Dialogue

Reflections on Law & Public Life

Honorable James L. Buckley

James L. Buckley is a Senior Judge on the United States Court of Appeals for the D.C. Circuit. Before joining the court in 1985, he served as President of Radio Free Europe and Radio Liberty and, before that, as Under Secretary of State for Security Assistance. As a candidate of the New York State Conservative Party, he won election to the United States Senate, where he represented the state from 1971 to 1977. Judge Buckley spoke with *Green Bag* Executive Editor Montgomery Kosma on April 1, 1998.

You became a senior judge a little over a year ago. How has that changed your life?

Dramatically. I'm very slow at both reading and writing, which constitute 99.9% of the work of an appellate judge. As a result, I have never spent so many hours per day and days per year on a job as I have on this one. Also, in dramatic contrast with my previous lives, an appellate judge leads a hermit's existence. Weeks can go by before one is scheduled to lay his eyes on anyone other than his clerks and secretaries. Now that I am a senior judge who has volunteered to take on 25% of the normal workload, I'm a free man most of the time, although I must still avoid any involvement in such things as partisan politics. I have moved back to Connecticut, but have a small apartment outside of Washington where my wife and I live when I am preparing for my court work.

So the tradeoff is that you sit on fewer cases?

The active judges on my court are normally assigned about 115 cases each during the course of the court term. I have agreed to handle 30 cases.

How are you planning on spending your spare time?

So far, much of my time has been spent getting myself organized so that I can handle part of my court work from my Connecticut home. This has required me to build a small office and install (and master) the electronic gadgetry – e-mail, fax, and so on – that enable me keep in close touch with my chambers and the work of the court. My new office was completed around the first week of September last, and since then I've spent much of my time indulging my wanderlust when I am not preparing myself for the sittings I had in Septem-

ber, November, January, March, and May.

In the future I expect to use my new leisure to catch up on a lot of deferred reading and to become involved in certain local activities such as the Sharon [Connecticut] Land Trust. Over the last 30 years I've been buying books that I thought would be interesting and setting them aside, until I had the time to read them. The moment of truth has finally arrived. I have also undertaken to conduct a four-day seminar at the high school I attended on the subject of "The Founders' Constitution." The obvious implication of my title is that the Constitution that we live under today is not necessarily the one the Founders had in mind.

That sounds intriguing. Tell me more about that – what do you think about the Founders' Constitution and why are you undertaking to teach it to young people?

First of all, if they weren't so young they'd be too bright for me to handle! No, I have always felt that people who are about to enter college are too apt to accept uncritically the common wisdom of the teaching fraternity, which tends to favor the kind of administrative state we have now. I thought it might be useful to apply a little bit of "shock therapy" by requiring them to focus on the reasoning behind such structural safeguards as the separation of powers and federalism. By doing so, I hope the students will gain a better understanding of why the Founders thought them essential to the preservation of freedom and how far we have departed – for better or worse – from the kind of government envisaged by those who voted to ratify the Constitution. And by limiting my focus to the Constitution as originally enacted and explaining why the delegates to the Philadelphia convention did not think it necessary to include a Bill of Rights in the original document, I hope to have them focus on the essential relationship of structural safeguards to a free society. In my first three sessions, I propose to review with the students both the powers delegated to the new government and the division of governmental authority among the three branches. My fourth symposium will probably consist of a general discussion of how we are currently governed to sharpen the contrast between the administrative state we now live under and the kind of government the Founders had in mind. I'm not going to say that what we have is good or bad, but will merely ask the students to recognize that what we have is not what was intended and let them make their own judgments. This is entirely experimental. I don't know if I'll be any good at it, I don't know if I'll enjoy it. But if I do enjoy it, I will probably offer to conduct similar seminars at other schools in the area where I live.

You served in the Senate for several years, and spent the last twelve or so on the D.C. Circuit, in a sense overseeing the administrative state. Have your ideas about the administrative state changed during that time?

All I can say is that the malevolent trend lines I spotted in the Senate have continued apace. They slowed down a bit during the Reagan years, but they have picked up again. When I entered the Senate in January 1971, the U.S. Code consisted of 11 volumes, exclusive of tables and index. It now consists of 25. The detailed marching orders – the regulations issued by the agencies charged with implementing the programs created by Congress – now fill over 180 volumes of fine print. God knows how many thousands of pages have been added in the years since I left the Senate. Having heard dozens of appeals from administrative agency decisions over the past few years, I certainly have a much more palpable understanding of the number and complexity

of the regulations that increasingly wide sections of American society have to cope with.

Is there any way that these "malevolent trend lines" can be altered? You mentioned that you did notice a slowdown during the Reagan years.

Those years were marked by a suspension of significant new regulatory legislation. Congress wasn't enacting any, and certainly the Reagan administration wasn't prodding Congress to come up with new programs. It was not until midway through the Bush administration that major new federal laws began to be enacted – sweeping revisions of the Clean Air Act and of the Civil Rights Act are two examples, and the Disabilities Act is a third. It's taken the agencies a while to churn out the regulations to implement these laws, and now we're beginning to see the appeals.

Do you see the motivation for this rebirth of federal regulation as centered anywhere in particular? Is it being driven by the executive branch, by Congress, by the people?

I don't think it's coming from the people if, by that, you mean the average citizen. But much of the pressure for new regulation comes from special interest groups outside of Washington. A lot of the environmental laws, in particular, originate outside, and the proposals catch somebody's attention in Congress. Or, the President will say, "such-and-such is at the top of my agenda, and next week our people will be sending you, Congress, a proposed bill to put this new program into effect." During my last few years in the Senate, my sense was that people were beginning to realize the extent and, often, the arbitrary nature of the control that was being exercised by federal agencies, and this was a result of Lyndon Johnson's Great Society. Prior to that time, the ordinary citizen was very little affected by laws at the federal level. The Great Society programs dealing with food stamps, educational programs, working conditions, and so forth, meant that ordinary citizens and small enterprises would suddenly find themselves subject to rules and regulations emanating from Washington. Having nowhere else to turn, these individuals knock on the doors of their representatives in Congress for help with a Medicare claim or relief from what they consider to be senseless bureaucratic directives.

These developments have had a dramatic – and adverse – effect on the work of Congress. Given the flood of letters that must be answered, delegations of supplicants to be met, constituent problems to be resolved, and an ever expanding number of committee meetings to be attended – the majority of them dealing with matters that could be handled just as well by state or local governments – there is simply very little time left in the congressional day for truly thoughtful lawmaking. Yet that is the primary responsibility of its members. Once upon a time, the work of Congress was largely limited to the areas of responsibility detailed in the Constitution. This meant that its members had the leisure to study all the important bills that would come up for a vote, and they would be on hand to hear and participate in floor debate; they were able to concentrate on policy issues of national importance and engage directly in the nitty-gritty job of preparing legislation. By the time I arrived, the explosion of responsibilities the federal government had taken on, and the resulting pressures from constituents for help or favors, had squeezed any remnant of leisure out of the job, and there was little time left to study the bills coming up for a vote or even to do an adequate job of scrutinizing the legislation being reported out by one's own committees.

Has this change affected the quality of legislation coming out of Congress, as well as its quantity?

It's certainly affected the quantity. The Senate once had the reputation of being the world's greatest deliberative body. I don't know enough about other legislative bodies to make a judgment; but what can be said is that the Senate can no longer claim to be a truly deliberative body because its members haven't got the time to study more than a handful of issues at any depth. After attending to the day's mail, attending to constituent needs, and attempting to give thought to one's own committee work, there is simply no time to examine, let alone master, the often important bills he will be called to vote upon the following day.

I was elected to the Senate in the fall of 1970. As I was on my way to Washington, somebody gave me a study of Congress that had just been completed by the Bar Association of the City of New York. The study concluded that the workload of the average congressional office had doubled every five years beginning in 1935. I know that in my six years, if it didn't double, it came fairly close to doing that, and I base that conclusion on the increasing difficulty of dealing with committee work. At that time, each Senator was assigned to two major committees and one minor committee, and each committee had its own subcommittees, all of which would have to meet periodically to hold hearings and draft legislation. When I first arrived in the Senate, I would often find that a couple of my committees were scheduled to meet at the same time. This in turn meant that I would have to decide which of them I would attend. During my last two years, it was not unusual to have three committees meeting at the same time.

I was very interested in environmental work and was able to secure a position on the Public Works Committee, as it was then called, which had primary responsibility for environmental issues. The first major legislation I plunged into was a detailed revision of the original Water Quality Act. I was sworn in in January 1971, and went right to work on it. By October of that year, we had held our hearings and reported out our bill, the House had done the same, and the revisions, which were *very* detailed, had been enacted into law. In 1975, our committee initiated a comparable revision of the Clean Air Act, with the intention of doing the same thing that had been done four years earlier with the Water Quality Act. Time after time, I would report for a meeting that would have to be rescheduled when a quorum failed to materialize. Too many of the members were attending other meetings which, in turn, may or may not have been able to conduct any business for lack of a quorum. And even when we had a quorum, our work would be interrupted by bells calling us to the floor for roll call votes. Not until the end of the following year did the Senate finally report out its bill. It had taken us almost twice as long to do that job as it had to revise the Water Quality Act.

Since your involvement in some of the early development of environmental law, you've done some writing in that area, and you've handled cases under the various acts since you've been on the D.C. Circuit. Where do you think we are today with environmental law – has it been helpful, or is it another example of the administrative state out of control?

Well, number one, our environmental laws have done substantial good. This is self-evident from any comparison of where we were in the late 60s with where we are today in terms of the quality of our air, the quality of our water, and so forth. We were heading in a disastrous direction, and that has been stopped. It is my strong impression, however, that we may have achieved these improvements at unnecessary cost and that some of today's environmental standards and regula-

tions border on the irrational. One of the things that I kept striving for, when I had a hand in formulating environmental policy, was the need for a cost-benefit analysis in the formulation of environmental regulations. In other words, I felt (and feel) that there should be some sort of relationship between the value of the benefits realized from the control of particular pollutants and the cost of controlling them. I'm not going to go into specifics, but I've been on a number of panels that have considered regulations that have imposed huge expenses on small communities in order to achieve the most marginal benefits. For example, the EPA has mandated limits on the content of a particular chemical in drinking water that can be extremely costly to attain even though it is not at all clear that that level of contamination will have other than a theoretical effect on the health of those who drink it. It is not for judges, however, to second guess such calls so long as Congress has authorized an agency to make them and they cannot be categorized as arbitrary or capricious.

I'm also concerned with the manner in which some excellent environmental laws are being applied. I was a passionate defender of the Endangered Species Act when I was in the Senate, and have since written in its support. At the time it was enacted, I don't think it had occurred to anyone that the law would affect other than governmental actions. But it is now being applied to control private land use. This may well be necessary if a particular species is to be saved, in which case, as a matter of policy, I think the private land owner should be compensated. As it is, certain applications of the Act have created some terrible counter incentives. It can discourage the creation of private nature preserves that will benefit rare species because once in place, the government can forbid the owner from returning the land to its original use. It has also created a powerful incentive for unscrupulous land owners to destroy rare animals or plants before their presence on their land is discovered by others.

So the government should buy the land, to internalize the cost of the regulation?

Or buy a conservation easement. Whether the government has any constitutional obligation to do so, of course, is another matter. This is an area of the law that could use further clarification by the Supreme Court.

You talked about the cost-benefit analysis, but does that apply under the Endangered Species Act? A listed endangered species, no matter what the cost, has to be protected. In my understanding, the government need not consider whether, say, some insect is too expensive to protect.

I am not sure that is entirely true. If memory serves, an amendment to the Act in the late 70s permits a cabinet-level committee to waive its enforcement under particular circumstances. I don't know whether such a committee ever considered the matter, but I doubt that even the most fervent environmentalist has condemned the extermination of the smallpox virus. That being said, I acknowledge that I have made an exception to my cost-benefit rule. I do so on aesthetic grounds. A wood thrush's song, for example, is no more subject to a cost-effective calculus than a Bach chorale, and it seems to me an act of unseemly arrogance to decree the extinction of a unique form of life without a compelling reason.

Another problem with the Endangered Species Act relates to the Supreme Court's opinion in Sweet Home *where, reversing your court, it held that the Act applied to habitat destruction.*[1] *So, all of a sudden, the federal government is engaged in land use*

1 *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995).

regulation anywhere and everywhere. And obviously that raises federalism concerns.

Yes. Well, I am utterly devoted to the federalist concept. In fact, my remedy for just about everything that has gone wrong with this country – and I think a number of things have – consists of taking the Tenth Amendment seriously. I favor returning to the states exclusive authority over all matters that *can* be effectively handled at a state or local level, whether or not we approve of the way they are being handled by this state or that. Thanks to the Supreme Court's interpretations of the commerce clause, my court can't put the genie back in the bottle. And as a practical political matter, you can't expect Congress to do so either. But when I was in the Senate, I would consciously apply the rule of subsidiarity, which predates the Constitution, in deciding whether a particular responsibility was appropriate for the federal government. I don't know if that phrase means anything to you.

In fact, Professor Currie from the University of Chicago has an article on subsidiarity which will appear in the same issue as this interview.[2]

I am delighted, as very few people seem to be aware of the principle. It is an obscure, medieval term for a principle of governance that is, in fact, part of the social teaching of the Catholic Church. I suppose a fundamentalist could chastise me for invoking an ancient popish doctrine. But you're familiar with what it says: that governmental responsibilities should be handled by the lowest level of government that is competent to handle them. I concluded that control of air and water pollution and the protection of species were legitimate federal concerns because pollutants and fauna and flora will move from one state to another.

Is this the familiar collective action problem, where one state doesn't want to impose strict regulations and drive businesses elsewhere?

That is part of the issue, but more important is the fact that air and water and animals pay no attention to political boundaries. As a consequence, New York has no ability to protect its citizens from, for example, sulfuric fumes that are generated in Ohio. States cannot impose regulations on one another, and only a body with authority over the collective whole is able to take effective action.

When Congress decided to do something about noise pollution, however, I applied the rule of subsidiarity and concluded that the federal government had no business controlling most sources of noise. New York State is quite capable of setting standards that will protect the eardrums of its citizens from most sources of noise; and if it fails to do so, excessive noise produced by New York jackhammers will not disturb the people in Jersey City. But it does make perfect sense to have federal controls on noise generated by airplanes, trains, buses, and trucks that (like air, water, and birds) will move from state to state.

The Supreme Court, up until Lopez, *at least, seemingly yielded the entire question of federal authority to the discretion of Congress. But Congress hasn't occupied every area of law with federal regulations. It hasn't gone overboard into the area of trusts and estates, for example.*

But just wait.

Perhaps Congress has refrained only because nobody with enough money or a loud enough voice has asked for legislation. Does the subsidiarity principle really restrain the legislature? Is there anything else? Is there perhaps any bite left in the oath of office our

2 See David P. Currie, *Subsidiarity*, 1 Green Bag 2d 359 (1998).

legislators take to uphold the Constitution?

First of all, with respect to the oath of office, when the issue is in doubt, too many legislators tend to say, "Let the courts decide." I think that's wrong. Members of each branch of the federal government have an obligation to make an independent judgment of what the Constitution permits. Second, as a political matter, members of Congress are not going to revoke on constitutional grounds programs that the public has come to accept as their birthright. I have a standard speech on federalism that I have been giving, with periodic updating, since my last years in the Senate. It is titled "Overloading the Federal Horse." I assert that the federal government has been assuming so many responsibilities that it is losing the capacity to handle any of them very well, hence the need to rediscover federalism. I then say that as we approach a state of gridlock in Washington, necessity if not philosophy may force us to reach a new consensus as to which governmental functions should be returned to the exclusive control of the states and which left to a far smaller federal establishment. Should that happy day arrive, we would all have to take a blood oath to abide by the new disposition.

Campaign finance reform has been an important item in the news lately. Much of the roots of today's controversy go back to the Supreme Court's decision involving your Senate campaign in Buckley v. Valeo.

That's not quite right. I was the lead plaintiff, but that case involved not my campaign but a challenge to the Campaign Reform Act of 1974. With all respect, that was an unfortunate decision. The Supreme Court got it half wrong, with the result that a bad bill was made worse. The Court preserved the thousand dollar limit on individual contributions, but ruled that no limit could be placed on what a candidate could spend on his own campaign. As a result, a candidate of normal means must spend huge amounts of time panhandling in order to finance increasingly expensive campaigns while the very wealthy sail ahead spending their own money. Under these circumstances, the average candidate will have to seek PAC funding and run the risk of being seen as the captive of special interests while the wealthy one can brag he is beholden to no one. But contrary to what the critics charge, no one can buy an election. This is amply proven by recent primaries.

But what is really pernicious about the present law is its impact on independent political action. It is instructive to look at the plaintiffs in *Buckley v. Valeo*, who generally had one thing in common: they were individuals or organizations that operated outside the political mainstream. They included the Conservative Party of New York, the ACLU, the Republican Party of Mississippi (at a time when Republicans were still political outcasts in most of the South), and Senator Eugene McCarthy (whose surprise showing in the 1968 New Hampshire primaries caused Lyndon Johnson to withdraw his candidacy for reelection). These plaintiffs were concerned that the limitation on the size of individual contributions would make it that much harder for them to challenge the political status quo, thereby further entrenching the power of the established party organizations. If the Campaign Reform Act had been in place in 1970, I could not have been elected to the Senate. As a third party candidate challenging a Republican incumbent and a Democratic congressman, I had to establish my credibility before I could secure the media attention that would in turn enable me to raise money through the mails – which is what third party candidates usually have to do. My candidacy was made possible

by a $13,000 gift from one family, which allowed me to conduct a poll that persuaded me that it was possible for me to win, and the loan to my campaign of $50,000 from a friend, which enabled me to pay five months advance rent for the headquarters Robert Kennedy had used in his presidential bid and to pay the large deposit required to equip it with a phone bank. Having established my viability, it was possible to hit the mails. By the end of the campaign, I had secured contributions from more individuals than my two opponents combined. Both of these accommodations would have been illegal under today's rules, but I couldn't have succeeded without them.

But candidates from the mainline parties go in with that infrastructure already established?

Yes, they are part of the establishment, they have money-raising machinery and lists of past contributors already in place. We had to build from scratch.

Members of Congress, of course, have the additional advantages of incumbency. They are in the public eye, have free access to the media, and can send newsletters to their constituents at public expense. That's why the 1974 bill was dubbed the "Incumbent Protection Act;" why it is romantic to believe that Congress would ever legislate a truly level political playing field; why I continue to believe that the one true reform would be to abolish limits on individual contributions while requiring immediate disclosure of the donors. Let the public make its own assessment of whether a particular candidate is being bought.

There are several other unintended, but highly predictable, consequences of the 1974 Act. The limitations on individual gifts caused people who would have liked to make a substantial gift to a particular candidate to send the balance of what they were prepared to give in support of a political cause to a political action committee. But PACs exert a baleful influence on a campaign because they tend to be focused on a single objective and will often require a candidate to commit himself in advance to particular positions. By contrast, it has been my experience that individual donors will back a candidate whose general political philosophy coincides with their own and leave it at that.

A second consequence of the present law has been the discouragement of genuine grass-roots activity. Back in 1970, I would wander around New York and come across small town "Buckley for Senator" storefronts that our campaign headquarters had known nothing about. These had been set up and staffed spontaneously and they enabled people who were taken with a particular candidate to go out on their own and knock on doors, distribute literature, and the rest of it. Under today's rules, such activities can require an intimidating compliance with red tape; and although the law does permit independent activity, the FEC is apt to take the independent actors to court after the election and require them to establish that they had in fact acted independently and not in connivance with the official campaign organization.

Still another unintended consequence has been the vast expansion of the influence of corporations, unions, and other entities that can create PACs or deploy "soft money." To the extent that the law limits what private individuals may contribute to a particular candidate, to that degree does it expand his dependence on alternative sources of financing. Those alternatives tend to make explicit demands on a candidate whereas individual contributors rarely do.

It sounds like, in a perverse way, the limits and the restrictions imposed have probably forced candidates to focus more on money, leading to all the sorts of

abuses that are being talked about now.

The presumption, which I disagree with, is that money inevitably corrupts. In my experience, it's the *promise of votes* that is the most corruptive force in elective politics. Several individuals made very substantial contributions to my campaign, and none of them ever tried to influence the way I voted after I was elected.

When I think about a candidate, I don't think about a single issue. But PACs or other organizations tend to have a very narrow focus on particular issues. Does this lead more readily to a quid pro quo?

It certainly does. PACs will often try to get you to commit in advance, to vote yes on such-and-such a bill. For example, an airline may tell you that if you are in favor of a particular bill, its PAC will contribute several thousand dollars to your campaign. This places pressure on you to commit in advance to vote for the legislation. If you accept the money, you have assumed the obligation. A principled candidate will refuse the money, but ambition and campaign pressures have a way of eroding principle.

It certainly seems a lot more complicated than it was in the 18th century.

Even 1970. When I ran in 1970, I was largely unaware of the money-raising side of the campaign. On rare occasion, I would turn up at a "koffee klatch" or meet somebody at the request of the finance people, but that was the extent of my involvement in the money side of the campaign. Today, candidates must spend incredible amounts of time grubbing for money.

It seems like the legislation in this area was a reaction to perceived abuse – to Watergate. I wonder whether the perception of abuse in the last election might lead to further unwise legislation, or if it might instead have a correcting effect?

If it became less difficult to finance a campaign with money received from individual American citizens there would be far less pressure to have to find money from single-minded corporations, or unions, or to bend the rules to get soft money. If you're interested in a particular candidate and there are no restrictions on how much you can contribute to a campaign, you're going to give that money to the candidate, not to some intermediary – I think it comes right down to that.

Justice Scalia, for one, has been criticized by some for making public statements about his religious beliefs. How do you combine the life of a public servant, a judge, a senator, with being a religious man?

The Founding Fathers would have been shocked at the suggestion that a public official should hide his religious beliefs. In fact, they emphasized time and again the central role of religion in a free society. They reasoned that without religion, we can't have virtue, and without virtue, we won't have the self-discipline that is essential to freedom. In fact, Adams wrote that the Constitution was made only for a moral and religious people. It is, in fact, fatuous to believe that an official can check his religious convictions at the door before entering the council chambers of government; and it is both inevitable and proper for an *elected* official to take those convictions into account in the formulation of public policy. A judge, however, has no license to formulate public policy. A judge is sworn to apply the Constitution and the laws of the United States, and he violates his oath if he bends the law to accommodate his religious beliefs. Now how does this apply to Justice Scalia? I have total confidence in his intellec-

tual integrity and see no conflict between his discussion of his religious views and his ability to be entirely objective in the discharge of his judicial responsibilities.

Does Washington, perhaps like the academic elite of our society, treat religious beliefs with disdain?

Absolutely. No doubt about it. In fact, Professor Stephen Carter of Yale has written a book on this subject which is titled "The Culture of Disbelief." It is his thesis that the prevailing intellectual climate is so hostile to religion that even the devout are reluctant to acknowledge their faith.