

---

## THE BOUNDARIES OF WAR

### FOREWORD

*Rosa Brooks\**

For an author, there is only one thing more terrifying than the possibility of writing a book that no one will read. This, of course, is the possibility of writing a book that many people will read. Books, like children, make their own way out in the world. Once launched, they must succeed or fail on their own merits; it is too late to change them or protect them.

Every now and then, an author gets lucky: a book gets precisely the readers the author had wished for, readers who take a book seriously and engage with it in a manner that is both challenging and affirming, seeking to answer its unanswered questions, extend its arguments into new areas, and wrestle with what it leaves unresolved. For me, the participants in this *Temple International & Comparative Law Journal* book symposium<sup>1</sup> are the dream readers every author hopes for, and I am grateful to all of them for their thoughtful responses to *How Everything Became War and the Military Became Everything*.

*How Everything Became War and the Military Became Everything* started out as a law review article in 2004.<sup>2</sup> Over more than a decade, my thinking evolved and my original argument grew new roots and new tendrils, eventually turning into a book. The book tells two intertwined stories: one is a story about law, and one is a story about institutions.

The first story—call it the story of how everything became war—is about the ways in which American policy makers and political leaders have come to see more and more problems through the lens of war—from geographically diffuse terrorist networks to cyber attacks and influence operations. As a result, more and more spheres of human activity have been swept into the ambit of legal regimes

---

\*Professor of Law, Georgetown University Law Center; Senior Fellow, Arizona State University/New America Future of War Program; Adjunct Scholar, Modern War Institute at West Point. I am extraordinarily grateful to Jaya Ramji-Nogales and Peter Spiro for organizing this book symposium, as well as to all the contributors.

1. The essays which comprise issue 32.1 of the *Temple International & Comparative Law Journal* were first prepared for a book roundtable co-hosted by the Institute for International Law and Public Policy at Temple University Beasley School of Law and the National Constitution Center on September 15, 2017.

2. Rosa Brooks, *War Everywhere: Human Rights, National Security, and the Law of Armed Conflict in the Age of Terrorism*, 153 UNIV. OF PA. L. REV. 675 (2004).

developed to regulate warfare, displacing “ordinary” law. But while ordinary law focuses on restraining state power—on protecting individual rights, ensuring transparency and requiring due process—both international and domestic legal regimes relating to warfare and the military tend to be far more tolerant of state secrecy, coercion, and lethal force.

The more activities we categorize as “war,” the more we allow state power to expand, unchecked. When the lines between war and “not-war” blur, we lose our ability to determine which legal rules are applicable. We lose the ability to determine whether and when judicial process and judicial review are required; whether and when government legal analyses can be kept secret; who can be detained, and under what circumstances; whether and when state actors can monitor (or censor) communications; and, ultimately, whether, when, and under what circumstances, individuals may be killed by the state.

The second story—call it the story of how the military became everything—is intertwined with the first. As we view more and more problems through the lens of war, we come to view more and more problems as the responsibility of the military. For many senior U.S. military leaders, the lesson of the 9/11 terror attacks was that the next threat, like the 9/11 attacks, could once again take the U.S. by surprise. On September 10, 2001, the U.S. military was not focused on Afghanistan, and the notion that civilian planes might be hijacked and used as weapons was barely contemplated by senior military decision-makers. But if the “next” threat could similarly come from anywhere and take almost any form, the U.S. military needed to be everywhere, and prepared for anything. Since 9/11, the U.S. military has increasingly tried to be everywhere and do everything. U.S. military personnel are now stationed in almost every country on earth doing almost every type of job on earth. They launch special operations raids, pilot surveillance drones, train partner forces, launch small business development taskforces, micro-loan programs, and women’s health clinics. They dig boreholes, train parliamentarians, run radio talk shows, and vaccinate cattle. You name it; someone in the US military is doing it.

Needless to say, these two stories—the story about law, and the story about the military as an institution—are interwoven. In many ways, the United States has been caught in a vicious circle: as we use “war” as the framework through which we understand more and more novel security threats, from terrorism and cyber attacks, to genocide and climate change, we ask the military to take on an ever-expanding range of non-traditional tasks. But viewing more and more threats as “war” brings more and more spheres of human activity into the ambit of the law of war, with its greater tolerance of secrecy, violence, and coercion and its reduced protections for basic rights. Meanwhile, asking the military to take on more and more new tasks requires higher military budgets, forcing us to look for savings elsewhere, so we freeze or cut spending on civilian diplomacy and development programs. As budget cuts and hiring freezes cripple civilian agencies, their capabilities dwindle, and we look to the military to pick up the slack, further expanding its role.

Everyone knows the old adage: “If your only tool is a hammer, everything looks like a nail.” It applies here as well. If your only functioning government

institution is the military, everything looks like a war, and “war rules” appear to apply everywhere, displacing peacetime laws and norms; and when everything looks like war, everything looks like a military mission, displacing civilian institutions and undermining their credibility while overloading the military.

*How Everything Became War and the Military Became Everything* as an effort to ring some alarm bells: to take several issues that were being discussed in a disconnected way in multiple policy and scholarly venues, and point out their interconnectedness, in a way that highlights the very high stakes. For the stakes are high indeed: at risk is American democracy, our commitment to the rule of law, and the viability of the global order America helped create.

I briefly thought the book might already be out of date when it was published. For a brief moment, late in the Obama administration, Defense Department budgets were shrinking, and political leaders in both parties were discussing the importance of scaling back the global war on terrorism, rebalancing civil-military authorities, and restoring lost resources and capabilities to civilian institutions. As a citizen, I was relieved. As an author, I was chagrined, worrying that my book might have been overtaken by events.

I need not have worried. For better or worse, and mostly for worse, the election of Donald Trump made this book more timely than I could have imagined. Since President Trump’s ascension to the Oval Office, we have seen every trend discussed in this book accelerate. The State Department has seen its budget slashed and its professional workforce decimated, while the Pentagon’s budget has expanded and U.S. military missions have also continued to expand. As I write, U.S. troops are engaged in combat operations in Afghanistan, Iraq, Syria, Yemen, Somalia, Libya, and Niger; and some 450,000 U.S. troops are stationed in more than 170 countries around the globe.

Here at home, President Trump has enthusiastically embraced military power and military advisors as well. In addition to stacking his cabinet and national security council with current and recently retired senior officers, he recently announced his intention to use the military to prevent unlawful immigration in the American southwest.<sup>3</sup> President Trump has also weakened many of the rules the Obama administration put in place to constrain military action: rules of engagement and constraints relating to drone strikes and civilian casualties have reportedly been loosened. No surprise from a president who professed his enthusiasm for bringing back torture and targeting the family members of terrorists.

The essays collected in this symposium issue take on the themes of *How Everything Became War and the Military Became Everything* in diverse and creative ways. Laura Dickinson asks if the problem is the expansion of “war” or simply the growing malleability of our concept of war, noting that while the label

---

3. Tara Copp & Aason Mehta, *Trump says military troops will guard US-Mexico border*, MILITARY TIMES (April 4, 2018) <https://www.militarytimes.com/news/your-military/2018/04/03/trump-says-military-will-guard-us-mexico-border/>.

“war” often helps political leaders evade legal accountability, it is also often the case that political actors deliberately disclaim the war label when doing so is convenient.<sup>4</sup> For instance, she discusses how increased reliance on unmanned systems and private contractors has enabled presidential evasion of the limitations created by the War Powers Resolution.<sup>5</sup> Zinaida Miller notes “the pervasive presence of ‘law-talk’” in discussions of war and peace; today, “law and legal categories are . . . being deployed routinely as part of the fighting of, and resistance to, war,” and different types of law talk have quite different potential consequences for the distribution of authority, judgment, and accountability.<sup>6</sup>

Mark Nevitt highlights the ways in which the structure of the military combatant commands further blurs the lines between military and civilian roles.<sup>7</sup> In particular, he notes, the geographic combatant commands and the military’s Special Operations Command have evolved in ways that arguably encroach, respectively, on State Department and intelligence agency prerogatives, while effectively bypassing traditional congressional oversight mechanisms.<sup>8</sup> Lesley Wexler worries about the ways in which the securitization of everything undermines civilian professional norms in fields such as anthropology, medicine and psychology.<sup>9</sup> Similarly, Jaya Ramji-Nogales highlights the ways in which the immigration and refugee policies have become dangerously militarized, and worries about the ways in which the enforcement paradigm tends to squeeze out humanitarian concerns.<sup>10</sup> David Luban highlights related concerns, noting that the military’s imperative is “winning,” and when this is extended to non-traditional areas, all good works risk becoming instrumentalized.<sup>11</sup> Dan Bodansky reflects on the nature of paradigm shifts in law, and wonders how it can be that war has become both omnipresent and invisible.<sup>12</sup> Peter Spiro reflects on civilian-military divides, and notes both the limitations and potential benefits of a military that takes on more and more civilian tasks.<sup>13</sup>

Margaret deGuzman suggests that more robust global governance and international accountability mechanisms may provide a partial solution to some of the dilemmas identified in *How Everything Became War and the Military Became*

---

4. Laura Dickinson, *Not-War Everywhere: A Response to Rosa Brooks’ How Everything Became War and the Military Became Everything*, 32 TEMP. INT'L & COMP. L.J. 17 (2018).

5. *Id.*

6. Zinaida Miller, *Time, Law, and Judgment*, 32 TEMP. INT'L & COMP. L.J. 53 (2018).

7. Mark Nevitt, *Reforming the Pentagon: Reflections on How Everything Became War and the Military Became Everything*, 32 TEMP. INT'L & COMP. L.J. 69 (2018).

8. *Id.*

9. Lesley Wexler, *The Importance of Professionalism: Addressing Discrimination, Exporting Military Values and Maintaining Civilian Ethics*, 32 TEMP. INT'L & COMP. L.J. 105 (2018).

10. Jaya Ramji-Nogales, *The War on Immigrants: Changing Military Culture*, 32 TEMP. INT'L & COMP. L.J. 87 (2018).

11. David Luban, *Humanitarianism as a Weapons System*, 32 TEMP. INT'L & COMP. L.J. 47(2018).

12. Dan Bodansky, *The Categorical Imperative*, 32 TEMP. INT'L & COMP. L.J. 7 (2018).

13. Peter Spiro, *The Military is Not Everything*, 32 TEMP. INT'L & COMP. L.J 97 (2018).

*Everything*,<sup>14</sup> and Mark Pollack situates the book in the tradition of other efforts by former government legal advisors to make sense of the indeterminacy, but not infinite malleability, of international law, noting the ways in which law simultaneously constrains and enables political actors.<sup>15</sup> Sasha Greenawalt highlights a range of areas requiring further exploration,<sup>16</sup> and Duncan Hollis takes up one of those challenges, attempting to develop a framework for thinking about different types of influence operations.<sup>17</sup>

These varied essays all contribute in important ways to the debate I tried to launch in *How Everything Became War and the Military Became Everything*. They do not offer easy answers, but they do something that is perhaps even more important: they pose tough questions, and do not shy away from grappling with them honestly and openly. I hope these essays will inspire other writers and thinkers, in turn, and that the discussion will continue. No author could ask for more.

---

14. Margaret M. deGuzman, *New Rules or More Global Governance?* 32 TEMP. INT'L & COMP. L.J. 13 (2018).

15. Mark Pollack, *The Legal Advisor Memoir as a Literary Form, and The Role of Law and Lawyers in a World Where Everything Has Become War*, 32 TEMP. INT'L & COMP. L.J. 79 (2018).

16. Alexander K.A. Greenawalt, *If War is Everywhere, Then Must the Law Be Nowhere?*, 32 TEMP. INT'L & COMP. L.J. 25 (2018).

17. Duncan Hollis, *The Influence of War; The War for Influence*, 32 TEMP. INT'L & COMP. L.J. 31 (2018).