

# Before the Smoke Cleared: Decision-Making in the Immediate Aftermath of 9/11

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I.	INTRODUCTION .....	763	R
II.	INSIDE THE MINDS OF TERRORISTS .....	765	R
	A. <i>Terrorism Generally</i> .....	765	R
	B. <i>What al-Qaeda Wanted Out of 9/11</i> .....	766	R
III.	DECISION-MAKING AND HEURISTICS .....	768	R
	A. <i>Automatic vs. Effortful Decision-Making</i> .....	768	R
	B. <i>Heuristics Triggered by Terrorism</i> .....	770	R
	1. AVAILABILITY .....	770	R
	2. PROBABILITY NEGLECT .....	772	R
	C. <i>Other Factors Triggered by Terrorism that Affect Decision-Making</i> .....	773	R
	1. TEMPORAL IMMEDIACY .....	773	R
	2. ANGER/OUTRAGE .....	774	R
	3. TERROR MANAGEMENT THEORY .....	775	R
	4. PLANNING FALLACY .....	776	R
IV.	REACTION: DECIDING UNDER THE INFLUENCE, 9/11/01 TO 9/14/01 .....	777	R
	A. <i>The Bush Doctrine</i> .....	777	R
	B. <i>Biases Affecting the Bush Doctrine</i> .....	778	R
	C. <i>Congressional Authorization to Use Military Force</i> .....	780	R
	D. <i>Biases at Work in the House of Representatives</i> .....	781	R
V.	CONCLUSION .....	783	R
	APPENDIX A – TIMELINE OF EVENTS .....	785	R
	APPENDIX B – AUTHORIZATION FOR USE OF MILITARY FORCE .....	791	R

## I. INTRODUCTION

“My blood was boiling. We were going to find out who did this, and kick their ass.”<sup>1</sup> It is September 11, 2001, approximately 9:43 a.m., and the President has just been informed that a plane has crashed into the Pentagon. By this time, two planes have already crashed into the World Trade Center, and it is clear that the United States is under attack. The President—and the nation—would experience a wide range of emotions over the next several days, but the decisions made during that time frame would reshape American foreign policy and international law forever. This Article will explore the decisions made during the unprecedented chaos and uncertainty of the four-day time span from September 11, 2001, (when the United States was attacked) to September 14, 2001,

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1. GEORGE W. BUSH, DECISION POINTS 128 (2010).

(when Congress authorized the use of military force to hunt down those responsible). This Article will examine the biases and heuristics that affect decision-making in the immediate aftermath of a terrorist attack and will argue that many major decisions following a terrorist attack should be subjected to a “cooling off” period to more effectively allow rationality to guide those choices.

Section II of this Article discusses the purposes behind terrorist acts in general and how terrorist groups use fear to get their enemies to subconsciously enact self-destructive policies. Section III examines decision-making processes in times of crisis, specifically discussing the biases triggered by acts of terror. Section IV scrutinizes the government action in the four days that followed the terrorist attacks, including the Bush Doctrine and the Authorization for Use of Military Force. Section V argues that it is necessary to create uniform policies for reacting to acts of terror in order to prevent bias from negatively affecting the larger long-term goals of American society.

There is perhaps a need for a disclaimer, though. More than twelve years have passed since the traumatic chain of events that transpired on that surreal Tuesday morning. Although most Americans of a certain age will remember exactly where they were that morning, it is quite impossible to experience the same emotions that took a collective hold over the nation during that frightful time. Many might claim to have vivid memories of where they were, what they were doing, or what they were thinking on that particular morning;<sup>2</sup> however, memory is generally not acutely reliable. Furthermore, due to the various factors at work that morning and the abundance of graphic images in the days and weeks that followed, detailed memories of those days’ events may be particularly susceptible to corruption.<sup>3</sup> With distance comes perspective, and there is certainly an element of hindsight bias in effect when scrutinizing the actions of those dealing with an unprecedented crisis.<sup>4</sup> This Article is

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2. That particular day has taken on such significance that it has effectively become a “border in time,” a moment that separates the “before” from the “after” and marks a new beginning in history. *See generally* TOM LUNDBORG, *POLITICS OF THE EVENT: TIME, MOVEMENT, BECOMING* 1 (2012).

3. For example, on several occasions, President Bush stated that he saw the first plane hit the World Trade Center on television while waiting to go into a classroom on September 11. However, there was no live footage of the first crash, and amateur footage did not surface until the next day. Nor did Bush witness the second plane hit the World Trade Center as it happened. A spokesman later refers to Bush’s repeated statements as “just a mistaken recollection.” PAUL THOMPSON, *CTR. FOR COOP. RESEARCH, THE TERROR TIMELINE* 388 (2004).

4. “In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared ‘relatively inevitable’ before it happened. People believe that others should have been able to anticipate events much better than was actually the case.” Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in

not intended to unfairly criticize the decisions made during that period by recklessly wielding the lens of history but is intended rather to explore the biases that affected decision-making at the highest levels of government during one of the most unimaginable junctures in American history. By understanding the biases that are triggered by terrorist attacks, decision-makers can better understand how to avoid making impulsive and counterproductive decisions.

## II. INSIDE THE MINDS OF TERRORISTS

### A. *Terrorism Generally*

In order to determine what heuristics and biases are triggered in decision-making related to terrorism, a brief understanding of terrorism itself is necessary. However, the term “terrorism” is loaded with meaning, and no simple definition is possible. The FBI, Department of Defense, Congress, and the U.N. each have different definitions. There are even competing definitions within the U.S. Code. In one section, terrorism is defined broadly as acts dangerous to human life that appear to be intended “to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>5</sup> In another, terrorism is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>6</sup>

For the purposes of this Article, a precise definition is not necessary, for this Article merely seeks to examine reactions to terrorism. While terrorism is used to fulfill political or ideological goals of the terrorist organizations, it is also designed to elicit certain responses. The design is not to cause a reaction but to cause an overreaction.<sup>7</sup> Terrorism is designed to leave a psychological impact far greater than the physical impact.<sup>8</sup> This is one of the reasons that terrorists target important symbols (e.g., the Capitol)—successful attacks on prominent symbols create a more pronounced psychological wound, causing those attacked to dis-

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JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 335, 341 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

5. 18 U.S.C. § 2331(1)(A)–(B), (5)(A)–(B) (2012). Also included in the statute defining terrorism are “act[s] of war,” which include any acts occurring in the course of “declared war; armed conflict, whether or not war has been declared, between two or more nations; or armed conflict between military forces of any origin.” 18 U.S.C. § 2331(4) (2012).

6. 22 U.S.C. § 2656f(d)(2) (2012).

7. See Fareed Zakaria, *Don't Panic. Fear is al-Qaeda's Real Goal*, WASH. POST, Jan. 11, 2010, at A3 (“The purpose of terrorism is to provoke an overreaction . . . Terrorism is an unusual military tactic in that it depends on the response of the onlookers. If we are not terrorized, then the attack didn't work. Alas, this one worked very well.”).

8. LOUISE RICHARDSON, WHAT TERRORISTS WANT 5 (2006).

proportionately gauge the abilities of the enemy.<sup>9</sup>

While some terrorist organizations want to scare their enemies into making specific decisions (e.g., the release of prisoners), many others design their tactics to scare their enemies into making certain types of decisions. Often, the terrorists will not have a good idea about what kind of reaction to expect, but instead they seek to force their enemies to make decisions while under the influence of shock, anger, fear, and humiliation.<sup>10</sup> Some organizations hope for a forceful response in order to demonstrate that their enemies are every bit as dangerous as the terrorists made them out to be.<sup>11</sup> The Bush administration's reaction to 9/11 was particularly fitting for painting a negative picture of America. According to one scholar, "[f]or Osama, the Bush administration has proven to be a perfect foil for his anti-Western jihad: arrogant, bullying, culturally insensitive, diplomatically inept, dishonest, unilateral, and militaristic. The *ihadis* could not have imagined a better enemy to point out the multiple sins of the infidel 'leader of the free world.'"<sup>12</sup>

#### B. *What al-Qaeda Wanted Out of 9/11*

Although September 11, 2001 will often delineate the day the war on terror began, Osama bin Laden had been at war with the United States since August 23, 1996, when he issued his "Declaration of War Against the Americans Occupying the Land of the Two Holy Places."<sup>13</sup> Fueled by religious zealotry, bin Laden had for years decried the Western "occupation" of Islamic lands and built up his resources in his desire to drive the Westerners out, specifically singling out U.S. forces as a target for attack.<sup>14</sup> However, bin Laden never definitively stated his goals, broadly stating that he would not call off his jihad against the United States until the U.S. stopped all aggressive action against Muslims everywhere and ended the "Western and American influence in [Muslim] countries."<sup>15</sup> Lacking clear motivation, bin Laden seemed to be more interested in destroying the existing system than designing his own.

It is often believed that bin Laden was deliberately trying to pro-

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9. *Id.* at 4–5.

10. *Id.* at 99.

11. *Id.*

12. PAUL G BUCHANAN, WITH DISTANCE COMES PERSPECTIVE: ESSAYS ON POLITICS, SECURITY AND INTERNATIONAL AFFAIRS 231 (2005).

13. LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 234 (2006).

14. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 59 (2004) [hereinafter 9/11 COMMISSION REPORT].

15. RICHARDSON, *supra* note 8, at 84.

voke the United States into using force as a way of creating a war between Islam and the West.<sup>16</sup> Ayman al-Zawahiri, bin Laden's second in command, in describing why al-Qaeda wanted to attack the United States, stated, "[T]hey will face one of two bitter choices: Either personally wage battle against the Muslims, which means the battle will turn into clear cut jihad against infidels, or they reconsider their plans after acknowledging the failure of the brutal and violent confrontation against Muslims."<sup>17</sup> If nothing else, an overreaction by the U.S. could be calculated to be large-scale, expensive, time-consuming, distracting, and counterproductive.

Khalid Sheikh Mohammed—the man who designed the 9/11 plan—felt the best way to influence U.S. policy was by targeting the American economy.<sup>18</sup> Destroying the American economy became a major strategy for accomplishing al-Qaeda's goals; bin Laden repeatedly stated that the best way to drive Americans from the Muslim world was to bankrupt the U.S. by drawing them into a series of small but expensive wars.<sup>19</sup> To date, the "war on terror"—including the war on Iraq—has cost the United States more than \$2.2 trillion (not including opportunity costs and social costs).<sup>20</sup> Not only that, but that number is only a down payment; spending on the wars in Afghanistan and Iraq is likely to cost between \$3.7 trillion and \$4.4 trillion, with another \$1 trillion cost associated with borrowing the money to perpetuate those wars.<sup>21</sup>

Furthermore, not only can the weakened economy be traced to the war on terror, but the American response to the attacks also weakened national security and compromised American principles.<sup>22</sup> These consequences can be directly tied to the course of action that was decided on in the immediate aftermath of the attacks. Section IV will further discuss the decisions made during that time frame, but a discussion of the heuristics involved in those decisions is useful for determining whether

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16. *Id.* at 99.

17. *Id.* at 100.

18. 9/11 COMMISSION REPORT, *supra* note 14, at 153. Mohammed also had great personal ambitions. His original plan, rejected by bin Laden, was to hijack ten planes, nine of which would crash into American targets. The tenth he would land himself, and, after killing all adult male passengers on board, he would deliver a speech regarding U.S. support for Israel, the Philippines, and repressive governments in the Arab world. *Id.* at 154.

19. NOAM CHOMSKY, 9-11: WAS THERE AN ALTERNATIVE? 21 (2011).

20. Paul Danahar, *U.S. Spent Trillions and Left Iraq in Violent Pieces*, BBC NEWS (Nov. 1, 2013), <http://www.bbc.com/news/world-us-canada-24730270>.

21. Mark Thompson, *The \$5 Trillion War on Terror*, TIME (June 29, 2011), <http://nation.time.com/2011/06/29/the-5-trillion-war-on-terror>.

22. See Joseph E. Stiglitz, *The True Cost of 9/11: Trillions and Trillions Wasted on Wars, a Fiscal Catastrophe, a Weaker America*, SLATE (Sept. 1, 2011, 4:51 PM), [http://www.slate.com/articles/business/project\\_syndicate/2011/09/the\\_true\\_cost\\_of\\_911.html](http://www.slate.com/articles/business/project_syndicate/2011/09/the_true_cost_of_911.html).

or not such consequences could even be contemplated before the search for survivors was even complete.

### III. DECISION-MAKING AND HEURISTICS

Facing an enormous amount of pressure to respond quickly, the Bush administration decided within hours of the attacks that a large-scale military response was needed. As the following discussion will illustrate, though, there is no worse time to enact momentous policy choices than immediately after a terrorist attack. At no time are policy-makers' decisions more likely to be clouded by bias, yet clothed in righteousness.

#### A. *Automatic vs. Effortful Decision-Making*

When a person makes judgments or engages in problem solving, two separate processing systems are at work.<sup>23</sup> The systems are often referred to in psychology as System 1 and System 2. Daniel Kahneman describes these two systems as follows:

- System 1 operates automatically and quickly, with little or no effort and no sense of voluntary control.
- System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.<sup>24</sup>

These two systems operate simultaneously and affect each other, but System 1 is the primary system that the brain uses to make decisions, while System 2 is only activated when called upon to solve a problem or answer a question that System 1 cannot.<sup>25</sup>

System 1 is an intuitive process common to all mammals.<sup>26</sup> System 1 includes such skills necessary for survival as the ability to recognize objects or perceive the world around us.<sup>27</sup> However, System 1 is also capable of learning how to handle more complex tasks, such as reading or playing chess, through repetition.<sup>28</sup> System 1 operates continuously and cannot be turned off at will.<sup>29</sup> It continually and effortlessly observes and assesses situations without any specific intentions, shaping

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23. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 819 (2001).

24. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011).

25. *Id.* at 24.

26. Haidt, *supra* note 23, at 818 tbl.1.

27. KAHNEMAN, *supra* note 24, at 21.

28. *Id.*

29. *Id.* at 28.

the beliefs and choices of System 2.<sup>30</sup> The impressions, feelings, intuitions, and intentions that System 1 generates are turned into beliefs and voluntary actions by System 2, often with little or no modification.<sup>31</sup>

System 2, on the other hand, normally operates at only a fraction of its capacity, activating fully only when needed to answer a problem that System 1 cannot or when things get difficult, such as when self-control is required.<sup>32</sup> Operation of System 2 is effortful, and since cognitive resources are limited, System 1 is generally relied upon unless there is a specific need to engage in systematic processing.<sup>33</sup> One of the defining characteristics of System 2 is laziness, “a reluctance to invest more effort than is strictly necessary.”<sup>34</sup> The “law of least effort” applies to both physical and cognitive exertion.<sup>35</sup> It holds that “if there are several ways of achieving the same goal, people will eventually gravitate to the least demanding course of action.”<sup>36</sup> This is especially problematic because System 1 is gullible, biased to believe, and will often answer questions by substituting an easier question rather than by resolving a complex matter.<sup>37</sup>

Even when System 2 would otherwise be necessary to resolve a difficult question, numerous factors can affect System 2’s ability to process information and make rational decisions. First, because operation of System 2 requires effort, if the mind is stressed or tired, the additional energy required to operate System 2 leads to reduced deliberation and increased reliance on System 1.<sup>38</sup> If the mind is otherwise preoccupied, System 1 has a stronger influence on behavior and people are more likely to give into temptation, since System 2 is responsible for self-control (and because System 1 has a sweet tooth).<sup>39</sup> Finally, because the deliberative processes take time to reach logical outcomes, anything that imposes time pressure on a judgment or decision will undermine the operation of System 2.<sup>40</sup>

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30. *Id.* at 24.

31. *Id.*

32. *Id.* at 24–25.

33. Haidt, *supra* note 23, at 820.

34. KAHNEMAN, *supra* note 24, at 31.

35. *Id.* at 35.

36. *Id.*

37. *Id.* at 81, 97.

38. Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHL-KENT L. REV. 1045, 1051 (2005).

39. KAHNEMAN, *supra* note 24, at 41. In a classic study, subjects were instructed to remember either a two-digit or a seven-digit number as they walked to a different room. On the way to the second room, the subjects were offered either fruit salad or a piece of cake. Those subjects asked to remember the longer number were far more likely to chose the cake (63%) than those asked to remember the shorter number (41%). Lobel & Loewenstein, *supra* note 38, at 1051–52.

40. Lobel & Loewenstein, *supra* note 38, at 1052.

### B. *Heuristics Triggered by Terrorism*

In order to make complicated decisions, especially where uncertainty is involved, System 1 relies on a number of different heuristics—mental shortcuts that reduce the complexity of assessment and prediction.<sup>41</sup> Heuristics often lead to intuitive assumptions, regarding what is true and right; however, these intuitions may be biased in that they are prone to predictable errors.<sup>42</sup> Although there are many different heuristics that operate subconsciously to affect judgments and decisions, this Article will explore only those most specifically triggered by terrorist activities or related to counterterrorism responses.

#### 1. AVAILABILITY

The availability heuristic is one of the most fundamental heuristics that affects judgment.<sup>43</sup> In the social context, “all heuristics are equal, but availability is more equal than the others.”<sup>44</sup> Simply defined, the availability heuristic is “the process of judging frequency by ‘the ease with which instances come to mind.’”<sup>45</sup> If one is asked to determine the probability of an event occurring when statistical data is unavailable, the individual will instead base the probability on his or her ability to think of an illustration.<sup>46</sup> Although this heuristic is useful in a variety of circumstances, availability can lead to the dangerous problem of neglecting large risks while giving excessive attention to smaller risks.<sup>47</sup>

When it is easy to think of an example, that type of event will seem to be more numerous than events of equal or lesser frequency that are not as easy to bring to mind.<sup>48</sup> There is perhaps nothing so designed to trigger the availability heuristic more than a terrorist attack.

[Terrorism] induces an availability cascade. An extremely vivid image of death and damage, constantly reinforced by media attention and frequent conversations, becomes highly accessible, especially if it is associated with a specific situation such as the sight of a bus. The emotional arousal is associative, automatic, and uncontrolled, and it produces an impulse for protective action. System 2 may “know” that the probability is low, but this knowledge does not eliminate the self-generated discomfort and the wish to avoid it. System 1 cannot be

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41. Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 532–33 (2005).

42. *Id.* at 532.

43. KAHNEMAN, *supra* note 24, at 129–30.

44. *Id.* at 142 (citing Timur Kuran & Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999)).

45. *Id.* at 129.

46. Sunstein, *supra* note 41, at 532.

47. *Id.*

48. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974).



turned off. The emotion is not only disproportionate to the probability, it is also insensitive to the exact level of probability.<sup>49</sup>

Although part of the design in every terrorist attack is to create the fear of future attacks,<sup>50</sup> none have ever managed to trigger the availability heuristic as effectively as 9/11. The familiarity of the targets, the scale of the damage and loss of life, and the extensive media coverage made it nearly impossible to erase the terrible images of that morning from the forefront of the memory in the days, weeks, and months that followed.<sup>51</sup> Whereas System 2 makes rational decisions by focusing on costs and benefits, System 1 is easily distracted and highly swayed by visual imagery.<sup>52</sup> High visibility and the shock of destroying important symbols—the Twin Towers, the Pentagon, the White House, and the Capitol<sup>53</sup>—were critical designs to the success of al-Qaeda’s mission. After the first plane hit the North Tower at 8:46 a.m., news traveled quickly and millions had turned on their televisions to attempt to grasp the situation. Although video of the incident would be shown again and again, millions watched live as Flight 175—seemingly from out of nowhere (and certainly not within the realm of imagination of most anyone)—disappeared into the 78th through 84th floors of the South Tower while traveling at approximately 590 mph.<sup>54</sup> It was at that moment, 9:03 a.m., that it became clear that the first crash was no accident, and that America was under attack from an unknown enemy. The entire sequence, followed by the terrible images that ensued—the fire, death, and destruction—was designed to be shocking, spectacular, and not easily forgettable. “In today’s world, terrorists are the most significant prac-

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49. KAHNEMAN, *supra* note 24, at 322–23. An availability cascade is defined as “a self-sustaining chain of events, which may start from media reports of a relatively minor event and lead up to public panic and large-scale government action.” *Id.* at 142.

50. *See id.* at 144 (“In today’s world, terrorists are the most significant practitioners of the art of inducing availability cascades . . . . [I]t is difficult to reason oneself into a state of complete calm. Terrorism speaks directly to System 1.”).

51. *See, e.g., Note, Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1230–31 (2002) (“Americans are all too familiar with video of planes crashing into the towers, of office workers jumping from the ninetieth floor, and of the towers collapsing. Four months after the attacks, the ruins of the World Trade Center are still smoldering in lower Manhattan, and the skyline is eerily incomplete.”).

52. Lobel & Loewenstein, *supra* note 38, at 1057.

53. It is unclear what the target was for United Flight 93 when a passenger revolt caused it to crash into a field in Shanksville, Pennsylvania. Intelligence reports show that even the planners were unclear about whether to attack the White House or the Capitol as late as August 2001, and the hijackers may have had discretion to decide based on their risk assessments. 9/11 COMMISSION REPORT, *supra* note 14, at 248.

54. DANIEL R. BOWER, NAT’L TRANSP. SAFETY BD., RADAR DATA IMPACT SPEED STUDY: AMERICAN AIRLINES FLIGHT 11 UNITED AIRLINES FLIGHT 175, at 2 (2002). Flight 11 was traveling at approximately 430 knots (approximately 494 miles per hour, or 724 feet per second) at the time it impacted the North Tower. Flight 175 was traveling at approximately 510 knots (approximately 587 miles per hour, or 861 feet per second) when it impacted the South Tower.

tioners of the art of inducing availability cascades. . . . [I]t is difficult to reason oneself into a state of complete calm. Terrorism speaks directly to System 1.”<sup>55</sup>

## 2. PROBABILITY NEGLECT

Closely related to the availability heuristic is probability neglect.<sup>56</sup> Probability neglect also factors into the ability to judge risks. When assessing risks, people often tend to focus on the outcome (as triggered by availability) rather than on the actual probability of that outcome occurring.<sup>57</sup> The problem is that when attempting to calculate the probability of a tragic event, such as a terrorist attack, people remain focused on the numerator—the easily recallable event—and ignore the denominator—the statistical likelihood of the event happening.<sup>58</sup> When especially strong emotions are involved, people will often not assess probability at all; instead the brain concentrates solely on the outcome.<sup>59</sup> This also holds true for highly responsive democratic institutions that translate fear into law during periods of intense emotion.<sup>60</sup>

A classic example of this is an experiment that asked people to estimate how many words in a 2,000-word section of a novel ended in the letters “ing.”<sup>61</sup> Responders gave much larger estimates than those asked to estimate how many words have “n” as the second-to-last letter in the same work, despite the fact that the former category is a subset of the latter.<sup>62</sup> Similarly, people are willing to pay more for flight insurance for losses resulting from terrorism than they are willing to pay for flight insurance from all causes.<sup>63</sup> The thought of terrorism significantly affects the ability and willingness to rationally calculate probability due to the intense emotions and extreme visual imagery evoked when attempting to determine the possibility of an attack. “The problem of vivid, emotional miscalculation of risk is particularly acute in the

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55. KAHNEMAN, *supra* note 24, at 144.

56. The difference between the two concepts is subtle. Availability answers the question of probability by answering an easier question (What salient examples comes to mind?) rather than the harder question (What is the statistical risk?). Probability neglect, on the other hand, occurs when “visualization makes the issue of probability less relevant or even irrelevant.” Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 82 (2002).

57. *Id.* at 86.

58. KAHNEMAN, *supra* note 24, at 144.

59. Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 540 (2007).

60. Sunstein, *supra* note 56, at 87.

61. Christine Jolls & Cass R. Sunstein, *Debiasing through Law*, 35 J. LEGAL STUD. 199, 203 (2006) (citing Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293, 295 (1983)).

62. *Id.*

63. Sunstein, *supra* note 56, at 81.

antiterrorism context, since fear is a particularly strong emotion, imperious to deliberate calculation.”<sup>64</sup> After 9/11, risk assessments were dramatically overstated, with respondents estimating the likelihood that they would be hurt in a terrorist attack at 20.5% and the likelihood that the “average American” would be hurt at 47.8%.<sup>65</sup>

C. *Other Factors Triggered by Terrorism that Affect Decision-Making*

1. TEMPORAL IMMEDIACY

The nature of the attacks on 9/11 created a panicked sense of urgency in the need to respond. While there were innumerable immediate crises to resolve (e.g., tending to the injured, taking preventative measures to avoid other imminent attacks), there was also a sharp outcry to respond quickly by hunting down and punishing those responsible. Such sentiment would lead to reliance on intuition over calculation. Intuition occurs quickly, effortlessly, and automatically, whereas reasoning occurs more slowly and requires more effort.<sup>66</sup> Therefore, when decisions are required quickly, people tend to rely on System 1 to jump to conclusions, rather than taking the time to think through the details with System 2. When System 2 is already tasked, time pressure makes it even more difficult to think through a problem; “[t]he most effortful forms of slow thinking are those that require you to think fast.”<sup>67</sup>

Part of the way that terrorism works is by instigating a quick reaction in which long-term consequences are undervalued or ignored. A prompt decision to go to war in the wake of a terrorist act is not only questionable policy, it is counter to constitutional design. Because of the dangers that strong emotions play in decisions surrounding war, the Framers of the Constitution specifically designated Congress to be the branch responsible for its declaration.<sup>68</sup> Fearful that the executive might act on emotional impulse, the Framers placed a check on Executive authority by requiring the Commander-in-Chief to be subject to the slow and deliberate process of legislative deliberation.<sup>69</sup> As will be explained in further detail in the next section, this constitutional check was lost in the lack of congressional debate regarding the use of military force in response to 9/11.

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64. Lobel & Loewenstein, *supra* note 38, at 1070.

65. Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 981 (2003).

66. Haidt, *supra* note 23, at 818.

67. KAHNEMAN, *supra* note 24, at 37.

68. See U.S. CONST. art. 1, § 8.

69. Lobel & Loewenstein, *supra* note 38, at 1059–1061.

## 2. ANGER/OUTRAGE

The Framers' concerns over strong emotions affecting executive judgment regarding war were well-founded.<sup>70</sup> Anger causes terrible distortions in the ability to make rational decisions, and there is no lack of anger in the wake of a terrorist attack. Anger is one of the strongest emotions that humans can experience, and any strong emotions that come into play when making decisions "short-circuit the search for alternatives, distort the estimation of the probabilities of outcomes, and bias the perception of the positive or negative value of the outcomes."<sup>71</sup> Anger causes individuals to have an inflated sense of certainty, which in turn makes them less inclined to process information systematically.<sup>72</sup> Moreover, the higher the degree of certainty associated with anger, the more susceptible people are to heuristic cues.<sup>73</sup> Even worse, when people are uncomfortable and unhappy, they are less likely to perform intuitive tasks effectively.<sup>74</sup> Anger also leads people to rely more heavily on dangerous stereotypes when making social judgments, leading to questionable moral decisions.<sup>75</sup>

Anger stresses mental processing, allowing System 1 to dominate decision-making. Moreover, because System 1 is gullible, people who are exceptionally angry are likely to believe almost anything.<sup>76</sup> "The propriety of our moral sentiments is never so apt to be corrupted as

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70. James Madison wrote, "[W]ar is in fact the true nurse of executive aggrandizement . . . the strongest passions and most dangerous weaknesses of the human breast: ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace." *Id.* at 1059 (citing James Madison, *Helvidius No. 4*, in WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906)).

71. J. KEITH MURNIGHAN & JOHN C. MOWEN, *THE ART OF HIGH-STAKES DECISION-MAKING* 131 (2002).

72. Feigenson, *supra* note 65, at 964.

73. *Id.*

74. KAHNEMAN, *supra* note 24, at 69.

75. Feigenson, *supra* note 65, at 965.

76. Lobel & Loewenstein, *supra* note 38, at 1053. One of the more powerful passages in George Orwell's *1984* describes the masses being deceived into believing they were at war with a different enemy during the height of Hate Week:

On the sixth day of Hate Week . . . when the great orgasm was quivering to its climax and the general hatred of Eurasia had boiled up into such delirium that if the crowd could have got their hands on the two thousand Eurasian war criminals who were to be publicly hanged on the last day of the proceedings, they would unquestionably have torn them to pieces—at just this moment it had been announced that Oceania was not after all at war with Eurasia. Oceania was at war with Eastasia. Eurasia was an ally. . . . Without words, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! The next moment there was a tremendous commotion. The banners and posters with which the square was decorated were all wrong! Quite half of them had the wrong faces on them. It was sabotage!

GEORGE ORWELL, *ANIMAL FARM AND 1984* 256–58 (2003).

when the indulgent and partial spectator is at hand, while the indifferent and impartial one is at a great distance.”<sup>77</sup> This is particularly exacerbated when one is attacked. “[P]eople who feel attacked will be ready to believe almost anything about their enemies.”<sup>78</sup>

### 3. TERROR MANAGEMENT THEORY

Although many of the definitions of “terrorism” note the intention to cause fear, few seem to focus on the intention to cause terror, a much more heightened state of fear. Whereas fear connotes a general sense of worry or alarm, terror is “a uniquely human response to the threat of annihilation.”<sup>79</sup> When mortality salience is high, people tend to suppress the more general fear of mortality by associating more closely with their cultural worldviews and by more harshly punishing anyone who violates those cultural values.<sup>80</sup> This can be seen in the overwhelming patriotism and “in-group” solidarity exhibited in the immediate aftermath of 9/11. However, whereas state-sponsored violence presents a very clear picture of whom and what to be unified against, terrorist acts produce a much more ambiguous presentation of who “they” are when taking an “us vs. them” mentality. The enemy is framed in broad, general terms, often invoking moral judgments. For example, in a speech to the United Nations General Assembly, then-mayor of New York City Rudolph Giuliani implored,

Look at that destruction, that massive, senseless, cruel loss of human life, and then I ask you to look in your hearts and recognize that there is no room for neutrality on the issue of terrorism. You are either with civilization or with terrorists. On one side is democracy, the rule of law, and respect for human life; on the other is tyranny, arbitrary executions, and mass murder. We are right and they are wrong. It is as simple as that. And by that I mean that America and its allies are right about democracy, about religious, political, and economic freedom. The terrorists are wrong, and in fact evil, in their mass destruction of human life in the name of addressing alleged injustices. . . . Those who practice terrorism—murdering or victimizing innocent civilians—lose any right to have their cause understood by decent people and lawful nations. On this issue—terrorism—the United Nations must draw a line. The era of moral relativism between those who practice or condone terrorism, and those nations who stand up against it, must end. Moral relativism does not have a place in this

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77. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 154 (D.D. Raphael & A.L. Macfie eds., 1982).

78. Lobel & Loewenstein, *supra* note 38, at 1053.

79. TOM PYSZCZYNSKI ET AL., *IN THE WAKE OF 9/11: THE PSYCHOLOGY OF TERROR* 8 (2003).

80. Haidt, *supra* note 23, at 821.

discussion and debate.<sup>81</sup>

How individuals cope with vivid reminders of their own death may have additional implications on how those individuals successfully recognize and compensate for the biases that result from the heuristics at work in decision-making and judgment. While people will cling more closely to their cultural worldviews when confronted with the inevitability of death, these worldviews in turn define the individual's sense of self-worth as measured against those standards ascribed to.<sup>82</sup> The anxiety caused by awareness of one's mortality leads to highly ego-driven responses to one's environment.<sup>83</sup> This is problematic in compensating for the negative effects of heuristic judgment because the effects of highly-driven emotional responses are less amenable to correction or debiasing than others.<sup>84</sup>

#### 4. PLANNING FALLACY

As a general matter, people tend to overconfidently view the outcome of proposed action. Amos Tversky and Daniel Kahneman coined the term "planning fallacy" to describe plans and forecasts that unrealistically expect to operate under a best-case scenario and could be improved by examining statistics in related cases.<sup>85</sup> People tend to be overconfident in their projections of how everything will work out once a plan is enacted, heavily discounting the probability of cost overruns, time delays, and other factors. When forecasting the outcomes of risky projects, executives "make decisions based on delusional optimism rather than on a rational weighting of gains, losses, and probabilities. . . . As a result, they pursue initiatives that are unlikely to come in on budget or on time or to deliver the expected returns—or even to be completed."<sup>86</sup> Those in positions of power who have the greatest influence on the lives of others are highly likely to be optimistic and overconfident.<sup>87</sup> Overconfidence also influences decisions by causing people to fail to gather the information necessary to make the best decision.<sup>88</sup>

Among the factors that people discount as a result of overconfidence is the future. The willingness to take on risks that will not occur

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81. Rudolph W. Giuliani, *Combating Terrorism*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 57, 60–61 (2002) (published remarks from a speech to the United Nations General Assembly on Oct. 1, 2001).

82. PYSZCZYNSKI ET AL., *supra* note 79, at 27.

83. Feigenson, *supra* note 65, at 974.

84. *Id.*

85. KAHNEMAN, *supra* note 24, at 250.

86. *Id.* at 252.

87. *Id.* at 256.

88. MURNIGHAN & MOWEN, *supra* note 71, at 49.

until some future point is much greater than if those same risks will be borne by the current generation.<sup>89</sup> When risks will not be faced until the distant future, and when availability is not triggered by consequences of salient events, optimistic outlooks lead people to highly devalue long-term risks.<sup>90</sup> In the terrorism context, “the short-term satisfaction of retaliatory military action against terrorists often is outweighed by the long-term consequences.”<sup>91</sup> However, given the myopia caused by all of the emotions and heuristics triggered by terrorist attacks, it is exceptionally difficult to recognize this fact when making decisions regarding response.

#### IV. REACTION: DECIDING UNDER THE INFLUENCE, 9/11/01 TO 9/14/01

As described before, terrorism is used to elicit a reaction from the targeted victims. By creating an environment of terror, fear, hostility, anger, outrage, and uncertainty, terrorists hope that their targets will make poor choices while blinded by these factors. As former CIA Director James Woolsey has phrased it, an effective response to terrorism is “at odds with it being prompt.”<sup>92</sup> However, the United States wasted little time in enacting sweeping policies to respond to the attacks, all of which were subject to the biases described above.

##### A. *The Bush Doctrine*

At 8:30 p.m. on September 11, just under twelve hours after the first plane crashed into the North Tower of the World Trade Center, President Bush addressed the nation for the third time that day. In his speech, he declared his administration’s approach to responding to the acts that occurred earlier in the day, an approach that would later be characterized as the “Bush Doctrine.”<sup>93</sup> This approach is best summarized by the phrase that President Bush insisted on including in the speech: “We will make no distinction between the terrorists who committed these acts and those who harbor them.”<sup>94</sup>

The importance of this policy cannot be overstated. This was not

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89. Sunstein, *supra* note 59, at 545.

90. *Id.*

91. Lobel & Loewenstein, *supra* note 38, at 1072.

92. *Id.*

93. The term “Bush Doctrine” has taken on several different meanings over the course of the years that followed, but, for the purposes of this discussion, the term is used to describe the policy announced on September 11, 2001. See Richard Starr, *What Exactly is the ‘Bush Doctrine’?*, WEEKLY STANDARD (Sept. 12, 2008, 2:08 AM), [http://www.weeklystandard.com/weblogs/TWSFP/2008/09/what\\_exactly\\_is\\_the\\_bush\\_doctr.asp](http://www.weeklystandard.com/weblogs/TWSFP/2008/09/what_exactly_is_the_bush_doctr.asp).

94. KURT EICHENWALD, 500 DAYS: SECRETS AND LIES IN THE TERROR WARS 49 (2012).

merely a measured response that any nation attacked would automatically resort to, but rather a historic break from traditional international law. Historically, under international law, a nation was not allowed to use force against another nation preemptively; rather, the only permissible use of force was when a nation was either “being attacked or was in imminent danger of attack.”<sup>95</sup> By erasing the distinction between the terrorists who committed the acts and the states that harbored them, the United States was rejecting the traditional model of sovereign equality and ushering in a new era with an essential message: You are either with us, or you are against us.<sup>96</sup> “In effect, the Bush Doctrine declares the entire world—including supposedly sovereign foreign governments—to be at once subject and instrument of the criminal justice apparatus of the United States, and enforces these obligations with the threat of military force.”<sup>97</sup>

### B. *Biases Affecting the Bush Doctrine*

As momentous as the Bush Doctrine was, it was not carefully deliberated over with full consideration of its possible consequences. In fact, President Bush takes credit for making that decision himself while flying back to Washington, D.C. from a secure location on September 11.<sup>98</sup> President Bush decided he would wait one day to tell the American people we were at war, later stating in his memoir,

I did want to announce a major decision I had made: The United States would consider any nation that harbored terrorists to be responsible for the acts of those terrorists. This new doctrine overturned the approach of the past, which treated terrorist groups as distinct from their sponsors. We had to force nations to choose whether they would fight the terrorists or share in their fate. And we had to wage this war on the offense, by attacking the terrorists overseas before they could attack us again at home.<sup>99</sup>

Bush also stated that he wanted his speech to convey his sense of “moral outrage.”<sup>100</sup> This decision thus entailed all of the previously described biases: making a quick decision under extreme time pressure while focusing on the most available image that came to mind and ignoring the statistical likelihood of similar occurrences, all while angry,

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95. Lobel & Loewenstein, *supra* note 38, at 1072.

96. Note, *supra* note 51, at 1227.

97. *Id.*

98. This would place the decision at some point between 4:33 p.m., when Air Force One departed from Offutt Air Force Base in Shreveport, Louisiana, and 6:42 p.m., when it landed in Washington, D.C. THOMPSON, *supra* note 3, at 466–67.

99. BUSH, *supra* note 1, at 137.

100. *Id.*



stressed, and confronted with the inevitability of death. Moreover, while President Bush was “untrained in national security” and admitted himself that he was “not a military tactician,”<sup>101</sup> he was overwhelmingly confident in his decision—even though he had not yet received formal input from the State Department.<sup>102</sup>

There can be no doubt that Bush’s judgment was clouded by anger and a desire for revenge. Shortly after the third hijacked plane hit the Pentagon, Bush turned to his staff and told them, “When we find out who did this, they’re not going to like me as president. Somebody is going to pay.”<sup>103</sup> He was also impatient and wanted everything to unfold as quickly as possible. On the evening of September 11, before his speech to the nation, he told then-Secretary of State Condoleezza Rice, “We’ve got to get [the Bush Doctrine] out there now.”<sup>104</sup> By September 13, Bush was pushing the Department of Defense for definitive attack plans. Despite the fact that the National Security Council meetings had been short and rushed over the previous two days and any level of concentration was difficult, Bush wanted concrete options within days. “‘This is a new world . . . Start the clock. This is an opportunity. I want a plan—costs, time. I need options on the table . . . I want decisions quick.’”<sup>105</sup> Apparently, the President was unfamiliar with the problems associated with quick decision-making in times of crisis.

After delivering his speech announcing the Bush Doctrine to the nation, the President met with his national security team. At the meeting, Bush displayed his overconfidence and inability to grasp the consequences of the broad approach he wanted to take. He told his team,

I want you all to understand that we are at war and we will stay at war until this is done. Nothing else matters. Everything is available for the pursuit of this war. Any barriers in your way, they’re gone. Any money you need, you have it. This is our only agenda.<sup>106</sup>

Untrained in international law, Bush had little patience for barriers that might stand in the way of his agenda. When Secretary of Defense Donald Rumsfeld told him that international law did not allow the use of force for retribution, Bush yelled at him, “I don’t care what the international lawyers say, we are going to kick some ass.”<sup>107</sup>

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101. BOB WOODWARD, *BUSH AT WAR* 33, 37 (2002).

102. *Id.* at 47. Secretary of State Colin Powell was in Lima, Peru on September 11 and was unable to speak with the President until 7:00 p.m. that evening. THOMPSON, *supra* note 3, at 467.

103. WOODWARD, *supra* note 101, at 17.

104. *Id.* at 31.

105. *Id.* at 62–63.

106. RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* 24 (2004).

107. *Id.*

### C. Congressional Authorization to Use Military Force

On September 12, the Office of the Attorney General began drafting the Authorization for Use of Military Force (“AUMF”).<sup>108</sup> However, because it was unclear exactly who the enemy was or what the conflict would look like, the authors wanted to use the broadest language possible in order to give the President as much authority as he could possibly need.<sup>109</sup> The proposal they came up with would have not only given the President the power to use force against the perpetrators of 9/11, but would have authorized the use of force to deter and preempt future acts of terrorism.<sup>110</sup> The proposed language “would have seemingly authorized the President, without durational limitation, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world without having to seek further authority from Congress.”<sup>111</sup>

Even though the language was broad, there was good reason to believe that Congress would adopt the resolution. On the way to Capitol Hill to negotiate with Congress, the White House lawyers expressed concern that Congress would never grant the President the broad authority they were asking for. Nancy Dorn, Vice President Cheney’s head of legislative affairs, was confident that the trauma and raw emotions would force Congress to acquiesce—no member of Congress would want to be portrayed as an obstructionist or a sympathizer.<sup>112</sup> In the end, she was only partially right.<sup>113</sup> The White House’s proposal would give the President the authority to use all necessary and appropriate force in the United States, an unprecedented power. That phrase was omitted before the resolution went to the Senate floor for vote, but other than that, it remained almost exactly as drafted.<sup>114</sup>

On September 14, the Senate and the House of Representatives heard and voted on the Authorization. Although some Senators expressed some hesitation concerning the broad powers they were enshrining the President with, the resolution passed unanimously by a vote of ninety-eight to zero.<sup>115</sup> The House then debated the resolution for approximately five hours before passing it by a vote of 420-to-one late

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108. EICHENWALD, *supra* note 94, at 59.

109. *Id.*

110. *See infra* APPENDIX B.

111. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS 22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2 (2007).

112. EICHENWALD, *supra* note 94, at 65.

113. For a comparison of the language proposed by the White House and the language adopted by Congress, *see infra* APPENDIX B.

114. EICHENWALD, *supra* note 94, at 66–67.

115. GRIMMETT, *supra* note 111, at 3.

that evening.<sup>116</sup>

The pace at which Congress passed this sweeping Presidential authority was in response to the general feeling in the U.S. that something had to be done immediately to defend the country from further attack and bring those responsible to justice. When a particularly negative and highly salient event occurs that triggers strong emotions, government will be pressured to act, even if the probability of a repeat occurrence is low.<sup>117</sup> This is because demand for government action corresponds to the perceived risk.<sup>118</sup> That risk is not calculated by statistical analysis, but by what the mind can most easily recall. Congress, designed to slowly and deliberately weigh the costs and benefits of proposed legislation, especially as it pertains to war,<sup>119</sup> gave in to fear, anger, and political pressure, and authorized the President to unilaterally attack any person, organization, or nation the President felt was responsible for 9/11. Because Congress did not fully contemplate the potential consequences of that course of action before rushing the resolution through, the AUMF has been used to justify numerous kinds of executive action that Congress did not anticipate. The AUMF's broad language has been used to justify indefinite detention, torture, domestic surveillance, and even the targeted killing of American citizens.<sup>120</sup> Although not everything could be predicted, the urgency with which Congress granted the President broad powers to accomplish ambiguous goals masked the true nature of the problem the country was facing.

#### D. *Biases at Work in the House of Representatives*

The legislative history of the AUMF exhibits a lot of patriotic rhetoric and support for armed conflict but offers little deliberation regarding the probability of another attack. One of the reasons for this is because the spectacular nature of the attacks made them overwhelmingly prominent in the recollection. Still fresh in the mind of the nation, many Representatives added to the recollection by recounting their own graphic stories of the carnage. Carolyn McCarthy (D-NY) described “the mountains of rubble that once was the World Trade Center.”<sup>121</sup> Bob Menendez (D-NJ) likened the damage at Ground Zero to areas bombed during World War II.<sup>122</sup> Some Representatives let the gruesome images

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116. *Id.*

117. Sunstein, *supra* note 56, at 69.

118. Note, *supra* note 51, at 1229.

119. *See supra* Part III.C.2.

120. *See generally* Al-Aulaqi v. Obama, 727 F. Supp. 2d (D.D.C. 2010) (Alien father sued the U.S. government for the targeted killing of his son, a U.S. citizen living in Yemen.).

121. 147 CONG. REC. H5619, 5673 (daily ed. Sept. 14, 2001).

122. *Id.* at 5660.

guide them: Jay Inslee (D-WA) said, “The vision of the World Trade Center and the vision of the Citadel, symbol of democracy for this globe, leads me to know in my heart and in my gut, this is the right thing for our Nation to do.”<sup>123</sup> With the powerful images imprinted on their minds, the likelihood of another major attack at the time seemed imminent.<sup>124</sup>

Many of the Representatives exhibited probability neglect by discussing how the AUMF would prevent another attack without calculating what the probability of another attack would be without the AUMF. Christopher Shays (R-CT) stated that he was “confident that authorizing force will save lives by preventing future acts of terrorism.”<sup>125</sup> Dale Kildee (D-MI) argued that Congress must give the President the power “to take all necessary actions to prevent those responsible for these dastardly acts from again inflicting such cowardly malice against our people.”<sup>126</sup> Without a full understanding of the nature of the threat, the members of the House were simply assuming that the perpetrators had the means to successfully execute another attack unless we could attack them first.

Because the demand for action from the people was great, Congress was under intense temporal pressure from the President and the people to do something and do it quickly. Steve Chabot (R-OH) stated, “The message must go out to all who seek to harm us in the future that America will respond to cowardly acts of violence against our people quickly and decisively.”<sup>127</sup> Even though they knew they were acting blindly, some Representatives just felt the need to do something. Chaka Fattah (D-PA) fit this profile, arguing, “We must respond. We know not what the tactics or strategy or play of this engagement will be, but we must act.”<sup>128</sup> Although under pressure to respond quickly, few expressed grave concern over pushing through a hastily concocted scheme for war before the plans were even designed or the enemy was clearly defined.

Other representatives exhibited their anger and desire for revenge. Nick Smith (R-MI) used his time during the House debate to send a message: “To those who have spilled the blood of American innocents, and those who have harbored them, our message is a simple one . . . for

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123. *Id.* at 5667.

124. *See, e.g.*, Statement of Eni Faleomavaega (D-AS) (“I fear that the next chapter of terrorism will be even more horrific and will likely involve weapons of mass destruction, such as nuclear weapons and biological and chemical agents, which long have been available in the international black market.”). *Id.* at 5656.

125. *Id.* at 5665.

126. *Id.* at 5667.

127. *Id.* at 5661.

128. *Id.*

what you have done, you will pay. You will pay.”<sup>129</sup> Others felt the need to cater to the anger of their constituents, such as Eva Clayton (D-NC), who said, “Many of our citizens are angry, indeed, enraged and want to strike back, and we must strike back.”<sup>130</sup> Many Representatives recognized that they were angry, but assured themselves and their colleagues that such emotions were not affecting their decisions.<sup>131</sup> Although recognizing biases goes a long way in adjusting for them, anger is a particularly strong emotion, which affects the ability to perform quantitative judgments, including judgments about probability.<sup>132</sup>

The Representatives also exhibited strong “in-group” judgments based on moral judgments and strong confidence in the inevitable success of the project, regardless of the lack of details. Dick Gephardt (D-MO) summed up this stance when he said,

I know in my heart we will prevail. We will face this foe, and we will not adopt the characteristics of those who attack us. We will not forget the civil liberties of our people. We will not discriminate. We will not use prejudice. We will not succumb to hatred in fighting this foe. We will not be divided.<sup>133</sup>

A common theme throughout the floor debate was unity and certainty of victory, a dangerous combination that led to serious miscalculations regarding what would be needed to actually achieve that victory.

## V. CONCLUSION

It is impossible to know how many lives were saved as a direct result of the decisions made on September 11, 2001 and the three days that followed. More than twelve years later, Osama bin Laden is dead, the Taliban does not pose an imminent threat, but the United States continues to use the AUMF to fight the “war on terror” against groups not even involved in the events of 9/11.<sup>134</sup> The decision to react to the terrorist attacks with a sustained military campaign may have been the best decision, but the timing and manner in which that decision was made were anything but ideal. Terrorist attacks are unique in that they seek to cause a disproportionate amount of psychological rather than physical damage. By triggering strong feelings of anger, vivid reminders of

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129. *Id.* at 5674.

130. *Id.* at 5673.

131. *See, e.g.*, Statement by Stephanie Tubbs Jones (D-OH) (“Mr. Speaker, I am angry, as I am sure most Americans are. . . . [B]ut we must not let our anger blow out our light of reason.”). *Id.* at 5653.

132. Sunstein, *supra* note 56, at 70.

133. 147 CONG. REC. H5619, 5659 (daily ed. Sept. 14, 2001).

134. Graham Cronogue, Note, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT’L L. 377, 378 (2012).

death, and endless distractions, terrorists attempt to force their enemies into making critical decisions while they are incapable of fully assessing the consequences of those choices. Should the United States ever suffer from another terrorist attack, the President and Congress should be quick to act in protecting the population but deliberate in deciding a long-term solution to resolve the problem. Such an approach would surely help to mitigate the effects of the various biases intentionally exploited by terrorists.

APPENDIX A – TIMELINE OF EVENTS<sup>135</sup>September 11, 2001

8:46 a.m.: American Airlines Flight 11 crashes into the 93rd through 98th floors of the North Tower of the World Trade Center.

8:55 a.m.: President Bush is informed that a plane has hit the World Trade Center while at a photo-op at Booker Elementary School in Sarasota, Florida. At the time, the incident is believed to be an accident.

9:03 a.m.: United Airlines Flight 175 crashes into the 78th through 84th floors of the South Tower of the World Trade Center. Millions watch on live television. By this time, New York City and the Port Authority of New York and New Jersey had already mobilized the largest rescue operation in New York City's history.

9:05 a.m.: President Bush is informed of the second strike. White House Chief of Staff Andrew Card approaches Bush as he is listening to children read a story and whispers in his ear, "A second plane hit the other tower, and America's under attack."<sup>136</sup> President Bush does not openly react and remains quietly seated in the classroom for approximately ten more minutes.

9:26 a.m.: An order is given forbidding every civilian, military, and law enforcement aircraft from taking off and requiring all planes in the air to land as soon as is reasonable. It is the first such order ever given since the invention of flying in 1903. Accounts vary as to who issued the order, from the head of the FAA, Jane Garvey, to the Secretary of Transportation, Norman Mineta, to the FAA National Operations Manager, Ben Sliney, who was at his first day on the job. Military and law enforcement aircraft are allowed to resume operations at 10:31 a.m.

9:29 a.m.: President Bush makes a scheduled speech from Booker Elementary. He says, "Today, we've had a national tragedy. Two airplanes have crashed into the World Trade Center in an apparent terrorist attack on our country . . . . [I] have ordered that the full resources of the federal government go to help the victims and their families and to conduct a full-scale investigation to hunt down and to find those folks who committed this act. Terrorism against our nation will not stand."<sup>137</sup>

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135. All times are Eastern Standard Time. Times and data have been derived from numerous sources, including GEORGE W. BUSH, *DECISION POINTS* (2010); KURT EICHENWALD, *500 DAYS: SECRETS AND LIES IN THE TERROR WARS* (2012); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* (2004); PAUL THOMPSON, *CTR. FOR COOP. RESEARCH, THE TERROR TIMELINE* (2004); RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* (2004).

136. BUSH, *supra* note 1, at 127.

137. *Id.* at 128.

9:32 a.m.: The New York Stock Exchange closes. It will remain closed until September 17.

9:37 a.m.: American Airlines Flight 77 crashes into the west wall of the Pentagon. All 64 people aboard Flight 77 are killed as well as 125 people inside the Pentagon.

9:43 a.m.: President Bush is informed of the attack on the Pentagon as he is on his way to board Air Force One.

9:45 a.m.: President Bush speaks with Vice President Cheney. According to notes from the call, Bush tells Cheney, "Sounds like we have a minor war going on here, I heard about the Pentagon. We're at war . . . somebody's going to pay."

9:45 a.m.: The White House is evacuated. Soon afterward, counterterrorism "tsar," Richard Clarke, institutes Continuity of Government plans, a program designed to relocate important government officials to alternate command centers during a national emergency.

9:48 a.m.: The U.S. Capitol is evacuated. Speaker of the House, Dennis Hastert, and other key personnel in the line of succession to the Presidency are taken to secure locations.

9:56 a.m.: Air Force One departs from Sarasota-Bradenton International Airport with no fixed destination. President Bush wants to return to Washington, D.C. but is convinced by the Secret Service not to do so. The airplane circles in a holding pattern until 10:35 a.m. when it heads to Shreveport, Louisiana, finally landing at 11:45 a.m.

9:59 a.m.: The South Tower collapses; the 110-story, 1,362-foot tall building takes ten seconds to collapse. Rescue personnel in the North Tower are ordered to evacuate; many on the upper floors of the North Tower are unaware that the South Tower has collapsed, believing perhaps that a bomb has exploded.

10:00 a.m.–10:15 a.m.: At some point, President Bush and Vice President Cheney discuss authorization to shoot down civilian aircraft suspected of being used as weapons by hijackers. Accounts vary as to exactly when the authorization is given, but the message is not effectively communicated to fighter pilots in time to prevent any further attacks. President Bush refers to this as his "first decision as a war-time commander in chief."<sup>138</sup>

10:03 a.m.: United Airlines Flight 93 crashes into a field in Shanksville, Pennsylvania. All 44 people on board—the two pilots, five flight attendants, and thirty-seven passengers (plus the four hijackers)—are killed on impact.

10:06 a.m.: President Bush is informed of the Flight 93 crash. He

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138. *Id.*



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## BEFORE THE SMOKE CLEARED

787

asks, “Did we shoot it down or did it crash?”<sup>139</sup> It is not until several hours later that he is assured that the plane crashed.

10:10 a.m.: Military forces are placed on DEFCON 3, the highest alert since 1973. Indicating defense readiness condition, DEFCON 3 places the military at a heightened state of readiness.

10:28 a.m.: The North Tower collapses; at 110 stories and 1,368 feet high, it was at one time the tallest building in the world. Between the two towers, 2,973 people are killed, including 343 FDNY personnel, 37 PAPD personnel, and 23 NYPD personnel.

11:00 a.m.: Skyscrapers and tourist attractions across the United States are evacuated.

12:16 p.m.: Domestic skies in the United States are completely clear of civilian aircraft. Civilian flight will not resume until September 13.

12:36 p.m.: President Bush records a second speech from the Barksdale Air Force Base in Shreveport, Louisiana. The speech will air on television at 1:04 p.m. He begins, “Freedom itself was attacked this morning by a faceless coward. And freedom will be defended . . . . Make no mistake, the United States will hunt down and punish those responsible for these cowardly acts.”<sup>140</sup>

1:27 p.m.: A state of emergency is declared in Washington, D.C.

1:30 p.m.: President Bush leaves Louisiana and is transported to Offutt Air Force Base in Nebraska where the U.S. Strategic Command is located.

2:50 p.m.: President Bush arrives in Nebraska and is taken to an underground bunker designed to withstand a nuclear blast. While there, he communicates with top officials, including Vice President Cheney, Secretary of Defense Donald Rumsfeld, National Security Adviser Condoleezza Rice, Deputy Secretary of State Richard Armitage, CIA Director George Tenet, counterterrorism “tsar” Richard Clarke, Secretary of Transportation Norman Mineta, and others. President Bush begins the conference with a clear declaration: “We are at war against terror. From this day forward, this is the new priority of our administration.”<sup>141</sup>

4:33 p.m.: Air Force One leaves Offutt Air Force Base to return to Washington, D.C. It will land in Washington at 6:42 p.m. During this flight, President Bush makes the decision that the United States would consider any nation that harbored terrorists to be responsible for the acts of those terrorists.

5:20 p.m.: World Trade Center Building 7, a 47-story tower, col-

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139. *Id.* at 131.

140. THOMPSON, *supra* note 3, at 463.

141. BUSH, *supra* note 1, at 134.

lapses. The area around the building had been evacuated nearly 50 minutes earlier, and no one is killed by the collapse. Although it was not hit by a plane, damage to the building was visible following the collapse of the North and South Towers, and it was reported to be on fire at 4:10 p.m.

6:54 p.m.: President Bush arrives at the White House by Marine One, the Presidential helicopter.

8:30 p.m.: President Bush delivers his third speech of the day, this one from the Oval Office. During the speech, he announces what comes to be known as the Bush Doctrine, stating, "I've directed the full resources for our intelligence and law enforcement communities to find those responsible and bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them."<sup>142</sup>

9:00 p.m.: President Bush meets with a small group of key advisers. Bush tells them, "I want you all to understand that we are at war and we will stay at war until this is done. Nothing else matters. Everything is available for the pursuit of this war. Any barriers in your way, they're gone. Any money you need, you have it. This is our only agenda." When Secretary of Defense, Donald Rumsfeld, states that international law only allows force to prevent future attacks and not retribution, Bush yells, "No. I don't care what the international lawyers say, we are going to kick some ass."<sup>143</sup>

#### September 12, 2001

President Bush and British Prime Minister, Tony Blair, speak for the first time since the attacks. Blair suggests that the President look to solidify international support, but Bush is focused inward on what the United States can and will do. Bush tells Blair, "I know what I've got to do. I'm not a good mourner. I'm a weeper. I'll weep for the country and then act, but I don't want to just hit cruise missiles into the sand."<sup>144</sup> After speaking with Blair, Bush speaks with other world leaders, including those of Canada, France, Italy, China, Germany, and Japan.

President Bush meets with his national security team. CIA Director, George Tenet, confirms that Osama bin Laden is responsible for the attacks. Bush makes it clear that this will be "a different kind of war,"<sup>145</sup> requiring the full resources of national power.

President Bush holds a press conference. He announces, "The deliberate and deadly attacks which were carried out yesterday against our

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142. THOMPSON, *supra* note 3, at 468.

143. *Id.*

144. BUSH, *supra* note 1, at 140-41.

145. *Id.* at 141.

country were more than acts of terror. They were acts of war . . . . Freedom and democracy are under attack.”<sup>146</sup>

White House attorneys prepare a draft on the resolution to authorize the use of military force in response to the attacks. The draft is given to the leaders of the Senate and the House of Representatives. This draft would give broad, sweeping powers to the President to take any action against any state, group, or individual in the world at any time at his discretion.

The Department of Defense discusses broadening the objectives of the military response to justify attacking Iraq. Defense Secretary Donald Rumsfeld complains that there are no decent targets to bomb in Afghanistan, and the U.S. should instead consider bombing Iraq. Later in the evening, President Bush asks counterterrorism “tsar” Richard Clarke to look for any shred of evidence linking Saddam Hussein to the attacks, despite all intelligence pointing directly to al-Qaeda alone. On March 20, 2003, the United States would initiate a preemptive war against Iraq.

#### September 13, 2001

The House and Senate pass the Public Safety Officer Benefits Bill (Public Law 107-37) authorizing the expedited payment of benefits for public safety officers killed or catastrophically injured as a result of the attacks.

The House passes the Victims of Terrorist Relief Act of 2001 (Public Law 107-134) to amend the IRS Code to provide tax relief to victims of the attacks. The Senate passed an amended version on November 16, 2001, and both houses of Congress eventually passed it on December 20, 2001.

#### September 14, 2001

President Bush speaks at the National Cathedral in Washington, D.C. as part of a national day of prayer and remembrance for the victims. Among his comments, he says, “Just three days removed from these events, Americans do not yet have the distance of history, but our responsibility to history is already clear: to answer these attacks and rid the world of evil.”<sup>147</sup> Later in the day, Bush flies to New York to visit Ground Zero.

The House and Senate pass the 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States (Public Law 107-38) authorizing \$40 billion in emergency funds to be made available to be used for preparedness in responding to and mitigating the attacks, counterter-

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146. *Id.*

147. *Id.* at 146.

rorism, increased transportation security, repairing public facilities and transportation systems, and national security.

The House and Senate pass the Authorization for Use of Military Force in Response to the 9/11 Attacks (Public Law 107-40). The Senate passed it before 11:00 a.m. The House passed it late that evening. The President signed it into law on September 18, 2001.

President Bush speaks with British Prime Minister Tony Blair regarding his plans to attack terrorist enemies. Bush again does not speak of an international effort, but rather a unilateral American response. Bush tells Blair that Afghanistan is only the beginning, and the next step is to look at other countries, including Iraq. Blair warns Bush about the level of evidence that would be required to justify an attack against Iraq. Bush responds that the U.S. would follow the terrorist threat wherever it went, and his administration had little doubt that the trail would lead to Iraq.

2014]

BEFORE THE SMOKE CLEARED

791

APPENDIX B – AUTHORIZATION FOR USE OF MILITARY FORCE<sup>148</sup>**Text of Original Draft of Proposed White House Joint Resolution 10 (September 12, 2001)**

## Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States,

Now, therefore be it

*Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled —*

That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression against the United States.

**Text of S.J. Res. 23 as passed September 14, 2001, and signed into law**

## Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens;

Whereas such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad;

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148. For the full text of both Joint Resolutions in Appendix B, see GRIMMETT, *supra* note 111.

Whereas in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence;

Whereas such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States; Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

#### **SECTION 1. SHORT TITLE.**

This joint resolution may be cited as the “Authorization for Use of Military Force.”

#### **SECTION 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.**

(a) **IN GENERAL.** — That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

#### **(b) WAR POWERS RESOLUTION REQUIREMENTS —**

(1) **SPECIFIC STATUTORY AUTHORIZATION** — Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) **APPLICABILITY OF OTHER REQUIREMENTS** — Nothing in this resolution supercedes [sic] any requirement of the War Powers Resolution.