The Lawyers' War: Counterterrorism From Bush to Obama to Trump

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The election of Donald Trump as president of the United States has stunned the nation and the world and raised a number of critically important issues about the future of U.S. government policy. Among these are hotly contested aspects of national security law, including the extent of government surveillance and secrecy, the use of drones for targeted killings, the detention and interrogation of suspected terrorists, immigration and refugee policies, and the deployment of U.S. forces in various roles across the Middle East. The stakes could not be higher: in the balance hang national security, democratic accountability, the rule of law,
civil liberties, and the very nature of the republic.

Two recent books can help navigate these vital issues. Charlie Savage’s *Power Wars* and Karen Greenberg’s *Rogue Justice* both analyze the U.S. government’s handling of national security since 9/11. Their thoughtful examinations of the counterterrorism policies of the administrations of George W. Bush and Obama deserve to be widely read, by the public at large and by those who will staff the next administration. So, too, does Savage’s detailed assessment of the Bush administration in his previous book, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. Taken together, Savage’s Power Wars and Takeover will stand among the definitive accounts of the United States’ approach to national security and law over the past decade and a half. Greenberg’s less detailed but clear and engaging book will be accessible to broader audiences and serve as an important reminder of the Bush administration’s excesses.

At the heart of both books lies the question of whether Obama fulfilled the expectation that he would change the national security policies and executive-power claims of his predecessor. Greenberg finds Obama’s performance deficient; Savage’s assessment is more balanced. Both authors are at times too harsh in their judgments, especially Greenberg, whose accusations of “hypocrisy” and “betrayal” are imprecise and exaggerated. In fact, Obama rejected Bush’s ideology of expansive executive authority and has done much to restore the rule of law to the U.S. government. True, Obama did not accomplish all that he attempted, and some of his actions deserve criticism. But his inability to do more stemmed largely from obstacles that Savage addresses: the mess Obama inherited, the intractability of the underlying problems, virulent partisan opposition, and extreme congressional dysfunction.
LAW GOES TO WAR

Five days after the 9/11 attacks, U.S. Vice President Dick Cheney appeared on Meet the Press and promised that the United States would use “any means at its disposal” to fight terrorism. In the days and weeks following an unprecedented mass killing on U.S. soil, some excesses, although regrettable, were understandable. But in the years that followed, the Bush administration sanctioned torture; held “enemy combatants” indefinitely without legal due process at secret prisons around the world and at the detention facility in Guantánamo Bay, Cuba; began warrantless domestic surveillance on a massive scale; and ordered military commissions to conduct trials of detainees—proceedings that the Supreme Court later declared unlawful as designed. The Bush administration largely built these policies in secret and on shaky, sometimes rotten legal foundations.
In 2008, Obama ran for president emphasizing the ways in which he would reverse course: he promised to end the practice of torture, close Guantánamo, work with Congress, reduce secrecy, and put U.S. counterterrorism on a solid legal footing. But just how different has Obama’s use of executive power been from Bush’s? For Greenberg, the answer is not very. Greenberg brings to bear the valuable expertise she has gained as the director of Fordham Law School’s Center on National Security. Even those steeped in the subject will learn from her narration of terrorism-related judicial proceedings, for example, and the persistent efforts by the American Civil Liberties Union (ACLU) to secure judicial review to force the government to release information vital to the proper functioning of U.S. democracy.

Greenberg’s criticism of both the Bush and the Obama administrations is scathing. She is on the mark regarding the Bush administration’s well-publicized shortcomings. She emphasizes that Obama failed to close Guantánamo, continued military commissions and mass surveillance, maintained high levels of government secrecy, held no one accountable for the torture committed under Bush, and ramped up targeted killings using drones. Many disappointed progressives agree with Greenberg’s emphasis on the continuities between the two administrations—as do some former Bush administration officials and others who are cheered, rather than discomforted, by the thought.

Greenberg makes some strong arguments, but others are incomplete or ultimately unpersuasive. For example, she highlights a speech that Eric Holder delivered at the American Constitution Society during the 2008 presidential campaign, when he was in private practice, in which he said
that “we owe the American people a reckoning.” She then criticizes Holder for flip-flopping when he decided, as Obama’s attorney general, not to prosecute for torture those who “acted reasonably and relied in good faith” on the government’s authoritative legal advice (bad as that advice may have been). But Greenberg ignores the serious obstacle that the constitutional guarantee of due process presents to this particular form of accountability: How can it be fair or just for the U.S. Department of Justice to advise that an action would be lawful and then later prosecute those who relied on that advice? The reckoning Holder called for came in more appropriate (although incomplete) forms, such as the Obama administration’s prompt public release and repudiation of many of the Bush administration’s legal opinions and the less prompt, partial release of the U.S. Senate Select Committee on Intelligence’s report on the Bush administration’s detention and interrogation program.

Greenberg’s charges that many Obama administration officials were guilty of hypocrisy and worse are excessive. “For every Cheney mongering fear and nurturing paranoia,” she writes, “there are many officials quietly going about their business . . . thinking they are doing the right thing but failing to grasp that in their wish to protect the country, they are in fact betraying it.” Her assessment helpfully identifies influential institutional pressures that tend to receive inadequate attention, but she does not fully account for the critical roles that the president and the vice president play in setting the direction of policies or the impediments that those further down the chain face if they seek to buck choices made at the top.

**CHANGE YOU CAN BELIEVE IN?**

Savage covers more ground and tells a more nuanced story. Drawing on his extensive access to government sources and his experience in covering these issues for more than a decade for The New York Times and The Boston Globe, he
provides a rare window into the Obama administration’s internal executive-branch decision-making. He gives the Obama administration relatively high marks when it comes to restoring and upholding the rule of law, emphasizing Obama’s rejection of extreme interrogation methods, black sites, and indefinite detention. He also details Obama’s struggles in the face of powerful opposition and new congressional restrictions—explaining, for example, that reforming, rather than eliminating, military commissions was part of the effort to close Guantánamo while adhering to a congressionally imposed prohibition on transferring any detainees from Guantánamo to the United States.

Trump threatens far more than Obama’s legacy.

Savage’s careful reporting and analysis enable readers to make their own judgments about the degree of continuity between the two administrations. One of Savage’s greatest contributions is a distinction early in the book that clarifies a sharp, puzzling divide among progressives. Some critics on the left have castigated the Obama administration for continuing Bush’s approach to executive power and national security. Greenberg, for example, describes a 2010 ACLU advertisement that portrayed Obama’s face morphing into Bush’s. Other progressives, including numerous lawyers with experience in recent Democratic administrations, strongly disagree. (This is a group with which I identify: I served as the acting head of the Department of Justice’s Office of Legal Counsel under Bill Clinton and on Obama’s transition team, and in 2009, Obama nominated me to head the Office of Legal Counsel. But for more than a year, Senate Republicans blocked a vote on my nomination, and I ultimately withdrew my name from consideration.)

Savage explains the split by noting that there were in fact two strands of criticism of the Bush administration, although they
were often interwoven. One strand opposed Bush’s policies fundamentally because they harmed civil liberties. The other condemned his administration for undermining the rule of law. Obama’s adherence to legal constraints and his rejection of Bush’s extreme view of executive power substantially addressed the rule-of-law critique. But Obama’s decision to continue many of the actual policies in question even if in modified, legal forms frustrated the expectations of those who had hoped for a much fuller restoration of civil liberties. Savage also explains that these expectations were artificially high; on close inspection, some of Obama’s own rule-of-law criticisms were misinterpreted as promises that he would expand civil liberties.

NO COMPARISON

To understand just how stark the difference is between Bush’s and Obama’s approach to the rule of law, one must understand a crucial Supreme Court precedent. In April 1952, in the middle of the Korean War, the United Steelworkers of America planned to go on strike. Just before the strike began, President Harry Truman seized control of the nation’s steel mills, on the grounds that such a disruption would damage the United States’ ability to wage war. The steel companies sued, and, in Youngstown Sheet & Tube Company v. Sawyer, the Supreme Court ruled that Truman’s actions exceeded his constitutional and statutory authorities.

It was an unusual instance in which the Supreme Court rejected a president’s assertion of wartime authority. In his concurring opinion, Supreme Court Justice Robert Jackson laid out how to judge whether a president possesses the authority to conduct a particular executive action. Among legal scholars, the courts, and government lawyers, his framework has become a touchstone. But Youngstown has never earned its deserved place in mainstream debates the way Brown v. Board of Education and Roe v. Wade have. And neither Greenberg nor Savage evaluates the Bush and Obama
administrations in Jackson’s terms, which is unfortunate.

Jackson’s core insight was simple: to assess whether an executive action is legal, one must consider what Congress has said on the subject. Jackson rejected the claim that presidents possess general emergency powers to act in ways that would otherwise be beyond the law, yet he allowed relatively broad presidential authority to act when Congress has not spoken to the contrary. More specifically, he delineated a framework of three essential zones of executive power that vary based on congressional action. The president’s power is at its “lowest ebb,” Jackson held, when he acts in defiance of Congress’ expressed will, and it is at its maximum when he acts with congressional approval. In between these poles is what Jackson called “the zone of twilight,” when the president acts in the absence of congressional direction; there, the president typically may act, but only as long as Congress does not disagree.

The sun rises over the U.S. detention center “Camp Delta” at Guantanamo Bay, Cuba, October 2012.
The Bush administration repeatedly asserted that as commander in chief, the president had the power to act contrary to federal statutes (or to interpret them in such a way that they did not constrain his sweeping view of executive power)—most notoriously, to avoid limits on interrogations and surveillance. Its legal analyses typically failed to even cite, much less properly apply, Youngstown. Savage won a Pulitzer Prize for his coverage in The Boston Globe of the unprecedented number of “signing statements” that Bush issued to challenge laws that conflicted with his expansive views of his constitutional authorities. Many presidents, Obama among them, have asserted limited authority to disregard or otherwise avoid statutory commands that their administrations deemed unconstitutional. But in an exhaustive historical review, the legal scholars David Barron and Martin Lederman documented that Bush was a historical outlier in his assertions of “lowest ebb” commander-in-chief authority to wage war in ways contrary to Congress’ direction. And even when Congress would have supported Bush’s policies through new legislation, the Bush administration preferred to bypass Congress, because, Savage writes, Bush and Cheney were “in the business of creating executive-power precedents” to license future unilateral executive action.

As is evident from Savage’s account, this is where the Obama administration sharply changed direction. It rejected the Bush administration’s disregard for the rule of law and disavowed extreme notions of commander-in-chief powers that would override Congress’ clearly expressed will. Obama also announced that he preferred to work with Congress, and he sought its support repeatedly, even in the face of extraordinary congressional dysfunction. With Congress paralyzed, Obama often did resort to executive action, but typically by asserting authority that Congress had already granted him or that fell in Jackson’s “zone of twilight.” The
Youngstown analysis shows how Obama’s critics err when they equate these actions with Bush’s “lowest ebb” claims of ultimate presidential power to override Congress.

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Some critics of Obama have argued, for example, that he acted unlawfully by ordering certain targeted killings with drones and, in the domestic context, by ordering the suspension of deportations of children whose parents brought them to the United States illegally. But it is crucial to note that in neither case did Obama assert executive authority to overrule Congress; Congress had not legislated on those precise questions, and Obama never suggested that he would refuse to follow any constitutional statute that Congress might enact contrary to his policies. To take another example: Obama did not assert overriding executive authority to fulfill his commitment to close Guantánamo. He has instead complied with a congressional ban on bringing detainees to the United States, which has proved devastating to his ability to close the camp. Critics can mount legitimate and, at times, strong arguments against Obama’s national security policies and even some of his legal interpretations, but it is wrong to claim that he shared Bush and Cheney’s beliefs about expansive executive power.

In particular, Greenberg errs when she equates the legal opinion that informed the Obama administration’s targeted killing, in September 2011, of Anwar al-Awlaki, a U.S. citizen and al Qaeda member in Yemen, with the 2002 opinion that the Bush administration relied on to support torture. She denigrates the lawyers in both cases by describing them as following “marching orders.” In fact, the opinions stand in stark contrast: the Obama administration’s was a model of
careful legal analysis in the best traditions of the Office of Legal Counsel; the Bush administration’s was an ends-driven, extreme piece of advocacy—after it was leaked, it earned bipartisan condemnation and was withdrawn, and replaced, by the Bush administration itself. The Harvard law professor Jack Goldsmith has described reading “deeply flawed” and “sloppily reasoned” opinions when he joined the Bush administration as head of the Office of Legal Counsel in 2003. The Obama administration’s opinion on targeted killing made no argument comparable to the Bush administration’s erroneous claim that the commander in chief had the authority to disregard or misinterpret Congress’ ban on torture. Instead, Congress’ post-9/11 Authorization for Use of Military Force had conferred on Obama the requisite power to wage war, and Obama faced no statute that specifically sought to ban or restrict such targeted killings.

Savage raises important questions about a few of the Obama administration’s legal interpretations. Most significant, Savage makes the case that the Obama administration erred when it concluded that U.S. air strikes in Libya did not constitute “hostilities” under the War Powers Resolution and thus were not subject to a 60-day deadline after which the president must get approval from Congress. Yet even here, Obama explicitly acknowledged the limits of executive authority: he accepted the law’s constitutionality, never questioned Congress’ authority to end the operation, and provided a detailed public explanation of his interpretation.

It is on the issue of secrecy that Savage and Greenberg make the strongest case that there has been too much continuity between Bush and Obama, although even there, fundamental differences exist. The Bush administration subverted democracy by secretly acting contrary to law, based on a body of undisclosed internal legal justifications. Only when leaks brought to light torture, surveillance, extraordinary renditions, and the underlying flimsy legal justifications could
the appropriate democratic processes commence.

Nothing suggests that the Obama administration has secretly violated any laws or otherwise come close to the Bush administration’s unprecedented secrecy. But the Obama administration has, at times, struck the wrong balance and kept from the public information that it could have shared without endangering national security. Its prolonged failure to disclose the details of major targeted-killing and surveillance programs undermined vital democratic debate and safeguards. And the administration made a serious error in withholding from the public its legal analysis behind targeted killing, which it could have shared—as it ultimately did—by omitting details that could have harmed national security. Excessive secrecy poses a direct threat to the delicate balance between executive and congressional powers and to the public’s ultimate ability and duty to check government. Reasonable minds may differ on legal interpretations, but secrecy destroys the possibility of democratic engagement.

A NATION OF LAWS?
Savage and Greenberg both sound hopeful notes in assessing where the nation stands as Obama’s presidency nears its end. Greenberg writes, “As Barack Obama’s presidency draws to a close, the flames of the counterterrorism frenzy that were ignited fifteen years ago have begun to die down. Neither civil liberties nor the rule of law was consumed.” But during his presidential campaign, Trump relentlessly fanned those flames, and his victory casts an ominous light on Savage’s prediction that Obama’s legacy will ultimately “be determined by his successor, future Congresses and the world as it is rather than as one might want it to be.”

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administration directs them to take part in wrongdoing.

In fact, Trump threatens far more than Obama’s legacy. Many of the most extreme proposals Trump has put forward would require an expansion of presidential power fundamentally at odds with the constitutional order. Of course, it is possible that Trump’s calls for unlawful actions will prove to have been little more than campaign hyperbole. And much will depend on the cabinet members and advisers he appoints. Trump may come to recognize—as the vast majority of people do when they assume positions of significant authority in government—that he will need to rely on the counsel of experts who have dedicated their lives to public service. In her concession speech, Hillary Clinton called on her supporters to grant Trump “an open mind and a chance to lead.” But she also emphasized the continued need for public engagement and singled out the importance of defending foundational constitutional values: “the rule of law, the principle that we are all equal in rights and dignity, freedom of worship and expression.”

If Trump seeks to disregard the legal barriers for which he expressed so much disdain during the campaign, Savage’s and Greenberg’s books will help point the way for those looking to constrain him. They chronicle numerous instances of resistance to excessive executive power, particularly in the early Bush administration, by the press, domestic and international nongovernmental organizations, state and local governments, and foreign nations, and also by the federal courts, Congress, and some within the executive branch itself. Each of these vital institutions played an important role—for example, in building broad bipartisan opposition to the Bush administration’s use of torture (although Republican leaders remain split on the issue).

The Supreme Court played a central role in rejecting the Bush administration’s most egregious abuses, just as in
Youngstown, it rejected Truman’s seizure of the steel mills. If Trump overreaches, the courts should step up once again. Congress, meanwhile, should consider how during the Bush administration, individual senators from both parties—notably Republican Senator John McCain and Democratic Senator Sheldon Whitehouse—helped force public disclosures and spark change.

Finally, during the Bush administration, many executive-branch officials and employees resisted unlawful policies and actions. Government employees should be prepared to push back, even at the risk of losing their jobs, if the Trump administration directs them to take part in wrongdoing. Leaks of classified information played a significant role in informing the public of torture and surveillance programs that should not have been kept secret from the American people. But leaks come at a very high cost, are rarely justified, and should never be necessary if strong systems exist to protect whistleblowing. In its final months, the Obama administration should strengthen such systems. It should also release any information on policies and legal analyses that it can publicize without jeopardizing national security and that might help constrain the Trump administration.

Trump and his supporters may defend aggressive, even unlawful uses of executive power by claiming that he is following in the footsteps not only of Bush but also of Obama. In this, they will find support from some commentators who have embraced the mistaken idea that Obama adopted Bush’s expansive view of executive authority. This idea is not only wrong; it is now also dangerous. Yes, Obama continued some controversial national security policies, arguably to the detriment of civil liberties, but he restored respect for the rule of law and unequivocally rejected Bush’s assertions of “lowest ebb” executive authority to act unlawfully. The sooner observers understand this distinction, the better they will be able to hold Trump to account.
Ultimately, however, it will be up to the electorate to hold Trump accountable should he fail to respect constitutional limits on his authority as president. As Jackson wrote in Youngstown, “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”

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