

## Book Review

F.H. Buckley, *The Once and Future King: The Rise of Crown Government in America*, New York, London: Encounter Books, 2014, pp. 424, \$27.99

Reviewed by Ronald Rotunda

If you want to understand your own language, learn a foreign tongue. Similarly, if you want to understand the American system of government, learn what our intellectual kin—Great Britain and Canada—have done. As Professor F.H. Buckley notes, “He who knows only his own country knows little enough of that.”<sup>1</sup> He is one of the few people who has thoroughly mastered the legal structure and history of all three countries.

When it comes to comparative law and comparative politics, it would be hard to find a more qualified or better-trained guide for the perplexed. Buckley holds a chaired professorship at George Mason University School of Law, in Virginia.<sup>2</sup> He has also taught at Panthéon-Assas University, Sciences Po in Paris, the University of Ottawa Faculty of Law, the McGill Faculty of Law in Montreal, and the University of Chicago.<sup>3</sup> He also practiced law for three years in Toronto.<sup>4</sup> His first law degree is Canadian (McGill University) and the second, American (Harvard).<sup>5</sup>

His latest book<sup>6</sup> is *The Once and Future King: The Rise of Crown Government in America*. By crown government, he means rule by a powerful central executive. At the time of our independence, the monarch, George III, was that figure. Now, the president of the United States is becoming that figure. He is *Rex Quondam, Rex Futurus*—the once and future king.

**Ronald Rotunda** is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University, Dale E. Fowler School of Law.

1. F.H. BUCKLEY, *THE ONCE AND FUTURE KING* 6 (Encounter Books 2014)(footnote omitted).
2. [http://www.law.gmu.edu/faculty/directory/fulltime/buckley\\_francis](http://www.law.gmu.edu/faculty/directory/fulltime/buckley_francis) (last visited May 15, 2015).
3. [http://en.wikipedia.org/wiki/F.H.\\_Buckley](http://en.wikipedia.org/wiki/F.H._Buckley) (last visited May 15, 2015).
4. *Id.*
5. [http://www.law.gmu.edu/assets/files/faculty/cv/BUCKLEY\\_CV-20130123.pdf](http://www.law.gmu.edu/assets/files/faculty/cv/BUCKLEY_CV-20130123.pdf) (last visited May 15, 2015).
6. Buckley is an unusually prolific writer with a wide range of interests. His other books are *THE FALL AND RISE OF FREEDOM OF CONTRACT* (ed., Duke 1999), *THE MORALITY OF LAUGHTER* (Michigan 2003), *JUST EXCHANGE* (Routledge 2005), *FAIR GOVERNANCE* (Oxford 2009), and *THE AMERICAN ILLNESS* (ed., Yale 2013).

Our Constitution is the oldest written constitution in the world,<sup>7</sup> yet that Constitution of 1787 is not the same today as it was over two centuries ago. Professor Buckley argues that we have gone through four constitutional stages, not only because of Supreme Court decisions but also because of the original decision of the framers to reject a parliamentary form of government. The framers were worried that Congress was the most dangerous of the three branches of government,<sup>8</sup> so it sought to separate executive powers from the legislature so that the chief executive would be an important check on legislative abuse. Now, the greater risk of abuse lies with executive power.

We have moved from the presidency that the framers envisioned to the type of government they had rejected—virtual crown government. Buckley argues that parliamentary government is a better protection for our liberties. To substantiate his position, he takes us on a fascinating historical tour, starting with George III and the Constitutional Convention, and ending with the modern presidency under Bill Clinton, George Bush, and Barack Obama. It is a carefully written and thoroughly researched work (the endnotes comprise 64 pages of this 385-page book).

Along the way, we learn that the framers came much closer than we know to creating a parliamentary system. In fact, they thought that they had created a quasi-parliamentary system. The House of Representatives, the framers thought, would really choose the president because the presidential electors would not agree. While the prime minister can choose to call a new election and face the voters when he thinks it is propitious, the American president would have a fixed term and must face reappointment every four years. However, what the framers envisioned is not what we have today.

Since 1787—and particularly in the past quarter-century—many countries have adopted written constitutions. And many of them have chosen the presidential system. Unfortunately, those countries that have adopted the presidential system have tended to be unfriendly to civil liberties as compared with countries that have adopted the parliamentary system. His book proves that point with analysis and also with statistics. Look at the countries around the world, and it is not difficult to find a president for life. It is harder to find a prime minister for life.

Buckley argues that presidential systems are more likely to enter a war. Presidential systems, as compared with parliamentary systems, have a 50 percent increase in military budgets.<sup>9</sup> (His appendices explain in detail his methodology.) It is easier to enter a war if the country already has a strong military and a president who does not need parliamentary approval.

America has been an exception. It is one of the freest countries in the world. Routinely we are told that America is “exceptional.” Polls show that we owe

7. Ronald D. Rotunda, *Bicentennial Lessons from the Constitutional Convention of 1787*, 21 *SUFFOLK U. L. REV.* 589, 621 (1987).

8. *THE FEDERALIST* No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

9. BUCKLEY, *THE ONCE AND FUTURE KING* at 180, *supra* note 1.

this to the framers and our Constitution. Buckley's response: "While that's a nice story, it lacks the added advantage of accuracy."<sup>10</sup> He contends that it is not our presidential system that made the difference: America is exceptional because it has remained free while remaining presidential.

Many of us (I included) favor the system we have lived in all our lives. Buckley favors the parliamentary system. Given his Canadian background, that is not surprising. Yet Buckley does not prefer the parliamentary system because of nostalgia. He has reasons, and this book is his justification. It is indeed a powerful justification. Even if this book does not persuade you, it is still worth your while to read it so that you see if what you believe merely reflects the fact that you were born in the United States.

Buckley explains that the United States has lived under four constitutions. The first was what the Colonies experienced, with crown government and rule from Britain, followed by the Articles of Confederation. The second was the Constitution of 1787, created to correct the problems under the Articles. It was closest to the parliamentary system, with a powerful Congress. The third Constitution came with the presidency of Andrew Jackson. Congress held the legislative power, but the president's role expanded. In that era, the protection of the separation of powers continued but the president became more powerful: We moved into the age of popular democracy with the president in charge, the head of state and the head of government.

The fourth Constitution is the one under which we now live. In practice, it gives the president many of the powers of a constitutional monarch. The media have transformed the president into a "rock star."<sup>11</sup> He alone has the moral authority of being elected by the entire country. He creates most of the law when his appointees issue regulations, and he unmakes federal statutes by refusing to enforce them. He can begin a war without a declaration of war. He becomes more powerful because there is only one chief executive while there are hundreds of members of Congress. Thus, any bargaining between the president and Congress starts with the members first negotiating among themselves, on the House or Senate floor, and in the press. How and why the fourth Constitution developed is the essence of this book.

Most of us are familiar with the Constitutional Convention, yet Buckley's discussion and analysis of that convention adds a new dimension. He shows that the framers came much closer to a parliamentary government than many of us realized. The delegates debated the method of selecting the president on twenty-one different days, taking more than thirty different votes on the subject. In sixteen of these, they voted on the method of selecting the president, and in six roll call votes (once unanimously) they decided that Congress should appoint the president. Once they voted in favor of the state legislatures appointing the president. Every time the delegates voted on whether the people should elect the president, they voted no. All of these votes show that

10. *Id.* at 168, *supra* note 1.

11. *Id.* at 11, *supra* note 1.

the delegates favored a system closer to the parliamentary system, where the House of Commons appoints the prime minister. The major difference is that the president, unlike the prime minister, would have a fixed term.

However, the final compromise did not give the House of Representatives the initial power to appoint the president. It rejected the parliamentary system, but the framers thought that what their compromise created was much closer to the parliamentary system than one might expect from reading the Constitution in light of the subsequent history. The framers—who in so many ways were prescient—thought that in the typical situation no candidate could muster a majority, so that the House would normally pick the president, with each state having one vote. For example, George Mason, one of the framers, thought the House of Representatives would elect the president 95 percent of the time.

Why the compromise? Buckley examines this question using not only the tools of history but also the tools of regression analysis. (He details, with great care, his methods of analyzing the many convention votes on this issue, as well as others, in three appendices included at the end of the book for those who like to read the methodology and the tables.)

In seeking to understand why the delegates accepted a presidential system, he examines a number of variables—delegates who were wealthier, delegates who were slaveholders, delegates who had been officers during the Revolutionary War (they were aristocratic and antidemocratic), delegates from states with larger populations, and so forth.

First, he looked at wealth. The wealth of the delegates is relevant on some issues, yet he warns, “[a]ny attempt to reduce the delegates’ motives solely to economics is crude, and mistaken.”<sup>12</sup> It turns out, upon examination of the many votes of the method of choosing the chief executive, wealthy delegates were 40 percent more likely to support a popularly elected president. One might think that those with more wealth would be concerned that candidates seeking the presidency would become rabble rousers in an effort to win votes and secure election. However, it appears they feared the people less than they feared Congress.

The officer variable was virtually irrelevant and did not explain any of the votes on presidential selection. One might think that this aristocratic class would oppose a popular election (not trusting the masses, the *vox populi*). If so, other factors were more important. An aristocrat like Alexander Hamilton, for example, favored a strong chief executive because he was a nationalist.

It is common to say that the final product of the debate on selecting the president was a compromise between small states (which favored the House appointing the president, with each state having one vote) and the larger, more populated states. However, Buckley shows that this assertion does not find support in any of the votes cast. Small-state delegates stuck together and favored the state legislatures appointing the senators but there was no

12. *Id.* at 299, *supra* note 1.

discernible evidence of a small-state coalition on the method of choosing the president.

Our Constitution was conceived in original sin, and that sin was slavery. Slave owners certainly were a voting bloc on some issues. After all, we would expect them to support the clause that forbids Congress to outlaw the importation of slaves prior to 1808.<sup>13</sup> However, slave ownership does nothing to explain the voting behavior of delegates on the method of selecting the president.

In general, delegates who were more nationalistic and wealthier preferred a strong presidential system, while less wealthy delegates (who also favored states' rights) supported a quasi-parliamentary system (where Congress appointed the president). The result, at the time, was a system by which the state legislature picked the electors and the electors picked the president. The result, now, is a strong president directly elected by the people.

Yes, there is the veneer of an Electoral College. Our Constitution still says that the electors choose the president. However, all the states now provide that the people, in the general election, choose the electors, who promise (in some cases, state law requires a promise under oath) that they will vote for the candidate to whom they are pledged. The faithless elector is an endangered species. People do not even know the names of their electors, because the ballots list just the presidential candidates. In the old days, the ballot listed the electors with the notation "pledged to \_\_\_\_". Now, even that formality is gone.

This result is also an option that none of the framers embraced: one person, both head of state and head of the government, elected by the people, with all the modern powers—a very powerful president whom Congress finds difficult to check.

Buckley's statistical analysis is significant and an important contribution to the literature. However, it would be misleading to think his book merely crunches numbers and wades through hundreds of votes. He also gives us a very thorough and entertaining history of the drafting of our Constitution, the Canadian Constitution, and the incremental changes in the largely unwritten British Constitution.

His historical analysis is fascinating. It also is a fun read. Let us be blunt: Reading about law is not often fun. Law review articles seldom read like a Jacqueline Susann novel. Buckley's book is different. He has a snappy prose and a delightful style.

Madison, one of our founders, wanted Congress to appoint the president. He also wanted the House of Representatives to appoint the senators; he wanted seats in the Senate allocated by population and a congressional veto over state laws. He lost all of those votes. Still, Madison is now called the Father of the Constitution. Buckley's quotable response: "If he *is* the Father

13. U.S. Constitution, Art. I, § 9, cl. 1.

of the Constitution, however, this is one of those cases, not unknown in the delivery rooms, where the child bears little resemblance to the father.”<sup>14</sup>

In a later chapter, he explains how Madison would have preferred the Canadian Constitution. One of the framers of the Canadian Constitution was John A. Macdonald, who carefully read Madison’s notes on the Philadelphia Convention. In fact, he brought a copy of them to the Quebec conference that created Canada’s Constitution. (Later, when a woman asked Macdonald why the Constitution did not extend the franchise to females, he said, “Madam, I cannot conceive.”<sup>15</sup>)

Buckley compares the U.S. Constitution as the framers thought it would work with the Constitution of today. The Constitution provides that Congress proposes legislation and the president vetoes. In modern times, it is the president who proposes legislation while Congress “vetoes” (by not enacting it). Even when the opposition party controls both houses of Congress, the president’s bill is always introduced and Congress conducts hearings and considers it even if it does not enact it.

When Congress passes legislation that the president does not like, the president can veto legislation. Admittedly, Congress can override, but the supermajority requirement of a two-thirds vote in each House makes that hard.

Moreover, in modern times, the president is more likely to sign the legislation and, in a signing statement, explain the decision not to comply with various provisions. Congress can override a veto but it cannot override a signing statement, which becomes more powerful than a veto. Barack Obama, as a senator, strongly objected to signing statements, while Barack Obama as president uses them with vigor.<sup>16</sup> Where you stand depends on where you sit.

The modern president now routinely decides to suspend a law. It is hornbook law that the president can refuse to enforce a law (civil or criminal) with the claim that it is unconstitutional. It is also a given that the president, as the chief legal officer, can decide not to prosecute someone in the criminal courts. What is new is that the president now claims to possess (and now exercises) power to waive or suspend portions of laws that he insists are constitutional but he would like to waive or suspend anyway.

For example, in 1996, President Clinton signed a major welfare overhaul that requires some welfare recipients to work. Congress, concerned that a future president would not enforce that requirement, stipulated in the law that the “workfare” requirements are nonwaivable. President Obama suspended

14. BUCKLEY, *THE ONCE AND FUTURE KING* at 60, *supra* note 1.

15. *Id.* at 109, *supra* note 1.

16. *Id.* at 136-38, *supra* note 1; Karen Tumulty, *Obama Circumvents Laws with ‘Signing statements,’ a Tool He Promised to Use Lightly*, WASHINGTON POST, June 2, 2014, [http://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508foa\\_story.html](http://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508foa_story.html) (last visited October 9, 2015). Ms. Tumulty is a national political correspondent for The Washington Post, where she received the 2013 Toner Prize for Excellence in Political Reporting.

the workfare requirement. The people who receive the financial benefit are in no mood to complain, nor would they have standing to do so.

Congress, in enacting the Affordable Care Act, scheduled various provisions to go into effect in 2014. The law delegates much authority to the executive branch, but there is no authority to waive these provisions. Nonetheless, the president waived them until 2015 simply by announcing that he was not going to enforce the penalties that the law provided. President Obama or his appointees have granted over 1,000 waivers.<sup>17</sup> We know that nearly 25 percent of the waivers went to labor unions that supported the Affordable Care Act.<sup>18</sup> The power to suspend laws is a power to help one's friends and hurt one's enemies. Many in Congress, including members of the president's own party, objected to the president's power to waive the law.<sup>19</sup> He did it anyway. Thus far, federal courts have rejected on standing grounds anyone who complains above the waiver.

As the president has increased his power over the past several decades, Congress has been complicit. It routinely enacts laws broadly delegating power to the president or his appointees, with the instructions to make regulations having the force of law. The only restriction is that the regulations should promote "public convenience and necessity,"<sup>20</sup> or should prevent "unfair methods of competition."<sup>21</sup> Or the secretary of Agriculture should set prices that he or she "deems to be in the public interest and feasible in view of the current consumptive demand."<sup>22</sup> The regulators are not members of Congress but unelected bureaucrats. These presidential appointees never come before the voters. They issue their rules without the cumbersome and irksome congressional procedure, which the framers imposed to protect our rights. The fact that we already live in a highly regulated world serves to magnify their power.

17. BUCKLEY, *THE ONCE AND FUTURE KING* at 139, *supra* note 1.

18. *Id.* at 139, *supra* note 1.

19. *E.g.*, Ronald D. Rotunda, *On the Health-Care Mandate, Obama Reaches Beyond the Law*, WASHINGTON POST, July 18, 2013, [http://www.washingtonpost.com/opinions/on-the-health-care-mandate-obama-reaches-beyond-the-law/2013/07/18/d442aefc-efb4-11e2-a1f9-ea873b7e0424\\_story.html](http://www.washingtonpost.com/opinions/on-the-health-care-mandate-obama-reaches-beyond-the-law/2013/07/18/d442aefc-efb4-11e2-a1f9-ea873b7e0424_story.html) (last visited October 9, 2015).

20. *E.g.*, *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951) (state commission order requiring interstate natural gas company to obtain certificate of public convenience and necessity held valid).

21. RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §§ 4.7(b), 4.8(b) (West Thomson Reuters 5th ed. 2012). See discussion at BUCKLEY, *THE ONCE AND FUTURE KING* at 131-32, *supra* note 1.

22. *Uelman v. Freeman*, 267 F.Supp. 842, 846 (E.D.Wis.) *aff'd sub nom.* *Uelmen v. Freeman*, 388 F.2d 308 (7th Cir.1967), quoting 7 U.S.C. § 602.

The president also issues executive orders that look like legislation but need no congressional input. Buckley quotes Democratic presidential adviser Paul Begala: “Stroke of the pen. Law of the Land. Kinda cool.”<sup>23</sup> Yes, it is.

For example, President Obama recently issued several executive orders that overhaul immigration. He justifies these orders as part of his “prosecutorial discretion.” However, his orders do not relate to criminal prosecutions. He does not claim that the governing laws are unconstitutional. Instead, he says that because Congress has not changed the law, he “changed the law.”<sup>24</sup>

These lengthy orders look like legislation. They are pages long, with sections, subsections, provisos and effective dates. I favor immigration reform (both my parents came from the old country), and I hope that Congress will do that. Nonetheless, it never occurred to me that the president, on his own, could order federal employees to issue several million Social Security cards to undocumented aliens—particularly when a host of opinions from the Office of Legal Counsel and the Department of Justice say explicitly that the president has no power to “suspend” law. The president and the Department of Justice ignored these earlier opinions.<sup>25</sup> (Apparently, it never occurred to the president or the Department of Justice either, until November of 2014. Before that, the president iterated and reiterated<sup>26</sup> that he had no executive power to change the immigration laws.<sup>27</sup>)

23. BUCKLEY, *THE ONCE AND FUTURE KING* at 131, *supra* note 1.

24. “I Just Took an Action to Change the Law,” November 25, 2014. <http://www.weeklystandard.com> (last visited October 9, 2015).

25. The Department of Justice and the Office of Legal Counsel have repeatedly opined that the president cannot suspend laws. For example, the OLC concluded that “the idea that the President has the authority to refuse to enforce a law which he believes is unconstitutional was familiar to the Framers. The Constitution qualifies the President’s veto power in the legislative process, but it does not impose a similar qualification on his authority to take care that the laws are faithfully executed.” *Issues Raised by Section 102(c)(2) of H.R. 3792*, 14 OP. OFF. LEGAL COUNSEL 37, 51, 1990 WL 488469, \*10 (1990). The Office of Legal Counsel, in a 1980 opinion, made quite clear that the president has no suspension power:

*The President has no ‘dispensing power.’* (emphasis added) . . . [T]he 17th century dispute between Parliament and the Stuart kings over the so-called ‘dispensing power’ [is] directly relevant to the questions you have raised. The history of that dispute was well-known to the Framers of the Constitution, and it is clear that they intended to deny our President any discretionary power of the sort that the Stuarts claimed.

*The Attorney General’s Duty to Defend & Enforce Constitutionally Objectionable Legislation*, 4A U.S. OP. OFF. LEGAL COUNSEL 55, 57, 1980 WL 20999, \*3, \*4 (1980).

26. Michael D. Shear, *For Obama, Executive Order on Immigration Would Be a Turnabout*, N.Y. TIMES, Nov. 17, 2014, <http://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html> (last visited October 9, 2015).

27. The Department of Justice’s Office of Legal Counsel issued an opinion letter on which the president relied. <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (last visited October 9, 2015). However, that letter never explains why assigning Social Security cards has anything to do with setting priorities of deporting undocumented aliens. The letter never deals with the president’s own justification: “Congress has failed.” <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (last visited October 9,



Is the road to crown government irreversible, or can we at least backtrack a bit? Buckley offers several ideas, some of which are not going to happen. We are unlikely to change our Constitution, just as we are unlikely to make impeachments easier.<sup>28</sup> However, Congress can delegate legislation with standards much more specific than “public convenience and necessity.” Courts could be more serious in requiring a delegation standard that is not so open-ended. Nothing prevents the president from regularly appearing before Congress to answer questions, as the prime minister does. Buckley quotes British political scientist Harold Laski, who said, “No better method has ever been devised for keeping administration up to the mark.”

Whether or not the road is irreversible, it will be an enjoyable journey to know of its past, its present, and its possible future by reading *The Once and Future King: The Rise of Crown Government in America*.

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2015). The president relies on this letter, but it says: “[A] general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses ‘special risks’ that the agency has exceeded the bounds of its enforcement discretion.” The president’s order is a general policy of nonenforcement for several million people, and much more (e.g., Social Security cards, issuing work permits) than nonenforcement. The opinion letter never even cites or tries to distinguish its early opinion letters to the contrary, cited in footnote 5, *supra*.

28. He provokingly says, “Congress should impeach and remove presidents often. When their policies fail, when they are touched with scandal, or for no reason, just for the spirit of the thing.” BUCKLEY, *THE ONCE AND FUTURE KING* at 289, *supra* note 1.