

By Charlie Savage

From [The New York Times](#) | Original Article

WASHINGTON — Civil libertarians recently [accused](#) [President Obama](#) of acting like former President [George W. Bush](#), citing [reports](#) about Mr. Obama's plans to detain terrorism suspects without trials on domestic soil after he closes the [Guantánamo](#) prison.

It was only the latest instance in which critics have argued that Mr. Obama has failed to live up to his campaign [pledge](#) “to restore our Constitution and the rule of law” and raised a pointed question: Has he, on issues related to fighting terrorism, turned out to be little different from his predecessor?

The answer depends on what it means to act like Mr. Bush.

As they move toward completing a review of their options for dealing with the detainees, Obama administration officials insist that there is a fundamental difference between Mr. Bush's approach and theirs. While Mr. Bush claimed to wield sweeping powers as commander in chief that allowed him to bypass legal constraints when fighting terrorism, they say, Mr. Obama respects checks and balances by relying on — and obeying — Congressional statutes.

“While the administration is considering a series of options, a range of options, none relies on legal theories that we have the inherent authority to detain people,” [Robert Gibbs](#), the White House press secretary, [said](#) this week in response to questions about the preventive detention report. “And this will not be

pursued in that manner.”

But Mr. Obama’s critics say that whether statutory authorization exists for his counterterrorism policies is just a legalistic point. The core problem with Mr. Bush’s approach, they argue, was that it trammelled individual rights. And they say Mr. Obama’s policies have not changed that.

“President Obama may mouth very different rhetoric,” said Anthony D. Romero, executive director of the [American Civil Liberties Union](#). “He may have a more complicated process with members of Congress. But in the end, there is no substantive break from the policies of the Bush administration.”

Complicating the analysis, Mr. Bush’s policies evolved over time. Much of the legal controversy that initially surrounded his administration’s efforts to prevent terrorist attacks had drained away by the time Mr. Obama took over on Jan. 20.

The Bush team stopped using its harshest [interrogation techniques](#), like [waterboarding](#), years before leaving office. And in Mr. Bush’s second term, Congress passed legislation bringing federal statutes into alignment with policies like [military commissions](#) and surveillance without warrants.

As a senator, Mr. Obama [voted](#) for the 2008 bill authorizing the surveillance program, which he has continued since taking office. He [voted](#) against a 2006 bill authorizing military commissions, but it passed anyway. While Mr. Obama initially halted the trials, he has since proposed reviving them in a revised form.

Mr. Obama has also drawn fire from human rights advocates for fighting to prevent detainees in Afghanistan from having [habeas corpus](#) rights. But his legal team notes that the 2006 Military Commissions Act contains a provision saying such prisoners may not challenge their detentions in court.

Still, Mr. Obama has also continued other Bush-era policies where statutory law is murkier or

absent — like the [C.I.A.](#) 's “[extraordinary rendition](#)” program in which detainees are transferred to other countries and the invocation of the “state secrets” privilege to shut down some lawsuits. (The administration is reviewing both policies.)

And after grappling with how to close the prison at the naval base in Guantánamo Bay, Cuba, Mr. Obama proposed a new system of preventive detention to deal with those terrorism suspects who, he says, would be hard to prosecute and dangerous to release.

But Mr. Obama's insistence that he would create such a preventive detention regime only with Congressional authorization may pose little pragmatic obstacle, because he can claim lawmakers have already granted it.

In 2004, the [Supreme Court](#) [ruled](#) , 5 to 4, that Mr. Bush could detain — indefinitely, without trial and on domestic soil — a man accused of fighting for the

[Taliban](#)

. It cited Congress's authorization to use military force against the perpetrators of the 2001 attacks, which remains on the books.

To be sure, Mr. Obama has made some significant changes to Bush policies. He closed the Central Intelligence Agency's long-term prisons and required strict adherence to antitorture rules. He also released secret legal memorandums about interrogation.

Those changes have opened him up to attacks from the right. In particular, former Vice President [Dick Cheney](#) [accused](#) Mr. Obama of abandoning the Bush-Cheney strategies, suggesting that Mr. Obama would bear direct responsibility for any future terrorist attack.

Mr. Obama has embraced Mr. Cheney's premise that he is an agent of change, as his campaign rhetoric suggested he would be. In a [speech](#) in May, Mr. Obama described his policies as “a new direction from the last eight years.”

But [Jack Goldsmith](#) , a top legal official in the Bush administration, said the claim of a vast gulf between Mr. Obama's counterterrorism policies and those at the end of Mr. Bush's tenure was

false.

“There is a faux debate that something new is afoot and both the Obama administration and Cheney have an interest in that being the case, but it’s just not true,” he said. “It just serves almost everyone’s political interests to make it seem like something brand new is happening, but it’s mostly window dressing for just what was going on before.”

[Neil J. Kinkopf](#), a Clinton administration lawyer, said that even if Mr. Obama’s policies look similar to Mr. Bush’s, his show of greater respect for Congress was important because he is not creating precedents that future presidents can cite to bypass unrelated laws.

Mr. Obama has not always been consistent in that respect. In a [signing statement](#) last week, for example, he claimed a right to ignore five sections of an appropriations bill related to international financial institutions. Such statutory limits, he said, “would interfere with my constitutional authority to conduct foreign relations.”

In any case, [Jack Balkin](#), a Yale Law School professor, said Mr. Obama’s ratification of the basic outlines of the surveillance and detention policies he inherited would reverberate for generations. By bestowing bipartisan acceptance on them, Mr. Balkin said, Mr. Obama is consolidating them as entrenched features of government.

“What we are watching,” Mr. Balkin said, “is a liberal, centrist, Democratic version of the construction of these same governing practices.”