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THE DECLINE AND FALL OF THE AMERICAN REPUBLIC:  
OBAMA'S LIBYAN INTERVENTION

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**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
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Obama's Libyan Intervention*

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## **Abstract**

The lecture traces a series of political, bureaucratic, and military transformations that have, over the past forty years, transformed the American presidency into a potential platform for charismatic extremism and bureaucratic lawlessness. Watergate, Iran-Contra, and President Bush's legitimization of torture may well be prelude to worse breakdowns in the future – unless the presidency can be fundamentally reformed.

## **Keywords**

Presidency, Libya, American Constitution, Torture memos, Obama

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After America's century-long rise to world hegemony, the presidency is a vastly different institution than it was in the days of Theodore Roosevelt and Woodrow Wilson. The next few decades will be equally transformative, but in ways that may generate great dangers for the future of the republic.

A series of political, bureaucratic, and military developments threaten to turn the presidency into a platform for charismatic extremism, bureaucratic lawlessness, and abrupt swings in foreign policy. Barack Obama's centrism and constitutionalism may disguise their significance in the short term. But this should not lead us to ignore the deeper institutional dynamics.

Let's begin with the presidential primary system.<sup>1</sup> Before 1972, when the current system was adopted, party chieftains steered the nomination towards established figures who would maximize their appeal to the political center. But the new rules shifted the balance in the direction of extremism – away from the median voter in the general election, toward the median voter in the primary or caucus. Turnouts in these preliminary elections are low – each party's nominating primary or caucus often draws fewer than 20 percent of its registered voters to the polls. This makes it possible for an extremist candidate to win the Democratic or Republican presidential nomination by mobilizing the ideological base of left-wing or right-wing activists.

This tendency towards extremism is heightened by the increasingly polarized character of the voting public: the Democratic base is egalitarian and welfarist at home and increasingly anti-militarist at abroad; the Republican, emphatically free-market at home and militarist abroad. Successful nominees have little choice but to pander to their base during the primary campaign. Once they win the White House, they may adopt more centrist positions. But then again, they may not – generating policies that gyrate from extreme to extreme with each electoral cycle.

At this point, a second institutional development intervenes: presidents now surround themselves with a White House staff of six hundred super-loyalists who actively shape government policy on a broad front. This is a modern development. It was only in 1939 that Franklin D. Roosevelt won the right to name six "presidential assistants" to serve on his staff. Until then, the president governed through his cabinet, relying only on occasional advisors loaned to him by one or another department.

Since FDR, the concentration of power in the White House has only accelerated. Although the president appoints his leading staffers unilaterally, his nominations to key positions in the State and Defense departments require confirmation by the Senate – where they are notoriously subject to sometimes infinite delay by a single senator. Between 1979 and 2003, Senate-confirmed positions were, on average, vacant 25 percent of the time. As the Senate finally fills empty jobs, others open up, continually undermining the team effort required for the smooth operation of cabinet departments.

This leadership vacuum maximizes the power of the White House. While departmental vacancies remain unfilled, the president can quickly replace burned-out White House staffers with new

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<sup>1</sup> Except where otherwise noted, all the factual points made in this Lecture are documented in my recent book, *The Decline and Fall of the American Republic* (Harvard University Press: 2010).

cadres of ambitious up-and-comers. Although new recruits will be closely vetted for political loyalty, they may not take seriously the advice of long-time government experts who don't have easy access to the West Wing. This is a recipe for policymaking that is strong on presidential "vision" at the expense of real-world experience or a sense of enduring national commitments.

A third institutional transformation may counterbalance these shifting presidentialist enthusiasms, but at a very high price. As civilian policymakers come and go, the military leadership demonstrates greater staying power – and it has been remarkably successful in colonizing positions previously reserved for civilians over the past generation.

Before 1980, national security advisors were foreign-policy intellectuals like McGeorge Bundy, Walt Rostow, Henry Kissinger, and Zbigniew Brzezinski – men who often eclipsed their secretaries of state during the presidencies of Lyndon Johnson, Richard Nixon, and Jimmy Carter. The only exception was retired Air Force Gen. Brent Scowcroft, who served as advisor to Gerald Ford while Henry Kissinger was dominating the field as Secretary of State.

Things changed under Ronald Reagan. After running through two undistinguished civilian advisors in three years, the President made a fateful turn to the military – choosing Col. Robert "Bud" McFarlane, followed by Vice Adm. John Poindexter. Their political naivete was a significant cause of the Iran-Contra scandal that traumatized the later years of the Reagan Administration. Despite this, Reagan and his successor George H.W. Bush continued the new practice with the appointments of Colin Powell and a repeat performance by Scowcroft. Neither could provide the intellectual firepower of a Kissinger or Brzezinski, but they did well enough to blot out the disastrous precedents left by McFarlane and Poindexter, making the position ripe for further military colonization at later moments. When Barack Obama named the former commandant of the Marine Corps, James Jones, to serve as his national security advisor, nobody seriously questioned the propriety of his choice. This top National Security Council post is no longer a job that is especially reserved for a civilian.

The military is gaining a foothold in other key positions. Consider the new directorship of national intelligence, charged with coordinating the entire surveillance effort. George W. Bush's first choice was a civilian, but he has been followed by four retired military men.

The active-duty high command is also carving out a much more aggressive political role. During the first generation after World War II, the Joint Chiefs of Staff did not have the capacity to present a united front to its civilian bosses. It was a forum for intense inter-service rivalry, with each chief fiercely promoting his service's distinctive interests and weapon systems. But the Goldwater-Nichols Act of 1986 changed all that, transforming the chairman of the Joint Chiefs into a political actor who could speak for the military as a whole. Colin Powell quickly exploited this new opportunity. As chairman under George H.W. Bush, he took the unprecedented step of formulating his own Powell Doctrine on the use of military force – and then backed it up by writing a *New York Times* op-ed during the 1992 campaign, lecturing Bill Clinton on his foreign-policy responsibilities. Subsequent chairmen have, in one way or another, followed Powell's example of operating as political spokesmen.

In contrast, career State Department officials play a diminishing role in White House deliberations. All this adds up to a fundamental imbalance. While civilian loyalists in the White House come and go, top military leaders have greater political influence and staying power, even after they leave active service. Although each president will bring his own enthusiasms (and enthusiasts) to the world stage, the larger policy establishment increasingly emphasizes the military over civilian aspects of the national interest.

So what's the big picture? Over the long haul, we can expect U.S. foreign policy to exhibit outbursts of extremism that swing in opposite directions but are sequentially taken up with partisan zeal by White House loyalists in a fashion that emphasizes the narrowly military aspects of the



problem. Not a pretty picture, especially for a country in decline. If a rising superpower exhibits such erratic behavior, other nations might go along, fearing that open opposition would lead to even harsher sanctions. But when a superpower is in decline, its unreliability will spur rising powers to search for more reliable partners.

The current constitutional crisis generated by President Obama's military intervention in Libya emphasizes the dangers that lie ahead. The War Powers Act of 1973 regulates the terms of such unilateral presidential actions. It gives the President sixty days to obtain approval from Congress after launching a military attack; if he fails to gain legislative assent, it provides him with only thirty more days to halt all "hostilities."<sup>2</sup>

But President Obama refused to obey these statutory requirements.<sup>3</sup> He continued America's bombing campaign long past the statutory termination date – ignoring the emphatic protests of the House of Representatives. Worse yet, he also ignored the views of his own Justice Department, which stood by its long-standing position finding the 60-day time-clock requirement was constitutional. It then took the fateful step of concluding that the Libyan intervention was a plain case of "hostilities" requiring Congressional approval.

This opinion should have led Mr. Obama to a moment of reappraisal: the Attorney General has traditionally served as the executive's authoritative legal voice since the founding of the republic. But the president refused to take no for an answer. Instead, he asked his White House Counsel, Robert F. Bauer, to pre-empt the Justice Department's traditional role. As the war powers deadline approached, Mr. Bauer held a series of White House meetings at which he contested the Office of Legal Counsel's interpretation and invited leading lawyers from the State Department and the Pentagon to join him in preparing competing legal opinions for the president.<sup>4</sup>

This pre-emptive move was not unprecedented. During George W. Bush's administration, shortly after 9/11, the White House Counsel, Alberto R. Gonzales, led an ad hoc war council that included State and Defense Department officials. It was in this hyper-politicized setting that John Yoo, representing the Justice Department, prepared his notorious "torture memos" for President Bush's approval.

The players are different this time around, but the dynamic is the same. Mr. Obama is creating a decisive and dangerous precedent for the next Commander in Chief, who is unlikely to have the Harvard Law Review on his résumé.

From a moral perspective, there is a large difference between authorizing torture and continuing a bombing campaign that may save thousands of Libyans from slaughter by Col. Muammar el-Qaddafi. But from a legal viewpoint, Mr. Obama is setting an even worse precedent.

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<sup>2</sup> I address the legal issues further in *The Constitutional Clock is Clicking on Obama's War* (with Oona Hathaway), *Foreign Policy*, April 6, 2011 at

[http://www.foreignpolicy.com/articles/2011/04/06/the\\_constitutional\\_clock\\_is\\_ticking\\_on\\_obamas\\_war](http://www.foreignpolicy.com/articles/2011/04/06/the_constitutional_clock_is_ticking_on_obamas_war); and *Obama's Illegal War* (with Oona Hathaway), *Foreign Policy*, June 1, 2011 at [http://www.foreignpolicy.com/articles/2011/06/01/obamas\\_illegal\\_war](http://www.foreignpolicy.com/articles/2011/06/01/obamas_illegal_war).

<sup>3</sup> Bruce Ackerman & Oona Hathaway, *Death of the War Powers Act?* (with Hathaway), *Washington Post*, May 17, 2011 at [http://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G\\_story.html](http://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G_story.html)

<sup>4</sup> Bruce Ackerman. *Legal Acrobatics, Illegal War*, *New York Times*, June 21, 2011 at [http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html?\\_r=3&ref=opinion](http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html?_r=3&ref=opinion)

Although Mr. Yoo's memos made a mockery of the applicable law, they at least had the approval of the Justice Department. In contrast, Mr. Obama's decision to disregard the Department's opinion and embrace the White House Counsel's view is undermining a key legal check on arbitrary presidential power.

This is a Beltway detail of major significance. Unlike the responsible officials of the Justice Department, the White House Counsel is not confirmed by the Senate — which means that the president can appoint whomever he likes. Some presidents have picked leading legal statesmen like Lloyd N. Cutler, who served both Jimmy Carter and Bill Clinton. But others have turned to personal friends to fill the office. In such cases, it is especially difficult for the White House Counsel to say no to a top presidential priority on the grounds that the law prohibits it.

Mr. Bauer is not the only administration lawyer to conclude that the billion-dollar bombing campaign in Libya does not amount to “hostilities” under the War Powers Act. The State Department's legal adviser and former Yale Law School dean, Harold H. Koh, has also taken this position. This is surprising, since Mr. Koh's legal scholarship over the years has been highly critical of presidential overreach on matters of national security.<sup>5</sup> Nevertheless, Koh's stature in the legal community enhanced the perceived legitimacy of the President's decision to take the law into his own hands.

Over the longer run, these details will be forgotten, but the precedent will serve as a powerful legitimator for more egregious actions in the future. Future presidents who do not like what the Justice Department is telling them could simply cite the example of Mr. Obama's war in Libya and instruct the White House Counsel to organize a supportive “coalition of the willing” made up of the administration's top lawyers. Even if only one or two agreed, this would be enough to push ahead and claim that the law was on the president's side.

Within the space of a single generation, the presidency has moved very far down the road to lawlessness. With forty years of hindsight, Richard Nixon's notorious effort to justify himself after Watergate seems almost benign. To be sure, he asserted that “when the president does it, that means it is not illegal,”<sup>6</sup> but that was largely because he lacked a powerful White House legal staff to rubberstamp his actions. If Nixon was Phase one, then George W. Bush represents Phase two: when he personally approved waterboarding, he saw no need to concede its blatant illegality under American law. As he explained in his recent book, *Decision Points*, the “Department of Justice and CIA lawyers conducted a careful legal review,” and concluded that it “complied with the Constitution and all applicable laws, including those that ban torture.”<sup>7</sup> An apologia of this kind is much worse than Nixon's brazen assertion of power, since it “interprets” the law in a way that discredits the lawyers who composed it in the name of the Justice Department. Nevertheless, Obama's actions announce the onset of an even worse Phase three: Here the President refuses to heed the sober advice of the Justice Department and obtains a legal rubber-stamp from his own White House Counsel — perhaps with the approval of one or another lawyer from one or another part of the executive establishment.

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<sup>5</sup> See, e.g., Harold Koh, *The National Security Constitution* (Yale University Press, 1990); Bruce Ackerman and Harold Koh, *We the People--and Congress--Have Yet To Be Heard*, *Los Angeles Times*, B7, May 5, 1993. I critique Koh's arguments in Bruce Ackerman, *The Lawless Presidency*, *The Daily Beast*, June 28, 2011 at <http://www.thedailybeast.com/articles/2011/06/28/obama-s-flawed-legal-reasoning-on-libya-and-how-to-fix-it.html>

<sup>6</sup> Interview by David Frost with Richard Nixon (May 20, 1977) at [www.landmarkcases.org/nixon/nixonview.html](http://www.landmarkcases.org/nixon/nixonview.html).

<sup>7</sup> George W. Bush, *Decision Points* 169 (Crown, 2010).

This decline and fall from legality seems more ominous when viewed within the larger framework developed in this Lecture. As we have seen, it has now become possible for a right- or left-wing extremist to gain the nomination of one of the major parties; if he does get elected, he can use his large White House staff to command the bureaucracy and military to do the president's bidding, even when these initiatives are blatantly illegal. This is where his pliant White House Counsel's office can play a crucial role, supplying the needed rubber-stamp to allay anxieties amongst officials charged with implementing White House commands.

The pathological potential for charismatic lawlessness is heightened further by the increasing politicization of the military high command – offering prospects of presidential-military collaboration for an assault on deeply rooted constitutional traditions. At this point, legal rationalization can be buttressed by presidential proclamations of (real or imagined) emergency.

I do not suggest that we have confronted this very dark scenario in all its blackness. Despite his blatant illegalities, George W. Bush was not elected as a right-wing extremist. He was the establishment candidate who defeated right-wing competitors for the Republican nomination, and then successfully appealed to centrist voters as a “compassionate conservative.” Nor did Mr. Bush possess the media skills required for charismatic leadership nowadays. Indeed, he couldn't even master the art of reading from a teleprompter without obvious gaffs. His success in pursuing a policy of torture is only a symptom of much worse pathologies to come.

The same is true of Mr. Obama's illegal war in Libya. The current President is the very opposite of an extremist. He is not only a centrist by persuasion, and a deal-maker by inclination, but he is in fact deeply committed to the constitutional tradition – even teaching the subject as a professor at the University of Chicago Law School. As a consequence, I do not believe that the President's lawless conduct in Libya suggests that he would endorse even more destructive uses of the military in the near future. Nevertheless, from a diagnostic point of view, when even a *constitutionalist* president engages in lawless warfare, what should we expect from an extremist successor who might also combine the willfulness of George W. Bush and the rhetorical skills of Barack Obama?

Which leads us to the obvious question: can anything be done to fix the presidency's multiple pathologies before it is too late?

Americans have confronted this problem before: over the course of the two centuries, they have repeatedly responded to the continuing rise of the presidency by designing new forms of checks and balances to control the potential for abuse. We owe the birth of judicial review, in *Marbury v. Madison*, to an early effort to check the pretensions of the plebiscitarian presidency.<sup>8</sup>

My recent book, *The Decline and Fall of the American Republic*,<sup>9</sup> continues this tradition by proposing a series of institutional reforms that have a real chance of keeping the twenty-first century presidency in check. But before a serious reform effort can begin, the current generation of constitutionalists must transcend their remarkably reverential attitude toward their tradition. The present period of constitutional triumphalism is without precedent: from the days of Jefferson to those of Roosevelt, there was always a robust critical tradition, constantly probing the weaknesses of the Founding inheritance.

But over the past generation, constitutional thought has moved into its cheer-leading phase. The American mind is dominated by heroic tales of the Founding Fathers, who built an Enlightenment machine that could tick-tock its way into the twenty-first century, with a little fine-tuning by the Supreme Court. While many criticize the extreme ancestor worship of Justices Scalia and Thomas,

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<sup>8</sup> See Bruce Ackerman, *The Failure of the Founding Fathers* (Harvard University Press, 2005).

<sup>9</sup> See *supra* n. 1.

almost everybody is trying to fill the gap with other heroes. Judicial activists celebrate the genius of the Warren Court; judicial minimalists, the prudence of crafty judges; popular constitutionalists, the creativity of mass movements. These are different themes, but they add up to a heady chorus: we must be doing something right — the only question is what?

But nothing lasts forever, not even the American Century. And looking forward, I don't think we can afford another generation of triumphalism. The pathologies of the existing system are too dangerous to ignore. We cannot limit our critique to details. We must ask whether something is seriously wrong — very seriously wrong — with the tradition of government that the country has inherited.

This has been the aim of the present Lecture: do we have the courage to open our eyes to presidentialist pathologies before it is too late?