Introduction

In June 2007, the Justice Department’s elite Office of Legal Counsel (OLC), whose earlier memos on detention, interrogation, and surveillance of suspected terrorists had ignited controversy, issued a memo on a more mundane subject: faith-based charities and employment discrimination. The Bush administration had long sought to give faith-based organizations a bigger slice of the pie in antipoverty programs. Among those lining up for federal aid was a group called World Vision, which informed the government that, “to maintain identity and strength,” it hired “only Christian staff.” Giving World Vision taxpayer money raised one problem: federal law prohibits religious discrimination in anticrime programs.

This obstacle did not deter the eager lawyers at OLC, who advised the administration that it could simply disregard the antidiscrimination law. The learned lawyers reached this conclusion through two moves. First, they provided a strained reading of another statute. Second, in case that argument failed, they proposed to gut the legal definition of religious discrimination.

According to OLC’s creative interpretation, another federal law, the Religious Freedom Restoration Act (RFRA), required that the government give money to World Vision despite its discriminatory practices. OLC took this position even though the RFRA does not address federal funding, and merely limits bureaucratic rules that interfere with the free exercise of religion. OLC also suggested that religious discrimination may not be discrimination at all, since it merely allows members of one group the freedom to associate with that group and reject everyone else. On this narrow view, white employers who merely wanted to associate with whites and therefore refused to hire persons of other races would not be practicing discrimination either.

OLC’s cheerful evisceration of federal discrimination law was not just an isolated failure of legal judgment; it was an attempt to undermine a pillar of American constitutionalism: the separation of powers. The framers created a federal government with three branches—the legislative, executive, and judicial. To prevent one branch of government from dominating the others, they
reasoned that “ambition must be made to counteract ambition.” Implementing this insight, they devised a scheme of checks and balances in which each branch possesses both unique and overlapping powers. For example, while the president proposes a budget, the Constitution gives Congress the power to appropriate funds. The executive spends the money, consistent with conditions imposed by Congress and subject to congressional oversight.

The separation of powers regarding the conduct of war is more complex. Congress has the power to declare war. It may also fashion rules that regulate the uniformed services, captures on land and sea, and the application of international law, including the laws of war. The president is commander in chief, fashioning war strategy. The Constitution leaves room for interpretation on where authorization for war ends and war strategy begins.9

The framers foresaw that the legislative, executive, and judicial branches would perennially contend for turf, but also recognize their common stake in furthering deliberation about the common good.10 The fluid dialog between and among the branches would prevent any one branch from gaining excessive leverage over the others. These checks and balances would also disperse the government’s aggregate power, thus protecting individual freedom.11 The OLC’s memo on faith-based charities flouted the framers’ carefully wrought separation of powers scheme.

The faith-based initiatives memo illustrated the signature strategy of the Bush administration: the construction of detours around legal barriers. When legislation, legal principles, or decades of historical practice stood in the way of a political or policy agenda, Bush officials sought to circumvent the obstacle. When legal impediments to a regime of detention, interrogation, and surveillance of suspected terrorists threatened to force a change in the administration’s plans, officials like Vice President Dick Cheney and his counsel, David Addington, simply procured legal opinions that interpreted away those hindrances. When federal prosecutor David Iglesias of New Mexico refused to use his office to target the administration’s political foes, top officials at the Justice Department and the White House removed him. When the financial markets showed clear signs of overheating in the period preceding the subprime mortgage meltdown, senior administration officials viewed regulation as unduly burdensome.

Detours of this kind have adverse legal and policy effects. In keeping with the framers’ scheme, the president has maximum legitimacy when he or she acts together with Congress.12 A president who takes a detour to evade Congress loses legitimacy and institutional credibility. Courts are more likely to hold that such unilateral acts violate the Constitution. In some areas, such
as requirements for federal civil service jobs, Congress has the final say. A presidential act that defies Congress on this front, as Bush officials did in seeking to use political tests to fill merit-based slots, is simply illegal.

Detours also have significant adverse policy impacts. Deliberation within and among the branches reduces the role of biases and unfounded assumptions. In contrast, a decision reached without deliberation will often ignore long-term consequences. This failure marked the administration’s policy on coercive interrogation, which damaged the United States’s moral standing in the world. Decisions that seem expedient in the short run can also trigger opportunity costs—missed chances to invest in other productive initiatives. For example, the Bush administration’s increasing focus on prosecuting undocumented aliens diverted resources from the investigation of fraud and organized crime. In addition, detours diminish transparency, making the president less accountable to voters.

Moreover, the secret resort to detours impedes the process of change that makes democracy superior to other, more rigid forms of government. In some cases, established laws or processes should adjust to emerging realities. The wisest course, like the one taken by President Roosevelt with the Lend-Lease Program aiding Britain in World War II, is identifying the problem publicly and mobilizing support for a solution. When government short-circuits this process through secret detours, like the Bush administration’s program for coercive interrogation of suspected terrorists or warrantless surveillance, it delays adjustment and consensus.

The flawed detours that symbolized the Bush administration flowed from three ideologies. Bush officials like Cheney and Addington believed that the president should exercise unilateral authority, unconstrained by Congress or the courts. Presidential unilateralism shredded the constitutional scheme of separation of powers, and defied international norms such as the prohibitions on torture and cruel, inhuman, and degrading treatment. Bush officials also championed the unitary executive theory, which held that the president could undermine the independence of any executive branch official who dared to challenge administration policy, and erase the line between merit-based civil service hiring and political appointments. At an agency like the Securities and Exchange Commission, charged with regulating corporate finance, an antiregulatory agenda in tune with White House wishes loosened constraints on investment banks and helped pave the way for the credit collapse of 2008. Finally, September 11 helped legitimize the law and order focus of the administration, which used the specter of terrorism to target immigrants and establish the Department of Homeland Security (DHS).
DHS served as a repository for Bush hangers-on like Michael Brown of the Federal Emergency Management Administration (FEMA). FEMA became a stepchild to DHS’s overriding counterterrorism mission, setting up the woefully inadequate federal response to Hurricane Katrina.

While the Bush administration was negligent in addressing risks posed by Katrina, its response to terrorism targeted disfavored groups without discernment or proportion. In the two years after September 11, the Bush Justice Department rounded up and deported thousands of undocumented immigrants from the Middle East and South Asia. Most had no record of violence or connection to terrorism. Nevertheless, the Justice Department detained them for months after investigations cleared them of all but violations of the immigration laws. In domestic immigration enforcement, the government conducted raids that broke apart families. The government also detained hundreds of people found in Pakistan and Afghanistan, eventually shipping many to the U.S. naval base at Guantánamo Bay, Cuba. Often, the only evidence linking these detainees to terrorism came from bounty hunters who craved the cash the government offered. Administration officials also engaged in extraordinary rendition, targeting individuals like Maher Arar, a Canadian national who turned out to be innocent of terrorism, but whom the United States arranged to ship to Syria to endure a protracted and abusive interrogation. Moreover, the administration targeted lawyers who sought to assist these groups, interfering in attorney-client relationships and seeking disproportionate punishments for attorneys whose zeal led them astray.

As the administration targeted others, it vigorously sought to insulate itself from accountability. It set up a law-free zone for interrogation and detention of detainees at Guantánamo Bay because it hoped that courts would not hear cases from those detained there. Lawyers at the Office of Legal Counsel advised Bush and Cheney that efforts by detainees to invoke domestic or international legal norms were a form of “lawfare” exploited by our enemies, and that any treatment of detainees, including maiming, would be appropriate if the president ordered it. The administration also relied on a similar legal opinion to justify a vast program of warrantless surveillance of Americans and those abroad. Finally, administration officials like political guru Karl Rove invoked the doctrine of executive privilege—a mainstay of the Nixon administration during the Watergate scandal—to avoid even appearing before Congress to answer questions about political motives for the firing of United States Attorneys.

Adding to their overreaching, administration officials aimed to centralize Justice Department policy and personnel in a fashion that ignored the
local wisdom of federal prosecutors and clashed with legal mandates for merit-based hiring. Working with Republicans in Congress, administration officials tried to blacklist judges who imposed sentences the administration and its allies viewed as soft on crime. Attorney General John Ashcroft and his successor, Alberto Gonzales, sought to promote use of the federal death penalty, even in communities where jurors were unlikely to agree; this pursuit of the death penalty made the exercise of justice slower and more costly. When United States Attorneys cited these community concerns, Gonzales fired them, triggering a scandal that eventually led to Gonzales’s resignation. Gonzales’s staffers improperly extended patronage hiring to jobs that federal law had long reserved for applicants based on merit, inquiring about candidates’ views on abortion or prodding them to name their favorite Bush administration official.

In criminal prosecutions, the administration pushed the envelope to allow conspiracy prosecutions even where evidence was stale or slender. Sometimes the alleged agreement that formed the basis for the prosecution came perilously close to a mere thought crime. Moreover, the administration used informants with agendas of their own, who sometimes seemed to be principal players in the plots they divulged.

Detours were also pronounced in the administration’s handling of voting rights and political prosecutions. Under Ashcroft and Gonzales, ideological zealots in the Justice Department shifted voting rights investigations from cases involving suppression of minority votes to the largely anecdotal issue of vote dilution—fear that people ineligible to vote, such as immigrants, would dilute the ballots of eligible voters. Efforts to combat rare incidents of vote fraud overwhelmed efforts to combat vote suppression—in part because vote suppression efforts conveniently targeted traditional Democratic constituencies. The Bush administration also tried to mobilize federal prosecutors, whose decisions should be divorced from politics, into shock troops for partisan interests. Prosecutors like David Iglesias who refused to play ball with the administration’s agenda of targeting political opponents were themselves targeted for dismissal.

The Bush administration’s approach to economics at home and abroad displayed the same eagerness to aid friends. In Iraq, companies with close ties to the administration, such as Halliburton, received lucrative no-bid contracts but failed to spot obvious, deadly flaws like faulty wiring in showers. Domestically, the administration’s commitment to staffing regulators like the Securities and Exchange Commission and the Federal Reserve with champions of market self-policing helped set up the subprime mortgage collapse of 2008.
The Bush administration’s use of detours is not entirely unprecedented. Lincoln famously suspended habeas corpus in the early days of the Civil War without congressional authorization. Truman, concerned about possible shortages of steel during the Korean War caused by a labor-management dispute, sought to seize the steel mills. Nixon created an ad hoc White House crew, the “Plumbers,” to break into the offices of those linked with political opponents. Reagan sought to raise money to aid the rightist Contras in Nicaragua by selling arms to the Iranian government without approval from Congress.

Lincoln’s actions could claim at least an attenuated link to congressional approval. They were also largely transparent, followed closely by disclosure to Congress and a direct request for congressional ratification. The Supreme Court struck down Truman’s seizure of the steel mills. The detours of Nixon and Reagan precipitated an impeachment inquiry for Nixon that led to his resignation, and criminal charges for aides in each administration.

While all these detours had their dangers, the secret detours fashioned by the Bush administration stand out for their pervasive character and relentless pressure on the integrity of lawyers and judges. Although Nixon’s creation of the Plumbers was more brazen than any single act of Bush, Cheney, and their underlings, Nixon interfered less with local prosecutors, who by and large continued to exercise judgment and do their jobs. Nor did Nixon seek to sabotage the civil service, as did the political zealots at the Bush Justice Department. The scope and breadth of the Bush administration’s detours are unparalleled in modern American history. This is an achievement of sorts, but not an achievement that any future president should care to repeat.

Dismay at the Bush administration’s detours will not eliminate the temptations that make detours seem desirable. Presidents of both parties will inevitably seek rationalizations for taking wrong turns. Moreover, as the afterword explains, criminal prosecution of Bush officials may only inspire a more partisan politics, and instill risk aversion in public officials who must sometimes take decisive action. As President Obama has observed, the public needs greater transparency, not payback jurisprudence. The account of the Bush administration’s detours offered here can help us see the red flags in the future, and stay on the right track.