
**NOT-WAR EVERYWHERE:
A RESPONSE TO ROSA BROOKS'S *HOW EVERYTHING
BECAME WAR AND THE MILITARY BECAME EVERYTHING***

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ABSTRACT

Rosa Brooks's *How Everything Became War and the Military Became Everything* ably documents the many ways that new technologies and the fight against terrorism have spawned expansive interpretations of both domestic legal definitions of war and the international law of war. This is an important point, but in this comment, I suggest that the problems of expansive executive power and unchecked aggressions abroad may be far worse than Brooks describes. Ironically, these problems are sometimes exacerbated by official determinations that certain actions are *not* war and, therefore, do not even fall within the limits provided by domestic authorizations to use military force (AUMFs) or the international law of armed conflict. Most notable has been the argument under domestic law that certain uses of military force do not qualify as “war for constitutional purposes,” and, therefore, do not require Congressional authorization. In addition, in the world of cyber actions, some have maintained that a broad range of actions do not constitute the use of force and do not reach the armed conflict threshold, and as a consequence, give Executive Branch officials more room to maneuver. In these arguments, it is precisely the lack of the “war” label that gives free-ranging authority to the Executive Branch, suggesting that the core underlying issue may not be the expansion of the legal category of “war” as such, but rather, unchecked Executive Branch power under either unduly broad or unduly narrow definitions. What is expanding is not so much the law, but U.S. Executive Branch power.

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The rise of new forms of global national security threats and challenges in the last twenty years has put enormous pressure on existing legal frameworks, in particular, the international law frameworks governing the resort to force (*jus ad bellum*) and regulating the use of force during armed conflict (*jus in bello*). Forged in the aftermath of World War II, the United Nations Charter and the Geneva Conventions still provide the foundational international legal principles in this domain. Yet modern conflict—often perpetrated by transnational terrorist organizations, carried out in and across territories with little or no effective state governance, fought by government proxies or private military and security contractors, conducted with increasingly autonomous weapons, and even spreading into the cyber domain—looks very different from the clashes of large state military forces of the prior era. A number of scholars have highlighted the way in which the nature of modern conflict has stretched established legal doctrines to, and

potentially past, their limits.¹ But perhaps no work on this topic is more provocative, or disturbing, than Professor Rosa Brooks's engaging page-turner, *How Everything Became War and the Military Became Everything: Tales from the Pentagon*.²

Brooks's gripping and insightful book goes far beyond analyzing the impact of the law. Brooks, who deftly interweaves her own personal narrative of working as a senior official at the U.S. Department of Defense with a trenchant policy analysis, makes the claim that the paradigm of war has expanded so far beyond its traditional boundaries that it has infected virtually "everything." With the fight against Al Qaeda and other terrorist groups defined as a global armed conflict, the modern battlefield could potentially encompass any place in the world. In the picture Brooks paints, militarization has encroached on domains from domestic policing to immigration policy to judicial procedure to surveillance to large swaths of social life. New technologies such as metadata and unmanned aerial vehicles (UAVs) are fueling this development. In addition to these broader policy points, Brooks is also making an important claim about the law, which appears in her telling to be woefully outmoded and powerless to stop this vast expansion of war. As she notes at the outset, "all our fine new technologies and fine new legal theories were blurring the boundaries of 'war,' causing it to spread and ooze into everyday life."³

Brooks focuses, in part, on the way in which new technologies and the fight against terrorism have spawned expansive interpretations of both domestic legal definitions of war and the international law of war. With respect to domestic law, she points to the way in which Obama administration officials stretched the 2001 Authorization for Use of Military Force (AUMF), passed by Congress against Al Qaeda, the Taliban, and associated forces beyond recognition to include a broad array of terrorist groups such as ISIS and others—an interpretation the Trump administration has appeared to embrace.⁴

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1. For an excellent recent book that distills and synthesizes the wide scholarship on this topic, authored by a prominent Canadian military lawyer who had first-hand experience grappling with this body of law in an operational context, *see generally* KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* (2016). Another much earlier, but also excellent, more interdisciplinary collection of essays on this topic can be found in *THE LIMITS OF LAW: THE AMHERST SERIES IN LAW, JURISPRUDENCE, AND SOCIAL THOUGHT* (AUSTIN SARAT, LAWRENCE DOUGLAS & MARTHA MERRILL UMPHREY eds., 2005).

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

3. *Id.* at 4.

4. Most significantly, Brooks notes that Obama officials argued that the AUMF

With respect to international law, Brooks devotes considerable attention to the broad reading of the *jus ad bellum* within the Obama administration (again, apparently adopted by the Trump administration). She points to capacious articulations of the principle of self-defense and, in particular, broad conceptions of “imminence” and threats to the United States and its allies, as well as the extensive use of the doctrine that consent of one state to another state’s use of force on its territory is not necessary if that state is “unwilling or unable” to address the threat.⁵ Brooks contends that this approach turns “the traditional international law interpretation of the concept [of self-defense] completely on its head It’s reminiscent of Humpty Dumpty’s famous exchange with Alice in Lewis Carroll’s *Through the Looking-Glass*.”⁶ She also notes that administration officials broadly construed the *scope* of armed conflict against Al Qaeda and other terrorist groups under the *jus in bello*. She observes that, under this view, the geographic area of this armed conflict potentially spans the globe and has no clear end. As a result, the international law of armed conflict, rather than the more restrictive law of human rights, is the dominant legal framework that applies, with its generally more permissive rules regarding the use of force. Moreover, Brooks contends that new technologies have given life to some of these legal gymnastics.

These are important points. The breadth of the U.S. government’s arguments regarding the scope of war is abundantly clear in a U.S. Executive Branch document published at the end of the Obama administration.⁷ Worthy for its transparent articulation of U.S. legal positions, the document makes plain the stunning scope of arguments under both domestic and international law that the United States is legally justified in using force against a broad array of terrorist groups—even without explicit Congressional authorization or U.N. Security Council approval. In addition, the law of war paradigm applies globally—even if, as a matter of policy, the United States may bind itself with more restrictive standards and practices. Published long after Brooks left the Department of Defense and wrote her book, the Executive Branch document reveals the prescience of Brooks’s arguments.

In some ways, however, the problems of expansive executive power and unchecked aggressions abroad may be far worse than Brooks describes. Ironically, these problems are sometimes exacerbated by official determinations that certain actions are *not* war and, therefore, do not even fall within the limits provided by

encompassed the use of force against terrorist groups beyond Al Qaeda, such as al-Shabaab and ISIS, even though Al Qaeda and ISIS are now sworn enemies combating each other on the ground in locations such as Iraq. Bemoaning what she terms “AUMF mission creep,” Brooks maintains that, “the 2001 AUMF just doesn’t cover groups and individuals that were unconnected to the September 11 attacks.” BROOKS, *supra* note 2, at 293–94.

5. *Id.* at 235, 284–86.

6. *Id.* at 287, *citing* LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 57 (Dover Publications 1999) (1872).

7. WHITE HOUSE, *REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS* (Dec. 2016).

domestic AUMFs or the international law of armed conflict.

For example, Brooks glosses over the fact that, at the same time U.S. Executive Branch officials across multiple administrations have in recent years advocated for *broad* interpretations of the legal definition of “war” or “armed conflict,” they have also, in some contexts, argued for *narrow* interpretations. Moreover, new technologies and new modes of projecting military power overseas, such as the use of UAVs, cyber technologies, and the deployment of private military and security contractors, have enabled these legal interpretations. Most notable has been the argument under domestic law that certain uses of military force do not qualify as “war for constitutional purposes,” and, therefore, do not require Congressional authorization.⁸ But another domain in which these arguments have surfaced is in the world of cyber actions, where some have maintained that a broad range of actions do not constitute the use of force and do not reach the armed conflict threshold, and as a consequence, give Executive Branch officials more room to maneuver.

Brooks does not grapple with the significance of these arguments, which we might characterize as legal claims that actions are “not war” and not armed conflict. In these arguments, it is precisely the lack of the “war” label that gives free-ranging authority to the Executive Branch, suggesting that the core underlying issue may not be the expansion of the legal category of “war” as such, but rather, unchecked Executive Branch power under either unduly broad or unduly narrow definitions. Like a rubber band, law is both being stretched and snapping back to suit the needs of the U.S. Executive Branch. What is expanding is not so much the law, but U.S. Executive Branch power.

In a recent book chapter entitled, *Drones, Autonomous Weapons, and Private Military Contractors, Challenges to Domestic and International Legal Regimes Governing Armed Conflict*, I lay out some of these arguments in more detail.⁹ In particular, I show how the twin trends of privatization and the use of new military technologies have enhanced Executive Branch power in the national security domain. Let me briefly discuss two aspects here: first, legal claims that the use of force does not qualify as “war” requiring Congressional authorization, and second, arguments that cyber actions do not meet the armed conflict threshold.

1. “Not War for Constitutional Purposes”

The growing use of military and security contractors, along with new military technologies such as UAVs and increasingly autonomous weapons, has made it easier to support legal arguments that the use of force does not require

8. See BROOKS, *supra* note 2, at 294 (“Saying that many recent U.S. drone strikes do not seem to fit well under the AUMF umbrella is not the same as saying that the president lacks any constitutional authority to use force in the absence of express congressional authorization.”).

9. LAURA DICKINSON, *Drones, Automated Weapons, and Private Military Contractors, Challenges to Domestic and International Legal Regimes Governing Armed Conflict*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 93-124 (Jay Aaronson & Molly Land eds., 2018).

Congressional approval. During the Clinton and Obama administrations, lawyers from the Department of Justice's Office of Legal Counsel (OLC) advanced a theory of the types of force that merit such approval. Probably the most notable articulation of this view appeared in the 2011 memorandum justifying the use of force in Libya without specific Congressional authorization.¹⁰ Under this theory, the use of force is justified but does not need Congress's blessing if it is supported by significant national interests (generally ones that track historical practice) and cannot be anticipated to be "sufficiently extensive in nature, scope and duration."¹¹ In particular, this standard is generally satisfied "only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."¹² According to this approach, the use of force that falls below this threshold is not "war for constitutional purposes," because it does not fit within the meaning of the U.S. Constitution's declare war clause.

Using this theory, the rise of unmanned systems combined with the growing use of private contractors enables the president to claim greater scope for unilateral action because the combination of drones and contractors means that aggressive actions are increasingly available without exposing U.S. military personnel to sustained risk of harm. Thus, the new technology has both emboldened the president politically and actually made possible new legal arguments to justify an expanded conception of the president's role in relation to Congress. For example, in both Kosovo in 1999 and Libya in 2011, the combination of UAVs and private contractors reduced the anticipated harm to U.S. troops, thereby enhancing the viability of the argument that military engagement would not expose "U.S. military personnel to significant risk over a substantial period."¹³ In addition, in both cases, a claim that the use of force was "not war" was precisely what expanded the power of the Executive Branch.¹⁴

2. Cyber Actions Below the Armed Conflict Threshold

Brooks makes much of the fact that cyber actions can trigger kinetic effects that would fall within the law of armed conflict framework. She observes that Executive Branch officials have argued that "cyber operations are subject to the law of armed conflict, and any cyberattacks that cause injury, death, or 'significant destruction,' could be considered 'armed attacks' for legal purposes, triggering, among other things, a legal right to retaliate using conventional armed force."¹⁵

Yet perhaps equally important are legal discussions about cyber actions that

10. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011).

11. *Id.* at 10 (internal quotations omitted).

12. *Id.* at 8.

13. Dickinson, *supra* note 9, at 109.

14. *See id.* at 96 ("By reducing the political cost of war, the rise of these weapon systems and the growing use of contractors have together emboldened the president to deploy force unilaterally.")

15. BROOKS, *supra* note 2, at 131.

fall *below* that threshold. Those actions can be tremendously disruptive, as we have seen in examples as wide-ranging as the Sony hack¹⁶ and the reported interference of Russia in U.S. elections. As discussed by Michael Schmitt and Liis Vihul in a recent article, there is currently a debate about which cyber actions below this threshold would violate the principle of sovereignty and whether respect for sovereignty itself is a freestanding international legal obligation.¹⁷ Schmitt and Vihul think that sovereignty is such a freestanding principle that imposes legal limits on cyber action below the armed conflict threshold, though others do not. Indeed, they cite an internal U.S. memorandum allegedly making the case that sovereignty is not a rule of international law.¹⁸ The point here is that there are those who argue that avoiding the law of armed conflict may be important precisely because it may give more scope for government action. Elements within the U.S. government have reportedly made such a case. Cyber actions that do not qualify as war potentially give governments more room to act without legal restraint under international law. And, of course, because these acts are not war, again, the executive arguably need not ask Congress for approval first.

CONCLUSION

The key point here is that the legal categorization of Executive Branch action as “not war” has been an important factor in the arguably expanding scope of Executive Branch power. Thus, a more complete picture of the trends Brooks so trenchantly describes would focus on the malleability of the war definition. She is right that the “war is everywhere” theory is a means to sidestep international human rights law. But not-war is everywhere too, as the use of technology combined with private contractors *also* increases Executive Branch power to project power abroad without following domestic or international law constraints. And even worse, it is possible that such projections of power could be not-war for domestic purposes, allowing unilateral Executive Branch action, while counting as an armed attack for international law purposes, thus triggering the reduced checks on power that Brooks warns about.

Finally, I think both Brooks’s story about the expansion of executive power and my addition to it need to acknowledge the role of Congressional polarization

16. In October 2014, hackers broke into the computer systems of Sony Pictures and stole confidential documents, then posted them online. The U.S. government traced the attack to the North Korean government, which was outraged by Sony’s film “The Interview,” which portrayed an assassination plot against North Korean leader Kim Jong-un. See Andrea Peterson, *The Sony Pictures Hack, Explained*, WASH. POST (Dec. 18, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/18/the-sony-pictures-hack-explained/?utm_term=.bda635a32a80.

17. Michael N. Schmitt & Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEX. L. REV. 1639 (2017).

18. *Id.* at 1641 (discussing Memorandum from Jennifer M. O’Connor, Gen. Counsel of the Dep’t of Def., International Law Framework for Employing Cyber Capabilities in Military Operations (Jan. 19, 2017), noting that the memorandum originally was not classified and “circulated widely internationally” but is now marked “for internal use only.”).

in causing this trend, at least with regard to the Clinton and Obama administrations. After all, it is not only the voracious efforts of the executive to accrete power that are fueling this power. Since the Gingrich takeover of Congress in the 1990s, Congressional Republicans have been increasingly resistant to consensus-building and compromise.¹⁹ This intransigence is at least partly responsible for the Clinton and Obama administrations' arguments for unilateral executive power, under both war everywhere and not-war everywhere theories. But whatever the cause, these arguments of Democratic administrations combined with Republican administrations' arguments for expanded executive authority regardless of Congress mean that the untrammelled power of the executive in this domain has expanded steadily for at least two decades.

Perhaps instead of thinking of this problem as "war everywhere," we should be focusing on the malleable definition of war to suit the purposes of the executive as the real culprit. Brooks gestures in this direction with this passage, rendered in her typically lively prose:

Most of the institutions and laws designed to protect rights and prevent the arbitrary or abusive exercise of state power rest on the assumption that we can readily distinguish between war and peace. When there is no longer any consistent or principled way to do so, many of our existing legal frameworks become little more useful to us than the lines Navajo warriors once drew in the sand.²⁰

Or perhaps our focus should turn toward the ways that the automation and privatization of war are transforming war itself, a trend that, again, Brooks gestures toward, but does not play out in all its legal implications. In any event, while Brooks's observations are important and right on target, the overarching concept of "war everywhere" does not fully capture it. Indeed, the problems regarding the future of war may be even more troubling than she describes and may have implications for arguments about the limits of law in this domain.

19. See generally Steven M. Gillon, *The Gingrich Revolution and the Roots of Republican Dysfunction*, HUFFINGTON POST (Oct. 12, 2015, 6:26 PM), <https://perma.cc/66M6-7JA5>; Stephen Collinson, *How Donald Trump Took the Republican Party by Storm*, CNN (Dec. 15, 2015, 5:23 AM), <https://perma.cc/3CYH-36Q8>.

20. BROOKS, *supra* note 2, at 351.

