
**THE LEGAL ADVISOR MEMOIR AS A LITERARY FORM,
AND THE ROLE OF LAW AND LAWYERS IN A WORLD
WHERE EVERYTHING HAS BECOME WAR**

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ABSTRACT

Rosa Brooks's book, *How Everything Became War and the Military Became Everything: Tales from the Pentagon*, represents an important addition to a genre of books that we might call the "legal advisor memoir," such as Abram Chayes's *The Cuban Missile Crisis* and Jack Goldsmith's *The Terror Presidency*. Like both Chayes and Goldsmith, Brooks seeks to document the role of law and lawyers in U.S. policy at a moment of national security crisis, yet Brooks also takes on the more ambitious task of exploring how the (always artificial) border between war and peace has become blurred almost beyond recognition in an age of terrorism and "unrestricted warfare." Her analysis is also substantially more pessimistic than either Chayes or Goldsmith about the ability of the law and lawyers to restrain and govern the conduct of war. Like Chayes, Brooks sees international law as inherently indeterminate; yet where Chayes saw limits to law's malleability, Brooks argues that the unprecedented nature of the war on terror has dramatically magnified that indeterminacy. Furthermore, where Goldsmith saw the President "ensnared" and "strangled" by law in the war on terror, Brooks presents a worrying picture of a U.S. government that is almost totally unbound by an international law rendered ever more indeterminate by the short-sighted interpretive choices of US government lawyers.

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It is a striking feature of Professor Rosa Brooks's book, *How Everything Became War and the Military Became Everything: Tales from the Pentagon*,¹ that it is the first in a decade of Temple book workshops to have an audiobook version on Audible.² I can only speculate as to the reasons for this, but other books in our

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1. ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* (2016).

2. ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* (2016) (available on Audible), <https://www.audible.com/pd/Nonfiction/How-Everything-Became-War-and-the-Military-Became-Everything-Audiobook/B01J1XLHNA>.

series have featured eminent authors taking on weighty and important topics, so I doubt that it is the subject matter. My hypothesis is that the reason lies, at least in part, in the “Tales from the Pentagon” part of Brooks’s subtitle. Indeed, if we focus on the form as well as the substance of Brooks’s book, we can identify it as part of a decades-old and (I suspect) growing genre of books and articles that we might call the “legal advisor memoir.”

In such memoirs, legal scholars, having taken an early-career or sabbatical detour into the world of foreign policy decision-making as legal advisors to government bodies such as the US State Department, the Justice Department, or the Pentagon, bring together their personal experiences as legal advisors with their positive and normative legal arguments as scholars. The result—at least in the three cases I consider here—is compelling both in the intellectual sense (since doctrinal arguments are supplemented by empirical observations about the role of lawyers and legal process in policymaking) and in the narrative sense (since many readers yearn for a glimpse of how decisions are made in the corridors of power). That said, different legal advisors can and do vary in the precise nature of the literary form and in the arguments they put forward. It is, therefore, instructive to place Brooks’s book in a longer literary tradition as a successor to works like Abram Chayes’s classic *The Cuban Missile Crisis*³ and Jack Goldsmith’s *The Terror Presidency*.⁴

Chayes’s classic book serves double duty: first, as the landmark work in a larger International Legal Process (ILP) approach to international law and, second, as the memoir of the acting legal advisor in the State Department at the height of the Cuban Missile Crisis. As an ILP scholar, Chayes’s aim was to understand, in empirical terms, the role of law and lawyers in U.S. foreign policy, including, and especially in, the “hard case” of a severe international crisis. As a practitioner, Chayes occupied a privileged position to answer that question, drawing on his personal experience as State Department legal advisor. Chayes’s famous answer to this question is that law and lawyers mattered in three ways: “[f]irst, as a constraint on action; second, as the basis of justification or legitimation for action; and third, as providing organizational structures, procedures, and forums,” within which political and legal decisions are made.⁵

Central to Chayes’s argument about the role of lawyers in the policy process were his legal realist views about the inherent indeterminacy in international law.⁶ In a setting of legal indeterminacy, Chayes argued, legal norms and rules do not offer a unique solution to policy problems, but are, instead, invoked and variously

3. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974).

4. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

5. CHAYES, *supra* note 3, at 7.

6. *See id.* at 101–02 (“International law, in its normative sense, must be seen as indeterminate with respect to much of the array of concrete choices open in a particular situation. Often the rules have no authoritative formulation in words. Even when they do, the terms are open to a broad range of interpretation and emphasis.”).

interpreted as resources by actors advocating for competing policy outcomes.⁷ “The persuasive force of such arguments and their final influence will depend on infinitely complex moral, psychological, and interpersonal processes of group decision-making. . . . But the position that the ultimate impact is *de minimis* cannot be maintained.”⁸ Moreover, the claim that international law is indeterminate does not mean that all arguments are equally persuasive. Instead, solid legal analysis can “distinguish a persuasive from a specious rationale, a responsible and serious performance from a trivial one.”⁹ Law, in other words, may be indeterminate, but it is not infinitely malleable.

Writing nearly four decades later, but in circumstances of comparable and dramatic crisis, Goldsmith’s *The Terror Presidency* pursues an overlapping but not identical set of aims. In literary terms, Goldsmith’s book is more properly considered a memoir, taking us from his youth to the University of Chicago to meeting rooms populated by rival groups of Bush administration lawyers seeking to influence the interpretation of the law and the direction of U.S. policy. In the various chapters of the book, Goldsmith takes the reader through the gamut of legal issues raised and debated in the early years of the U.S. war on terror, from detainee designation and treatment (including the famous Yoo “torture memos”) to warrantless wiretapping. Much of Goldsmith’s book is given over to recreating arguments among government lawyers about the proper interpretation of the Geneva Conventions and the U.S. Constitution in setting the parameters of the U.S. war on terror.

Hovering above these issue-specific arguments, however, Goldsmith presented a more general answer to Chayes’s question about the role of law and lawyers in U.S. foreign policymaking: By contrast with observers who worried that U.S. presidents were unbound by law, Goldsmith presented a presidency “ensnared by law.”¹⁰ Comparing the Bush-era war on terror to the infamous decision by President Franklin D. Roosevelt on the internment of Japanese Americans during World War II, Goldsmith argued that Roosevelt faced a “permissive” legal culture in which the primary constraints were set by the political acceptability of his actions rather than by international or domestic law or courts.¹¹ By contrast, the Bush administration in 2001 encountered a much more dense legal landscape, featuring a growing body of both international laws and domestic U.S. laws criminalizing multiple wartime acts, as well as the specter of prosecution before an ever-growing number of international courts (such as the International Criminal Court), foreign courts (potentially asserting universal jurisdiction), and domestic U.S. courts.¹²

7. *Id.*

8. *Id.* at 103.

9. *Id.* at 42.

10. GOLDSMITH, *supra* note 4, at 43.

11. *See id.* at 49 (noting that Roosevelt worried about the reaction of the American people, the press, and Congress, but not being sued or prosecuted).

12. *Id.* at 53–67.

Goldsmith, like Chayes, also emphasized the radical indeterminacy of many of these laws, including a distinctive argument about the dangers of indeterminacy to U.S. government officials eager to safeguard national security *without* subjecting themselves to potential criminal liability. “The essential problem for [White House Counsel Alberto] Gonzales and company,” Goldsmith argued, “was that many of the laws criminalizing warfare—like the international laws on which some of them were based—were subject to multiple interpretations.”¹³ Furthermore, many of these vague laws, once left to the auto-interpretation of governments, were now justiciable before domestic and potentially international tribunals. Faced with the prospect of unpredictable domestic or international prosecutors and courts, worried U.S. policymakers turned to lawyers at Goldsmith’s Office of Legal Counsel and elsewhere in government for authoritative interpretations of the relevant laws, and, ideally, for assurances about the legality of their actions.¹⁴ Hence, far from being indifferent to the law, Goldsmith famously argued, “the administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death.”¹⁵

In this distinguished lineage, Brooks’s *How Everything Became War and the Military Became Everything* shares important literary and substantive similarities to Chayes and Goldsmith, as well as some dissimilarities. In literary terms, Brooks’s work, like the previous two, combines elements of memoir with more scholarly aims. Although her introduction is full of vivid autobiographical detail and preliminary “tales from the Pentagon,” Brooks informs us that,

This book is not a memoir. It’s part journalism, part policy, part history, part anthropology, and part law, leavened with occasional stories. Only a few of the stories are my own. Still, in some ways this is a very personal book, for I’m part of this story too. Or perhaps I should say that this story is part of me: as someone who went from a childhood of antiwar demonstrations and an early career in human rights to a job at the Pentagon and a life as an Army wife, I have lived many of the contradictions that brought us to our current state of unbounded war.¹⁶

In comparative literary perspective, it is true that Brooks does not follow the lead of Goldsmith. Goldsmith’s book really *is* a legal advisor’s memoir, taking us from meeting to meeting to witness the intra- and inter-agency debates over the interpretation of the domestic and international laws of war. Brooks, by contrast, provides the reader with vivid glimpses into her role as a Pentagon legal advisor, particularly in the first two-fifths of the book, but makes no effort to present blow-by-blow accounts of the full range of policy debates within the Pentagon or between the Pentagon and other executive agencies. On the other hand, Brooks is *far* more autobiographical than Chayes, effectively interweaving her personal experiences from a life (not just a sabbatical) spent engaging with issues of law,

13. *Id.* at 67–68.

14. *Id.* at 69.

15. *Id.*

16. BROOKS, *supra* note 1, at 24–25.

war, and human rights, with more academic chapters presenting legal, historical, and anthropological analyses.

Furthermore, Brooks is different from Chayes and Goldsmith in that she pursues broader, and more ambitious, aims. Substantively, Chayes and Goldsmith both focus on the question of the role of law and lawyers in U.S. foreign policymaking. Distinguishing her book, Brooks takes on the more ambitious task of exploring the contemporary transformation in the nature of twenty-first century warfare and its relation to law. Echoing Mary Dudziak's *War Time*,¹⁷ a previous Temple Law book workshop selection, Brooks argues the always artificial border between war and peace has become blurred almost beyond recognition in an age of "unrestricted warfare" and terrorism.¹⁸ "War," she writes, "has burst out of its old boundaries," and is challenging the neat legal categories that have, in principle, governed the use of armed force since World War II and the traditional distinction between civilian and military functions—drawing the military increasingly into civilian functions and civilian officials and agencies, such as the Central Intelligence Agency, into situations indistinguishable from combat.¹⁹ Indeed, the first two parts of Brooks's book are essentially wide-ranging ethnography of the lived experiences of military and civilian officials, and of civil-military relations, at a time when their respective tasks are increasingly overlapping and merging.

Later, Brooks pivots more directly to the law, providing a systematic analysis of the legal implications of a world in which the always problematic border between war and peace has become increasingly blurred. "Here's the basic problem," she writes:

If we can't tell whether a particular situation counts as "war," we can't figure out which rules apply. And if we don't know which rules apply, we don't know when the deliberate killing of other human beings is permitted—perhaps even required—and when killing constitutes simple murder. We don't know if drone strikes are lawful wartime acts, or murders. We don't know when it's acceptable for the U.S. government to lock someone up indefinitely, without charge or trial, and when due process is required before detention is permissible. We don't know if mass government surveillance is reasonable or unjustifiable. Ultimately, we lose our collective ability to place meaningful restraints on power and violence.²⁰

The central argument of the book, then, is that the changing nature of warfare has profound and inescapable implications for both civil-military relations and for the rule of law. Unlike both Chayes and Goldsmith, however, the empirical role played by lawyers, *qua* lawyers in policymaking, is not Brooks's main theme. Brooks has bigger (or at least other) fish to fry.

However, since Brooks's account is so rich, we can take away three core

17. MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012).

18. BROOKS, *supra* note 1, at 11.

19. *Id.* at 13.

20. *Id.* at 22.

insights about the role of law and lawyers in her new world, each of which speaks to—and adds to—the longer tradition of legal advisor memoirs *à la* Chayes and Goldsmith.

First, as Brooks hints with the title of her third chapter, she is more focused than earlier studies on “lawyers with guns.”²¹ That is to say, she focuses more than her predecessors on military lawyers, depicted as “boy scouts,” and on the tensions between military and civilian lawyers.²² Moreover, Brooks identifies an emergent phenomenon, in which military lawyers focus not only on the traditional laws of war, but on promoting the *domestic* rule of law in countries in which the U.S. military operates—showing another example of blurred boundaries between the military and civilian sides of government.

Second, Brooks picks up Chayes’s core theme of legal indeterminacy and runs with it—arguing that the largely unprecedented nature of the war on terror has dramatically magnified that indeterminacy and has created new challenges for both U.S. policymaking and the international legal order. Moreover, Brooks manages to achieve the seemingly impossible: she makes legal indeterminacy *colorful* through the use of two vividly effective metaphors, both destined to become classics.

In the first metaphor, the attack on 9/11, and by implication other international phenomena, is compared to Wittgenstein’s image of “rabbit-duck”—an image that could be interpreted as either a rabbit or a duck depending on the context: placed among rabbits, the image becomes a rabbit; placed among ducks, it becomes a duck.²³ In a similar fashion, Brooks argues, “the legal status of 9/11 is effectively indeterminate.”²⁴ Placed alongside the Oklahoma City bombings and the activities of Mexican drug cartels, 9/11 seems like a crime; but placed alongside the 1993 World Trade Center bombings, the 1998 embassy bombings, and the attack on the USS Cole, “the 9/11 attacks look like another stage in an ongoing armed conflict.”²⁵ Neither of these descriptions, she argues, is “truer” than any other, because, as Chayes argued, international law is not sufficiently determinate to provide a “right” answer to the question of how to interpret the 9/11 attacks.²⁶ The indeterminacy of the situation and the law offered the Bush administration lawyers an interpretive choice between crime and armed conflict. Their choice of the “armed conflict” frame proved consequential in shaping both U.S. legal doctrine and the military response to the threat of terrorism.²⁷

In the second metaphor, Brooks illustrates three ideal-typical legal responses to an indeterminate body of law, which she relates to a game of tennis. “[W]e all

21. *Id.* at 70 (referring to the book’s third chapter entitled, “Lawyers with Guns”).

22. *E.g., id.* at 199 (describing a soon-to-be-classic scene, in which John Yoo declares, “I have *no* respect for [JAG lawyers!]”).

23. BROOKS, *supra* note 1, at 222, *referencing* LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 22 (Joachim Schulte ed., 4th ed. 2009).

24. BROOKS, *supra* note 1, at 221.

25. *Id.* at 223.

26. *Id.*; *see* CHAYES, *supra* note 3, at 101

27. *See* BROOKS, *supra* note 1, at 223–24.

know,” she writes, “that there is a difference between playing tennis in a way that pushes the envelope between the permissible and the impermissible, ‘cheating,’ and leaving the game altogether.”²⁸ Applying this to the “law game” in the post-9/11 world, Brooks suggests that Bush administration lawyers, in deciding that the terrorist detainees would not receive the protections of the Geneva Conventions, adopted the first option, “playing by the rules” but “pushing the boundaries a bit.”²⁹ By contrast, Yoo’s redefinition of torture represented the second approach: “illegitimate and unethical forms of legal argumentation, ignoring and selectively misreading various relevant texts in order to reach a predetermined conclusion.”³⁰ Like Chayes, Brooks finds the law indeterminate, but not infinitely malleable. Yet, Brooks also argues that “cheating, however reprehensible, is still a way to play the game; [since,] by definition, if you are cheating at a game, you are still accepting most aspects of the game itself.”³¹ Finally, she contrasts both of these responses with the third and most dangerous approach, which she calls the “game-ending move.” According to Brooks, the Bush administration’s claims of “inherent executive powers” fall into this category.³² One might add, the Trump administration’s claim—that its travel ban on six Muslim-majority countries was not reviewable by the courts³³—constitutes a game-ending move as well.

Brooks’s concern about both cheating and game-ending acts of legal interpretation, in turn, culminates in a third and final theme of the book, which encapsulates her concern about the ultimate ability of the law to constrain and humanize war. Whereas Goldsmith saw the President “ensnared” and “strangled” by law, Brooks presents a fearful picture of a U.S. government that is almost totally unbound by an international law rendered increasingly indeterminate by both the nature of the conflict *and* the opportunistic or short-sighted interpretive choices of U.S. government lawyers. While some degree of legal vagueness and ambiguity can be useful, Brooks argues, “the introduction of excessive uncertainty wholly undermines the probability of clarity, stability, predictability, and non-arbitrariness.”³⁴ She continues:

When key international law concepts vital to the regulation of violence lose any fixed meaning—when, for instance, an exceptionally powerful state begins to interpret international law in a substantially different way than most other states—it becomes increasingly difficult to predict that state’s behavior. And unpredictability can spread: one powerful outlier can pave the way for others, and as more states join the outlier, the

28. *Id.* at 201.

29. *Id.*

30. *Id.*

31. *Id.* at 201–02.

32. *Id.* at 202.

33. Adam Liptak, *Appeals Court Will Not Reinstate Trump’s Revised Travel Ban*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/us/politics/trump-travel-ban-blocked.html>.

34. BROOKS, *supra* note 1, at 283.

foundations of the rule of law begin to crumble.³⁵

Even more explicitly, Brooks argues that by blurring the nature of both the threat from terrorism and the U.S. counterterrorist response, U.S. government lawyers have reduced legal certainty, applied the law of armed conflict—rather than peacetime human rights law—to an ever-growing sphere of human activity, and thus undermined both human rights and government accountability, setting dangerous precedents for the future.

In the final part of the book, Brooks makes a normative case for her preferred response to the radical indeterminacy of the current period—not by trying to jam phenomena back into now-outdated conceptual and legal boxes, but by recasting the laws of war to take the nature of contemporary terrorism and counterterrorism into account, and by inventing new types of legal safeguards to protect human rights and promote government accountability in the new reality. Whatever the merits of her proposals, which are discussed and debated in some of the other papers in this symposium, I was ultimately left with a final question for Brooks, in the spirit of both Chayes's and Goldsmith's earlier legal advisor memoirs: What did Brooks, and her Obama administration colleagues, believe they were doing when, in her view, they were draining the traditional law of armed conflict of its meaning and its ability to “constrain and humanize” future conflicts?

35. *Id.* at 283–84.