February 25, 2013

Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World

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Abstract. Court opinions in the terrorism context are often distinguished by fact finding that relates to risk assessment. These risk assessments—inherently policy decisions—are influenced by cultural cognition and by cognitive errors common to probability determinations, particularly those made regarding highly dangerous and emotional events. In a post-9/11 world, in which prevention and intelligence are prioritized over prosecution, courts are more likely to overstate the potential harm, neglect the probability, and presume the imminence of terrorist attacks. As a result courts apt to defer to the government and require less evidence in support of measures that curtail civil liberties. This Article takes as its case study Holder v. Humanitarian Law Project, the Supreme Court’s 2010 opinion upholding a material support of terrorism ban on speech. This Article explores the body of behavioral applied science on biases and cognitive errors and examines Humanitarian Law Project and other post-9/11 case law through that discipline’s lens. The Article offers solutions for how courts should reach decisions that are less susceptible to psychological and cultural biases. In particular, courts should require the government to provide specific evidence supporting restrictions on civil liberties rather than accept speculative justifications. In addition, courts should disclose their anxiety and uncertainty over their own risk assessments, rather than cloaking them in empirical facts, the objectivity of which is always contested.
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It must remain open [for judicial determination] whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.

-Whitney v. California (Brandeis, J., concurring)\(^1\)

In this context conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government.

-Holder v. Humanitarian Law Project\(^2\)

When we are dealing with detainees, candor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism.

-Esmail v. Obama (D.C. Cir.) (Silberman, J., concurring)\(^3\)

This time we are trying to name the future, not in our normally hopeful way but guided by dread.

-Don DeLillo\(^4\)

INTRODUCTION

It is difficult to determine the risk of a terrorist attack.\(^5\) The government always runs the chance of underestimating or overestimating the probability of an attack, both of which have costs. The 9/11 attacks themselves were attributed to a failure to appreciate the risk. In its report on the September 11 attacks, the 9/11 Commission criticized the government for its failure to imagine the likelihood of an attack by al Qaeda.\(^6\) Yet based upon

\(^{*}\) Assistant Professor of Law, Case Western Reserve University School of Law; Associate Director, Institute for Global Security Law and Policy.
\(^1\) 274 U.S. 357, 378–379 (1927) (Brandeis, J., concurring).
\(^2\) 130 S.Ct. 2705, 2728 (2010).
\(^3\) 639 F.3d 1075, 1077 (D.C. Cir. 2011) (Silberman, J., concurring).
\(^5\) Risk assessment may be reduced most crudely to the following equation:
\[\text{Risk} = (\text{Harm Caused by Attack}) \times (\text{Probability of Attack}).\]
\(^6\) NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 339 (2004). The 9/11 Commission recommended taking steps that would “institutionalize imagination,” as well as
this failure of imagination, the pendulum has swung in the other direction.

The threat of terrorism summons a post-9/11 impression that although terrible harm is uncertain we must act as though it is imminent. Such thinking is a variant of the Precautionary Principle, which Cass Sunstein describes as positing that “action should be taken to correct a problem as soon as there is evidence that harm may occur, not after the harm has already occurred.” This mindset explains the capacious definition of imminence that the government purportedly relies on as part of its legal justification of targeted killings of American citizens. No one wants to be wrong again. This post-9/11 heuristic now pervades our society, our government, and our courts.

Part of this transformation entails an emphasis on, and preference for, an intelligence-based preventative strategy. The preventative approach, which necessarily incorporates fear and uncertainty, is a hallmark of what legal scholars Jack Balkin and Sanford Levinson have called the National Surveillance State.
This governing regime “is increasingly statistically oriented, *ex ante* and preventative, rather than focused on deterrence and *ex post* prosecution of individual wrongdoing.”\textsuperscript{12} In this system advances in technology and globalization may erode distinctions between international and domestic spheres.\textsuperscript{13} The blurring of military, intelligence, and criminal lines also wreaks havoc with previously understood standards of proof, suspicion and evidence.\textsuperscript{14} The preventative emphasis sets the foundation for “a parallel track of preventative law enforcement”-Guantanamo, extraordinary renditions, torture-that evades constitutional rights protections.\textsuperscript{15} Moreover, the parallel track can creep into established criminal law enforcement and distort the traditional protections afforded in that realm.\textsuperscript{16}

The Supreme Court has directly addressed a number of the government’s post-9/11 counterterrorism measures. While a number of the Court’s post-9/11 decisions-the enemy combatant decisions, in particular-were often characterized by the media and some scholars as significant defeats for the government, there is reason to question that narrative. A few years removed, the decisions appear fairly modest in their limitations on the government.

These opinions were invariably quite deferential to the political branches. Though the opinions assuredly marked a territorial role for the courts in the post-9/11 world, they offered more heat than light. The opinions derived from Separation of Powers structural principles rather than from the Bill of Rights.\textsuperscript{17} Thus the decisions were more procedural than substantive, offering little insight on the

\begin{footnotes}
\footnote{Balkin, supra note __, at 10-11.}
\footnote{See id. at 19-20 (noting that government can justify domestic surveillance on the basis of foreign intelligence collection).}
\footnote{See id. at 15-15 (describing inevitable pressures to use military and intelligence resources in domestic law enforcement). See also Nick Paumgarten, The World of Surveillance, Here’s Looking at You, THE NEW YORKER, 46 (May 14, 2012) (describing evolution of military drone use to domestic law enforcement).}
\footnote{Balkin, supra note __, at 15. See also DANA PRIEST & WILLIAM M. ARKIN, TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE 52 (2011) (describing government as two parallel governments; one open and the other a secret national security government).}
\footnote{Balkin, supra note __, at 16.}
\end{footnotes}
nature of detainees’ rights. The decisions also provided minimal guidance even as to process, relegating many of the decisions on the details to lower courts and to the political branches.

Finally, consider what the Court has not thus far addressed or done. Richard Fallon points out that the Court has not limited the movement of military and intelligence officers in their counterterrorism operations; it has not opined on the state secrets doctrine; nor has it permitted lawsuits seeking relief for abuses suffered as a consequence of counterterrorism abuses to go forward. More specifically, it has not ordered a release in a habeas case and it does not appear poised to do so anytime soon. Fallon attributes such restraint to the notion that judicial review is “politically constructed,” that is, Justices may decide cases based in part on how their opinions may be popularly received, and the Court’s authority respected.

This Article offers another explanation of the Court’s deference: the Justices are afraid. They are afraid of terrorism. They are afraid of what could happen to our security if they rein in government. This Article examines the ways in which fear has affected and influenced judges in addressing terrorism. Importantly, the discussion is not limited to enemy combatant cases or to the Supreme Court, but examines the ways in which the post-9/11 heuristic has affected a range of judicial opinions, from limits on political protests to airport security measures to criminal prohibitions of material support of terrorism.

Such rulings invariably entail the courts making their own risk assessments. Yet forecasts of uncertain catastrophic events are notoriously unreliable. This is due to cognitive errors and biases that Cass Sunstein and others have documented.

What then is a court to do? Many suggest courts should defer to the political branches. Deference is untenable for a number of reasons. First, it is unclear whether political actors are any more

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21 Id. at 363-70.
22 See LAWS OF FEAR, supra note __. See also CASS SUNSTEIN, WORST-CASE SCENARIOS (2007) [hereinafter WORST-CASE SCENARIOS].
adept at making predictions. Second, the arguments for deference in the terrorism threat context are less compelling than in war because, the Court has intimated, the geographic and temporal limitations to fighting terrorism are not evident. Deference would not be a short-term or limited posture, as it might be for a military armed conflict, but one that would endure as long as the seemingly permanent crisis of terrorism. Third, deferring to the government in all events terrorism-related threatens to upset domestic criminal law jurisprudence because counterterrorism measures involve a mélange of military, intelligence, and criminal approaches that employ differing standards of proof.

Finally, even when invoking judicial deference and lack of national security expertise, what can be seen at work in many judges’ post-9/11 opinions are their own risk assessments, which evidence their own cognitive biases impacted by the fears engendered by terrorism. Ironically, their frequent fact finding of risks or lack of threat is wholly at odds with the purported deferential stance that judges insist they are taking in addressing the terrorism cases. This tendency can be seen in various Justices and lower court judges’ opinions, regardless of whether they uphold or strike down government actions.

This Article takes Holder v. Humanitarian Law Project as its case study. Part I of the Article reviews the Supreme Court’s 2010 decision upholding application of the criminal prohibition on material support of a foreign terrorist organization to human rights advocates’ training of such groups in international humanitarian law and human rights law. The case reveals much about how the Court undertakes terrorism risk assessments and how the judiciary is likely to handle most terrorism cases going forward. The opinion also illustrates the Court’s tendency to fall prey to cognitive errors and biases in undertaking risk assessments even when stating it is deferring to other branches’ factual

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23 See infra discussion in Section IV.
24 See Boumediene v. Bush, 553 U.S. 723, 797-98 (2008) (“Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”); Hamdi v. Rumsfeld, 542 U.S. 507, 522 (2004) (“If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”).
25 See infra discussion in Section IV.
determinations. The decision also presages a reduced standard of evidence and suspicion in the name of preventing terrorism in the criminal context. Given the government’s increased emphasis on terrorism, there is reason to worry the standard will infect the criminal justice system. Finally, these findings of fact undermine the Court’s credibility because they will be perceived by the public as bad faith efforts to masquerade personal policy preferences as empirical facts.

Part II of the Article explores the literature on decision making and risk assessment and how certain dread risks can influence people’s decisions, particularly those of judges. Part II does not limit the discussion to Sunstein’s focus on cognitive errors but builds on Dan Kahan, Paul Slovic, and others’ critique of that account by also reviewing social and cultural influences that affect a person or a judge’s perception of risk. Part III then examines various court opinions, in particular Humanitarian Law Project, to explore how these errors and influences manifest. Next Part IV addresses and ultimately rejects judicial deference as a means to adapting to the concomitant errors of judicial review of terrorism-related matters. Finally, Part V proposes solutions that will enable courts to overcome cognitive biases and other social and cultural influences. The Article concludes that evidentiary standards favoring those whose civil liberties are targeted is a necessary step toward overcoming particular biases that ignore probability. In addition, courts should resist writing in terms of certainty, including findings of fact, but should instead candidly disclose their uncertainty and anxiety over terrorism threats.

I. HOLDER V. HUMANITARIAN LAW PROJECT

Holder v. Humanitarian Law Project26 presents the Court’s fullest discussion of risk assessment and fact finding concerning terrorism.27 In this pre-enforcement challenge to the material

26 130 S. Ct. 2705 (2010).
27 It is also the most recent terrorism case the Supreme Court has decided that involves risk assessment. By the time this Article is published, however, the Supreme Court will have decided Clapper v. Amnesty International USA, 638 F. 3d 118 (2d Cir. 2012), cert. granted, 132 S. Ct. 2431 (U.S. May 21, 2012) (No. 11-1025). In that case, the plaintiff-respondents have sought a declaration that Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1881a (Supp. II 2008), which authorizes the “targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence
support statute, a 6-3 majority held that prohibiting teaching international humanitarian law for peaceful purposes to a foreign terrorist group did not, as applied to the plaintiff human rights advocates, violate the First Amendment. The dispute between the majority and the dissent centered on whether the teaching would aid terrorist groups; in effect, whether their speech would make a terrorist attack more likely.

The material support statute at issue, 18 U.S.C. §2339B, makes it a federal crime to “knowingly provide material support or resources to a foreign terrorist organization.” The plaintiffs were human rights advocates who wanted to teach international humanitarian and human rights law to two designated foreign terrorist organizations, Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which seek independent states for, respectively, Kurds in Turkey and Tamils in Sri Lanka. The human rights advocates sought clarity, through a pre-enforcement challenge, whether their teaching could fall within the proscribed terms of “training,” “expert advice or assistance,” “personnel,” or “services” in the statute.

In undertaking the First Amendment analysis, Chief Justice Roberts, in his majority opinion, did not apply strict scrutiny. He did not regard the speech as pure political speech, or as conduct, as the Government argued, but as providing material support in the form of speech. He thus applied “‘a more demanding standard’” than that required by the conduct standard in United States v. O’Brien.

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28 130 S. Ct. 2705. The Court also held that the material support statute was not vague under the Due Process Clause of the Fifth Amendment, id. at 2718-21, and that it did not violate the plaintiffs’ freedom of association under the First Amendment. Id. at 2730-31.

29 The majority explained that the material support statute “may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.” Id. at 2724.

30 Id.

31 Id. at 2724 (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)).
Accepting combatting terrorism as a compelling interest, it remained to determine whether prohibiting the plaintiffs’ speech would further the government interest in preventing terrorism. Roberts framed the issue as an “empirical question”—“[w]hether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism.”

Roberts explained that he was deferring to the political branch determinations because the case “implicates sensitive and weighty interests of national security and foreign affairs.” Quoting Justice Kennedy’s majority opinion from Boumediene v. Bush on the habeas rights of detainees at Guantanamo Bay, Roberts noted that “‘neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.’”

Roberts reasoned that deference to the government’s conclusions was also appropriate because terrorism presented a context involving “efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.” Moreover, the material support statute is a preventive measure that does not criminalize terrorist attacks but the aid that increases their probability. Accordingly, the Court should not scrutinize the evidence too rigorously. “In this context,” Roberts explained, “conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government. . . . The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces

32 Id. at 2724.
33 Id. at 2727. The Court distinguished the litigation from the question in Cohen v. California, 403 U.S. 15 (1971). Id. at 2728. In that case the State of California convicted a man for wearing a jacket bearing the word “Fuck the Draft.” Roberts explained that the Cohen Court had invalidated that conviction in part because the government could not make principled distinctions concerning the offensiveness of speech. Id. (quoting Cohen, 403 U.S. at 25). Here, in contrast, Roberts explained, the political branches were “uniquely qualified” to distinguished between what will, and will not, aid terrorism and harm foreign relations. Id.
34 Id. at 2727 (quoting 553 U.S. 723, 797 (2008)). See also id. (“It is vital in this context ‘not to substitute . . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.’”) (quoting Rostker v. Goldberg, 453 U.S. 57, 68 (1981)).
35 Id. at 2727.
36 Id. at 2728.
in the puzzle before we grant weight to its empirical conclusions.”

Roberts held that the government’s conclusions merited “significant weight,” and were sustained by “persuasive evidence.” He concluded that the teaching intended to promote lawful and peaceful ends was “fungible” because it “frees up other resources within the organization that may be put to violent ends.” He also determined that the advocates’ teaching and communication about international law and the United Nations could legitimize, and therefore assist, terrorist acts. Such legitimacy could facilitate recruitment of members and the increase of funds in support of terrorist acts.

Although Roberts presented his opinion as one of judicial deference, he also conjured up his own idea of how lawful and peaceful advocacy might aid terrorism. “The PKK could,” Roberts offered as an example, “pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks.” For support, Roberts cited the book, Blood and Belief, a few pages of which discussed the PKK’s suspension of violence and return to fighting. The government neither made this argument nor was the book a part of the record. But defending his hypothesized danger, Robert explained, “[t]his possibility is real, not remote.”

37 Id.
38 Id. at 2728.
39 Id. at 2725.
40 Id.
41 Id. (citing Declaration of Kenneth R. McKune, App. 135, ¶ 11; M. LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD 2 (2006)). Roberts also found that the teaching could support terrorism by straining relations with Turkey, which might not tolerate any form of support of the PKK. Id. at 2726-27.
42 Id. The hypothesized outcome is one without historical precedent in the national security-free speech canon. In his dissent Justice Breyer observed that the Court had never before “accepted anything like a claim that speech or teaching might be criminalized lest it, e.g., buy negotiating time for an opponent who would put that time to bad use.” Id. at 2738 (Breyer, J., dissenting) (citing Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47, 39 (1919); Abrams v. United States, 250 U.S. 616 (1919)).
43 Id. at 2729 (citing A. MARCUS, BLOOD AND BELIEF: THE PKK AND THE KURDISH FIGHT FOR INDEPENDENCE 286-295 (2007). See also id. at 2738 (Breyer, J., dissenting) (criticizing reliance on book and its limited relevance).
44 See id. at 2738 (Breyer, J., dissenting). Similarly, the majority determined that teaching how to petition for “relief” before the United Nations could encompass relief in the form of money, which could be used to purchase weapons. Id. at 2729. That determination ignored, however, clear statements by
Dissenting, Justice Breyer insisted that notwithstanding the significant threat of terrorism, the Court could assess any evidence of the danger involved, the gravity of the threat, and its imminence. But Breyer disputed there was any “evidence” or “specific facts” supporting the government’s and the majority’s conclusion that the advocates’ teaching was either fungible or would legitimate the PKK. Roberts’ “general and speculative” arguments could not justify infringement of the First Amendment. Breyer criticized in particular the judicially-generated “hypothetical claims” as “arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about ‘the international legal system’ is too dangerous a thing; that an opponent’s subsequent willingness to negotiate might be faked, so let’s not teach him how to try.” Expressing “serious doubt” about the statute’s constitutionality, Breyer would have construed the statute to prohibit “First-Amendment–protected pure speech and association only when the defendant knows or intends that those activities will assist the organization’s unlawful terrorist actions.”

*Humanitarian Law Project* thus affords an example of two Justices’ differing perceptions of the risk of terrorism and the consequent differing analytic approaches that courts should adopt. Because it appears that courts’ understanding of risk may drive the analysis, *i.e.*, whether they defer, what level of proof they require, it is critical we better understand how judges make risk assessments. The next section explores the literature on risk cognition and how courts are susceptible to errors in their predictions of risks.

the plaintiffs that the relief sought was recognition under the Geneva Conventions and a denial that such relief would include monetary aid. See *id.* at 2739 (Breyer, J., dissenting) (citing 2003 Complaint, App. 57-58; Fertig Declaration, at 113; Tr. Oral Arg. 63).

45 *Id.* at 2729.
46 *Id.* at 2739 (Breyer, J., dissenting) (quoting Whitney v. California, 274 U.S. 357, 379 (1927) (Brandeis, J., concurring)).
47 *Id.*
48 *Id.*
49 *Id.* at 2738.
50 *Id.* at 2739-40
II. ERRORS IN RISK ASSESSMENTS

The past few decades have witnessed an upsurge of research on biases in judgments, decisions and choices. Scholars cutting across the fields of economics and psychology, referred to collectively as behavioral applied science, have found that intuition, or System 1, is far more influential in reaching decisions than is commonly thought. Our deliberative faculties, System 2, while able to moderate our more instinctive judgments, are often still influenced by these first impressions. As a result of particular biases and cognitive errors, we are less adept at forecasting events than we tend to believe. Our ability to predict uncertain catastrophic events, such as a terrorist attack, is particularly burdened by these biases, which are accentuated when extremely vivid or emotional issues are involved.

This Part first discusses some of the biases that Cass Sunstein has catalogued which are most likely to affect judges’ decisions regarding terrorism. The section then explores how peoples’ perceptions are also shaped by their cultural and social affiliations and identity. Finally, the section examines the growing body of literature that documents policy makers and judges are not immune from the influence of cognitive errors and other influences.


52 “Applied behavioral science” refers to the work by those often termed behavioral economists and social psychologists regarding the emotional, cognitive, social and cultural factors that influence behaviors. See Daniel Kahneman, Foreword, in Shafir, supra note __, at ix.

53 KAHNEMAN, supra note __, at 21-22.

54 Id. at 103-04

55 This Article considers judges policy makers. Their decisions help shape policies; the decisions themselves are not simply a statements of fact or law, but invariably reflect views on policies. See, e.g., Paul Brest, Quis Custodiet Ipsos Custodes: Debiasing the Policy Makers Themselves, in Shafir, supra note __, at 482 (“Policy makers include legislators, administrative officials who determine facts or make decisions, and judges (notwithstanding the unconvincing claims of federal judicial nominees that they do not make policy.”)); Brown v. Plata, 131 S.Ct. 1910, 1954-55 (2011) (Scalia, J., dissenting) (describing role of judges’ policy preferences in making decisions).
A. Availability and Affect Heuristics

In analyzing risks, people often resort to what is available to them in trying to understand or make their assessment. This mode of thinking is referred to as the availability heuristic. Specifically, people try to determine the magnitude of a risk based on what they can most easily think of. Thus people are more likely to be frightened by something if they can think of examples of its occurring than if they cannot. So, for example, a bump in media reports of shark attacks will lead many people to believe attacks are more likely than is statistically probable.

People also make decisions about an activity’s risks based on their positive or negative feelings about an activity. This sort of reasoning is called the affect heuristic. Thus a person who has a negative reaction about a particular course of conduct is likely to ascribe other negative qualities to the actions and ignore possible positive attributes. For example, a person with a negative view of guns is more likely to cite statistics on gun related accidents in the home, but ignore instances in which having a gun protected a person from a home intruder.

While familiarity will influence what is available to people in how they assess risk, so too will the salience of an event. Thus, watching video footage of a boat capsizing will have a greater impact on the probability assessment of such events than if one reads about the accident. Similarly, the more vivid or detailed the description of the possible harm, the more likely people are to believe it will come to fruition.

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56 Kahneman, supra note __, at 129-35 (2011); Laws of Fear, supra note __, at 36.
57 See, e.g., Brest, supra note __, at 486 (observing that there are many more deaths caused by falling television sets than by shark attacks). See also Daniel Gardner, The Science of Fear: How the Culture of Fear Manipulates Your Brain ___ (2009).
59 Id. See also Kahneman, supra note __, at 103, 138-40.
60 See Laws of Fear, supra note __, at 37.
61 Id. Sunstein discusses a study that illustrates this point. Researchers had subjects read a description of an illness that was spreading across a campus. One group received a description of the symptoms that were easy to understand and imagine while another group received a description of the symptoms that was vague and difficult to imagine. The subjects were asked to write an account
It is hard to exaggerate the salience of the 9/11 attacks. Devastating in the thousands of lives killed, watched in real time by millions, the attacks left an impression that is deeply etched in people’s consciousness. 62 News coverage for weeks and months afterward was constant. Further reflecting the pervasive and available idea of a risk of a terrorist attack, the United States government continually reported to the public there was an elevated, or higher, risk of a terrorist attack. For example, the color-coded Homeland Security Advisory system, which was implemented in 2002, never lowered its color-coded threat level below that of yellow or “elevated—significant risk of terrorist attacks” from the time of the program’s inception until it was replaced in 2011.63 Critics of the color coded threat levels often complained that the system only stoked anxiety without providing substantive information.64

62 A study conducted by Television researcher Nielsen and Sony Electronics found that watching news coverage of the attacks was “the most impactful TV moment[ ] of the past 50 years.” Courtney Garcia, September 11 Attacks, Katrina Top List of Memorable TV Moments, Reuters, July 11, 2012, available at http://www.reuters.com/article/2012/07/11/entertainment-us-memorablemoments-idUSBRE86A0EG20120711.

63 Pierre Thomas & Jason Ryan, DHS to Scrap Color Code Terror Alerts by April, ABCNews.com, Jan. 26, 2011, at http://abcnews.go.com/Politics/dept-homeland-security-decides-retire-color-code-threat/story?id=12770409. The replacement for the color-coded system is known as the National Terrorism Advisory System. The new system will purportedly issue alerts only “when credible information is available.” The alerts will state whether there is “an imminent threat” or “elevated threat,” and “will provide a concise summary of the potential threat, information about actions being taken to ensure public safety, and recommended steps that individuals, communities, businesses and governments can take to help prevent, mitigate or respond to the threat.” An “elevated threat” alert is issued when the Department of Homeland Security does not have “specific information about the timing or location” of the threat. The alert is “Imminent, if [DHS] believe[s] the threat is impending or very soon.” See U.S. Dep’t Homeland Security, NTAS Guide: National Terrorism Advisory System Public Guide 2, 4 (April 2011), http://www.dhs.gov/xlibrary/assets/ntas/ntas-public-guide.pdf.

As novelist Don DeLillo puts it, “It is our lives and minds that are occupied now. This catastrophic event changes the way we think and act, moment to moment, week to week, for unknown weeks and months to come, and steely years. Our world, parts of our world, have crumbled into theirs, which means we are living in a place of danger and rage.”\(^{65}\) The almost permanently etched and horrific imagery of the attacks is as fertile ground as there is for the availability and affect heuristics.\(^{66}\)

B. Probability Neglect

Probability neglect refers to peoples’ tendency to disregard the likelihood of an event, particularly when the feared event entails powerful feelings.\(^{67}\) Again, as with the availability heuristic, events that can be readily associated with images that elicit strong emotional reaction such as fear, will skew peoples’ ability to assess the likelihood of risk, leading them to ignore differences in probability. Also when people harbor negative feelings toward something they are less inclined to entertain questions of probability.\(^{68}\)

Consider the following study’s findings: “[W]hen people are asked how much they will pay for flight insurance for losses program also lost the public’s confidence and people grew largely indifferent to the alert system as well. See id.\(^{65}\) DeLillo, supra note __, at 33.

\(^{66}\) President Bush utilized the availability heuristic in asking rhetorically why it was necessary to attack Iraq, and answering simply: “There is a reason. We have experienced the horror of September 11. . . . Our enemies would be no less willing—in fact they would be eager—to use a biological, or chemical, or a nuclear weapon.” Transcript of President George W. Bush’s Remarks, Oct. 8, 2002, available at http://edition.cnn.com/2002/ALLPOLITICS/10/07/bush.transcript/. The merging of the Iraq War and 9/11 in the public consciousness was pronounced. Polling found that in April 2004 20 percent of Americans believed Iraq was responsible for the 9/11 attacks. Amy Gushkoff & Shana Kushner, Shaping Public Opinion: The 9/11-Iraq Connection in the Bush Administration’s Rhetoric, PERSPECTIVES ON POLITICS, Vol. 3, No. 3, 525, 533 (Sept. 2005). A late 2002 poll also found that people who considered Al Qaeda the most important threat to the United States were more likely to support invading Iraq than those who ranked Al Qaeda as less of a threat. Id. at 531.

\(^{67}\) LAWS OF FEAR, supra note __, at 39, 64-67. As Sunstein notes, probability neglect may skew people’s judgments whether the outcome is one feared or hoped for. Id. For example, a person ignores the small likelihood of winning when he buys a lottery ticket.\(^{68}\) Id. at 39, 86 (2005) (discussing “affect heuristic”); KAHNEMAN, supra note __, at 103, 139-40.
resulting from ‘terrorism,’ they will pay more than if they are asked how much they will pay for flight insurance from all causes.”

The specter of terrorism and the emotional wallop it entails (The study was done in 1993, well before 9/11.) leads people to make significant judgments in error regarding the likelihood of certain harms. Moreover, a psychological study further determined that just the discussion of a low-probability risk, even one in which trustworthy sources elaborate on the minimal risk, increases perceptions of the risk’s probability.

What are termed “dread risks,” “worst-case scenarios,” or, “low probability, high consequence events” powerfully impact human behavior. Indeed, consider that in the three months after 9/11 numerous Americans stopped flying and that a good proportion of those people chose to drive instead. Flying remains, even with the specter of terrorism, a far riskier endeavor than driving. Yet people disregarded this fact. The increase in road traffic led to 353 more fatalities nationwide than had occurred in the last quarter of the preceding five years, 1996-2000.

Also at work here may be alarmist bias. When differing accounts of risk are presented, people are more likely to favor the more “alarming” version, crediting the accounts that describe more dangers as more informative. W. Kip Viscusi characterizes this outcome as one of “irrational asymmetry: respondents overweight the value of a high risk judgment.”

In fact, there may even be reason to believe that the fear engendered by the 9/11 attacks has contagion effects, leading people to fear increased risks from sources well beyond terrorism. For example, a study of ninth graders in California found that adolescents surveyed prior to 9/11 perceived a slighter risk of

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69 LAWS OF FEAR, supra note __, at 40 (citing Eric J. Johnson, et al., Framing, Probability Distortions, and Insurance Decisions, 7(I) J. RISK & UNCERTAINTY 35 (1993)).


72 Id.

73 See GARDNER, supra note __, at 3 (comparing 1-in-135,000 chance of being killed in airplane hijacking to 1-in-6,000 chance of being killed in a car crash).

74 Gigirenzer, supra note __, at 286-87.

75 LAWS OF FEAR, supra note __, at 82 (citing W. Kip Viscusi, Alarmist Decisions with Divergent Risk Information, 107 EC. J. 1657, 1657-59 (1997)).
dying than those surveyed a few weeks after the attacks.\textsuperscript{76} Specifically, respondents believed there was a 34.62 percent chance of dying by a tornado before 9/11 but the perception of such a risk increased to 64.33 percent after the attacks. The perceived risk of dying by earthquake increased from 24.64 percent to 41.94 percent.

When seized by fear, people make probability determinations that they would otherwise not make. Moreover these decisions do not track the variations in probability. One study asked participants what they would pay to avoid participating in an experiment in which there was a chance they would be subjected to a painful electric shock or to a 20 dollar penalty.\textsuperscript{77} Faced with a 1 percent, 99 percent or 100 percent risk of shock, participants’ median willingness to pay ranged from 7 dollars to avoid a 1 percent risk to 10 dollars to avoid the 99 percent risk. In contrast, the willingness to pay to avoid the 20 dollars penalty ranged from 1 dollar to avoid the 1 percent chance to 18 dollars to avoid the 99 percent chance. The results demonstrate that people are willing to pay a lot to avoid the low probability of an emotionally charged risk but that their willingness to pay does not vary greatly with the probability.

Similarly, even when the risks of a high outrage occurrence such as nuclear waste radiation and a low rage event like radon exposure were the same, people perceived the high outrage threat as a higher risk and expressed a greater intention to limit that threat.\textsuperscript{78} Another study found that people perceived a greater risk from a terrorist event causing the same number of casualties as a non-terrorist propane tank explosion or release of an infectious disease.\textsuperscript{79}


\textsuperscript{77} \textit{Laws of Fear}, supra note __, at 76-77 (discussing Yuval Rottenstreich & Christopher Hsee, \textit{Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk}, 12 PSYCH. SCI. 185, 176-88 (2001)).

\textsuperscript{78} See id. at 80 (discussing Peter Sandman, et al., \textit{Communications to Reduce Risk Underestimation and Overestimation}, 3 RISK DECISION & POLICY 93 (1998)). When dealing with “outrage” risks, people react the same, even if the difference in risk was between 1 in 100,000 and a 1 in 1,000,000. \textit{Id}.

C. Cultural Cognition

Dan Kahan, Paul Slovic, and other scholars have argued that Sunstein’s emphasis on risk perception as irrational ignores peoples’ propensity to adopt views on risk consonant with their cultural worldview.\(^{80}\) They call this inclination cultural cognition.\(^{81}\) Disputing Sunstein’s objective understanding of risk, Kahan and his co-authors argue that people match their evaluations of risk to their conception of an “ideal society.”\(^{82}\) They conclude risk is something that should be publicly deliberated, rather than limited to expert analysis and resolution.\(^{83}\)

One way in which people may process information is through “identity-protective cognition.” Identity-protective cognition is a type of reasoning that impels people to think and decide in a manner that affirms their membership in a social group.\(^{84}\) This may take the form of a search for information that supports the positions of their group identity.\(^{85}\) They are also inclined to dismiss information that challenges the positions of their group.\(^{86}\) People are also generally unable to appreciate the effects of identity-protective cognition. Specifically, people tend to characterize their opponents’ views as biased whereas they consider their own views predicated on objective fact.\(^{87}\)

Cultural cognition also helps explain the availability heuristic, the affect heuristic and probability neglect.\(^{88}\) Cultural worldviews can explain what is available to people and what they view as

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\(^{81}\) Id. at 1072-73, 1083-88; Kahan, supra note __, at 23.

\(^{82}\) Kahan, et al., at 1072. See also id. at 1105 (discussing MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE 36(1982)). See also KAHNEMAN, supra note __, at 140-45 (discussing implications for role of experts in light of debate over risk as either a product of culture or reducible to objective criteria).

\(^{83}\) See Kahan, et al., supra note __, at 1106.

\(^{84}\) Kahan, supra note __, at 20.

\(^{85}\) Id. at 21.

\(^{86}\) Id. Identity protective cognition is not only exhibited by “emotional” or “affective” right brain thinkers. People who are reflective and deliberate in their judgments, or left brain thinkers, are likely to employ complex information analysis to support their group’s views. Id. These tendencies bear striking similarity to what we commonly refer to as “confirmation bias.” See KAHNEMAN, supra note __, at 80-81.

\(^{87}\) Kahan, supra note __, at 22.

\(^{88}\) Kahan, et al., supra note __, at 1084-85.
negative or positive, shaping how their biases tilt and how they forecast the likelihood of particular events.\textsuperscript{89}

D. Judicial Susceptibility to Errors

Research and anecdotal accounts suggest that judges may also be susceptible to emotions and concomitant cognitive errors in their decision making.\textsuperscript{90} For example, one study found that on various cognitive tests, trial judges tend to employ intuitive rather than deliberative reasoning at levels very similar to the general public, resulting in poorer scores.\textsuperscript{91} Other studies evidence judges’ tendencies to respond intuitively to numeric anchors, and in evaluations of statistical evidence as well as assessing conduct after learning outcomes associated with that conduct, that lead to erroneous or unjust results.\textsuperscript{92} Other studies have found that in areas where predictions are often inaccurate, judges may “over-rely on their intuitions.”\textsuperscript{93} Still another study found that extraneous influences, such as a late morning snack or lunch, could lead to more favorable rulings by judges by parole judges.\textsuperscript{94}

Although these studies have generally focused on trial judges and have greater ramifications for those making relatively quick decisions, the demonstrable impact of intuition on judgments suggests that initial responses to emotional stimuli will impact

\textsuperscript{89} Id.
\textsuperscript{90} See, e.g., Brest, supra note __, at 481 (describing biases affecting policy makers, particularly in the areas of adjudicative fact finding, legislative fact finding and decision making); Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1 (2007).
\textsuperscript{91} Guthrie, supra note __, at 17. See also Brest, supra note __, at 484-85 (discussing biases common to the adjudicative process, including hindsight bias, anchoring and insufficient adjustment, confirmation bias, treating evidence originating from a single source as if it were based on multiple independent sources, and difficulties in prediction.)
\textsuperscript{92} Guthrie, supra note __, at 19, 43. See also Terry A. Maroney, Emotional Regulation and Judicial Behavior, 99 CAL. L. REV. 1485, 1494 (2011) (reviewing literature on impact of emotion on judicial decision making).
\textsuperscript{93} Brest, supra note __, at 485 (citing R.M. Dawes, D. Faust, & P.E. Meehl, Clinical Versus Actuarial Judgment, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 306-34 (Daniel Kahneman & Amos Tversky eds.) (1982)).
appellate decisions as well. Paul Brest argues appellate courts’ legislative fact finding—determining facts that support particular regulations or acts—is equally susceptible to availability and affect biases. He suggests judges’ lack of training in statistics renders them more prone to errors in probability determinations. Best also contends that “[i]n legislative fact-finding, overconfidence combines with motivated skepticism, confirmation bias, and the gravitational force of prior commitments to make it particularly difficult for policy makers to be open to considering alternative positions relevant to major policy issues.”

Individual accounts by appellate judges indicate that emotions inevitably affect and influence their reasoning. Indeed, Judge Richard Posner suggests that not only may judges be influenced by emotions, but feelings elicited by the facts of a case can be a good basis for a decision. Similarly, Judge Alex Kozinski acknowledges the presence and potential influence of emotions and biases but suggests that a judge can overcome them through thoughtful deliberation. Other judges, as discussed below, acknowledge the emotional impact of the 9/11 attacks on their decisions; whether they are able to overcome the related cognitive biases is less clear.

III. POST-9/11 JUDICIAL RISK ASSESSMENTS

Many judicial opinions invoke the “post-9/11 world” in upholding measures taken in connection with airport security.

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95 Brest, supra note __, at 486.
96 Id.
97 Id. at 487. Although there have been no empirical studies examining the impact of cultural cognition and identity-protective cognition on judges, Kahan speculates that such studies would demonstrate that judges are better able than laypersons, due to certain “habits of mind,” to overcome “but not perfectly,” the prejudicial effects of identity-protective cognition. Kahan, supra note __, at 24, 27-28.
98 Maroney, supra note __, at 1497-98.
100 Alex Kozinski, What I Ate for Breakfast and Other Mysteries of Judicial Decision Making, 26 Loy. L.A. L. Rev. 993, 997-98 (19993). See also Maroney, supra note __, at 1508-31 (discussing approaches to integrating emotions in judicial decision making).
101 See United States v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007) (en banc); Kjolhede v. State, 333 S.W.3d 631, 633-34 (Tex. App. 2009) (“Any subjective belief a person might have that his baggage checked for transport aboard a passenger aircraft may not be searched ‘makes little sense in a post-9/11 world.’” (quoting Aukai, 497 F.3d 960)); State v. Rabb, 920 So. 2d 1175, 1189
subway searches,\textsuperscript{102} restrictions on political speech at political conventions,\textsuperscript{103} and in immigration decisions.\textsuperscript{104} Some courts have been particularly candid about the influence of the post-9/11 heuristic and how it affects their perceptions of risks, facts, and law. Even without explicit reference we see biases and cultural cognition at work in many post-9/11 opinions that involve risk assessment.

A. The “Post-9/11 World”

\textit{Humanitarian Law Project} never references the “war on terror,”\textsuperscript{105} “al Qaeda,”\textsuperscript{106} or “September 11.” But the majority opinion evidences a risk assessment that is assuredly a product of the 9/11 attacks. Without explicitly attributing it to the attacks, Roberts explained, greater latitude must be given to the government to prevent terrorist attacks. Roberts appeared to attribute the divide between the majority and the dissent to

\footnotesize{(Fla. Dist. Ct. App. 2006) (“Without doubt any protection of luggage in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world.”).}

\footnotesize{102 See McWade v. Kelly, 460 F.3d 260 (2d Cir. 2006).}

\footnotesize{103 See Marcavage v. City of New York, 689 F.3d 98 (2d Cir. 2012); Bla(a)ck Tea Soc’y v. City of Boston, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring).}

\footnotesize{104 See Safadi v. Howard, 466 F. Supp. 2d 696, 701 (E.D. Va. 2006) (holding court lacks jurisdiction over government processing of adjustment to permanent residence status applications and that four year delay may be reasonable in light of security concerns “in this post-9/11 world”). See also Ma v. Rice, 8-CV-14008, 2009 WL 160288, at *6 (E.D. Mich. Jan. 22, 2009) (collecting cases finding USCIS has discretion as to timing of review of adjustment applications and that courts lack subject matter jurisdiction to compel USCIS to process an application). Lower courts have also come to the opposite conclusion, rejecting the invocation of the “post-9/11 world” as “a magic talisman that can be waved in front of courts whenever the government seeks to insulate itself from judicial review.” Saleem v. Keisler, 520 F. Supp. 2d 1048, 1060 (W.D. Wis. 2007). See also Keshkoo v. Chertoff, 553 F. Supp. 2d 1131, 1146, 1147 (D. Ariz. 2008) (collecting cases rejecting 9/11 attacks as sole basis for denial of review).}

\footnotesize{105 Mary Dudziak attributes the lack of discussion to the fact that by 2010 the “war on terror had less of a hold on American political consciousness.” DUDZIAK, \textit{supra} note ---, at 124. And yet at that time, as Dudziak acknowledges, there were public disputes over the Islamic cultural center near Ground Zero and body scanners were placed in airports everywhere.}

\footnotesize{106 At oral argument, the justices pushed the plaintiffs’ lawyer, David Cole, on whether the government could ban the same sort of instruction if the terrorist groups were al Qaeda or the Taliban. Cole suggested the matter might be different if these groups were involved because (1) the United States is at war with them; and (2) it is unclear whether al Qaeda or the Taliban engage in any lawful activities. Tr. Oral Argument, 22-24, 30-31.}
differing worldviews, or their own distinct cultural cognition.\footnote{107}{See Kahan, supra note __, at 23.}

As Roberts described it, Breyer saw the world through rose colored glasses. “[T]he dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs’ proposed activities in the abstract.”\footnote{108}{Humanitarian Law Project, 130 S. Ct. 2729.} Breyer, explained Roberts, was naïve; he failed to understand how training in international law might be exploited by terrorist groups.\footnote{109}{Id.}

“In the dissent’s world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations ‘are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.’”\footnote{110}{Id. (quoting Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose)).}

Though Roberts did not name the attacks as his anchor for analysis or his heuristic, lower courts have been more forthcoming about their post-9/11 orientation.

In Bl(a)ck Tea Soc’y v. City of Boston,\footnote{111}{378 F.3d 8.} the First Circuit addressed restrictions imposed by the city of Boston on protesters at the 2004 Democratic National Convention. The city confined protesters to a “demonstration zone,” which amounted to a chain link and mesh 90 by 300 feet “enclosed space” or “a pen.”\footnote{112}{Id. at 11.} The court affirmed the district court’s denial of a motion for preliminary injunction seeking modification of the zone.\footnote{113}{Id. at 15.}

Though the majority did not refer to the 9/11 attacks as a factor in its decision,\footnote{114}{The district court did, however, emphasize the convention would be the first one to follow the 9/11 attacks and that they originated from Boston’s Logan Airport. See Coal. to Protest Democratic Nat. Convention v. City of Boston, 327 F. Supp. 2d 61, 64 (D. Mass. 2004) aff’d sub nom., Bl(a)ck Tea Soc’y v. City Of Boston, 378 F.3d 8.}

Judge Kermit Lipez, in his concurring opinion, felt compelled to acknowledge its influence.

Inevitably, the events of 9/11 and the constant reminders in the popular media of security alerts color perceptions of the risks around us, including the perceptions of judges. The risks of violence and the dire consequences of that violence seem more
... probable and more substantial than they were before 9/11. When judges are asked to assess these risks in the First Amendment balance, we must candidly acknowledge that they may weigh more than they once did.\textsuperscript{115}

Judge Lipez’s admission was an articulation of his own cultural cognition or the post-9/11 heuristic. He now saw facts differently. In light of his cultural worldview (“the events of 9/11”), Lipez explained, he would fall prey to the availability heuristic (“the constant reminders . . . of security alerts”) and probability neglect (“risks of violence . . . seem more probable”). But, Lipez stated, courts should be forthright about their new orientation and its impact on balancing of security and civil liberty.

Similarly, in United States v. Auki, an en banc Ninth Circuit held that permitting a person “to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world.”\textsuperscript{116} Thus, the court rejected a defendant’s appeal of his conviction for possession of methamphetamines.\textsuperscript{117} Judge Graber, in her concurrence, took issue with the “irrelevant and distracting references to 9/11 and terrorists.”\textsuperscript{118} The majority insisted, however, that “the present threat of organized terrorists using the 9/11 tactic” was relevant to determining the reasonableness of the search.\textsuperscript{119} To omit reference to 9/11 and the terrorist threat would be “speculative.”\textsuperscript{120} Citing Orwell, the court warned, “[w]e should also be wary to eliminate historical facts such as 9/11.”\textsuperscript{121}

The dispute between the majority and the concurrence, which did not lead to any difference of opinion over the result, centered on how the different judges viewed facts and the law in a “post-9/11 world.” Judge Graber considered the references superfluous because the case concerned a man convicted of drug possession, not terrorism.\textsuperscript{122} For the majority on the other hand, 9/11 could not be ignored. It argued that the screening procedures were

\textsuperscript{115} Id. at 19 (Lipez, J., concurring) (emphasis added).

\textsuperscript{116} 497 F.3d at 960. The court made further findings of fact that allowing evocation of consent would assist terrorists in their planning. Id. at 960-61.

\textsuperscript{117} Id. at 955.

\textsuperscript{118} Id. at 963 (concurrence, J., Graber). Graber argued that linking the holding to 9/11 would make it “dependent on the existence of the current terrorist threat, inviting future litigants to retest the viability of that holding.” Id. at 964.

\textsuperscript{119} Id. at 962 n.6.

\textsuperscript{120} Id.

\textsuperscript{121} Id. (citing GEORGE ORWELL, 1984, Book Three, Chapter II (1949).

\textsuperscript{122} Id. at 963 (concurring, J., Graber).
authorized by legislation passed in response to the 9/11 attacks.\textsuperscript{123} But more importantly, the majority maintained it had to explain “\textit{why}” it decided the case the way it did.\textsuperscript{124} For at least the majority, its holding could not be separated from the fact that 9/11 occurred and that a terrorist threat persisted. Thus the dispute also revealed how 9/11 may be a part of some judges’ cultural cognition and not of others; if 9/11 so permeates their worldview, if it is available, the majority suggested, they cannot pretend it does not influence both their thinking but also what might be reasonable security actions, even if the facts have nothing do with terrorism threats.

Other judges also echo Chief Justice Roberts’ admonition not to forget “that we live in a different world” now.\textsuperscript{125} In \textit{The News & Observer Publ’g Co. v. Raleigh-Durham Airport Auth.}, the Fourth Circuit affirmed a district court’s summary judgment decision that an airport’s total ban on newspaper racks inside its terminals violated the First Amendment.\textsuperscript{126} Invoking “common sense” that “security is of paramount importance at airports in our post-9/11 world,”\textsuperscript{127} Judge Andre Davis, in his dissent, criticized the majority for relying on a Fourth Circuit 1993 decision\textsuperscript{128} holding the risk posed by newspaper racks was “de minimis.” The majority, Judge Davis, declared, ignored that case’s “proper context: it predates September 11, 2001.”\textsuperscript{129} Put simply, pre-9/11 case law does not speak to the post-9/11 world.\textsuperscript{130} It is a historical artifact. It should no longer be employed as a heuristic through which to analyze present facts. Relying on such precedent, the dissent argued, was poor risk assessment. Taking into account the post-9/11 world, may supersede or even overrule pre-9/11.\textsuperscript{131}

\textsuperscript{123} \textit{Id.} at 962 n.6.
\textsuperscript{124} \textit{Id.} (emphasis added).
\textsuperscript{125} Humanitarian Law Project, 130 S. Ct. at 2729.
\textsuperscript{126} \textit{The News & Observer Publ’g Co. v. Raleigh-Durham Airport Auth.}, 597 F.3d 570 (4th Cir. 2010).
\textsuperscript{127} \textit{Id.} at 589 (Davis, J., dissenting).
\textsuperscript{128} See Multimedia Publishing Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport District, 991 F.2d 154 (4th Cir. 1993).
\textsuperscript{129} \textit{News & Observer Publ’g Co.}, 597 F.3d at 589 (Davis, J., dissenting).
\textsuperscript{130} Adrian Vermeule describes the incongruence of law with a crisis as a general problem with “common law emergency oversight.” Adrian Vermeule, \textit{Holmes on Emergencies}, 61 STAN. L. REV. 163, 196 (2008). “Emergencies are novel situations, so the informational value of precedent is reduced.” \textit{Id.} at 197.
\textsuperscript{131} See also Jews for Jesus, Inc. v. Port of Portland, Or., CV04695HU, 2005 WL 1109698 (D. Or. May 5, 2005) aff’d sub nom. Jews for Jesus, Inc. v. Port of Portland, 172 F. App’x 760 (9th Cir. 2006) (“Moreover, in the post-September
B. Common Sense and System 1 Thinking about Terrorism

Post-9/11 opinions often evidence as much System 1 thinking as System 2 thinking. Roberts suggested in *Humanitarian Law Project* that basic “common sense” holds “that material support of a terrorist group’s lawful activities facilitates the group’s ability to attract ‘funds,’ ‘financing,’ and ‘goods’ that will further its terrorist acts.” But the appeal to “common sense” was Roberts’ own personal policy judgment or his intuitive or System 1 response. It also amounted to drawing factual inferences, the very sort that he disclaimed the aptitude as a judge to do.

The invocation of common sense also implicitly acknowledges the tenuous connection between teaching international humanitarian law for peaceful purposes and supporting terrorism. As Best notes, it is in uncertain areas that courts rely too heavily on System 1. Richard Posner has argued that assessing the national security risks posed by providing habeas to suspected terrorists is precisely the sort of claim that must be resolved by a judge’s intuition. Posner characterizes a judge’s use of “common sense” “as a set of policy judgments that everyone agrees on and so are not thought political at all.” But of course they are. As we have seen, these sorts of System 1 responses are also a product of cultural worldviews. One judge’s common sense is not often another’s.

Consider *Ashcroft v. Iqbal*, a Supreme Court case concerning the liability of government officials for abusive counterterrorism measures. Two months after the 9/11 attacks, Javaid Iqbal, a Pakistani Muslim, was arrested on immigration fraud related charges and then detained for six months as a person of “high interest” to the 9/11 investigation only, he alleged, because of his

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11. 2001 world, air travel is more encumbered than it was when *Lee v. International Soc’y for Krishna Consciousness*, 505 U.S. 830 (1992) was decided, providing airports with an even stronger interest in regulating non-travel related interferences with passengers."

133 *Id.* at 2727.
134 Best, *supra* note __, at 485.
135 *See* RICHARD A. POSNER, HOW JUDGES THINK 116. Posner contends that judges revert to “their intuitions because the empirical challenges to their intuitions do not have the force required to dislodge those intuitions.” *Id.*
136 *Id.* at 117.
race, religion, or national origin. The Court ruled 5-4 in a Justice Kennedy opinion that Iqbal’s complaint failed to state claims upon which relief could be granted.\textsuperscript{138}

Relying on his “judicial experience and common sense,”\textsuperscript{139} Kennedy found implausible the allegations that Mueller and Ashcroft discriminated in directing the arrest and detention of thousands of Arab Muslim men, and their restrictive confinement, as part of the 9/11 investigation.\textsuperscript{140} In light of the role played by Arab Muslims in the 9/11 attacks, Kennedy explained, “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”\textsuperscript{141} Yet Kennedy pointed to no link between Iqbal and the 9/11 terrorists save for “their Muslim faith and ethnic background.”\textsuperscript{142}

Kennedy’s “common sense” response here is a byproduct of his own cultural cognition and emotional responses to risk, and how the government should address terrorism. Cultural cognition has significant implications for how civil liberties and their infringement may be tolerated. Researchers have found that people concerned about various dangers, including future terrorist attacks after 9/11, are more willing to sacrifice their own civil liberties and the rights of others whom they believe pose a threat, than people who do not perceive the same societal threats.\textsuperscript{143} People who are more trusting of government are also more willing to sacrifice civil liberties.\textsuperscript{144} Christina Wells similarly concludes,

\textsuperscript{138} Id.
\textsuperscript{139} Id. at 679 (citing Iqbal v. Hasty, 490 F.3d 143, 57-58 (2d Cir. 2007).
\textsuperscript{140} Id. at 682.
\textsuperscript{141} Id. at 682.
\textsuperscript{144} BERINSKY, supra note __, at 162 (citing Darren W. Davis and Brian D. Silver, Civil Liberties vs. Security in the Context of the Terrorist Attacks on America, AMERICAN JOURNAL OF POLITICAL SCIENCE 48:28-46 (2004)).
based upon her review of psychological research, that, “left to their own devices in times of stress, people, including judges, tend to vastly exaggerate and react against the threats posed by disfavored groups.”

In the post-9/11 context, judges are more likely to defer to the government’s assessment of risks. Courts will therefore be even less receptive to claims of discrimination. As Ramzi Kassem observes, “the subjective, common sense standard applied by the judiciary will likely tilt towards mainstream, majority group views that include a dose of skepticism towards claims of invidious discrimination against minority groups, particularly unpopular, insular ones.” Whatever the merits to civil rights litigation that Kennedy acknowledged (“Litigation, though necessary to ensure that officials comply with the law . . .”), he did not countenance diverting government resources to respond to such discrimination claims “when Government officials are charged with responding to, ‘a national and international security emergency unprecedented in the history of the American Republic.’” Thus we see that a courts’ “common sense” perceptions of terrorism threats do not bode well for abuse claims relating to the government counterterrorism measures.

C. The Availability Heuristic Post-9/11

Courts invariably reach for what is available in analyzing risks posed by terrorism. In *Humanitarian Law Project*, Roberts’

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146 But see Haddad v. Ashcroft, 221 F. Supp. 2d 799 (E.D. Mich. 2002), vacated on grounds of mootness, 76 F. App’x 672 (6th Cir. 2003) (holding secret deportation hearing violated Lebanese alien’s due process rights and that he must have his case heard before a different immigration judge). The district court observed that after 9/11 “individuals (including some in government) are more willing to abridge the constitutional rights of people who are perceived to share something in common with the ‘enemy,’ either because of their race, ethnicity, or beliefs.” *Id.* at 804.

147 Kassem, *supra* note __, at 1452.

148 *Iqbal*, 56 U.S. at 685.

149 *Id.* (quoting *Iqbal* v. *Hasty*, 490 F.3d, 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)).

location and invocation of the book *Blood and Belief* reflected a judicial reversion to the availability heuristic and also confirmation bias. Following, and supporting his intuition, Roberts sought out evidence that supported his viewpoint. He extrapolated from the book a plausible narrative account, purporting to validate it in historical “fact.” But what is “possible” is not evidence of probability.\(^{151}\) And a coherent account does not a good basis for prediction make. Kahneman observes that “uncritical substitution of plausibility for probability has pernicious effects on judgments when scenarios are used as tools of forecasting.”\(^{152}\) Nor is selective fact finding deferring to the political branches. Instead, the fact finding is the very sort of judgment Roberts insisted courts were not competent make.\(^{153}\)

Dissenting in *Boumediene v. Bush*, in which the Court held 5-4 that detainees at Guantanamo Bay had a constitutional right to habeas, Justice Scalia similarly employed the availability heuristic in describing vividly the harm that the decision would cause.\(^{154}\) America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D. C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a

\(^{151}\) *See* Al-Adahi v. Obama, 613 F.3d 1102, 1110 (D.C. Cir. 2010) (“Valid empirical proof requires not merely the establishment of possibility, but an estimate of probability.”) (quoting DAVID HACKETT FISCHER, HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 53 (1970)).

\(^{152}\) KAHNEMAN, *supra* note __, at 159. *See also* id. at 218 (observing that “our tendency to construct and believe coherent narratives of the past makes it difficult for us to accept the limits of our forecasting ability”) (citing NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2007)).

\(^{153}\) Humanitarian Law Project, 130 S. Ct. at 2727 (“But when it comes to collecting evidence and drawing factual inferences in this area, ‘the lack of competence on the part of the courts is marked.’” (quoting Rostker v. Goldberg, 453 U.S. 65)).

\(^{154}\) 533 U.S. at 827 (Scalia, J., dissenting).
plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.\textsuperscript{155}

By granting the detainees habeas, Scalia warned, Americans would be killed.\textsuperscript{156} Scalia’s selective adoption of information from outside the record evidenced fact finding based on that which was available to him in making a risk assessment. First, Scalia offered his own personal, common sense perception of the risk based on local and airport security measures. Second, his account was also a product of a cultural worldview that broadened the enemy beyond al Qaeda to include all of radical Islam and identified the origins of the war on terrorism almost two decades earlier, claims that were not made by the Government.\textsuperscript{157} His detailed violent history and plausible forecast of resulting American deaths could also lead people to think his predicted outcome was more probable than in actuality.\textsuperscript{158}

D. Probability Neglect, Worst-case Scenarios, and Imminence

This section examines how courts often neglect probability in undertaking risk assessments. This cognitive error is not, however, unique to post-9/11 jurisprudence. Indeed, it appears that at times of crisis and through the special needs doctrine, the Supreme Court has long sanctioned probability neglect as an analytical tool.

In \textit{Humanitarian Law Project} Roberts accepted as a foregone conclusion that acts of terrorism were very likely: “The

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} H. Robert Baker, The Supreme Court Confronts History: Or, Habeas Corpus Redivivus, Common-Place, Vol. 8, No. 4, July 2008, available at \url{http://www.common-place.org/vol-08/no-04/talk/}.

Government,” Roberts explained, “when seeking to prevent *imminent* harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”¹⁵⁹ The reference to “imminent harms” is jarring; nowhere in the opinion was there any discussion of the likelihood of a terrorist attack. There was no basis for believing an attack was imminent. This was simply Roberts’ default position in the face of uncertain harm.

The presumption of imminence ups the stakes. In so doing Roberts presented the Court with a form of the ticking time bomb hypothetical,¹⁶⁰ or the “one percent doctrine.”¹⁶¹ That is, whatever the odds really may be, and we cannot know what they are, we should assume and act as though an attack is about to occur.

The standard permits just about any imagined outcome to justify the prohibition of speech to a designated foreign terrorist group. It is also then an invitation to always err on the side of the government and feed cognitive errors and emotions rather than facilitate more deliberative reflection. Though the post-9/11 risk of terrorism may be different from prior threats, the Supreme Court has historically adopted the worst-case scenario, presuming imminence in times of perceived existential dangers.

### 1. Historical Examples of Presumed Imminence

In *Korematsu v. United States*, the Court upheld the exclusion and internment of over 112,000 Japanese Americans on the grounds of the elastic idea of military necessity.¹⁶² Writing for the six-justice majority, Justice Black justified the decision based upon deference to the military’s determination “that all citizens of

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¹⁵⁹ 130 S. Ct. at 2728.

¹⁶⁰ In the post-9/11 era the ticking time bomb hypothetical has been frequently raised to ask when torture might be justified. In his thorough critique of the question, David Luban observes that because any torture might help us in fighting terrorism “we verge on declaring all military threats and adversaries that menace American civilians to be ticking bombs whose defeat justifies torture.” David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425, 1443 (2005).

¹⁶¹ The “one percent doctrine,” or “Cheney Doctrine,” as it was also characterized, held that “even if there’s just a one percent chance of the unimaginable coming due, act as if it’s a certainty.” RON SUSSKIND, *THE ONE PERCENT DOCTRINE*, 62 (2006).

¹⁶² 323 U.S. 214 (1944).
Japanese ancestry be segregated from the West Coast” because the “disloyal members of that population . . . could not be precisely and quickly ascertained.” Writing in dissent, Justice Murphy would have required the government to show that a constitutional deprivation based on “military necessity” “is reasonably related to a public danger that is so ‘immediate, imminent, and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger,” before simply accepting the military’s judgment. The near total deference and lack of any evidentiary requirement aided the Court in its approval of “obvious racial discrimination.” Looking back at his vote upholding the exclusion, Justice Douglass acknowledged that psychological and social fears and biases inevitably played a role in the decision. The Court’s “members are very much a part of the community and know the fears, anxieties, cravings and wishes of their neighbors . . . The state of public opinion will often make the Court cautious when it should be bold.”

_Dennis v. United States_, in which the Court upheld convictions of American Communist party leaders for conspiring to “advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence,” also prescribed an approach to national security matters that permitted worst-case scenarios to trump lack of evidence of probability or imminence. Unsatisfied with earlier iterations of the “clear and present danger” test, which the _Dennis_ Court

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163 _Id._ at 218-19, 223-24.
165 _Id._. See also _id._ at 246 (Jackson, J., dissenting) (“But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.”).
168 The _Dennis_ court explained that “clear and present danger” could not “mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the
determined were not apposite because they did not deal with a “substantial threat to the safety of the community,” such as the existential crisis posed by Communism, the Court adopted Judge Learned Hand’s rule, crafted in the Court of Appeals.\textsuperscript{169} The rule provided that for cases involving free speech, courts “must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”\textsuperscript{170} Under this analysis, however, what the rule permitted was that the graver the danger or perceived harm, the lesser the probability of such harm required in order to uphold the government action.\textsuperscript{171} Thus the \textit{Dennis} Court articulated an iteration of the clear and present danger test that operationalized cognitive errors such as probability neglect.\textsuperscript{172}

\textit{Brandenburg}, invoked by Breyer in dissent, seemingly overruled the \textit{Dennis} test, holding unconstitutional the proscription of advocacy of the use of force unless it “is directed to inciting or producing \textit{imminent} lawless action and is \textit{likely} to incite or produce such action.”\textsuperscript{173} Probability becomes a more significant concern at least under First Amendment analysis. Yet as \textit{Humanitarian Law Project} suggests, a variant of the \textit{Dennis} rule, or its psychological antecedents, is alive and well. The threat of catastrophic attack weighs heavily on justices, justifying, it would seem, government restrictions on civil liberties, notwithstanding a low or unidentified probability.

2. Special Needs Cases

The Supreme Court’s special needs line of cases also evidences a general willingness on the part of courts to ignore calculations of probability or require specific evidence where the potential harm is

\begin{itemize}
\item Id. at 509.
\item Id. at 510.
\item Id. (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950))
\item Christina E. Wells, \textit{Fear and Loathing in Constitutional Decision-Making}, 2005 Wis. L. Rev. 115, 151-52 (2005). As Wells observes, Judge Hand, in his application of the test, took “judicial notice of world events that were unrelated to the CPUSA” in determining that that evil of overthrow was probable. Imminence becomes a function of CPUSA’s evil character.
\item See id. at 159-64 (theorizing that perceptions of CPUSA’s dangerousness might have become exaggerated through probability neglect and/or intolerance owing to prejudice).
\item 395 U.S. at 447 (emphasis added).
\end{itemize}
great.\(^{174}\) For example, in *Nat’l Treasury Employees Union v. Von Raab*, the Supreme Court upheld 5-4 the United States Customs Service’s required urinalysis testing for all those seeking certain promotions or transfer to certain position in the service.\(^{175}\) Justice Kennedy explained that where “the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.”\(^{176}\) Justice Scalia dissented, objecting to the lack of evidence that there was a high level of drug use or that such drug use presented a serious harm.\(^{177}\) Attributing the policy to only a “generalization” that drug use pervades all workplaces, Scalia indicated he would, however, accept simplification where “catastrophic social harm” is involved, and “no risk whatever is tolerable.”\(^{178}\)

Thus we see in high risk contexts a judicial propensity to weight the harm heavily in disregard of evidence supporting the probability or imminence of that harm. Special needs cases seem to reify the “gravity of the evil” analysis of *Dennis*. How could the prevention of terrorism be anything but a special need that would render government efforts, however intrusive, reasonable?

### 3. Terrorism Hypotheticals

The Supreme Court has also hypothesized in several cases that the threat of terrorism could demand deference to the political branches and diminish civil liberties protections. In *City of Indianapolis v. Edmond*, the Court struck down a suspicionless checkpoint intended to catch drug offenders as a violation of the

\(^{174}\) See, e.g., Ferguson v. City of Charleston, 532 U.S. 67, 74 (2001). The special needs doctrine requires the balancing of the intrusion of privacy against the special needs of the government, which must be distinct from general law enforcement objectives. *Id.* at 78-79.

\(^{175}\) 489 U.S. 656 (1989).

\(^{176}\) *Id.* at 674-75. Justice Kennedy stated it was this principle that justified searching all bags of people boarding airplanes without any individualized suspicion. *Id.* at 675 n.3 (*United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (emphasis in original)) (“When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, . . .”).

\(^{177}\) *Id.* at 681-85 (Scalia, J., dissenting); *id.* at 681 (“[N]either frequency of use nor connection to harm is demonstrated or even likely.”).

\(^{178}\) *Id.* at 684. For Justice Scalia, the “secured areas of a nuclear power plant” would present a circumstance allowing for such generality.
Fourth Amendment because its primary purpose was crime control. Justice O’Connor, noted with approval, however, the Seventh Circuit’s assumption in its opinion below that an otherwise criminal objective would not preclude setting up a suspicionless checkpoint in an emergency situation such as “an imminent terrorist attack.” The Seventh Circuit’s full scenario involved “a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis,” leading the Indianapolis police to “block[ ] all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity.” Judge Posner explained that suspicionless checks would not offend the Fourth Amendment because “[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact.” Posner’s hypothetical involved an imminent attack; the probability was therefore high. This is the proverbial ticking time bomb. The problem with the hypothetical is it writes in to the equation a level of high probability. What level of urgency is there if it is unclear where or when the terrorist attack may be perpetrated?

Justice Souter answered this question five years later with his own revealing hypothetical. The Court held in Illiniois v. Caballes that the use of a narcotics detecting dog outside of a car in connection with a lawful traffic stop did not violate the Fourth Amendment. Justice Souter dissented, contending the dog sniffing constituted an unauthorized search that was not justified. While insisting that dog sniffs should be treated as searches and subjected to traditional Fourth Amendment scrutiny, Souter offered a footnoted disquisition on the terrorism exception.

180 Id. at 44 (2000) (discussing Edmond v. Goldsmith, 183 F.3d 659, 662-63 (7th Cir. 1999)).
181 Edmond, 183 F.3d 663.
182 Id.
184 Id. at 410-11 (Souter, J., dissenting) (disputing majority’s reasoning that dog search did not intrude on the car passenger’s legitimate expectation of privacy because dogs only would detect contraband) (“The infallible dog, however, is a creature of legal fiction.”).
All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.\footnote{Id. at 417, n. 7. See also id. at 423 (Ginsburg, J., dissenting) (“A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter.”); id. at 425 (“[T]he immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine.”).}

Souter’s discussion of reasonableness appears rooted in a definition of risk that focuses on the potential harm, but is not concerned with the probability of that harm. Although he references a “demonstrated risk,” that evidence of risk appears focused solely on the “destructive or deadly” outcome, not the likelihood. This calculus, which we as a society have seemed to accept as a commonplace, is deeply rooted in probability neglect. Imminence is presumed. The bomb is always ticking.\footnote{In \textit{Zadvydas v. Davis}, the Court’s last opinion written prior to the 9/11 attacks, the Court held that a post-removal-period, immigration detention statute did not authorize indefinite detention and must be read to limit an alien’s detention to a reasonable period. 533 U.S. 678 (2001). Writing for the majority, Justice Breyer also noted that if the Court were considering terrorism suspects, “special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.” Id. at 696. Breyer’s comments suggested a predisposition to accept a differently calibrated risk analysis when confronted with terrorism cases.}

4. \textit{Post-9/11 Worst-Case Scenarios}

Since the 9/11 attacks some lower courts have employed risk analyses that implicitly and explicitly consider worst-case scenarios. A worst-case scenario is, by definition, an imagining of the gravest evil.\footnote{See \textit{WORST-CASE SCENARIOS}, supra note __, at 18.} These decisions, not unlike the Court’s hypotheticals or the \textit{Dennis} test, are particularly susceptible to cognitive errors of probability neglect and the affect heuristic.\footnote{See \textit{LAWS OF FEAR}, supra note __, at 64-65.
In its first ever written decision, the Foreign Intelligence Surveillance Court of Review addressed a FISA court’s surveillance order which restricted law enforcement officials’ communications with intelligence officials regarding the surveillance and use of it for criminal prosecution.\footnote{In re Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).} The court observed that while the threat may not be “dispositive,” it is “a crucial factor” in determining whether a search is reasonable.\footnote{Id. at 746.} One can only imagine how crucial it was for this court. In the next sentence, the court speculated, “[o]ur case may well involve the most serious threat our country faces.”\footnote{Id.} Again, the court’s apprehension of the potential harm—“the gravity of the evil”\footnote{Id.}—appeared to overwhelm any other analysis of what was a reasonable search, including probability or imminence of an attack.

In similar fashion, the Second Circuit upheld New York City’s random, suspicionless searches of peoples’ bags on the subway, explaining that where the danger of a terrorist attack was so great, “immediacy” and “a specific, extant threat” were not relevant under the special needs analysis.\footnote{McWade, 460 F.3d at 272.} In another case, the Second Circuit upheld restrictions on political protesters at the Republican National Convention notwithstanding objections that the security risks were “unspecific” and “generic.”\footnote{Marcavage, 689 F.3d at 105.} Instead of requiring a specific or immediate threat, the court stated that government limitations of speech could be justified on the basis of “managing potential risks,” “consideration of the worst-case scenario” and “possible security threats.”\footnote{Id. (citing Citizens for Peace in Space v. City of Colo. Springs, 477 F.3d 1212, 1223–24 (10th Cir. 2007)).} Noting that the convention was the first one after the 9/11 attacks, the court concluded that the possible risk of attack, in addition to the traffic and crowd challenges, demonstrated the government had a compelling interest in security. \textit{Id.}
suspect, Judge Laurence Silberman explained that “unusual incentives and disincentives” affected judges in their decisions concerning habeas for Guantanamo detainees. In contrast to the usual criminal case, in which a “good judge” might overturn a conviction where evidence is lacking even if she were certain of the defendant’s guilt, the detainee case presented a different risk analysis. Silberman expanded: “When we are dealing with detainees, candor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. One does not have to be a “Posnerian”—a believer that virtually all law and regulation should be judged in accordance with a cost/benefit analysis—to recognize this uncomfortable fact.” Therefore, Silberman reasoned, a “preponderance of the evidence” standard would be too burdensome. He speculated that none of his colleagues would “vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.”

Judge Silberman may have been only speculating, but it offers a glimpse into how at least one judge, and surely some of his colleagues, undertakes risk analysis. Strikingly, Silberman not only focused on the worst-case scenario, but maintained that a lower burden of proof, lower than what the government advocated, was necessary, making it less likely the “gravity of the evil” could be “discounted by its improbability.”

As we can see, in a post-9/11 world, a System 1 fear of terrorism and concomitant probability neglect might not be offset by System 2’s more deliberative faculties. As Kahneman has noted, where attitudes and beliefs are involved, which they assuredly are in the assessment of risk and related government responses, System 2 may instead function as an “apologist” or “endorser” of System 1 responses to terrorism. Thus in contemplating worst-case scenarios, judges may employ System 2

196 Id.
197 Id.
198 Id. at 1078.
199 See KAHNEMAN, supra note __, at 103-04.
to reduce evidentiary requirements for government action intended to prevent terrorism.

5. Lack of Exigency as Basis for Judicial Review

In light of judges’ susceptibility to biases it may be surprising that the Supreme Court took as active a role as it did in the enemy combatant cases. However, the Court’s involvement can be explained in part by the relatively modest results in three of the cases of requiring a hearing for detainees. But it may be better attributed to at least a majority of the Court’s view that the cases did not entail exigent circumstances or encroach on issues of military necessity that the Korematsu Court, for example, did perceive. Yet even this determination itself has entailed findings of fact.

In Rasul v. Bush, a 6-3 majority held that there was federal habeas jurisdiction over detainees who were not from nations at war with the United States and might be held indefinitely at the U.S. Naval Base at Guantanamo Bay, Cuba. Concurring, Justice Kennedy inferred from the base’s location outside of “any hostilities,” and the lengthy detention a lack of exigency. Kennedy’s risk assessment here—his finding of a lack of imminence—was no less a personal policy preference than was Roberts’ presumption of imminence in Humanitarian Law Project. But for Kennedy, the lack of exigency was a necessary a priori finding. Without such, he might not have sanctioned judicial review.

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200 See LAWS OF FEAR, supra note ___ at 211. See Hamdi, 542 U.S. at 509 (holding that “citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”); Rasul v. Bush, 542 U.S. 466, 485 (2004) (noting that Court did not even decide “[w]hether and what further proceedings may become necessary after” the Government responds to the detainees’ claims); Boumediene, 553 U.S. 723 (holding DTA was inadequate substitute for habeas corpus).

201 See 323 U.S. at 218-19, 223-24. But see id. at 248 (Jackson, J., dissenting) (declining “to make a military judgment as to whether General DeWitt’s evacuation and detention program was a reasonable military necessity”).


203 Id. at 487 (Kennedy, J., concurring)

204 Id. at 488 ((Kennedy, J., concurring) (“It suggests a weaker case of military necessity . . . [A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”) (emphasis added).
Four years later, in Boumediene the Court held that the legislation crafted in response to Rasul stripped federal courts of habeas jurisdiction over the Guantanamo detainees’ petitions. The Court further held that detainees had a constitutional right to habeas and that the jurisdiction stripping provision amounted to an unconstitutional suspension of habeas. Writing for the majority, Kennedy concluded that “[t]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.” As in Rasul, Kennedy inferred a lack of exigency or imminent harm from the now six years of detention for many of those held at Guantanamo.

The Court is more likely, however, to defer to the government, or even decline jurisdiction where a threat is perceived as imminent. Rumsfeld v. Padilla presented the question whether the President had the authority to militarily detain an American citizen arrested in the United States, who the President determined had conspired with Al Qaeda to commit terrorist attacks in the United States, including detonating a dirty bomb in the United States. The government acknowledged that its motivation for removing him from the criminal justice system and detaining him incommunicado was “to try and find out everything he knows so that hopefully we can stop other terrorist acts.” In a 5-4 opinion, the Court avoided the issue and ruled that Padilla had improperly filed his habeas petition in the Southern District of New York (where he had been held in federal criminal custody). Instead, the majority held Padilla should have filed in the District of South Carolina where he was held in a naval brig. Declining jurisdiction allowed the Court to avoid reaching a decision that could have interfered with government efforts to prevent terrorism. Such denials of jurisdiction may be viewed as risk assessments sub

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205 553 U.S. 723.
206 Id.
207 Id. at 769, 794-95.
208 See id. at 794, 797 (noting six years of detention without judicial review). See also id. at 800-01 (Souter, J., concurring) (same).
210 See Padilla v. Rumsfeld, 352 F.3d 695, 701 (2d Cir. 2003).
212 Id. at 430.
213 Id. at 436.
silentio. But such a stealth approach may amount to what Stephen Vladeck terms “passive-aggressive judicial review.”214 Thus the Court’s post-9/11 decisions provided at times only structural space for the Court, with little prospect of the justices striking down government measures, and effectively sanctioning the conduct.215

IV. JUDICIAL DEFERENCE

Errors in cognition and other biases owing to cultural cognition might be thought to buttress arguments in favor of judicial deference in the terrorism context. However, because deference does not mean total judicial abdication,216 deferring to government characterization of risk assessments can reinforce and even compound cognitive errors and biases endemic to the government’s initial risk assessment. As we have seen, courts often undertake their own fact finding and risk assessment to support their decision to defer. Moreover, government terrorism experts are also susceptible to cognitive errors and the biases of cultural cognition.217 They are also very much subject to concerns over political or public outcry and blameworthiness, which may lead them to overestimate the probability of attacks and ignore civil liberties concerns.218 This section examines the differing rationales for judicial deference and ultimately rejects each of them as untenable.

First, deference proponents contend that because emergencies and national security crises are of some fixed and limited duration, the harms affecting civil liberties will be confined in similar scope; therefore, courts need not intervene. Chief Justice William Rehnquist sketched out this historical argument in All the Laws but One, describing how the Court has generally issued decisions favoring civil liberty only after hostilities ceased.219 Similarly, Eric Posner and Adrian Vermeule contend that eventually

214 *Passive-Aggressive Virtues, supra* note __, at 140.
215 *Id.*
216 *See* Humanitarian Law Project, 130 S. Ct. at 2727.
following a crisis, “the government will downgrade its threat assessment, and judges will worry less and less about the harms from blocking emergency measures.”

Arguments favoring judicial abdication because of temporary and possibly exigent circumstances are less persuasive in light of the seeming permanence of the terrorism threat. It is hardly clear when the threat of terrorism will abate. While the government may no doubt be viewed as a provider of security, it is also a provider of civil liberty. Where the nation is now so fully consumed by prevention of catastrophic terror attacks and susceptible to cognitive errors, it is incumbent on the court in a perpetual crisis not to presume imminence but to test the government’s risk assessments.

Second, proponents argue deference is justified in the national security arena because of foreign and international relations, which are highly sensitive and demand discretion from the executive. Roberts invoked this rationale in *Humanitarian Law Project*, deferring to the government’s contention that teaching peaceful advocacy to the PKK could upset relations with Turkey.

If *Humanitarian Law Project* has a limiting principle, it would appear to be its national security and foreign affairs context. Critical to the decision was that it concerned material support of a foreign terrorist organization. Although not situated in the “wartime” context of several of the Court’s post-9/11 decisions,
the rationale for deference hinges on similar reasoning. Thus one might expect that decisions addressing similar communication or teaching of human rights law to a domestic terrorist organization would come out differently.\textsuperscript{226}

But there is good reason to question the extent of this limitation. The increasingly globalized and interconnected world raises questions about the elasticity and malleability of this theory of deference in the terrorism context. The most domestic of threats may well have an international dimension or a foreign connection. Thus the logical stopping place of this rationale is unclear.

Third, deference advocates argue that national security issues are of a highly complex and classified nature, which courts are not competent to handle or assess. Without full information about potential harms and the expertise to make risk assessments, courts are not equipped to determine whether the government’s infringement of a particular liberty is appropriate.\textsuperscript{227} Kennedy articulated this rationale in \textit{Boumediene}, allowing that in contrast to the other branches, most judges do not “begin the day with briefings that may describe new and serious threats to our Nation and its people.”\textsuperscript{228} Though the dissenter it as a rhetorical pose,\textsuperscript{229} Roberts reified the rationale in \textit{Humanitarian Law Project} at the heart of his opinion.\textsuperscript{230} Relatedly, deference may be rationalized because the objective in the terrorism context is prevention, not prosecution.\textsuperscript{231} As a result the government may rely on
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intelligence standards as opposed to those utilized in the criminal context.\textsuperscript{232} Courts are not familiar with the intelligence area and are therefore not qualified to evaluate the evidence the government may rely upon.\textsuperscript{233} Finally, deference may be urged due to the lack of precision or quantification of likelihood of an attack.\textsuperscript{234}

The expertise rationale ignores the fact that courts review the decisions of experts in a myriad of highly complex subjects. Article III courts have of course overseen scores of terrorism cases, both of domestic and international dimensions.\textsuperscript{235} As for the secretive nature of certain subjects, there are procedures in place that have permitted courts to have access to classified information.\textsuperscript{236} Finally, specialized courts have also been created
criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur’’).
\textsuperscript{232} See id. at 2728; Balkin, supra note __, at 15-16.
\textsuperscript{233} Humanitarian Law Project, 130 S. Ct. at 2727-28.
\textsuperscript{234} Id. at 2728. See also RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 171, 174 (2004). Posner argues that the reaction or “overreaction” to 9/11 cannot be viewed as an example of probability neglect because we are unable to quantify the risk of terrorist attacks. Posner adds that “it would be a mistake to dismiss a risk merely because it cannot be quantified and therefore may be small—for it may be great instead.” Id. See also Howard Kunreuther & Erwann Michel-Kerjan, Dealing with Extreme Events: New Challenges for Terrorism Risk Coverage in the U.S., WP 04-09, 9-10 (April 2004) Center for Risk Management and Decision Processes – The Wharton School of the University of Pennsylvania, at http://www.opim.wharton.upenn.edu/risk/downloads/04-14-HK.pdf (suggesting that the “dynamic uncertainty” of terrorism, which often includes an amorphous enemy and secrecy about the threats, poses challenges that are not presented by natural disasters, for which there is an enormous amount of information on the historical risks and science in the public domain, or even war, which usually entails a more readily identifiable enemy and location of the warzone); Howard Kunreuther and Erwann Michel-Kerjan, The Market for Terrorism Insurance: Evaluating the Effectiveness of Risk Financing Solutions, 14, Risk Management and Decision Processes Center, The Wharton School of the University of Pennsylvania, February 2008, http://opim.wharton.upenn.edu/risk/library/WP2008-02-01_HK_EMK_TerrorismInsurance.pdf.
\textsuperscript{236} See, e.g., Foreign Intelligence Surveillance Act (FISA) of 1978, 50 U.S.C. §§ 1801-12 (establishing Foreign Intelligence Surveillance Court that secretly reviews government applications for surveillance or searches aimed at foreign intelligence information); Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025, 2025-31 (1980) (codified at 18 U.S.C. app. 3) (providing procedures that protect national security information from disclosure without denying defendants fair trial).
that allow for courts to review information, with standards distinct from those in traditional Article III courts.\textsuperscript{237}

Concerning the lack of quantification, some scholars argue that risk analysis can be undertaken as it is in other areas of uncertainty such as nuclear power plant accidents and environmental protection.\textsuperscript{238} Moreover, private entities such as insurance companies as well as various risk analysis, private and governmental, commonly engage in the admittedly difficult enterprise of predicting terrorist attacks.\textsuperscript{239}

Deference can finally be rejected because experts aren’t always right.\textsuperscript{240} Indeed, experts are often political actors whose predictions and assessments may be as much a product of fears of blame and accountability as objective analysis.\textsuperscript{241} Moreover, judicial review that entails an honest discussion of risk assessments can play an important role in a democratic society; how we deal with the risks we face should not be left only to the experts.\textsuperscript{242}

\begin{footnotesize}
\textsuperscript{237} See, e.g., FISA, 50 U.S.C. §1803 (authorizing designation of judges for Foreign Intelligence Surveillance Court that will hear applications for and grant orders approving electronic surveillance).


\textsuperscript{239} Id. at 24 (2011). See RICHARD C. LUGAR, THE LUGAR SURVEY ON PROLIFERATION THREATS AND RESPONSES (June 2005), http://lugar.senate.gov/nunnlugar/pdf/NPSurvey.pdf (surveying nuclear non-proliferation and national security experts on variety of threats including the likelihood of a major biological terrorist attack causing numerous fatalities within the next five years, which 43 of 83 experts characterized as between 10% and 30%).

\textsuperscript{240} See, e.g., PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? (2005) (detailing errors by experts); Tetlock & Mellers, supra note __, at 1 (describing poor prediction record of intelligence community); Robert Jervis, Reports, Politics, and Intelligence Failures: The Case of Iraq, 29 JOURNAL OF STRATEGIC STUDIES 1, 46, (Feb 2006) (observing that intelligence community “lacked the time as well as incentives to step back, re-examine central assumptions, explore alternatives, and be more self-conscious about how it was drawing its conclusions”)

\textsuperscript{241} See McGraw, et al., supra note __, at 29.

\textsuperscript{242} See Kahan, et al., supra note __, at 1105-06.
\end{footnotesize}
V. REVISING JUDICIAL REVIEW IN THE POST-9/11 WORLD

This section proposes a way forward in which judicial review is less deferential to the political branches and less subject to the various cognitive errors that generally pervade risk assessments. Building on Cass Sunstein’s framework for judicial analysis, which attempts to counteract the Precautionary Principle’s adverse effects, this section proposes refinements to that framework. In particular, I propose that courts should apply burdens of proof and presumptions regarding evidence that favor the persons or groups whose civil liberties are curtailed. Second, courts should insist on specific evidence that supports deprivations of liberty, particularly those aimed at minority groups. In light of courts’ tendencies to defer to government interpretations of evidence and dilute evidentiary requirements, imposing set standards may counter these propensities. Finally, drawing from literature on the regulation of judicial emotions I propose that courts adopt candid disclosures, in the mien of Judges Lipez and Silberman, concerning the post-9/11 heuristic’s impact on their thinking. These admissions are more likely to earn the court trust in the public discourse of terrorism in a post-9/11 world.

A. Adjusting Sunstein’s Framework

Cass Sunstein accepts both that courts lack information and expertise to gauge whether curtailing civil liberties may be justified and that the probability of an attack may defy estimation.243 Notwithstanding these institutional limitations, Sunstein proposes a framework for judges to review government counterterrorism measures. Specifically, courts should (1) require restrictions on civil liberties to be authorized by the legislature;244 (2) exact special scrutiny to measures that restrict the liberty of members of identifiable minority groups, because the ordinary political safeguards are unreliable when the burdens imposed by law are not widely shared;245 and (3) apply second-order balancing because case-by-case ad hoc balancing is more likely to permit excessive intrusions.246

243 LAWS OF FEAR, supra note ___, at 205.
244 Id. at 211-14.
245 Id. at 214-17.
246 Id. at 217-22.
How might *Humanitarian Law Project* have fared in Sunstein’s framework? Congress’s passage of the material support law suggests that a court should defer under the first prong. However, the ambiguity as to whether the teaching of peaceful advocacy constitutes “training,” or “expert advice or assistance,” under the material support ban would warrant careful judicial review. Under the second prong, because the ban targets political speech it would also deserve special scrutiny. Roberts may have come fairly close to applying the level scrutiny envisioned by Sunstein as he analyzed the law’s application somewhere between strict scrutiny and that reserved for conduct. Finally, what second order balancing applies? Sunstein identifies the considerations of imminence and likelihood from *Brandenburg* as factors a court might consider. It was precisely these elements that Breyer asked to be considered in his dissent.

But would the second order balancing have made a difference to Roberts? The answer is almost certainly no. And it is this fact that illustrates the limitations of Sunstein’s proposal. Just as the gravity of the harm may be exaggerated, the probability and imminence of that harm also may be overstated. Much of this may be attributed to cultural cognition, Roberts’ understanding that we now live in a “different world.” As a result, Roberts, like many other judges, appeared to presume the probability and imminence of an attack.

Sunstein’s second example of torture similarly illustrates the inevitably subjective calculations, or fact finding, that also pervade second-order balancing. Theorizing that torture might be justified in a specific instance under ad hoc balancing, Sunstein contends that utilitarian arguments of the potential for widespread and unjustified torture would lead courts not to approve its isolated use. But it’s not clear that these utilitarian considerations would make a judge any more likely to strike down the use of torture. Based on various biases and cultural affinities, courts could come to different conclusions, even if this second order balancing is adopted, that the potential number of lives saved by torture could offset significant numbers of lives wrongly tortured. Judge Silberman adverted to this in his acceptance of the idea of letting a potentially guilty man go free in the criminal context based on second-order considerations, and in his refusal to authorize the release of a

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247 *Id.* at 221.
possible al Qaeda detainee because of the "infinitely greater downside risk to our country."  

As a result, specific standards of evidence that the government must satisfy in order to justify infringements of civil liberties should be grafted onto the Sunstein framework. These standards should favor the individual or groups whose liberties may be infringed because the government is likely to pursue measures that not only disregard probability but are also calculated to curry popular favor.

Researchers found in a series of studies that judgments of blameworthiness for failing to prevent an attack are far more likely to affect anti-terror budget priorities than probability judgments. These studies’ authors concluded that because people blame policy makers more for high consequence events than for more probable ones, policy makers will be tempted to “prevent attacks that are more severe and upsetting without sufficiently balancing the attack’s likelihood against its outcome.” To counteract this emotional tendency, the studies’ authors suggested that policy makers explicitly consider likelihood data in formulating counterterrorism policy.

Similarly, without prescribed evidentiary standards, courts are likely to craft opinions that defer to the government’s interpretation of evidence and ignore probability and imminence, often by diluting the evidentiary requirements to the point where they favor the government. Indeed, Roberts decried the dissent’s call in Humanitarian Law Project for “detail,” “specific facts,”

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248 Esmail, 639 F.3d at 1077 (Silberman, J., concurring).
249 McGraw, at al., supra note __, at 29.
250 See id. at 27. Counterterrorism priorities are not, however, an either/or game. “Normative considerations suggest that it is not likelihoods per se that should matter in anti-terror preferences or blame judgments. Rather, one should take into account likelihoods and outcomes together, as well as their interaction (i.e., weighting outcomes by likelihoods).” Id. at 30. Nate Silver argues that the number of the fatalities should be the key concern of a counterterrorism strategy. NATE SILVER, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL BUT SOME DON’T 438 (2012) (“When it comes to terrorism, we need to think big, about the probability for very large magnitude events and how we might reduce it, even at the margin. Signals that point toward such large attacks should therefore receive much higher strategic priority.”). See also id. at 441-42 (praising Israeli counterterrorism approach, which “tolerates low-scale terrorism” and focuses on preventing “large-scale terrorism”). But see MUELLER & STEWART, supra note __, at 13-23 (discussing different strategies to preventing terrorism).
251 McGraw, at al., supra note __, at 32.
252 Id.
“specific evidence,” and “hard proof” “that [the advocates’] activities will support terrorist attacks.” Rather, it was sufficient to rely on the Blood and Belief-sourced notion that “[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.” And Roberts was content to rely simply on the idea that “[t]his possibility is real, not remote.” But failing to require any demonstrable risk when the First Amendment and national security conflict, invites imaginings of the possible and plausible, without sufficient regard for the probable. Applying such a rule, Breyer argued, will grant the government a victory in every instance.

Breyer’s and Roberts’ dispute over the quantum of evidence required to establish a connection between the human rights advocates’ speech and terrorist attacks reverberates in the lower courts. This has played out most fully in the post-Boumediene litigation in the D.C. Circuit and district courts. In most instances, the D.C. Circuit has crafted evidentiary standards that benefit the government.

For example, the D.C. Circuit has held that the government need only show by a preponderance of the evidence that a detainee is a member of al Qaeda or associated forces. Yet many of the judges have chafed at even the preponderance standard, advocating a lesser burden of proof. Not content with the reduced burden of proof, the D.C. Circuit also held that government intelligence

253 130 S.Ct. at 2727-28.
254 Id. at 2727-28.
255 Id. at 2729.
256 Id. Breyer countered that “the risk that those who are taught will put otherwise innocent speech or knowledge to bad use is omnipresent, at least where that risk rests on little more than (even informed) speculation.” Id. at 2738 (Breyer, J., dissenting).
257 Id.
258 See Al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010).
259 See Esmail, 639 F.3d at 1078 (Silberman, J., concurring) (advocating “some evidence” standard). See also Al-Adahi,” 613 F.3d at 1104-05. The Al-Adahi court expressed doubt that the Suspension Clause required as high a standard of proof as that of preponderance of the evidence to show a detainee was part of al Qaeda, the Taliban or associated forces and thus could be detained. Id. at 1105. The government accepted the preponderance of the evidence standard but has maintained that “‘a different and more deferential standard may be appropriate in other cases or contexts.’” Id. 1105 (citation omitted).
reports enjoy a presumption of regularity. The D.C. Circuit has also insisted that courts undertake “conditional probability analysis,” or a “mosaic approach,” which entails reviewing evidence collectively as opposed to in isolation.

The practical effect of these decision has been to, in the words of D.C. Circuit Judge David Tatel, “mov[e] the goal posts,” and “call[ ] the game in the government’s favor.” Humanitarian Law Project and the post-Boumediene litigation demonstrate that in the absence of clearly prescribed evidentiary standards, courts will craft a set of standards that support the government’s contentions, fearful of both the potential for harm and the public’s ire.

Thus my proposal requires that burdens of proof be placed squarely on the government and that presumptions about evidence should not tilt against the person or group whose liberty interest has been implicated. This proposal does not ignore valid security interests or call the game in civil liberties’ favor. What it does recognize, however, is that the government, and judges, often overstate the harm, the probability, and imminence of terrorist threats.

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260 See Latif v. Obama, 677 F.3d 1175, 1179 (D.C. Cir. 2012). See also id. at 1180 (“[I]ntelligence reports involve two distinct actors—the non-government source and the government official who summarizes (or transcribes) the source’s statement. The presumption of regularity pertains only to the second: it presumes the government official accurately identified the source and accurately summarized his statement, but it implies nothing about the truth of the underlying non-government source’s statement.”).

261 Al-Adahi, 613 F.3d at 1105-07. See also Salahi v. Obama, 625 F.3d 745, 753 (D.C. Cir. 2010) (“Merely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence ‘may be tossed aside and the next [piece of evidence] may be evaluated as if the first did not exist.’ The evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof.”); Latif, 677 F.3d at 1194 (“The district court’s unduly atomized approach is illustrated by its isolated treatment (or failure to consider) several potentially incriminating inferences that arise from evidence . . .”).

262 Latif, 666 F.3d at 779 (Tatel, J., dissenting). See also BENJAMIN WITTES, ROBERT M. CHESNEY & LARKIN REYNOLDS, THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HabeAS CASES AS LAWMAKING 23 (April 2012) (observing presumption of regularity may have the practical effect of placing the burden of proof on the detainee). The elevation of the “mosaic approach” in the habeas cases also favors the government, further diluting the evidentiary requirements. See also id. at 112 (stating the “mosaic approach” in the habeas cases favors the government, further diluting the evidentiary requirements).
In order to justify a limitation on a liberty interest, the government must provide specific evidence supporting its assessments of the danger, probability, and imminence of a terrorist attack. Evidence must rise above generality and speculation. Courts should also adopt Cristina Wells’ proposed refined balancing, which entails clarifying the interests implicated and examining the government’s evidence supporting curtailment of the protected activity. A prescribed set of questions or checklist might have the salutary effect of moving judges from an intuitive process to a more deliberative one.

Moreover, requiring such specificity is consistent with Philip Tetlock’s admonition that “we as a society would be better off if participants in policy debates stated their beliefs in testable forms.” This approach can only obtain greater accuracy and accountability of all participants, including the government, experts, and judges.

Finally, requiring the government to meet a substantial burden of proof should not be alarming. It is hard to understand, for example, how a “clear and convincing” burden of proof in the detention context would prize civil liberty too dearly. This is not an unbearable burden for the government. As Baher Azmy argues, courts have applied this standard in a variety of sensitive and complex contexts including the pretrial detention of people for dangerousness, the civil commitment of “sexually violent predators,” and the commitment of those found not guilty by

263 In the post-9/11 world courts have at times insisted upon evidence beyond the general or speculative in support of counterterrorism measures. See, e.g., Bourgeois v. Peters, 387 F.3d 1303, 1312 (11th Cir. 2004) (holding unconstitutional city’s use of magnetometer at political protest that government sought to justify based on Department of Homeland’s elevated yellow threat advisory level, and requiring searches be “based on evidence-rather than potentially effective, broad, prophylactic dragnets.”); Yusupov v. Att’y Gen., 518 F.3d 185, 201 (3d Cir. 2008) (rejecting attorney general’s interpretation of national security exception to withholding of removal that would require only information that an “alien may pose a danger to the national security,” and holding instead that that the information must show the alien “actually pose[s] a danger”) (emphasis added).

264 Wells, supra note __, at 221-22.

265 See Guthrie, et al., supra note __, at 40-42 (describing scripts, checklists, and multifactor tests as mechanisms for reducing judicial cognitive errors)

266 Tetlock, supra note __, at 230.

267 See Tetlock & Mellers, supra note __, at 8-9.
reason of insanity. A lesser standard is more likely to feed biases, neglecting probability and presuming imminence.

B. Full Disclosure

Requiring “concrete evidence” supporting government curtailments of civil liberties will not eradicate fact finding gleaned through a post-9/11 heuristic. Biases will inevitably influence the conclusions that judges reach about particular risks and the need for consequent security measures and curtailments of civil liberties. Full objectivity and neutrality may be an illusion, one which courts should not pretend to offer in their opinions. Thus courts must be circumspect in what they present as fact. And in how they present facts. They should acknowledge the contested terrain of risk assessment.

Many courts have, even when deferring to the government, made findings of fact that are not in the record. Courts should resist this inclination in assessing the risks of terrorism. Examples of the availability heuristic demonstrate that the information a court locates outside of the record supporting assessments of danger, imminence, and likelihood is highly suspect. However, courts should also refrain from seeking out their own information that would suggest lesser risks; such optimistic determinations may also be another form of probability neglect.

In addition to limiting what courts should rely on as findings of fact, courts should take care in how they present their risk assessments. These findings of facts are inevitably, in part, policy judgments, a byproduct of emotions and cultural affinities. Kahan notes critically that invoking empirical evidence (or lack thereof) as the basis for decision is a particular feature of the Supreme Court’s constitutional jurisprudence. It also distinguishes courts’ post-9/11 terrorism decisions. But rather than elicit a perception of objectivity, this approach more often garners criticisms of bad faith and partisanship.

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269 LAWS OF FEAR, supra note __, at 52-53.
270 Kahan, supra note __, at 34.
271 Id. (citing Suzanne B. Goldberg, Constitutional Tipping Point: Civil Rights, Social Change, and Fact-Based Adjudication, 106 COLUM. L. REV. 1955 (2006)).
Courts should therefore openly address the emotional element that may animate their decisions and fact findings underlying their risk assessments.\textsuperscript{272} Terry Maroney contends this sort of transparency ensures that emotions are expressed thoughtfully and deliberately, potentially limiting the initial intuitive System 1 reaction.\textsuperscript{273} Moreover, “judicial emotion disclosure” allows the public to both apprehend and consider “the legitimacy and value of those emotions."\textsuperscript{274}

Kahan suggests that the antidote to opinions written with overstated certainty, is to employ “judicial idioms of aporia.”\textsuperscript{275} What this means practically is that judges should acknowledge in their opinions the complexity of the question before them. A less unequivocal stance will ideally make the decision more palatable to those who oppose the outcome or at least reduce the likelihood that they will receive it with as great hostility and distrust.\textsuperscript{276}

Kahan also recommends that courts engage in affirmation, a process that offers an identity-affirming message to a particular group even while potentially delivering a bad outcome on the primary issue. It might also be characterized as “splitting the difference” or making all sides happy, or unhappy, as the case may be. I am not optimistic about this approach to judicial expression in the post-9/11 context. In trying not to antagonize any segment of the public or the government, a court can write an opinion awash in rhetoric that promises all things to everyone but ultimately delivers little.

Consider Boumediene. Kennedy’s holding that the Suspension Clause reached Guantanamo and that Congress had not provided an adequate substitute was a monumental and controversial decision.\textsuperscript{277} Kennedy did not, however, minimize the significant

\begin{itemize}
\item \textsuperscript{272} See Maroney, supra note __, at 1513-14.
\item \textsuperscript{273} Id. at 1529; Guthrie, supra note __, at 35-36.
\item \textsuperscript{274} Maroney, supra note __, at 1529.
\item \textsuperscript{275} Kahan, supra note __, at 62.
\item \textsuperscript{276} Kahan, supra note __, at 63.
\end{itemize}
and enduring threat of terrorism. And he acknowledged a deficit of expertise and knowledge about the risk of terrorism. Yet he also engaged in fact finding that led to his certain conclusion that judicial involvement would not interfere with the military effort to deter terrorism.

Perhaps trying to win over other members of the Court or allay the public’s fears Kennedy indicated that the scope of the habeas right could be limited. He allowed that “[i]n considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.” And he stressed that his “opinion [did] not address the content of the law that governs [ ] detention.”

Any limitations to habeas and paean to the political branches’ expertise did little to mollify the dissenters, instead leading Scalia and Roberts to accuse Kennedy of “faux deference” and second-guessing the political branches’ judgments on the adverse effect of habeas jurisdiction on the military mission. It also led, in part, to Scalia’s earlier discussed vivid, “fact-based” description of

278 Boumediene, 553 U.S. at 793 (“The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate.”); id. at 795 (commenting “that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent.”).
279 See id. at 797.
280 See id. at 769, 794-95.
281 Id. at 779 (observing “release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.”); id. at 793-94 (explaining there might not be a right to immediate habeas in the case of detentions of foreign citizens abroad, or “domestic exigencies.”); id. at 995-96 (approving of channeling all habeas challenges to one district to ease administrative burdens on the Government and for the district court to use its discretion in accommodating the government’s interests in protecting sources and methods and intelligence gathering).
282 Id. at 796.
283 Id. at 798.
284 Id. at 830 (Scalia, J., dissenting).
285 Id. at 831. Chief Justice Roberts wrote that the majority opinion’s “modest practical results” suggested that the decision was more about asserting judicial supremacy over foreign policy and national security decisions rather than the rights of the detainees. Id. at 801 (Roberts, C.J., dissenting). He forecasted that “the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners’ detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA.” Id. at 802. He further predicted the opinion would only result protracted litigation over the content of the habeas right before the district court and the D.C. Circuit. Id. at 826. On this latter score, he appears to have been clairvoyant.
America’s “war with radical Islamists.”286 The very lack of clarity concerning the habeas right, however, permitted the D.C. Circuit to severely restrict protections for detainees, prompting Judge Tatel to object that that “it is hard to see what is left of the Supreme Court’s command in Boumediene that habeas review be ‘meaningful’”287 Affirmation clearly has its limits.

Moreover, the Court’s subsequent silence in response to every petition for certiorari challenging the D.C. Circuit’s decisions,288 suggests that Kennedy, and perhaps other members of the Boumediene majority, have come to regret the decision. It might be inferred from the Court’s reticence that at least some of the justices now question the findings of fact that judicial involvement will not harm the country’s security interests.289 In “splitting the difference,”-holding the detainees had a constitutional right to habeas but allowing the D.C. Circuit to decide the content of the law-the Court has issued what is effectively a dead letter.290 The result is that the detainees’ judicial review slants entirely in the government’s favor. Moreover, Boumediene appears disingenuous and the Court’s authority “to say what the law is”291 in the post-9/11 world emerges impotent.292

The error of Boumediene is that Kennedy was not sufficiently candid. He sought to craft an opinion that would be all things to all people, that said detainees may enjoy a right to habeas and that no one’s security will suffer. Similarly, Roberts failed in Humanitarian Law Project to afford what was clearly political speech its commensurate strict scrutiny293 and he overstated the

286 Id. at 827-28 (Scalia, J., dissenting).
287 Latif, 666 F.3d at 779 (Tatel, J., dissenting) (quoting Boumediene, 553 U.S. at 783).
288 See Latif v. Obama, 11-1027; Al-Madhwani v. Obama, 11-7020; Al-Alwi v. Obama, 11-7700; Al-Bihani v. Obama, 10-1383; Uthman v. Obama, 11-413; Almerfedi v. Obama, 11-683, and Al-Kandari v. Obama, 11-1054. See Esmail, 639 F.3d at 1078 (Silberman, J., concurring) (criticizing the Court for failing to “tak[e] a case might obligate it to assume direct responsibility for the consequences of Boumediene”).
289 Cf. Latif, 666 F.3d at 764 (“Boumediene’s airy suppositions have caused great difficulty for the Executive and the courts.”)
290 See Esmail, 639 F.3d at 1077 (Silberman, J., concurring) (describing Boumediene as a “theoretical [ ] assertion of judicial supremacy”).
291 Marbury v. Madison, 1 Cranch 137, 177 (1803).
292 I am indebted to Greg Gilchrist for this observation.
293 130 S.Ct. at 2734 (Breyer, J., dissenting) (“[W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications ‘strictly.’”)
imminence of a terrorist attack, imagining how international humanitarian law could be used for terrorist purposes.

Courts should be prepared to acknowledge the complexity of the situation. For example, a court should be willing to acknowledge that it may be impossible to eliminate the risk of terrorism entirely and that a counterterrorism approach that limits civil liberties cannot be justified on such grounds.\textsuperscript{294} Indeed the Israel Supreme Court came close to this sort of admission when it held that the country’s General Security Service could not authorize brutal interrogations.\textsuperscript{295} Chief Justice Aharon Barak acknowledged the potentially harmful consequences in his opinion, revealing that “[t]he possibility that this decision will hamper the ability to deal properly with terrorists and terrorism disturbs us.”\textsuperscript{296} As a branch of the government addressing some of the most consequential and contentious issues that face the nation, courts would do well to issue opinions that do not aggravate group polarization and undermine the public’s trust.\textsuperscript{297} Rather than engage in heated rhetoric or couch their findings as objective truth or empirical facts, judges should reveal their own doubts and difficulty with their analysis. Their candor may facilitate a civic dialogue over the risk we will or will not tolerate.

CONCLUSION

In this Article I have attempted to explain how perceptions of risk, influenced by psychological, social, and cultural biases, affect judges’ decisions about terrorism. These influences offer four insights on what courts have written since the 9/11 attacks.

First, judges resort to fact finding in supporting their decisions that balance the government policies aimed at preventing terrorism and the intrusion on civil liberties. Judges often make findings regarding terrorist threats that are not supported by the evidence in the record. Rather, they are based upon information that is available to them, and ignore the probability of threats actually occurring. As a result judges may derive findings that overstate

\textsuperscript{294} Cf. Industrial Union Department, AFL-CIO v. API, 448 U.S. 607, 645, 650 (1980) (noting “Congress’ express recognition of the futility of trying to make all workplaces totally risk-free.”).

\textsuperscript{295} See HCJ Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, 38 I.L.M. 1471 ([1999] (Isr.)).

\textsuperscript{296} Id. at 1488.

\textsuperscript{297} Kahan, \textit{supra} note ___ at 74.
the risk of a terrorist attack. Judges are particularly susceptible to these System 1 reactions and conclusions because of the violent and vivid nature of the 9/11 attacks.

Second, judges experience difficulty overcoming these intuitive responses because their deliberative reasoning, or System 2, is very much a product or captive of their cultural cognition. For many judges, their cultural worldview is shaped by the attacks. They write opinions in, and about, a “post-9/11 world.” Thus judges engage (often consciously) in balancing that overstates the harm from a terrorist attack, its probability, and its imminence. Courts also consequently engineer evidentiary standards in their balancing to favor government counterterrorism policies.

Third, judges tend to defer to government positions and interpretations of evidence not only in cases involving military, intelligence or international matters, but increasingly in domestic and criminal cases involving terrorism or the threat of terrorism. This is particularly problematic because of the indefinite threat of terrorism and the then potentially permanent skewing of traditional constitutional protections.

Fourth, judges often intend for their fact findings to provide empirical objectivity to their assessments of terrorist threats. Ironically—and inevitably—even when courts purport to defer to the government on the ground that they are unable to assess terrorism risks, they still engage in such fact finding. Cloaking an opinion’s risk assessment in empirical certainty does a disservice to the public discussion and engagement over terrorism and how we should balance preventative measures and civil liberties.

In light of this understanding of post-9/11 jurisprudence, I recommend prescribing evidentiary standards and burdens of proof that favor those persons or groups whose civil liberties may be curtailed by government policies. This weighting is necessary to counter the biases of the government, experts, and judges, who all tend to overweight the potential harm, overstate probability, and presume imminence. Courts must also scrutinize carefully the inferences the government purports to draw from evidence that it claims support intrusions on civil liberties. This is particularly necessary when only minority groups’ liberties are targeted. Generalization or speculation cannot suffice. Finally, courts should fully disclose their uncertainty over their own risk
assessments. Such candor will better inform the political branches and the public of how judges actually balance security and liberty.