

# H-Net Reviews

in the Humanities & Social Sciences



**David K. Nichols.** *The Myth of the Modern Presidency.* University Park: Pennsylvania State University Press, 1994. viii + 181 pp. \$27.00 (paper), ISBN 978-0-271-01317-6; \$24.95 (cloth), ISBN 978-0-271-01115-8.

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It is not definitive, it is not brilliant, it is not seminal. The answers it supplies are not always equal to the questions it asks. The author, Dr. David K. Nichols of Montclair State University, has a habit of stepping off the main trail and wondering down the odd rabbit path. He has a disconcerting tendency to let us see the scholar peering all too eagerly at us from behind his words. Too many items are asserted rather than developed. Structurally, *The Myth of the Modern Presidency* can be startling as it loops and reloops back upon itself. Moreover, the author is often too intent that the reader be persuaded rather than educated. In most books such flaws would be fatal and this review would be negative.

For *The Myth of the Modern Presidency*, the above are mere quibbles.

Let me go further. In 1999, I will be teaching an undergraduate course on the Presidency and I intend to use Nichols' book. He has asked the right questions and—regardless of the side trails he runs down and the loops which do not quite make it all the way back—he has provided an important and insightful resolution of the “problem” of the very powerful president's place within the Constitution. My greatest fear is that, by doing too many loops and by not coming quickly to his ultimate conclusion, Nichols' book will be disregarded and forgotten. This should not happen.

Since I have been most impressed by the author's argument, what follows is basically an exegesis hidden behind a review.

The first chapter alone makes the book worth purchasing. By following Wilson, Theodore Roosevelt, Lincoln, Jackson, and Washington, the author convincingly demonstrates that the Rooseveltian presidency existed long before Roosevelt. Pinning his definition of a “modern” president to the existence and use of broad pools of discretionary power as ratified

by the people and not forbidden by the legislature, the author reinforces his argument with example after example of presidents using broad discretion to achieve ends they themselves have determined. In short, he concludes that the “modern presidency” is not a chronological development, but a presidential “style.” Although Nichols' case is strong, this reviewer believes it is stronger than even he realizes. For by using only the “name” presidents, he invites the reader to reduce what is a constitutional “style” to a matter of personality. Yet, it is clear that some “lesser” presidents—presidents who do not have National Monuments—also used the discretionary powers Nichols describes. For instance, Hoover, Harding, McKinley, Hayes, Van Buren, and Monroe all used discretionary powers to effect fundamental policy decisions—decisions which more Whiggish scholars might say fall well within the sole purview of Congress or the courts. At the very least, the fact that Polk is mentioned only three times in the book is a serious omission and one which weakens the book by reducing Nichols' examples to the “usual suspects.” The author needs to make the case that the “modern presidency” is based, not on individuals, but on the inherent constitutional properties of the office.

The second chapter of the book is similarly an excellent reason to purchase the book and, to the mind of this reviewer, an excellent reason to use it for undergraduate courses. This chapter constitutes a very precise analysis of how different constitutional clauses relate to presidential power and authority. It is surgical in its pulling apart and reassembling of the constitutional bases of presidential power. The quibble here is that Dr. Nichols has tilted his argument ever so slightly by (mostly) ignoring the chronology of the Constitutional Convention. The strong executive emerged only slowly and somewhat late in the convention and as a reaction to both the overly strong

Congress and the overly slow Congress the founders had created. It would be easy to read Nichols' words as illustrating that strength was given to the president almost as a *sine qua non* qualification for the creation of the office. I suspect that had the delegates been quizzed, they would have seen, not broad pools of power, but tightly defined ponds of countervailing strength. Still, the author's skill in tracking the sources of the Chief Executive's powers to their fountainhead constitutes a tour de force.

The third chapter, alas, is dreadful. Attempting to examine the relationship of domestic policy and budgetary affairs, Nichols loses the skien of the argument he has woven in the first two chapters. In truth, an examination of his footnotes reveals that the author comes by his befuddlement honestly. Much of what has been written about the president and the budget come from late-twentieth century scholars tapping on their computers beneath soft electric lights. Such scholars tote up budgets by the dollars. This may be historical for 1998, but it is ahistorical for 1848. Since we live on this side of the managerial revolution and not on that side, we tend not to recognize budgeting processes which do not reflect book-keeping and /or "statistical" practices. Yet most of the budgets of the United States have not been book-keeping operations (and indeed a good deal of the budget still is not). The budgetary records of even such acts as the Timber and Stone Act did not reflect, in real dollars, the value of budgetary transfers between public and private. As a result of Nichols' too simple treatment of this subject, he tends to see only the trees closest to him in time and not the forest stretching far back to the earliest presidents.

In Chapter Four, "Administrative Responsibility," Nichols regains his focus. On the first page of this chapter, he states his thesis clearly:

According to the myth of the modern presidency, another crucial change...has been the rise of an extensive bureaucracy in the White House to support the President's legislative agenda and independent policy-making....[This] myth is incorrect because it fails to recognize that the conflict between legal and discretionary administrative authority goes back to the earliest days of the Constitution.

The rest of the chapter focuses on a broad spectrum of occurrences. These occurrences, the Removal Controversy, the Tenure of Office conflicts, the tension over the authority of the Independent Regulatory Commission, and, most importantly the Chadha case

(1983) which essentially killed the legislative veto, represent a good cross-section of American history and American thought as to presidential discretion. With whatever cheek it takes to present a section entitled "The Right Reasons," Nichols is absolutely right in his final analysis. In this section of Chapter Four, he drives home the fact that without administrative discretion (the removal of which is an impossibility in the first place), there is no administrative responsibility. Moreover, he demonstrates that executive responsibility is an intrinsic part of the Constitution which can (and does) act to preserve constitutional limitations. Fundamentally, a president cannot sign a bill or execute a legislative dictate which he deems unconstitutional without breaking his oath (as Jackson noted in his Bank Veto). And that means that the president has the discretion to make such choices, which, in turn, means he has administrative discretion. Given the president's constitutional obligations as exemplified by his oath, his discretion is co-equal to that of other branches and checked either by the approval or opprobrium of his constituents and the threat of impeachment.

In Chapter Five, the author slices through the questions of presidential discretion and foreign policy. Although most would say that the president has emergency extra-constitutional powers, *The Myth of the Modern Presidency* rises decisively above such a poorly-defined and vague concept. After all, who defines when one can break the constitution? If, as probably the great majority of constitutional scholars have argued, that decision is in the hands of the president, then the constitution can be exceeded at the discretion of the person who is exceeding it. James Madison and, for that matter, Charles Pinckney and Elbridge Gerry, must be rolling in their graves. For those who are frowning at the fact that both Nichols and I are flying in the face of conventional wisdom, let me ask you this: do you really want to give Huey Long and his spawn a theory of extra-legal constitutionality to justify their actions? Or do you wish to make emergency actions unconstitutional and have the Carters and the Coolidges pause at the moment of crisis? Neither option appears appetizing to this reviewer. Nichols has found, with the help of Mr. Justice Frankfurter, what appears to be a way to incarnate the spirit of restrained government in the context of a strong presidency. The author, agreeing with Frankfurter, finds that emergencies shift the balance of power "within the constitution." And Nichols re-emphasizes, as did Frankfurter, "within the consti-

tution.” Thus, the so-called “emergency powers” are not unconstitutional and can be checked, rather easily, by the people or the legislature. For instance, we have held at least fourteen elections during wartime or during times of great economic or constitutional crises (1800, 1812, 1840, 1864, 1896, 1916, 1932, 1936, 1940, 1944, 1952, 1964, 1968, and 1976). And in seven of those, the party who held the White House lost it—which certainly appears to be a rather significant check on the so-called emergency powers of the executive.

Chapter Six discusses the evolution of the concept of the liberal executive. Nichols does a competent job of drawing out precedents from the thought of Machiavelli, Hobbes, Montesquieu, and Locke for his definition of the “modern liberal executive.” The author does establish that the idea of a powerful executive—possessed of significant discretion, drawing authority from the agreement of free people, yet operating within a system of laws not dependent upon the momentary pleasure of the mob, has a long and too often overlooked pedigree. The reviewer would add that it goes back in an unbroken line to at least Marsiglio of Padua, Dante and even beyond the Caesero-papist theorists of the eleventh century. For instance, the tenth-century theorists, Adelbaro of Laon and Gerard of Cambrai recognized that government should be ordered a priori and that “opinion” did act upon the legitimacy of the acts of rulers—who in turn had to work within the structure of government.

Nichols’ conclusion that the writers of the United

States constitution were the ones who actually constructed a broad, powerful, and yet constrained president arrives with remorseless logic. Similarly, his faulting of theories which free Presidents from constitutional constraints is a logical extension of his previous chapters. His solution to the fear of the over-powerful chief executive is not to debate when a president may assume extra-constitutional powers, but to declare all extra-legal powers void and to read what appears to be extra-legal back into the constitution. Thus, the guarantees of “modern,” liberal, and constitutional government exist at all times, and the discretionary powers of the president, however they may expand in different situations, never escape the restraints of popular approval and legislative oversight.

For those who doubt the validity of such an argument, let me point out that had Lincoln’s suspension of *habeas corpus* and his other powerful exercises of presidential discretion not been accepted by the people and the legislature, then either President Hamlin or President McClellan would surely have stopped them when they assumed office.

*The Myth of the Modern Presidency* receives my highest praise. Well done, Dr. Nichols.

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