

EXCERPT

War Like No Other: The Constitution in a Time of Terror

A new book by Owen Fiss, edited and with a foreword by Trevor Sutton, examines the effects of U.S. counterterrorism policies on the Constitution and American law.

TREVOR SUTTON '10 has edited and written the foreword to *A War Like No Other: The Constitution in a Time of Terror*, a new collection of essays by Owen Fiss, Sterling Professor Emeritus of Law.

A graduate of Stanford and Oxford, in addition to the Law School, Sutton has served as a law clerk on the U.S. Court of Appeals for the District of Columbia Circuit and as a fellow in the Office of the Secretary of Defense. Currently a fellow at the Center for American Progress, he lives in New York City and works on anti-corruption matters for a global consulting firm.

The *Law Report* asked Sutton about the work that went into the book, as well as his thoughts on the themes the essays address.

His responses, as well as an excerpt from the foreword, are below.

YLR How did you get involved with this project?

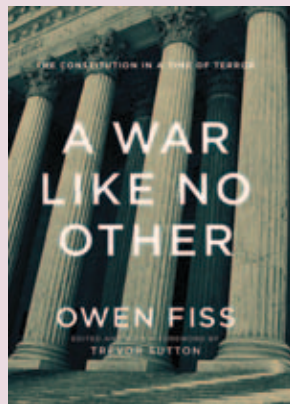
Trevor Sutton I was Owen's research assistant (RA) for a long time—five years if you can believe it. I was his RA for so long that I helped research and edit many of the essays in the book. One day after I had graduated from the Law School, Owen approached me and floated the idea of turning his essays on national security law into a book. I found the idea appealing but was concerned about the timeliness of some of the essays. So we engaged in a bit of dialogue on how to frame and update his writings, and eventually he proposed that I incorporate some of my views into the book itself.

How did working with Fiss help develop your thinking about the constitutional issues he raises?

Since working with Owen (and studying with him), I've come to view the major

legal debates of the War on Terror in more procedural terms. To many, "procedure" suggests abstractions and technicalities, but as Owen demonstrates in the book (and in all of his classes), procedure is also about human dignity. It goes to the question of how we treat others, and whether we view them as equal to us on a very

basic level. If we, as a country, decide that there exists a class of people who can be deprived of their most essential liberties through a different process than that granted to everyone else, what does that say about us? This is the question lurking in the background of all the major constitutional controversies Owen surveys in the book.



In the foreword, you write that, despite the deep concerns in the essays, "Fiss remains committed to the belief that a well-functioning democracy can defeat even the most dangerous of foreign

threats without compromising its most cherished values." What do you see as the biggest challenges to sustaining such a "well-functioning democracy"?

I think the biggest challenge in sustaining a well-functioning democracy is the tendency to think "this time is different" every time a new threat to the safety of the nation emerges—that is, to acknowledge the mistakes of the past but insist that they do not apply in the present because the current threat is unlike anything we have ever confronted before. That line of thought certainly contributed to many of the worst excesses of the Bush Administration, and I suspect it is a major reason why President Obama has not repudiated his predecessor's national security policies quite as firmly as many had hoped. Perhaps most troublingly, even the courts have been seduced by this logic on many occasions. But it's either arrogant or cowardly—arguably both—to think the challenges we are facing today are graver or more bewildering than those faced by past generations. If our fundamental values are to have any meaning, they must be adaptable to new and unforeseen situations.

An excerpt from Trevor Sutton's foreword to A War Like No Other: The Constitution in a Time of Terror, by Owen Fiss (the New Press, 2015).

September 11, 2001: a day that changed everything.

This has been a common mantra of government agencies and the media in assessing the effects of the terrorist attacks on the World Trade Center and the Pentagon. Some have described the attacks as changing the way the United States assesses and responds to threats to its national security. Others have gone further to suggest that the attacks changed the relationship between the United States and the world in a more general sense.

More than a decade after September 11, such views may seem overblown. The past two presidential elections—to say nothing of congressional midterm and state races—were perceived to have turned more on differences in the candidates' domestic policy agendas than matters of national security or foreign policy. Moreover, the winding down of the wars in Iraq and Afghanistan, the death of Osama bin Laden, the Obama administration's declaration of a "pivot"

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or “rebalance” toward Asia, and the challenge posed by an expansionist Russia all suggest a return to a more traditional national security strategy, one in which the threats posed by international terrorist organizations such as al-Qaeda—and more recently ISIS—are no longer the primary drivers of American foreign policy.

There is one area, however, where the legacy of September 11 has proven unusually enduring: the law. While the threat of terrorism may no longer dominate debate in Congress or command daily headlines as regularly as it once did, the legislative enactments and judicial decisions passed in response to the counterterrorism policies of the Bush and Obama administrations continue to cast a long shadow over many areas of the law, including constitutional jurisprudence. Freedom of speech and association; due process; habeas corpus; the Fourth Amendment warrant requirement; even the prohibitions on torture and extrajudicial killings—the law governing these constitutional principles looks vastly different in 2015 than it did in the summer of 2001.

The essays in this volume chronicle the reactions of one scholar, Professor Owen Fiss of the Yale Law School, to the counterterrorism practices of the Bush and Obama years. The volume begins in 2003—in the early days of the Iraq War, before the Supreme Court’s decisions in *Hamdi v. Rumsfeld*, and before Barack Obama or John Roberts had risen to national prominence. From this point of embarkation, Fiss surveys and assesses the major legal controversies of the following decade, from Guantánamo to drones, with a particular focus on the constitutional dimensions of the disputes. Linking all the essays is Fiss’s sustained concern for the offense done to the Constitution by the political branches in the name of public safety, and the refusal of the judiciary to hold those branches accountable. As Fiss observes, practices that at first seemed like temporary excesses of the Bush administration have become entrenched legal doctrines perpetuated by President Obama and enshrined in judicial opinions. How these constitutional aberrations outlasted the political climate that created them constitutes the central narrative of this volume.

In some respects, this is an unlikely book. Before 2003, Fiss, a scholar of equal protection, civil procedure, and free speech, had not published on topics relating to national security or the laws of war. That he would write ten essays relating to the fight against international terrorism over the next decade was not to be expected.

Fiss was not alone in embarking on a new project of legal analysis after September 11. The legal questions raised by the Bush administration’s response to the attacks were terra incognita for nearly all legal academics and jurists. Cases that were obscure for all but law-of-war specialists—*Ex Parte Milligan*, *Ex Parte Quirin*, *In Re Yamashita*, *Johnson v. Eisentrager*—suddenly assumed burning importance, and questions that seemed like academic speculation—the reach of due process on the battlefield; the limits on executive detention outside the formal territory of the United States—were now being litigated in federal courts.

For Fiss, it was natural that the judiciary’s duty to embody and apply public reason in the domestic context, a responsibility Fiss has argued for over the past forty years, could extend to the national security sphere. In vital respects, the legal issues raised by the War on Terror are about process—process not only in the

conventional sense of rules that govern legal and administrative proceedings but also in the more profound sense of the bulwarks that stand between the individual and the awesome power of the state. Behind the major national security cases of the post-September 11 era—*Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*—was the question of what role, if any, the judiciary should have in mediating the relationship between the Bush administration and those suspected of plotting or facilitating terrorism. Nested within this question was another inquiry, one that would continue to trouble courts into the Obama presidency: When does the judiciary’s responsibility to defend fundamental rights

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take precedence over the executive’s expertise in national security and foreign relations?

In Fiss’s view, the major victories in the legal battle over the fight against terrorism were pyrrhic. The Supreme Court’s decisions in *Hamdi*, *Hamdan*, and *Boumediene*, along with the Detainee Treatment Act of 2005, gave as much to the executive branch as they took away, and left many vital questions unanswered—for example, whether the use of military commissions to try detainees off the battlefield violated constitutional due process. These deficiencies have been compounded by the actions of the lower courts, which have handed the government victory after victory in suits alleging torture, warrantless surveillance, and extrajudicial killings. To an even greater degree than in the era of the Burger and Rehnquist Courts, the actions of the judiciary in the post-September 11 era have fallen short of “the law as it could be,” to borrow the title of Fiss’s 2003 book.

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These ten essays take up disparate topics, but they share a number of key themes. The most important of these is the centrality of constitutional norms to all of Fiss’s arguments. While many of the legal controversies discussed in the book involve the meaning of statutes and international conventions (particularly those that seek to regulate the conduct of the executive during wartime), for Fiss these instruments embody and are backstopped by the rights and privileges found in the Constitution itself. No statute or treaty can abrogate the constitutional principles that Fiss identifies in the essays, such as the principle of freedom or the prohibition of torture.

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Despite their concerned tone, the message of all these essays is fundamentally one of hope. Through the example of Aharon Barak, Fiss remains committed to the belief that a well-functioning democracy can defeat even the most dangerous of foreign threats without compromising its most cherished values. Fiss, like Barak, is steadfast in his belief that the challenges intrinsic to the fight against terrorism should never cause us to lose sight of the principles that make us great. ∞