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### 1AC Presumed Imminence

#### Contention 1 is Presumed Imminence

#### post-Boumediene lower court decisions that authorize lower evidentiary standards have made habeas useless

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Beginning in 2001, the United States began transporting hundreds of persons captured overseas in the “War on Terror” to the U.S. Naval Base at Guantánamo Bay, Cuba.1 They were kept at Guantánamo specifically to insulate from judicial review the military’s decision to detain them.2 Seven years later, the Supreme Court in Boumediene v. Bush granted Guantánamo detainees the right to petition for the writ of habeas corpus in the Court of Appeals for the D.C. Circuit. 3 The Court held that detainees must have “a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law.”4 The Court’s central concern was with the habeas court’s power to admit and consider relevant exculpatory evidence, a power necessary “[f]or the writ of habeas corpus, or its substitute, to function.”5 But while the Court’s central preoccupation was with a habeas court’s power to independently review the evidence, the Court did not enumerate any specific procedural requirements. The Court—hesitant to place burdens on the military and cognizant of the need to protect classified information—sketched only the broad outlines of what the Constitution requires.6 In so doing, it left “[t]he extent of the showing required of the Government in these cases . . . a matter to be determined”7 and charged the district courts with the task of balancing the government’s legitimate interests against each detainee’s right to have a court assess the lawfulness of his detention.8 Since Boumediene, the courts within the D.C. Circuit have heard over sixty habeas petitions from detainees at Guantánamo Bay.9 At first, many writs were granted. The lower courts applied a functional framework for determining the admissibility, credibility, and probity of evidence, holding the government to the ordinary burden of preponderance of the evidence.10 However, as the government and detainees began to appeal habeas decisions on the basis of adverse evidentiary rulings, the Court of Appeals announced binding evidentiary rules limiting the district courts’ discretion to admit, exclude, weigh, and consider evidence as the district courts saw fit.11 This Note argues that these evidentiary rules deny detainees a “meaningful opportunity” to contest the factual basis of their detention.12 The D.C. Circuit maintains that it holds the government to a preponderance standard13 and has cast its reversals of the District Court’s grants of habeas corpus as mere corrections in judging evidentiary probity.14 However, in substance, the Court of Appeals’ evidentiary rules have quietly but significantly eroded the evidentiary burden. The way in which the evidentiary standard and the evidentiary rules interact to weaken Boumediene has, for the most part, escaped scrutiny.15 Many have praised the D.C. Circuit for striking an appropriate balance between the needs of national security and the rights of those wrongfully detained.16 But this underestimates the combined significance of the D.C. Circuit’s evidentiary rulings. Boumediene’s central purpose was to withhold from the executive branch the unchecked power to detain whomever it deems a threat.17 Yet the D.C. Circuit’s evidentiary rules have empowered the government to detain upon so little evidence **that** the habeas hearing no longer serves the checking role the Boumediene Court intended.18 The D.C. Circuit has tacitly reduced the amount and quality of evidence necessary to establish the lawfulness of detention through three powerful mechanisms: (1) all but eliminating corroboration requirements and restrictions on the admissibility of hearsay evidence, no matter how unreliable;19 (2) establishing that courts consider the evidence in the “whole record” when determining whether a petitioner meets the requirements for detention—a determination that often reduces to the Court of Appeals’ deciding that the District Court wrongly refused to credit sufficient government evidence;20 and (3) developing irrefutable presumptions of detainability in which a single fact once established— such as a stay at an al-Qaeda affiliated guesthouse—is dispositive on the question of detention, even when other facts in the record point strongly in the opposite direction.21 That these rules operate to significantly reduce the government’s burden, and thereby deprive detainees of a meaningful opportunity to contest the factual basis of their detention, is not readily apparent from the D.C. Circuit’s decisions. Rather, the D.C. Circuit has framed its successive evidentiary decisions as meeting Boumediene’s goal of striking a careful and necessary balance between the significant burdens that a higher evidentiary requirement would impose on the military during wartime, and the minimal impact that these decisions would have on the substantive rights of detainees in habeas proceedings.22 This Note explains how, contrary to the Court of Appeals’ rhetoric, these evidentiary rules have played a dispositive role in the outcome of these cases. Part I analyzes how the credibility rules established by the Court of Appeals reduce the government’s evidentiary burden. Part II explains how the mosaic theory that the Court of Appeals has imposed on the district courts often privileges unreliable evidence. Finally, Part III demonstrates how the Court of Appeals’ development of irrefutable presumptions for establishing the lawfulness of detention decreases the quality and amount of evidence that the government must put forth to prove membership in al-Qaeda, the Taliban, or associated groups. This Note concludes that the Court of Appeals’ construction of evidentiary rules and the interaction among them has taken the bite out of Boumediene, granting executive detention at Guantánamo Bay judicial sanction without judicial scrutiny.

#### Statistics show this has effectively negated any review process for detention—the government can now prove any person, guilty or not, is an enemy combatant

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It is an open secret that Boumediene v. Bush’s promise of robust review of the legality of the Guantanamo detainees’ detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with Al-Adahi v. Obama. This Report examines the outcomes of habeas review for Guantanamo detainees, the right to both habeas and “a meaningful review” of the evidence having been established in 2008 by the Supreme Court in Boumediene. There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government’s factual allegations rather than reject them.1 The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in Al-Adahi. Detainees won 59% of the first 34 habeas petitions. Detainees lost 92% of the last 12. The sole grant post-Al-Adahi in Latif v. Obama has since been vacated and remanded by the D.C. Circuit. The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government’s factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations. The effect of Al-Adahi on the habeas corpus litigation promised in Boumediene is clear. After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition. Given the fact-intensive nature of district court fact-finding, the shifting pattern of lower court decisions could only be due to an appellate court’s radical revision of the legal standards thought to govern habeas petitions, raising questions about whether the D.C. Circuit has in fact correctly applied Boumediene. This Report analyzes allegations that repeatedly appear in habeas cases to reveal the actual pattern of district court fact-finding.

#### The denial of habeas to innocent people represents a unique form of cruel and unusual punishment

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Eisenberg 9

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Representing Guantánamo detainee Mohammed Abd Al Al Qadir (Guantánamo Internee Security Number 284)1 has been an experience unlike any other of my legal career. While serving as counsel for Mr. Al Qadir (also known as Tarari Mohammed), Jerry Cohen2 and I encountered numerous obstacles unique to Guantánamo cases. Convoluted administrative procedures, allegedly implemented to protect national security, made representation difficult for lawyer and client alike. In 2004, the U.S. Department of Defense issued procedures to assess the need to continue detaining enemy combatant detainees.3 Three years later, Tarari Mohammed was cleared for release or transfer.4 Nevertheless, he was still detained in Guantánamo Bay’s Camp 6 as of our March 20, 2008 visit.5 When Jerry and I arrived at the base, guards escorted us to an interview cell. When the cell door was unlocked, we saw our client shackled to the floor,6 as always, and immediately noticed he was wearing a white respirator on his face. The respirator was of the sort a contractor wears when working with toxic materials. Alarmed, I asked if he was all right. As the interpreter began to translate my question, our client interrupted, saying something in Arabic. The interpreter shot us a look and said, “We will talk about it.” After the guards left the room and locked the door behind them, Tarari uncharacteristically spoke in a serious and determined tone. On all other occasions, he had been extremely polite, deferential, and allowed us to lead the conversation. Tarari Mohammed proceeded to tell his story, one he had clearly been waiting to tell. Approximately three weeks prior, he had an appointment with a representative of the International Committee of the Red Cross (ICRC).7 He met with the representative, who brought a letter from our client’s sister. The letter was the first and only communication our client received from any member of his family in over six years of detention. In the letter, Tarari’s sister informed him of their mother’s death, but did not provide details as to the date or cause. The letter also stated that, prior to her death, his mother had been distraught over her son’s detainment; it also detailed his father’s sadness. Tarari expressed that his heart was breaking and that he wanted to return to his cell. At the conclusion of their meeting, the ICRC representative told Tarari that his family had not received any letters from him. Tarari explained he had written and sent many letters during his detainment. The military never forwarded the letters. Communication is a constant struggle for both detainees and counsel. Lawyers must comply with a protective order (PO)8 entered by the court, regulating the dissemination of information.9 The protective order renders all communication with the detainee, whether to or from him, subject to review by a designated authority.10 More specifically, all communications must be handled, transported, and stored in a secure manner as described in the PO.11 The order places an additional burden on an already strained attorney-client relationship, rendering the detainee’s lawyer powerless, unable to have mail delivered between them, or between the client and his family. Petitioner’s counsel (“habeas counsel”) must treat all written and oral communication with a detainee as classified, unless otherwise determined by the reviewing authority.12 Even the notes we take during our client meetings are subject to review.13 Mail is also a source of constant strife for habeas counsel. There are two types of mail, “legal mail” and “non-legal mail,” which are processed in different manners.14 Legal mail is reviewed in a secure facility in or around Washington, D.C.,15 while non-legal mail is reviewed by the military.16 In theory, POs are intended to surmount the many logistical obstacles generated by these cases, and to reconcile the divergent priorities of the government and habeas counsel.17 Secrecy and national security are of paramount interest to the government,18 while habeas counsel advocates for open communication with clients, their families and home countries, as well as the public at large.19 The government contends that without the prescribed screening process, messages could be transmitted to terrorist organizations, possibly endangering the United States or its allies.20 In reality, the process operates to compound the psychological and emotional damage these men suffer, further isolating them from the outside world.21 Not only are detainees isolated from the outside world, but some, like Tarari, have been punished without cause. Tarari’s few freedoms were drastically reduced after his ICRC meeting. Guards came to his cell to measure him for clothing, explaining he was no longer allowed to wear his white jumpsuit, which indicated compliance, and instead must wear orange.22 When asked why they were punishing him, the guards replied that he was in trouble for spitting.23 Tarari denied ever spitting on anyone, yet the guards said he would not only have to wear the orange jumpsuit, but also a respirator.24 During our visit, Tarari asked how anyone could have such hate in their hearts that they punish someone for the death of his mother. He told us that at 2:00 a.m., on the morning after the guards’ visit, they returned to search his cell, harassing him further.25 Tarari then informed us that following the status change, and before our visit, he sought out a particular Non-Commissioned Officer (NCO) who had always treated him fairly. He asked the NCO why he had been disciplined, maintaining he had never spit and that the accusations were false. Tarari trusted the NCO, who told him he would not be punished further. Yet, despite the NCO’s assurances, the punishment did not cease. The NCO later told him that his superior had ordered the reprimand, offering no further justification. Absent another explanation, my co-counsel and I concluded Tarari was punished for having learned his mother had passed away. We speculated that this was a preemptive effort to ensure his compliance, for should Tarari get upset over his mother’s passing, the sanctions would make him easier to control—lending new meaning to the term “prior restraint.”26 We may never know whether our client actually committed a punishable offense, or whether the guards were simply acting out of spite. While anything is possible, it is unlikely our client would lie to us, given our long-established attorney-client relationship and the many hours we have spent together. Tarari celebrated the beginning of his seventh year in captivity, with no charges ever having been brought against him, by learning that he had lost his mother. Even if this otherwise compliant man had acted out after learning of his mother’s death, is that so hard to understand? Tarari is just one of the many Guantánamo detainees who must suffer punishment without recourse. Together, their stories reveal the government’s actions at Guantánamo, redefining cruel and unusual.

#### These decisions reflect a post 9-11 heuristic of deference to the executive and acceptance of its claims of imminent threat based on irrational fears

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It is difficult 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 11 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 summons a post-9/11 impression that although terrible harm is uncertain we must act as though it is imminent. Such thinking is a variant of the Precautionary Principle, which Cass Sunstein describes as positing that “action should be taken to correct a problem as soon as there is evidence that harm may occur, not after the harm has already occurred.” This mindset explains the capacious definition of imminence that the government purportedly relies on as part of it legal justification of targeted killings of American citizens. No one wants to be wrong again. This post-9/11 heuristic now pervades our society, our government, and our courts. Part of this transformation entails an emphasis on, and preference for, an intelligence-based preventative strategy. The preventative approach, which necessarily incorporates fear and uncertainty, is a hallmark of what legal scholars Jack Balkin and Sanford Levinson have called the National Surveillance State. This governing regime “is increasingly statistically oriented, ex ante and preventative, rather than focused on deterrence and ex post prosecution of individual wrongdoing.” 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 evidence. 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 a number of the government’s post-9/11 counterterrorism measures. While a number of the Court’s post-9/11 decisions the enemy combatant decisions, in particular were often characterized by the media and some scholars as significant defeats for the government, there is reason to question that narrative. A few years removed, the decisions appear fairly modest in their limitations on the government. These opinions were invariably quite deferential to the political branches. Though the opinions assuredly marked a territorial role for the courts in the post-9/11 world, they offered more heat than light. The opinions derived from Separation of Powers structural principles rather than from the Bill of Rights. Thus the decisions were more procedural than substantive, offering little insight on the nature of detainees’ rights. The decisions also provided minimal guidance even as to process, relegating many of the decisions on the details to lower courts and to the political branches. Finally, consider what the Court has not thus far addressed or done. Richard Fallon points out that the Court has not limited the movement of military and intelligence officers in their counterterrorism operations; it has not opined on the state secrets doctrine; nor has it permitted lawsuits seeking relief for abuses suffered as a consequence of counterterrorism abuses to go forward. More specifically, it has not ordered a release in a habeas case and it does not appear poised to do so anytime soon. Fallon attributes such restraint to the notion that judicial review is “politically constructed,” that is, Justices may decide cases based in part on how their opinions may be popularly received, and the Court’s authority respected. This Article offers another explanation of the Court’s deference: the Justices are afraid. They are afraid of terrorism. They are afraid of what could happen to our security if they rein in government. This Article examines the ways in which fear has affected and influenced judges in addressing terrorism. Importantly, the discussion is not limited to enemy combatant cases or to the Supreme Court, but examines the ways in which the post-9/11 heuristic has affected a range of judicial opinions, from limits on political protests to airport security measures to criminal prohibitions of material support of terrorism. Such rulings invariably entail the courts making their own risk assessments. Yet forecasts of uncertain catastrophic events are notoriously unreliable. This is due to cognitive errors and biases that Cass Sunstein and others have documented. What then is a court to do? Many suggest courts should defer to the political branches. Deference is untenable for a number of reasons. First, it is unclear whether political actors are any more adept at making predictions. Second, the arguments for deference in the terrorism threat context are less compelling than in war because, the Court has intimated, the geographic and temporal limitations to fighting terrorism are not evident. Deference would not be a short-term or limited posture, as it might be for a military armed conflict, but one that would endure as long as the seemingly permanent crisis of terrorism. Third, deferring to the government in all events terrorism-related threatens to upset domestic criminal law jurisprudence because counterterrorism measures involve a mélange of military, intelligence, and criminal approaches that employ differing standards of proof. Finally, even when invoking judicial deference and lack of national security expertise, what can be seen at work in many judges’ post-9/11 opinions are their own risk assessments, which evidence their own cognitive biases impacted by the fears engendered by terrorism. Ironically, their frequent fact finding of risks or lack of threat is wholly at odds with the purported deferential stance that judges insist they are taking in addressing the terrorism cases. This tendency can be seen in various Justices and lower court judges’ opinions, regardless of whether they uphold or strike down government actions. This Article takes Holder v. Humanitarian Law Project as its case study. Part I of the Article reviews the Supreme Court’s 2010 decision upholding application of the criminal prohibition on material support of a foreign terrorist organization to human rights advocates’ training of such groups in international humanitarian law and human rights law. The case reveals much about how the Court undertakes terrorism risk assessments and how the judiciary is likely to handle most terrorism cases going forward. The opinion also illustrates the Court’s tendency to fall prey to cognitive errors and biases in undertaking risk assessments even when stating it is deferring to other branches’ factual determinations. The decision also presages a reduced standard of evidence and suspicion in the name of preventing terrorism in the criminal context. Given the government’s increased emphasis on terrorism, there is reason to worry the standard will infect the criminal justice system. Finally, these findings of fact undermine the Court’s credibility because they will be perceived by the public as bad faith efforts to masquerade personal policy preferences as empirical facts. Part II of the Article explores the literature on decision making and risk assessment and how certain dread risks can influence people’s decisions, particularly those of judges. Part II does not limit the discussion to Sunstein’s focus on cognitive errors but builds on Dan Kahan, Paul Slovic, and others’ critique of that account by also reviewing social and cultural influences that affect a person or a judge’s perception of risk. Part III then examines various court opinions, in particular Humanitarian Law Project, to explore how these errors and influences manifest. Next Part IV addresses and ultimately rejects judicial deference as a means to adapting to the concomitant errors of judicial review of terrorism-related matters. Finally, Part V proposes solutions that will enable courts to overcome cognitive biases and other social and cultural influences. The Article concludes that evidentiary standards favoring those whose civil liberties are targeted is a necessary step toward overcoming particular biases that ignore probability. In addition, courts should resist writing in terms of certainty, including findings of fact, but should instead candidly disclose their uncertainty and anxiety over terrorism threats.

#### This causes ineffective risk analysis that produces bad decisionmaking and mass racial discrimination—aff solves

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This section examines how courts often neglect probability in undertaking risk assessments. This cognitive error is not, however, unique to post-9/11 jurisprudence. Indeed, it appears that at times of crisis and through the special needs doctrine, the Supreme Court has long sanctioned probability neglect as an analytical tool. In Humanitarian Law Project Roberts accepted as a foregone conclusion that acts of terrorism were very likely: “The Government,” Roberts explained, “when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.” The reference to “imminent harms” is jarring; nowhere in the opinion was there any discussion of the likelihood of a terrorist attack. There was no basis for believing an attack was imminent. This was simply Roberts’ default position in the face of uncertain harm. The presumption of imminence ups the stakes. In so doing Roberts presented the Court with a form of the ticking time bomb hypothetical, or the “one percent doctrine.” That is, whatever the odds really may be, and we cannot know what they are, we should assume and act as though an attack is about to occur. The standard permits just about any imagined outcome to justify the prohibition of speech to a designated foreign terrorist group. It is also then an invitation to always err on the side of the government and feed cognitive errors and emotions rather than facilitate more deliberative reflection. Though the post-9/11 risk of terrorism may be different from prior threats, the Supreme Court has historically adopted the worst-case scenario, presuming imminence in times of perceived existential dangers. 1. Historical Examples of Presumed Imminence In Korematsu v. United States, the Court upheld the exclusion and internment of over 112,000 Japanese Americans on the grounds of the elastic idea of military necessity. Writing for the six-justice majority, Justice Black justified the decision based upon deference to the 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 Douglass acknowledged that psychological and social fears and biases inevitably played a role in the decision. The Court’s “‘members are very much a part of the community and know the fears, anxieties, cravings and wishes of their neighbors . . . The state of public opinion will often make the Court cautious when it should be bold.’” Dennis v. United States, in which the Court upheld convictions of American Communist party leaders for conspiring to “advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence,” also prescribed an approach to national security matters that permitted worst-case scenarios to trump lack of evidence of probability or imminence. Unsatisfied with earlier iterations of the “clear and present danger” test, which the Dennis Court determined were not apposite because they did not deal with a “substantial threat to the safety of the community,” such as the existential crisis posed by Communism, the Court adopted Judge Learned Hand’s rule, crafted in the Court of Appeals. 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.’” Under this analysis, however, what the rule permitted was that the graver the danger or perceived harm, the lesser the probability of such harm required in order to uphold the government action. Thus the Dennis Court articulated an iteration of the clear and present danger test that operationalized cognitive errors such as probability neglect. Brandenburg, invoked by Breyer in dissent, seemingly overruled the Dennis test, holding 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.” Probability 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. 2. Special Needs Cases The Supreme Court’s special needs line of cases also evidences a general willingness on the part of courts to ignore calculations of probability or require specific evidence where the potential harm is great. For example, in Nat’l Treasury Employees Union v. Von Raab, the Supreme Court upheld 5-4 the United States Customs Service’s required urinalysis testing for all those seeking certain promotions or transfer to certain position in the service. Justice Kennedy explained that where “the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.” Justice Scalia dissented, objecting to the lack of evidence that there was a high level of drug use or that such drug use presented a serious harm. 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.” Thus we see in high risk contexts a judicial propensity to weight the harm heavily in disregard of evidence supporting the probability or imminence of that harm. Special needs cases seem to reify the “gravity of the evil” analysis of Dennis. How could the prevention of terrorism be anything but a special need that would render government efforts, however intrusive, reasonable? 3. Terrorism Hypotheticals The Supreme Court has also hypothesized in several cases that the threat of terrorism could demand deference to the political branches and diminish civil liberties protections. In City of Indianapolis v. Edmond, the Court struck down a suspicionless checkpoint intended to catch drug offenders as a violation of the Fourth Amendment because its primary purpose was crime control. Justice O’Connor, noted with approval, however, the Seventh Circuit’s assumption in its opinion below that an otherwise criminal objective would not preclude setting up a suspicionless checkpoint in an emergency situation such as “an imminent terrorist attack.” The Seventh Circuit’s full scenario involved “a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis,” leading the Indianapolis police to “block[ ] all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity.” Judge Posner explained that suspicionless checks would not offend the Fourth Amendment because “[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact.” Posner’s hypothetical involved an imminent attack; the probability was therefore high. This is the proverbial ticking time bomb. The problem with the hypothetical is it writes in to the equation a level of high probability. What level of urgency is there if it is unclear where or when the terrorist attack may be perpetrated? Justice Souter answered this question five years later with his own revealing hypothetical. The Court held in Illinois v. Caballes that the use of a narcotics detecting dog outside of a car in connection with a lawful traffic stop did not violate the Fourth Amendment. Justice Souter dissented, contending the dog sniffing constituted an unauthorized search that was not justified. While insisting that dog sniffs should be treated as searches and subjected to traditional Fourth Amendment scrutiny, Souter offered a footnoted disquisition on the terrorism exception. 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. Souter’s discussion of reasonableness appears rooted in a definition of risk that focuses on the potential harm, but is not concerned with the probability of that harm. Although he references a “demonstrated risk,” that evidence of risk appears focused solely on the “destructive or deadly” outcome, not the likelihood. This calculus, which we as a society have seemed to accept as a commonplace, is deeply rooted in probability neglect. Imminence is presumed. The bomb is always ticking. 4. Post-9/11 Worst-Case Scenarios Since the 9/11 attacks some lower courts have employed risk analyses that implicitly and explicitly consider worst-case scenarios. A worst-case scenario is, by definition, an imagining of the gravest evil. 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. In its first ever written decision, the Foreign Intelligence Surveillance Court of Review addressed a FISA court’s surveillance order which restricted law enforcement officials’ communications with intelligence officials regarding the surveillance and use of it for criminal prosecution. 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 “the gravity of the evil” 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 “unspecified” and “generic.” Instead of requiring a specific or immediate threat, the court stated that government limitations of speech could be justified on the basis of “managing potential risks,” “consideration of the worst-case scenario” and “possible security threats.” A variant of the worst-case scenario also figured prominently in at one D.C. Circuit judge’s evaluation of the standard of proof for determining 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 usual criminal case, in which a “good judge” might overturn a conviction where evidence is lacking even if she were certain of the defendant’s guilt, the detainee case presented a different risk analysis. Silberman expanded: “When we are dealing with detainees, candor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. One does not have to be a “Posnerian”—a believer that virtually all law and regulation should be judged in accordance with a cost/benefit analysis—to recognize this uncomfortable fact.” Therefore, Silberman reasoned, a “preponderance of the evidence” standard would be too burdensome. He speculated that none of his colleagues would “vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.” Judge Silberman may have been only speculating, but it offers a glimpse into how at least one judge, and surely some of his colleagues, undertakes risk analysis. Strikingly, Silberman not only focused on the worst-case scenario, but maintained that a lower burden of proof, lower than what the government advocated, was necessary, making it less likely the “gravity of the evil” could be “discounted by its improbability.” As we can see, in a post-9/11 world, a System 1 fear of terrorism and concomitant probability neglect might not be offset by System 2’s more deliberative faculties. As Kahneman has noted, where attitudes and beliefs are involved, which they assuredly are in the assessment of risk and related government responses, System 2 may instead function as an “apologist” or “endorser” of System 1 responses to terrorism. Thus in contemplating worst-case scenarios, judges may employ System 2 to reduce evidentiary requirements for government action intended to prevent terrorism.

#### Specifically, deference to the national security executive is co-constitutive with legal sanctioning of racism

* These trials permit these beliefs

Joo 2, Professor of Law

 [Fall, 2002; Thomas W. Joo, Professor, University of California, Davis, School of Law (King Hall), “PRESUMED DISLOYAL: EXECUTIVE POWER, JUDICIAL DEFERENCE, AND THE CONSTRUCTION OF RACE BEFORE AND AFTER SEPTEMBER 11”, 34 Colum. Human Rights L. Rev. 1]

Because of its peculiar position as the official voice of society, law plays an important role in the construction of social institutions and beliefs, even those that are not typically considered "legal." The study of law and social norms and the study of expressive law focus on this aspect of law. n1 Of course, law does not make up social institutions from whole cloth, but neither is it a passive mirror of existing social beliefs. By demanding precise articulation and justification, law can transform vague and contested ideas into [\*2] legitimate and even enforceable concepts. In so doing, the law not only reflects social institutions but actively constructs them. Critical race theory teaches that race is one of the social institutions shaped by law. Law helps define the boundaries of racial groups. n2 Moreover, the legal treatment of racial groups disseminates and legitimates ideas about the supposed characteristics of members of those groups. n3 For example, American law and society have a long tradition of treating non-White immigrants and their descendants (including U.S. citizens) as permanently foreign and un-assimilable. n4 In times of conflict or perceived conflict with foreign powers, the presumption of foreignness gives rise to a further presumption that these "permanent foreigners" are loyal to those nations and disloyal to America. Our government and law often give official approval of the presumption of disloyalty and thus help to inscribe disloyalty as a racial characteristic. This is an important step in the ongoing process of constructing the meaning of racial categories. In the wake of the terrorist attacks of September 11, 2001, Arab, South Asian, and Muslim Americans have borne the brunt of the presumptions of foreignness and disloyalty. Previously, the foreignness and disloyalty presumptions have been central to the construction of the "Asian"/"Oriental" racial category in America. Thus, although current American usage does not usually apply the racial labels "Asian" and "Oriental" to Arab, South Asian, or Muslim Americans, n5 Asian American legal history holds many lessons about their racial construction since September 11. In the years just prior to September 11, Chinese Americans were the main targets of the "Oriental" disloyalty presumption. The investigation of the American nuclear scientist Wen Ho Lee was the most prominent example of [\*3] this focus. During World War II, the Japanese American internment provided the most vivid and notorious example of the outrages the disloyalty presumption can create. Part I of this Article sets the stage with a description of the Wen Ho Lee investigation. Part II places the Lee case in a larger context. The Lee case implicates racialized presumptions of "Oriental" foreignness and disloyalty that have consistently influenced Asian American legal history, most notoriously in the internment of Japanese Americans during World War II. Part III critiques the courts' deference to the executive branch in the Supreme Court's internment cases and the Lee case. This type of deference does twofold damage. First, and most obviously, it cedes excessive power to the executive branch. Second, by relying on the racial presumption of disloyalty, it constructs the meaning of the "Oriental" racial category to include disloyalty and legitimates the analytical relevance of such racial myths. Finally, Part IV will look at the "war on terrorism" as a new example of similar presumptions in action in another ongoing episode of racial construction. In the modern post-segregation era, the law rarely makes explicit reference to race. But the law often gives government agents discretion to act within broad race-neutral parameters. If discretion is broad enough, racial assumptions can work their way into the application of discretion. The most commonly recognized example of this phenomenon is the police practice of racially profiling suspects. In many areas, police officers have stopped African American drivers or pedestrians at disproportionate rates without significant reasons, or treated African American suspects more harshly than non-Black suspects. n6 The disproportionality is at least partly due to the racial stereotype, held by individual officers or the law enforcement culture, that an African American person (especially a young man) is likely to be a criminal. n7 Similarly, even though laws may not explicitly discriminate against Asian Americans today, Asian Americans may be the subject of racial profiling based on the stereotype of Oriental disloyalty. Wen [\*4] Ho Lee may have been a victim of this kind of thinking. Many of the individuals caught up in the September 11 investigation may be as well. It is critical to recognize the threads that connect the internment, the Lee investigation, the "war on terrorism," and police use of racial profiling. The concept of "racism" should not be limited to specific or isolated acts or policies explicitly based on discriminatory hatred. That view focuses on the moral blameworthiness of the "racist." Race and racism should be viewed as overarching processes and structures that result in subordination of certain people based on their supposed membership in a "non-White" group. n8 This approach emphasizes the effect on the persons who are "raced" - that is, the persons who are the objects of racial thinking. It also acknowledges that law and policy can construct and communicate racial thinking even when they are not explicitly based on race. As we know from the debate over racial profiling in conventional criminal law enforcement prior to September 11, it is difficult to determine whether racial stereotyping is involved when government policy is not based explicitly on race. But the absence of explicit stereotyping does not necessarily mean that government actions are not influenced by racial stereotypes. n9 Negative racial stereotypes are deeply ingrained in our culture and history, and thus reflected in the law and in government conduct. When government acts are consistent with historical discriminatory assumptions and are difficult to explain on race-neutral grounds, racialized assumptions should be considered a plausible explanation. Our society relies heavily on judicial and public scrutiny to control abuses of power by executive agencies such as law enforcement and the military. This requires judges, the press, and the public to take into account the unconscious and pervasive nature of racism. The Japanese American internment, and more recently the Wen Ho Lee [\*5] case, show how excessive judicial and public deference to executive discretion in the name of national security can permit racial scapegoating. Simultaneously, accepting racial scapegoating as a policy justification can permit the expansion of unchecked executive discretion. The current "war against terrorism" shows the same forces at work once again.

#### Race and executive power are inevitably intertwined—war on terror presents a key opportunity for a judicial challenge – aff solves

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[Fall, 2002; Thomas W. Joo, Professor, University of California, Davis, School of Law (King Hall), “PRESUMED DISLOYAL: EXECUTIVE POWER, JUDICIAL DEFERENCE, AND THE CONSTRUCTION OF RACE BEFORE AND AFTER SEPTEMBER 11”, 34 Colum. Human Rights L. Rev. 1]

It is far from clear that the racially unbalanced compromises in civil liberties in the wake of September 11 will advance the fight against terrorism. Indeed, as of December 2002, the aggressive post-September 11 detentions of Arab and Muslim immigrants had not produced any significant breakthroughs in the investigation. n196 The categories of "Arab" and "Muslim" are simply too broad to narrow the list of suspects in any meaningful way. n197 As Arab American activist James Zogby put it, "If you're looking for a needle in a haystack, [\*42] adding hay isn't going to help." n198 Focusing on Muslim men of "Arab appearance" would not only remain too broad a category, it would exclude some of the most notorious accused terrorists apprehended since September 11: John Walker Lindh (a White American); Zaccarias Moussaoui (of Moroccan descent, born and raised in France); Richard Reid (a British citizen of West Indian and White ancestry); and Jose Padilla (a Latino American). n199 Furthermore, even if a man of Arab descent is relatively more likely to be a terrorist than a non-Arab, the likelihood that any given Arab man is a terrorist remains negligible. n200 Long-term, systematic reforms of airport security n201 and basic police work n202 are more likely than racial profiling to succeed in fighting terrorism. As the internment and the Lee case show, judicial review is not a panacea for racial profiling by law enforcement or the military. Judges may suffer from the same biases as executive agents, or from excessive deference to national security concerns. But judges have the opportunity for contemplation that military and law enforcement authorities often lack. Furthermore, judges, unlike executive agents, are expected to provide reasoned justifications for their decisions. Judges must perform searching and independent review, and the press, public, and legal commentators must demand it. Unfortunately, like past wars, the current "war on terrorism" is eroding independent judicial, political, and public review in the name of expediency without considering how it may endanger justice. [\*43] Not only have the Department of Justice practices and new USA PATRIOT Act powers expanded the Executive's discretionary authority, the shroud of secrecy over post-September 11 detentions has made it difficult for courts or the public to tell whether law enforcement is observing the bounds of its authority. n203 For example, the federal government ordered New Jersey county jails holding INS detainees to withhold the detainees' names, the attorneys' names, the detention dates, the locations of detainees' arrests, and the locations where they were held. n204 Shortly after the September 11 terrorist attacks, Chief Immigration Judge Michael Creppy sent a memorandum instructing all immigration judges to hear certain immigration cases in secret when so directed by the Attorney General. n205 In "special interest" cases so designated by the Attorney General, immigration judges (who are officers of the Executive and not Article III judges) must hold separate hearings closed to all visitors, family members, and the press. n206 The memo prohibits immigration judges from "disclosing any information about the case to anyone outside the Immigration Court." n207 Immigration judges are prohibited from even "confirming or denying whether [a] [special interest case] is on the docket or scheduled for a hearing." n208 [\*44] Despite history's repeated lessons about the danger of excessive deference to the Executive, unquestioning unity with the President is a recurring and unsettling theme of the "war on terrorism." The current Administration, like most presidential administrations, seeks to expand its power and defends it jealously against oversight by the other branches. n209 The secrecy and expansion of executive power in the war on terrorism are consistent with a more general program to expand executive power that predates September 11. n210 For example, beginning in June 2001, Congress requested records of Vice President Cheney's Energy Task Force. n211 Despite judicial orders, Cheney refused to produce the records, and continued to do so after the Enron scandal increased concerns about the task force's activities. n212 Since September 11, the Administration has redoubled its efforts to expand its power, and has encountered much less resistance. For example, in quickly passing the USA PATRIOT Act, Congress gave the Administration much of the authority it requested and used little independent judgment. n213 The USA PATRIOT Act did not create a study commission to evaluate its effectiveness. n214 Furthermore, although the USA PATRIOT Act requires the collection of data regarding complaints of racial profiling and other violations of civil liberties, the Department of Justice itself is to collect the data [\*45] without independent oversight. n215 In the summer and fall of 2002, the Administration sought further expansion of its power by insisting it did not need congressional authority to take military action against Iraq. n216 No showdown with the legislature was necessary, however. In October 2002, Congress readily approved a resolution giving the Administration broad authority to use military force, requiring only that the White House inform Congress within forty-eight hours of initiating action. n217 In some instances, the theme of unity with the Executive has been twisted into an attempt to silence criticism. In testimony before the Senate Judiciary Committee, Attorney General John Ashcroft claimed that his critics "aid terrorists" and "give ammunition to America's enemies." n218 Similarly, when Democratic Senator Tom Daschle stated that the White House would have to justify requests for congressional funding approval by clearly explaining the goals of the "war on terrorism," Republican Senator Trent Lott responded: "How dare Senator Daschle criticize President Bush while we are fighting our war on terrorism?" n219 Uncritical deference to the executive branch is a threat to justice. Compromises in principle may seem justified by immediate purposes, but create unjust results and lasting dangerous precedents. In Ex parte Quirin, n220 for example, the Supreme Court deviated from its normal procedures to quickly uphold the government's use of military tribunals during World War II. The defendants were a group of would-be saboteurs from Germany, two of whom were U.S. citizens. After a special session and less than twenty-four hours of deliberation, the Court rejected the defendants' constitutional objections with little explanation. n221 The Court promised to provide a full opinion later. During deliberations, Justice Felix Frankfurter [\*46] encouraged his fellow Justices to avoid technical legal distinctions and issue a unanimous opinion in order to show support for the war effort. n222 Three months passed before the Court issued its unanimous opinion holding that that the trial did not violate the Constitution's guarantee of due process. By that time, six of the eight defendants (including one U.S. citizen) had already been executed, and President Franklin D. Roosevelt had ordered the record of the case sealed for the remainder of the war. n223 At least some of the Justices who participated in the Quirin case came to regret their hasty support of the military. According to Justice William O. Douglas, Quirin "indicated ... to all of us that it is extremely undesirable to announce a decision without an opinion accompanying it. Because once the search for the grounds ... is made, sometimes those grounds crumble." n224 VI. Conclusion The historical treatment of Other non-Whites in American law give important insights into the Wen Ho Lee case and the war on terrorism. History shows that the "Oriental" racial category has been constructed to be synonymous with disloyalty. White Americans are presumed to be loyal to America unless there is proof to the contrary. For "Oriental" Americans, however, the presumption runs in the opposite direction. While the Bellows Report found no "smoking gun" proving explicit racial animus in the Lee case, it also failed to offer an explanation for why the investigation focused on Lee to the exclusion of so many other potential suspects. It is, of course, impossible to conclusively disprove that racial assumptions influenced the government's decision to focus on Lee. But the court did not even ask the government to offer an explanation until the case had dragged on for years, at which point the government abruptly dropped its case. The racial category of the "Arab" has historically been less familiar to most Americans than that of the "Oriental." But the [\*47] "Arab" racial construct has rapidly taken center stage in the wake of September 11. As in the internment and in the Wen Ho Lee case, many Americans cast race-and religion-based suspicion and blame on Muslims and persons of Arab descent, and even on members of other groups mistaken for Arabs or Muslims. Law enforcement's broad discretion to apply race-neutral factors and general immigration regulation poses special dangers to those believed to "look like terrorists." The absence of explicitly race-based laws makes it far more difficult to determine whether racial factors are driving government action. Of course, the fact that racial assumptions are accepted as "common sense" does not mean that they underlie every government decision that affects people of color. But it does mean that they often escape notice. Courts and the public must acknowledge the subtle and pervasive nature of racial bias and be aware that it can exist even in the absence of overt racial hostility. Race and executive power are closely intertwined in the current national security crisis, as they have been in past crises, real and perceived. Excessive deference to the Executive may legitimate racial reasoning, and racial reasoning may legitimate expansion of executive power. The judiciary and the public must be wary of such developments and their potential for lasting negative effects on law and democracy.

#### Applying standardized burdens of proof solves deference and cognitive errors in judicial decisionmaking

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This section proposes a way forward in which judicial review is less deferential to the political branches and less subject to the various cognitive errors that generally pervade risk assessments. Building on Cass Sunstein’s framework for judicial analysis, which attempts to counteract the Precautionary Principle’s adverse effects, this section proposes refinements to that framework. In particular, I propose that courts should apply burdens of proof and presumptions regarding evidence that favor the persons or groups whose civil liberties are curtailed. Second, courts should insist on specific evidence that supports deprivations of liberty, particularly those aimed at minority groups. In light of courts’ tendencies to defer to government interpretations of evidence and dilute evidentiary requirements, imposing set standards may counter these propensities. Finally, drawing from literature on the regulation of judicial emotions I propose that courts adopt candid disclosures, in the mien of Judges Lipez and Silberman, concerning the post-9/11 heuristic’s impact on their thinking. These admissions are more likely to earn the court trust in the public discourse of terrorism in a post-9/11 world. A. Adjusting Sunstein’s Framework Cass Sunstein accepts both that courts lack information and expertise to gauge whether curtailing civil liberties may be justified and that the probability of an attack may defy estimation. Notwithstanding these institutional limitations, Sunstein proposes a framework for judges to review government counterterrorism measures. Specifically, courts should (1) require restrictions on civil liberties to be authorized by the legislature; (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; and (3) apply second-order balancing because case-by-case ad hoc balancing is more likely to permit excessive intrusions. How might Humanitarian Law Project have fared in Sunstein’s framework? Congress’s passage of the material support law suggests that a court should defer under the first prong. However, the ambiguity as to whether the teaching of peaceful advocacy constitutes “training,” or “expert advice or assistance,” under the material support ban would warrant careful judicial review. Under the second prong, because the ban targets political speech it would also deserve special scrutiny. Roberts may have come fairly close to applying the level scrutiny envisioned by Sunstein as he analyzed the law’s application somewhere between strict scrutiny and that reserved for conduct. Finally, what second order balancing applies? Sunstein identifies the considerations of imminence and likelihood from Brandenburg as factors a court might consider. It was precisely these elements that Breyer asked to be considered in his dissent. But would the second order balancing have made a difference to Roberts? The answer is almost certainly no. And it is this fact that illustrates the limitations of Sunstein’s proposal. Just as the gravity of the harm may be exaggerated, the probability and imminence of that harm also may be overstated. Much of this may be attributed to cultural cognition, Roberts’ understanding that we now live in a “different world.” As a result, Roberts, like many other judges, appeared to presume the probability and imminence of an attack. Sunstein’s second example of torture similarly illustrates the inevitably subjective calculations, or fact finding, that also pervade second-order balancing. Theorizing that torture might be justified in a specific instance under ad hoc balancing, Sunstein contends that utilitarian arguments of the potential for widespread and unjustified torture would lead courts not to approve its isolated use. But it’s not clear that these utilitarian considerations would make a judge any more likely to strike down the use of torture. Based on various biases and cultural affinities, courts could come to different conclusions, even if this second order balancing is adopted, that the potential number of lives saved by torture could offset significant numbers of lives wrongly tortured. Judge Silberman adverted to this in his acceptance of the idea of letting a potentially guilty man go free in the criminal context based on second-order considerations, and in his refusal to authorize the release of a possible al Qaeda detainee because of the “infinitely greater downside risk to our country.” As a result, specific standards of evidence that the government must satisfy in order to justify infringements of civil liberties should be grafted onto the Sunstein framework. These standards should favor the individual or groups whose liberties may be infringed because the government is likely to pursue measures that not only disregard probability but are also calculated to curry popular favor. Researchers found in a series of studies that judgments of blameworthiness for failing to prevent an attack are far more likely to affect anti-terror budget priorities than probability judgments. These studies’ authors concluded that because people blame policy makers more for high consequence events than for more probable ones, policy makers will be tempted to “prevent attacks that are more severe and upsetting without sufficiently balancing the attack’s likelihood against its outcome.” To counteract this emotional tendency, the studies’ authors suggested that policy makers explicitly consider likelihood data in formulating counterterrorism policy. Similarly, without prescribed evidentiary standards, courts are likely to craft opinions that defer to the government’s interpretation of evidence and ignore probability and imminence, often by diluting the evidentiary requirements to the point where they favor the government. Indeed, Roberts decried the dissent’s call in Humanitarian Law Project for “detail,” “specific facts,” “specific evidence,” and “hard proof” “that [the advocates’] activities will support terrorist attacks.” Rather, it was sufficient to rely on the Blood and Belief-sourced notion that “[a] foreign organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.” And Roberts was content to rely simply on the idea that “[t]his possibility is real, not remote.” But failing to require any demonstrable risk when the First Amendment and national security conflict, invites imaginings of the possible and plausible, without sufficient regard for the probable. Applying such a rule, Breyer argued, will grant the government a victory in every instance. Breyer’s and Roberts’ dispute over the quantum of evidence required to establish a connection between the human rights advocates’ speech and terrorist attacks reverberates in the lower courts. This has played out most fully in the post-Boumediene litigation in the D.C. Circuit and district courts. In most instances, the D.C. Circuit has crafted evidentiary standards that benefit the government. For example, the D.C. Circuit has held that the government need only show by a preponderance of the evidence that a detainee is a member of al Qaeda or associated forces. Yet many of the judges have chafed at even the preponderance standard, advocating a lesser burden of proof. Not content with the reduced burden of proof, the D.C. Circuit also held that government intelligence reports enjoy a presumption of regularity. The D.C. Circuit has also insisted that courts undertake “conditional probability analysis,” or a “mosaic approach,” which entails reviewing evidence collectively as opposed to in isolation. The practical effect of these decision has been to, in the words of D.C. Circuit Judge David Tatel, “mov[e] the goal posts,” and “call[ ] the game in the government’s favor.” Humanitarian Law Project and the post-Boumediene litigation demonstrate that in the absence of clearly prescribed evidentiary standards, courts will craft a set of standards that support the government’s contentions, fearful of both the potential for harm and the public’s ire. Thus my proposal requires that burdens of proof be placed squarely on the government and that presumptions about evidence should not tilt against the person or group whose liberty interest has been implicated. This proposal does not ignore valid security interests or call the game in civil liberties’ favor. What it does recognize, however, is that the government, and judges, often overstate the harm, the probability, and imminence of terrorist threats. In order to justify a limitation on a liberty interest, the government must provide specific evidence supporting its assessments of the danger, probability, and imminence of a terrorist attack. Evidence must rise above generality and speculation. Courts should also adopt Cristina Wells’ proposed refined balancing, which entails clarifying the interests implicated and examining the government’s evidence supporting curtailment of the protected activity. A prescribed set of questions or checklist might have the salutary effect of moving judges from an intuitive process to a more deliberative one. Moreover, requiring such specificity is consistent with Philip Tetlock’s admonition that “we as a society would be better off if participants in policy debates stated their beliefs in testable forms.” This approach can only obtain greater accuracy and accountability of all participants, including the government, experts, and judges. Finally, requiring the government to meet a substantial burden of proof should not be alarming. It is hard to understand, for example, how a “clear and convincing” burden of proof in the detention context would prize civil liberty too dearly. This is not an unbearable burden for the government. As Baher Azmy argues, courts have applied this standard in a variety of sensitive and complex contexts including the pretrial detention of people for dangerousness, the civil commitment of “sexually violent predators,” and the commitment of those found not guilty by reason of insanity. A lesser standard is more likely to feed biases, neglecting probability and presuming imminence.

### 1AC Risk Analysis

#### The dominance of “any risk logic” that pervades judicial decision-making is a direct parallel to the debate community—instead of “possibilistic thinking,” we believe “probabilistic thinking” should be the frame for the debate

#### Possibilistic Thinking impedes skills development—the critical thinking skills that debate teaches become useless outside of the activity because we can only use them to think in terms of extremes that don’t reflect reality—as a result, debaters become incapable of effectuating change

#### Possibilistic thinking makes effective decision making impossible—don’t assume every part of their DA is true – instead you should have inherent skepticism

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(CNN) -- At a security conference recently, the moderator asked the panel of distinguished cybersecurity leaders what their nightmare scenario was. The answers were the predictable array of large-scale attacks: against our communications infrastructure, against the power grid, against the financial system, in combination with a physical attack. I didn't get to give my answer until the afternoon, which was: "My nightmare scenario is that people keep talking about their nightmare scenarios." There's a certain ~~blindness~~ that comes from worst-case thinking. An extension of the precautionary principle, it involves imagining the worst possible outcome and then acting as if it were a certainty. It substitutes imagination for thinking, speculation for risk analysis and fear for reason. It fosters powerlessness and vulnerability and magnifies social ~~paralysis~~. And it makes us more vulnerable to the effects of terrorism. Worst-case thinking means generally bad decision making for several reasons. First, it's only half of the cost-benefit equation. Every decision has costs and benefits, risks and rewards. By speculating about what can possibly go wrong, and then acting as if that is likely to happen, worst-case thinking focuses only on the extreme but improbable risks and does a poor job at assessing outcomes. Second, it's based on flawed logic. It begs the question by assuming that a proponent of an action must prove that the nightmare scenario is impossible. Third, it can be used to support any position or its opposite. If we build a nuclear power plant, it could melt down. If we don't build it, we will run short of power and society will collapse into anarchy. If we allow flights near Iceland's volcanic ash, planes will crash and people will die. If we don't, organs won't arrive in time for transplant operations and people will die. If we don't invade Iraq, Saddam Hussein might use the nuclear weapons he might have. If we do, we might destabilize the Middle East, leading to widespread violence and death. Of course, not all fears are equal. Those that we tend to exaggerate are more easily justified by worst-case thinking. So terrorism fears trump privacy fears, and almost everything else; technology is hard to understand and therefore scary; nuclear weapons are worse than conventional weapons; our children need to be protected at all costs; and annihilating the planet is bad. Basically, any fear that would make a good movie plot is amenable to worst-case thinking. Fourth and finally, worst-case thinking validates ignorance. Instead of focusing on what we know, it focuses on what we don't know -- and what we can imagine. Remember Defense Secretary Donald Rumsfeld's quote? "Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don't know we don't know." And this: "the absence of evidence is not evidence of absence." Ignorance isn't a cause for doubt; when you can fill that ignorance with imagination, it can be a call to action. Even worse, it can lead to hasty and dangerous acts. You can't wait for a smoking gun, so you act as if the gun is about to go off. Rather than making us safer, worst-case thinking has the potential to cause dangerous escalation. The new undercurrent in this is that our society no longer has the ability to calculate probabilities. Risk assessment is devalued. Probabilistic thinking is repudiated in favor of "possibilistic thinking": Since we can't know what's likely to go wrong, let's speculate about what can possibly go wrong. Worst-case thinking leads to bad decisions, bad systems design, and bad security. And we all have direct experience with its effects: airline security and the TSA, which we make fun of when we're not appalled that they're harassing 93-year-old women or keeping first-graders off airplanes. You can't be too careful! Actually, you can. You can refuse to fly because of the possibility of plane crashes. You can lock your children in the house because of the possibility of child predators. You can eschew all contact with people because of the possibility of hurt. Steven Hawking wants to avoid trying to communicate with aliens because they might be hostile; does he want to turn off all the planet's television broadcasts because they're radiating into space? It isn't hard to parody worst-case thinking, and at its extreme it's a psychological condition. Frank Furedi, a sociology professor at the University of Kent, writes: "Worst-case thinking encourages society to adopt fear as one of the dominant principles around which the public, the government and institutions should organize their life. It institutionalizes insecurity and fosters a mood of confusion and powerlessness. Through popularizing the belief that worst cases are normal, it incites people to feel defenseless and vulnerable to a wide range of future threats." Even worse, it plays directly into the hands of terrorists, creating a population that is easily terrorized -- even by failed terrorist attacks like the Christmas Day underwear bomber and the Times Square SUV bomber. When someone is proposing a change, the onus should be on them to justify it over the status quo. But worst case thinking is a way of looking at the world that exaggerates the rare and unusual and gives the rare much more credence than it deserves. It isn't really a principle; it's a cheap trick to justify what you already believe. It lets lazy or biased people make what seem to be cogent arguments without understanding the whole issue. And when people don't need to refute counterarguments, there's no point in listening to them.

#### If we win indicts to the meta-structure of their arguments, it precedes individual risk assessments—effective decisionmaking is impossible in the mindset of possibilistic thinking

Furedi 9, Professor of Sociology

[2009, Frank Furedi is a professor of Sociology, School of Social Policy, Sociology, Social Research, The University of Kent, Canterbury, “PRECAUTIONARY CULTURE AND THE RISE OF POSSIBILISTIC RISK ASSESSMENT”, Erasmus Law Review Volume 2 Issue 2]

The emergence of a speculative approach towards risk is paralleled by the growing influence of possibilistic thinking, which invites speculation about what can possibly go wrong. In our culture of fear, frequently what can possibly go wrong is equated with what is likely to happen. The shift towards possibilistic thinking is driven by a powerful sense of cultural pessimism about knowing and an intense feeling of apprehension about the unknown. The cumulative outcome of this sensibility is the routinisation of the expectation of worst possible outcomes. The principal question posed by possibilistic thinking, ‘what can possibly go wrong’, continually invites the answer ‘everything’. The connection between possibilistic and worse-case thinking is self-consciously promoted by the advocates of this approach. The American sociologist Lee Clarke acknowledges that ‘worst case thinking is possibilistic thinking’ and that it is ‘very different’ from the ‘modern approach to risk’ which is ‘based on probabilistic thinking’.18 However he believes that the kinds of dangers confronting humanity today require us to expect the worst and demand a different attitude towards risk. He claims that: Modern social organization and technologies bring other new opportunities to harm faraway people. Nuclear explosions, nuclear accidents, and global warming are examples. We are increasingly ‘at risk’ of global disasters, most if not all of which qualify as worst cases.19 Warning us about ‘how vulnerable we are to worst case events’, Clarke concludes that ‘we ought to prepare for possible untoward events that are out of control and overwhelming’.20 Politicians and their officials have also integrated worse-case thinking into their response to terrorism and to other types of catastrophic threats. Appeals to the authority of risk assessment still play an important role in policy-making. However, the prevailing culture of fear dictates that probabilistic-led risk management constantly competes with and often gives way to possibilistic-driven worst-case policies. As an important study of Blair’s policy on terrorism notes, he combines an appeal to risk assessment with worse-case thinking. David Runciman, the author of this study, observed that in his response to the threat of terrorism, ‘Blair relied on expert risk assessment and on his own intuitions’. Runciman added that Blair ‘highlighted the importance of knowing the risk posed by global terrorism, all the while insisting that when it comes to global terrorism the risks are never fully knowable’.21 In practice, the co-existence of these two forms of threat assessment tends to be resolved in favour of the possibilistic approach. The occasional demand for a restrained and low-key response to the risk of terrorism is overwhelmed by the alarmist narrative of a worse-case scenario.

#### This additionally hurts solutions to systemic harms—cognitive biases make us focus on one-shot impacts we can supposedly solve, ignoring structural issues like racism

Glassner 99, President of Lewis and Clark and Former Professor of Sociology

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One of my initial hypotheses about why pseudodangers receive so much attention was that they provide opportunities to talk about, and perhaps rectify, problems too big to face in their totality. Stupefied by the quantity of guns on the streets, we might focus on doing something about the much smaller number in cars. My hypothesis could not have been farther from the truth. Pseudodangers represent further opportunities to avoid problems we do not want to confront, such as overcrowded roads and the superabundance of guns, as well as those we have grown tired of confronting. An example of the latter is drunk driving, a behavior that causes about eighty-five times as many deaths as road rage (about 17,000 versus 200). Close to half of all fatal traffic crashes involve alcohol, and three in five Americans will be involved in an alcohol-related crash at some point in their lives. Moved by those statistics and by the advocacy group, Mothers Against Drunk Driving, journalists had covered the issue of drunk driving in a sound and sustained way throughout the 1980s and early 1990s. Thanks in part to that coverage, the number of alcohol-related highway deaths plunged by 31 percent between 1982 and 1995. Fatality rates fall twice as rapidly, studies find, in years of high media attention compared to those of relatively little attention. Intensive coverage permits passage of powerful laws, creation of sobriety checkpoints, and new notions such as the "designated driver," all of which save lives.l6 Yet by the mid-1990s groups like MADD were finding it difficult to be heard in the media over the noise about road rage and other trendy issues. In the years that followed the fatality rate stopped declining. Polls taken on the eastern seaboard during the late 1990s found people more concerned about road rage than drunk driving. Who could blame them when they read in their local paper, "It's not drunken or elderly or inexperienced drivers who are wreaking havoc. Instead, scores of people are severely injured or killed every day by stressed-out drivers who have abandoned civil roadway behavior" (Philadelphia Daily News).17

#### There are two impacts to this shift towards low probability high magnitude impacts

#### First—skills development—the critical thinking and reasoning skills that debate teaches become useless outside of the activity because we can only use them to think in terms of extremes and through risk heuristics that don’t reflect actual assessments of different impacts—we become incapable of using the skills we get to productive ends because we don’t know how to couch our arguments in analysis that is used credibly—as a result, debaters become incapable of effectuating change

#### This undermines all decisionmaking and makes robust national security policymaking impossible by substituting cultural anxieties for real analysis

Friedman 8, Research Fellow and Affiliate at MIT

[Winter 2008, Benjamin H. Friedman is a research fellow in defense and homeland security studies. He is an affiliate of the Security Studies Program at the Massachusetts Institute of Technology, “The Terrible ‘Ifs’”, http://object.cato.org/sites/cato.org/files/serials/files/regulation/2007/12/v30n4-1.pdf]

Students of regulatory policy know of the precautionary principle, an idea about risk favored by advocates of various health and environmental regulations. The concept can be stated as follows: Whenever some activity poses a possible risk to health, safety, or the environment, the government should take preventive action. Government intervention is warranted even if the evidence that the activity is harmful is uncertain and the cost of preventive action is high. In Laws of the Fear, University of Chicago law professor Cass Sunstein demonstrates that the precautionary principle is incoherent. The principle fails to acknowledge that decisions about risk, whether they regulate health hazards or arm against a state, cannot deal with one risk alone. Because resources are always limited, efforts to head off a particular danger take resources away from other government programs and from private investment that also reduce risk. Also, because of unintended consequences, actions that prevent one danger can create new ones. If we took the precautionary principle seriously, we would have to be cautious about all the dangers a particular decision touches. That includes the danger of doing nothing. Taken literally, the principle prevents all action and inaction, making it useless. States often ignore this logical failure and apply the precautionary principle to particular hazards. Sunstein argues that in many of those cases, precautionary action will be more harmful to society than running the risk. Those are cases where the danger is small and the cost of prevention is large. The use of asbestos as building insulation is an example. When contained in walls, asbestos is harmless. If the materials containing it deteriorate, however, the asbestos might be inhaled or ingested and, in very rare cases, could cause respiratory diseases including lung cancer. The precautionary principle can be evoked by those demanding the material’s removal. But removal creates new cancer risks and its cost is enormous. Whoever bears it, that cost will take money away from other risk-reducing uses, be it savings, health care, or education. Removal harms society more than leaving the asbestos in place. Another example is genetically modified foods. European regulators argue that the uncertain risks of genetically modified crops justify limiting trade flows and the resulting higher prices on consumers. They exchange an uncertain risk for a sure one. The illogic of the precautionary principle does not mean that states should not regulate against uncertain dangers. The point is that dangers should be evaluated by cost-benefit analysis. This means that decisions about risk should consider the cost that preventive action would avert, the likelihood that preventive action will work, and the action’s cost. Decisionmakers should also consider, as Sunstein notes, not just total costs and benefits, but the equity of their distribution. The problem with cost-benefit analysis is that it relies on unavailable information about the magnitude and likelihood of the harm. Everyone would agree to head off disaster at low cost and to avoid costly defenses against tiny dangers. Everyone agrees that research is helpful to getting policy right. But some degree of uncertainty is hard to extinguish. You never know, some will say, what the true cost is of asbestos as insulation . If science is never complete, cost-benefit analysis is impossible. The problem with this critique of cost-benefit analysis is that its virtue does not depend on getting rid of uncertainty. Analysts use cost-benefit analysis to get all the potential costs into the debate and force recognition of choice. They show that the pursuit of perfect safety, of chasing a danger out of existence, creates other dangers. This point shows why debate about the precautionary principle is often phony. Inherent uncertainty means that the decisions about risk are likely to be made by some criteria other than a principle about risk. That criterion will be a prior political preference — in the case of genetically modified foods, probably protection of domestic producers. Critics of the precautionary principle charge that it is a justification for regulation, not its cause — that the principle’s defenders care more about the environment than other public goods. Defenders of the principle claim that cost-benefit analysis serves corporate bottom lines. They are both part right. Fights about regulating risks are about which risks to confront and which to accept, not about how much risk to accept. All government policies ultimately reduce one risk or another. Politics is competition between risk preferences. Societies are not consistent in their approach to dangers. They are precautionary about certain risks and acceptant of others. Americans are less fearful — less precautionary — than Europeans about global warming and genetically modified foods. We are more cautious about secondhand smoke, drug approval, and nuclear proliferation. The differences cannot be justified by objective appeals to science. Scholars offer various explanations for the origins of those preferences. In Risk and Culture, Mary Douglas and Aaron Wildavsky argued that culture causes risk perception. They claimed that groups are organized by preferences about what dangers ought to be confronted collectively and that the rise of new political coalitions brings new priorities about danger. University of Oregon psychologist Paul Slovic points to people’s psychological tendencies to react to certain risks — such as those that are novel or involve a perceived loss of control — and the way those perceptions spread by social interaction and media. mit’s Harvey Sapolsky argues that risk perception results from the balance of the various special interests that benefit from society either confronting or running the risk. The groups compete to guide public opinion about danger. The variance in the balance of interest groups’ power across countries explains their variant reaction to risks. Whatever their origin, political preferences drive demand for regulation of risks. Statements about the certainty or uncertainty of science are often disguises for those preferences. This discussion about the precautionary principle applies to national security dangers in two ways. First, American national security policy is explicitly precautionary and is thus subject to the same problems as the application of the precautionary principle in other policy areas. Second, the precautionary reasoning advanced to defend our security policies hides political motives. As with the regulatory arena, cost-benefit analysis can help expose choices among risks that advocates of precaution shroud with claims of uncertainty. Some will argue that security dangers are so distinct from health and safety risks that the comparison is useless. Certainly the two sorts of risk are different. Politics produces national security dangers, making them more uncertain than environmental risks that result from physical phenomena. Moreover, national security dangers — conquest, mass death, economic devastation — are generally catastrophic and sudden. Some health and safety risks share that quality, but in most cases they exact a creeping toll. The unique attributes of security dangers do not remove the danger of precautionary reasoning. True, uncertain dangers of potentially great and irreversible consequence merit extensive preventive efforts. That is why states have traditionally devoted large portions of their budgets to defense. But high uncertainty and potential consequences do not mean that states can ignore the costs of defenses. Moreover, national security dangers are not always as uncertain and dangerous as we hear.

#### The second impact is systemic harms—cognitive biases make us focus on one-shot impacts we can supposedly solve, ignoring structural issues like racism

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## 2AC

### 2AC O/V—Impact Framing vs Big Impact

#### We should prioritize probable systemic impacts over possibilistic spectacular impacts—the 9/11 focus on big unlikely impacts means we ignore violence that ends up causing the most deaths

Nixon ‘11

(Rob, Rachel Carson Professor of English, University of Wisconsin-Madison, Slow Violence and the Environmentalism of the Poor, pgs. 12-14)

Over the past two decades, this high-speed planetary modification has been accompanied (at least for those increasing billions who have access to the Internet) by rapid modifications to the human cortex. It is difficult, but necessary, to consider simultaneously a geologically-paced plasticity, however relatively rapid, and the plasticity of brain circuits reprogrammed by a digital world that threatens to "info-whelm" us into a state of perpetual distraction. If an awareness of the Great Acceleration is (to put it mildly) unevenly distributed, the experience of accelerated connectivity (and the paradoxical disconnects that can accompany it) is increasingly widespread. In an age of degraded attention spans it becomes doubly difficult yet increasingly urgent that we focus on the toll exacted, over time, by the slow violence of ecological degradation. We live, writes Cory Doctorow, in an era when the electronic screen has become an "ecosystem of interruption technologies.''" Or as former Microsoft executive Linda Stone puts it, we now live in an age of "continuous partial attention.?" Fast is faster than it used to be, and story units have become concomitantly shorter. In this cultural milieu of digitally speeded up time, and foreshortened narrative, the intergenerational aftermath becomes a harder sell. So to render slow violence visible entails, among other things, redefining speed: we see such efforts in talk of accelerated species loss, rapid climate change, and in attempts to recast "glacial"-once a dead metaphor for "slow-as a rousing, iconic image of unacceptably fast loss. Efforts to make forms of slow violence more urgently visible suffered a setback in the United States in the aftermath of 9/11, which reinforced a spectacular, immediately sensational, and instantly hyper-visible image of what constitutes a violent threat. The fiery spectacle of the collapsing towers was burned into the national psyche as the definitive image of violence, setting back by years attempts to rally public sentiment against climate change, a threat that is incremental, exponential, and far less sensationally visible. Condoleezza Rice's strategic fantasy of a mushroom cloud looming over America if the United States failed to invade Iraq gave further visual definition to cataclysmic violence as something explosive and instantaneous, a recognizably cinematic, immediately sensational, pyrotechnic event. The representational bias against slow violence has, furthermore, a critically dangerous impact on what counts as a casualty in the first place. Casualties of slow violence-human and environmental-are the casualties most likely not to be seen, not to be counted. Casualties of slow violence become light-weight, disposable casualties, with dire consequences for the ways wars are remembered, which in turn has dire consequences for the projected casualties from future wars. We can observe this bias at work in the way wars, whose lethal repercussions spread across space and time, are tidily bookended in the historical record. Thus, for instance, a 2003 New York Times editorial on Vietnam declared that" during our dozen years there, the U.S. killed and helped kill at least 1.5 million people.'?' But that simple phrase "during our dozen years there" shrinks the toll, foreshortening the ongoing slow-motion slaughter: hundreds of thousands survived the official war years, only to slowly lose their lives later to Agent Orange. In a 2002 study, the environmental scientist Arnold Schecter recorded dioxin levels in the bloodstreams of Bien Hoa residents at '35 times the levels of Hanoi's inhabitants, who lived far north of the spraying." The afflicted include thousands of children born decades after the war's end. More than thirty years after the last spray run, Agent Orange continues to wreak havoc as, through biomagnification, dioxins build up in the fatty tissues of pivotal foods such as duck and fish and pass from the natural world into the cooking pot and from there to ensuing human generations. An Institute of Medicine committee has by now linked seventeen medical conditions to Agent Orange; indeed, as recently as 2009 it uncovered fresh evidence that exposure to the chemical increases the likelihood of developing Parkinson's disease and ischemic heart disease." Under such circumstances, wherein long-term risks continue to emerge, to bookend a war's casualties with the phrase "during our dozen years there" is misleading: that small, seemingly innocent phrase is a powerful reminder of how our rhetorical conventions for bracketing violence routinely ignore ongoing, belated casualties.

#### Their math is wrong—at low enough of probabilities, there’s a risk to every action and inaction causing paralysis and meaning our decisions are made by cultural biases—uniquely true with national security risks

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#### First—the reliance on secondary and unqualified sources masquerading as experts that use anecdotes and isolated incidents to speak about trends give unrealistic impacts the appearance of legitimacy

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The pressing question is the same now as it was in 1938: Why do People embrace improbable pronouncements? How did listeners to the [war of the] Worlds" manage to disregard four announcements during °adcast that identified the program as a radio play? Why do peoay believe in the existence of mysterious new illnesses even medical scientists say they do not exist? Why do we entertain preposterous claims about husband abuse, granny dumping, or the middle-class romance with heroin? Soon after the broadcast of "War of the Worlds," Hadley Cantril, a social psychologist at Princeton, set out to determine why more than a million Americans had been frightened and thousands found themselves "praying, crying, fleeing frantically to escape death from the Martians." In a book that resulted from his research— The Invasion from Mars, first published in 1940-Cantril refuted social scientists of his day who presumed, as one put it, that "as good an explanation as any for the panic is that all the intelligent people were listening to Charlie McCarthy" on the rival network. Based on his analysis of the broadcast itself and interviews with people who heard it, Cantril showed that the explanation lay not in a lack of intelligence on the part of listeners but in the acumen of the program's producers and in social conditions at the time. The program had a credible feel, Cantril suggested, largely because it featured credible-sounding people professing to report scientific or firsthand information. The character played by Orson Welles, Professor Richard Pierson of the Princeton Observatory, was only one of several with distinguished titles and affiliations. Other professors and scientists spoke as well, and at various points in the drama people identified as secretary of the interior, vice-president of the Red Cross, and commander of a state militia chimed in. In nearly every episode of fear mongering I discussed in the previous chapters as well, people with fancy titles appeared. Hardly ever were they among the leading figures in their field. Often they were more akin to the authorities in "War of the Worlds": gifted orators with elevated titles. Arnold Nerenberg and Marty Rimm come immediately to mind. Nerenberg (a.k.a. "America's road-rage therapist") is a psychologist quoted uncritically in scores of stories even though his alarming statistics and clinical descriptions have little scientific evidence behind them. Rimm, the college student whom Time glorified in its notorious "cyberporn" issue as the "Principal Investigator" of "a research team," is almost totally devoid of legitimate credentials. I have found that for some species of scares—Internet paranoia among them—secondary scholars are standard fixtures. Bona fide ex-perts easily refute these characters' contentions, yet they continue to appear nonetheless. Take scares about so-called Internet addiction, a malady ludicrously alleged to afflict millions of people and sometimes cause death. Far and away the most frequently quoted "expert" has been psychologist Kimberly Young, whom journalists dubbed "the world's first global shrink" (Los Angeles Times}. Her "major study" (Psychology Today] turns out to have been based on unverifiable reports from a nonscientific sample of people who responded to her postings online. Young's research was rebutted on basic methodological grounds by scholars within and outside her field. Yet she managed to give Internet addiction a clinical air and tie it to serious afflictions by talking of "a newfound link between Net addiction and depression" (USA Today) and offering ill-suited similes. "It's like when a smoker thinks they can quit anytime they want, but when they try they can't," Young told a reporter.3 Fear mongers make their scares all the more credible by backing up would-be experts' assertions with testimonials from people the audience will find sympathetic. In "War of the Worlds" those people were actors playing ordinary citizens who said they had seen the Martians, experienced the destruction they wrought, or had a plan for how to survive the attack. In the stories I studied comparable characters appear: victims of Gulf War Syndrome, multiple chemical sensitivity, and breast implant disorders who testify before congressional panels, juries, and talk show audiences; "seasoned travelers" who express their concerns to reporters at airports after plane crashes; former friends and neighbors of women who have murdered their children. Professional narrators play an important role too in transforming something implausible into something believable. Cantril observed of 'War of the Worlds" that "as the less credible bits of the story begin to enter, the clever dramatist also indicates that he, too, has difficulty in believing what he sees." When we are informed that a mysterious object is not a meteorite but a spaceship, the reporter declares, "this is the most terrifying thing I have ever witnessed." Anchors on TV newsmagazines utter similar statements at the beginning or end of scare stories. "It's frightening," NBC's Katie Couric says as she introduces a report suggesting that "shots designed to protect your children might actually hurt or cripple them." ABC's Barbara Walters opines at the conclusion of a report about a woman who falsely accused her father of sexual abuse, "What a terrifying story."4 Statements of alarm by newscasters and glorification of wannabe experts are two telltale tricks of the fear mongers' trade. In the preceding chapters I pointed out others as well: the use of poignant anecdotes in place of scientific evidence, the christening of isolated incidents as trends, depictions of entire categories of people as innately dangerous. If journalists would curtail such practices, there would be fewer anxious and misinformed Americans. Ultimately, though, neither the ploys that narrators use nor what Cantril termed "the sheer dramatic excellence" of their presentations fully accounts for why people in 1938 swallowed a tall tale about martians taking over New Jersey or why people today buy into tales about perverts taking over cyberspace, Uzi-toting employees taking over workplaces, heroin dealers taking over middle-class suburbs, and so forth.5 The success of a scare depends not only on how well it is expressed but also, as I have tried to suggest, on how well it expresses deeper cultural anxieties. In excerpts Cantril presents from his interviews it is clear what the primary anxiety was in his day. Another year would pass before Britain went to war with Germany, and more than three years before the United States finally joined the Allies in World War II. But by late 1939 Hitler and Mussolini were already well on their way to conquering Europe, and less than two weeks after the "War of the Worlds" broadcast Nazi mobs would destroy Jewish synagogues, homes, and shops in what came to be known as Kristallnacht. Many Americans were having trouble suppressing their fears of war and at the same time their sense of culpability as their nation declined to intervene while millions of innocent people fell prey to the barbarous Nazi and fascist regimes. For a substantial number of listeners "War of the Worlds" gave expression to those bridled feelings. Some actually rewrote the script in their minds as they listened to the broadcast. In place of martians they substituted human enemies. "I knew it some Germans trying to gas us all. When the announcer kept calling them people from Mars I just thought he was ignorant and didn't know that Hitler had sent them all," one person recalled in an interview in Cantril's study. Said another, "I felt it might be the Japanese— they are so crafty."6 Such responses were not the norm, of course. Most listeners envisioned the invaders pretty much as Welles and company described them. Yet this didn't stop some of them from making revealing connections to real dangers, "I worry terribly about the future of the Jews. Nothing else bothers me as much. I thought this might be another attempt to harm them," one person said. Reported another: "I was looking forward with some pleasure to the destruction of the entire human race and the end of the world. If we have fascist domination of the world, there is no purpose in living anyway."7 Flash forward to the 1980s and 1990s and it is not foreign fascists we have to put out of our minds in order to fall asleep at night, even if we do fantasize about hostile forces doing us great harm. (Witness the immediate presumption after the Oklahoma City bombing and the crash of TWA Flight 800 that Middle Eastern terrorists were to blame.) Mostly our fears are domestic, and so are the eerie invaders who populate them—killer kids, men of color, monster moms. The stories told about them are, like "War of the Worlds," oblique expressions of concern about problems that Americans know to be pernicious but have not taken decisive action to quash—problems such as hunger, dilapidated schools, gun proliferation, and deficient health care for much of the U.S. population. Will it take an event comparable to the Japanese attack on Pearl Harbor to convince us that we must join together as a nation and tackle these problems? At the start of the new century it ought to be considerably easier for us to muster our collective will and take decisive action than it was for our own parents and grandparents six decades earlier. This time we do not have to put our own lives or those of our children at risk on battlefields halfway around the globe. We do have to finance and organize a collective effort, which is never a simple matter, but compared with the wholesale reorientation of the U.S. economy and government during World War II, the challenge is not overwhelming. Fear mongers have knocked the optimism out of us by stuffing us full of negative presumptions about our fellow citizens and social institutions. But the United States is a wealthy nation. We have the resources to feed, house, educate, insure, and disarm our communities if we resolve to do so. There should be no mystery about where much of the money and labor can be found—in the culture of fear itself. We waste tens of billions of dollars and person-hours every year on largely mythical hazards like road rage, on prison cells occupied by people who pose little or no danger to others, on programs designed to protect young people from dangers that few of them ever face, on compensation for victims of metaphorical illnesses, and on technology to make airline travel-which is already safer than other means of transportation—safer still. We can choose to redirect some of those funds to combat serious dangers that threaten large numbers of people. At election time we can choose candidates that proffer programs rather than scares.8 Or we can go on believing in martian invaders.’

#### Second—the use of multi-chain internal link and scenarios eclipse reality by obscuring the actual likelihood of the impact—the conjunctive fallacy dictates that they’re less likely

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[2008, Eliezer Yudkowsky is a Research Fellow at theMachine Intelligence Research Institute “Cognitive Biases Potentially Aﬀecting Judgment of Global Risks.”, In Global Catastrophic Risks, edited by Nick Bostrom and Milan M. Ćirković, 91–119]

The conjunction fallacy similarly applies to futurological forecasts. Two independent sets of professional analysts at the Second International Congress on Forecasting were asked to rate, respectively, the probability of “A complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983” or “A Russian invasion of Poland, and a complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983.” The second set of analysts responded with significantly higher probabilities (Tversky and Kahneman 1983). In Johnson et al. (1993), MBA students at Wharton were scheduled to travel to Bangkok as part of their degree program. Several groups of students were asked how much they were willing to pay for terrorism insurance. One group of subjects was asked how much they were willing to pay for terrorism insurance covering the flight from Thailand to the US. A second group of subjects was asked how much they were willing to pay for terrorism insurance covering the round-trip flight. A third group was asked how much they were willing to pay for terrorism insurance that covered the complete trip to Thailand. These three groups responded with average willingness to pay of $17.19, $13.90, and $7.44 respectively. According to probability theory, adding additional detail onto a story must render the story less probable. It is less probable that Linda is a feminist bank teller than that she is a bank teller, since all feminist bank tellers are necessarily bank tellers. Yet human psychology seems to follow the rule that adding an additional detail can make the story more plausible. People might pay more for international diplomacy intended to prevent nanotechnological warfare by China, than for an engineering project to defend against nanotechnological attack from any source. The second threat scenario is less vivid and alarming, but the defense is more useful because it is more vague. More valuable still would be strategies which make humanity harder to extinguish without being specific to nanotechnologic threats—such as colonizing space, or see Yudkowsky (2008) on AI. Security expert Bruce Schneier observed (both before and after the 2005 hurricane in New Orleans) that the U.S. government was guarding specific domestic targets against “movie-plot scenarios” of terrorism, at the cost of taking away resources from emergency-response capabilities that could respond to any disaster (Schneier 2005). Overly detailed reassurances can also create false perceptions of safety: “X is not an existential risk and you don’t need to worry about it, because A, B, C, D, and E”; where the failure of any one of propositions A, B, C, D, or E potentially extinguishes the human species. “We don’t need to worry about nanotechnologic war, because a UN commission will initially develop the technology and prevent its proliferation until such time as an active shield is developed, capable of defending against all accidental and malicious outbreaks that contemporary nanotechnology is capable of producing, and this condition will persist indefinitely.” Vivid, specific scenarios can inflate our probability estimates of security, as well as misdirecting defensive investments into needlessly narrow or implausibly detailed risk scenarios. More generally, people tend to overestimate conjunctive probabilities and underestimate disjunctive probabilities (Tversky and Kahneman 1974). That is, people tend to overestimate the probability that, e.g., seven events of 90% probability will all occur. Conversely, people tend to underestimate the probability that at least one of seven events of 10% probability will occur. Someone judging whether to, e.g., incorporate a new startup, must evaluate the probability that many individual events will all go right (there will be sufficient funding, competent employees, customers will want the product) while also considering the likelihood that at least one critical failure will occur (the bank refuses a loan, the biggest project fails, the lead scientist dies). This may help explain why only 44% of entrepreneurial ventures2 survive after 4 years (Knaup 2005). Dawes (1988, 133) observes: “In their summations lawyers avoid arguing from disjunctions (‘either this or that or the other could have occurred, all of which would lead to the same conclusion’) in favor of conjunctions. Rationally, of course, disjunctions are much more probable than are conjunctions.” The scenario of humanity going extinct in the next century is a disjunctive event. It could happen as a result of any of the existential risks we already know about—or some other cause which none of us foresaw. Yet for a futurist, disjunctions make for an awkward and unpoetic-sounding prophecy.

### 2AC Deference DA

#### Our presumed imminence argument internal link turn the deference DA—executive insulation ensures an over focus at ridiculous threat scenarios at the expense of probability—this means it leads to ineffective foreign policy—that’s Covers

#### Democracy solves the impact and exec flex isn’t key—their impact assumes cold war era fears

Spiro 2, Professor at Hofstra Law School

[Winter 2002, Peter J. Spiro is a Professor, Hofstra Law School, “Explaining the End of Plenary Power”, 16 Geo. Immigr. L.J. 339]

Building on those two girders, one can describe how plenary power was generated by the international context from which it emerged. That context was historically characterized by the proto-anarchical nature of relations among states and the resulting need to centralize foreign policymaking in non-judicial institutions. Immigration policy inherently implicated foreign relations, and those relations were, up until recently, characterized by great instability and risk. In the late nineteenth century, nations still routinely made war on each other, for reasons of pure power projection; there was little in the way of a normative or institutional superstructure to act as a brake on conflict. That conflict posed a serious threat, not the least to the not-yet-superpower United States. In a world in which the use of force remained a legitimate means of extending state power, foreign relations were the ultimate high-stakes arena. The world that bore plenary power was also one that demanded unitary decisionmaking. In the face of potentially catastrophic downside risk, the state needed to centralize the formulation of foreign policy. The courts were least suited to assume that institutional task. As famously propounded in Curtiss-Wright, traditional foreign policymaking required speed, secrecy, and singular responsibility, qualities antithetical to judicial process. n42 Nor could the courts claim any substantive competence in the area. Foreign relations were an area that could not tolerate judicial freelancing. n43 In the worst scenario, a court would make the wrong call for want of accurate information and foreign policy expertise, leading us into conflict with another country with all the dangers such conflict posed. n44 Alternatively, the [\*350] courts would make their rulings and have them ignored by the political branches, diminishing critical institutional capital in the process. n45 Either way, there were powerful incentives for the courts to remain on the sidelines when it came to foreign relations. Hence the political question doctrine in matters involving foreign relations, of which plenary power is a variant. n46 Indeed, all of the major plenary power cases stress the foreign relations element of immigration lawmaking and the dangers posed by judicial intervention in such matters. n47 Until recent years, that abnegation was justifiable, if not always justified. Even in such cases as Knauff and Mezei, which have appropriately fallen into disrepute with the passage of time, there were ways of filling out the picture that would have dictated restraint, given the magnitude of the perceived threat. n48 So strong was the judicial reticence that the Court refused anything more than cursory constitutional review even where an immigration controversy implicated no apparent foreign policy sensitivities. n49 The Court feared, perhaps, that to impose constitutional constraints in an innocuous case might dictate their application in ones involving greater foreign policy dangers (or, alternatively, give rise to transparently unprincipled decisional criteria that [\*351] could be used to undermine rights in the domestic context). Better to stay out of the area altogether. And that the Court has largely done until the cases this past Term. n50 There is nothing in the cases themselves to suggest that the shift is owed to the international context. But the context has witnessed an architectural transformation away from those features that sustained plenary power. First, the world is a far less dangerous place today, at least as between states (bracketing for a moment the problem of terrorism). In its traditional conception, war has become something of an anachronism. Democracies have been shown not to make war on each other as a historical matter, n51 and as the realm of democracy expands, so too does the zone of peace. That has lowered the stakes of foreign relations. The downside risk of upsetting relations among nations is now significantly less daunting than in the heyday of plenary power. Compared to the context in which plenary power was spawned (the late nineteenth century), there are more effective institutional brakes on the way to armed conflict. The chances of the United States finding [\*352] itself in real war with a major power -- of the sort of the World Wars -- is virtually nil. Compared to the context in which plenary power found its most extreme form, during the Cold War, the strength of hostile adversaries is not nearly as threatening. It is easy to forget the Cold War perception that the world stood at the brink of nuclear annihilation. That fear has dissipated. The fact that foreign relations no longer pose its historical dangers makes it a less weighty interest relative to individual rights. Foreign relations, in theory, used to pose the ultimate threat, with survival in the balance. That rendered it almost an incommensurable value, a trump against which all others lost. Now that major conflict is unlikely and annihilation improbable (at least as undertaken by another country), it no longer presents a showstopper. Foreign relations interests can be assessed and balanced. They can also be incorrectly assessed and balanced without risk of catastrophic results. It is no longer so easy to frame these interests as imperatives, qualitatively distinguishable from other societal concerns. The transformed nature of foreign relations also puts less of a premium on the decisionmaking anomalies that distinguished it from other areas of lawmaking. The hallmarks of centralization, secrecy, and dispatch no longer present a clear functional advantage. On the contrary, most of the issues that have come to the fore in the new global order (human rights, environmental protection, health, trade, market regulation, etc.) demand a counter-approach at both the domestic and international levels. These issues are, first of all, better addressed through decentralized institutional mechanisms, both governmental and non-governmental. Anne-Marie Slaughter has highlighted the "disaggregation" of central governments in international policymaking. n53 No longer do foreign ministries hold a monopoly on foreign policymaking; other kinds of agencies are forming decisionmaking networks among their international counterparts and undertaking international policy with only marginal participation of diplomatic corps. Beyond the decentralization of central government actors, other entities, including subnational governments and non-governmental organizations, are also emerging as independent players on the international stage. n54 Secrecy is antithetical to efficient decisionmaking on most of the new global issues; one cannot make good policy with respect to environmental protection, for instance, without the full dissemination of relevant data. This observation ties into the decentralization phenomenon. As entities other than foreign ministries come to play an important part in international decisionmaking they need to be afforded full information; [\*353] traditional national security classification schemes pose an impediment to efficient decisionmaking rather than a premise to it. n55 Finally, speed is no longer of the essence in most international policymaking. Because it poses less of a competitive proposition (at least among nation-states), international affairs no longer require the battlefield agility -- real and proverbial -- of earlier times. These developments -- the diminished risks of foreign relations and the changed nature of international decisionmaking -- are what allow the retreat from plenary power and the more vigorous participation of the courts in immigration lawmaking. The diminished risks of foreign relations (again, bracketing for now the question of terrorism) reduce the risk of judicial error. No longer, as they did in the Cold War, do the courts have to fret that a misstep on their part will lead us into World War III or irretrievably undermine national security in the traditional sense of protecting against state adversaries. Nor do they have to conceive of foreign policy as a finely calibrated enterprise not admitting of multiple actors. American judges are themselves increasingly active on the international stage and are developing sustained relationships with their foreign counterparts. n56 In the immigration realm that translates into greater possible institutional discretion for the courts. First, it will allow courts to entertain constitutional challenges to elements of the immigration law regime that have only an attenuated connection to foreign policy. n57 The Fiallo and Nguyen cases present examples. Although both involved foreign nationals (as do all immigration cases), the cases could not have been of much concern to other countries. n58 In the past, such cases might have been avoided for fear of impacting foreign policy in even a marginal fashion or for fear of making judicial involvement unavoidable in other cases with more apparent foreign policy implications. But even such cases that do have a clear foreign policy element are fair judicial game. Because the stakes are lower and because foreign policymaking is now a multilevel game, the courts can assert themselves in the way they assert themselves in other contexts. Zadvydas presents an example. The case clearly involved foreign policy; the United States had been negotiating for [\*354] the return of the detained aliens with their homeland governments. n59 But that no longer posed an obstacle to review, as it almost surely would have in the past.

### 2AC Ban T

#### We meet—there are less conditions under which the executive can detain someone after the plan

#### Restriction includes a limitation

STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, April 10, 2008, Filed, Appellant., 1 CA-CR 06-0167, 2008 Ariz. App. Unpub. LEXIS 613, opinion by Judge G. MURRAY SNOW

P10 The term "restriction" is not defined by the Legislature for the purposes of the DUI statutes. See generally A.R.S. § 28-1301 (2004) (providing the "[d]efinitions" section of the DUI statutes). In the absence of a statutory definition of a term, we look to ordinary dictionary definitions and do not construe the word as being a term of art. Lee v. State, 215 Ariz. 540, 544, ¶ 15, 161 P.3d 583, 587 (App. 2007) ("When a statutory term is not explicitly defined, we assume, unless otherwise stated, that the Legislature intended to accord the word its natural and obvious meaning, which may be discerned from its dictionary definition.").

P11 The dictionary definition of "restriction" is "[a] limitation or qualification." Black's Law Dictionary 1341 (8th ed. 1999). In fact, "limited" and "restricted" are considered synonyms. See Webster's II New Collegiate Dictionary 946 (2001). Under these commonly accepted definitions, Wagner's driving privileges were "restrict[ed]" when they were "limited" by the ignition interlock requirement. Wagner was not only [\*7] statutorily required to install an ignition interlock device on all of the vehicles he operated, A.R.S. § 28-1461(A)(1)(b), but he was also prohibited from driving any vehicle that was not equipped with such a device, regardless whether he owned the vehicle or was under the influence of intoxicants, A.R.S. § 28-1464(H). These limitations constituted a restriction on Wagner's privilege to drive, for he was unable to drive in circumstances which were otherwise available to the general driving population. Thus, the rules of statutory construction dictate that the term "restriction" includes the ignition interlock device limitation.

#### Their interpretation overlimits to only one aff in each topic area—aff flex ensures innovative topics encouraging research skills and in depth discussions

#### Our interpretation is more precise by citing a court case—that means our limit is predictable and better reflects the topic

#### Default to reasonability—competing interpretations leads to a race to limit out affs at the expense of substance—affs need to know they’re topical

### 2AC CP

#### The executive CP is a voting issue—

#### a. Avoids the resolutional question—executive skirts debates over whether the executive should be restricted by artificially imagining the need for executive restrictions doesn’t exist—this skirts topic debates over how to restrict the executive—especially true when the advantage is based off the type of decisionmakng of the executive

#### b. Opportunity Cost—the CP is the logic of deference by shifting responsibility from action to the executive—whether or not the executive shouldn’t be racist doesn’t change the judicial and statutory obligation to act— the CP inculcates a culture of responsibility shifting that makes us inactive agents who let atrocities happen

#### Self restraint mechanism fails—executive can’t internalize costs to future actions—ensures racism

Gott 5, Professor of International Studies

[01/01/05, Gil Gott is a Professor of International Studies at DePaul University, “The Devil We Know: Racial Subordination and National Security Law” Villanova Law Review, Vol. 50, Iss. 4, p. 1075-1076, http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1235&context=vlr]

Tushnet's social learning hypothesis posits a public awareness that the government has exaggerated the existence of threats in the past and has dealt ineffectively with real threats that existed. The public is thus less inclined to trust governmental claims regarding threats, and governmental actors who know of this social learning will limit the scope of their responses to such perceived threats. 22 Tushnet, however, also asserts a qualified defense of policymakers who he sees as facing ex ante decision contexts wherein exaggerations and overreactions are "entirely rational and ought not be criticized in retrospect."23 He admonishes those who would constrain policy-makers in such contexts, warning that "we should be careful not to constrain them because of our hindsight wisdom-unless we are confident that the constraints we put in place really do respond only to tendencies to exaggerate uncertain threats or to develop ineffective policy responses to real ones."24 Tushnet, however, fails to consider how racism informs the "rational" exaggerations and overreactions of policy makers that he views as beyond critique. In the end, Tushnet's social learning-based model promises little, if any, protection or remedy for demonized Others. Tushnet counsels too much caution for civil society actors who would otherwise presumably embody and operationalize social learning in their deployment of "hindsight wisdom" to challenge repressive security policies. Absent the use of such wisdom, however, it is hard to imagine how civil rights can be championed in the face of ex ante state monopoly over relevant information. 25 Moreover, Tushnet's reliance on the Whig version of social learning allows him to remove the judiciary from an active, let alone robust, role in overseeing security state actors. What we are left with is a historically unsupported faith that state actors will themselves have sufficiently internalized social learning to prevent abuses of the Other. In other words, Tushnet's offer to demonized groups amounts to little more than a form of political decisionism cloaked in the hope that social learning (among state actors) can stanch the negative synergy of hysteria and racism. Deploying the notion of social learning from a critical race perspective, we might be able to take a more complete account of the subordinationist problem in state security power exercises and provide effective racial remedies. As opposed to a white-normative deployment of social learning, a critical race perspective would reject a Whig narrative that presents the internment as something that has been transcended, as a symbol of a redeemed/enlightened national identity. The concept of social learning, in this sense, would have to be refined substantially to focus on the more critical problem of "racial learning." What exactly has white America learned from the internment? To what extent have the state's culturally and demographically white security institutions and policy-makers actually internalized critical race perspectives on group subordination, racial injury and racial remedy? Indeed, to what extent has the legal academy and the judiciary internalized these perspectives?

#### DOJ is a poor check on presidential powers --- several factors make its support inevitable

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(April 2008, William P., Boston University Law Review, “THE ROLE OF THE PRESIDENT IN THE TWENTY-FIRST CENTURY: ARTICLE: ELEVEN REASONS WHY PRESIDENTIAL POWER INEVITABLY EXPANDS AND WHY IT MATTERS,” 88 B.U.L. Rev. 505))

Some might argue that even if the Attorney General may be overly susceptible to the influence of the President who appointed her, the same should not be true of the career legal staff of the DOJ, many of whom see their role as upholding the Constitution rather than implementing any President's specific agenda. But the ability of the line lawyers at DOJ to effectively check executive branch power may be more illusory than real. First, the lawyers in the DOJ are likely to have some disposition in favor of the government if only because their clients are the President and the executive branch. n44 Second, those DOJ lawyers who are hired for their ideological and political support of the President will likely have little inclination to oppose the President's position in any case. Third, as a recent instance at DOJ demonstrates, the President's political appointees can always remove or redeploy staff attorneys [\*513] if they find them too independent. n45 Fourth, even if some staff lawyers have initial resistance to the President's position, the internal pressures created by so-called "group-think" may eventually take over. n46 The ability of a staff attorney to withstand the pressures of her peers in adhering to legal principle in the face of arguments based on public safety or national security can often be tenuous, particularly when the result of nay-saying may lead the lawyer to exile in a less attractive assignment. To be sure, the DOJ has, at times, viewed itself as a truly independent voice. Attorney General Edward Bates, appointed by Lincoln reportedly stated that it was his duty "to uphold the Law and to resist all encroachments, from whatever quarter of mere will and power." n47 Robert H. Jackson, in contrast, looking back from the perch of a Supreme Court Justice, saw his role as the Attorney General during the Roosevelt Administration otherwise, describing in one case the opinion he offered as Attorney General as "partisan advocacy." n48 But whatever the views of those individuals holding the position of Attorney General, those views are, at best, only of secondary importance. Far more important are the views of the Presidents who appoint the Attorneys General, and in this respect the positions of the occupants of the White House have been [\*514] consistent. As one study states, "the President expects his Attorney General ... to be his advocate rather than an impartial arbiter, a judge of the legality of his action." n49 Under such a system, the pressure for DOJ to develop expansive interpretations of presidential power is inexorable.

### 2AC Terror DA

#### The major terrorist event of our lifetime involved box cutters, the majority of foiled terrorist plots involve non-WMD weapons, and the greatest death toll of a so called “WMD” terrorist attack has been twelve people, so why the focus on WMD?—even if their discussions of terrorism are good, their focus on WMD level terrorist threats overprescribes its importance in policymaking and leads to blunders

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The increased work being focused on suicide terrorism is arguably both¶ overdue and useful. However, increased research is also being focused on other¶ aspects of terrorism which are less obviously of growing importance. Of particular¶ concern was the rapid growth in research investigating the (potential) use of¶ Chemical, Biological, Radiological, and Nuclear weapons (CBRN) – also often¶ referred to as weapons of mass destruction (WMD) – by terrorists. Figure 2.7¶ shows that the amount of research focused on CBRN terrorism more than¶ doubled in the first three years after 9/11.¶ Yetwhy did this happen? After all, 9/11 was not a CBRN attack. Nearly¶ 3,000 people may have been killed, but the hijackers did not use a nuclear bomb¶ to cause the carnage, they did not spray poisonous chemicals into the atmosphere¶ or release deadly viruses. They used box-cutters. Nevertheless, CBRN¶ research experienced major growth in the aftermath.¶ Arguably,CBRN research has always been over-subscribed. Prior to 9/11,¶nearly six times more research was being conducted on CBRN terrorist tactics than on suicide tactics. Indeed, no other terrorist tactic (car-bombings, hijackings,¶assassinations, and the like) received anywhere near as much research¶ attention in the run-up to 9/11 as CBRN. If the relatively low amount of research¶ attention which was given to al-Qaeda is judged to be the most serious failing of¶ terrorism research in the years prior to 9/11, the relatively high amount of¶ research focused on the terrorist use of CBRN must inevitably be seen as the¶ next biggest blunder.¶ To date, in the few cases where terrorists have attempted to develop CBRN¶ weapons, they have almost always failed. In the handful of instances where they¶ have actually managed to develop and use such weapons, the highest number of¶ individuals they have ever been able to kill is twelve people. In the list of the¶ 300 most destructive terrorist attacks of the past twenty years, not a single one¶ involved the use of CBRN weapons. Yet somehow, one impact of the 9/11¶ attacks was that CBRN research – already the most studied terrorist tactic during¶ the 1990s – actually managed to attract even more research attention and¶ funding, doubling the proportion of articles focused on CBRN in the journals.¶ A degree of research looking at CBRN terrorism is justified. Instances such as¶ the 1995 Tokyo subway attack and the post-9/11 anthrax letters show that CBRN¶ attacks can happen (albeit only rarely). Such attacks have never caused mass¶ fatalities however, and the popular acronym of Weapons of Mass Destruction¶ (WMD) in describing CBRN weapons is desperately misleading. Despite the¶ rarity – and the extreme unlikelihood of terrorists being able to accomplish a¶ truly devastating attack using these weapons – CBRN remains a popular topic¶ for government and funding bodies. They will award research grants for work on¶ this topic when other far more common and consistently far more deadly terrorist¶ tactics are ignored. This popularity with funding sources partly helps to explain¶ the continuing high profile of CBRN in the literature. It has to be acknowledged,¶ however, that some articles on the subject in the core journals are actually¶ arguing that the issue is blown out of proportion and does not warrant the¶ research funding it has and continues to receive (see Claridge, 1999; Leitenberg,¶ 1999).¶ Those who had hoped that 9/11 – a stunning example of how non-CBRN¶ weapons can be used to kill thousands of people – might then have heralded at¶ least a modest shift away from CBRN research, would have been disappointed¶ by the initial reaction. Thankfully, the 2005–7 period shows an improvement¶ and the level of research on CBRN dropped notably, though it is still receiving¶ more attention than prior to 9/11 (and still remains the most heavily researched¶ terrorist tactic after suicide attacks).

#### NATO cohesion is impossible- too many members and failures in Afghanistan

Alexander Melikishvili- research associate with the James Martin Center for Nonproliferation Studies- 1/26/09, YaleGlobal, NATO’s Double Standards Make for a Hollow Alliance, http://yaleglobal.yale.edu/content/nato%E2%80%99s-double-standards-make-hollow-alliance

 As events of the past year demonstrate, NATO faces an existential crisis, reflected in the three aspects underpinning its operations – an inconsistent enlargement policy, diminished internal cohesion and inadequate military planning. Unless NATO can overcome these weaknesses, excitement in Europe about a new era of cooperation with an Obama-led United States may turn out to be premature and groundless. Lost among diplomatic platitudes is the real question of what actually constitutes the set of criteria by which Brussels deems one country to be eligible for NATO membership while another is not. A comparison of Albania and Georgia highlights NATO’s dysfunctional enlargement process of late, raising serious questions about NATO prioritization in membership considerations. At the last NATO summit in April 2008, alliance members unanimously decided to extend membership to Albania. The “Solomonic” wisdom behind admitting Albania, widely recognized as the epicenter of organized crime and corruption in Europe, defies common sense and logic, pointing towards NATO’s double standards with regard to arbitrarily adjusting membership criteria on a case-by-case basis. 1 The unstable character of the Albanian state was highlighted on the eve of the summit: In mid-March a massive explosion at the munitions decommissioning facility just 15 kilometers west of the Albanian capital, Tirana, killed dozens, wounded hundreds and displaced thousands of people. This tragic incident led to the resignation of Albanian Defense Minister Fatmir Mediu, also implicated in an illegal arms-trafficking case. According to details of an ongoing federal investigation, in 2007 Florida-based defense contractor AEY Inc. illegally supplied malfunctioning Chinese-made weapons and munitions from Albanian stockpiles, to the Afghan Army, under terms of a multimillion-dollar Pentagon military-to-military assistance contract. 2 The hypocrisy was on display during a two-day visit by a NATO delegation to Georgia in September. Addressing Tbilisi State University students, NATO Secretary General Jaap de Hoop Scheffer emphasized that Georgia’s progress towards receiving the coveted Membership Action Plan (MAP) – a roadmap intended to facilitate an applicant country’s eventual incorporation into NATO – was contingent on implementation of further democratic reforms by the Georgian government. In response, speaking at the UN General Assembly in New York, Georgian President Mikheil Saakashvili unveiled new reforms aimed at ensuring independence of judiciary, increasing media freedoms and supporting political opposition. Indeed, if judged by the most commonly accepted standards of democratic governance, rule of law and economic development, Albania lags behind Georgia. The Transparency International’s Corruption Perceptions Index 2008 ranks Albania at the 85th position, whereas Georgia ranks 67th. It’s truly mind-boggling that Secretary Scheffer demands greater democratic reforms from Tbilisi while apparently giving a free pass to Tirana’s dismal performance. There’s only one explanation for this discrepancy, and it’s rooted in the combination of guilt of NATO bureaucrats over Albania’s wait in the membership-action antechamber – since 1999 – and US insistence, an unusual byproduct of American involvement in the Balkans in the aftermath of Yugoslavia’s bloody dissolution. Inconsistencies reflected in the selective membership dispensation undermine the founding principles and credibility of the NATO alliance as a whole. Moreover, the relentless pace of enlargement over the past decade and a half has had an adverse impact on NATO’s cohesion. This is particularly evident in the emergence of factions within NATO that led former US Secretary of Defense Donald Rumsfeld to draw distinctions between the “Old” and “New” Europe. His successor, Robert Gates, was more diplomatic in his remarks, but frustrated by an inability to elicit adequate troop commitments from European allies for the Afghanistan stabilization campaign, he too warned of the “two-tiered alliance” in which some members are more willing to fight than others. Several cycles of enlargement clearly had a debilitating effect on NATO’s collective decision making mechanism because the sheer number of voting members grew to the current 26 (or 28, with Albania and Croatia expected to formally join the alliance by April), which invariably complicated policy formulation. Furthermore, deep resentment felt by a number of Western European governments towards the Bush administration in the aftermath of the Iraqi invasion further exacerbated tensions with former Warsaw Pact countries vying for Washington’s attention. Nowhere have the growing cleavages within the alliance been as evident as in Afghanistan, where NATO maintains 50,000-strong contingent under the aegis of the UN-sanctioned International Security Assistance Force. Since August 2003, when NATO took command of the ISAF, this out-of-area operation has repeatedly tested the limits of allied military cooperation in addressing the security challenges in Afghanistan. The US increasingly faces difficulty in forging NATO consensus on the most pressing issues concerning security in Afghanistan. What else can explain that it took close to five years for the allies to reach an accord authorizing military attacks on the country’s burgeoning underground opium-heroin industry? For years, regional experts issued dire warnings that profits from poppy cultivation, which according to UN estimates now account for at least half of Afghanistan’s gross domestic product, support the Taliban comeback. At the October meeting of NATO defense ministers in Budapest, the allies finally hammered out an agreement to authorize military force against Afghan drug lords. However, the NATO members that customarily favor restrictive caveats regarding deployment of their forces, including Germany and Italy, insisted on including a provision that effectively cuts the agreement at its knees. The provision states that attacks on the Afghan narcotics industry will occur only with explicit approval of the respective national governments. In effect, the agreement allows some NATO members to basically opt out of the operations that put their troops in harm’s way. What’s striking is the apparent lack of realization on the part of some European allies that NATO’s failure in Afghanistan will deal a deadly blow to the alliance and may even spell its demise.

#### Judicial review key to detention restraint—avoids false leads

O’Neil 11 [Winter, 2011, Robin O'Neil, “THE PRICE OF PURITY: WEAKENING THE EXECUTIVE MODEL OF THE UNITED STATES' COUNTER-TERROR LEGAL SYSTEM”, 47 Hous. L. Rev. 1421]

While providing for judicial review may not make sense in every anti-terror context, absent limitation, the executive may offend the Constitution in any number of ways, leaving those affected no recourse. n152 Further, the lack of judicial review compromises counter-terror activities by not requiring the President to provide plausible reasons for and explanations of his actions; n153 for example, "by failing to provide even perfunctory individualized hearings [to detainees at Guantanamo Bay], ... the U.S. government ... misspent our scarce interrogation capacities on individuals of minimal or no intelligence value." n154 Had the President's orders been subject to [\*1445] judicial oversight, he would have had to explain how the unilaterally implemented deprivations of due process were narrowly tailored to effect an important purpose, prompting a more thorough analysis of what was to be gained by the President's detention policies. n155 The weak form of the executive model gives the President limited flexibility in exigent circumstances to move forward without congressional authorization, while retaining a strong preference for specifically authorized executive action and the judicial recourse it usually provides. n156 The fact that both Congress and the Bush Administration made a concerted effort to cut the courts out of the counter-terrorism legal scheme altogether supports the proposition that the anti-terrorism legal system developed during the Bush Administration has brought the U.S. executive model perilously close to operating in its pure form, notwithstanding the broad legislative mandates enacted in support of the President's unilateral activities. n157 President Obama should heed the Boumediene Court's admonitions regarding the centrality of judicial review to the preservation of American democracy and press Congress to lift what barriers to judicial recourse the MCA continues to impose on War on Terror detainees. n158 In those rare circumstances in which legislative authorization is not practicable, the President should provide for meaningful judicial recourse by his own order. n159

### 2AC Salaries DA

#### Congress will defer to court rulings—politicians will only talk

Devins 6, Goodrich Prof of Law

[2006, Neal Devins is a Goodrich Professor of Law and Professor of Government, College of

William and Mary, “Should the Supreme Court Fear Congress?”, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1158&context=facpubs&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fq%3Dcourt%2Bcongress%2Bstripping%2Bdetention%26btnG%3D%26hl%3Den%26as_sdt%3D0%252C5#search=%22court%20congress%20stripping%20detention%22>]

That the Roberts Court need not worry about jurisdiction stripping legislation is important, but ultimately does not answer the question of whether the Court should fear Congress. Congress, after all, can slap the courts down in other ways.132 Nevertheless, changes in Congress over the past twenty years suggest that the Roberts Court has less reason to fear Congress than did the Warren or Burger Courts. As detailed in Part II, today's lawmakers are less engaged in constitutional matters and less interested in asserting their prerogative to independently interpret the Constitution. Correspondingly, lawmakers place relatively more emphasis on expressing their opinions than on advancing their policy preferences. Consequently, even though the Rehnquist Court invalidated more federal statutes than any other Supreme Court, Congress did not see the Court's federalism revival as a fundamental challenge to congressional power. 133 Lawmakers, instead, preferred to appeal to their base by speaking out on divisive social issues-launching rhetorical attacks against lower federal courts and state courts.

### 2AC Politics

#### You should refuse the logic of the DA—subordinating ethics to political concerns in just one instance undermines our capacity to make any ethical choices

Hedges 11

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The liberal class, which attempted last week to discredit the words my friend Cornel West spoke about Barack Obama and the Democratic Party, prefers comfort and privilege to justice, truth and confrontation. Its guiding ideological stance is determined by what is most expedient to the careers of its members. It refuses to challenge, in a meaningful way, the decaying structures of democracy or the ascendancy of the corporate state. It glosses over the relentless assault on working men and women and the imperial wars that are bankrupting the nation. It proclaims its adherence to traditional liberal values while defending and promoting systems of power that mock these values. The pillars of the liberal establishment—the press, the church, culture, the university, labor and the Democratic Party—all honor an unwritten quid pro quo with corporations and the power elite, as well as our masters of war, on whom they depend for money, access and positions of influence. Those who expose this moral cowardice and collaboration with corporate power are always ruthlessly thrust aside. The capitulation of the liberal class to corporate capitalism, as Irving Howe once noted, has “bleached out all political tendencies.” The liberal class has become, Howe wrote, “a loose shelter, a poncho rather than a program; to call oneself a liberal one doesn’t really have to believe in anything.” The decision to subordinate ethics to political expediency has led liberals to steadily surrender their moral autonomy, voice and beliefs to the dictates of the corporate state. As Dwight Macdonald wrote in “The Root Is Man,” those who do not make human beings the center of their concern soon lose the capacity to make any ethical choices, for they willingly sacrifice others in the name of the politically expedient and practical.

#### **Losers-lose is wrong --- won’t impact rest of agenda**

Sargent, 9/10 (Greg, 9/10/2013, Washington Post.com, “No, a loss on Syria would not destroy the Obama presidency,” Factiva))

If not? None of the other permutations here are anywhere close to that kind of threat to the Obama presidency. Presidents lose key votes which are then mostly forgotten all the time. They pursue policies which poll badly, but are then mostly forgotten, all the time. Look, there is no question that if Obama loses Syria vote, the coverage will be absolutely merciless. But let's bring some perspective. The public will probably be relieved, and eventually all the "Obama is a loser" talk will sink out of the headlines and be replaced by other big stories with potentially serious ramifications for the country. It's key to distinguish between two things here. One question is: How would a loss impact the credibility of the President and the United States with regard to upcoming foreign policy crises and confrontations? That's not the same as asking: How would a loss impact Obama's relations with Congress in upcoming domestic battles? And on that latter score, there's a simple way to think about it: Look at what's ahead on the calendar. The two looming items are the government shutdown and debt ceiling battles, and when it comes down to it, there's no reason to believe a loss on Syria would substantially alter the dynamics on either. Both are ultimately about whether House Republicans can resolve their own internal differences. Will a Syria loss weaken Obama to the point where Republicans would be even more reluctant than they are now to reach a deal to continue funding the government? Maybe, but even if a shutdown did result, would a loss on Syria make it any easier for the GOP to dodge blame for it? It's hard to see how that work in the eyes of the public. Same with the debt limit. Is the argument really going to be, See, Obama lost on Syria, so we're going to go even further in threatening to unleash economic havoc in order to defund Obamacare and/or force cuts to popular entitlements? There's just no reason why a Congressional vote against Syria strikes would make the "blame game" on these matters any easier for Republicans. Is it possible that a loss on Syria will make Congressional Dems less willing to draw a hard line along with the president in these talks, making a cave to the GOP more likely? I doubt it. It will still be in the interests of Congressional Dems to stand firm, because the bottom line remains the same: House Republicans face potentially unbridgeable differences over how far to push these confrontations, and a united Dem front exploits those divisions. Syria doesn't change any of that. If a short term deal on funding the government is reached, the prospects for a longer term deal to replace the sequester will be bleak, but they've been bleak for a long time. Syria will fade from public memory, leaving us stuck in the same stalemate -- the same war of attrition -- as before. What about immigration? The chances of comprehensive reform passing the House have always been slim. Could a Syria loss make House Republicans even less likely to reach a deal? Maybe, but so what? Does anyone really imagine Latinos would see an Obama loss on Syria as a reason to somehow become less inclined to blame the GOP for killing reform? The House GOP's predicament on immigration will be unchanged. Whatever happens on Syria, and no matter how much "Obama is weak" punditry that results from it, all of the remaining battles will be just as perilous for the GOP as they appeared before the Syria debate heated up. Folks making the case that a Syria loss throws Obama's second term agenda into serious doubt -- as if Congressional intransigence were not already about as bad as it could possibly get -- need to explain what they really mean when they say that. It's not clear even they know.