarily a public, institutionalized arrangement involving many people and groups, and operating in the complex ways of large-scale social arrangements. What makes it representation is not any single action by any one participant, but the over-all structure and functioning of the system, the patterns emerging from the multiple activities of many people. This argument transfers responsibility for the public interest from particular individuals to the anonymous functioning of a social system. It leads Pitkin to conclude that "[e]ven if most people vote in an irrational and uninformed response to primary group pressures, this does not preclude the system as a whole from displaying a degree of 'rational' response." Where human beings are incapable of defining the substance of the public interest, they may always hope that the "system as a whole" will do it for them. The consequences of such a position are profoundly conservative. There are no standards for evaluating how well the system functions and, even more important, no incentives for expanding intelligent political participation. With regard to public policy, the constituent "need not express his wishes, or even have formulated any, but he must be capable of doing so; when he does, his wishes should be fulfilled unless there is good reason (in terms of his interest) to the contrary." In consequence, those who are most articulate and who have been able to formulate their desires with the greatest clarity will have their way more frequently than the less

3. Id. at 221-22.
4. Id. at 224.
5. Id. at 232.
articulate and more confused. This is a prescription for elitism, and stems from Pitkin's failure to take account of the educational, economic, and cultural requirements for responsible representation.

The roots of Pitkin's failure are in her interpretation of the differences between the present era and Burke's age. Perhaps the most significant change since Burke's time is not the absence of belief in a natural law interpreted by a "reliable elite group," but the inability of elite groups to sustain the belief of broad masses that the various interests in contemporary societies are additive. In her discussion of Burke, Pitkin notes that "in his fundamental thought" interests are not only objective, but additive: "The interests of the realm, added together, compose the interest of the realm. All the different localities and functional groupings in the nation are part of the nation, and consequently have an interest in the welfare of the whole." Though Pitkin does not follow it up, the inability to maintain that interests are additive in the modern age points to an alternative theory of history to the one she develops. The revolutionary movements of the eighteenth, nineteenth, and twentieth centuries have been based upon the principle that some of the most important social interests (for example, economic class, ethnic and racial, religious ties) may be or actually are in fundamental conflict. The modern period has been characterized by the appearance of competing worldviews issuing in conflicting political programs and activities. Under these conditions it is no cause for surprise that many human beings have found it difficult to believe that elite groups are able to discern the public interest and put measures into effect to secure it. Their doubts have rested on the more basic doubt that interests are additive. Pitkin's appeal to a public interest does nothing to meet these suspicions, which themselves grow out of and refer back to severe and actual political conflicts.

One consequence of Pitkin's approach is a concern with the characteristics of the representative (what should the representative do?) rather than with the aspirations of the constituent and their quality (who should the constituent support?). For Pitkin, the core meaning of representation is acting in the interest of the represented, in a manner responsive to them, but also independently and with discretion (though the represented are conceived as capable of independent action and judgment). The concept of representation covers an area of cases

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6. Id. at 186.
7. Id.
between the point at which the representative becomes a mere mouthpiece for constituents and the point at which he becomes their guardian. By concentrating on the tension between the poles of mouthpiece and guardian, Pitkin obscures a more fundamental predicament. If the problem of representation is merely furthering the interests of the constituents consistent with the promotion of the public interest, then Pitkin's conceptualization of representation seems adequate. However, regardless of traditions of language use, if people are separated by clashing worldviews and are engaged in severe political conflicts, other concepts of representation may be more adequate to clarifying and transforming the public situation. What, for example, might be the perspective on representation held by someone concerned with securing major institutional changes or by someone concerned with defending institutions against attack?

For those engaged in comprehensive and deep conflicts, the best representative is one who can be trusted, who shares one's worldview and general aspirations. The point is neither to find a representative who will be a puppet, nor to select one who will act as a guardian, nor even to choose one who will be some of both, but, instead, to select a representative who will act as a friend or colleague. Conceived of in this way, the representative is not a passive tool, but someone who meets issues as they arise from the viewpoint of a set of principles which are shared by the constituent. He applies those principles in specific decisions, and thereby gains a certain discretion. However, this discretion does not arise from an ability to know the public interest any better than the constituent, but from performing a specific function (promoting public policies in a given institutional structure) which the constituent does not perform. Under this interpretation, the constituent should be able to recognize his own will in the representative's decision, even if he had not thought about the issue beforehand. If such recognition does not occur, then the constituent has not been represented in that case. Thus, there can be no representation in this sense when political judgments are irrational and uninformed responses to primary group pressures, because there is no "objective welfare" assumed which can be promoted apart from reference to a particular shared worldview. Pitkin recognizes that a theorist's view of representation is "correlated with his conception of political life in the broadest sense: his ideas on the nature of political issues, the relative capacities of rulers and ruled, the nature of man and society—in short what we might call his
metapolitics."\(^8\) However, she does not carry this insight over to the relations between representative and constituent. Do they not also have metapolitics? She argues that "to the degree that interests, will, welfare, or whatever is supposed to be involved in representing as activity is regarded as something each man can only define for himself, representing as activity becomes impossible."\(^9\) Now, the commitment to a metapolitics or a worldview can only be defined by each man for himself, but this does not mean that each individual has a unique worldview. A representative relation can be constituted between two people with similar worldviews and political preferences, only this relation will look more like friendship than like something between servility and guardianship. In a constituency with deep ideological divisions, a representative will not be able to represent the constituency as a whole, but only those constituents who share his proclivities. This is because there is no public interest beyond the conception of public interest defined in each worldview. The representative may attempt to explain how his decisions are consistent with the goals of a particular program, but he may not claim that he is representing when he acts to attain aims at variance with those of his constituents. At bottom, Pitkin assumes that for representation to occur there must be a broad consensus on ultimate values and metapolitical conceptions. However, the foregoing analysis has revealed that this is only one special case of representation, where all parties to the relation can pretend that an objective public interest is being served. Perhaps the assumption of political consensus is built into the ordinary usage of the term representation in the English language. If so, then ordinary usage in this case stands in the way of clarifying the public situation, for beyond the special case of representation where political consensus exists, there are the many cases of representation in situations of intense ideological conflict. In these cases a more basic concept of representation is revealed—that of trust and civic friendship among those with the same political direction. Thus, one might say that Pitkin presents a "special theory of representation" applicable to some phases of British and American history, which is only one case of a much broader "general theory of representation."

Perhaps the foregoing discussion seems unsatisfactory because there is no assurance given that conflicts ultimately have a rational solution.

8. Id. at 146.
9. Id. at 208.
When faced with the possibility of deep antagonisms, Pitkin merely gives up. She states that where there is

... lifelong, profound disagreement among men as to what their interest is—disagreement that remains despite deliberation and justification and argument . . . the possibility of a substantive acting for others breaks down, and that view of the concept [of representation] becomes irrelevant to politics.¹⁰

This passage reveals the assumption Pitkin makes that consensus is a prerequisite for representation, but even more important, it betrays a profound pessimism about the possibilities for transcending ideological conflicts. "Deliberation," "justification," and "argument" are all words related to the view that political discourse is aimed at arriving at some "correct" or "true" resolution of outstanding problems. Where people hold conflicting definitions of truth itself, this view of discourse will not lead to conflict resolution but, perhaps, even to the exacerbation of conflicts. An alternative to the "deliberation" model of discourse, which takes account of ideological conflict, is the view that the best possibility for conflict resolution lies in the growing appreciation of diverse worldviews by the general public. Such appreciation of different perspectives would not necessarily lead to consensus, but it would, perhaps, alleviate some of the worst barbarities. However, if appreciation rather than deliberation is the best hope for overcoming some of the worst conflicts of the modern age, then it is not sufficient to take a functionalist view of representation in which citizens may be irrational reactors and the system may continue to function well. It is necessary to create a citizenry capable of relativizing perspectives and appreciating diversity, and at this point in history, such creative activity would not be representative of many people.

Michael A. Weinstein*

¹⁰. Id. at 213.

* Ph.D., Case Western Reserve University, 1967; Professor of Political Science, Purdue University.

This book, a compilation of post-1965 articles on cities, the federal government and the relationship between the two, has as its stated purpose, "to introduce the reader to the study of relationships between the American federal government and the cities." The topic has been a key one since the New Deal but has heightened importance since President Nixon's recent efforts to drastically alter federal-state-city relationships. American cities, large and small, have no chance of maintaining or increasing their livability without substantial financial assistance from the federal government. The form, the delivery mechanisms, and the amount of these federal funds directly influence the nature of federal and local politics.

As I read this book, cities, counties and states were receiving their first revenue sharing checks from the federal government; these checks are a down payment of $5.3 billion of unrestricted federal aid to state and local governments this year. Simultaneously, other federal funds were being cut off. Secretary George Romney of HUD announced a funding moratorium on all federally subsidized housing construction. Model Cities and Urban Renewal Agencies, it was announced, will also be phased down. Other important cutbacks included a freeze on Economic Development Administration funds, a ten percent reduction in federal aid to education, a cut back from $2 billion to $1.2 billion for federally funded social service programs, and reductions in manpower programs.

The effects of these drastic funding changes are only beginning to be felt on the local political scene. Clearly, the Nixon Administration is using revenue sharing to effect some political changes at the local and state level. According to the National Journal,

[i]n the view of the Nixon Administration and of others who have pushed revenue sharing, the categorical grant system has established a huge bureaucracy in Washington that operates in ways incom-

† Professor, University of Connecticut.
1. D. Fox, THE NEW URBAN POLITICS xi (1972) [hereinafter cited as Fox].
patible with a true democracy. The bureaucracy, they believe, is not answerable to the people whose lives it directly affects.\(^5\)

John Ehrlichman, assistant to the President for domestic affairs, has been quoted as saying that revenue sharing’s chief benefit is that it “returns the political spotlight to locally elected officials,”\(^6\) and that it will “... improve the quality of locally elected officials.”\(^7\)

Elected officials, with a no-strings federal subsidy, are indeed forced into a situation in which they have greater flexibility in responding to their constituencies. In some cities this means lowering of taxes, in others it means expenditures for needed capital equipment. In all, it means some turmoil as the local decision making process adjusts to cope with the local windfall.

Douglas Fox’s book of readings, while not aimed directly at the revenue sharing issue, provides some analysis of the history and effects of earlier federal aid programs on local governments and serves as a framework which can be used to analyze the new funding arrangements. The book is organized into five major sections: The New Urban Environment, the Federal System and the Cities, the Federal Policy-Making Process, the Politics of Policy Implementation, and What Can the Federal Government Do. Some of the selections are significant contributions to this emerging field of literature, and make the implications of current federal-local changes more understandable.

In the first section, James Q. Wilson’s *The Mayors Versus the Cities* is reprinted from *The Public Interest.*\(^8\) Wilson observes that during the late 1960’s many big city mayors, once elected, tended toward more liberal decisions and stances than would be expected given their voting constituency. Wilson explains this behavior by examining the importance of the mayor’s audience, rather than constituency. Wilson maintains that because federal, state, and private funds must be obtained by a mayor to improve his city, he must respond to the more liberal federal bureaucrats and progressive businessmen who control these discretionary dollars. This is certainly an interesting and plausible outcome when federal technicians make the key decisions on the allocation of federal dollars.

The effect of the formula-based revenue sharing on this behavior is

\(^{5}\) NAT'L J. at 1555.
\(^{6}\) Id.
\(^{7}\) Id. at 1557.
not difficult to project. Since mayors will find it less necessary to influence federal bureaucrats to receive funds, the role of the audience will diminish. Ehrlichman’s desire for increased responsiveness by politicians to their constituencies will occur. The effect on how dollars will be spent and how this will affect a city’s ability to tackle its problems, particularly those of minority groups, is difficult to determine. In Wilson’s opinion “...the audience has played a critical role in preventing...the emergence of an urban nativism that would exploit base emotions and encourage vindictive sentiments.” It will be important to examine the effect of revenue sharing in these terms.

Two articles on the Federal Policy Making Process are particularly noteworthy. Harold Shulman provides a fascinating description of the politics behind presidential commissions in Behind the Scenes and Under the Rug: One Man’s Presidential Commission. Shulman’s article takes the generality that bureaucrats are turf-protectors, and puts it into a case study with the bureaucrats identified. Lee Rainwater and William Yancy analyze the politics surrounding the publication of the Moynihan Report, formally titled The Negro Family, A Case Study for National Action. The issuance of the Moynihan Report in 1965 created significant upset in the black community, academia, and the federal government. This selection emphasizes the manner in which the permanent government (civil service bureaucrats) handles unpleasant policy shifts which are caused by the presidential government (political appointments).

The section on the Politics of Policy Implementation is limited to an analysis of the implementation of the Federal Anti-Poverty and Model Cities Programs. The selections, however, only provide varying explanations of the failures of these programs. One exception, by Frances Fox Piven and Richard Cloward on How the Federal Government Caused the Welfare Crisis, provides evidence that the welfare rolls grew in the 1960’s directly as a result of the social action programs, since these programs brought a larger number of eligibles into the welfare program. This outcome was dramatic but completely unplanned by those who framed the social action programs. It is the kind of unplanned outcome which can accompany a change as far-reaching as revenue sharing.

Although this book certainly has a number of pluses, it also has some major problems. First, the book does not adequately fulfill its stated purpose of introducing the reader to the topic. The editor’s comments

are too sparse to permit the development of a theme or generalization about urban politics and the federal government. Second, like many readers, it is an uneven collection of articles, some very elementary, others quite advanced. This volume will be of most interest to someone who has pursued, or intends to pursue, the study of federal-local politics in depth.

Paul C. Brophy*