
The Long Decade

How 9/11
Changed the Law

Edited by

DAVID JENKINS
AMANDA JACOBSEN
ANDERS HENRIKSEN



OXFORD

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Amanda Jacobsen
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LIST OF CONTRIBUTORS

Iain Cameron is a Professor of Public International Law at Uppsala University. He has been a member of the Council of Europe Commission on Democracy through Law since 2005. He has also been a Rapporteur for the journal *European Public Law* (1995–2009) and an expert in the Commission of Inquiry into U.N. and E.U. Sanctions. He is the author of several books, including *An Introduction to the European Convention on Human Rights* (2011), *International Criminal Law from a Swedish Perspective* (2011), and *National Security and the European Convention on Human Rights* (2000).

Oren Gross is a Professor of Law and the Director of the Institute for International Legal & Security Studies at the University of Minnesota Law School. He was a member of the faculty of the Tel Aviv University Law School in Israel from 1996 to 2002. Between 1986 and 1991, he served as a senior legal advisory officer in the international law branch of the Israeli Defense Forces' Judge Advocate General's Corps. In 1998, he served as the legal adviser to an Israeli delegation that negotiated an agreement with the Palestinian Authority's senior officials concerning the economic component of a permanent status agreement between Israel and Palestine.

Anders Henriksen is an Associate Professor of International Law at the University of Copenhagen, Faculty of Law. He holds a Ph.D. in international law from the University of Copenhagen and was affiliated with the Danish Center for Military Studies before joining the University. He has written extensively on international law and national security. His 2009 book in Danish, *Arven efter Bush: Præsidentembedet og krigen mod terror*, focused on the legal legacy of the George W. Bush presidency; his 2010 book, *Krigens folkeret—og international væbnet terrorbekæmpelse*, dealt with the international regulation of armed counter-terrorism; and his 2011 book, *Antiterrorismen, retsstaten og demokratiet*, discussed various international and constitutional law aspects of Danish counter-terrorism legislation.

Amanda Jacobsen is a Research Fellow at the University of Copenhagen, Faculty of Law. She is licensed to practice law in the United States and acts as habeas corpus counsel for Abu Zubaydah, a former CIA prisoner, now being detained in Guantanamo Bay, Cuba. Before coming to the University, she worked in private practice in Washington, DC, primarily in government contract litigation. She has also previously worked as a legal researcher for the Office of the Prosecutor at the U.N. International Criminal Tribunal for Rwanda.

David Jenkins is an Associate Professor of Comparative Law at the University of Copenhagen, Faculty of Law. He is an attorney at law in the United States, and earned his J.D. from Washington and Lee University School of Law. In addition to M.A.s in both history and political science from Marshall University, he holds the LL.M. and Doctor of Civil Law (D.C.L.) degrees from McGill University's Institute of Comparative Law in Montréal. He has published multiple articles regarding comparative constitutional law, with a focus on emergency theory, anti-terrorism measures, and the separation of powers.

Amnon Lev is an Associate Professor at the University of Copenhagen, Faculty of Law. He has advanced degrees in both law and philosophy (cand. jur et phil., Ph.D.) and studied law and philosophy in Copenhagen, Freiburg im Breisgau and Paris. His research interests include transformations of sovereignty, natural law, and constitutional politics.

Fiona de Londras is a Professor at Durham Law School in the United Kingdom. Prior to her appointment at Durham, she was a Lecturer at University College Dublin. Dealing primarily with the relationship between counter-terrorism, human rights and constitutionalism, her work has been published in leading internationally peer-reviewed journals including *Human Rights Quarterly*, the *Modern Law Review*, and the *Journal of Law and Society*. Her latest book, *Detention in the "War on Terror": Can Human Rights Fight Back?* was published by C.U.P. in 2011. She is one of the editors of *Legal Studies*, the scholarly journal of the Society of Legal Scholars, and co-editor in chief of the *Irish Yearbook of International Law*.

Victor V. Ramraj is an Associate Professor in the Faculty of Law, National University of Singapore. From 2006 to 2010, he served as the Faculty's Vice-Dean for Academic Affairs, and in 2010–2011, as a Faculty Co-Director of the Center for Transnational Legal Studies in London. He has qualifications in law (LL.B., Toronto; LL.M., Queen's University Belfast) and philosophy (B.A., McGill; M.A., Ph.D., Toronto) and is a

member of the Law Society of Upper Canada (Ontario). Before joining the N.U.S. Faculty, he served as a law clerk at the Federal Court of Appeal in Ottawa and as a litigation lawyer in Toronto. He has edited several books with Cambridge University Press, including *Emergency Powers in Asia* (2010), *Emergencies and the Limits of Legality* (2009), and *Global Anti-Terrorism Law and Policy* (2nd ed., 2011), and *Fundamental Principles of Criminal Law* (LexisNexis, 2005).

Kent Roach is a Professor of Law and holds the Prichard-Wilson Chair of Law and Public Policy at the University of Toronto, Faculty of Law, with cross-appointments in criminology and political science. He is a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada and has been editor-in-chief of the *Criminal Law Quarterly* since 1998. His book, *The 9/11 Effect: Comparative Counter-Terrorism*, was published by Cambridge University Press in 2011. In 2010, he authored *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation between Intelligence and Evidence*. He has also co-edited *Global Anti-Terrorism Law and Policy* (2nd ed., 2011), and *Taking Remedies Seriously* (2010).

Gabor Rona is the International Legal Director of Human Rights First, where he advises on questions of international law and coordinates international human rights litigation. Previously, he was a Legal Advisor to I.C.R.C. in Geneva, where he was focused principally on the application of international humanitarian and human rights law to counter-terrorism policies and practice. In addition, he represented the I.C.R.C. in connection with the establishment of international and other criminal tribunals, including the International Criminal Court. He has also taught International Humanitarian Law and International Criminal Law in several academic settings, including Columbia University in New York; the International Institute of Human Rights in Strasbourg, France; and the University Centre for International Humanitarian Law in Geneva, Switzerland.

Jens Elo Rytter is a professor of constitutional law at the University of Copenhagen, Faculty of Law. His Ph.D. thesis from 2000 concerned fundamental rights and the role of courts in upholding them against the legislature. He is the author of two textbooks on human rights law and has published numerous articles on national and European human rights law and on the constitutional role of the judiciary, including several articles concerned with counter-terrorism measures.

Martin Scheinin is a Professor of International Law and Human Rights at the European University Institute in Florence, Italy. He was

also the first United Nations Special Rapporteur on Human Rights and Counter-Terrorism. He was selected for this position after serving for eight years (1997–2004) as a member of the United Nations Human Rights Committee. A few of his recent publications include *International Protection of Human Rights: A Textbook*; *Monitoring Human Rights Obligations and the Fight against Terrorism: Whose Obligations? And Monitored How?*; *Security and the Law—Facing the Dilemma*; and *The Impact of Human Rights Law on General International Law*.

Kaarlo Tuori is a Professor of Jurisprudence at the University of Helsinki, Faculty of Law, where he is also the Director of the Centre of Excellence in Foundations of European Law and Polity. He has been a member of the Venice Commission (European Commission for Democracy through Law) since 1998, and its Vice-Presidence since 2007. In jurisprudence, his main work is *Critical Legal Positivism* (Ashgate, 2002). He is currently preparing an English version of a monograph called *Ratio and Voluntas in Law*, which has already appeared in Finnish in 2007.

Mark Tushnet is the William Nelson Cromwell Professor of Law at Harvard Law School. He served as a law clerk to Justice Thurgood Marshall. Some of his most recent books include *The Routledge Handbook of Constitutional Law* (2012); *Why the Constitution Matters* (Yale University Press, 2010); and *The Constitution of the United States of America: A Contextual Analysis* (Hart Publishing, 2009). Some of his most recent articles include “The Rise of Weak Form Judicial Review” (2011), “How Different Are Waldron’s and Fallon’s Core Cases for and against Judicial Review?” (2010), and “A Political Perspective on the Theory of the Unitary Executive” (2009).

Adrian Vermeule is the John H. Watson Professor of Law at Harvard Law School. He is a graduate of Harvard College and Harvard Law School. Vermeule was on the faculty of the University of Chicago Law School from 1998 to 2005, and of Harvard Law School from 2006 onward. His writings on terrorism and national security include “Our Schmittian Administrative Law,” *Harvard Law Review* (2009); *Terror in the Balance: Security, Liberty and the Courts* (Oxford University Press, 2007, with Eric A. Posner); and *The Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2011, with Eric A. Posner). He is also the author of, *The System of the Constitution* (Oxford University Press, 2011).

Clive Walker is Professor of Criminal Justice Studies at the School of Law, University of Leeds, where he has served as the Director of the Centre for Criminal Justice Studies (1987–2000) and as Head of School (2000–2005, 2010). He has written extensively on terrorism issues, with publications

not only in the United Kingdom but also in several other jurisdictions, especially the United States, where he has been a visiting professor at George Washington and Stanford Universities. In 2003, he was a special adviser to the U.K. Parliamentary select committee and scrutinized what became the Civil Contingencies Act 2004, from which experience he published *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press, 2006). He has also authored a comprehensive study of *Terrorism and the Law* (Oxford University Press, 2011).

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Introduction

CHAPTER 1



The Long Decade

DAVID JENKINS*

It is well over twelve years since September 11, 2001, when the airplanes hit the World Trade Center and the Pentagon, killing nearly three thousand innocent people—around the same number as the worst night of the London Blitz in 1941. Indeed, London itself has not been spared tragedy since “9/11.” On July 7, 2005, Britain’s “7/7,” terrorists detonated bombs in central London, killing fifty-two people and injuring over seven hundred more. Throughout the ensuing years, there have been more attacks by radical Islamists: in Madrid, Bali, Mumbai, Glasgow, Stockholm, and other places outside of the Middle East. The Western response to such terrorism has been forceful. The United States, United Kingdom, and their allies have carried out two wars and lengthy occupations in Afghanistan and Iraq. The United States and its accomplices have imprisoned without trial, abducted, and even tortured suspected terrorists, while targeted killings of Islamic militants by American drone strikes—with much “collateral damage”—have become regular in the Middle East. Many countries have implemented tough anti-terrorism laws. Nevertheless, the so-called “war on terrorism” is no closer to being won.

Instead, we live in a “long decade” of 9/11, where terrorists and the state press against us from both sides with little sign of relenting. If the contemporary globalized world has indeed become an intrinsically insecure and unpredictable place, as some have suggested, the state has likewise adapted quickly to meet its security obligations to its populace. This period has accordingly been—and continues to be—a time of significant political and legal transformation throughout the West, but where an emphasis

on security threatens to destabilize and perhaps even replace other constitutional values. A lingering fear of terrorism, the rise of militant democracy, and an increasing turn to extraordinary legal measures now challenge many of our assumptions about liberal constitutionalism, built as they are on notions of limited, accountable government and individual rights.

This chapter looks at how these post-9/11 trends threaten to become the “new normal,” if they are not halted. Of course, many commentators have already expressed concerns about just such a normalization of exceptional responses to crisis situations and the attendant dangers of permanently increased executive powers, reduced democratic transparency, ever more assaults on individual rights, and—with those—a lasting damage to the rule of law. Although this chapter is negative in outlook, it does not go so far as to say that fear, militant democracy, and extraordinary legal procedures have yet become so severe or permanent as to have fatally damaged liberal constitutionalism; such a claim would be an exaggeration. Yet, these changes have been significant and they present, certainly in theory, serious challenges to pre-9/11 liberal norms. Furthermore, because these challenges will be ongoing for the foreseeable future as a condition of our new, insecure global community—and hence, just why the decade after 9/11, still with us, continues to be a long one—their dangers lie not only in whatever damage they might already have done. Rather, it is their strength as ongoing, still slowly developing trends that should be of special worry to defenders of liberal constitutionalism.

Characterizing the “long decade” in this way, this chapter draws support from and introduces the rest of this book, which is comprised of contributions by participants who took part in an international conference held at Copenhagen University in August 2011. These chapters, like those scholarly discussions, examine more specific legal changes that occurred over the long decade and have had lasting effects on international law and many national legal systems. Although this introduction does not presume that all contributors agree with everything about its characterization of the “long decade,” it nonetheless suggests that they implicitly lend support to its identification of this period’s major trends of fear, militant democracy, and the use of extraordinary legal procedures. The structure of the book is loosely based on this premise.

Part I of this book explores the conflict between security and rights resulting from panics and fear, and considers the difficulty of crafting anti-terrorism measures that succumb neither to irrational fears nor alternative political agendas. Part II then closely follows with discussions of the challenges to international law and transnational governance in the post-9/11 world, as both states and the international order

adapt to new security threats. In Part III, the book then looks at how terrorism has stressed legal and political models of constitutionalism in the United States and United Kingdom, and how it has forced those countries to make choices about their political stakeholders and the targets of their counter-terrorism measures. Part IV follows up on these themes with a couple of case studies of how the United Kingdom and Sweden have taken more proactive counter-terrorism measures that increasingly bypass criminal procedures. Part V then critiques how, over the past decade, extraordinary legal procedures, military or intelligence operations, and counter-terrorism efforts generally have challenged democratic accountability and human rights protections in ways that could harm the rule of law. Although the contributors to this volume take varied approaches on a variety of topics, this introduction argues that they all nevertheless lend various degrees of support to the main contention of this chapter and, along with it, this book: the years following 9/11 have witnessed significant, lasting legal changes throughout the world, and those changes continue in ways that pose risks to liberal democracy as we have known it. Security has bred insecurity. In this sense, the long decade just keeps getting longer.

FEAR

From Panic to Fear

There was, it is fair to say, a widespread panic in many countries—not only in the United States—in the weeks and months after 9/11. The apparent randomness, scale of destruction, and callousness of those attacks (even as compared to past acts of terrorism) touched a chord in the international community in a way that other ones had not. There was a palpable feeling of solidarity across the globe and a sense among much of its population that these attacks were not directed solely at the Americans. The resultant anxiety was perfectly natural and understandable. Nevertheless, anxiety and caution—indeed, even fear—are not the same as panic. Merriam-Webster's English dictionary defines panic as: (1) "a sudden overpowering fright; *also*: acute extreme anxiety," and (2) "a sudden unreasoning terror often accompanied by mass flight."¹ Although some of the reaction to 9/11 by the public and governments of many liberal democracies was sensible, much of it was indeed overpowering, extreme, and unreasoning.

This post-9/11 panic spurred an important reaction in the minds of politicians and the public throughout North America and Europe: that is, there was *us*, the innocents and potential victims of violent circumstance,