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Paul Horwitz
University of Alabama - School of Law, phorwitz@law.ua.edu

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The Two-Body Problem

Author : Paul Horwitz

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Daphna Renan, *The President's Two Bodies*, 120 **Columbia L. Rev.** 1119 (2020).

For reasons that remain mysterious, the past four years or so have seen a distinct rise in interest among public law scholars in the concept of "office" and surrounding ideas. What is an office, precisely? Is its defining feature one of powers—or of duties? What is the relationship between the office and the person occupying it? Do the powers and duties connected to that office inhere in the office, the officer, or some mixture of both? Can an officer speak for him- or herself, or is that speech always "official?" What is the relationship between office, officer, and the *oath* of office? Does the idea of fiduciary duty illuminate such questions, or obscure them? Of course these questions have a long pedigree. But since roughly 2017, this broad topic has seen a distinct upturn in scholarly work. One hopes it is not temporary or expedient.

Scholarly work on the question of office can take different approaches—legal or political, practical or theoretical. It can attain a level of abstraction that may yield general insights but few prescriptions—this is my own preferred sin—or give very precise recommendations that are hard to tie firmly to the legal, historical, or philosophical materials. (This is one way, in my view, to read a recent critique of "fiduciary constitutionalism," even if one thinks the concept is worth exploring.) If one wants to avoid one or the other extreme, one had better be willing to live with tension and ambivalence. That position makes many law professors uncomfortable, given their own normative inclinations and the political and professional incentives that drive them. But it can be achieved—and beautifully, at that. Such is the case with Professor Daphna Renan's recent article, *The President's Two Bodies*.

Renan's subject is "a central paradox in the structure of American constitutional government." That paradox relates to any officer, but the keystone example and the subject of this article is the chief executive. Although the Constitution "split the atom of sovereignty," its roots lie in English legal and political history, and there we find a long concern, both political and metaphysical, with the nature of the king's authority as sovereign and chief executive. The classic treatment is Ernst Kantorowicz's book *The King's Two Bodies*, which explored the dual nature of the king, in English law and politics, as both an individual monarch with a "body mortal" and an enduring "body politic": king and kingship, one person with two distinct but indivisible aspects.

Renan traces the idea of the king's two bodies in changed form through the American presidency along three dimensions, noting the different visions of the presidency that emerge, and the tensions that are produced, from the king/kingship model in each dimension. One is the "personal/impersonal" dimension, arising from the "interdependence of the person and the office of the presidency," which "belies efforts to make the President's personal and official character fully severable." She offers as an example the debate between Justice Jackson and Chief Justice Vinson in the *Steel Seizure Case*. Here, Vinson stands for the view that "the president's individual judgment is not an extraconstitutional impulse but a facet of constitutional leadership itself," while Jackson concedes the charismatic element of the American presidency but sees "the role of constitutional law" as being "to offer a counterweight to presidential charisma in the form of the separation of powers."

The second conceptual distinction is between the temporary and continuous nature of the presidency. On the one hand, the presidency is a continuing institution that exists and acts across particular administrations. On the other, each president is elected in substantial measure for his or her charismatic vision and is expected to "implement a particular policy and ideological" program. An example of this tension can be found in the law and practice around executive orders, which enable each entering president to put his or her stamp on the office but are constrained, in

practice, by procedural norms and rules of "process and publicity" that strengthen the legitimacy and legality of an executive order but also entrench it against sudden changes of course by the next administration.

Finally, there is the "singular/composite dimension," embracing the distinction between the executive as a particular individual in whom the Article II power is vested and as a corporate institution arising from the fact that "the execution of presidential power," especially given the nature and reach of the modern executive branch, "requires a collective." Thus, in *Trump v. Hawaii,* Chief Justice Roberts's opinion "embraces an impersonal, thoroughly institutional presidency," in which the president's own tweets are less important than the evidence of some proper institutional process in coming up with later iterations of the "travel ban." By contrast, in Justice Sotomayor's dissent, what matters is "executive 'unitariness,'" and "the person of the president cannot—as a legal matter—hide behind the façade of an orderly office."

Along each of these dimensions and across many issues, Renan argues, the idea of "the President's 'two bodies' has been at the crux of ongoing debates about presidential power," and the duality of the presidency has been "the defining ambiguity, the central paradox of the constitutional office." Even as particular decisions and elements of presidential power can be understood better from the standpoint of one vision or another, taken together the duality "plays a mystifying or obscuring role," while also serving as a constitutive feature of the modern presidency. It "orients practice toward certain fundamental, though conflicting, ideas about what the exercise of presidential power should actually entail," such as the fundamental—and conflicting—desires for both a charismatic leader to occupy the "body mortal" and a constrained and time-extended executive branch to fulfill our need for a stable "body politic."

How to resolve this paradox? One of the most admirable and frankly refreshing aspects of Renan's article is that she does not suggest it *can* be resolved. We can *understand* the paradox better, identifying it at work and tracing its complex effects. But we cannot eliminate it. She states forthrightly: "Public law theory cannot solve or somehow move beyond the two-bodies paradox. But it can get the nature of the problems right."

This is no small thing. That's certainly true stylistically. Any reader of law reviews gets used to articles that consist of, in effect, 40 pages of second-hand journalism recounting some "new" issue, combined with five or ten pages of a draft statute or judicial opinion; or, on a higher plane, articles with a substantial, nuanced, and fascinating discussion of a legal problem, combined with a cursory, un-nuanced, seemingly obligatory "solution" section. Anything that breaks out of that format is a pleasure to readers.

The approach exemplified by Renan's article also has disciplinary benefits, and those benefits are of special (but not unique) importance to public law. It is a field that offers many opportunities for technical fixes, on the one hand, and big ideas on the other. Both have their value—and both are diminished by a tendency, reinforced by law review gatekeepers and then reproduced within the academy, to jam the two together. The combination produces less than the sum of its parts. A big idea that is not allowed to end with a question mark is deprived of its full creative potential and often results in the most interesting problems being waved aside, or cut so the cloth can be tailored to the (often politically over-determined) garment. A narrower, more technical fix is more likely to be treated as lacking in prestige if it is not tied to a largely unnecessary 50-page lead-in and gaseous pronouncements about its "broader implications." We would be better off if leading law reviews were more eager to publish shorter and more "narrow" public law pieces that strip away the extraneities and work on solving one problem at a time—and if "big" pieces abandoned any felt need to wrap things up cleanly with one prescription or another.

This is Renan's approach here. In examining "the relationship between the person of the president and the office or institution of the presidency," she does not plump for one vision over the other, but recognizes that both have worked themselves into the fabric of the "presidency," broadly understood. Just as important is the relationship between them, which makes the chief executive "an amalgamation of the individual president and the institutional presidency." Unless we more clearly understand the uneasy coexistence of both visions and which vision is being invoked in a particular case, we can expect not only accidental "incoherence in our law," but also "opportunism," as officials (including executive branch lawyers) appeal to one or the other line of thought depending on their goals.

I do not mean to overstate the size of the question mark or the degree of abstraction in Renan's article. It is certainly *not* abstract. The examples I cited above are only three among many concrete treatments of particular legal issues: executive privilege and immunity, the role of presidential intent and of executive branch institutional processes, the role of the White House Counsel, the extent to which the executive branch can bind future administrations through litigation settlements or consent decrees, and others. Nor is Renan silent on the question of how we might best "integrate" the competing visions of the presidency. Here, her conclusion is that "legal engagement with the two-bodies paradox must come at a more retail level, context by context." Our answers should focus not on the duality itself, but on the substance of each particular issue. That may leave a good deal of open ground, but lack of a definitive resolution is not the same thing as being irresolute.

It is possible, I venture to add, that we might bring in some of the concepts that have arisen in the context of fiduciary constitutionalism and elsewhere, as in Philip Hamburger's *Law and Judicial Duty*—or, still further back, in Cicero's *De Officiis*—to think further about the ways in which we have attempted to marry individual and institutional conceptions of governance. The relationship between person and institution is not new, and we have long sought means of effecting a "constitutional marriage of personality and impersonality." The concept of office itself is a way of doing so, by tying the power of an office to the duties that are fundamental to that office. "What are the highest places," a judge of the English Court of Common Pleas once asked, "but obligations of the greatest dewties?" Such an approach is embodied in the oath of office itself, which personalizes in the office-holder those sense of duties. And it relies in turn on a "proper sense of honor," as Washington called it, under which not power or charisma or satisfaction of particular wants, but integrity in the performance of office, are the keys to being held in high regard by others and by oneself.

I doubt any of this can be liquidated into a set of mechanical prescriptions. It is no more certain an answer to particular questions than Renan's injunction to consider the individual constitutional commitments involved in each particular issue. And it certainly partakes of what may seem an archaic set of motivations and values. But "archaic," in my view, is a description, not a criticism. It may be that more people now more fully appreciate the extent to which personal character and a sense of honor and promise-keeping are necessary qualities in even the most bureaucratized democratic state, and a necessary counterweight to the charisma that people of all stripes seem to want from our presidents. One hopes they will keep the lesson in mind.

In any event, the overall emphasis in Renan's article is on what can be better understood but not finally answered. "Even as the two-bodies prism illuminates a crucial role for public law in constituting 'the President,'" Renan concludes, "it also underscores the limits of law and legal methods in managing its defining ambiguity." We can better understand the fundamental elements of the presidency and how they interact, but no alchemical formula exists that can transmute them into a single perfect substance. That is a more than satisfactory answer in a tremendously satisfying paper.

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