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

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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.

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[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

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2 130 S. Ct. 2705, 2728 (2010).
When we are dealing with detainees, candor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism.

_Esmail v. Obama_ 3

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

_Don DeLillo_ 4

**INTRODUCTION**

It is difficult—if not impossible—to determine the risk of a terrorist attack. 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. 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.” But the post-9/11 presumption of imminence differs from the Precautionary Principle in that it addresses matters that generally defy quantifiable risk assessment.

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3 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring).
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).
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. 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. No one wants to be wrong again. This post-9/11 heuristic now pervades our society, our government, and our courts.

Part of this transformation entails an emphasis on, and preference for, an intelligence-based preventative strategy. The preventative approach, which necessarily incorporates fear and uncertainty, is a hallmark of what legal scholars Jack Balkin and Sanford Levinson have called the National Surveillance State. This governing regime “is increasingly statistically oriented, ex ante and preventative, rather than focused on deterrence and ex post prosecution of individual wrongdoing.” In this system, advances in technology and globalization may erode distinctions between international and domestic spheres. 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.


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

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. 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. 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.

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.


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

This Part first discusses 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.

A. System 1 and System 2

Psychologists divide our ways of thinking into two primary methods: System 1 and System 2. System 1 describes our “automatic”
mode of thinking, which is based on “impressions, intuitions, intentions, and feelings.” System 2, on the other hand, describes a more complex manner of thinking; one that entails greater concentration and conscious reasoning.

Some aspects of System 1 are innate or reflexive, such as the recognition of an object or the fear of an animal. 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.” This automatic and impulsive sort of thinking is critical to getting through many activities without too much exertion. But System 1 thinking is also distinguished by irrational responses to stimuli, confirmation bias, heuristics, and probability neglect.

System 2 thinking comes into play when activities demand greater attention, such as a more involved mathematical equation like “17 x 24,” or evaluating a complex logical argument. 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. But System 2 also inevitably builds on the impressions of System 1, turning them into beliefs and judgments. However, people often try to hide, or do not believe, or are unaware, that their reasoned decisions are the product of impulsive reactions. Thus, System 2 may sometimes act as “an apologist for System 1,” leading to decisions predicated on biases and other cognitive errors. 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. This mode of thinking is referred to as the “availability heuristic.” Specifically,
people try to determine the magnitude of a risk based on what they can 
most easily think of. Thus, people are more likely to be frightened by 
something if they can think of examples of its occurring than if they 
cannot. So, for example, a bump in media reports of shark attacks will 
lead many people to believe attacks are more likely than is statistically 
probable.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
consciousness. 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. 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. Critics of the color-coded threat levels often complained that the system only stoked anxiety without providing substantive information.

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.

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

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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-memorablemoments-idUSBRE86A0EG20120711.


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-terror/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]mminent, 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. 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.

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

What are termed “dread risks,” “worst-case scenarios,” or “low-probability, high-consequence events,” powerfully impact human behavior. 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. Flying remains, even with the
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

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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)).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{73} He stresses that it is “irrationality, not a different set of values,” that explains the gulf in risk assessments.\textsuperscript{74}

\textbf{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.\textsuperscript{75} They call this inclination “cultural cognition.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{78}

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

\begin{footnotesize}
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\item \textsuperscript{70} Id. at 188–89.
\item \textsuperscript{71} See SUNSTEIN, supra note 7, at 80 (discussing Peter M. Sandman et al., \textit{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.
\item \textsuperscript{72} See William J. Burns & Paul Slovic, \textit{Predicting and Modeling Public Response to a Terrorist Strike, in SLOVIC}, supra note 42, at 285, 293–97, 302.
\item \textsuperscript{73} See SUNSTEIN, supra note 7, at 85–87.
\item \textsuperscript{74} Id. at 86.
\item \textsuperscript{76} Id. at 1072–73, 1083–88; Dan M. Kahan, \textit{The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law}, 125 HARV. L. REV. 1, 23 (2011).
\item \textsuperscript{77} Kahan, Slovic, Braman & Gastil, supra note 75, at 1072, 1105 (discussing MARY DOUGLAS & AARON WILDAVSKY, \textit{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).
\item \textsuperscript{78} See Kahan, Slovic, Braman & Gastil, supra note 75, at 1105–06.
\end{itemize}
\end{footnotesize}
reasoning that impels people to think and decide in a manner that affirms their membership in a social group.\textsuperscript{79} This may take the form of a search for information that supports the positions of their group identity.\textsuperscript{80} People are also inclined to dismiss information that challenges the positions of their group.\textsuperscript{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.\textsuperscript{82}

Cultural cognition also helps explain the availability heuristic, the affect heuristic, and probability neglect.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\footnotesize{
\textsuperscript{79} Kahan, supra note 76, at 20; see also Cassandra Burke Robertson, \textit{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).
\textsuperscript{80} Kahan, supra note 76, at 21.
\textsuperscript{81} \textit{Id.} Identity-protective cognition is not only exhibited by “emotional” or “affective” right brain thinkers. \textit{Id.} People who are reflective and deliberate in their judgments, or are left brain thinkers, are likely to perform complex information analysis to support their group’s views. \textit{Id.}
These tendencies bear striking similarity to what we commonly refer to as “confirmation bias.” See \textit{Kahneman}, supra note 22, at 80–81.
\textsuperscript{82} Kahan, supra note 76, at 22.
\textsuperscript{83} Kahan, Slovic, Braman & Gastil, supra note 75, at 1084–85.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} See, \textit{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, \textit{Blinking on the Bench: How Judges Decide Cases}, 93 CORNELL L. REV. 1 (2007).
\textsuperscript{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

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)).
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. Judge Richard Posner contends that it is impossible “to judge without biases.” Posner argues these biases or “priors” influence all judges, including at the appellate level, in their weightings of evidence and assessments of probability. 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. 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.” 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, 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.


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, restrictions on political speech at political conventions, and immigration decisions. 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** 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. The dispute between the majority and the dissent centered on whether the teaching would aid terrorist groups; in effect, whether their speech would make a terrorist attack more likely.

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

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

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]ether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism.” 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.” Quoting Justice Kennedy’s majority opinion from Boumediene v. Bush on the habeas rights of detainees at Guantanamo Bay, Roberts noted that “neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.”

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

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.
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 distinguished 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.” 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. 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.

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

Although Roberts presented his opinion as one of judicial deference, he also conjured up his own idea of how lawful and peaceful advocacy might aid terrorism. “The PKK could,” Roberts offered as an example, “pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks.” For support, Roberts cited the book, Blood and Belief, a few pages of which discussed the PKK’s suspension of violence and return to fighting. The government

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. But defending his hypothesized danger, Robert explained, “[t]his possibility is real, not remote.”

Dissenting, Justice Breyer insisted that notwithstanding the significant threat of terrorism, the Court could assess any evidence of the danger involved, the gravity of the threat, and its imminence. But Breyer disputed 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. Roberts’s “general and speculative” arguments could not justify infringement of the First Amendment.

Breyer criticized, in particular, the judicially-generated “hypothetical claims” as:

arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about ‘the international legal system’ is too dangerous a thing; that an opponent’s subsequent willingness to negotiate might be faked, so let’s not teach him how to try[].

Expressing “serious doubt” about the statute’s constitutionality, Breyer would have construed the statute to prohibit “First–Amendment–protected pure speech and association only when the defendant knows or intends that those activities will assist the organization’s unlawful terrorist actions.”

_Humanitarian Law Project_ never references the “war on terror,” “Al Qaeda,” or “September 11.” But the majority opinion evidences a

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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. 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.” Breyer, explained Roberts, was naïve; he failed to understand how training in international law might be exploited by terrorist groups.

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.”

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 Black Tea Society v. City of Boston, the First Circuit addressed restrictions imposed by the city of Boston on protesters at the 2004 Democratic National Convention. The city confined protesters to a “demonstration zone,” which amounted to a chain link and mesh 90 feet by 300 feet “enclosed space” or “a pen.” The court affirmed the district court’s denial of a motion for preliminary injunction seeking modification of the zone. Though the majority did not refer to the 9/11 attacks as a factor in its decision, 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.
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

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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.\textsuperscript{153} But more importantly, the majority maintained it had to explain “why” it decided the case the way it did.\textsuperscript{154} For the majority, its holding could not be separated from the fact that 9/11 occurred and that a terrorist threat persisted.\textsuperscript{155}

\textit{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.\textsuperscript{156} In \textit{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.\textsuperscript{157} Invoking “common sense” that “security is of paramount importance at airports in our post-9/11 world,”\textsuperscript{158} Judge Andre Davis, in his dissent, criticized the majority for relying on a Fourth Circuit 1993 decision\textsuperscript{159} holding that the risk posed by newspaper racks was “de minimis.”\textsuperscript{160} The majority, Judge Davis declared, ignored the 1993 case’s “proper context: it predates September 11, 2001.”\textsuperscript{161} Put simply, pre-9/11 case law does not speak to the post-9/11 world.\textsuperscript{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.\textsuperscript{163} As a result, Judge Davis, and other judges, would appear to argue that

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  \item \textsuperscript{153} \textit{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)).
  \item \textsuperscript{154} \textit{Id.} (emphasis added).
  \item \textsuperscript{155} \textit{See id.} at 960–61.
  \item \textsuperscript{156} \textit{Holder v. Humanitarian Law Project}, 130 S. Ct. 2705, 2729 (2010).
  \item \textsuperscript{157} \textit{News \& Observer Publ’g Co. v. Raleigh-Durham Airport Auth.}, 597 F.3d 570 (4th Cir. 2010).
  \item \textsuperscript{158} \textit{Id.} at 589 (Davis, J., dissenting).
  \item \textsuperscript{159} \textit{See Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.}, 991 F.2d 154 (4th Cir. 1993).
  \item \textsuperscript{160} \textit{News \& Observer Publ’g Co.}, 597 F.3d at 589 (Davis, J., dissenting) (internal quotation marks omitted).
  \item \textsuperscript{161} \textit{Id.}
  \item \textsuperscript{163} \textit{News \& Observer Publ’g Co.}, 597 F.3d at 589–90 (Davis, J., dissenting).
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acknowledging the “post-9/11 world” (and its laws) may supersede or overrule the pre-9/11 world (and its laws).\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{170} a Supreme Court case concerning the liability of government officials for abusive counterterrorism measures.\textsuperscript{171} Two months after the 9/11 attacks, Javaid Iqbal, a Pakistani Muslim, was arrested on immigration fraud related charges and then detained for six months as a person of “high interest” to the 9/11 investigation only, he alleged, because of “his race, religion, or national

\textsuperscript{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).

\textsuperscript{165} Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 n.6 (2010).

\textsuperscript{166} Id. at 2727.

\textsuperscript{167} Brest, supra note 26, at 485.

\textsuperscript{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.

\textsuperscript{169} Id. at 116–17.

\textsuperscript{170} 556 U.S. 662 (2009).

\textsuperscript{171} Id.
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.

\(^{177}\) Id.


\(^{179}\) 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)).


\(^{180}\) 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.”

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

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. Following his

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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 Kasem, supra note 177, at 1454; see also Huq, supra note 178, at 250.
185 Id. (quoting Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring), reversed and remanded by 556 U.S. 662).
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. 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. 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.” 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. Instead, the fact-finding is the very sort of judgment Roberts insisted courts were not competent to make.

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

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”).

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)).

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”).

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


Id. at 827 (Scalia, J., dissenting).
Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.\textsuperscript{195}

By granting the detainees habeas, Scalia warned, Americans would be killed.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{195} Id. (citations omitted).
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{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).
\textsuperscript{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) (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.
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.” Writing in dissent, Justice Murphy would have required the government to show that a constitutional deprivation based on “military necessity” “is reasonably related to a public danger that is so ‘immediate, imminent, and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger,” before simply accepting the military’s judgment.

The near-total deference and lack of any evidentiary requirement aided the Court in its approval of “obvious racial discrimination.” Looking back at his vote upholding the exclusion, Justice 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.”

Dennis v. United States, in which the Court upheld convictions of American Communist party leaders for conspiring to “advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence,” also prescribed an approach to national security matters that permitted worst-case scenarios to trump lack of evidence of probability or imminence. Unsatisfied with earlier iterations of the “clear and present danger” test, which the Dennis Court determined were not apposite because they did not deal with a “substantial threat to the safety

206 Id. at 218–19, 223–24.
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.”).
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

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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).
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).
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

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\(^{220}\) 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. 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.”

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.” Judge Posner explained that suspicionless checks would not offend the Fourth Amendment because “[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact.”

Posner’s hypothetical involved an imminent attack; 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. Justice Souter dissented, contending that the dog sniff constituted an unauthorized search that was not justified. Yet Souter also saw fit to endorse a terrorism exception:

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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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”).\textsuperscript{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.”).

\textsuperscript{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.


\textsuperscript{238} See Sunstein, supra note 7, at 64–65.
The court observed that while the threat may not be “dispositive,” it is “a crucial factor” in determining whether a search is “reasonable.” 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.” 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. 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.” 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.”

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.

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. Silberman explained:

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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.
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.
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.  

Therefore, Silberman reasoned, a “preponderance of [the] evidence” standard would be too burdensome. He speculated that none of his colleagues would “vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.”

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

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

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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).


251 See KAHNEMAN, supra note 22, at 103–04.
hearing for detainees. But it may be better attributed to at least a majority of the Court’s view that the cases did not entail exigent circumstances or encroach on issues of military necessity that the Korematsu Court, for example, did perceive. Yet even this determination itself has entailed findings of fact.

In Rasul v. Bush, a 6-3 majority held that there was federal habeas jurisdiction over detainees who were not from nations at war with the United States and might be held indefinitely at the U.S. Naval Base at Guantanamo Bay, Cuba. Concurring, Justice Kennedy inferred from the base’s location outside of “any hostilities,” and the lengthy detention, a lack of exigency. Kennedy’s risk assessment here—his finding of a lack of imminence—was no less a 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. The Court further held that detainees had a constitutional right to habeas and that the jurisdiction stripping provision amounted to an unconstitutional suspension of habeas. Writing for the majority, Kennedy concluded that “[t]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.” As in Rasul, Kennedy

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) (“Due 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.\textsuperscript{260}

The Court is more likely, however, to defer to the government, or even decline jurisdiction where a threat is perceived as imminent. \textit{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,\textsuperscript{261} including detonating a dirty bomb in the United States.\textsuperscript{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.”\textsuperscript{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).\textsuperscript{264} Instead, the majority held Padilla should have filed in the District of South Carolina where he was held in a naval brig.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,\textsuperscript{268} deferring to government characterization of risk

\begin{footnotesize}
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  \item[260] See id. at 794, 797 (noting six years of detention without judicial review); see also id. at 800–01 (Souter, J., concurring) (same).
  \item[262] See Padilla v. Rumsfeld, 352 F.3d 695, 701 (2d Cir. 2003), reversed and remanded by 542 U.S. 426.
  \item[264] \textit{Id.} at 429–30 (majority opinion).
  \item[265] \textit{Id.} at 432, 436–37, 446.
  \item[266] Vladeck, \textit{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).
  \item[267] See Vladeck, \textit{supra} note 19, at 140.
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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


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. 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.

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

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

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275 See Margulies, supra note 198, at 759–60 (discussing the Court’s “punitive turn”).


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. 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.

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.” Though the dissenters in Boumediene criticized its employment as a rhetorical pose, Roberts reified the rationale in Humanitarian Law Project at the heart of his opinion.

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

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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.


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


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.


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. 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. Article III courts have, of course, overseen scores of terrorism cases, both of domestic and international dimensions. As for the secretive nature of certain subjects, there are procedures in place that have permitted courts to have access to classified information. Finally, specialized courts have also been created that allow for judicial review of information with standards distinct from those in traditional Article III courts.

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. Envtl. 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.


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. 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.

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 Baaack . . . ’: The Rebirth of al Qaeda?, FOREIGN POL’Y (July 29, 2013), http://walt.foreignpolicy.com/posts/2013/07/29/theyre_baaackthe_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. Indeed, experts are often political actors whose predictions and assessments may be both a product of fear of blame and accountability and objective analysis. 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.

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. Notwithstanding these

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

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.\(^\text{303}\) And yet, Roberts’s deference to the government’s evidence overrode even that high level of scrutiny.\(^\text{304}\)

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

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.


\(^{304}\) 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.” As a result, Roberts, like many other judges, appeared to presume the probability and imminence of an attack.

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.”

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.

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

307 Id. at 2729 (majority opinion).
308 Id. at 2728.
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.”

To counteract this emotional tendency, these authors suggested that policy makers explicitly consider likelihood data in formulating counterterrorism policy. Similarly, without prescribed evidentiary standards, courts are likely to craft opinions that defer to the government’s interpretation of evidence and ignore probability and imminence, often by diluting the evidentiary requirements to the point where they favor the government. Indeed, Roberts decried the dissent’s call in *Humanitarian Law Project* “demanding hard proof—with ‘detail,’ ‘specific facts,’ and ‘specific evidence,’—that [the] proposed activities will support terrorist attacks.” Rather, it was sufficient to rely on the *Blood and Belief*-sourced notion that “[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.” And Roberts was content to rely simply on the idea that “[t]his possibility is real, not remote.” But failing to require any demonstrable risk when the First Amendment and national security conflict, invites imaginings of the possible and plausible, without sufficient regard for the probable. Applying such a rule, Breyer argued, will grant the government a victory in every instance.

Breyer’s and Roberts’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. 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. Yet, many of the judges have chafed at the higher preponderance standard, advocating a lesser burden of proof. Furthermore, at least one D.C. Circuit member has

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314 *Id.*
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).


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 DEPT 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 U.S. 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 magnets”).

\(^{328}\) 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

\(^{330}\) Tetlock, supra note 296, at 230.

\(^{331}\) See Tetlock & Mellers, supra note 294, at 549–50.


\(^{333}\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{336}

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

Kahan suggests that the antidote to opinions written with overstated certainty is to employ “judicial idioms of aporia.”\textsuperscript{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.\textsuperscript{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.

\textsuperscript{334} SUNSTEIN, supra note 7, at 52–53.
\textsuperscript{335} Kahan, supra note 76, at 34.
\textsuperscript{336} Id. (citing Suzanne B. Goldberg, Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication, 106 COLUM. L. REV. 1955, 1996 (2006)).
\textsuperscript{337} See Maroney, supra note 89, at 1513–14.
\textsuperscript{338} Id. at 1529; Guthrie, Rachlinski & Wistrich, supra note 85, at 35–36.
\textsuperscript{339} Maroney, supra note 89, at 1529.
\textsuperscript{340} Kahan, supra note 76, at 62 (emphasis added).
\textsuperscript{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. In his opinion, Kennedy tried to please both sides. On the one hand, Kennedy noted the significant and enduring threat of terrorism. And he acknowledged a deficit of expertise and knowledge about the risk of terrorism. 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.

Perhaps trying to win over other members of the Court or allay the public’s fears, Kennedy indicated that the scope of the habeas right could be limited. He 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.” And he stressed that his “opinion [did] not address the content of the law that governs [the] detention.”

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

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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.” 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 “it is hard to see what is left of the Supreme Court’s command in *Boumediene* that habeas review be ‘meaningful.’” 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, 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. 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. 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” in the post-9/11 world emerges impotent.

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

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