

# The Dangers of the Ever More Powerful Presidency

by Lincoln Caplan  
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*A lawsuit over the legality of the war on ISIS has highlighted the troubling transformation of executive power.*

*PHOTOGRAPH BY DREW ANGERER / GETTY*

In his [book](#) “The Decline and Fall of the American Republic,” Bruce Ackerman writes that the power of the American Presidency today vastly exceeds what the founders had in mind and, as a result, is “a serious threat to our constitutional tradition.” With the office’s current powers, “perhaps we will hear President Rightist insisting that the nation can no longer tolerate tens of millions of illegal immigrants in our midst, and that he has no choice but to detain or deport them ‘with all deliberate speed,’ ” Ackerman writes. “Or perhaps President Leftist will be demonizing the banks, condemning them for creating a great conspiracy and strangling the nation’s hopes for prosperity, and demanding their immediate nationalization in the name of the People.”

The views of the first President are not far from Donald Trump’s, of course, and the views of the second not far from Bernie Sanders’s. But Ackerman’s book was not written to capitalize on the theatrical appeal of the 2016 election. He published it in 2010, to explain his concern about the state of America’s political institutions, in particular “the threat posed by the transformation of the White House into a platform for charismatic extremism and bureaucratic lawlessness.”

Ackerman, a professor of law and political science at Yale, is best known for his multivolume constitutional history, called "We the People." (I have an affiliation with Yale Law School and know Ackerman.) Its thesis is that the true heroes of this Republic are "the ordinary Americans who have shaped and reshaped the country's fundamental commitments over the centuries—from the Founding to Reconstruction, from the New Deal to the civil rights revolution, and beyond." He calls these transformations "moments at which Americans redefined their constitutional identity," by mobilizing themselves to reckon with an extraordinary crisis that demanded fundamental change. Those "moments" lasted for decades, because of their complexity and scale and the tumult they caused in politics and society.

Ackerman himself is having a moment now, thanks to a [lawsuit](#) brought by the Army captain Nathan Michael Smith against President Obama about the legality of the war against *ISIS* in Iraq and Syria. Smith is deployed to the Kuwait headquarters of the Combined Joint Task Force - Operation Inherent Resolve, which commands all forces in support of that war. As Ackerman wrote last week in an op-ed [piece](#) for the *Times*, the suit is based on an [essay](#) that Ackerman wrote in August for *The Atlantic*, which opened like this: "The biggest casualty in the struggle against the Islamic State so far has been the American Constitution." Its argument was succinct: "Existing case-law establishes that individual soldiers can go to court if they are ordered into a combat zone to fight a war that they believe is unconstitutional."

Last week, in Washington, D.C., Smith asked a federal district judge whether, as a soldier, he is betraying his oath to the Constitution by fighting in a war that is illegal. The legal complaint that David Remes, a human-rights lawyer, filed for him, with Ackerman listed as a consultant, argues that Congress has not authorized the war against *ISIS*, so, under the War Powers Resolution of 1973, Obama is obliged to end America's military engagement in that fight. Remes and Ackerman claim that the court should rule that the President must obtain specific authorization from Congress or disengage all American forces from the war.

The lawsuit is a result of the failure of the President and Congress to work together "to hammer out a new authorization," as Ackerman put it. Hawks in Congress favored an unlimited authorization. Obama sought wide latitude, but with a three-year time limit and some limits on the use of combat troops. Doves wanted even more limits on the use of those troops. Last year, the President twice tried and failed to get Congress to approve his proposed authorization. (Ryan Lizza [wrote](#) about the first effort last February.)

Part of the problem was that Obama's White House and his lawyers were already prosecuting a war against *ISIS*, without a new authorization, and argued that they did not need one. According to the Administration, the war against *ISIS* is justified by the 2001 authorization for the fight against Al Qaeda because *ISIS* is affiliated with it, even though that grant of authority includes no proviso about affiliated groups and the two organizations are now in conflict. Respected legal scholars (for example, Jack Goldsmith, of Harvard Law School, and Mary Ellen O'Connell, of Notre Dame Law School, in addition to Ackerman) disputed this view as an indefensible stretch, but it drew no formal challenge in this era of expanded Presidential power.

Whether from Bill Clinton's executive initiatives in the face of Republican control of both houses of Congress, George W. Bush's wartime assertions of authority, or other actions, the power concentrated in the White House has expanded in each Administration since Franklin D. Roosevelt's. Some of the increases are barely noticed and usually accepted as benign, like

the substantial growth in the number of political appointments the President now makes in the executive branch and in the size of the White House staff. Others are noticed without much understanding about why they are important, like the creation of the White House Office of Information and Regulatory Affairs, which oversees all regulation issued by the executive branch, making the person who leads it what Ackerman called the government's "supreme regulator." Others are prominent, like the frequent use of executive orders to govern, which has been controversial off and on since the Second World War.

The transformed Presidency makes it easy, Ackerman writes, for "super-loyalists" of either party to ignore "expert assessments of the facts, or traditional understandings of the law, provided by the agencies." In theory, Congress and the courts check and balance the President's exercise of power. In practice, there is strikingly little checking and balancing. From the Presidency of Ronald Reagan until now, the breakdown in this essential mechanism has resulted in executive supremacy and set the stage for the extremist Presidency.

With the selection of Presidential candidates through state primaries that favor candidates at the ideological extremes, the rise of social media, and the breakdown of the traditional media—all developments that tend to weaken traditional parties and strengthen extremists—Ackerman in 2010 foresaw "the president's transformation from an eighteenth-century notable to a nineteenth-century party magnate to a twentieth-century tribune to a twenty-first-century demagogue," who will assert "extra-constitutional authority to master the latest crisis threatening the Republic."

The most surprising and chilling element of Ackerman's account is about what he called "the politicized military." A century ago, to maintain their nonpartisanship, almost all officers chose not to vote in elections. That started to change during the Second World War, when a quarter of the top officers voted, but as recently as 1976 more than half of high-ranking officers considered themselves independent. Now, while almost half of service members [identify](#) as independent, the other half have defined themselves in political terms, and on the whole are more conservative and less moderate than the general public. Ackerman wrote, "We must consider scenarios in which the high command can play an independent political role—sometimes dangerously expanding the powers of an extremist presidency, sometimes reducing the 'commander in chief' to a figurehead."

The notion of a politicized military put to political use is the stuff of potboiler fiction, but these days fiction must hustle to keep up with reality. In [sketching](#) what his first hundred days as President would look like, Donald Trump described "key roles for military generals," empowering them "over foreign affairs specialists in national security debates," the *Times* reported. He also said that, on his first day in office, "he would meet with Homeland Security officials, generals, and others—he did not mention diplomats—to take steps to seal the southern border and assign more security agents along it."

Ackerman's book explained why these unnerving embraces of a politicized military and an extremist Presidency would not be anomalies ushered in by an anomalous President. They would be the dangerous outgrowths of a transformation in the Presidency that has been unfolding over the past three-quarters of a century. But they would also likely reveal the consequences of executive supremacy as no Administration has ever done, showing how easily an extremist Presidency can flout the essential workings of the American Republic. With Trump on the ballot, the Presidential election will test whether the country's democratic

character remains intact or, out of anger, fear, and other blinding emotions, voters succumb to a would-be autocrat.

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