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“I’m Just Talking About the Law”: Guantánamo and the Lawyers

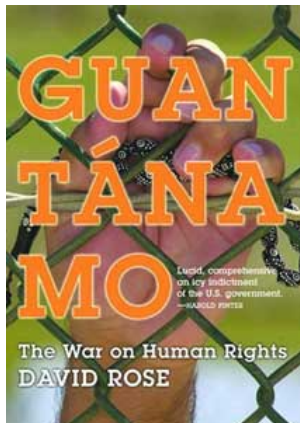
Abstract

A review of:

Guantánamo: The War on Human Rights by David Rose. New York: The New Press, 2004.

Keywords

Guantanamo, David Rose, John Yoo, Torture, Government lawyers, Ethics, Exceptionalism



“I’m just talking about the law”¹: Guantánamo and the Lawyers

By Marten Zwanenburg

Guantánamo: The War on Human Rights by David Rose. New York: The New Press, 2004.

“Because the legal advice was we could do what we wanted to them there” (22). This is how a top-level Pentagon official, in David Rose’s Guantánamo: The War on Human Rights, explains why detainees held by the United States have been detained at Guantánamo Bay. It is just one illustration of the important role that lawyers have played in the “War on Terror”—a role, along with factors that have or that may have influenced it, that forms the topic of this essay.

The part that a number of American government lawyers have played in devising a legal framework for the United States’ response to the attacks of September 11, 2001 has become increasingly clear over the last few years. Over time a number of previously classified memoranda written by these lawyers have become public. Often controversially referred to as the “torture memos,” these documents justify policies and actions that many lawyers and commentators consider violations of American Constitutional law and/or international obligations of the United States.² One particularly controversial memo was the so-called “Bybee memo,” written by the Office of Legal Counsel (OLC) of the Justice Department. It was signed by Assistant Attorney General Jay Bybee, but it has been reported that former OLC Deputy Assistant Attorney General John Yoo drafted important parts of its substance. The Bybee memo created an uproar when it was leaked to the *Washington Post* in June 2004.

¹ The title is taken from an exchange between John Yoo and Alberto Mora reproduced in Mayer (2006a):
Mora asked him, “Are you saying the President has the authority to order torture?”

“Yes,” Yoo replied.

“I don’t think so,” Mora said.

“I’m not talking policy,” Yoo said. “I’m just talking about the law.”

“Well, where are we going to have the policy discussion, then?” Mora asked

² It has even been suggested that the memos themselves were illegal. For a suggestion by a leading authority that this might be the case see Paust (2005: 862).

It is outside the ambit of this essay to analyze the memo in depth, which in any case has already been done elsewhere. (O’Connell 2005; Paust 2005; and Rouillard 2005) It is instructive to briefly describe its contents, however. The objective of the memo is to examine the limits on the use of force (“standards of permissible conduct”) for interrogations conducted outside the United States found in the [Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment](#) (Torture Convention) as implemented in American law.

It concludes that the restrictions are very limited—that only acts inflicting and “specifically intended to inflict severe pain or suffering,” whether mental or physical, are prohibited (Bybee 2002). On the other hand, circumstances that inflict severe mental pain not intended to have lasting effects, as well as physical pain less than that which accompanies “serious physical injury such as death or organ failure,” are allowed under the Torture Convention (Bybee 2002).

The memo continues to argue that even if an interrogation method arguably were to violate the prohibition on torture in American law, that law would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign. It adopts a very broad interpretation of the Constitution with regard to the powers of the President to arrive at the conclusion that any effort to apply the law in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants would be unconstitutional.

The final part of the memorandum examines possible defenses to a charge of torture. It concludes that necessity or self-defense could provide justifications that would eliminate any criminal liability (Bybee 2002: 46).

Due mainly to this memo, the media has made John Yoo particularly emblematic of the role played by a number of American government lawyers in the “War on Terror.” This role is characterized by a very narrow interpretation of international law, accompanied by a very broad reading of the powers of the President of the United States in general, and during a crisis or war in particular. Certain commentators have not only criticized the interpretation of the law given by these lawyers, but also their approach to tendering legal advice. According to these commentators, the way this was done by the lawyers concerned constitutes a perversion of the role that government lawyers should play. As one commentator wrote in the *New York Times*: “[o]nce charged with giving unvarnished advice about whether political policies remained within the law, the Bush administration’s legal counsels have been turned into the sort of cynical corporate lawyers who figure out how to make something illegal seem kosher—or at least to minimize the danger of being held to account” (Rosenthal 2004).

These same commentators distinguish these lawyers from other government lawyers who reportedly challenged government tactics in the “War on Terror.” These other government lawyers include Alberto J. Mora, General Counsel of the United States Navy until early 2006. His attempts, through discussions with other government officials, to change government policies that he described as “unlawful,” “dangerous” and “erroneous” were described in the *New Yorker* magazine (Mayer 2006a).

The conduct of Yoo and a number of others has led to questions about the “proper” roles of government lawyers being raised. This has been done in the public media, but also in leading law journals.³ These questions are also raised on a number of occasions in Guantánamo: The War on Human Rights, written by British journalist David Rose. As its title suggests, the book is a scathing attack on American tactics in the “War on Terror,” in particular in Guantánamo. The book, Rose writes, is an attempt to answer the question of what Guantánamo is and a few related questions, such as what its place is in the “War on Terror” and how effectively it is fulfilling its proclaimed mission. Based principally on a visit to the base itself, interviews with U.S. officials and with four British detainees who were released from Guantánamo, he draws several conclusions, principally that Guantánamo has not provided the enormously valuable intelligence that its protagonists claim it has. He then goes on to place the issue in a broader framework, as a component of a system in which the Bush administration was mounting attacks on Enlightenment values and the U.S. Constitution. It reflects, to Rose, one side in a “culture war” between the secular and constitutional principles of the American republic on the one hand and the “Christian authoritarianism” of Bush on the other hand. Rose suggests that a number of government lawyers have taken the latter side and that this has informed their legal advice.

The book is well written and researched, but the author’s arguments and conclusions are so one-sided that Rose will probably not convince anyone who does not already share his views. This is particularly the case for the “meaning” which he reads into Guantánamo as a battlefield in a “culture war.”

This essay is not a book review of Guantánamo: The War on Human Rights. However, the references to lawyers in the book did form the inspiration for this essay, which will discuss the role of government lawyers. The study of this subject is certainly not new, but it has taken on a new importance in the “War on Terror” in which established law is subjected to great pressures in deference to the alleged necessities of fighting terrorists. This essay first looks at standards that may be applied to judge the conduct of government lawyers. In particular, it describes two theories in legal doctrine on the way government lawyers should give advice to their principals, referred to as the “agency approach” and the “public interest approach.” The essay then investigates factors that may have influenced government lawyers in the specific context of American culture and the “War on Terror.” It will then draw some conclusions.

Standards

There are surprisingly few professional standards that provide guidance to government lawyers. All civil servants, including military personnel, take an oath of office. This includes solemnly swearing that they will support and defend the Constitution of the United States and will well and faithfully discharge the duties of the office they hold. The wording of this oath is so general that it does not offer much guidance to lawyers involved in giving legal advice on sensitive issues.

Lawyers who work for the federal government are also bound by state ethics rules. Most state ethics rules are, to a large extent, based on the Model Rules of Professional Conduct adopted by the

³ See, for example, Bilder & Vagts (2004).

American Bar Association. However, these rules are very general in scope. It is important to note that the rules make a distinction between the lawyer acting in the role of advocate and in the role of advisor (Clark 2005). Different ethics rules apply to these two distinct functions. In the role of the lawyer as an advocate before a tribunal, he may make any legal argument as long as it is not frivolous. He does not need to give the court his honest opinion of how the law applies in the case. When a lawyer gives legal advice, however, he has a professional obligation of candor toward the client.

The government lawyers writing the torture memos were working in an advisory role. They were not defending their client's interests before a tribunal. As such, one of the rules applicable to them is rule 2.1 which reads: “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation” (ABA 2002).

Under these circumstances, what exactly does rendering candid advice mean?⁴ And who decides whether moral factors are relevant to the government's situation in a particular case?

Another relevant rule is 1.2 (e), which provides that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent” (ABA 2002). This seems to be stating the obvious: a lawyer may not advise the government to break the law.

As noted above, two main approaches to the role of the government lawyer may be identified in doctrine. The first can be referred to as the “agency” approach, the other as the “public interest” approach. The former plays down the differences between government lawyers and those in private practice. The agency the lawyer works for is his client, and he must do everything to represent the interests of his client. Under the agency approach, the government lawyer is obligated to press every “non-frivolous” legal argument to support the agency's position, regardless of the possible injustice arising from any given situation. The government lawyer's role is very much a technical one. Factors that are extraneous to the technical interpretation of the law, such as moral factors, should not enter into his analysis. The lawyer's responsibility is to advise his client on the state of the law. That is as far as his responsibility goes: policy decisions should be made by the politicians, and the client is fully autonomous. In this way democratic accountability is increased, as the politicians are those who take the decisions for which they can be held accountable by the public. In order for the politician to be able to make an informed decision, he should be presented with all the arguments and options.

John Yoo for example appears to tend toward this model, as illustrated by his statement that:

Our system has a place for the discussion of morality and policy. Our elected and appointed officials must weigh these issues in deciding on how it will conduct interrogations. Ultimately, they must answer to the American people for their choices. A lawyer must not read the law to be more restrictive than it is just to

⁴ Hazard & Hodes (2001: § 23.2) explain that “[A] client may consult a lawyer to have her own preconceptions confirmed rather than to seek genuine advice. A lawyer may be tempted to play sycophant to such a client, to ensure continued employment. Rule 2.1 prohibits such an approach, however, first by requiring that a lawyer's advice be candid; and second, by requiring the lawyer to exercise judgment that is both independent and professional.” This and other explanations, while helpful, leave room for ample interpretation.

satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international human rights law (Yoo 2004).

The agency approach to the role of government lawyers raises several issues. The first is its assumption that legal advice itself has no influence apart from decisions taken by politicians pursuant to the advice. The only thing that matters is the decision that the politician who has received the legal advice makes, and he is free to ignore the legal advice received. “After all, if the principal transgressed, it is no defense that he was merely following his attorney’s counsel; and if he acts properly, it makes no difference that his lawyer gave him bum advice that he wisely ignored” (McCarthy 2004). This assumption is mistaken, because legal advice tends to make its way through the organization and have its effects there, even if it is not followed by the principal.⁵ As Rose writes concerning the Bybee memo:

Embarrassed as the administration may later have become about the memo, it would be disingenuous to underestimate its effects. Milton Bearden, former CIA officer and veteran of the secret portion of the war in Vietnam, told me this: “It doesn’t matter what distribution that memo had or how tightly it was controlled. That kind of thinking will permeate the system by word of mouth. Anyone who suggests that this and other official memos on this subject didn’t have an impact, doesn’t know how these things work on the ground (96).

Another issue with this approach is that it assumes an absolute separation between legal advice and policy preferences. It takes for granted that there is such a thing as totally “objective” legal advice. This is a fallacy, however. As the Critical Legal Studies movement and others have demonstrated, there is no such clear demarcation between law and policy. In interpreting the law, the prejudices, political preferences and moral values of the interpreter inevitably play a role, whether he admits it or not. The Bybee memo is a good example of this, because values are an integral part of its reasoning. For example, the memo emphasizes the need “to make clear the nature of the threat presently posed to the nation” and that the “capture and interrogation of [suspected members of Al Qaeda] is clearly imperative to our national security and defense” (Bybee 2002: 33). These are clearly extralegal considerations. That the values of the authors are part of the memo’s legal analysis does not necessarily disqualify it, but it is disingenuous for its authors to argue that the memo was value-free. This is precisely what Yoo appears to have done, judging from the following statements:

I think it’s very important not to put in an opinion interpreting a law on what you think the right thing to do is, because I think you don’t want to bias the legal advice with these other considerations. Otherwise, I think people will question the validity of the legal advice. They’ll say, “Well, the reason they reached that result is that they had certain moral views or certain policy goals they wanted to achieve.”

And actually I think at the Justice Department and this office, there’s a long tradition of keeping the law and policy separate. The department is there to interpret the law so that people who make policy know the rules of the game, but you’re not telling them what plays to call, essentially...

⁵In this context it is also interesting to note that the Detainee Treatment Act provides that “[g]ood faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful” This provision is part of the section in the act which provides for a so-called “mistake of law” defense (2005: Sec. 1004 (a)).

I don't feel like lawyers are put on the job to provide moral answers to people when they have to choose what policies to pursue. For example, it's not the Justice Department's job to say: "Here are the things you should do. We have conducted this examination of interrogation techniques worldwide, and these are the 10 that seem to work best. And so go ahead and do those" (Yoo 2005).

For the “agency approach” to function, the government lawyer must give the decision maker all the available options and the legal arguments. Only on this condition can he make a fully informed decision and is not prejudiced by legal advice that has “filtered” the options. This is however difficult to achieve. Often, decision makers prefer memos to be as short as possible. Where this is not possible, they prefer an executive summary to be included in the memo, which may be the only part they actually read.⁶ This preference is difficult to reconcile with describing all the possible options. Brevity was apparently not a requirement for the Bybee memo, which ran for 46 pages. Yoo has suggested that a government lawyer should set out all the options for his client: “[t]he client retains the ultimate authority to choose which actions to pursue and which legal arguments to adopt, and he or she cannot make that decision without being presented with the full range of constitutional arguments and options” (Yoo 1998).

It can hardly be said, however, that the Bybee memo gives all the options. On the contrary, all the reasoning appears to point to the same conclusion. As a former head of the Office of Legal Counsel stated with respect to the memo: “What’s depressing is that it’s such a one-sided advocacy argument” (Liptak 2004).

A final issue with the agency approach concerns the meaning of frivolous arguments. As noted above, under the agency approach, the government lawyer may press every non-frivolous legal argument to support the agency’s position. It is recognized that creativity is a characteristic of good governmental lawyers, but the question revolves around the point in which a legal argument is no longer merely creative but becomes frivolous. With regard the Bybee memo, Mora described its reasoning as “unlawful,” “erroneous” and “dangerous.” After the memo became public an entire cottage industry developed, generating articles in law reviews disagreeing with all or certain parts of the memo’s reasoning. In June 2004 the Bybee memo was withdrawn by the Justice Department. It was replaced by another OLC memo on December 30, 2004, which states explicitly that it disagrees with important parts of the reasoning in the Bybee memo. Does this mean all or some of the arguments in that memo were frivolous? The difficulty is that in the role of the government lawyer as counsel, there is no independent review of the legal arguments. Much of the advice given will never be tested before a court. If the advice is secret, the likelihood of judicial review is even smaller.

According to Wendel, in contrast to litigation:

In transactional representation, however, these checks and balances are absent, and the lawyer in effect assumes the role of judge and legislator with respect to her client’s legal entitlements. If a government lawyer says, for example, that the President has the authority as Commander-in-Chief to suspend the obligations of the United States under various international treaties, then for the purposes of that act, the lawyer’s advice is the law. If the lawyer’s advice is erroneous, the consequences for the government could be disastrous, but only if they are discovered (Wendel 2005: 120-121).

⁶This remark is based on the author’s own experience as a government lawyer.

To avoid this from happening, legal advice should be scrutinized by other lawyers. The more that giving legal advice becomes a collaborative process, the less likely it is that the situation described by Wendel will occur. This is precisely what does not seem to have happened in the case of the Bybee memo and other important memos setting out the legal framework for the “War on Terror.” On the contrary, it appears that only a small group of lawyers was involved in drafting them. It must be noted that in some cases there may be a genuine need for confidentiality which requires limiting the number of people involved.⁷ It has also been suggested in the media, however, that lawyers critical of ideas in the small group involved were excluded from the drafting process because they were critical (Golden 2004). Including (some of) them could have improved the advice.

The second approach to the role of the government lawyer is the “public interest approach.” This approach stresses the difference between a lawyer in private practice and a government lawyer.⁸ The primary duty of the latter is to serve the common good, not to represent the interests of the particular agency he works for. It recognizes that certain actions that may be good for the agency may not necessarily be good for the larger public. In this case the interest of the public takes precedence. The public interest approach also places a responsibility on the government lawyer to uphold the rule of law. But the approach goes further in leaving room for moral arguments to enter into legal analysis. More than the agency approach, the public interest approach is concerned with the ends sought by the client as well as the means used to achieve those ends.

In the words of one commentator, government lawyers: “[h]ave a duty to argue what is right, not just what is convenient. Their motto is, ‘The government wins when justice is done’—not, ‘The government wins when it gets to do whatever it wants’” (Lazarus 2006).

Like the agency approach, the public interest approach also raises a number of issues. The first has to do with the definition of “public interest,” or rather, of “public.” For the government lawyer, this model places a premium on putting the interest of the public first. For the government lawyer, it may seem self-evident that “the public” refers to the citizens of the country he works for. In the context of this essay—the American “War on Terror”—this is the American public. It is, after all, this public which has elected the government he works for. It is also this public which pays the taxes that provide for his salary. And it is this public which is the “We, the People” mentioned in the Constitution that he has sworn to defend. It could be argued that maximizing the possibilities for interrogation of suspected terrorists is in the interest of the American people, because this improves the chances that plans for new terrorist attacks may be discovered and prevented.⁹ From the wording of the Bybee memo this seems to have been the view of Bybee and Yoo.

However, “the public” can also be interpreted differently. It must be recalled that the issues in the Bybee memo center upon human rights. These rights have been incorporated in domestic law and form part of American law. The very basis of the idea of human rights is that everyone has certain rights based on membership in the human species. In other words, for a lawyer working with

⁷ According to Yoo “Operational security demanded by the war on terrorism changed some of OLC’s standard operating procedures” (Yoo 2006: 101).

⁸ Bilder & Vagts (2004: 693) list some of the differences between lawyers in private practice and government lawyers.

⁹ It could also be argued that this is not in the interest of the American public, for example because harsh interrogation tactics lead to more terrorists. The point is however that the argument is not outlandish.

human rights “the public” is not limited to the citizens of one particular country but includes all human beings. This perspective is reflected in the following statement by Mora:

The Constitution recognizes that man has an inherent right, not bestowed by the state or laws, to personal dignity, including the right to be free of cruelty. It applies to all human beings, not just in America—even those designated as “unlawful enemy combatants.” If you make this exception, the whole Constitution crumbles. It’s a transformative issue (Mora quoted in Mayer 2006a).

The way a lawyer defines the “public” whose interests he must keep in mind can lead to different advice being given. If, for example, enemies in the “War on Terror” are not included in the definition of “public,” it becomes easier to argue for coercive interrogations. In that case the interests of enemies—to have their human rights respected for example—are secondary to the interests of the American public to obtain as much intelligence as possible.

The different possible interpretations of the “public interest” point to an important factor in much of the legal advice tendered in the “War on Terror.” As noted, many of the issues that are central to this advice concern international law. These include the nature of the conflict in Afghanistan, the status of captured fighters in that conflict and the scope of application of Common Article 3 to the 1949 Geneva Conventions. The interpretation of torture also has an important international law element: the prohibition of torture is an obligation undertaken by the United States as a party to the United Nations Convention Against Torture. However, much of the legal advice given on these issues was from experts of American constitutional law, not public international law. The principal expert on international law, the legal adviser of the State Department, apparently was not asked for his views on the definition of torture.¹⁰ This is difficult to reconcile with the abundant literature which ascribes a special responsibility to the legal advisers of foreign ministries, in the case of the United States the legal adviser of the State Department, as to the formulation of legal advice or argument regarding international legal questions.¹¹

Like “the public,” different interpretations of “interest” are possible. It will usually not be possible or desirable to ask the public what it considers its interest. After all, indirect democracies like the United States are based on the understanding that voters elect politicians who, during their tenure, decide what is in the public interest.¹² This means that a government lawyer who, in the course of giving legal advice, must determine what is in the public interest must make this determination for himself. In other words, what is in the public interest is subjective. In this context it is interesting to note that the Office of Legal Counsel is informally called “the conscience of the Justice Department,” according to a former head of that office (Liptak 2004). The fact that a government lawyer’s determination of what is in the public interest is subjective means that it is important that he clearly acknowledge this in legal advice.¹³

¹⁰ Yoo writes that Justice Department officials have prohibited any specific discussion of the process that produced the Bybee memo, but describes the standard process for opinions involving intelligence matters. He states that “[s]ometimes neither State nor Defense lawyers would know about the opinion” (2006: 170).

¹¹ See, for example, American Society of International Law (1990) and St. John Macdonald (1977).

¹² Note however that in contemporary American politics opinion polls play an important role. This phenomenon is sometimes referred to as “politics by polls.”

¹³ In the personal experience of the author, advice is often written by lawyers and policy advisers together. The policy advisers contribute sections on policy arguments to be included in the advice. If the advice is written solely by the

However, the public interest is not, in all cases, a personally subjective factor. It could be argued that in certain cases it is clear what the public considers its interest. The Bybee memo has met with overwhelming criticism both by the American public and internationally. In a December 2005 poll conducted by ABC News and the Washington Post, 64 percent of respondents answered that they regarded as unacceptable the use of torture against people suspected of involvement in terrorism (ABC News/Washington Post 2005). On this basis it could be argued that Bybee and Yoo could have known that their reasoning was not, ultimately, in the public's interest. When they wrote the memos they could not have known the results of a poll taken in 2005, of course. The point is that if they could have reasonably surmised that a majority of Americans rejected torture, the public interest would not have been a wholly subjective factor for them.

The agency and public interest approaches are models for the role of government lawyers. In reality it is unlikely that a particular lawyer will strictly follow one approach or the other under all circumstances. This is also the case for American government lawyers in the context of the "War on Terror." Thus, for example, it cannot be concluded that Yoo exclusively followed the agency approach. This does not detract from the usefulness of the models in order to help us understand how the role of government lawyers is seen by themselves as well as others.

A Special Case

Government lawyers in many different countries are confronted with questions that may raise moral issues. The discussion about their role in the decision making process and the difference between the agency and public interest approach discussed above is not limited to American government lawyers. In the specific case of American government lawyers, however, there appear to be a number of additional factors that are important in understanding the role that they have played in the "War on Terror." These factors could help explain the tone of the debate on the role of government lawyers that has erupted after the Torture memos became public.¹⁴

One of these factors is the discourse in the United States government after the terrorist attacks on September 11, 2001. Directly after the attacks, there was much political and legal confusion. At the same time, it appears that a number of lawyers like John Yoo found a renewed sense of purpose. This purpose was to do whatever was necessary to prevent new attacks and respond to the attacks that had already been perpetrated. One of the lawyers involved in discussions about how to frame the Administration's legal response to the attacks recalled how "raw" the feelings were:

lawyers, a section may be included stating that certain policy arguments may be relevant while underlining that these are not legal arguments.

¹⁴ See, for example, Paust (2005), Bilder & Vagts (2004), Liptak (2004), and Lazarus (2006). See also, among many others: Vanessa Blum, "Culture of Yes: Singing Off on a Strategy: From torture to detention, lawyers for Bush haven't objected much", *Legal Times* Vol. XXVII, no 24 (2004); Julie Hilden, "Did a Government Lawyer Aid and Abet Possible War Crimes by Writing a Crucial Memo?," *Findlaw Commentary* 8 June 2004; Victor Hansen, "Going Native at Guantanamo: When Government Lawyers Lose their Way," *Jurist Forum* (<http://jurist.law.pitt.edu>).

There were thousands of bereaved American families. Everyone was expecting additional attacks. The only planes in the air were military. At a moment like that, there's an intense focus on responsibility and accountability. Preventing another attack should always be within the law. But if you have to err on the side being too aggressive or not aggressive enough, you'd err by being too aggressive (Mayer 2006b).

This is illustrated by the question that Alberto Gonzalez, White House Counsel and a central figure in the development of the legal response to 9/11, is reported to have asked repeatedly: “Are we being forward-leaning enough?” (Smith & Eggen 2005). In this way he expressed his concern that policies and legal interpretations should be as permissive as possible in the fight against terrorists.

Some argue that 9/11 was merely an opportunity for a number of politicians to achieve long-cherished political objectives, rather than being the origin of those objectives. In particular, claims have been made that Vice President Cheney and others already promoted the idea of vast executive powers for the President, a central point in the Bybee memo, long before the attacks (Mayer 2006b). John Yoo advocated an executive with broad powers in his academic work before he started working for the OLC (Yoo 1996).

Whether or not some government lawyers already had an *a priori* political agenda, it appears that 9/11 had a profound influence on the climate in which they did their work. Rose even goes so far as to state that “[i]n the intellectual and political climate created by September 11, the background assumption was that any pre-existing code of conduct could be abandoned if America’s aims in the war on terror so required” (92).

Another factor that may have played a role is the adversarial legal culture in the United States. In broad terms, the adversarial system of conducting proceedings refers to a system in which the parties, and not an adjudicator, have the primary responsibility for defining the issues in dispute. There is minimal intervention by the adjudicator whose role it is to ensure fairness of the proceedings in the sense that each party is able to present his case without interference by the other party. There is an emphasis on winning the contested issues with the objective of each party to secure a favorable outcome, rather than a decision which is correct by reference to some external standard. The skill and zeal with which a lawyer represents the client are central to this system. This tends to emphasize confrontation, represented in popular culture by dramatic court scenes in television shows. Lawyers in the United States receive a legal education in which this partisan role of the lawyer in the legal system is inculcated. This is particularly the case for lawyers acting in their role of advocate (i.e., when they are defending a particular action a client has taken). But it also carries over into the role of the lawyer as counselor (i.e., when they advise a client on a course of action to take). It may be that this makes American government lawyers more inclined to see their role from the perspective of the agency approach.

Finally, the American approach to the “War on Terror” has been strongly influenced by the idea of “American exceptionalism.” This concept has many facets and is a field of study unto itself. It is outside the ambit of this essay to study the concept extensively. Rather, it focuses on those aspects that may have influenced some American lawyers approach to the “War on Terror.” American exceptionalism is a term that was first used by Alexis de Tocqueville in his book Democracy in America. It is, essentially, the idea that the United States is qualitatively different from other states, particularly developed states in Western Europe. The unique traits that American exceptionalism ascribes to the United States are said to include liberty, egalitarianism, individualism, populism and

laissez-faire. The strong influence of religion, and especially Protestant Christianity, on society is also seen as an aspect of this idea. Another element is a disdain for international law (Spiro 2000). This disdain is connected with a strong emphasis on the concept of “sovereignty.” In political science the unique traits of the United States are not necessarily seen as positive or negative. For many, however, American exceptionalism is an expression of moral superiority of Americans.

This idea of superiority goes back to the Puritan settlers of New England, in whose thinking the concept is rooted. The statement by leader John Winthrop of the New England Puritan community referring to that community as a “City upon a Hill” is part of the exceptionalist discourse. It refers to the role of the community as an example that the rest of the world should follow. This points to the missionary character of the concept, that is the idea that not only the world should follow the American lead, but that the United States should actively promote this role. As Jeanne Kirkpatrick, U.S. Ambassador to the United Nations during the Reagan Administration, said, “American exceptionalism expresses the conviction that the U.S. has a moral mission which flows out of its identity and which should guide its policies. Our exceptional character, which was originally used to justify disdaining alliances and quarrels of the so-called old world, has often been cited as the grounds to improve the world” (Kegley & Wittkopf 1994: 251).

American exceptionalism is a cultural phenomenon that is not necessarily connected to a particular group or political party in the United States. It has been used to legitimize both liberal and conservative policies, from Woodrow Wilson to Ronald Reagan. The concept plays an especially important role in the George W. Bush administration, however. For example, the statement by Bush that he senses a “third awakening” of religious devotion in the United States ties in with the religious element of the concept (Baker 2006).

The anti-international law strand of American exceptionalism also plays an important role in the current administration. This strand describes the belief that the United States should not be bound by international law, or, in a more moderate form, that international law is secondary to American law in normative force. One argument for this belief is that international law contravenes the status of the Constitution as the “highest law,” and subordinates the will of the American people to foreigners.¹⁵ As noted above, this argument places much importance on the concept of sovereignty. Sovereignty, it is argued, requires that a state be independent and autonomous and not subject to

¹⁵ Just one many examples, the following statement by Gingrich (2005):

A coalition of genuine democracies can explicitly and consistently reject a growing anti-democratic international movement that seeks to create a system of rules and “laws” which will circumscribe American liberty and coerce America into taking steps which the people of America would never take. The use of large international meetings to create new systems of “law” and new “norms” of international behavior are a direct threat to the American system of Constitutional liberty and must be rejected
http://www.usip.org/congress/testimony/2005/0622_gingrich.html.

See also the following statement by Rabkin (2005):

The Constitution makes federal law (and the federal Constitution) “supreme law of the land.” States don’t even have the last word on their own constitutions (or when they can adhere to their own constitutions). All of the Founders would have been appalled at the thought that the federal government, in turn, would be subordinate to some supranational or international entity, which could claim priority in this way over the American Constitution and American laws
<http://www.nationalreview.com/comment/rabkin200503100742.asp>.

decisions of other states or international organizations. One of the leading advocates of this idea in the United States is Jeremy Rabkin. John Yoo appears to be sympathetic to Rabkin's argument, as illustrated by a book review he wrote of Rabkin's book The Case for Sovereignty (Yoo 2005b). In this book review Yoo writes with apparent approval of Rabkin's ideas:

If international law or institutions were permitted to become a policy-making forum, the American people would lose their connection to their government and its founding principles. We would no longer be a nation. For this reason, Rabkin writes, "The United States needs to safeguard its sovereignty in order to safeguard its own form of government. It is not simply a matter of legal technicalities. It is about preserving a structure under which Americans—in all their diversity, with all their rights, and all their differences of opinion—can live together in confidence and mutual respect, as fellow citizens of the same solid republic." So, Rabkin seems to say to our diplomats, cooperate all you like, but always remember that the United States, because of the primacy of its Constitution, has the right to ignore international law or withdraw from its institutions (Yoo 2005b).

A second argument against international law used by advocates of American exceptionalism is that the United States cannot violate international law, especially human rights law, because it has itself been at the forefront of the advance of human rights. This argument makes an appeal to the moral superiority that to many is part and parcel of American exceptionalism. This argument has come under stress as a result of the reports of mistreatment of detainees in Guantánamo, Abu Ghraib and elsewhere.

American exceptionalism already had a strong influence on the Bush Administration before 11 September 2001 (Spiro 2000). The "War on Terror" that followed appears to have made the concept's grip on the Administration even stronger. The rhetoric used by the Administration in that war has strong exceptionalist connotations. This can be illustrated with President Bush's address to the nation directly after 9/11. In this address, the President evoked the idea of Americans as a people chosen by God by referring to the words "Even though I walk through the valley of the shadow of death, I fear no evil, for You are with me" from Psalm 23. He also used wording that strongly reflects de Tocqueville's idea of the "City on a Hill" when he stated that "America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world. And no one will keep that light from shining" (Bush 2001). The disdain for international law, which is also an element of exceptionalism, was magnified after 9/11. For David Rose, this is what Guantánamo is all about: "[i]n the minds of the administration's ideologists, the shrugging-off of the straitjacket of international law is a virtue in and of itself, evidence of America's exceptionalism, proof of its manifest destiny in the twenty-first century" (153-154).

"Manifest destiny," a term that is part of the discourse of American exceptionalism, was used in the 1840s to promote the annexation of much of what is now the Western United States. The manifest destiny idea implied that the United States' expansion was guided by Providence—a destined mission which could not be neglected (McEvoy-Levy 2001: 25). Rose does not provide evidence in support of his claim that the memos that laid the legal framework for the "War on Terror" were manifestations of an exceptionalist project. It is likely, however, that the lawyers who wrote these memos were influenced by exceptionalist ideas, and indeed the memos themselves clearly contain exceptionalist references, in particular concerning the subordinate role of international law.

Conclusion

Guantánamo: The War on Human Rights appeared in October 2004. Four months prior to its publication, the Supreme Court handed down its judgment in the case of *Rasul v. Bush*.¹⁶ In this judgment the Court rejected the argument made by the Administration that *habeas corpus* protection did not apply to the detainees at Guantánamo Bay. David Rose, however, warned that there were some signs that celebrations on the detainees' behalf might be premature.

Since then, the Supreme Court in June 2006 delivered its judgment in the case of *Hamdan v. Rumsfeld*.¹⁷ In this case the Court also disagreed with arguments made by the Administration, in particular concerning the powers of the President and the narrow interpretation of the scope of application of Common Article 3 to the Geneva Conventions.

Despite these important Supreme Court decisions, much of the initial legal advice that was given by government lawyers continues to be part of the legal framework the Administration applies to the “War on Terror.” Certain measures taken by the Administration that the Supreme Court found fault with have, with minor changes, simply been adopted as law passed by Congress. One example is the inclusion in the Military Commissions Act, approved by Congress in September 2006 and signed by President Bush on October 17, 2006, of a provision to prevent the courts from considering applications for habeas corpus by “by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination” (Military Commissions Act 2006). Fundamental tenets of the Administration’s approach to the “War on Terror,” including the premise that the Geneva Conventions do not apply to Al Qaeda fighters because Al Qaeda is not a state, and the concept of “unlawful enemy combatants” that are neither protected by the provisions on prisoners of war nor the provisions on civilians in the Geneva Conventions, have not changed. Prisoners are still being held at Guantánamo Bay and subjected to coercive interrogation.

A number of governments—particularly in Europe—have indicated their disagreement with the treatment of detainees at Guantánamo Bay. The United Kingdom for example has stated that “[w]e regularly make representations to the U.S. Administration about the Guantánamo Bay detention facility. We have made it clear that we regard the circumstances under which detainees continue to be held there as unacceptable” (Triesman 2006).

A number of these governments have engaged in discussion with the Administration with a view to adjusting the legal framework that the United States is using.¹⁸ In so doing they have tended to focus on legal arguments, by offering alternative interpretations of provisions in the Geneva Conventions. This essay suggests that this may have limited effect, because in addition to legal arguments other factors influenced the advice given by a number of American government lawyers in the “War on Terror.”

¹⁶ *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

¹⁷ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

¹⁸ This includes the Netherlands. In April 2005, for example, a high-level Dutch official had several meetings in Washington D.C. to discuss Dutch concerns regarding the detention and legal status of detainees in Guantánamo Bay.

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