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Jeff Smith



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Jeff Smith

- 1 In recent years, American politics has fallen into what amounts to an ongoing, low-grade constitutional crisis. This condition still goes by time-honored names like “gridlock,” “polarization” and “brinksmanship,” but as it has grown more serious, other terms have come into vogue: “radicalization,” “dysfunction,” “constitutional hardball,” “total obstruction,” “hostage-taking,” a “toxic” or “scorched-earth” politics, the “death of comity,” the destruction of “political norms,” the “weaponizing” of parliamentary rules. Presidential actions that used to be largely routine, like the appointing of judges and agency heads, are now instead routinely politicized or blocked altogether. The filibuster, a once-rare maneuver to stop action in the U.S. Senate by requiring supermajority votes, has become standard operating procedure, with only a minimal (and partisan) recent revision to at least allow the staffing of agencies and courts. Threats to shut down the government or cut off America’s borrowing authority, thus risking global financial turmoil, have become almost once-a-year instead of once-a-generation events. Party-line voting is common, indeed the norm on major legislation – of which there rarely is any, since the problems just listed make it almost impossible to pass.

2 Addressing those problems may well call for drastic reforms, and this book proposes one. The proposal seems to have few takers; *Two Presidents Are Better Than One* has been out since 2013, with little sign of any movement developing to advance its ideas. The book nonetheless makes for a very interesting thought experiment, perhaps all the more so insofar as its analysis is crucially mistaken.

3

As a law professor and constitutional law scholar, medical doctor, health-care expert, and former Indiana Democratic state legislator, author David Orentlicher comes well prepared. What he calls for, simply, is a “plural executive”: a two-person presidency, with one co-president chosen from each of America’s two leading parties. Large parts of his short book are devoted to demonstrating that such an idea is not as strange as it sounds, and of course to detailing what he sees as its advantages. By removing executive power and the nation’s focus from one individual, Orentlicher argues, a bipartisan presidency would be less “imperial” (a longstanding criticism), and less likely to be viewed unrealistically as a national “savior.” It would give both parties a stake in the executive’s success, eliminating the incentive for total obstruction, lowering the level of partisan discord, smoothing relations with Congress, and better representing the views of citizens across the political spectrum, which in turn would raise public interest and participation in politics. Sharing decision-making between co-presidents would reduce the chance of costly mistakes, and would ensure that major initiatives had bipartisan legitimacy and backing. And far from departing radically from America’s constitutional design, Orentlicher says,

it would be more faithful than a single president to the framers’ overall vision of the national government. The framers did not anticipate the emergence of a powerful, policy-making president, nor did they foresee its impact on the constitutional balance between the executive and legislative branches. They did not predict the enormous role of political parties and their distortion of the political process. A two-person presidency can do much to address these problems so the national government better realizes the founding fathers’ vision. (17)

4 As Orentlicher points out, the 1787 Constitutional Convention considered creating a plural executive, albeit based not on parties but on regions. Other precedents he cites for divided executive power include the governing structures of business corporations; American states, many of which elect several of their top executives; semi-freestanding executive agencies, like the U.S. Federal Reserve Board, that make policy to varying degrees independently of the presidents who appoint them; parliamentary Cabinet governments, with their traditions of

ministerial responsibility; “cohabitation” arrangements between opposing presidents and prime ministers in France; and, somewhat further afield, the “dual monarchy” of the Austro-Hungarian Empire. Perhaps the closest analogue to Orentlicher’s proposal is a “national unity” government of the kind that several nations have convened during wars or other great crises, with opposition leaders purposely included in Cabinets to ensure that decisions on which the nation’s survival might depend have the broadest possible public support.

5

There are obvious objections to his scheme that Orentlicher does an impressive job trying to answer, with frequent and informative reference not just to historical cases but to current political science, game theory, and psychological research on decision-making and related problems like “groupthink.” He admits that many of his answers are educated guesses. Wouldn’t guaranteeing that both parties “win” turn presidential elections into non-events? Yes, but it could also increase interest in nomination contests and perhaps encourage the rise of viable third parties. What about foreign policy? A dual executive would deal with other nations more moderately and, by plausibly representing America as a whole, more effectively. What about piloting the idea at the state level first? Yes, Orentlicher agrees, that might be a good idea. And so on. It is a thoughtful discussion, and much of the book’s value comes from the chance to follow along with Orentlicher as he thinks the idea through.

6

There is something odd, though, about the whole premise. In the United States, even commonsensical and much-discussed systemic reforms – like electing presidents directly, or regulating the legalized bribery known as campaign finance – struggle mightily to make headway. A transformation as large as Orentlicher’s would be thinkable only in a system that was relatively fluid and open to change. But if America had such a system, the deadlocks and dysfunctions that seem to call for big change probably would not exist in the first place. In that sense, this proposal is self-canceling.

7

But to consider it on its merits: Why *wouldn’t* two presidents be better than one? Orentlicher is right, after all, that America’s constitutional design is not currently working as the framers would have wished. What he is missing, though, are the all-important concepts of “veto

points” and “status-quo bias.” Put simply, the American system has too many veto points, too many ways in which action can be blocked. It is therefore too difficult to get things done, and the result for policy is a strong structural bias in favor of current arrangements and opposed to reforms of any kind. The principal problem with a dual executive is that it would create yet another veto point, another and very large obstacle to getting policies made even when they would benefit the country.

8

To take an instructive case that Orentlicher himself discusses: The Patient Protection and Affordable Care Act (ACA), popularly known as “Obamacare,” was a relatively modest reform, aimed at a goal that the Democratic Party had sought for decades – universal access to affordable health care, like that which the citizens of every other advanced country have long taken for granted. It was not a nationalization of health care itself on the model of the British National Health Service, nor even a nationalization of health insurance on the model of Canada’s Medicare (or America’s own Medicare, which however is limited to senior citizens). It was a federal reorganization of insurance markets, combined with a system of regulations, mandates and subsidies designed to deliver private insurance companies millions of new customers on condition that they not discriminate against the sick. It was not fully in effect yet when Orentlicher wrote his book, but it is now, and by most measures it’s working better and at lower cost than expected: uninsurance rates have plummeted, and health-cost inflation has noticeably slowed.

9

But the ACA has nearly been stopped or gutted numerous times. It exists only because of a short-lived, filibuster-proof Democratic supermajority in Congress, some fancy parliamentary footwork after that majority was unexpectedly lost, continued Democratic control of the presidency after 2012, and a single vote on an otherwise hostile Supreme Court, which has twice been asked to destroy or seriously weaken the act – both times on dubious and once on ridiculous grounds (a single ambiguous phrase) – and which did damage it by allowing states to partly opt out, leaving millions of poorer Americans in Republican-controlled states still uninsured at this late date. At every stage, Republican opposition has been near-total and at times hysterical, and each veto point has given that opposition new opportunities. The ACA has, just barely, made it past them all mostly intact, but this makes it the

exception that proves the rule: No other such new programs are even under serious consideration, and the next opportunity for one will probably not arise until sometime in the 2020s.

10

Under Orentlicher's proposal, co-presidents would have to agree in order to do anything. That means that each would be a veto point for the other. In perhaps the least persuasive passage in the book, Orentlicher argues that such a system would have led to more, not less, health-care reform: a Barack Obama - John McCain co-presidency "probably would have proposed a bill at least as significant as what eventually passed" (161). The weaknesses of the ACA, he believes, are the result of party competition creating incentives for each side to undermine the other's initiatives. Co-presidents would share an "interest in making change and creating a legacy for the ages, and their proposals would not automatically provoke partisan opposition. The effect of a second president easily could be not to stifle policy initiatives but to channel them in a more balanced direction." Since an Obama-McCain administration would have had bipartisan support, it would have faced fewer effective veto points, not more. Instead of having to thread a needle, as Obama did, it could have been bold, "push[ing] for a real overhaul of the U.S. health care system" (160).

11

This, to put it mildly, is a very best-case scenario. It presumes that both parties broadly agree that the federal government should use its power to solve problems like lack of access to health care, even if that means legislating nationally, raising some taxes, intervening in the "free market" (as conservatives like to call it), and overriding the wishes of some states. Behind this are the further assumptions that markets might fail at furnishing what modern societies need, that central governments are proper vehicles for correcting this, that Americans' rights ought not depend on where they live, and that people should not be faulted for lacking basic necessities, which should be treated as entitlements of citizenship rather than rewards for "success." In fact, though, these are precisely the philosophical differences between the parties. "In the end," Orentlicher writes, "voters want their elected officials to solve problems, not to let the country's problems go unaddressed" (128). True, and if both parties thought like Democrats, ambitious problem-solving would be possible even without a co-presidency. As it is, problems go unaddressed because Americans don't even agree on what

count as problems. Republicans – the party to which Orentlicher does not belong – claim that the country’s problems include over-dependence on “big government” or “Washington,” businesses hamstrung by regulations and lawsuits, and a system that transfers too much wealth from “makers” to “takers,” thus creating wrong incentives and rewarding and penalizing the wrong people. (Also, illegal immigrants are coddled instead of deported, not enough people are carrying guns in public places, gay people have been granted the right to get married, and in world affairs, America is too much the shrinking violet.) For those who think this way, Obamacare was enraging, a late-twilight retreat toward the discredited statism that stands between America and its former greatness. Some went so far as to claim that harming the nation was its conscious intent.

12

Granted, some of those objections were not really serious; on many points, including the basic structure of the ACA itself, Republicans reversed their own former positions, transparently looking for any possible way first of stopping the legislation and then of damaging Obama. Exactly this sort of demagoguery, Orentlicher thinks, is what a single presidency invites but a dual presidency would render pointless. But even cynical arguments work by appealing to genuine beliefs. An Obama - McCain administration would not have abolished Americans’ great disagreements over the purpose of government. It might have agreed on a package of minor “tweaks,” but the notion that it would have produced substantial health reform, let alone improved on Obamacare, just seems fanciful.

13

In fairness, another example from recent history gives Orentlicher’s point much better support. As he says, a joint George W. Bush - Al Gore presidency would not have made the appalling error of invading Iraq; co-President Gore would not have agreed to it. What this suggests is that even a very flawed constitutional design will probably work well in at least some situations. In the case of Iraq, it so happened, a status-quo bias would have been a good thing.

14

Then again, the status quo of March 2003 was acceptable. What about the status quo of March 1933? Would a joint Franklin Roosevelt - Herbert Hoover co-presidency have launched the New Deal? Would it have come to agreement on massive jobs programs, which Hoover called “demoralizing”? On labor and stock-market reforms? On federal home loans and deposit insurance? On abandoning the gold standard, an essential step that

Hoover had actively resisted? No, Orentlicher concedes, probably not. Offsetting this, he suggests, the preceding Hoover - Al Smith administration would have avoided Hoover's mistake of raising tariffs. Overall, though, a dual executive would most likely have locked in Hooverism - and likewise, in the future, would give the upper hand on any given issue to whichever president and party preferred not to act.

15

Orentlicher's proposal hearkens back to the Progressive Era at the turn of the twentieth century, when partisan divisions partly yielded for a time to shared reform impulses that animated both Republicans and Democrats. But that was unusual. Programs like America's Social Security and Medicare, or Britain's National Health Service, popular though they later became, were not the products of a bipartisan consensus. Imposed over strenuous conservative opposition, they exist thanks to periods of creative policy-making made possible by large, if temporary, one-party majorities. Orentlicher wants to ensure that such periods never happen again. In his view, this is a worthwhile trade: "Reducing the risk of a very damaging policy more than compensates for the possibility of missing an exceptionally good policy" (157).

16

Behind this premise - and, as he acknowledges, contrary to the views of many contemporary political scientists - is a mistaken distaste for political parties that Orentlicher shares not only with the Progressive reformers, but with the Constitution's framers and, for that matter, with most Americans. Underrating the role of parties in presidential decision-making leads him to make two especially dubious assumptions. The first is that co-presidents' main points of reference would be each other, and the joint legacy they would build by cooperating, not the demands of their respective party "bases." In theory, it is true, neither party would have an interest in seeing a joint presidency "fail." But the parties would still differ profoundly in how they defined success and failure - and this would be most true of each party's activists, who would fiercely resist their co-president's efforts to cooperate in search of a legacy. In recent years, Republican leaders in particular have been under huge continuing pressure from their party's base, which - as polls have repeatedly shown - insists they "stick to principle" rather than compromise with Democrats, even on such must-pass measures as funding the government or honoring its bonds so as not to destroy America's credit. Similar if lesser pressures afflict

Democrats: What lost Hillary Clinton the 2008 Democratic nomination, almost certainly, was the fact that she had angered her party's base by voting with President Bush on Iraq.

17

Orentlicher suggests that his proposal could change these incentives, and he also believes it might expand the bases, reducing polarization, as more citizens involved themselves in the party primary contests that in effect would choose the co-presidents. Perhaps, but these again seem like best-case scenarios. Activists in both parties look at the other party and see not merely fellow citizens with whom they disagree, but an irrational, alien presence intent on destroying a great nation. This may be a larger problem in America than elsewhere, given its millenarian political culture and historical intermingling of very diverse groups. Regardless, it's not a problem that a dual executive will erase. Whatever his personal hopes for a shared legacy, a Republican co-president in particular, would almost certainly come under intense pressure to withhold cooperation from the forces of darkness.

18

The second questionable assumption involves what withholding cooperation would mean. Orentlicher writes as if presidential "decisions" are discrete, occasional, and easily identified events like the calendared votes in a legislature. Should we leave or stay on the gold standard? Establish Medicare, or something else? Invade Iraq, or sit tight? Even if they disagreed on such big-ticket items, Orentlicher supposes, the two chiefs would generally keep the government humming along.

19

In fact, though, the problems confronting executives are fluid, dense and dynamic, sometimes cropping up with no advance warning and no time to spare. This is most obvious in military affairs. Combat situations might not even offer the option of doing nothing: to move troops or hold position, to press an attack or negotiate for peace, are all equally "actions" no matter which course is chosen. To which would the system default if co-presidents disagreed, especially if decisions were needed within minutes or in quick succession? Who, finally, sits at the head of the table? Orentlicher's vision of joint commanders in chief seems not just impractical, but oxymoronic: if both, supposedly, are in command, then neither is really "in chief."

20

Combat, however, is just an especially dramatic case. Even the everyday work of the Executive Branch involves a constant flow of decisions. Every line of every public statement that comes out of the White House, every memo and micro-directive to every federal department, every posting on every federal web site is a decision, often one that already requires input from a daunting number of different officials. The huge federal bureaucracy's many agencies rely on signals from the White House, and from their politically appointed heads, in setting priorities and interpreting the laws they're given to implement. What happens if two presidents are sending different signals? Orentlicher imagines co-presidents working out a *modus vivendi*, parceling out responsibilities in different policy areas, which could usefully ease some of the presidency's current burdens and perhaps take advantage of co-presidents' different talents. In theory, one co-president could then make decisions in his or her designated areas without continually needing the other's approval.

21

But this too seems very unlikely. Dividing responsibilities would be difficult enough even on paper – and in practice, the Executive Branch is a dizzying array of intertwined and overlapping activities, less a neat organizational chart than an Escher drawing. Almost every government function involves many agencies, with decisions flowing from one through another to another on an endless twisting path. More than twenty different agencies, for instance, are members of the interagency task force on adapting to climate change, an Obama creation. The task force attempts to coordinate their efforts and proposes measures affecting still more agencies. Now suppose, as is entirely possible given current U.S. party divisions, that one co-president saw climate change as an urgent problem while the other doubted it was even happening. With what would the task force be tasked? Or suppose the Democratic president took overall charge of the Labor Department, and the Republican of the Department of Homeland Security. A question then comes up concerning immigration, which involves both. Which president finds it in his in-box?

22

The problem is not just that policy coherence is hard to come by even under a single president. It is also this: Outside of the agencies themselves, the people most likely to care about these innumerable decisions, to understand

and closely follow what the federal government does day to day, are leaders and members of interest groups that are often party-aligned, providing the party with activists and lobbying its elected officials. These highly engaged partisans also have outsized influence in choosing the party's candidates. Far from honoring a scheme of divided responsibilities, they would pressure their respective co-presidents on literally every question that came up. This would make agreement very difficult, even for two presidents who, left to themselves, might happily settle most questions over a spirited round of golf.

23

Ultimately, what makes American politics almost uniquely dysfunctional is not a shortage of presidents, but an outmoded, eighteenth-century constitutional design that tried to ignore political parties instead of putting them to good use. A good party-based system mediates between the people and the government, fostering inclusion and accountability. Most modern nations elect one partisan "government of the day" at a given time, albeit one that may be constructed from a coalition of multiple but (usually) not ideologically hostile parties. The executive in such systems is an extension of the legislature and depends on a legislative majority in order to function. Governments that lose their majorities are typically dissolved, with party leaders "going to the country" for new mandates. The United States, however, with its "separation of powers" - a system based on an antique theory of government from Queen Anne's England - has national elections on fixed dates every two years, choosing its executive in partially staggered alternation with its legislature. This means that the two elective branches, which must cooperate for most things to happen, will often be under the control of opposed parties. And since there are only two significant parties, thanks to the overhang of other eighteenth-century forms, that opposition will be diametrical. In effect, America often has not one but two governments of the day, and its system is all but intended to set them working at cross-purposes.

24

Moreover, since it turns out that modern citizens make somewhat indifferent voters, those who favor the policies of the current president tend to stop paying attention, which means that midterm or "off-year" elections disproportionately draw the presidents' most determined critics. It is more likely than not, therefore, that modern presidents will face a hostile Congress for much, most, or sometimes all of their terms in office. That, in fact, is the situation as I write this. It involves each party correctly

noting that it won the most recent election (for its branch), and therefore claiming that it represents the current wishes of the American people. With both parties simultaneously holding the people's mandate, neither party actually does. And this problem compounds itself: Since each party can block the other or force it to retreat, the policies that actually emerge are neither party's real choice. This makes government untransparent, denying voters a chance to respond to an incumbent party's policy direction with a clear yes or no - because there is no one incumbent party. It's a situation of astonishing danger, an open opportunity for sabotage of a kind that Republicans in the Obama years have all but bragged of seizing. Voters are invited, in the fine old tradition, to cast angry votes against the do-nothing bum - thus perversely empowering the saboteurs, and ensuring that the bum can do even less.

25

Orentlicher is aware of all this. He explains why he thinks a dual presidency would solve it, not simply write the current gridlock into the Constitution. His is a comparatively simple change, he argues, since the rest of the constitutional design would be left undisturbed. But if that's the criterion, the real problem would be better addressed through an even simpler change: increase House members' terms to four years - a good reform in itself, in this age of endless campaign fundraising - and eliminate midterm elections. This would tie the choice of executive more closely to the choice of a legislative majority, producing a more or less cohesive government whose unsabotaged achievements, then, voters could review and either approve or reject. It would preserve the separation of powers, in case that's thought to be important, but without the current separation of electorates and mandates.

26

When they're involved in setting up governments for other countries, American leaders themselves normally opt for unseparated parliamentary systems of some kind, not variants of their own creaky, counterintuitive, and bizarrely complex "presidential" system from the age of ruffled cuffs and powdered wigs. Yet that same wisdom deserts Americans when they consider their own system. Precisely because of its archaic mystique, the Constitution is treated as holy writ. It is not a jumble of political compromises, patched up through guesswork in a snuff-filled room of yesteryear - a system with a mixed record of partial success and occasional huge failure, long overdue for rethinking in light of the actual needs of modern nations and the historical experiences of Western governments over the

past two and a quarter centuries. No, say some, it is literally divinely inspired, God's own blessing on his chosen nation.

²⁷

Despite this, reforms based on parliamentary models have occasionally been proposed. Orentlicher surveys a number of these but rejects them, embracing instead the framers' basic logic: the best way to keep government focused on the public good is not to set parties against each other, inviting the people to choose between them at regular intervals, but to set the government against itself. "Unified executive and legislative branches that promote one political party's agenda may not serve the country's interests well," he writes. "Efficient lawmaking does not guarantee good lawmaking" (135). No, but it could help guarantee *some* lawmaking. "To be sure," says Orentlicher, "dividing power makes it more difficult to implement change, but that was an important part of the constitutional plan. The framers understood that they were creating a government prone to inertia" (135). By following "the kind of structural approach that typifies the U.S. constitutional system," his proposal would complete that original plan: "Just as the framers protected against the accumulation of power and factional conflict by dividing power and requiring it to be shared, so would a coalition presidency work by dividing the executive power and requiring it to be shared" (17).

²⁸

It is not clear that the framers actively hoped for inertia; opinions were at least divided, with Alexander Hamilton famously preferring "energy," and the framing project itself an effort to give the disjointed new nation a centralized means for getting things done. It was the Constitution's opponents who demanded checks and limits; highlighting these was partly salesmanship, the framers' artful appeal to an ambivalent public. At any rate, the bias toward inertia is a weakness. Yet this is the feature that Orentlicher seeks not just to preserve but to intensify, even while transforming the system more drastically than Americans have contemplated since the 1780s. The single head of government is one of the world's best-established political conventions. Orentlicher would have America break from it permanently, something no other modern Western nation has done, while nonetheless clinging to a political theory from the eighteenth century. He is proposing radical change while also arbitrarily limiting it -

“thinking outside the box” while confining himself to a different box.

²⁹

In the end, Orentlicher seems to admit that the book has been largely an intellectual exercise. He expresses hope that his proposal, even if not enacted, can help Americans identify solutions by clarifying their problems’ causes. It does, although not in the way he intends. The U.S. government needs fewer veto points, not more, and the implausibly harmonious politics imagined in *Two Presidents* points up why. Instructive as this is, it is not a blueprint for America’s future.

AUTHOR

JEFF SMITH

Masaryk University