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# Foreword

Kenneth M. Karas
*District Judge, S.D.N.Y.*



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# Foreword

**The Honorable Kenneth M. Karas***

Usama Bin Laden first declared war against the United States in August 1996. Since that time, al Qaeda has taken credit for, or has been deemed responsible for, numerous attacks, including those on our embassies in East Africa in 1998, the USS Cole in 2000, the attacks of September 11, 2001, and the recent, so-called "Christmas bombing" of Northwest Flight 253. Public reporting tells us that from its inception al Qaeda has burrowed itself in countries throughout the Middle East, Africa, and Asia, and has expanded its attacks to many nations in Asia, the Middle East, and Europe. And, we have all seen television images of the provocative statements of Bin Laden and his chief lieutenant, Ayman al-Zawahiri.

Three presidents have had to confront the threat posed by al Qaeda and its affiliated groups, two of them in the post-9/11 world. In managing the conflict with al Qaeda, these presidents, and those who have served under them, have used traditional military and diplomatic tools. They also have employed never-before-used military and diplomatic tools to combat a group that does not identify itself with a particular nation, language, or uniform. These efforts have presented unique challenges to our nation. They also have introduced new challenges to our political and legal systems. Indeed, the conflict with al Qaeda has been a voting issue in the last two presidential elections, has been the subject of numerous pieces of congressional legislation and resolutions, and has spawned innumerable lawsuits, no less than five of which have resulted in landmark Supreme Court decisions.

Before anybody had heard of Usama Bin Laden, few law schools offered courses in national security law, and law reviews published little on the topic. The primary threat to our country was believed to be from other countries, and those versed in the Classified Information Procedures Act,[1] Foreign

* United States District Judge, Southern District of New York.

1. Pub. L. No. 96-456, 94 Stat. 2025 (1980).

Intelligence Surveillance Act,[2] and the *Milligan*,[3] *Quirin*,[4] and *Eisentrager*[5] decisions were few in number. September 11 changed all of that. Almost over night, the country became immersed in all things al Qaeda. Bin Laden became a punch line for late night comics, and we all learned about the Taliban, the Northern Alliance, and Afghanistan. We also started a national dialogue about how to live in a world scarred by terror.

Among lawyers, law students, legislators, and judges, the debate has been especially intense almost from the morning of the September 11 attacks. Profound questions about the sources and boundaries of executive power have been posed and discussed in the halls of Congress, in law school classrooms, and in courtrooms around the country. Related questions about the use of interrogation techniques, the means of intelligence collection and the methods of sharing that intelligence within the government, and the proper forum for bringing captured al Qaeda members and associates to justice have been pondered at length. These questions touch upon some of the most central foundations of our Republic and our Constitution. Underlying all of these difficult questions is the age-old conundrum of securing liberty from threats imposed by our enemies without unduly sacrificing liberty through our reactions to those threats.

This issue of the PACE LAW REVIEW is a constructive addition to the dialogue. In it, there are articles that address the key fault lines in the debate over securing liberty and the Rule of Law. The distinguished authors of these articles look both historically and prospectively at balancing the struggle against terror with the preservation of liberty. There is a look back at the amendments to the Foreign Intelligence Surveillance Act in the Patriot Act, and a comparison of how free speech rights have been affected, both here and abroad, by the struggle against terrorism. The invocation of the state secrets privilege, by both the Bush and Obama administrations, is analyzed, as is the Eighth Amendment

2. Pub. L. No. 95-511, 92 Stat. 1783 (1978).
3. *Ex Parte* Milligan, 71 U.S. 2 (1866).
4. *Ex Parte* Quirin, 317 U.S. 1 (1942).
5. Johnson v. Eisentrager, 339 U.S. 763 (1950).

implications of enhanced interrogation techniques. The impact of the Supreme Court's decision in *Boumediene v. Bush*[6] on military operations is thoroughly discussed. There also are thoughtful policy pieces about the current administration's approach in Afghanistan and the need for re-evaluating our foreign policy approach to the terrorist threat. Finally, there is an insightful review of *Willful Blindness*,[7] a penetrating book by my former colleague, Andrew McCarthy.

The importance of these articles cannot be understated. They are timely and topical as the struggle against modern terror is deep into its second decade. And, the debate about how to carry out this struggle under the Rule of Law is no less relevant today than it was on September 11, 2001. Indeed, it is more important than ever that we stay vigilant in preserving our freedoms from threats of all kinds, including ones we might impose on ourselves. Some may be fatigued by this seemingly endless debate, while others may never have tuned in. To be sure, many myths and half-truths have cluttered the discussion. But, it is scholarship like that offered in this issue of the PACE LAW REVIEW that can assist all of us to understand and participate in the debate and help ensure that we get the balance between liberty and security right.

6. 128 S. Ct. 2229 (2008).

7. ANDREW MCCARTHY, WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD (2008).