

THE MODERN AMERICAN PRESIDENCY: HOW THE EXECUTIVE BRANCH HAS CHANGED

Tyler Gustafson '20

ABSTRACT: Has the American presidency shifted to a completely different version than what the founders intended, or would the founders approve of the presidency that is seen today? Ultimately, the founders would, indeed, approve of the presidency that is seen today. Certain presidents have changed the office of the president but not in ways that make the office unconstitutionally powerful. Indeed, there are differences in how the president functions today versus how that office functioned at the founding. Presidents Woodrow Wilson and Franklin Delano Roosevelt are the main cause of this change. President Wilson wanted to democratize American government while placing so-called experts in positions to determine policy making. FDR took Wilson's ideas and implemented them with the Reorganization Act of 1939. This allowed FDR to change the office of the president permanently by expanding the Executive Bureaucracy. But this change is not unconstitutional, for the founders created a path by which the president could become what it is today.

* Tyler Gustafson is a Political Science major at Grove City College. He has minors in Pre-law and in Biblical and Religious Studies. Tyler is active on campus through Student Government and Young Americans for Freedom. He also throws the javelin on the track team and plays football. Tyler comes from a wonderful family of seven in the heart of South-Central Pennsylvania. After graduation, Tyler plans on attending law school and eventually becoming a federal prosecutor and making his way into public policy.

Did the American Presidency change from traditional to “modern”, or did a different change take place? Some scholars suggest that there is a difference between the traditional presidency of the founders versus the “modern” presidency of today. Typically, this shift from the original presidency to the “modern” presidency is attributed to President Franklin D. Roosevelt.

One scholar, Fred Greenstein, posits four areas where the “modern” presidency has taken on roles that the original presidency would not. First, he states that the president became actively involved in initiating and seeking congressional support for legislation and frequently using the power of veto as a way to pursue his legislative agenda. Second, Greenstein notes that the president, who normally exercised few unilateral powers, transitioned into the frequent use of executive orders to bypass Congress. Third, the president created an extended bureaucracy in the executive branch to support his own legislative agenda through independent policy making. Finally, the presidency became personalized.¹

1 Fred Greenstein, *Change and Continuity in the Modern Presidency* (1978)

Greenstein attributes these changes to FDR². However, his assertions are flawed. One only needs to look to the Constitution and the framers' intention for the presidency to understand that all four of the above categories fall under the original jurisdiction of the president. Greenstein's rules for the "new" presidency which he believes began under FDR, miss the mark regarding the changes FDR actually initiated in the presidency. Yet, other scholars seek to blame the modern presidency on other presidents. Jeffery K. Tulis claims that the modern presidency was created under Woodrow Wilson.³ His two main problems with this "modern" presidency are that it creates a "Super-man" role for the president by raising his expectations far too high, and it makes extraordinary power seem routine.⁴ Both of these scholars recognize that there is change in how the executive branch is perceived. However, they both fail to recognize where the real problem lies. The "modern" presidency is not modern.

in *THE NEW AMERICAN POLITICAL SYSTEM*, (Anthony King ed. AEI Press 1990).

2 *Id.*

3 Jeffrey Tulis, *The Two Constitutional Presidencies* in *THE PRESIDENCY AND THE POLITICAL SYSTEM 2* (Michael Nelson, ed. CQ Press 2014).

4 *Id.* at 23.

Rather, the framers would support the office of the president as it is used today. The real problem can be found in how policy-making changed and how FDR and Woodrow Wilson shifted the executive branch.

James Wilson set up how the president was to operate. His language regarding the presidency allowed for an executive with oversight of the executive branch. According to Wilson, the executive must act with energy, dispatch, and responsibility⁵. James Wilson looked to the Governor of New York as a template for the American presidency.⁶ Governor Morris of New York was also a prominent supporter of a strong executive⁷. Wilson saw what New York was doing as practicable and useful for America going forward. New York's general grant of executive power is similar to the Constitution's Vesting Clause. The Vesting Clause reads, "The executive power shall be vested in a President of the United States of America."⁸ This clause was left intentionally vague to allow the executive to act when necessary.

5 Charles Thach, THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 90 (Liberty Fund Inc. 2010).

6 Thach, *supra* note 5, at 104-105.

7 *Id.*

8 U.S. CONST. art II, §1.

Governor Morris is why the Vesting Clause reads in such a manner. However, that wording is not necessarily problematic in its original meaning. Morris was tasked with writing the Constitution and, in doing so, he included what he thought to be the correct view of presidential power. As David Nichols points out, “Under Morris’ formulation, the legislative powers of the government are limited to those specifically granted by the Constitution, but the executive power is subject to no such limitation.”⁹ The framers, fearful of an overpowered legislature, created mechanisms by which the legislature could be checked. The executive, however, was different. It would be checked in other ways not like the enumerated powers of Congress. The president is bound by the people and the Constitution. The framers’ foresight allowed for an expansive executive branch. The Vesting Clause and the language that the framers used surrounding the president made the office one that could accommodate change.

Greenstein’s analysis of the presidency’s chang-

9 David Nichols, *THE MYTH OF THE MODERN PRESIDENCY* 38 (Penn. St. Univ. Press 1994).

es seems to disregard the Vesting Clause. Through such a clause, the executive branch was inherently going to be expansive. Thomas Jefferson, the third president of the United States, initiated and sought after legislation to make the Louisiana Purchase. After Congress acted too slowly to make the purchase, Jefferson did so unilaterally. His unilateral action was even supported by one of his adamant opponents, Alexander Hamilton, who understood that the executive had such authority over foreign affairs. Jefferson later explained his actions to the public and although his explanation of executive power was flawed through his assertion of prerogative power, he demonstrated the personalization of the presidency. During Andrew Jackson's presidency, Jackson used the power of veto in a manner pursuant to his legislative agenda. Jackson thought that he had an obligation to the people. Jackson's presidency further demonstrates how Greenstein misses the mark. Of these presidents both would be considered "modern," but they both demonstrated traits of Greenstein's "modern" presidency.

Like Greenstein, Tulis has a flawed understanding of the presidency. James Wilson wanted a single executive with

energy, dispatch, and responsibility.¹⁰ The executive branch was to be separate from the legislature to prevent any means of creating a privy council over the president. According to Tulis, that separation for the executive signaled the framers' intention to make the presidency independent from Congress and the people.¹¹ He is correct in asserting that the president was to remain independent from the legislature. However, Tulis misses the mark regarding the president's relation to the people. The framers bound the president to the Constitution through a national election, and, in doing so, tied the president to the people. Inherently, a nationally-elected executive must be in touch with the people. James Wilson believed that it was necessary for the executive to have good leadership in managing the office¹². In doing so, the executive must be able to make public arguments.

Jeffery Tulis makes another distinction that separates the traditional and "modern" presidencies. He calls that distinction the divide between the first and second constitutions; the first is what the founders intended, the sec-

10 Thach, *supra* note 5, at 90.

11 Tulis, *supra* note 3, at 10.

12 Thach, *supra* note 5, at 104-105.

ond is more concerned with rhetoric.¹³ Tulis, however, fails to account for James Wilson's argument that the president must be able to make public arguments and use executive power as a single executive¹⁴. Tulis tries to credit the rhetorical presidency to Woodrow Wilson. However, the rhetorical presidency did not start there: presidents prior to Woodrow Wilson were rhetorical and acted unilaterally. Examples of such presidents are not hard to find. George Washington, James Monroe, Andrew Jackson, and Abraham Lincoln all made public arguments and acted within the purview of the Constitution as it related to executive power. Tulis also claims that the second constitution makes a situation like the Iran-Contra affair more likely due to greater perceived executive power.¹⁵

Tulis seems to be correct if one only considers recent affairs. President Obama illegally entered Libya which led to the infamous Benghazi terrorist attacks. However, Tulis is wrong. Thomas Jefferson engaged in a quasi-war with the Barbary Pirates off the coast of Libya. He did so unconsti-

13 Tulis, *supra* note 3, at 1.

14 Thach, *supra* note 5, at 74.

15 Tulis, *supra* note 3, at 25.

tutionally without the approval of Congress, despite the fact that only Congress possess the power to declare war. The Iran-Contra affair was unconstitutional, but it was not made more likely by the second constitution. Such actions took place long before the arrival of Tulis' second constitution.

Wilson and FDR both enacted change on the executive branch but did not change the entire branch, as Greenstein and Tulis assert. If the "modern" presidency is so vastly powerful, beyond what the framers intended, how does one go about explaining the similarities between the "traditional" and "modern" presidents? Both Presidents Jefferson and Obama illegally engaged in military affairs near or in the country of Libya. President Jackson wielded the veto power like a sword. Presidents Abraham Lincoln, Thomas Jefferson, and George Washington engaged with the people through addresses. Although there are more examples, those presidents demonstrated traits of the "modern" presidency, yet they are not modern.

The "modern" presidency can be seen through many "traditional" presidents. Likewise, the "traditional" presidency can be seen in "modern" presidents. Consider George

W. Bush. His presidency did not demonstrate vast executive power beyond the framers' intent. Before going to war in Iraq, Bush first went to Congress. He conducted military operations constitutionally, during a time when many would not exercise such restraint. Additionally, Bush demonstrated how a "modern" president did not follow Tulis' second constitution claim that the new presidency is more rhetorical. President Bush often struggled to clearly articulate his plan for the nation. The "modern" presidency is not new. Wilson and FDR did, however, change the office and how it functions.

Although the presidency of Woodrow Wilson was not new in terms of its rhetorical status, it was different in that it attempted to change the American system of governance. At first, Wilson wanted parliamentary government. When he became president, he pivoted to stating that the president should have the most power. In reality, Wilson wanted to make the American government a pure democracy, rather than democratic republic the Constitution established.¹⁶ The founders, who were fearful of pure democracy, set up a form

16 Nichols, *supra* note 9, at 19.

of representative government to curb purely democratic tendencies. The balance of power was made so that it would be difficult to pass legislation. Wilson harbored a distaste for the separation of powers that the Constitution had set up.¹⁷ His aversion to grid-lock, and preference that the president and Congress be integrated, furthered what some scholars have termed a “Darwinian” approach to the Constitution, as opposed to what may be termed the founders’ “Newtonian” approach.¹⁸ This approach essentially treated the Constitution as a living document. His apathy toward the Constitution allowed him to think and operate in ways that changed American governmental practices. Wilson wanted big debates about big principles and sought to eliminate interest groups as he saw them as detrimental to democracy. Wilson sought to change the deliberative practices that the framers intended for the passage of legislation. However, such changes were dealt to the entire system rather than just the office of the President.

Woodrow Wilson sought to expedite the process by

17 Christopher Wolfe, *Woodrow Wilson: Interpreting the Constitution*, 41 REVIEW OF POLITICS 121, 128 (1979).

18 Nichols, *supra* note 9, at 14-15.

which legislation was passed and sought to eliminate the checks and balances that slowed down that legislative process. In his view, the agendas should be informed by “non-partisan” experts.¹⁹ Thus, the executive bureaucracy took on a greater role in the policy planning of America. When Franklin Roosevelt took office, Woodrow Wilson’s plan for America took off. FDR was strongly influenced by the thoughts and practices of Woodrow Wilson who is recognized as the first writer to advocate the doctrine of responsible party government.²⁰ FDR’s New Deal solidified the notion that there had been a shift in the American governmental system. That shift signified that the New Deal gave impetus to an extension of presidential responsibility which tended to replace partisan politics with the executive administration.²¹

In an environment where poverty was high and people were struggling to find ways to live during the Great Depression, FDR’s New Deal seemed like a plausible solution no matter what it did to the Constitution. FDR promised a

19 *Id.* at 17.

20 Sidney Milkus, *Franklin D. Roosevelt and The Transcendence of Partisan Politics*, 100 POLITICAL SCIENCE QUARTERLY 479, 480 (1985).

21 *Id.*

concrete plan for the New Deal as a campaign tactic. In reality, he did not have such a plan. He had an ideology which proved to be harmful to the framers' government. The Second Bill of Rights demonstrated how FDR thought of power and how he planned to go about changing America. He listed them as: the right to a useful job; the right to earn enough for adequate food, clothes, and recreation; the right of a farmer to sell products for decent living; the right for businesses to free trade; the right of every family to a decent home; the right to adequate medical care; protection from economic problems of old age; and the right to a good education.²²

FDR announced these rights to the public without congressional approval, in a rhetorical way. That was not a major issue and was a part of the traditional presidency. Rather, the problem stemmed from the positive nature of these new rights. The original Bill of Rights consisted of negative rights stating what the government could not do. The Second Bill of Rights was stated in the opposite fashion, elaborating on what the government could and should

22 Franklin Roosevelt, State of the Union Message to Congress, (Jan. 11, 1944).

do. Such a pivot from the original understanding of rights changed how Americans interacted with the government. Most people began to expect the government to provide for them when they could not provide for themselves. Such dependence on the federal government, through the New Deal, fostered a culture of reliance.

In order to act on his Second Bill of Rights, FDR had to first take on his own party. One scholar, Sydney Milkus, asserts that Roosevelt tried to establish a personal party. His idea of a personal party was illuminated by the election of 1938 which is often dubbed the “Purge Campaign of 1938”.²³ Roosevelt’s purge was likened to Adolf Hitler’s weeding-out of dissension within the German Nazi party and Joseph Stalin’s elimination of disloyal party members in the Soviet Communist Party of Russia, but without the massive casualties.²⁴ FDR’s endorsement of candidates was not unprecedented, but his use of government funds to do so was questionable and possibly illegal. Until the Hatch Act of 1939, FDR used the growing army of federal workers in local and

23 Milkus, *supra* note 20, at 485.

24 *Id.* at 486.

state political activity to get people of his liking elected. The Hatch Act barred federal employees from participating in campaigns. Prior to the Hatch Act, some thought that Roosevelt was assembling a modern Tammany.²⁵ His political actions, regarding the purge of the Democratic Party were vital in passing the New Deal. FDR knew that in order to pass such sweeping change he would need to change the mindsets of those in the legislature or replace the current minds with new ones who would follow his ideas. With a legislature that thought like him, Roosevelt had set up the path by which the next step could be taken to advance his agenda.

FDR enabled the government to act on his Second Bill of Rights with the passage of the Executive Reorganization Act which greatly expanded the executive bureaucracy²⁶. This act permanently changed how legislators operate. In 1933 the executive bureaucracy employed around 500,000 people. By 1945 it had expanded to include 3.5 million people.²⁷ This allowed the president to become the main initiator

25 *Id.* at 494.

26 5 U.S.C. § 133 (1939).

27 *The Development of the Bureaucracy*, US HIST., <http://www.ushistory.org/gov/8a.asp> (last visited Apr. 28, 2019).

of legislative material. The huge staff that was allotted to the executive branch through this act enabled the president to research policy and create public policy plans.

Although controversial, the Executive Reorganization Act was not unconstitutional. Clearly, the framers intended to give legislative authority to Congress. Article one of the Constitution delineates that power to them²⁸. However, FDR turned that practice on its head. By advocating and campaigning for politicians who followed his own New Deal doctrine, FDR enabled himself to pursue his own agenda. He effectively got Congress to turn over their power to create legislation to the president through the Executive Reorganization Act. Policy and legislation making has not been the same since then. Similarly, the growth of the executive branch has given much of the perceived power of the purse to the president. By the 1970s Congress relied heavily on the president to submit a budget and relied on the estimations and projections of executive branch officials.²⁹ Such change can be credited to FDR's New Deal practices which set up a

28 U.S. CONST. art I.

29 Nichols, *supra* note 9, at 66.

system by which he could achieve his goals efficiently.

Such an overgrown executive branch is not unconstitutional. Modern presidency theorists fail to recognize the expansive tendency of Article II of the Constitution. Additionally, the president is the only elected official that is elected by the nation as a whole, which should dispel the notion that the legislature is the branch that is closest to the people.³⁰ That said, FDR still changed how the American government functions.

One can view the effects of such change today. President Trump and his lack of direction for Congress shows how FDR changed that process. Since FDR, presidents have been the leading agenda-makers. Arguably, President Trump's position can be described as true to the Constitution. Whether he knows it or not, he is allowing Congress to do its intended job. The fact Congress has been ineffective in doing so demonstrates the dependency on the president as an agenda maker. Without a vision from the president, Congress has been inept. In this way, President Trump has been a "traditional" president. On the other hand, President

30 *Id.* at 28.

Trump would be considered “modern” by Tulis through his use of Twitter and many opportunities to speak directly to the American people. Although the framers could not have foreseen the arrival of social media, they would not consider it problematic to use it to speak to the American people. The content of what President Trump includes in his Twitter account is a different matter, but its use is aligned with how the framers saw the presidency. It is true that many framers, including James Wilson, understood that the president should be in touch with the people. However, the current executive branch is tainted by the effects of FDR and Woodrow Wilson. Although Congress finagled the budget plan, they ultimately relied on the executive branch to come forth with a plan to move forward.

Although FDR changed how legislation was created, it was not an unconstitutional change. Some people succumb to the notion that the president has no place in the legislature. That rudimentary understanding fails to account for the executive’s veto power and state of the union address. Clearly, the framers intended for the president to have those powers that involve the act of legislating and articulating an agenda

for the nation. To claim that the president has no authority to interfere with legislation is equivalent to ignoring the text of the Constitution. Additionally, those who support the notion of an entirely different modern presidency often point to the mushrooming effect of the executive administration after FDR.³¹

Modern presidency theorists fail to recognize that the president has the constitutional authority to oversee those administrations. A notable part of the executive's job is to execute the laws. Doing so requires the discretion afforded the president by his office. Although the oversight and expansion of the executive bureaucracy is constitutional and a part of the traditional presidency, this does not mean that FDR did not have a significant impact on the way America functions.

The presidency, as seen today, is not an unconstitutional version of the office. Rather, it is an extension of what the founders put in place. FDR and Woodrow Wilson, radically progressive as they were, did not create an entirely new version of the presidency. Instead, constitutional prac-

31 *Id.* at 93.

tices changed in a manner congruent with the Constitution. The results, however, were negative. FDR created many new programs and vastly expanded the executive bureaucracy. It has not shrunk since then. Resulting from such expansion is a massive deficit, unsustainable social programs, and a population very dependent on the government. One only needs to view the current state of affairs to see such results.

Wilson and FDR's pragmatic approach to the Constitution, the "living constitution perspective," has damaged the executive branch. However, their presidencies have not destroyed the executive branch. Although the "modern" presidency is not so modern, the practices of the government changed due to Woodrow Wilson and FDR. They expanded the executive branch and changed how legislation was created. Because of them, America has become a society trapped by New Deal politics.

