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PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD

Avidan Y. Cover[†]

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 are apt to defer to the government and require less evidence in support of measures that curtail civil liberties. This Article explores the body of behavioral applied science on biases and cognitive errors and examines 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.

TABLE OF CONTENTS

INTRODUCTION	1417
I. ERRORS IN RISK ASSESSMENTS	1421
A. <i>System 1 and System 2</i>	1421
B. <i>Availability and Affect Heuristics</i>	1422

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C.	<i>Probability Neglect</i>	1425
D.	<i>Cultural Cognition</i>	1427
E.	<i>Judicial Susceptibility to Errors</i>	1428
II.	POST-9/11 JUDICIAL RISK ASSESSMENTS	1430
A.	Holder v. Humanitarian Law Project	1431
B.	<i>The “Post-9/11 World”</i>	1435
C.	<i>Common Sense and System 1 Thinking About Terrorism</i>	1438
D.	<i>The Availability Heuristic Post-9/11</i>	1440
III.	RISK AVERSION AND THE PRESUMPTION OF IMMINENCE	1442
A.	<i>Historical Examples of Presumed Imminence</i>	1443
B.	<i>Special Needs Cases</i>	1445
C.	<i>Terrorism Hypotheticals</i>	1447
D.	<i>Post-9/11 Worst-Case Scenarios</i>	1448
E.	<i>Lack of Exigency as a Basis for Judicial Review</i>	1450
IV.	THE INADEQUACY OF DEFERENCE IN THE POST-9/11 WORLD	1452
V.	REVISING JUDICIAL REVIEW IN THE POST-9/11 WORLD.....	1458
A.	<i>Adjusting Sunstein’s Framework</i>	1458
B.	<i>Full Disclosure</i>	1464
	CONCLUSION.....	1468

[I]t 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*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

¹ 274 U.S. 357, 379 (1927) (Brandeis, J., concurring), *overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

² 130 S. Ct. 2705, 2728 (2010).

When we are dealing with detainees, candor obliges me to admit that one can not 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*³

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

Don DeLillo⁴

INTRODUCTION

It is difficult—if not impossible—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 11th 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 this failure of imagination, the pendulum has swung in the other direction.

The threat of terrorism now summons a post-9/11 impression that although terrible harm may be uncertain, we must act as though it is imminent. Such thinking is a variant of the Precautionary Principle, which Cass Sunstein describes as the idea 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.”⁷ But the post-9/11 presumption of imminence differs from the Precautionary Principle in that it addresses matters that generally defy quantifiable risk assessment.⁸ Action, as the

³ 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring).

⁴ Don DeLillo, *In the Ruins of the Future: Reflections on Terror and Loss in the Shadow of September*, HARPER’S MAG., Dec. 2001, at 39.

⁵ Risk assessment may be reduced most crudely to the following equation: *Risk = (Harm Caused by Attack) x (Probability of Attack)*. See JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY 24 (2011).

⁶ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 339 (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>. The 9/11 Commission recommended taking steps that would “institutionalize imagination,” as well as structure better intelligence management, intelligence sharing between agencies, and a “preventive counterterrorism posture.” *Id.* at 346, 399–419, 425.

⁷ CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 19 (2005) (internal quotation marks omitted).

⁸ I am indebted to Juscelino Colares for his emphasizing the distinction between risk and uncertainty to me. In addressing threats that are uncertain—and therefore do not permit statistical evaluation—courts are even more likely to succumb to their own intuitions and

thinking goes, may be taken to address a perceived terrorism-related problem on the slightest reed of evidence.

This mindset explains, for example, the capacious definition of imminence that the government purportedly relies on as part of its legal justification of targeted killings of American citizens.⁹ Due to the uncertainty of the harm and the likelihood of the risk of a terrorist attack, policymakers reduce evidentiary requirements and expand definitions of imminence in order to justify counterterrorism measures.¹⁰ No one wants to be wrong again.¹¹ This post-9/11 heuristic¹² 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.¹³ This governing regime “is increasingly statistically oriented, ex ante and preventative, rather than focused on deterrence and ex post prosecution of individual wrongdoing.”¹⁴ In this system, advances in technology and globalization may erode distinctions between international and domestic spheres.¹⁵ The blurring of military, intelligence, and criminal lines also wreaks havoc with previously understood standards of proof, suspicion, and

biases. Of course, even when statistical evaluation might be available, courts’ findings may be influenced by the same cognitive errors.

⁹ See DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 7 [hereinafter DEP’T OF JUSTICE WHITE PAPER], available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (“[T]he condition that an operational leader present an ‘imminent’ threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons will take place in the immediate future. . . . [T]he threat posed by al-Qa’ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate.”).

¹⁰ *Id.*

¹¹ See HARVEY MOLOTCH, AGAINST SECURITY: HOW WE GO WRONG AT AIRPORTS, SUBWAYS, AND OTHER SITES OF AMBIGUOUS DANGER 8 (2012) (describing security planners’ sentiment that they must act regardless of whether they understand risk).

¹² In this Article, I explore the notion of a post-9/11 world as a heuristic, which affects the way courts and others perceive risks, much in the same manner as Mary Dudziak discusses wartime as a heuristic. See MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012). Dudziak explains that the “wartime” heuristic is “a shorthand, invoking the traditional notion that the times are both exceptional and temporary.” *Id.* at 107. She argues that “wartime” is a form of cultural framing that may be used to justify government expansion, “rather than an inevitable feature of our world.” *Id.* at 136.

¹³ Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 15 (2008); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

¹⁴ Balkin, *supra* note 13, at 11.

¹⁵ See *id.* at 19–20 (noting that the government can justify domestic surveillance on the basis of foreign intelligence collection).

evidence.¹⁶ The preventative emphasis sets the foundation for “a parallel track of preventative law enforcement”—Guantanamo, extraordinary renditions, torture—that evades constitutional rights protections.¹⁷ Moreover, the parallel track can creep into established criminal law enforcement and distort the traditional protections afforded in that realm.¹⁸

The Supreme Court has directly addressed several 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.¹⁹

Richard Fallon points out that the Court has not acted in a significant number of areas, including military movements in counterterrorism operations, state secrets, and detainee abuse, nor has it ordered the release of a detainee.²⁰ Fallon attributes this 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.²¹

This Article offers another explanation for the Court’s deference: The Justices are afraid. They are afraid of terrorism. They are afraid of

¹⁶ See *id.* at 15–16 (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*, NEW YORKER, May 14, 2012, at 46 (describing evolution of military drone use to domestic law enforcement).

¹⁷ Balkin, *supra* note 13, at 15; see also DANA PRIEST & WILLIAM 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).

¹⁸ Balkin, *supra* note 13, at 16.

¹⁹ Although the opinions assuredly mark a territorial role for the courts in the post-9/11 world, they offer more heat than light. Stephen Vladeck has observed that the opinions derive from separation of powers structural principles, rather than from the Bill of Rights. Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 127–30 (2011). Jenny Martinez has similarly observed that the decisions are more procedural than substantive, offering little insight on the nature of detainees’ rights. Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1014–15 (2008). The decisions also provide minimal guidance even as to process, relegating many of the decisions on the details to lower courts and to the political branches. See Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 163–66 (2012); Vladeck, *supra*, at 130.

²⁰ Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 367 (2010) (characterizing the Court’s opinions as addressing “the margins of the United States’s War on Terror policy”). The Court’s avoidance of counterterrorism issues is also reflected in the Court’s 5-4 decision holding lawyers and human rights advocates lacked standing to challenge § 702 of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a (Supp. II 2008), finding their injury speculative and self-created. See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).

²¹ Fallon, *supra* note 20, at 363–70; see also Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1411, 1422, 1428 (2009) (noting “accountability and legitimacy concerns” in some factual judgments and the potential institutional fallout for the Court).

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.

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.

Part I of this 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 I builds on Sunstein's focus on cognitive errors in his *Laws of Fear: Beyond the Precautionary Principle*, and looks at other scholars' critiques of that account by also reviewing social and cultural influences that affect a person or a judge's perception of risk. Part II then examines various court opinions to explore how these errors and influences manifest. Part III examines a number of ways in which courts articulate and rationalize their intuitive aversion to risk—their fears—through legal reasoning. Judges transform biases, such as probability neglect, into parts of their deliberative judgments—expressed as hypothetical scenarios, reduced standards of evidence, and legal analyses, such as the special needs doctrine. Next, Part IV addresses—and ultimately rejects—judicial deference as a means of adapting to the concomitant errors of judicial review of terrorism-related matters. Finally, Part V proposes solutions that will enable judges to better 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 judicial biases that ignore probability. In addition, judges should resist writing in terms of certainty, but should instead candidly disclose their uncertainty and anxiety over terrorism threats.

I. ERRORS IN RISK ASSESSMENTS

The past few decades have witnessed an upsurge of research on biases in judgments, decisions, and choices.²² Scholars cutting across the fields of economics and psychology, referred to collectively as applied behavioral science,²³ have found that our intuitive thinking, or “System 1,” is far more influential in reaching decisions than is commonly thought.²⁴ Our deliberative faculties, “System 2,” while able to moderate our more instinctive judgments, are often still influenced by these first impressions.²⁵ 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 the operations of System 1 and System 2 in our thinking. I then recount some of the biases that Cass Sunstein and others have catalogued that are most likely to affect judges’ decisions regarding terrorism. This Part then explores how peoples’ perceptions are also shaped by their cultural and social affiliations and identity. Finally, this Part examines the growing body of literature that documents how policy makers and judges are not immune from the influence of cognitive errors and other influences.²⁶

A. *System 1 and System 2*

Psychologists divide our ways of thinking into two primary methods: System 1 and System 2.²⁷ System 1 describes our “automatic”

²² See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); PAUL SLOVIC, THE PERCEPTION OF RISK (2000); THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY (Eldar Shafir ed., 2013); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

²³ “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* to THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY, *supra* note 22, at ix.

²⁴ KAHNEMAN, *supra* note 22, at 21–22.

²⁵ *Id.* at 103–04, 415.

²⁶ This Article considers judges as policy makers. Their decisions help shape policies; the decisions themselves are not simply statements of fact or law, but invariably reflect views on policies. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1954–55 (2011) (Scalia, J., dissenting) (describing role of judges’ policy preferences in making decisions); Paul Brest, *Quis Custodiet Ipsos Custodes?: Debiasing the Policy Makers Themselves*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY, *supra* note 22, 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).”).

²⁷ KAHNEMAN, *supra* note 22, at 20–21.

mode of thinking, which is based on “impressions, intuitions, intentions, and feelings.”²⁸ System 2, on the other hand, describes a more complex manner of thinking; one that entails greater concentration and conscious reasoning.²⁹

Some aspects of System 1 are innate or reflexive, such as the recognition of an object or the fear of an animal.³⁰ Other System 1 functions may be learned, such as simple mathematical equations like “ $2 + 2 = 4$ ” or basic facts such as “thinking of Paris when the capital of France is mentioned.”³¹ This automatic and impulsive sort of thinking is critical to getting through many activities without too much exertion.³² But System 1 thinking is also distinguished by irrational responses to stimuli, confirmation bias, heuristics, and probability neglect.³³

System 2 thinking comes into play when activities demand greater attention, such as a more involved mathematical equation like “ 17×24 ,” or evaluating a complex logical argument.³⁴ In some instances, System 2 controls the impulses of System 1, or acts as a filter of System 1, preventing potentially inaccurate or foolish decisions.³⁵ But System 2 also inevitably builds on the impressions of System 1, turning them into beliefs and judgments.³⁶ However, people often try to hide, or do not believe, or are unaware, that their reasoned decisions are the product of impulsive reactions.³⁷ Thus, System 2 may sometimes act as “an apologist for System 1,” leading to decisions predicated on biases and other cognitive errors.³⁸ The next few sections examine these cognitive errors in greater detail.

B. *Availability and Affect Heuristics*

In analyzing risks, people often resort to what is available to them in trying to understand or make their assessment.³⁹ This mode of thinking is referred to as the “availability heuristic.”⁴⁰ Specifically,

²⁸ *Id.* at 24.

²⁹ *Id.* at 21–22.

³⁰ *Id.* Daniel Kahneman provides a helpful list of examples of automatic System 1 activities, which include detecting hostility in a voice and reading words on billboards. *Id.* at 21, 105 (listing characteristics of System 1).

³¹ *Id.* at 22.

³² *See id.* at 416 (“System 1 is indeed the origin of much that we do wrong, but it is also the origin of most of what we do right—which is most of what we do.”).

³³ *See id.* at 105.

³⁴ *Id.* at 22–23 (listing examples of System 2 operations).

³⁵ *Id.* at 24–25, 415.

³⁶ *Id.*

³⁷ *Id.* at 21, 415–17.

³⁸ *Id.* at 415.

³⁹ Tversky & Kahneman, *supra* note 22, at 1127.

⁴⁰ KAHNEMAN, *supra* note 22, at 129–35; SUNSTEIN, *supra* note 7, at 36.

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.⁴¹

People also make decisions about an activity's risks based on their positive or negative feelings about an activity.⁴² This sort of reasoning is called the affect heuristic.⁴³ Thus, a person who has a negative reaction about a particular course of conduct is likely to ascribe other negative qualities to the action 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.⁴⁴

While familiarity will influence what is available to people in how they assess risk, Sunstein notes, so too will the salience of an event.⁴⁵ 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.⁴⁶ Similarly, the more vivid or detailed the description of the possible harm, the more likely people are to believe it will come to fruition.⁴⁷

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

⁴¹ See, e.g., Brest, *supra* note 26, 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* 179–80 (2009) (describing the “Summer of the Shark” in 2001).

⁴² Ian Bateman, Sam Dent, Ellen Peters, Paul Slovic & Chris Starmer, *The Affect Heuristic and the Attractiveness of Simple Gambles*, in PAUL SLOVIC, *THE FEELING OF RISK: NEW PERSPECTIVES ON RISK PERCEPTION* 3, 4 (2010).

⁴³ *Id.*; see also KAHNEMAN, *supra* note 22, at 103, 138–40.

⁴⁴ See, e.g., KAHNEMAN, *supra* note 22, at 103 (describing how “political preferences” and “emotional attitude” influence views on benefits and risks).

⁴⁵ See SUNSTEIN, *supra* note 7, at 37.

⁴⁶ See *id.*

⁴⁷ *Id.* Sunstein discusses a study that illustrates this point. *Id.* at 38 (citing Stephen J. Sherman et al., *Imagining Can Heighten or Lower the Perceived Likelihood of Contracting a Disease: The Mediating Effect of Ease of Imagery*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 82 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002)). Researchers had subjects read a description of an illness that was spreading across a campus. *Id.* One group received a description of the symptoms that was easy to understand and imagine while another group received a description of the symptoms that was vague and difficult to imagine. *Id.* The subjects were asked to write an account of what it would feel like if they had the illness. *Id.* The participants were then told to assess on a one to ten point scale the probability of getting the illness. *Id.* Those receiving the more comprehensible symptoms were far more likely to believe they would contract the illness. *Id.* at 38–39.

consciousness.⁴⁸ 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 and the media continually reported to the public that there was an elevated, or higher, risk of a terrorist attack.⁴⁹ 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 “an elevated significant risk of terrorist attacks” from the time of the program’s inception until it was replaced in 2011.⁵⁰ Critics of the color-coded threat levels often complained that the system only stoked anxiety without providing substantive information.⁵¹

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.⁵²

The almost permanently etched and horrific imagery of the attacks is as fertile ground as there is for the availability and affect heuristics.⁵³

⁴⁸ A study conducted by “[t]elevision researcher Nielsen and Sony Electronics” found that “[w]atching news coverage of the September 11 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, 2:53 PM), <http://www.reuters.com/article/2012/07/11/entertainment-us-memorablenoments-idUSBRE86A0EG20120711>.

⁴⁹ Brigitte L. Nacos, Yaeli Bloch-Elkon & Robert Y. Shapiro, *Post-9/11 Terrorism Threats, News Coverage, and Public Perceptions in the United States*, 1 INT’L J. CONFLICT & VIOLENCE 105, 111–14 (2007).

⁵⁰ David Kravets, *Color-Coded Threat Level Advisory Under Attack*, WIRED.COM (Sept. 16, 2009, 3:17 PM), <http://www.wired.com/threatlevel/2009/09/threatleveladvisory>; see also Pierre Thomas & Jason Ryan, *DHS to Scrap Color Code Terror Alerts by April*, ABC NEWS (Jan. 26, 2011), <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. U.S. DEP’T OF HOMELAND SEC., NTAS GUIDE: NATIONAL TERRORISM ADVISORY SYSTEM PUBLIC GUIDE 2 (Apr. 2011), available at <http://www.dhs.gov/xlibrary/assets/ntas/ntas-public-guide.pdf>. The new system will purportedly issue alerts only “when credible information is available.” *Id.* 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.” *Id.* 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. *Id.* at 4. The alert is “[i]mmminent, if [DHS] believe[s] the threat is impending or very soon.” *Id.*

⁵¹ Thomas & Ryan, *supra* note 50; see also Kravets, *supra* note 50. To be sure, the program also lost the public’s confidence and people grew largely indifferent to the alert system as well. See *id.*

⁵² DeLillo, *supra* note 4, at 33.

⁵³ 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

C. Probability Neglect

Probability neglect refers to peoples' tendency to disregard the likelihood of an event, particularly when the feared event evokes powerful feelings.⁵⁴ Again, as with the availability heuristic, events that can be readily associated with images that elicit strong emotional reactions 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.⁵⁵

Consider the following study's findings: "[W]hen people are asked how much they will pay for flight insurance for losses resulting from 'terrorism,' they will pay more than if they are asked how much they will pay for flight insurance from all causes."⁵⁶ The specter of terrorism and the emotional wallop it entails leads people to make significant judgments in error regarding the likelihood of certain harms.⁵⁷ 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.⁵⁸

What are termed "dread risks," "worst-case scenarios," or "low-probability, high-consequence events," powerfully impact human behavior.⁵⁹ Consider that in the three months after the 9/11 attacks occurred, numerous Americans stopped flying and a good proportion of those people chose to drive instead.⁶⁰ Flying remains, even with the

eager—to use a biological, or chemical, or a nuclear weapon." *Bush: Don't Wait for Mushroom Cloud*, CNN.COM/INSIDE POL. (Oct. 8, 2002, 10:47 AM), <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% of Americans believed Iraq was responsible for the 9/11 attacks. Amy Gershkoff & Shana Kushner, *Shaping Public Opinion: The 9/11-Iraq Connection in the Bush Administration's Rhetoric*, 3 PERSP. ON POL. 525, 533 (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.

⁵⁴ SUNSTEIN, *supra* note 7, at 39, 64–67. As Sunstein notes, probability neglect may skew people's judgments whether the outcome is one feared or hoped for. *Id.* at 39. For example, a person ignores the small likelihood of winning when he buys a lottery ticket. *See id.*

⁵⁵ *Id.* at 39, 86 (discussing "affect heuristic"); *see also* KAHNEMAN, *supra* note 22, at 103, 139–40.

⁵⁶ SUNSTEIN, *supra* note 7, at 40 (citing Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35 (1993)).

⁵⁷ *See id.*

⁵⁸ *Id.* (citing A.S. Alkahami & Paul Slovic, *A Psychological Study of the Inverse Relationship Between Perceived Risk and Perceived Benefit*, 14 RISK ANALYSIS 1085, 1086, 1094 (1994)).

⁵⁹ SUNSTEIN, *supra* note 7, at 65; Gerd Gigerenzer, *Dread Risk, September 11, and Fatal Traffic Accidents*, 15 PSYCHOL. SCI. 286, 286–87 (2004).

⁶⁰ Gigerenzer, *supra* note 59, at 286–87.

specter of terrorism, a far less risky endeavor than driving.⁶¹ Yet, people disregarded this fact. The increase in road traffic led to 353 more fatalities nationwide “in the last [three] months of 2001” when compared to the last quarter of the preceding five years, 1996–2000.⁶²

Also at work here may be an 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 overweigh[] the value of a high risk judgement.”⁶³

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 lesser risk of dying than those surveyed a few weeks after the attacks.⁶⁴ Specifically, respondents believed there was a 34.62% chance of dying by a tornado before 9/11, but the perception of such a risk increased to 64.33% after the attacks.⁶⁵ The perceived risk of dying by earthquake increased from 24.64% to 41.94%.⁶⁶

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 penalty.⁶⁷ Faced with a 1%, 99%, or 100% risk of shock, participants’ median willingness to pay ranged from \$7 to avoid the 1% risk to \$10 to avoid the 99% risk.⁶⁸ In contrast, the willingness to pay to avoid the \$20 penalty ranged from \$1 to avoid the 1% chance to \$18 to avoid the 99% chance.⁶⁹ The results demonstrate that people are willing to pay a lot to avoid the low probability of an “affect-rich outcome,” but that their

⁶¹ See GARDNER, *supra* note 41, at 3 (comparing a “1-in-135,000 chance of being killed in a[n airplane] hijacking” to a “1-in-6,000 [chance] of being killed in a car crash”).

⁶² Gigerenzer, *supra* note 59, at 286–87.

⁶³ SUNSTEIN, *supra* note 7, at 82 (quoting W. Kip Viscusi, *Alarmist Decisions with Divergent Risk Information*, 107 *ECON. J.* 1657, 1668 (1997)).

⁶⁴ Bonnie L. Halpern-Felsher & Susan G. Millstein, *The Effects of Terrorism on Teens’ Perceptions of Dying: The New World Is Riskier than Ever*, 30 *J. ADOLESCENT HEALTH* 308, 310 (2002).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ SUNSTEIN, *supra* note 7, at 76–77 (discussing Yuval Rottenstreich & Christopher K. Hsee, *Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk*, 12 *PSYCH. SCI.* 185 (2001)).

⁶⁸ Rottenstreich & Hsee, *supra* note 67, at 188.

⁶⁹ *Id.*

willingness to pay does not vary greatly with the probability of the occurrence of the event.⁷⁰

Similarly, even when the risks of a high outrage occurrence such as nuclear waste radiation, and a low outrage 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.⁷¹ 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.⁷²

Based on the empirical literature, Sunstein concludes that experts are better placed than ordinary people to make risk assessment because the former are more rational and aware of the relevant facts.⁷³ He stresses that it is “irrationality, not a different set of values,” that explains the gulf in risk assessments.⁷⁴

D. 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.⁷⁵ They call this inclination “cultural cognition.”⁷⁶ Disputing Sunstein’s contention that risk may be objectively evaluated, Kahan and his co-authors argue that people match their evaluations of risk to their conception of an “ideal society.”⁷⁷ Given this conception of risk as subjective, they conclude risk is something that should be publicly deliberated, rather than limited to expert analysis and resolution.⁷⁸

One way in which people may process information is through “identity-protective cognition.” Identity-protective cognition is a type of

⁷⁰ *Id.* at 188–89.

⁷¹ See SUNSTEIN, *supra* note 7, at 80 (discussing Peter M. Sandman et al., *Communications to Reduce Risk Underestimation and Overestimation*, 3 J. RISK DECISION & POL’Y 93 (1998)). When dealing with “outrage” risks, people react the same, even if the difference in risk is between 1-in-100,000 and 1-in-1,000,000. *Id.*

⁷² See William J. Burns & Paul Slovic, *Predicting and Modeling Public Response to a Terrorist Strike*, in SLOVIC, *supra* note 42, at 285, 293–97, 302.

⁷³ See SUNSTEIN, *supra* note 7, at 85–87.

⁷⁴ *Id.* at 86.

⁷⁵ Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) (book review).

⁷⁶ *Id.* at 1072–73, 1083–88; Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 23 (2011).

⁷⁷ Kahan, Slovic, Braman & Gastil, *supra* note 75, at 1072, 1105 (discussing MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* 36 (1982)); see also KAHNEMAN, *supra* note 22, at 140–45 (discussing implications for the role of experts in light of the debate over risk as either a product of culture or as reducible to objective criteria).

⁷⁸ See Kahan, Slovic, Braman & Gastil, *supra* note 75, at 1105–06.

reasoning that impels people to think and decide in a manner that affirms their membership in a social group.⁷⁹ This may take the form of a search for information that supports the positions of their group identity.⁸⁰ People are also inclined to dismiss information that challenges the positions of their group.⁸¹ 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.⁸²

Cultural cognition also helps explain the availability heuristic, the affect heuristic, and probability neglect.⁸³ Cultural worldviews can explain what is available to people and what they view as negative or positive, thus shaping how their biases tilt and how they forecast the likelihood of particular events.⁸⁴

E. *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.⁸⁵ 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.⁸⁶ Other studies evidence judges' tendencies to respond intuitively to numeric anchors. In one study, German judges were given a description of a shoplifter and then rolled loaded dice that

⁷⁹ Kahan, *supra* note 76, at 20; *see also* Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 271–79 (2012) (discussing the roles of identity and social identity in the war on terror).

⁸⁰ Kahan, *supra* note 76, at 21.

⁸¹ *Id.* Identity-protective cognition is not only exhibited by “emotional” or “affective” right brain thinkers. *Id.* People who are reflective and deliberate in their judgments, or are 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 22, at 80–81.

⁸² Kahan, *supra* note 76, at 22.

⁸³ Kahan, Slovic, Braman & Gastil, *supra* note 75, at 1084–85.

⁸⁴ *Id.*

⁸⁵ *See, e.g.*, Brest, *supra* note 26, 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).

⁸⁶ Guthrie, Rachlinski & Wistrich, *supra* note 85, at 17; *see also* Brest, *supra* note 26, 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).

would land on either a three or a nine.⁸⁷ Judges who rolled a nine said they would sentence the shoplifter to an average of eight months, whereas those who rolled a three recommended a five-month sentence.⁸⁸

Additional studies found judges likely to react emotionally to evaluations of statistical evidence and assess conduct after learning of outcomes associated with that conduct, which leads to erroneous or unjust results.⁸⁹ Other studies have found that in areas where predictions are often inaccurate, judges may “over-rely on their intuitions.”⁹⁰ Still another study found that extraneous influences, such as a late morning snack or lunch, could lead to more favorable rulings by judges.⁹¹

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 appellate decisions as well. For example, appellate judges may rely on System 1 thinking and intuition in choosing how to vote immediately after argument. Thereafter, writing the opinion is a System 2 exercise in justifying a particular outcome, notwithstanding the possibility of the judge’s change of heart or mind.⁹²

Paul Brest argues that appellate courts’ legislative fact-finding—determining facts that support particular regulations or acts—is equally susceptible to availability and affect biases.⁹³ He suggests that judges’ lack of training in statistics renders them more prone to errors in probability determinations.⁹⁴ Brest 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.”⁹⁵

⁸⁷ KAHNEMAN, *supra* note 22, at 125–26 (discussing Birte Englich, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 188–200 (2006)).

⁸⁸ *Id.*

⁸⁹ Guthrie, Rachlinski & Wistrich, *supra* note 85, at 19, 43; *see also* Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1494–1501 (2011) (reviewing literature on the impact of emotion on judicial decision making).

⁹⁰ Brest, *supra* note 26, at 485 (citing Robyn M. Dawes, David Faust & Paul E. Meehl, *Clinical Versus Actuarial Judgment*, 243 SCI. 1668 (1989)).

⁹¹ Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PNAS 6889 (2011).

⁹² *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING 128 (2013) (characterizing the judge’s confidence in his decision as a “common self-delusion”).

⁹³ Brest, *supra* note 26, at 486.

⁹⁴ *Id.*

⁹⁵ *Id.* at 487. Although there have been no empirical studies examining the impact of

Many judges may cling to the principle or belief that their decisions withstand the influence of System 1 thinking or other external considerations, but individual accounts by appellate judges indicate that emotions inevitably affect and influence their reasoning.⁹⁶ Judge Richard Posner contends that it is impossible “to judge without biases.”⁹⁷ Posner argues these biases or “priors” influence all judges, including at the appellate level, in their weightings of evidence and assessments of probability.⁹⁸ Judge Alex Kozinski also acknowledges the presence and potential influence of emotions and biases, but suggests that a judge can overcome them through thoughtful deliberation.⁹⁹ Posner proposes that “[t]hrough self-awareness and discipline a judge can learn not to allow his sympathies or antipathies to influence his judicial votes—unduly.”¹⁰⁰ 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.

II. POST-9/11 JUDICIAL RISK ASSESSMENTS

Many judicial opinions invoke the “post-9/11 world” in upholding measures taken in connection with airport security,¹⁰¹ subway

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 75, at 24, 27–28.

⁹⁶ POSNER, *supra* note 92, at 129–30 (“Many judges would say that nothing outside ‘the law,’ in the narrow sense that confines the word to the texts of formal legal documents, influences *their* judicial votes at all. Some of them are speaking for public consumption, and know better. Those who are speaking sincerely are fooling themselves.”); *see also* Maroney, *supra* note 89, at 1497–98; Linda Greenhouse, Op-Ed., *When Judges Don’t Know Everything*, N.Y. TIMES (Oct. 30, 2013), <http://www.nytimes.com/2013/10/31/opinion/greenhouse-when-judges-dont-know-everything.html>.

⁹⁷ POSNER, *supra* note 92, at 129. While insisting that judges are invariably influenced by emotions, Posner also argues that feelings elicited by the facts of a case can be a good basis for a decision. *See id.*; RICHARD A. POSNER, *HOW JUDGES THINK* 106 (2008).

⁹⁸ POSNER, *supra* note 92, at 130.

⁹⁹ Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 997–98 (1993); *see also* Maroney, *supra* note 89, at 1508–31 (discussing approaches to integrating emotions in judicial decision making). *But see* Cynthia McPherson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 161 (2006) (conducting experiments showing that greater deliberation actually firms up pre-existing unconscious biases); Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 11 (2009) (discussing McPherson Frantz’s studies).

¹⁰⁰ POSNER, *supra* note 92, at 130. Posner notes that the qualification of “unduly” bears emphasis. *See id.* It is in the context of highly emotional and potentially consequential cases, such as those concerning terrorism, however, that System 1 and its concomitant biases are likely to exert “undue” influence on even appellate judges.

¹⁰¹ *See* United States v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007) (en banc); State v. Rabb, 920

searches,¹⁰² restrictions on political speech at political conventions,¹⁰³ and immigration decisions.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. Holder v. Humanitarian Law Project

*Holder v. Humanitarian Law Project*¹⁰⁵ presents the Supreme Court's fullest discussion of risk assessment and fact-finding concerning terrorism. In this pre-enforcement challenge to the material 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.¹⁰⁶ 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.”¹⁰⁷ The plaintiffs were human rights advocates who wanted to teach international humanitarian and human rights law to two designated foreign terrorist organizations, Partiya

So. 2d 1175, 1189 (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.”); *Kjohede 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 at 960)).

¹⁰² See *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006).

¹⁰³ See *Marcavage v. City of New York*, 689 F.3d 98, 105 (2d Cir. 2012); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 18–19 (1st Cir. 2004) (Lipez, J., concurring).

¹⁰⁴ See *Safadi v. Howard*, 466 F. Supp. 2d 696, 701 (E.D. Va. 2006) (holding that the court lacked jurisdiction over government processing of adjustment to permanent residence status applications and that a four-year delay may be reasonable in light of security concerns “in this post-9/11 world”); see also *Ma v. Rice*, Nos. 8-CV-14008, 08-CV-14009, 2009 WL 160288, at *6 (E.D. Mich. Jan. 22, 2009) (collecting cases finding that the U.S. Citizenship & Immigration Services (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 *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1146–47 (D. Ariz. 2008) (collecting cases rejecting 9/11 attacks as sole basis for denial of review).

¹⁰⁵ 130 S. Ct. 2705 (2010).

¹⁰⁶ *Id.* at 2725–30. 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.

¹⁰⁷ 18 U.S.C. § 2339B(a)(1) (2012).

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.¹⁰⁸ 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” within the statute.¹⁰⁹

In undertaking the First Amendment analysis, Chief Justice Roberts, in his majority opinion, did not apply strict scrutiny.¹¹⁰ 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.¹¹¹ Instead he applied “a more demanding standard” than that required by the conduct standard in *United States v. O’Brien*.¹¹²

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.”¹¹³ Roberts explained that he was deferring to the political branch’s determinations because the case “implicates sensitive and weighty interests of national security and foreign affairs.”¹¹⁴ 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.”¹¹⁵

Roberts reasoned that deference to the government’s conclusions was also appropriate because terrorism presented a context involving

¹⁰⁸ *Humanitarian Law Project*, 130 S. Ct. at 2713.

¹⁰⁹ *Id.* at 2714.

¹¹⁰ 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.

¹¹¹ *Id.*

¹¹² *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)) (citing *United States v. O’Brien*, 391 U.S. 367 (1968)).

¹¹³ *Id.*

¹¹⁴ *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.” *Cohen*, 403 U.S. at 16. 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. *Humanitarian Law Project*, 130 S. Ct. at 2728 (quoting *Cohen*, 403 U.S. at 25). Here, in contrast, Roberts explained, the political branches were “uniquely positioned” to distinguish between what will, and will not, aid terrorism and harm foreign relations. *Id.*

¹¹⁵ *Humanitarian Law Project*, 130 S. Ct. at 2727 (quoting *Boumediene v. Bush*, 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.’” (alteration in original) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981))).

“efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.”¹¹⁶ Moreover, “the material-support statute is, on its face, a preventive measure” that does not criminalize terrorist attacks, but criminalizes the aid that increases the probability of the attacks.¹¹⁷ 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 in the puzzle before we grant weight to its empirical conclusions.¹¹⁸

Roberts held that the government’s conclusions merited “significant weight” and were sustained by “persuasive evidence.”¹¹⁹ He concluded that the teaching intended to promote lawful and peaceful ends was “fungible” because it “free[d] up other resources within the organization that may be put to violent ends.”¹²⁰ He also determined that the advocates’ teaching and communication about international law and the United Nations could legitimize, and therefore assist, terrorist acts.¹²¹ Such legitimacy could facilitate recruitment of members and the increase of funds in support of terrorist acts.¹²²

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.”¹²³ 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.¹²⁴ The government

¹¹⁶ *Id.* at 2727.

¹¹⁷ *Id.* at 2728.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2725.

¹²¹ *Id.*

¹²² *Id.* 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.

¹²³ *Id.* at 2729. 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 (1919); *Abrams v. United States*, 250 U.S. 616 (1919)).

¹²⁴ *Id.* at 2729 (majority opinion) (citing ALIZA MARCUS, *BLOOD AND BELIEF: THE PKK AND THE KURDISH FIGHT FOR INDEPENDENCE* 286–95 (2007)); see also *id.* at 2738 (Breyer, J., dissenting) (criticizing reliance on this book and emphasizing its limited relevance).

neither made this argument nor was the book a part of the record.¹²⁵ But defending his hypothesized danger, Robert explained, “[t]his possibility is real, not remote.”¹²⁶

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.¹²⁷ But Breyer disputed that 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 legitimize the PKK.¹²⁸ Roberts’s “general and speculative” arguments could not justify infringement of the First Amendment.¹²⁹

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[.]¹³⁰

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.”¹³¹

Humanitarian Law Project never references the “war on terror,”¹³² “Al Qaeda,”¹³³ or “September 11.” But the majority opinion evidences a

¹²⁵ See *id.* at 2738. 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 (majority opinion). That determination ignored, however, clear statements by 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).

¹²⁶ *Id.* at 2729 (majority opinion).

¹²⁷ *Id.* at 2739 (Breyer, J., dissenting) (citing *Whitney v. California*, 274 U.S. 357, 378–79 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 2738.

¹³¹ *Id.* at 2739–40 (internal quotation marks omitted).

¹³² 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, *supra* note 12, 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. See *id.*

¹³³ 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. Transcript of Oral Argument at 22–24, *Humanitarian Law Project*, 130 S. Ct. 2705 (No. 08-1498). Cole suggested the matter might be different if these groups were involved

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 differing worldviews, or their own distinct cultural cognition.¹³⁴ 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.”¹³⁵ Breyer, explained Roberts, was naïve; he failed to understand how training in international law might be exploited by terrorist groups.¹³⁶

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.”¹³⁷

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 and System 1 influences.

B. *The “Post-9/11 World”*

In *Bl(a)ck Tea Society v. City of Boston*,¹³⁸ the First Circuit addressed restrictions imposed by the city of Boston on protesters at the 2004 Democratic National Convention.¹³⁹ The city confined protesters to a “demonstration zone,” which amounted to a chain link and mesh 90 feet by 300 feet “enclosed space” or “a pen.”¹⁴⁰ The court affirmed the district court’s denial of a motion for preliminary injunction seeking modification of the zone.¹⁴¹ Though the majority did not refer to the 9/11 attacks as a factor in its decision,¹⁴² Judge Kermit Lipez, in his concurring opinion, felt compelled to acknowledge its influence:

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. *Id.* at 30–31.

¹³⁴ See Kahan, *supra* note 76, at 23.

¹³⁵ *Humanitarian Law Project*, 130 S. Ct. at 2729.

¹³⁶ *Id.*

¹³⁷ *Id.* (quoting Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1247).

¹³⁸ 378 F.3d 8 (1st Cir. 2004).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 10–11.

¹⁴¹ *Id.* at 15.

¹⁴² 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

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.¹⁴³

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").¹⁴⁴ But, Lipez stated, courts should be forthright about their new orientation and its impact on balancing of security and civil liberty.¹⁴⁵

Similarly, in *United States v. Aukai*, 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."¹⁴⁶ Thus, the court rejected the defendant's appeal of his conviction for possession of methamphetamines.¹⁴⁷ Judge Graber, in her concurrence, took issue with the "irrelevant and distracting references to 9/11 and terrorists."¹⁴⁸ 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.¹⁴⁹ To omit reference to 9/11 and the terrorist threat would be "speculative."¹⁵⁰ Citing George Orwell, the court warned, "[w]e should also be wary to eliminate historical facts such as 9/11."¹⁵¹

The dispute between the majority and the concurrence 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.¹⁵² For the

Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 64 (D. Mass. 2004), *aff'd sub nom.*, *Bl(a)ck Tea Soc'y*, 378 F.3d 8.

¹⁴³ *Bl(a)ck Tea Soc'y*, 378 F.3d at 19 (Lipez, J., concurring) (emphasis added).

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ 497 F.3d 955, 960 (9th Cir. 2007) (en banc). The court made further findings of fact that allowing revocation of consent would assist terrorists in their planning. *See id.* at 960-61.

¹⁴⁷ *Id.* at 955.

¹⁴⁸ *Id.* at 963 (Graber, J., concurring). 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.

¹⁴⁹ *Id.* at 960 n.6 (majority opinion).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (citing GEORGE ORWELL, 1984, at 248 (1949)) ("Who controls the present controls the past. . . ." (alteration in original) (internal quotation marks omitted)).

¹⁵² *Id.* at 963 (Graber, J., concurring).

majority, on the other hand, 9/11 could not be ignored. The majority argued that the screening procedures were authorized by legislation passed in response to the 9/11 attacks.¹⁵³ But more importantly, the majority maintained it had to explain “*why*” it decided the case the way it did.¹⁵⁴ For the majority, its holding could not be separated from the fact that 9/11 occurred and that a terrorist threat persisted.¹⁵⁵

Aukai demonstrates how the “post-9/11 world” is a form of cultural cognition; the attacks permeate the judges’ worldviews. Through that perspective, judges analyze the reasonableness of any security action with the attacks in mind, even when the facts at issue do not concern terrorism threats.

Other judges also echo Chief Justice Roberts’s admonition not to forget “that we live in a different world” now.¹⁵⁶ In *News & Observer Publishing Co. v. Raleigh-Durham Airport Authority*, 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.¹⁵⁷ Invoking “common sense” that “security is of paramount importance at airports in our post-9/11 world,”¹⁵⁸ Judge Andre Davis, in his dissent, criticized the majority for relying on a Fourth Circuit 1993 decision¹⁵⁹ holding that the risk posed by newspaper racks was “*de minimis*.”¹⁶⁰ The majority, Judge Davis declared, ignored the 1993 case’s “proper context: *it predates September 11, 2001*.”¹⁶¹ Put simply, pre-9/11 case law does not speak to the post-9/11 world.¹⁶² 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.¹⁶³ As a result, Judge Davis, and other judges, would appear to argue that

¹⁵³ *Id.* at 960 n.6 (majority opinion) (referring to the Aviation Transportation Security Act, Pub. L. No. 107-71, § 110, 115 Stat. 597, 614–15 (2001)).

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ *See id.* at 960–61.

¹⁵⁶ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2729 (2010).

¹⁵⁷ *News & Observer Publ’g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570 (4th Cir. 2010).

¹⁵⁸ *Id.* at 589 (Davis, J., dissenting).

¹⁵⁹ *See Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993).

¹⁶⁰ *News & Observer Publ’g Co.*, 597 F.3d at 589 (Davis, J., dissenting) (internal quotation marks omitted).

¹⁶¹ *Id.*

¹⁶² Adrian Vermeule describes the incongruence of law with a crisis as a general problem with “common law emergency oversight.” Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 194 (2008) (quoting William E. Scheuerman, *Emergency Powers*, 2 ANN. REV. L. & SOC. SCI. 257, 265–70 (2006)) (internal quotation marks omitted). “Emergencies are novel situations, so the informational value of precedent is reduced.” *Id.* at 197.

¹⁶³ *News & Observer Publ’g Co.*, 597 F.3d at 589–90 (Davis, J., dissenting).

acknowledging the “post-9/11 world” (and its laws) may supersede or overrule the pre-9/11 world (and its laws).¹⁶⁴

C. *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.”¹⁶⁵ But the appeal to “common sense” was Roberts’s own personal policy judgment or his intuitive or System 1 response. It also amounted to drawing factual inferences, the very determination that he disclaimed the aptitude as a judge to do.¹⁶⁶

The invocation of common sense also implicitly acknowledges the tenuous connection between teaching international humanitarian law for peaceful purposes and supporting terrorism. As Brest notes, it is in uncertain areas that courts rely too heavily on System 1.¹⁶⁷ 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.¹⁶⁸ 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.”¹⁶⁹ 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*,¹⁷⁰ a Supreme Court case concerning the liability of government officials for abusive counterterrorism measures.¹⁷¹ Two months after the 9/11 attacks, Javid 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 race, religion, or national

¹⁶⁴ *Id.*; see also *Jews for Jesus, Inc. v. Port of Portland, Or.*, No. CV04695HU, 2005 WL 1109698, at *9 (D. Or. May 5, 2005) (“Moreover, in the post-September 11, 2001 world, air travel is more encumbered than it was when *Lee [v. Int’l 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.”), *aff’d*, 172 F. App’x 760 (9th Cir. 2006).

¹⁶⁵ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 n.6 (2010).

¹⁶⁶ *Id.* at 2727.

¹⁶⁷ Brest, *supra* note 26, at 485.

¹⁶⁸ See POSNER, *supra* note 97, at 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.*

¹⁶⁹ *Id.* at 116–17.

¹⁷⁰ 556 U.S. 662 (2009).

¹⁷¹ *Id.*

origin.”¹⁷² The Court ruled 5-4 in Justice Kennedy’s majority opinion that Iqbal’s complaint failed to state claims upon which relief could be granted.¹⁷³

Relying on his “judicial experience and common sense,”¹⁷⁴ 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.¹⁷⁵ 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.”¹⁷⁶ Yet Kennedy pointed to no link between Iqbal and the 9/11 terrorists save for “their Muslim faith and ethnic background.”¹⁷⁷ But Kennedy’s own “judicial experience and common sense” determination revealed the limits of his own biases and cultural myopia; what he missed in Iqbal’s discrimination claim was that Iqbal was *not* an Arab but a Pakistani.¹⁷⁸

Kennedy’s “common sense” response here is also 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.¹⁷⁹ People who are more trusting of the government are also more willing to sacrifice their civil liberties.¹⁸⁰ Christina Wells similarly

¹⁷² *Id.* at 662.

¹⁷³ *Id.* at 663.

¹⁷⁴ *Id.* at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *reversed and remanded* by 556 U.S. 662).

¹⁷⁵ *Id.* at 682.

¹⁷⁶ *Id.*

¹⁷⁷ See Ramzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1452–53 (2010).

¹⁷⁸ See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 250–51 (2010) (“Categorizing a Pakistani as an Arab, as Justice Kennedy does, is about as accurate as calling an American ‘European’ based on a perception of shared ethnic heritage. The Court’s opinion thus rests on the very act of plainly erroneous racial miscategorization that Iqbal attacked as invidious.” (footnote omitted)).

¹⁷⁹ ADAM J. BERINSKY, *IN TIME OF WAR: UNDERSTANDING AMERICAN PUBLIC OPINION FROM WORLD WAR II TO IRAQ* 160 (2009) (discussing Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28 (2004)); GEORGE E. MARCUS ET AL., *WITH MALICE TOWARD SOME: HOW PEOPLE MAKE CIVIL LIBERTIES JUDGMENTS* (1995); JOHN L. SULLIVAN ET AL., *POLITICAL TOLERANCE AND AMERICAN DEMOCRACY* (1982).

¹⁸⁰ BERINSKY, *supra* note 179, at 162 (citing Davis & Silver, *supra* note 179).

concludes, 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.”¹⁸¹

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.¹⁸² 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.”¹⁸³ Whatever the merits to civil rights litigation that Kennedy acknowledged (“[l]itigation, though necessary to ensure that officials comply with the law”),¹⁸⁴ 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.’”¹⁸⁵ Thus we see that a court’s “common sense” perceptions of terrorism threats do not bode well for abuse claims relating to the government’s counterterrorism measures.¹⁸⁶

D. *The Availability Heuristic Post-9/11*

Courts invariably reach for what is available in analyzing risks posed by terrorism. In *Humanitarian Law Project*, Roberts’s location and invocation of the book *Blood and Belief* reflected a judicial reversion to the availability heuristic and also confirmation bias.¹⁸⁷ Following his

¹⁸¹ Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 119; see also SUNSTEIN, *supra* note 7, at 209 (“Stereotyping of groups significantly increases when people are in a state of fear . . .”).

¹⁸² *But see* Haddad v. Ashcroft, 221 F. Supp. 2d 799 (E.D. Mich. 2002) (holding that a secret deportation hearing violated Lebanese alien’s due process rights and that he must have his case heard before a different immigration judge), *vacated as moot*, 76 F. App’x 672 (6th Cir. 2003). 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.

¹⁸³ Kassem, *supra* note 177, at 1454; see also Huq, *supra* note 178, at 250.

¹⁸⁴ Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009).

¹⁸⁵ *Id.* (quoting Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007) (Cabrane, J., concurring), *reversed and remanded by* 556 U.S. 662).

¹⁸⁶ See Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012) (observing that no court has awarded damages for claims relating to post-9/11 terrorism measures).

¹⁸⁷ Roberts’s fact-finding outside the record and briefs of the parties is not unique to terrorism cases. Over the last fifteen years, more than one hundred Supreme Court opinions

intuition, Roberts sought out evidence that supported his viewpoint.¹⁸⁸ 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.¹⁸⁹ 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.”¹⁹⁰ Moreover, Roberts’s selection of particular facts that were not submitted by the government or a part of the record is inconsistent with rationales supporting judicial deference.¹⁹¹ Instead, the fact-finding is the very sort of judgment Roberts insisted courts were not competent to make.¹⁹²

Dissenting in *Boumediene v. Bush*, in which the Court held 5-4 that detainees at Guantanamo Bay had a constitutional right to habeas,¹⁹³ Justice Scalia similarly employed the availability heuristic in describing vividly the harm that the decision would cause.¹⁹⁴

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 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

asserted facts based on “outside” sources. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1262–63 (2012).

¹⁸⁸ Allison Orr Larsen suggests that one danger of judicial fact-finding in the digital age—separate and apart from *seeking* sources that confirm viewpoints—is that because of the personalization of search results on the Internet, a judge “will only find factual authorities to support what it is she wants to argue.” *Id.* at 1294 (discussing the effects of “filter bubble”).

¹⁸⁹ 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))).

¹⁹⁰ KAHNEMAN, *supra* note 22, at 159, 218 (citing NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* (2007)) (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”).

¹⁹¹ See *infra* Part IV (discussing arguments in favor of judicial deference).

¹⁹² *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (“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. 57, 65 (1981))).

¹⁹³ 553 U.S. 723 (2008).

¹⁹⁴ *Id.* at 827 (Scalia, J., dissenting).

Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.¹⁹⁵

By granting the detainees habeas, Scalia warned, Americans would be killed.¹⁹⁶ Scalia's selective adoption of information from outside the record evidenced fact-finding based on what 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.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹

III. RISK AVERSION AND THE PRESUMPTION OF IMMINENCE

This Part examines how courts express and rationalize probability neglect and other System 1-related cognitive errors in their System 2-reasoned opinions. The biases are still apparent—albeit refined—through hypothetical scenarios, reduced standards of evidence, and legal analyses such as the special needs doctrine. What is almost always missing from these opinions, however, is the acknowledgment of the animating fears and potential biases.

Probability neglect is not 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

¹⁹⁵ *Id.* (citations omitted).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See H. Robert Baker, *The Supreme Court Confronts History: Or, Habeas Corpus Redivivus*, COMMON-PLACE (July 2008), <http://www.common-place.org/vol-08/no-04/talk>. Joe Margulies has criticized the type of terrorist description that Scalia lays out “as the latest, and by far the most dangerous iteration of a lurking, apocalyptic danger posed by a subhuman predator that threatens to overwhelm the American public, and for which the American public demands the prompt elimination of all risk.” Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 769 (2011).

¹⁹⁹ See KAHNEMAN, *supra* note 22, at 159–60 (describing the distinction between plausibility and probability); SUNSTEIN, *supra* note 7, at 82 (discussing “alarmist bias”). The Senate Minority Report, cited by Scalia, put the number of recidivating Guantanamo detainees at thirty. S. REP. NO. 110-90, pt. 7, at 13 (2007). But various other sources of course provide different estimates. See John Monahan, *The Individual Risk Assessment of Terrorism*, 18 PSYCHOL. PUB. POL’Y & L. 167, 177 (2012) (citations omitted) (estimating released Guantanamo detainees’ “postrelease rate of actual or suspected terrorism” “between 6% and 25%” (citations omitted)). The uncertainty and variability of these estimates demonstrates in part the problem with Scalia’s presentation of information as empirical findings of fact.

an analytical tool. Such thinking reflects what Joe Margulies has described as part of America's "cultural hostility to risk," a predisposition that is amplified during crises.²⁰⁰

That hostility to risk—and its partner, probability neglect—is similarly reflected in the permissive evidentiary standards crafted by the current courts. In *Humanitarian Law Project* Roberts accepted as a foregone conclusion that acts of terrorism are very likely when he invoked the government need "to prevent *imminent* harms."²⁰¹ The reference to "imminent harms" is jarring;²⁰² 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's 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,²⁰³ or the "one percent doctrine."²⁰⁴ 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.

A. *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.²⁰⁵ Writing for the six-justice majority, Justice Black justified the decision based upon deference to the

²⁰⁰ Margulies, *supra* note 198, at 770.

²⁰¹ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010) (emphasis added).

²⁰² *Id.*

²⁰³ 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: "[W]e 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).

²⁰⁴ The "one percent doctrine," or "Cheney Doctrine" as it was also characterized, held that "[e]ven if there's just a one percent chance of the unimaginable coming due, act as if it is a certainty." RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11*, at 62 (2006) (quoting Dick Cheney).

²⁰⁵ 323 U.S. 214 (1944).

military's determination "that all citizens of Japanese ancestry be segregated from the West Coast" because the "disloyal members of that population . . . could not be precisely and quickly ascertained."²⁰⁶ 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.²⁰⁷

The near-total deference and lack of any evidentiary requirement aided the Court in its approval of "obvious racial discrimination."²⁰⁸ Looking back at his vote upholding the exclusion, Justice Douglas 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, craving and wishes of their neighbors . . . [T]he state of public opinion will often make the Court cautious when it should be bold."²⁰⁹

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,"²¹⁰ also prescribed an approach to national security matters that permitted worst-case scenarios to trump lack of evidence of probability or imminence.²¹¹ Unsatisfied with earlier iterations of the "clear and present danger" test,²¹² which the *Dennis* Court determined were not apposite because they did not deal with a "substantial threat to the safety

²⁰⁶ *Id.* at 218–19, 223–24.

²⁰⁷ *Id.* at 234 (Murphy, J., dissenting) (quoting *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627 (1871), *abrogated by Doe v. United States*, 95 Fed. Cl. 546 (2010)) (citing *Raymond v. Thomas*, 91 U.S. 712, 716 (1875); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134, 135 (1851), *abrogated by Doe*, 95 Fed. Cl. 546).

²⁰⁸ *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.").

²⁰⁹ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 304 (2004) (quoting WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 38 (1980)).

²¹⁰ 341 U.S. 494, 512 (1951).

²¹¹ *Id.* at 510.

²¹² 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 leaders feel the circumstances permit, action by the Government is required.

Id. at 509.

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 for the Second Circuit.²¹³ 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.”²¹⁴ Under this analysis, however, what the rule permitted was that the graver the danger or perceived harm, a lesser probability of such harm was required in order to uphold the government action.²¹⁵ Thus, the *Dennis* Court articulated an iteration of the “clear and present danger” test that operationalized cognitive errors such as probability neglect.²¹⁶

Brandenburg v. Ohio,²¹⁷ invoked by Breyer in his *Humanitarian Law Project* dissent, seemingly overruled the *Dennis* test.²¹⁸ The *Brandenburg* Court held unconstitutional the proscription of advocacy of the use of force unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²¹⁹ Probability thus becomes a more significant concern, at least under First Amendment analysis. Yet as *Humanitarian Law Project* suggests, a variant of the *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.

B. *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

²¹³ *Id.* at 510.

²¹⁴ *Id.* (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff’d*, 341 U.S. 494) (internal quotation marks omitted).

²¹⁵ Wells, *supra* note 181, at 151–52. As Wells observes, Judge Hand, in his application of the test, took “judicial notice of world events that were unrelated to the [Communist Party of the USA (CPUSA)]” in determining that the evil of government overthrow was probable. Imminence becomes a function of CPUSA’s evil character.

²¹⁶ *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).

²¹⁷ 395 U.S. 444 (1969) (per curiam).

²¹⁸ *Id.* at 450 (Black, J., concurring) (“I join the Court’s opinion, which, as I understand it, simply cites [*Dennis*], but does not indicate any agreement on the Court’s part with the ‘clear and present danger’ doctrine on which *Dennis* purported to rely.” (citation omitted)); *id.* at 454 (Douglas, J., concurring) (“I see no place in the regime of the First Amendment for any ‘clear and present danger’ test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.”).

²¹⁹ *Id.* at 447 (majority opinion) (emphasis added).

great.²²⁰ For example, in *National 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 positions in the service.²²¹ Justice Kennedy, writing for the majority, 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."²²² Justice Scalia dissented, objecting to the lack of evidence supporting a high level of drug use, or that such drug use presented a serious harm.²²³ 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."²²⁴

Applying the special needs analysis to post-9/11 suspicionless searches of ferries, then-judge Sonia Sotomayor stressed "that the government, in its attempt to counteract the threat of terrorism, need not show that every airport or every ferry terminal is threatened by terrorism in order to implement a nationwide security policy."²²⁵ It was of no consequence to the court's special needs analysis that "Lake Champlain ferries are a less obvious terrorist target than ferries in . . . New York City or Los Angeles."²²⁶ "[P]revention of terrorist attacks on large vessels"—the special need—overrides the need for any specific findings of threat.²²⁷

Thus, in high-risk contexts, we see 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*.²²⁸ How could the prevention of terrorism

²²⁰ 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.

²²¹ 489 U.S. 656 (1989).

²²² *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 ("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 . . .") (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)).

²²³ *Id.* at 681-85 (Scalia, J., dissenting); *id.* at 681 ("[N]either frequency of use nor connection to harm is demonstrated or even likely.").

²²⁴ *Id.* at 684. For Justice Scalia, the "secured areas of a nuclear power plant" would present a circumstance allowing for such generality.

²²⁵ *Cassidy v. Chertoff*, 471 F.3d 67, 83 (2d Cir. 2006).

²²⁶ *Id.*

²²⁷ *Id.* at 82.

²²⁸ *Dennis v. United States*, 341 U.S. 494, 510 (1951) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494).

be anything but a special need that would render government efforts, however intrusive, reasonable?

C. *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 Fourth Amendment because its primary purpose was crime control.²²⁹ However, Justice O'Connor, writing for the Court, approved of 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."²³⁰

The Seventh Circuit's full factual 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."²³¹ 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."²³²

Posner's hypothetical involved an imminent attack; therefore, the probability of a terrorist attack was high. This is the proverbial ticking time bomb. The problem with the hypothetical is that it writes into 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. In *Illinois v. Caballes*, the Court held 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.²³³ Justice Souter dissented, contending that the dog sniff constituted an unauthorized search that was not justified.²³⁴ Yet Souter also saw fit to endorse a terrorism exception:

²²⁹ 531 U.S. 32 (2000).

²³⁰ *Id.* at 44 (discussing *Edmond v. Goldsmith*, 183 F.3d 659, 662–63 (7th Cir. 1999), *aff'd*, 531 U.S. 32).

²³¹ *Edmond*, 183 F.3d at 663.

²³² *Id.*

²³³ 543 U.S. 405 (2005).

²³⁴ *Id.* at 410–11 (Souter, J., dissenting) (disputing the majority's reasoning that a dog search

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.²³⁵

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 more focused on the "destructive or deadly" outcome ("marijuana" vs. "suicide bombs"), not the likelihood. This calculus, which we as a society have seemed to accept as commonplace, is deeply rooted in probability neglect. Imminence is presumed. The bomb is always ticking.²³⁶

D. *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 essentially an imagining of the gravest evil.²³⁷ These decisions, not unlike the Court's hypotheticals or the *Dennis* test, are particularly susceptible to cognitive errors of probability neglect and the affect heuristic.²³⁸

In its first ever written decision, the Foreign Intelligence Surveillance Court of Review addressed a Foreign Intelligence Surveillance Act (FISA) court's surveillance order that restricted law enforcement officials' communications with intelligence officials regarding the surveillance and use of such surveillance for criminal

did not intrude on the car passenger's legitimate expectation of privacy because the dogs would only detect contraband, noting that "[t]he infallible dog, however, is a creature of legal fiction").

²³⁵ *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.").

²³⁶ In *Zadvydas v. Davis*, 533 U.S. 678 (2001), 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. 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.

²³⁷ *See Dennis v. United States*, 341 U.S. 494, 510 (1951) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494); CASS R. SUNSTEIN, WORST-CASE SCENARIOS 18 (2007).

²³⁸ *See* SUNSTEIN, *supra* note 7, at 64-65.

prosecution.²³⁹ The court observed that while the threat may not be “dispositive,” it is “a crucial factor” in determining whether a search is “reasonable.”²⁴⁰ 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.”²⁴¹ Again, the court’s apprehension of the potential harm—Learned Hand’s “gravity of the evil” in *Dennis*—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.²⁴² 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.”²⁴³ Instead of requiring a particularized 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.”²⁴⁴

A variant of the worst-case scenario also figured prominently in at least one D.C. Circuit judge’s evaluation of the standard of proof for determining whether a detainee at Guantanamo is a member of Al Qaeda or associated forces. Addressing the possible release of a terrorism suspect, Judge Laurence Silberman explained that “unusual incentives and disincentives” affected judges in their decisions concerning habeas for Guantanamo detainees.²⁴⁵ In contrast to the normal 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.²⁴⁶ Silberman explained:

²³⁹ *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

²⁴⁰ *Id.* at 746.

²⁴¹ *Id.*

²⁴² *MacWade v. Kelly*, 460 F.3d 260, 272 (2d Cir. 2006). Yet, the court then found the danger “sufficiently immediate,” referencing “the thwarted plots to bomb New York City’s subway system, its continued desirability as a target, and the recent bombings of public transportation systems in Madrid, Moscow, and London” as factual grounds for concluding that “the risk to public safety is substantial and real.” *Id.*

²⁴³ *Marcavage v. City of New York*, 689 F.3d 98, 105 (2d Cir. 2012).

²⁴⁴ *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 that the government had a compelling interest in security. *Id.*

²⁴⁵ *Esmail v. Obama*, 639 F.3d 1075, 1077 (D.C. Cir. 2011) (Silberman, J., concurring).

²⁴⁶ *Id.*

When we are dealing with detainees, candor obliges me to admit that one can not 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.²⁴⁷

Therefore, Silberman reasoned, a “preponderance of [the] evidence” standard would be too burdensome.²⁴⁸ 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.”²⁴⁹

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.”²⁵⁰

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.²⁵¹ Thus, in contemplating worst-case scenarios, judges may employ System 2 faculties to reduce evidentiary requirements for government action intended to prevent terrorism.

E. *Lack of Exigency as a 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 that required a

²⁴⁷ *Id.* at 1077–78. Silberman’s reasoning may be viewed as a form of “weighted accuracy argument,” “in which the harms associated with a false negative are perceived to greatly outweigh the harms associated with a false positive.” Chesney, *supra* note 21, at 1414.

²⁴⁸ *Esmail*, 639 F.3d at 1078 (Silberman, J., concurring).

²⁴⁹ *Id.*; *see infra* Part V.A (discussing the D.C. Circuit’s conflation of the preponderance of evidence and substantial evidence standards).

²⁵⁰ *See Dennis v. United States*, 341 U.S. 494, 510 (1951).

²⁵¹ *See* KAHNEMAN, *supra* note 22, at 103–04.

hearing for detainees.²⁵² 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.²⁵³ 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.²⁵⁴ Concurring, Justice Kennedy inferred from the base's location outside of "any hostilities,"²⁵⁵ and the lengthy detention, a lack of exigency.²⁵⁶ Kennedy's risk assessment here—his finding of a lack of imminence—was no less a product of biases and a personal policy preference than was Roberts's 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.

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.²⁵⁷ 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.²⁵⁸ 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."²⁵⁹ As in *Rasul*, Kennedy

²⁵² See SUNSTEIN, *supra* note 7, at 211; see also *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the process provided by the Detainee Treatment Act (DTA) was an inadequate substitute for habeas corpus review); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) ("[D]ue process demands that a 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 the Court did not even decide "[w]hether and what further proceedings may become necessary after" the government responds to the detainees' claims).

²⁵³ See *Korematsu v. United States*, 323 U.S. 214, 218–19, 223–24 (1945). *But see id.* at 248 (Jackson, J., dissenting) ("My duties as a justice . . . do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity.").

²⁵⁴ *Rasul*, 542 U.S. at 470, 485.

²⁵⁵ *Id.* at 487 (Kennedy, J., concurring).

²⁵⁶ *Id.* at 488 ("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)).

²⁵⁷ *Boumediene*, 553 U.S. 723.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 769.

inferred a lack of exigency or imminent harm from the now six years of detention for many of those held at Guantanamo.²⁶⁰

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 of whether the President had the authority to detain militarily 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,²⁶¹ including detonating a dirty bomb in the United States.²⁶² 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.”²⁶³ 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).²⁶⁴ Instead, the majority held Padilla should have filed in the District of South Carolina where he was held in a naval brig.²⁶⁵

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 silentio. But the stealth approach may amount to what Stephen Vladeck terms “passive-aggressive judicial review.”²⁶⁶ 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.²⁶⁷

IV. THE INADEQUACY OF DEFERENCE IN THE POST-9/11 WORLD

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,²⁶⁸ deferring to government characterization of risk

²⁶⁰ See *id.* at 794, 797 (noting six years of detention without judicial review); see also *id.* at 800–01 (Souter, J., concurring) (same).

²⁶¹ *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

²⁶² See *Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2d Cir. 2003), *reversed and remanded by* 542 U.S. 426.

²⁶³ 542 U.S. at 464 n.9 (Stevens, J., dissenting) (quoting *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 573–74 (S.D.N.Y. 2002)) (internal quotation marks omitted).

²⁶⁴ *Id.* at 429–30 (majority opinion).

²⁶⁵ *Id.* at 432, 436–37, 446.

²⁶⁶ Vladeck, *supra* note 19, at 140. The Supreme Court’s holding that lawyers, activists, and reporters lacked standing to challenge § 702 of FISA offers another variant of silent or passive-aggressive risk assessment. See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013).

²⁶⁷ See Vladeck, *supra* note 19, at 140.

²⁶⁸ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

assessments can reinforce and even compound cognitive errors and biases endemic to the government's initial risk assessment. The factual findings relating to terrorism threats also have significant constitutional implications for civil liberties in the post-9/11 world.²⁶⁹

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.²⁷⁰ 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.²⁷¹ This Part 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.²⁷² Similarly, Eric Posner and Adrian Vermeule contend that eventually following a crisis, “the government will downgrade its threat assessment, and judges will worry less and less about the harms of blocking emergency measures.”²⁷³

Arguments favoring judicial abdication because of temporary and possibly exigent circumstances are less persuasive in light of the seeming permanence of the terrorism threat.²⁷⁴ It is hardly clear when the threat

²⁶⁹ See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 953–54 (1999) (observing how courts' acceptance of facts and evidence influences decisions in constitutional balancing of interests).

²⁷⁰ See MUELLER & STEWART, *supra* note 5, at 13–20; A. Peter McGraw, Alexander Todorov & Howard Kunreuther, *A Policy Maker's Dilemma: Preventing Terrorism or Preventing Blame*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 25 (2011).

²⁷¹ See McGraw, Todorov & Kunreuther, *supra* note 270, at 27–29.

²⁷² WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

²⁷³ ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 42 (2007); see also DUDZIAK, *supra* note 12, at 81 (quoting POSNER & VERMEULE, *supra*, at 42).

²⁷⁴ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 770–71, 797–98 (2008) (“[T]he cases before us lack any precise historical parallel” and the war on terrorism “is already among the longest wars in American history. . . . 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, 521 (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.”); see also Vladeck, *supra* note 19, at 136 (“The critical point for present purposes is the unique intersection of the war on terrorism's temporal indeterminacy with its merger of the military and criminal paradigms.”). President Obama's May 2013 call to “define the nature and scope of this struggle, or else it will define us,” has not altered the fact that he perceives ongoing significant terrorist threats requiring a “comprehensive counterterrorism strategy.” Barack Obama, President of the United

of terrorism will abate. While the government may no doubt be viewed as a provider of security, it is also a protector of civil liberty.²⁷⁵ Where the nation is now so fully consumed by prevention of catastrophic terror attacks and susceptible to cognitive errors, it is incumbent on judges in a perpetual crisis not to presume imminence but to test the government's risk assessments.

Second, proponents argue that deference is justified in the national security arena because of foreign and international relations, which are highly sensitive and demand discretion from the executive branch. 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.²⁷⁶

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.²⁷⁷ Although not situated in the "wartime" context of several of the Court's post-9/11 decisions,²⁷⁸ 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.²⁷⁹

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

States, Address at National Defense University: The Future of our Fight Against Terrorism (May 24, 2013) [hereinafter Remarks of President Barack Obama], available at <http://abcnews.go.com/Politics/transcript-future-fight-terrorism/story?id=19245240>.

²⁷⁵ See Margulies, *supra* note 198, at 759–60 (discussing the Court's "punitive turn").

²⁷⁶ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726–27 (2010).

²⁷⁷ See *id.* at 2730 ("We . . . do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.").

²⁷⁸ Mary Dudziak views Roberts's move away from the rhetoric of "wartime" as a positive development. "In finding the case to be framed by national security concerns short of war, the Court paralleled the new Obama administration's attempt to step back from the capacious idea of a war on terror . . ." DUDZIAK, *supra* note 12, at 126. I am less sanguine about the change in rhetoric or contextualizing. Rather, "terrorism" functions as a heuristic not all that distinct from Dudziak's understanding of the rhetoric of "wartime." Certainly both heuristics entail risk assessments of uncertain but catastrophic events. And just as Dudziak shows wartime cannot be neatly confined to temporal periods, the terrorism heuristic may similarly evade categorizations of foreign or domestic, criminal justice or national security, intelligence, civilian or military, raising questions for how the Court might review government actions that infringe on civil liberties. *Id.* at 81.

²⁷⁹ See *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 995–1001 (9th Cir. 2012). The Ninth Circuit held in 2012 that a multicultural affairs organization had a First Amendment right to convene press conferences and draft press releases in coordination with the domestic branch of a foreign terrorist organization. *Id.* The court distinguished this case from *Humanitarian Law Project*, based in part on the domestic nature of the branch. See *id.*

international dimension or a foreign connection.²⁸⁰ 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.²⁸¹

Kennedy articulated the expertise rationale in *Boumediene*: in contrast to members of 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.”²⁸² Though the dissenters in *Boumediene* criticized its employment as a rhetorical pose,²⁸³ Roberts reified the rationale in *Humanitarian Law Project* at the heart of his opinion.²⁸⁴

Relatedly, deference may be rationalized because the objective in the terrorism context is prevention, not prosecution.²⁸⁵ As a result, the government may rely on intelligence standards as opposed to those utilized in the criminal context.²⁸⁶ Courts are not familiar with the intelligence area and are therefore not qualified to evaluate the evidence that the government may rely on.²⁸⁷ Finally, deference may be urged due to the lack of precision or quantification of likelihood of an attack.²⁸⁸

²⁸⁰ At the very least, the terrorism threat is one that is varied and dynamic, defying compartmentalization. See Remarks of President Barack Obama, *supra* note 274 (“Lethal, yet less capable al-Qaeda affiliates, threats to diplomatic facilities and businesses abroad, homegrown extremists. This is the future of terrorism.”).

²⁸¹ See Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005) (“Judges rarely have the background or the information that would allow them to make sensible judgments about whether some particular response to a threat to national security imposes unjustifiable restrictions on individual liberty or is an unwise allocation of decisionmaking power.”); see also SUNSTEIN, *supra* note 7, at 210; Chesney, *supra* note 21, at 1409–10.

²⁸² *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

²⁸³ See *id.* at 830 n.1 (Scalia, J., dissenting).

²⁸⁴ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010).

²⁸⁵ See *id.* (deferring to government interpretation of evidence in part because the material support statute is preventative).

²⁸⁶ See *id.*; Balkin, *supra* note 13, at 15–16.

²⁸⁷ *Humanitarian Law Project*, 130 S. Ct. at 2727–28.

²⁸⁸ *Id.* at 2728; see also RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 171 (2004). Posner argues that people's reaction or ability to “overreact” to 9/11 cannot be viewed as an example of probability neglect because we are unable to quantify the risk of terrorist attacks. *Id.* 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, WHARTON UNIV. OF PA. RISK MGMT. & DECISION PROCESSES CTR., DEALING WITH EXTREME EVENTS: NEW CHALLENGES FOR TERRORISM RISK COVERAGE IN THE U.S. (June 2004), available 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

The expertise rationale ignores the fact that courts review the decisions of experts in a myriad of highly complex subjects.²⁸⁹ Judges also may be at a greater advantage in terms of determining the accuracy of information because of the adversarial process, which allows them to weigh contrary information that executive officials might not have incentive to consider.²⁹⁰ Article III courts have, of course, overseen scores of terrorism cases, both of domestic and international dimensions.²⁹¹ As for the secretive nature of certain subjects, there are procedures in place that have permitted courts to have access to classified information.²⁹² Finally, specialized courts have also been created that allow for judicial review of information with standards distinct from those in traditional Article III courts.²⁹³

enemy and location of the warzone); Howard Kunreuther & Erwann Michel-Kerjan, *The Market for Terrorism Insurance: Evaluating the Effectiveness of Risk Financing Solutions* 14 (Wharton Univ. of Pa. Risk Mgmt. & Decision Processes Ctr., Working Paper No. 2008-02-01), available at http://opim.wharton.upenn.edu/risk/library/WP2008-02-01_HK,EMK_Terrorism_Insurance.pdf.

²⁸⁹ See, e.g., *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582, 589 (1993) (addressing causation of birth defects by prescription drugs and setting standard for admitting expert scientific testimony in federal trials) (“[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”); *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1134 (10th Cir. 2010) (considering expert testimony on the risks of developing cancer from exposure to plutonium); *Finestone v. Fla. Power & Light Co.*, 272 F. App’x 761, 767–68 (11th Cir. 2008) (upholding district court’s exclusion of experts’ reports and testimony on whether nuclear power plant caused children’s cancer and characterizing experts’ assumption about evidence as “leaps of faith”); *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 930 (8th Cir. 2001) (upholding district court’s admission of expert testimony that exposure to toxic organic solvent caused brain dysfunction and personality disorders); cf. *Ethyl Corp. v. Evtl. Prot. Agency*, 541 F.2d 1, 28 (D.C. Cir. 1976) (en banc) (footnote omitted) (requiring EPA’s risk assessment of gasoline emissions pursuant to the Clean Air Act be rational but that “[w]here a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect”).

²⁹⁰ See Chesney, *supra* note 21, at 1407.

²⁹¹ See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS (July 2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf> (reviewing terrorism cases prosecuted in federal courts).

²⁹² Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025, 2025–31 (1980) (codified at 18 U.S.C. app. 3 (2013)) (providing procedures that protect national security information from disclosure).

²⁹³ See, e.g., Foreign Intelligence Surveillance Act (FISA) of 1978, 50 U.S.C. §§ 1801–12 (2012) (establishing the Foreign Intelligence Surveillance Court (FISC), which secretly reviews government applications for surveillance or searches aimed at foreign intelligence information). However, the FISA framework presents a host of its own problems that do not resolve the question of deference or the role of biases in judges’ risk assessments and fact-finding. Most worrisome are that the FISC’s proceedings and opinions have generally been classified, that there is no advocate arguing against the government’s surveillance requests, and that the FISC applies minimal evidentiary standards to approve surveillance, resulting in approval of almost all government requests. See James G. Carr, Op-Ed., *A Better Secret Court*, N.Y. TIMES, July 23, 2013, at A21 (former FISA judge proposing appointment of independent lawyers to challenge

Concerning the lack of quantification, some scholars argue that terrorism risk analysis can be undertaken as it is in other areas, where threats are analyzed “as a matter of course,” such as nuclear power plant accidents and environmental protection.²⁹⁴ Moreover, private entities, such as insurance companies, and various private and governmental risk analysts commonly engage in the admittedly difficult enterprise of predicting terrorist attacks.²⁹⁵

government’s application for FISA orders in novel areas); *see also* Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, N.Y. TIMES, July 10, 2013, at A16 (describing former FISA Judge James Robertson’s criticism of lack of adversarial system in national security surveillance judicial review); *Foreign Intelligence Surveillance Act Court Orders 1979–2012*, ELECTRONIC PRIVACY INFO. CENTER, http://epic.org/privacy/wiretap/stats/fisa_stats.html (last visited Jan. 21, 2014). From 1979 through 2012, the government made 33,949 applications to the FISC to conduct electronic surveillance and physical searches for foreign intelligence purposes. Over these thirty-three years, the FISC disapproved only eleven requests for collection authority. *Id.* Identity-protective cognition may also explain the seeming rubber stamp approval of FISA applications. *See* Kahan, *supra* note 76, at 20; *see also* Robertson, *supra* note 79, at 271–79. Critics of the FISA court system have complained that the overwhelming majority of court members are biased in favor of the government based on their political affiliation (Republican) and employment history (executive branch lawyers). *See* Charlie Savage, *Roberts’s Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 26, 2013, at A1. These features of the FISA courts—most notably the secrecy, lack of adversarial viewpoint, and reduced evidentiary standards—together with the pressure to approve national security-related decisions quickly and often without written opinions, make judges highly susceptible to the cognitive errors discussed in Part I of this article, as documented in studies of trial court judges. *See* Guthrie, Rachlinski & Wistrich, *supra* note 85, at 14–19, 35–40. Targeted killings have also engendered discussion of the creation of specialized courts for their review and approval. *See, e.g., A Court for Targeted Killings*, N.Y. TIMES, Feb. 14, 2013, at A26 (calling for a special court as analogue to FISC); *see also* Remarks of President Barack Obama, *supra* note 274 (“[T]he establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process but raises serious constitutional issues about presidential and judicial authority.”). But critics have warned that because *ex ante* judicial review of targeted killings implies a lack of imminence, “the establishment of a specialized court would more likely institutionalize the existing program, with its elision of the imminence requirement, than narrow it.” Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185, 186 (2013) (favoring *ex post* judicial review through *Bivens* actions in regular federal courts).

²⁹⁴ *See* MUELLER & STEWART, *supra* note 5, at 23; *see also* Philip E. Tetlock & Barbara A. Mellers, *Intelligent Management of Intelligence Agencies: Beyond Accountability Ping-Pong*, 66 AM. PSYCHOLOGIST 542, 548–49 (2011) (calling for institutionalization of accuracy metrics in the intelligence community). The resistance to quantify probability may also be attributed to the refusal to tolerate any risk of terrorist attack. *See* Margulies, *supra* note 198, at 770 (describing the driver of policy as the “explosive, populist insistence that all risk be eliminated and all danger prevented”); Stephen M. Walt, *They’re Baaaack . . . : The Rebirth of al Qaeda?*, FOREIGN POL’Y (July 29, 2013), http://walt.foreignpolicy.com/posts/2013/07/29/theyre_baaaackthe_rebirth_of_al_qaeda (calling for “a fundamental rethinking of the entire anti-terrorism campaign” and “a rational ranking of costs, benefits, and threats”).

²⁹⁵ MUELLER & STEWART, *supra* note 5, at 24; *see* RICHARD G. LUGAR, THE LUGAR SURVEY ON PROLIFERATION THREATS AND RESPONSES (June 2005), *available at* https://www.fas.org/irp/threat/lugar_survey.pdf (surveying nuclear non-proliferation and national security experts on a variety of threats, including the likelihood of a major biological terrorist attack causing numerous fatalities within the next five years, which forty-three out of eighty-three experts characterized to be between 10% and 30%).

Deference can finally be rejected because experts are not always right.²⁹⁶ Indeed, experts are often political actors whose predictions and assessments may be both a product of fear of blame and accountability and objective analysis.²⁹⁷ 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.²⁹⁸

V. REVISING JUDICIAL REVIEW IN THE POST-9/11 WORLD

This Part 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 Part 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. Drawing from literature on the regulation of judicial emotions, I propose that courts adopt candid disclosures, in the mien of Judges Lipez and Silberman, regarding the impact of the post-9/11 heuristic on their decision making. These admissions are more likely to earn trust for the courts in the public discourse of terrorism in a post-9/11 world.

A. *Adjusting Sunstein's Framework*

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.²⁹⁹ Notwithstanding these

²⁹⁶ See, e.g., PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* (2005) (detailing errors by experts); Robert Jervis, *Reports, Politics, and Intelligence Failures: The Case of Iraq*, 29 J. STRATEGIC STUD. 3, 45–46 (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”); Tetlock & Mellers, *supra* note 294, at 542 (describing the poor prediction record of the intelligence community).

²⁹⁷ See McGraw, Todorov & Kunreuther, *supra* note 270, at 29.

²⁹⁸ See Kahan, Slovic, Braman & Gastil, *supra* note 75, at 1105–06.

²⁹⁹ SUNSTEIN, *supra* note 7, at 205.

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;³⁰⁰ (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;³⁰¹ and (3) apply second-order balancing because case-by-case ad hoc balancing is more likely to permit excessive intrusions.³⁰²

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, this speech would also deserve special scrutiny. Roberts may have come fairly close to applying the scrutiny envisioned by Sunstein by applying a level of scrutiny somewhere between strict scrutiny and that which is reserved for conduct.³⁰³ And yet, Roberts's deference to the government's evidence overrode even that high level of scrutiny.³⁰⁴

Finally, what second order balancing applies? Sunstein identifies the considerations of imminence and likelihood from *Brandenburg* as factors that a court might consider.³⁰⁵ It was precisely these elements that Breyer asked to be considered in his dissent.³⁰⁶

But would the second order balancing have made a difference to Roberts? The answer is almost certainly no. 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's understanding that we now live in a "different

³⁰⁰ *Id.* at 211–14.

³⁰¹ *Id.* at 214–17.

³⁰² *Id.* at 217–22.

³⁰³ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010).

³⁰⁴ See Solove, *supra* note 269, at 955 ("In deference cases, the very minimal examination of factual and empirical evidence tends to override whatever level of scrutiny is applied, and is often dispositive."); see also Chesney, *supra* note 21, at 1389 n.102. Peter Margulies criticizes *Humanitarian Law Project*'s deference to the government as "both unnecessary to the decision and inconsistent with the heightened scrutiny that the Court adopts." Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 496 (2012).

³⁰⁵ SUNSTEIN, *supra* note 7, at 221.

³⁰⁶ *Humanitarian Law Project*, 130 S. Ct. at 2739 (Breyer, J., dissenting).

world.”³⁰⁷ As a result, Roberts, like many other judges, appeared to presume the probability and imminence of an attack.³⁰⁸

Sunstein’s second example—torture—similarly illustrates the inevitably subjective calculations and related 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 to reject its isolated use. However, it is 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; and even if this second order balancing is adopted, the potential number of lives saved by torture could offset significant numbers of people wrongly tortured. Judge Silberman adverted to this in his acceptance of the idea of letting a potentially guilty man go free in a criminal context based upon second-order considerations, as well as in his refusal to authorize the release of a possible Al Qaeda detainee because of the “infinitely greater downside risk to our country.”³⁰⁹

As a result, specific standards of evidence that the government must satisfy in order to justify infringements of civil liberties should be grafted onto Sunstein’s framework. These standards should favor the individuals 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.³¹⁰

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.³¹¹ The authors of these studies concluded that because people blame policy makers more for high consequence events than for more probable ones,³¹² policy makers will be tempted to “prevent attacks that are more

³⁰⁷ *Id.* at 2729 (majority opinion).

³⁰⁸ *Id.* at 2728.

³⁰⁹ *Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring).

³¹⁰ *See Chesney, supra* note 21, at 1414 (discussing “weighted accuracy” as a means of judicial fact-finding); *see also supra* notes 245–48 and accompanying text.

³¹¹ McGraw, Todorov & Kunreuther, *supra* note 270, at 29.

³¹² *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 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 a much higher strategic priority.”); *see also id.* at 441–42 (praising Israeli counterterrorism approach, which “tolerates small-scale terrorism” and focuses on preventing “large-scale terrorism”). *But*

severe and more upsetting without sufficiently balancing the attack's likelihood against its outcome."³¹³ To counteract this emotional tendency, these authors suggested that policy makers explicitly consider likelihood data in formulating counterterrorism policy.³¹⁴

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* "demanding hard proof—with 'detail,' 'specific facts,' and 'specific evidence,'—that [the] proposed activities will support terrorist attacks."³¹⁵ 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."³¹⁶ And Roberts was content to rely simply on the idea that "[t]his possibility is real, not remote."³¹⁷ 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.³¹⁸

Breyer's and Roberts's 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.³¹⁹

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 an associated force.³²⁰ Yet, many of the judges have chafed at the higher preponderance standard, advocating a lesser burden of proof.³²¹ Furthermore, at least one D.C. Circuit member has

see MUELLER & STEWART, *supra* note 5, at 13–23 (discussing different strategies to prevent terrorism).

³¹³ McGraw, Todorov & Kunreuther, *supra* note 270, at 32.

³¹⁴ *Id.*

³¹⁵ Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727–28 (2010).

³¹⁶ *Id.* at 2729 (emphasis added).

³¹⁷ *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).

³¹⁸ *Id.*

³¹⁹ See *infra* notes 320–24 and accompanying text.

³²⁰ See *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

³²¹ See *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (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

contended that the courts' opinions merely invoke the "preponderance of the evidence standard while in fact requiring nothing more than substantial evidence to deny habeas petitions."³²² Not content with the reduced burden of proof, the D.C. Circuit has also held that government intelligence reports enjoy a presumption of regularity.³²³ 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.³²⁴

The practical effect of these decisions 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."³²⁵ *Humanitarian Law Project* and the

of preponderance of the evidence to show that 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.* at 1104 (citation omitted).

³²² *Hussain v. Obama*, 718 F.3d 964, 971 (D.C. Cir. 2013) (Edwards, J., concurring) (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)) (internal quotation marks omitted).

³²³ See *Latif v. Obama*, 677 F.3d 1175, 1178–79, 1180 (D.C. Cir. 2011) ("[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.").

³²⁴ *Al-Adahi*, 613 F.3d at 1105–07 (explaining conditional probability's "key consideration" as "the occurrence of one [event] makes the occurrence of the other more or less likely" (alteration in original) (quoting JOHN ALLEN PAULOS, *BEYOND NUMERACY: RUMINATIONS OF A NUMBERS MAN* 189 (1991))); see also *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"); *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." (alteration in original) (quoting *Al-Adahi*, 613 F.3d at 1105)). The D.C. Circuit has also characterized its approach to evidence as simply drawing a "common-sense inference" in line with "the infamous duck test." *Hussain*, 718 F.3d at 968 ("WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck." (quoting *Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 n.2 (D.C. Cir. 1989)) (internal quotation marks omitted)). Judge Edwards criticized the *Hussain* majority's approach as "quite invidious because, arguably, any young, Muslim man traveling or temporarily residing in areas in which terrorists are known to operate would pass the 'duck test.'" *Id.* at 972 (Edwards, J., concurring). As Judge Edward's critique suggests, the common sense inferences that are inherent to the duck test increase the likelihood that decisions will be made based on biases and intuitive reasoning rather than clear evidence.

³²⁵ *Latif v. Obama*, 666 F.3d 746, 779 (D.C. Cir. 2011) (Tatel, J., dissenting); see also BENJAMIN WITTES, ROBERT M. CHESNEY & LARKIN REYNOLDS, *THE HARVARD LAW SCH. NAT'L SEC. RESEARCH COMM., THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* 23 (2012) (observing a 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 *id.* at 112.

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.³²⁶

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 favor of civil liberties. What it does recognize, however, is that the government—and judges—often overstate the harm, the probability, and the imminence of terrorist threats.

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.³²⁷ Courts should also adopt Cristina Wells's proposed refined balancing, which entails clarifying the interests implicated and examining the government's evidence supporting curtailment of the protected activity.³²⁸ A prescribed set of questions or checklist might have the salutary effect of moving judges from an intuitive process to a more deliberative one.³²⁹

³²⁶ Built into the Executive Branch's evidentiary standards for targeted killings is, not surprisingly, a similarly government-friendly and highly malleable imminence standard. See DEP'T OF JUSTICE WHITE PAPER, *supra* note 9, at 7 (determining that "clear evidence" of a specific or immediate attack is not needed to constitute an "imminent" threat justifying targeted killing). But, as a consequence, Amos Guiora warns, "identification of legitimate targets, the true essence of moral operational counterterrorism, becomes looser and less precise." Amos N. Guiora, *Targeted Killing: When Proportionality Gets All out of Proportion*, 45 CASE W. RES. J. INT'L L. 235, 257 (2012). Guiora concludes: "In the high-stakes world of operational counterterrorism, there is no room for imprecision and casual definitions; the risks, to innocent civilians on both sides and to our fundamental values, are just too high." *Id.*

³²⁷ In the post-9/11 world, courts have, at times, insisted upon evidence beyond that which is general or speculative in support of counterterrorism measures. See, e.g., *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 881–83 (2d Cir. 2008) (rejecting a statutory provision requiring the court to treat as conclusive certification by senior governmental officials that "the disclosure of the [National Security Letter] itself or its contents *may* endanger the national security of the United States," and requiring "some demonstration from the Executive Branch of the need for secrecy" (emphasis added) (citation omitted)); *Yusupov v. Att'y Gen.*, 518 F.3d 185, 201 (3d Cir. 2008) (rejecting the 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 to U.S. security" (second emphasis added) (quoting *In re A-H-*, 23 I. & N. Dec. 774, 789 (A.G. 2005))); *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004) (holding unconstitutional the city's use of a magnetometer at a political protest that the government sought to justify based on the Department of Homeland's elevated yellow threat advisory level and requiring searches to be "based on evidence—rather than potentially effective, broad, prophylactic dragnets").

³²⁸ Wells, *supra* note 181, at 221–22.

³²⁹ See KAHNEMAN, *supra* note 22, at 227 (discussing the value of the Apgar test in evaluating infant health); *id.* at 417–18 (noting the organizational requirements of checklists

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."³³⁰ This approach can obtain greater accuracy and accountability of all participants, including the government, experts, and judges.³³¹

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 reason of insanity."³³² A lesser standard is more likely to feed biases: neglecting probability and presuming imminence.

B. *Full Disclosure*

Requiring "concrete evidence" to support government curtailments of civil liberties will not eradicate biases in 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 that courts should not claim to offer in their opinions. Thus, courts must be circumspect in that which they present as fact and in how they present facts. And courts 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 to support assessments of danger, imminence, and likelihood is highly suspect.³³³ However, courts should also refrain from seeking out their own information that would suggest lesser risks; such

limit errors); Guthrie, Rachlinski & Wistrich, *supra* note 85, at 40–42 (describing scripts, checklists, and multifactor tests as mechanisms for reducing judicial cognitive errors).

³³⁰ TETLOCK, *supra* note 296, at 230.

³³¹ See Tetlock & Mellers, *supra* note 294, at 549–50.

³³² Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 521 (2010) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

³³³ In contrast, Peter Margulies has argued that the failure of *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), was that it did not rely on enough authority independent of the government's arguments and claims. Margulies, *supra* note 304, at 496–97. Margulies contends that the citation of such sources would have lent legitimacy to the decision. *Id.*

optimistic determinations would be yet another form of probability neglect.³³⁴

In addition to limiting what should be relied on as findings of fact, courts should take care in how they present their risk assessments. These findings of fact are inevitably, in part, policy judgments, and byproducts 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.³³⁵ The use of empirical evidence 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.³³⁶

Courts should, therefore, openly address the emotional element underlying their risk assessments that may animate their decisions and fact-findings.³³⁷ Terry Maroney contends this sort of transparency ensures that emotions are expressed thoughtfully and deliberately, potentially limiting the initial intuitive System 1 reaction.³³⁸ Moreover, "judicial emotion disclosure" allows the public to both apprehend and consider "the legitimacy and value of those emotions."³³⁹

Kahan suggests that the antidote to opinions written with overstated certainty is to employ "judicial idioms of *aporia*."³⁴⁰ Practically, this means that judges should acknowledge the complexity of the question before them in their decisions. A less unequivocal stance will ideally make decisions more palatable to those who oppose the outcome or at least reduce the likelihood that the decisions will be received with great hostility and distrust.³⁴¹

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 to mollify 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.

³³⁴ SUNSTEIN, *supra* note 7, at 52–53.

³³⁵ Kahan, *supra* note 76, at 34.

³³⁶ *Id.* (citing Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1996 (2006)).

³³⁷ See Maroney, *supra* note 89, at 1513–14.

³³⁸ *Id.* at 1529; Guthrie, Rachlinski & Wistrich, *supra* note 85, at 35–36.

³³⁹ Maroney, *supra* note 89, at 1529.

³⁴⁰ Kahan, *supra* note 76, at 62 (emphasis added).

³⁴¹ *Id.* at 63.

Consider *Boumediene*. Kennedy's holding that the Suspension Clause reached Guantanamo and that Congress had not provided an adequate habeas substitute was a monumental and controversial decision.³⁴² In his opinion, Kennedy tried to please both sides. On the one hand, Kennedy noted the significant and enduring threat of terrorism.³⁴³ And he acknowledged a deficit of expertise and knowledge about the risk of terrorism.³⁴⁴ But on the other hand, Kennedy engaged in fact-finding that led to his certain conclusion that judicial involvement would not interfere with the military effort to deter terrorism.³⁴⁵

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.³⁴⁶ He stated 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."³⁴⁷ And he stressed that his "opinion [did] not address the content of the law that governs [the] detention."³⁴⁸

Any limitations to habeas and paeans to the political branches' expertise did little to mollify the dissenters, instead leading Scalia and Roberts to accuse Kennedy of "faux deference"³⁴⁹ and second-guessing the political branches' judgments on the adverse effect of habeas jurisdiction on the military mission.³⁵⁰ It also led, in part, to Scalia's

³⁴² A review of different newspaper and magazine editorial headlines reflects the disparity of the public response to the opinion. See *Guantanamo: Rule of Law Wins*, SEATTLE POST-INTELLIGENCER, June 13, 2008, at B6; *No King George: U.S. Supreme Court Preserves Freedom by Backing the Constitution's Ban on Arbitrary Imprisonment*, HOUS. CHRON., June 14, 2008, at B6. Contra Matthew Continetti, *The Gitmo Nightmare: What the Supreme Court Has Wrought*, WKLY. STANDARD, June 23, 2008, at 9; *President Kennedy*, WALL ST. J., June 13, 2008, at A14.

³⁴³ *Boumediene v. Bush*, 553 U.S. 723, 793 (2008) ("The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate."); *id.* at 795 ("[I]t does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent.").

³⁴⁴ See *id.* at 797.

³⁴⁵ See *id.* at 769, 794-95.

³⁴⁶ *Id.* at 779 ("[R]elease 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 "[d]omestic exigencies"); *id.* at 795-96 (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).

³⁴⁷ *Id.* at 796.

³⁴⁸ *Id.* at 798.

³⁴⁹ *Id.* at 830 n.1 (Scalia, J., dissenting).

³⁵⁰ *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:

vivid, fact-based description of America’s “war with radical Islamists.”³⁵¹ The very lack of clarity concerning the habeas right, however, permitted the D.C. Circuit to severely restrict protections for detainees. This prompted 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.’”³⁵² 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,³⁵³ 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.³⁵⁴ 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.³⁵⁵ 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”³⁵⁶ in the post-9/11 world emerges impotent.³⁵⁷

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

the habeas process the Court mandates will most likely end up looking a lot like the [Detainee Treatment Act] 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 in 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.

³⁵¹ *Id.* at 827–28 (Scalia, J., dissenting).

³⁵² *Latif v. Obama*, 666 F.3d 746, 779 (D.C. Cir. 2011) (Tatel, J., dissenting) (quoting *Boumediene*, 553 U.S. at 783).

³⁵³ See *Al Alwi v. Obama*, 132 S. Ct. 2739 (2012) (mem.); *Al Kandari v. United States*, 132 S. Ct. 2741 (2012) (mem.); *Al-Madhwani v. Obama*, 132 S. Ct. 2739 (2012) (mem.); *Almerfed v. Obama*, 132 S. Ct. 2739 (2012) (mem.); *Latif v. Obama*, 132 S. Ct. 2741 (2012) (mem.); *Uthman v. Obama*, 132 S. Ct. 2739 (2012) (mem.); *Al-Bihani v. Obama*, 131 S. Ct. 1814 (2011) (mem.); see *Esmail v. Obama*, 639 F.3d 1075, 1078 (Silberman, J., concurring) (criticizing the Court for failing to “tak[e] a case [which] might obligate it to assume direct responsibility for the consequences of *Boumediene*”).

³⁵⁴ *Cf. Latif*, 666 F.3d at 764 (“*Boumediene*’s airy suppositions have caused great difficulty for the Executive and the courts.”).

³⁵⁵ See *Esmail*, 639 F.3d at 1078 (Silberman, J., concurring) (describing *Boumediene* as a “theoretical . . . assertion of judicial supremacy”).

³⁵⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁵⁷ I am indebted to Greg Gilchrist for this observation.

scrutiny,³⁵⁸ and he overstated the imminence of a terrorist attack by imagining how international humanitarian law could be used for terrorist purposes.³⁵⁹ Judge Edwards criticized the D.C. Circuit for similarly failing to acknowledge its conflation of the preponderance of the evidence and substantial evidence standards: “[I]t is important to at least acknowledge what is happening in our jurisprudence.”³⁶⁰

Courts should be prepared to acknowledge the complexity of the situation. They should identify the role that fear and its concomitant biases may play in their decisions, their reasoning, and their assessments of evidence. A court also 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.³⁶¹ Indeed the Supreme Court of Israel came close to this sort of admission when it held that the country’s General Security Service could not authorize brutal interrogations.³⁶² Chief Justice Aharon Barak acknowledged the potentially harmful consequences in his opinion by stating that the possibility “that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us.”³⁶³

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.³⁶⁴ Rather than engage in heated rhetoric or couch their findings as objective truth or empirical facts, judges should reveal their own doubts and difficulties contained within their analysis. Their candor may facilitate a civic dialogue over the risk we will or will not tolerate in regard to terrorism threats.

CONCLUSION

In this Article, I have attempted to explain how perceptions of risk, influenced by psychological, social, and cultural biases, affect judges’

³⁵⁸ Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723–24 (2010); *cf. id.* 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’ . . .”).

³⁵⁹ *Id.* at 2728–29 (majority opinion).

³⁶⁰ Hussain v. Obama, 718 F.3d 964, 972 (D.C. Cir. 2013) (Edwards, J., concurring).

³⁶¹ *Cf. Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 645, 650 (1980) (“[C]ongress’ express recognition of the futility of trying to make all workplaces totally risk-free.”).

³⁶² See *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service’s Interrogation Methods*, 38 I.L.M. 1471 (1999).

³⁶³ *Id.* at 1488.

³⁶⁴ Kahan, *supra* note 76, at 74.

decisions about terrorism. These influences offer four insights on opinions that courts have written since the 9/11 attacks.

First, judges resort to fact-finding in supporting their decisions that balance government policies aimed at preventing terrorism and intrusion on people's civil liberties. Judges often make factual findings regarding terrorist threats that are not supported by evidence in the record. Instead, these fact-findings are based on information that is available to them, ignoring the probability of threats actually occurring. As a result, judges may derive findings that overstate 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 System 1 responses because their deliberative reasoning, or System 2 faculty, 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. Judges 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 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 judges purport to defer to the government on the ground that they are unable to assess terrorism risks, they still cite facts regarding the probability of, or harm from, attacks. Cloaking an opinion's risk assessment in empirical certainty undermines the necessary, frank public debate regarding 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 of terrorist attacks. Judges must also carefully scrutinize inferences that the government purports to draw from evidence, which it claims supports

intrusions on civil liberties. This scrutiny is particularly necessary when only the liberties of minority groups are targeted. Generalization or speculation cannot suffice. Finally, judges 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.