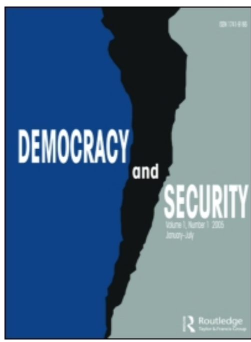

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Judicial Responses to Counter-Terrorism Law after September 11

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ABSTRACT
The role of the courts is quite important, especially in the protection of individual rights and liberties. Many counter-terrorism policies implemented at the national level often infringe on these rights, and courts are the best line of defense against these violations of liberty. However, courts do not always rule in favor of liberty, sometimes ruling in favor of a strict government policy. This analysis seeks to explain the conditions that may lead courts to rule in favor of, or against, the government, arguing that political fragmentation is a potentially key factor in determining when particular case outcomes occur.

KEYWORDS
Counter-terrorism law, high courts, political fragmentation, judicial decision-making

Introduction

Courts can be the best line of defense to curb infringements of liberty by policymakers. However, courts do not always uphold personal liberties. Instead, they may uphold the government's laws that infringe on protected rights. The dynamics of when this occurs may depend on some elements of institutional design, political factors, or the relevance of recent events. Courts often act strategically when deciding court cases, and cases involving terrorism policies are no exception. This analysis seeks to investigate the strategy involved in determining when to rule against the government. Do courts constrain themselves in judicial decisions based on political fragmentation? Based on a fuzzy-set qualitative comparative analysis (fsQCA) across twelve democratic country high courts, this analysis finds preliminary evidence that regardless of the threat environment or level of judicial independence given to a high court, courts are nevertheless willing to rule against the government in terror-related cases as long as political fragmentation is evident. Based on this result, the high courts of Australia and Indonesia are examined in greater detail based on what Seawright and Gerring call a "typical case" selection technique.[1]

Terrorism provides a unique opportunity to examine the courts. Terrorist attacks at home from abroad can create rapid changes in policy that are often

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guided by politics and rhetoric. For instance, the Government Regulation in Lieu of Law 1/2002 was adopted in Indonesia on October 18, 2002, six days after the Bali attacks committed by Jemaah Islamiyah. This law allowed the government to pursue a number of activities that restrict civil liberties (such as longer detention periods). Also, the 2001 PATRIOT Act passed soon after the September 11 attacks in 2001 and was signed by President Bush with little to no debate or amendment to the legislation. It swiftly passed through the House with a vote of 357–66, and through the Senate with a vote of 98–1. The Act included provisions for enhanced wire-tapping and the subpoena of records of individuals without probable cause, among other provisions. The task of this article is to discover the court cases relevant to these security laws, discover their decision, and position these cases in the surrounding political environment and terrorist threat environment surrounding the case at that time. Is the government fragmented, non-fragmented, or somewhere in the middle? Has a recent attack occurred? If so, then do courts generally uphold security laws or opt to protect liberties instead?

Courts are not separate from government; they are a part of it. Because they are concerned about their survival as an institution as much as the other politicians that are concerned about winning elections, courts can also respond uniquely in times of attack. The argument of this article is that courts support liberty-restrictive behavior only when they believe the government is non-fragmented. If no fragmentation is present, then the courts will be deferential to the other branches and will tend to support government security policies. When fragmentation is present, then courts are able to take a key role to combat overbearing security policies. Because of an inter-branch strategic calculus, they would be more likely to overturn government policies when there is fragmentation versus when there is not.

Answering these questions is complicated by the lack of relevant court cases or challenges. Some countries have only a few cases that are directly related to terrorism, and fewer occur in a timeframe that can be considered relevant to policy implementation in times of crisis. Sometimes, courts protect civil liberties, while at other times they are willing to allow other branches of government to encroach on civil liberties in the name of national security. This study asks if there are certain conditions that affect the courts' decision-making after a terrorist attack has occurred. Specifically, when courts operate within a government that is not fragmented, are they more likely to defer to government actions involving anti-terrorism policy? In order to examine this question, a fuzzy-set qualitative comparative analysis (fsQCA) is utilized to determine the likely causal pathways that can lead to future statistical inferences in this important question. This method is important to use in this analysis because it allows the researcher to examine the qualitative and quantitative aspects of the data simultaneously. The rest of the article proceeds as follows. The next section highlights the previous work that has been done in

judicial decision-making with respect to terrorism. The following section unpacks the multidimensional theoretical influence of judicial independence, political fragmentation, and the timing of recent attacks on case outcomes. The fourth section describes the design of the analysis, while the fifth section provides an explanation of the data and the fsQCA. The sixth section explains the results from the models. The seventh section provides two brief case studies that place the results of the models in context. The final section concludes with some fruitful avenues for future research.

The Literature

There is a longstanding legal literature that provides a detailed analysis of courts and cases that address terrorism. The qualitative explanations of how courts handle these cases are thorough in their description of what the facts of the case are, the various legal arguments that are involved, the structural constraints on courts, and the outcomes of these cases. In general, there are two major strands of the literature in this space. One of these strands focuses on the normative question of whether or not courts should adjudicate counter-terrorism legislation, or in how it should be adjudicated.[2] This philosophical debate is interesting but will not be settled in this analysis. A second theme in the literature focuses on the patterns of how cases are adjudicated, with respect to case outcomes.[3] For instance, Mark Tushnet provides one of the seminal works in this field, unpacking the legal justification for restrictions on civil liberties during times of war.[4] He finds that, although there is some degree of deference to the emergency powers of the Executive, over time "the most extreme and problematic ones [are] being replaced… by less troubling ones."[5] Others have also looked at the differences in questions of standing and justiciability as reasons for differences in decisions.[6] However, very few of these explanations point to a single thematic relationship that can explain variation both within countries and between countries. In order to illustrate this, two case studies highlight the possibility that some underlying mechanism is in place that guides the court in its decision-making, regardless of the application of law, the timing of events, or the limits of review (justiciability). What is apparent is that in the case of both India and Israel, there is variation on case outcomes even when other theoretical elements remain the same. For example, Satish and Chandra[7] discuss the way India's Supreme Court adjudicates terrorism cases, finding that they tend to defer to the government, but not always. The Court finds themselves to be the primary guarantor of personal liberties, and often decides most cases with that in mind; however, when it comes to cases involving terrorism and national security, the Court often rules in favor of the government. The question of why is not explicitly found. The conclusion develops an interesting possibility for why India's Supreme Court operates

differently in terror-related cases than in others. They argue that judicial minimalism should be a likely explanation in that the Court adjudicates rights cases on the "narrowest possible grounds while leaving larger questions of principle for decision by the political branches."[8] However, in terror-related cases, this does not appear to be the case. Instead, the Court is more likely to strike down security policies, leading the authors to call this an "opportunistic role reversal."[9] Their explanation points to the idea that the court ex ante determines in which direction they will defer pending a clear necessity to rule differently. But the mechanism behind this opportunism is not discussed. This article argues that the type of opportunism that is seen in the Indian Supreme Court is driven by political stability, not a random process.

Yigal Mersel looks at the Supreme Court of Israel and how they have ruled on specific cases related to terrorism, and finds that the court is aware of the political environment around them and chooses a strategy of decision-making based on that environment.[10] Even though the Israeli court accepts the role of being the actor that is primarily responsible for protecting civil liberties and is willing to strike down executive and legislative actions, there is recognition that it is partially dependent on the political environment around them. Only under certain conditions is there a natural deference to the policymaking branches, but in some instances there is not. The Israeli Court acknowledges that the legislature and the executive are the actors that are responsible for combating terrorism. Because of this, there is a significant amount of deference on individual actions made by the government. However, the Court is willing to strike down many of these actions. For instance, the Israeli Court may at times use international law as the basis for determining the legality of an act. For example, even when an executive action is legal according to Israeli law, the Court at times invokes the Fourth Geneva Convention to rule against the government. The reason why the Court chooses to use one legal basis or another is not discussed. Furthermore, the Court is aware of the potential backlash by the public and the legislature. Because of case outcomes, members of the Knesset have even sought to limit the jurisdiction of the Court on terrorism-related matters. Yet the Court continues to act in these instances. The mechanism behind why this phenomenon occurs is not addressed. This further points to an underlying concept that creates a starting point for the courts when facing cases about terrorism. In the Israeli case, the ability for other branches to check the power of the Supreme Court is an option that could be used to constrain judicial decisions. For instance, the Knesset may amend basic laws in order to circumvent court rulings and may also change the jurisdiction of the Court. These potential constraints may appear at any time, if the Knesset determines that the courts deviate from the public will.[11]

In a third, comparative look at the courts of the United States and United Kingdom, Fiona de Londras examines the outcomes of terrorism cases over time. There are two main conclusions that are drawn from her analysis of the degree of deference in these courts. First, there is significant variation in the frequency of deference. At times, these two courts are very willing to defer—for instance, in *Bankovic*[12] and *Korematsu*[13]—but at other times they are insistent on protecting rights by ruling against the government, as in *JJ*[14] and *Boumediene*.[15] The basis for this variation is considered by de Londras, but it is left unsettled. "The reduction in deference… could be explained by reference to the lack of temporal proximity… But the pattern of deference that was exemplified by cases such as *Korematsu* and *Liversidge* shows that temporal removal from a crisis does not necessarily reduce judicial deference… Nor can it be wholly attributed to… the lack of judicial election… There must, it seems, be another explanation."[16]

With these historical examples, a gap in the literature is present. When it comes to judicial decision-making, there is the procedural ability for courts to strike down the actions of the policymaking branches. At times, they choose to indeed strike down these laws. However, there are instances when the court has shown to be deferential to the policymaking branches under certain conditions. With a specific focus on terrorism, there is a consistent variation in the court's willingness to defer to governmental actions even when the court accepts its role as the guarantor of individual liberties. This generates an interesting puzzle: What is the driving factor behind the way courts decide cases related to terrorism?

Theory

The answer to this question is not one-dimensional; multiple elements are simultaneously working. Generally, there are three prevailing mechanisms that can help to answer this question; the ability to rule (judicial independence), the external environment (timing of events), and how judges behave (decision-making). Judicial independence is difficult to define, but it is safely considered to be some degree of the court to act without the fear of retribution from other actors.[17] Of particular importance is when judicial independence can be observed. In other words, are there certain conditions in which we can expect to find greater independence versus less? Ramseyer[18] comparatively assesses the judicial independence of the US Supreme Court and the Japanese Supreme Court and its relationship to shifts in power of the ruling political party, and finds two results. Similar to a one-shot Prisoner's Dilemma, when elections are not expected to continue (in the context of Imperial Japan), there is an incentive to not allow courts to be independent. To allow for independent courts would cede some authority to those courts. This would decrease the overall gains of power when there is an imminent expected end to the democratic regime. In a

second result, when the results of Japanese elections were expected to keep the ruling party in power, the courts were less independent. In contrast, because the American guarantee of rotating executives prevents decades of single-party control, and because there is no perceived end to American democracy, courts maintain independence. This is an important contribution to the argument presented here, in that it highlights the interaction between the policymaking branches and the courts. Because the executive and legislature are interested in gains from policymaking, potential hindrances to those gains may generate backlash from judicial decisions that overturn executive and legislative policies. Reactions to judicial interference may lead to restrictions on jurisdiction (in the Israeli instance above) or would lead to alternative policies that attempt to recoup gains. The ability for legislatures to override judicial decisions diminishes the effective power of the court. Because of this, courts should be more apt to overrule the government when they anticipate that the other branches will not be able to override the decision.

However, although there is the need for judicial independence to be present in order to be able to adjudicate cases, there is no real theoretical benefit to additional levels of independence. More independent courts are not inherently less able to be overridden by a legislature. There should be some level of independence that is necessary for courts to be able to rule on particular cases, but once that threshold is met, more independence should not create more decisions against the government.

In other instances, scholars have attempted to answer questions about the effects of conflict timing, but most do not focus on terrorist attacks. Epstein et al. discuss how the Court acts in times of war, and they find that during times of crisis, the Courts defer to Congress and the Executive and take less responsibility in protecting rights.[19] With cases that are not war-related, the Courts continue to maintain the responsibility for protecting rights. This article extends their argument in two ways. First, they analyze cases during times of *war*, which involves state to state conflict. This study focuses on terrorist attacks, which can potentially have the courts operate under a different mechanism. When engaged in a war, there is a known enemy, and there is a foreseeable end to the conflict. Policies that restrict rights are expected to last for a relatively short period of time. Courts may respond differently to policies dealing with terrorism because there is a longer shadow of the future regarding potential rights infringements. Second, the focus of the Court's decision-making is *during* times of war. The effects of terrorist attacks may have longer temporal effects on the courts than in the immediacy. During times of war, there is an expectation that the conflict will last for some extended period of time. With respect to terrorism, more attacks may be anticipated in the future, even in the near future, but there is not an expectation that multiple attacks will occur for days, weeks, and months at a

time. War assumes a constant crisis, which is likely not the case when dealing with transnational terrorism.

A third mechanism explains how judges decide cases the way they do. They may decide cases attitudinally or strategically, or they may follow a legal model. Although judges have the ability to act attitudinally, some authors have found that judges act strategically in deciding terror-related cases[20]; they recognize the need to be strategic, even choosing certain legal doctrines over others simply to obtain a strategic result. This is evident in the separation of powers explanation for strategic behavior by Epstein and Knight.[21] Here, in the context of the United States Supreme Court, the judges are aware that there are Constitutional checks that are available to Congress that they can choose to deploy against the Court, including salary and jurisdictional constraints. Although this has been utilized in rare instances (in court-curbing attempts after *Watkins v. United States*, for example), the mere fact that attempts to constrain the Court have been used in the past means that the justices have reason to believe that the legislature will do so in the future.[22] These strategic considerations may move the decision away from the ideal point of the justices, indicating an inter-branch strategic interaction. This is not a uniquely American phenomenon. There is evidence that this behavior exists in the context of the European Court of Justice (ECJ),[23] Israel,[24] and Canada.[25] However, there currently exists no statistical analysis of the United States in these terror-related cases.

One question remains: What is the mechanism behind the strategic behavior of courts? The argument of this analysis is that courts recognize when the policymaking branches of government are fragmented. Because of this, they view fragmentation as an opportunity to rule against the executive (or legislature) without a fear of backlash. Rios-Figueroa explains this sentiment:

> The judiciary depends on the other branches to exercise its power effectively. When the executive and legislative organs are strong and ready to react to a judicial decision that affects them, we can expect the judiciary to be relatively weak and deferential toward them. But coordination problems in the executive and legislative branches can reduce constraints on the courts, empowering them to rule against executive and legislative interests.[26]

Because justices are strategic and politically motivated,[27] they must look ahead to the options that could potentially occur after their decision has been announced. Because of a threat of backlash or reversal, courts must recognize the cohesiveness of the other branches. If there is a significant amount of unity, then those branches may retaliate in some form. If the legislature wants to punish the court, then they must have the support of the executive. If this support is not present, then the legislature will be unable to retaliate against the court. Only when the other branches of the government are

unified will there be a threat of retaliation. This creates a strategic environment for courts to exercise their independence.

This dynamic is operationalized in the concept of political stability. Political stability is defined here as the government's ability to carry out its declared program(s) and its ability to stay in office, based on three factors: executive cohesiveness, legislative unity, and popular support.[28] These three concepts provide the theoretical foundation for this analysis—that the decision-making of courts is dependent on the relative stability (or degree of fragmentation) of the other branches. When stability is high, courts will more often defer to the executive and legislature because those two branches are able to effectively govern and may be more apt to create a new policy that circumvents the judicial decision or punish the court. When stability is low, then the courts are able to take on a larger role because they do not anticipate that the other branches will be able to evade or sidestep their decision with a new policy.

H1a: Courts will rule against the government in terror-related national security cases when political fragmentation is high, and when there is not a consistent threat of attack.

H1b: Courts will rule in favor of the government in terror-related national security cases when political fragmentation is low, and when there is a consistent threat of attack.

This question is important, because the ability for a country's high court or constitutional court to act as an adjudicator between the various branches is most needed when the threat of terrorism is high. After terrorist attacks, executives and legislatures are often pressured to maintain security and to prevent attacks from occurring. In democracies, courts serve a critical role as a check against potential governmental infringement of protected civil liberties. The ability of courts to strike down executive orders or laws is crucial in maintaining legitimacy and independence.[29] The implication of court legitimacy and independence is that they are necessary to prevent backsliding toward authoritarianism.[30]

However, there are potential challenges in the causal flow of these variables. Does stability influence independence, where independence then influences the case outcome? Or is stability an intervening variable? Rios-Figueroa again provides some key insight on this question. He finds that in the case of Mexico, the Courts were unwilling to challenge PRI policies even though they did have constitutional protections of their independence.[31] In fact, they waited six years to overrule the government because of the degree of fragmentation they saw between the executive and the legislature. They conclude that the notion of independence is a necessary condition for courts to reject government policies, but it is not a sufficient one. This analysis will follow the result of Rios-Figueroa and assume that independence precedes stability but is still a necessary part of the equation. More often than not, some degree of independence is necessary in order

to rule against the government, and given that baseline, courts will tend to engage in that behavior when stability is low.

Research design

Three issues plague a potential analysis in this space. The first is that each country's top courts have differences in terms of policy and institutional structure. Some courts have justices that maintain lifetime tenure, and some do not. Some have wide jurisdictional authority, and some have a narrow area of jurisdiction. Second, in order for a court to hear a case, there often must be a challenge to an already-implemented policy (*a posteriori* review, as in the United States), but in others, courts are allowed to question the constitutionality of a piece of legislation prior to implementation (*a priori* review). Third, a lack of cases requires alternative techniques to approach a scientific analysis that is beyond a descriptive case study but resembles the rigor of inferential regression. Because of these three issues, a fuzzy-set qualitative comparative analysis is appropriate.

Which Courts, Which Cases?

In terms of the countries that can be included in the analysis, there are two concerns that limit the number of cases and countries available for analysis. The first is the need to consider types of security policies. National security policies with respect to terrorism can be varied for multiple reasons. Some countries may not have a longstanding tradition of security policies specifically related to terrorism because that country had not experienced previous attacks and therefore felt no need to implement those policies. Others may have created narrow policies related only to specific areas (such as transportation or finance). However, after the September 11 attacks, the United Nations adopted Resolution 1373, which called for all member states to adopt new security policies that criminalized a certain set of activities, including financial support of terrorists, documentation security, and more.[32] This resolution provides the best control for the different types of security policy available. Furthermore, it generates more potential cases to be studied. The timeframe for this analysis begins in 2001, after the adoption of Resolution 1373, and ends in 2011, the final year of data that is currently available. The second limiting factor is based on regime type. When it comes to the distinction between democracies and autocracies, autocracies are found to use courts for five main purposes: to establish social control, to claim legitimacy for the regime, to strengthen compliance within the regime, to boost trade and investment, and to be used as a tool for the implementation of unpopular or divisive policies.[33] In other words, courts are used as a tool for the

regime's benefit. Because this article attempts to test courts that have the authority to protect civil liberties potentially against the government's interest, non-democracies must be removed from the list of potentially included countries. In this instance, courts are likely to be independent, because they are needed to protect party interests in the long term, when there are competitive elections that may place them in the minority.[34]

Based on these two constraints, the analysis is restricted to all democracies between the years 2001 and 2011. To determine which countries are democracies, this article uses the latest release (2012) of the Unified Democracy Scores (UDS) in order to make this distinction.[35] The choice to use UDS scores instead of options such as the Polity index is because of some relevant issues that have been raised regarding Polity. Questions have been raised regarding the use of multiple aggregation methods for different types of regimes. Democracies have one weighting mechanism, while autocracies have a separate weighting procedure. Additionally, because the index is built on six subcomponents, there is difficulty in determining if some components may be driving the final Polity score in a particular direction.[36]

In order to make a reasonable distinction between democracies and non-democracies, while not losing any potentially democratic-leaning countries, the top 50 percent of countries in the UDS will be considered to be democracies. This is similar to the use of 0–10 as democracies on the Polity scale. Many are democracies, whereas many may not be fully democratic but leaning in that direction. Only states that fall within this range are included, in order to capture a conservative estimate of the countries that are most reasonably democratic. Ninety-one countries satisfy these particular requirements. When combining these countries with countries that have adopted national security policy suggestions from UN Resolution 1373, the number of countries is reduced to 77. Finally, political stability is also the key variable of interest in this analysis. Political stability scores are available for each of these countries within the timeframe specified.

The final characteristic that can restrict which countries can be included is whether or not a country's high court has ruled on a case. This is necessary in order to obtain non-missing values for the dependent variable. If a court requires a case to be heard in order to issue a judgment, then a case must be heard in order for it to be included in the population of included countries. If the court is able to publish a ruling on a potential law (in the case of *a priori* review) without needing a lawsuit to be brought, then it is included in the analysis, whether or not the court has published a ruling on a security law. With this final requirement in place, the final number of potential cases to be included is 12 countries. Table 1 below identifies the 12 countries included for comparison, and the name/case number of the court cases heard.

Table 1. Universe of cases.

Table of Available Cases			
Country	Political Stability	Cases Heard	Case Names
Australia	1	1	[2007] HCA 33
Belgium	0.5	3	125/2005; 22/2008; 98/2008
Canada	0.5	3	2002 SCC 1, 2002 SCC 2, 2012 SCC 69
France	0.75	2	n2004-492 (2004), n2005-532 (2006)
Germany	0.5	9	109 BVerfGE 279 (2004), 109 BVerfGE 190 (2004), 115 BVerfGE 320 (2006), 113 BVerfGE 273 (2005), 115 BverfGE 118 (2006), 120 BVerfGE 274 (2008), 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08
India	0.5	2	Crl. A. No. 974 of 2008, Crl. A. No. 1651–1652 OF 2008
Indonesia	0.5	1	013/PUU-I/2003
Ireland	0.75	1	[2005]IESC51
Israel	0.25	17	2936/02, 7957/04, 9132/07, 3278/02, 1890/03, 6659/06, 3239/02, 11225/03, 3799/02, 7015/02, 769/02, 8990/02, 2056/04, 5784/03, 5591/02, 7052/03, 8414/05
Latvia	0.5	1	2008–47-01
United Kingdom	0.5	3	UKSC 2 (2010), UKSC 24 (2010), UKSC 35 (2011)
United States	0.75	6	542 U.S. 466 (2004), 542 U.S. 507 (2004), 561 U.S. 1 (2010), 542 U. S. 426 (2004), 548 U.S. 557 (2006), 553 U.S. 723 (2008)

Data and Methods

In order to make inferential claims, this analysis utilizes a Ragin "fuzzy-set" qualitative comparative analysis ("fsQCA" henceforth) method. The approach is a variation of the original Boolean/crisp-set QCA presented by Ragin (2014).[37] The Boolean method allows for the dichotomous classification (membership vs. non-membership) of each case along all appropriate variables. Further consolidation is then applied to create the final specified model. This final model is the best explanation for the presence of a condition given some outcome across all cases (in this instance, countries).[38] The fuzzy-set variant follows much of the same technique used in the Boolean approach, but it allows for intermediate or partial classification (membership, partial membership, and non-membership) of each case.[39] These sets are defined in this instance by using a four-values membership set, where a score of 1 indicates full membership or a case to a particular condition, 0.75 indicates that the case is more of a member than a non-member to that condition, 0.5 indicates that a case is more a non-member than a member, and a score of 0 indicates that the case is fully out as a member of that particular condition. This same fuzzy-set classification system is applied to all variables in the analysis, including the outcome variable. This methodological approach is best because it combines the advantages of both qualitative and quantitative techniques, developing a rich model that allows for multiple causal pathways while also including the systematic precision and inferential conclusions that are derived from quantitative techniques.[40]

Defining the Conditions

The hypothesis offered in this analysis is based on a single primary condition: political fragmentation. When courts observe higher levels of political fragmentation, then they are more willing to strike down security policies that are restrictive of individual liberties even when a recent attack has occurred. When courts observe lower levels of political fragmentation, they are more likely to defer to the other branches of government, upholding policies that may encroach on individual liberties.

Data on political fragmentation are taken from the government stability scores from the International Country Risk Guide (ICRG) from the Political Risk Services group. Countries can be classified into four categories: high stability (in the first quartile), more stable than unstable (second quartile), more unstable than stable (third quartile), and unstable (fourth quartile). These cases are then analyzed to determine the prevalence of attacks. Attack data are taken from Gaibulloev, Sandler, and Santifort.[41] This dataset takes the full set of terrorist attacks around the world and defines (according to a set of rules) which attacks are domestic in nature and which are transnational. This analysis utilizes the total number of transnational attacks across the scope of the study (2001–2011), and then creates logical breaks for the fuzzy-set values. Transnational terrorist attacks are used rather than domestic terrorism because of the nature of anti-terrorism policy. Major policies are often created in response to transnational terrorist events rather than domestic events (e.g., the PATRIOT Act and UN Resolution 1373). For attacks, if a country has been the victim of 10 or more attacks within the scope of the analysis, then a score of 1 (full member) is assigned to the country. Attack counts between 6 and 9 are assigned a score or 0.75, while counts between 3 and 5 are given a score of 0.25, and counts of 0–2 are given a score of 0 (full non-member). This is a crude measure, but it is the only way to consider how often a country is under attack by terrorists given this method. The number of attacks by country over the total scope of the analysis is shown in Figure 1. Because true temporal dynamics cannot be accounted for using fuzzy-set analysis, this measure of recent attacks provides a running average of how many attacks occur per year.[42]

Of additional importance is the overall level of judicial independence. If a court is normally considered to not be independent, then it is less likely to be apt to challenge government policies. If they do maintain some baseline level of independence, then the ability to challenge is readily available. Measures of judicial independence are difficult to construct. Questions about *de jure* independence or *de facto* independence are part of an ongoing discussion in the literature. *De jure* independence describes the institutional rules in place, while *de facto* independence describes the reality of independence regardless of the rules in place. An example of *de jure* independence would

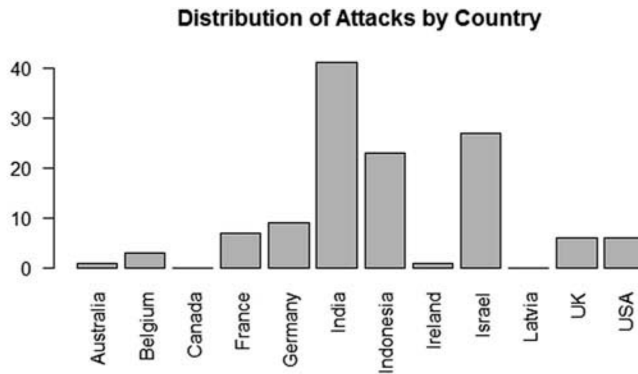

Figure 1. Number of total transnational attacks by country.

be the US Supreme Court's protection of lifetime tenure. However, although this rule is in place, if the average length of tenure on the Court was 5–10 years, there would be a decrease in *de facto* independence. This study does not attempt to adjudicate this debate. In lieu of this, both measures of *de jure* and *de facto* independence are tested. Voigt, Gutmann, and Feld[43] have the most recent data on judicial independence, with measures for both *de jure* and *de facto* independence included. These data are a revision and extension of Feld and Voigt's original data collection effort,[44] which was originally met with some praise and some criticism.[45] Values for *de jure* and *de facto* independence are measured on a continuous 0–1 scale, and in order to construct the fuzzy-set values, the[46] scores are broken into quintiles and are then assigned fuzzy-set values as described in other measures previously.

The Outcome

The outcome in this analysis is the court's decision to either support or strike down national security policies once the Court has chosen to accept (or initiate) a challenge. Restrictions on civil liberties can take on multiple forms, but usually occur as a restriction on due process rights, speech rights, and privacy rights. For example, new security policies may restrict an accused individual's access to a lawyer, a restriction on peaceful protest, or allowances for wiretapping without probable cause. This can be evaluated on a case-by-case basis. Courts may choose to uphold a law, strike down a law in its entirety, or uphold in part and strike down in part, or they may choose to not take the case. For each of the 12 countries, a search was conducted to find cases at the court of last resort. These courts have different names, with Supreme Court or Constitutional Court being the most likely title. In each court, all cases directly related to terrorism were found within the timeframe used (2001–2011) and were analyzed to determine the case outcome. Cases that were only remotely related to terrorism were not included. For example,

Al-Kateb v. Godwin (2004) was an Australian court case questioning the legality of an indefinite detention order pending the immigrant's removal to another country which Australia did not have transfer agreements with. This is a case that affects various aspects of counter-terrorism policy, but it is not directly related to it. Cases such as these are not included in the data.

Included court cases are coded 1, 2, or 3, with 1 meaning that the court fully (or nearly entirely) upheld the government's policy, 2 meaning that the court either dismissed the case without ruling on the merits (e.g., based on a technicality)[47] or upheld the government in part and struck down in part, and 3 meaning that the court struck down fully (or nearly entirely) the law or provision under question. With all these outcomes, a ratio was then taken of cases upheld to cases struck down. This generated a measure of case outcome with a range of 0 to 1, with 1 signifying the court always upholding the government, and 0 meaning the court always strikes down the government. For fuzzy-set classification, values are calculated based on logical percentages, where a country receives a case outcome score of 0 of the court upholds government policy 0–25 percent of the time, a score of 0.25 if the court upholds government policy 25–50 percent of the time, a score of 0.75 if the court upholds the government 50–75 percent of the time, and a score of 1 if the court upholds the government more than 75 percent of the time. The distribution of these fuzzy-set scores is found in Figure 2.

Mechanics of the Method

The fsQCA approach utilizes Boolean algebra to calculate the various conditions against the outcome. Because of the simple mathematics involved, this can be done with relative ease by hand. However, to assist in computation and also to provide more thorough results, the fsQCA software package was developed by Ragin and Davey.[48] This software is easily downloadable online, and it is freely available at www.fsqca.com. This software output provides two

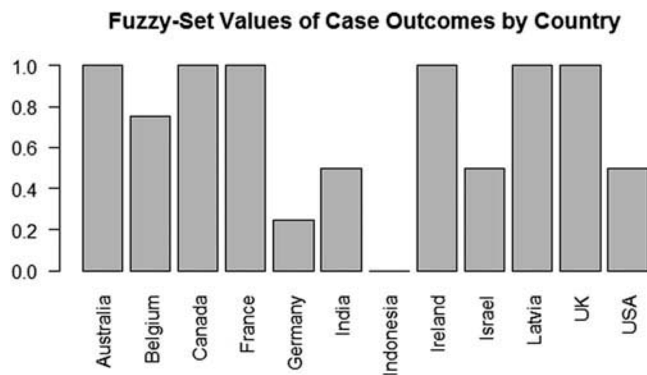

Figure 2. Case outcomes in twelve countries.

results. First, the software determines what the coverage is for each condition. Coverage is a calculation of how much of the outcome is explained by each condition (solution). The second result is consistency, which measures the extent to which the conditions (solutions) are subsets of the outcome.[49] Two steps are involved in the analysis. First, truth tables are constructed to determine when particular conditions are present and absent given the outcome, and then measures of consistency and coverage are calculated to define the final model. The outputs are therefore a quantitative explanation of the causal influences that are extrapolated in a qualitative analysis.

Results

The algorithm used in this analysis sets ˜Case Outcome (ruling against the government) as being caused by the following conditions: stability, recent attacks, and judicial independence. Judicial independence is tested with both *de jure* and *de facto* scores. Tables 2 and 3 show the truth tables generated by this algorithm. The purpose of truth tables is in model specification, assisting the researcher in determining which models are more likely to be consistent with the data and which are not consistent. For example, in Table 2 it is more likely that the absence of political stability, in conjunction with no recent attacks and with the absence of *de jure* protections for judges, is a better model than the opposite specification. This descriptive function is useful for potentially alternate model specification, but the analytic exercise is handled by the software.

In Table 2, using *de jure* independence as the measure of judicial independence, there are five different causal combinations that are consistent with the outcome. Three different combinations are found to contain the most number of cases in them, each with three. This happens to be the presence of each condition without the presence of the other two. Considering all combinations, seven cases are consistent with a lack of stability, while nine are not consistent with a recent attack, and seven cases do not indicate a need for substantially high judicial independence.

Table 2. Truth table on case outcome with de jure independence.

Truth Table of Conditions on Case Outcome—Model 1				
Stability	Recent Attack	De Jure	Number of Occurrences	Raw Consist.
1	0	0	3	0.64
0	1	0	3	0.64
0	0	1	3	0.43
1	0	1	2	0.29
0	0	0	1	0.7
1	1	1	0	
1	1	0	0	
0	1	1	0	

Table 3. Truth table on case outcome with *de facto* independence.

Truth Table of Conditions on Case Outcome—Model 2				
Stability	Recent Attack	De Facto	Number of Occurrences	Raw Consist.
1	0	0	5	0.41
0	1	0	3	0.64
0	0	0	3	0.53
0	0	1	1	0.45
1	1	1	0	
1	1	0	0	
1	0	1	0	
0	1	1	0	

In Table 3, using *de facto* independence as the measure of judicial independence, there are four different combinations that are consistent with the outcome. Nearly half of the cases fall into a single combination, where stability is present, but there is no recent attack, nor is there a significantly high level of *de facto* independence. However, looking at all the combinations, the lack of stability is consistent with the outcome in seven cases, and no recent attack is found in nine cases, which is the same result given *de jure* judicial independence. A different result is seen in *de facto* independence, in that there is no need for significantly high independence in eleven cases.

However, this result provides only a small portion of the overall result. The second step of the analysis is to determine what the complete model is for the outcome. Table 4 shows the final results of the analysis. There are five parameters reported in the table. The parameters of interest in this result are raw coverage and solution coverage. These provide a measure of how much of the outcome is explained by the individual causal combinations (raw) and the total solution set (solution). In Table 4 the results show that when the courts do not uphold security policies, a lack of stability is a causal condition that should be present. This is true in both models, regardless of the type of judicial independence that is being included. Lower levels of stability or, in other words, higher degrees of fragmentation are causally

Table 4. Fuzzy-set analysis of case outcomes on two models.

Fuzzy-Set Analysis of Case Outcomes			
Causal Combination	Raw Coverage	Unique Coverage	Consistency
Model 1			
~Stability*~De Jure	0.6	0.13	0.563
~Recent Attack	0.8	0.33	0.324
Solution coverage: 0.933			
Solution consistency: 0.32			
Model 2			
~Stability*~De Facto	0.73	0.13	0.478
~Stability*~Recent Attack	0.6	0	0.474
~Recent Attack*De Facto	0.8	0.2	0.413
Solution coverage: 0.933			
Solution consistency: 0.378			

linked to the presence of cases where courts overturn anti-terrorism policies. This provides strong support for the hypothesis.

Judicial independence also matters. In both models, high degrees of judicial independence are not associated with rulings against the government, which is counterintuitive. Under normal theoretical assumptions, courts (and judges) must be independent in order to effectively rule against the government. However, upon a closer examination, this result is not far off logically. The construction of the conditions of judicial independence assumes some foundational level of independence in these countries (considering their belonging to a democratic form of government). Non-membership in judicial independence does not imply a complete lack of independence, but rather describes a relative difference, to that of other democracies. The only reasonable inference from this result is that a substantially high degree of judicial independence, either in terms of *de jure* or *de facto* independence, is not causally necessary for courts to rule against the government. This result lends modest support for Hypothesis 1—that judicial independence is not necessarily a causal condition. Because of the set of countries included in the analysis, the best conclusion that can be drawn is that additional independence is not necessary, but it does not rule out the possibility of its significance in the global set of countries.

Results for the recent attacks condition are also consistent across the models. The absence of recent attacks is causally connected to the overturning of government policies. This means that only in times of relative peace do we see courts rule against the government in these types of cases. The result is consistent with the findings of Epstein et al.,[50] in that the courts are willing to challenge government policies only when the country is not facing a crisis. This finding also supports the hypothesis that timing of court cases and crisis is an important predictor of case outcomes.

These results provide a unique understanding of the causal relationship between case outcomes and some important theoretically driven predictors. The results generally support all hypotheses, although one hypothesis receives meager support. However, what this analysis cannot determine is to what degree each of these conditions matter. At best, fuzzy-set analysis can provides insight into which conditions may matter more than other predictors, but it stops short in being able to explain the degree to which any condition influences the outcome. Further statistical analysis should be done in this space. However, in order to rely on standard regression techniques, an in-depth data collection effort must be accomplished before an analysis of this type is performed.

In lieu of this, two cases have been selected in order to provide strength to the argument. Both cases are representative of the result, in that they show the direct connection between political stability and case outcomes. The Australian case tells the story of a highly stable government, with a legislature that is consistently able to quickly respond to terrorist events (even in other

countries) by enacting security policies. Alternatively, in the Indonesian case, there is significant fragmentation and division in the legislature regarding security issues, which allows the Court to step in and adjudicate cases against the government. These cases provide examples of the causal relationship between stability and case outcomes. Dependent on the ability to enact legislation swiftly due to stability, courts restrict themselves to a certain outcome.

The cases

Australia and Indonesia both provide examples of how this mechanism works realistically. In the Australian case, the High Court does not overrule the government (a case outcome score of 1), and political stability is high (a fuzzy-set score of 1). In the Indonesian case, the Court consistently overrules the government (a case outcome score of 0), and political stability is relatively low (fuzzy-set score of 0.5). For each case, the policy framework will be set up, including the stability condition as well as whether or not there were recent attacks.

The Australian case

The High Court of Australia provides an example of how the court is more deferential to the government's policies when the legislature shows little signs of political fragmentation. The beginning of the anti-terrorism policy regime in Australia occurred after the September 11 attacks in the United States and the Bali attacks in 2002. The laws created in 2002 were a series of amendments to criminal codes and national security bills that existed prior to the attacks on September 11. Two bills brought a considerable amount of debate and tension in Parliament. The first, the Security Legislation Amendment (Terrorism) Bill, was focused on creating new criminal offenses for activities related to terrorism. These merely expanded the scope of what was considered to be an illegal activity, which provided a challenge to lawmakers to make clear distinctions between terroristic activity and general protest. The second bill was more problematic for members of Parliament. The Australian Security Intelligence Organization Legislation Amendment (Terrorism) Act of 2003 [2002] created considerable disputes between members of Parliament, debating the merits of extending arrest, detention, and interrogation practices. However, although a contentious policy, compromise was found, and the bill was allowed to pass. Additional counter-terrorism laws were passed in 2004 after the Madrid train bombings. Unlike the September 11 attacks and the Bali attacks, there were no Australian casualties in the Madrid bombings. Regardless of this fact, efforts to pass these new laws in 2004 moved quickly and without much resistance, citing the increased fear of

terrorism. The most significant development in Australian anti-terrorism policy with respect to the courts is the 2005 Anti-Terrorism Act (no. 2), which created a specific amendment to the Administrative Decisions (Judicial Review) Act of 1977. The Act describes which types of cases and activities are under the jurisdiction of the High Court. It also defines which types of actions are not reviewable by the Court. The Anti-Terrorism Act (no. 2) removes the jurisdictional authority of the High Court in instances where the Attorney General creates orders on security grounds. The Act was met with little resistance.

This creates a unique situation in the Australian system. There is a Parliament that initially maintains some degree of division in framing anti-terrorism policies, but over time, even with the expansion of power and the curtailing of rights, Parliament became less interested in fighting the merits of a policy and instead became more interested in implementing new policies in response to terrorist attacks. However, what is interesting in the Australian case is that these attacks occurred elsewhere and did not include Australian citizens in the casualty counts. It was merely the threat of these attacks—and the increasing frequency of global attacks after September 11—that caused the Australian Parliament to act.

Only one case is addressed in the High Court, *Thomas vs. Mowbray* (2007). In Thomas, an interim control order was placed on Thomas, after his criminal conviction for training with Al-Qaeda was overturned. The interim control order placed various restrictions on movement, communication, and instituted a curfew. Thomas sued, claiming the control order was unconstitutional. The High Court disagreed and upheld the control order by a 5–2 vote. In the decision, Chief Justice Gleeson writes that

> On the question of power, however, they repeat the legislative object: protecting the public from an apprehended terrorist act. That is not only the purpose of the legislation generally, it is the purpose to which the control order must be directed, and with which it must conform. This is in the specific context of prevention of a terrorist act, or dealing with a person who has trained with a terrorist organisation. The level of risk of the occurrence of a terrorist act, and the level of danger to the public from an apprehended terrorist act, will vary according to international or local circumstances. Assuming, for the moment, that the legislative criterion for the sufficiency of the connection between the control order and the protection of the public from a terrorist act is not otherwise invalid (a point to which I shall return), the existence of that criterion means that the legislation is supported by the defence power supplemented, where necessary, by the external affairs power.[51]

The High Court in this instance affirms Parliament's ability to exercise this degree of power, allowing the government to continue in the practice of issuing control orders.

The Australian High Court is a prime example of judges being aware of the way a legislature is able to successfully pass and implement laws. As this

was becoming easier over time for Parliament, the Court began to take a deferential role. This supports the historical example in India[52] and Israel[53] given above.

The Indonesian case

The Indonesian path of anti-terrorism policymaking has been substantially different than the Australian process. In Indonesia, Parliament has enacted only one major law since September 11 to combat terrorism. This law is known as the Government Regulation in Lieu of Legislation (GRL) on Combating Criminal Acts of Terrorism No. 1 (2002). A GRL has the same function as normal legislation but is handed down by decree from the president. The GRL immediately takes effect but must be approved by Parliament in the next session for it to continue to be a valid legal instrument. The types of activities that are criminalized in the GRL are similar to many of the provisions called for in UN Resolution 1373 regarding aviation security, financial transactions, and the like. The policy was subject to intense scrutiny by individuals within the government and outside the government. For instance, Vice President Hamzah Haz had supported Jemaah Islamiyah, an Islamic terrorist organization in Indonesia. Prior to President Megawati's implementation of the GRL, an anti-terrorism bill had been under significant debate in Parliament. These conditions, and the potential scale of the political landscape being changed in a 2004 election, provided a significant opportunity for the Constitutional Court to potentially intervene.

The case left for the Constitutional Court to decide is the case against Masykur Abdul Kadir (2004). Beyond the initial President Megawati passed GRL No. 1 of 2002, and second GRL the same day. GRL No. 2 provided for the application of GRL No. 1 retroactively to the date of its passage. The intent of this was to allow the government to prosecute individuals who were connected to the Bali bombings.

The Court ruled in favor of Kadir, by a narrow 5–4 margin. The majority found that the protection against the retroactive application of laws in the Indonesian Constitution should not be disregarded, even in this instance of terrorism. The government argued that because other areas of the Constitution demanded the respect of the human rights of others, and terrorism is an act of extraordinary cruelty against the human rights of others, the retroactive application of the law is justified. The minority agreed, but the majority utilized a strict application of Article I, Section 28I, which forbade the retroactive application of laws.

One considerable reason why was the significant lack of stability throughout the government. The coalition government was already sensing the political posturing prior to the 2004 election, but because of some Islamic

parties that were seeking to grow in Parliamentary representation, there was a fear that any hope for a majority was waning.[54] Because of a simultaneous development of a popular human rights movement, conflicts between various groups arose in society, which did not encourage any governmental cohesion. This provided a perfect opportunity for the Constitutional Court to exercise its power of judicial review, especially in a time where the Court was needing to potentially flex its muscles, given its recent establishment less than 1 year prior to the case. Had the government been able to definitively address this need for anti-terrorism legislation without much debate, the Court may have felt less able to overturn Kadir's conviction, especially given the narrowest margin of support for the ruling against the government.

Conclusion

Courts have a unique ability to reverse the course of governmental actions that intrude on civil liberties.[55] Courts are also willing to accept this role as the protector of those rights. However, there are instances where the courts do not protect those rights, and instead have chosen to support restrictive policies written in the name of national security. To date, there has been minimal work done in assessing the relationship between courts and terrorism. This is due largely to the lack of available cases. However, some methods can be used to test the available data. Using a technique that takes advantage of both qualitative analysis and quantitative rigor known as the fsQCA, this analysis has found support for the proposition that courts will decided cases based on whether or not the government is stable, if there has not been any recent attacks, and as long as there exists some baseline level of independence, regardless of how independence is measured. The cases of Australia and Indonesia provide some anecdotal support for this hypothesis, with Australia showing high degrees of stability, and a court that is less willing to challenge the government. In the case of Indonesia, however, there is a significant disagreement among branches of government, and also generally in the population. They are met with a court that is willing to strike down their policies, and did so in a significant way, so as to release a convicted terrorist from prison. Future work can continue in this area, especially in data collection. Determining the facts of the case, the types of legislative statutes that are being challenged, and the legal justifications found in the opinions would provide a solid foundation for continuing an evaluation of how courts respond to the anti-terrorism policies of legislatures and executives. Furthermore, work in determining what the effects, if any, of these decisions on overall civil liberties protection also provides an interesting venture for researchers interested in the delicate balance between rights protection and national security. Finally, what are the effects of the court decision on policymaking? Is there a significant difference in the quality of

output after a policy has been upheld or overturned? Regardless of the direction taken, what can certainly be learned is that the courts continue to be an integral part of the policymaking process, whether it is supporting the government or reversing their policies. There are interesting implications for policymakers and academics alike, and finding answers to questions like these help us to understand the relationship between the courts and the other branches of government.

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Notes

1. Jason Seawright and John Gerring, "Case Selection Techniques in Case Study Research." *Political Research Quarterly* 61 (2008): 294–308. The "typical case" technique aims to find cases that exhibit the behavior expected based on the theory, rather than using divergent, deviant, or extreme cases.
2. Fergal F. Davis and Fiona de Londras, *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge: Cambridge University Press, 2014), Mark V. Tushnet, "Controlling Power in the War on Terrorism," *Harvard Law Review* 118 (2005); Oren Gross and Fionnuala ni Aolain. "Terrorism, Emergencies, and International Responses to Contemporary Threats," in *Law in Times of Crisis* (Cambridge, UK: Cambridge University Press, 2006) edited by Oren Gross and Fionnuala ni Aolain; Bruce A. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, CT: Yale University Press, 2006); Mark V. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008).
3. Mark Tushnet, "Defending *Korematsu*? Reflections on Civil Liberties in Wartime." *Wisconsin Law Review* 271 (2003); Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford, UK: Oxford University Press, 2007); Federico Fabbrini, "The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice," *Yearbook of European Law* 28 (2009): 664; Mary L. Volcansek and John F. Stack Jr., *Courts and Terrorism: Nine Nations Balance Rights and Security* (Cambridge, UK: Cambridge University Press, 2010); Clifford J. Carrubba Schepple, Matthew Gabel, and Charles Hankla, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102 (2008).
4. Ibid., see note 3.
5. Ibid., p. 296, see note 4.
6. Stephanie C. Blum, *The Necessary Evil of Preventive Detention in the War on Terror* (Amherst, NY: Cambria Press, 2008), 128.
7. Mrinal Satish and Aparna Chandra, "Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-related Adjudication." *National Law School of India Review* 21, no. 1 (2009).
8. Ibid., p. 53, see note 7.

9. Ibid., p. 76, see note 7.
10. Yigal Mersel, “Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary during the Terror Era.” *NYU Journal of International Law & Politics* 38 (2005), 67.
11. Marcia Gelpe, “Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space.” *Emory International Law Review 13* (1999): 530.
12. *Bankovic and Others v. Belgium and 16 Other Contracting States, 11 BHRC 435* (2001).
13. *Korematsu v. United States*, 323 US 214 (1944).
14. *Secretary of State for the Home Department v. JJ & Ors*, UKHL 45 (2007)
15. *Boumediene v Bush*, 553 U.S. 723 (2008).
16. de Londras, p. 275.
17. This definition of judicial independence comes from John Ferejohn. “Independent Judges, Dependent Judiciary: Explaining Judicial Independence,” *Southern California Law Review* 72 (1998): 353. However, judicial independence is notoriously difficult to define, and it is subject to significant debate in the literature. This debate regards what determines whether or not independence exists, or if independence exits in two different forms. For instance, judges should be the “authors of their own opinions” according to Lewis A. Kornhauser, “Is Judicial Independence a Useful Concept?,” in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Steven B. Burbank and Barry Friedman (Thousand Oaks, CA: Sage Publications, 2002). Furthermore. judicial outcomes are meaningless if they are not enforced, reflecting the concept of power articulated by Charles M. Cameron. “Judicial Independence: How Can You Tell It When You See It? And, Who Cares?” in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, edited by Steven B, Burbank and Barry Friedman (Thousand Oaks, CA: Sage Publications, 2002) and Christopher M. Larkins. “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” *American Journal of Comparative Law* 44(4): 605–626. As noted later in the text, this analysis attempts to parse out the finer-grained distinctions between autonomy and power through the use of Voigt, Gutmann, and Feld’s measurement of *de jure* and *de facto* independence; see note 45. There is no clear consensus as to whether or not *de jure* or *de facto* independence is more important in order for judges to adequately rule without the fear of retribution, but there is considerable thought that some mix of both is necessary to create “independence.”
18. J. Mark Ramseyer, “The Puzzling (In) ependence of Courts: A Comparative Approach.” *Journal of Legal Studies* 23, no. 2 (1994): 721–747.
19. Lee Epstein et al., “Supreme Court during Crisis: How War Affects Only Non-War Cases,” *NYU Law Review* 80 (2005): 1.
20. Emanuel Gross, *The Struggle of Democracy against Terrorism: Lessons from the United States, the United Kingdom, and Israel* (Charlottesville, VA: University of Virginia Press, 2006); Posner and Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford, UK: Oxford University Press, 2007), see note 3.
21. Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: Sage, 1997).
22. Ibid., p. 142.
23. Clifford J. Carubba, Matthew Gabel, and Charles Hankla, “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice.” *American Political Science Review* 102, no. 4 (2008): 435–452.
24. Gal Dor, “Governmental Avoidance versus Judicial Review: A Comparative Perspective on Israeli Decision-making Strategies in Response to Constitutional Adjudication.” *13 Temple International and Comparative Law Journal 231*, (1999).

25. Donald R. Songer and Susan W. Johnson, "Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model." *Canadian Journal of Political Science* 40, no. 4 (2007).
26. Julio Rıos-Figueroa, "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002." *Latin American Politics and Society* 49, no. 1 (2007): 31–57, 33.
27. Rafael Gely and Pablo T. Spiller, "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases." *Journal of Law, Economics, and Organization* 6, (1990): 263–300.
28. PRS, *International Country Risk Guide*. Political Risk Services Group. (2015) http://www.prsgroup.com/about-us/our-two-methodologies/icrg.
29. Gregory A. Caldeira, "Public Opinion and the US Supreme Court: FDR's Courtpacking Plan." *American Political Science Review* 81, no. 4 (1987): 1139–1153. In instances of terrorism, the courts are often seen as the last line of defense for civil liberties that are at risk of encroachment. However, there is some debate on this point, especially considering the larger context of the role of judges and courts. For instance, some argue that judges are merely interpreters of law, meant to serve in a function of correcting the system when it has gone astray. See William H. Rehnquist. "The Changing Role of the Supreme Court," 14 *Florida State University Law Review* (1986). Others argue that courts should be more responsive to the changing nature of society, and is therefore more active in modifying the interpretation of the law to account for societal change. See Aharon Barak. "A Judge on Judging: The Role of a Supreme Court in a Democracy," *Harvard Law Review* 116 (2002).
30. Douglas M. Gibler, *International military alliances, 1648–2008* (Washington, DC: CQ Press, 2009).
31. Rıos-Figueroa, "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002"; see note 31.
32. Victor V Ramraj et al., *Global Anti-terrorism Law and Policy* (Cambridge, UK: Cambridge University Press, 2012).
33. Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge, UK: Cambridge University Press, 2008).
34. Ramseyer, "The Puzzling (In) Dependence of Courts"; see note 21, p. 741.
35. Daniel Pemstein, Stephen A. Meserve, and James Melton, "Democratic Compromise: A Latent Variable Analysis of Ten Measures of Regime Type," *Political Analysis 18*(4) (2010).
36. Michael Coppedge et al. "Conceptualizing and Measuring Democracy: A New Approach," *Perspectives on Politics* 9, no. 2 (2011): 247–267.
37. Charles C. Ragin, *The Comparative Method: Moving beyond Qualitative and Quantitative Strategies* (Oakland, CA: University of California Press, 2014).
38. Henceforth, I will be using the language traditional to Boolean techniques, where, for example, the term outcome is used rather than dependent variable.
39. Charles C. Ragin, "Qualitative Comparative Analysis Using Fuzzy Sets (fsQCA)," *Configurational Comparative Methods: Qualitative Comparative Analysis (QCA) and Related Techniques*, edited by Benoit Rihoux and Charles C. Ragin (Thousand Oaks, CA: Sage Publications, 2009).
40. Benoit Rihoux, "Qualitative Comparative Analysis (QCA) and Related Systematic Comparative Methods: Recent Advances and Remaining Challenges for Social Science Research," *International Sociology* 21, (2006): 679–706.
41. Khusrav Gaibulloev, Todd Sandler, and Charlinda Santifort, "Assessing the Evolving Threat of Terrorism," *Global Policy* 3, no. 2 (2012): 135–144.

42. It is assumed that judges are not privy to additional information regarding the threat of terrorism which the public does not also have access to. Therefore, as a proxy for real threat, it is assumed that the greater the number of attacks, the more an individual (judges included) will perceive a greater threat of terrorism.
43. Stefan Voigt, Jerg Gutmann, and Lars P. Feld, "Economic Growth and Judicial Independence, a Dozen Years on: Cross-country Evidence Using an Updated Set of Indicators," *European Journal of Political Economy* 38 (2015): 197–211.
44. Lars P. Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Crosscountry Evidence Using a New Set of Indicators," *European Journal of Political Economy* 19, no. 3 (2003): 497–527.
45. Julio Rıos-Figueroa and Jeffrey K. Staton, "An Evaluation of Cross-national Measures of Judicial Independence", *Journal of Law, Economics, and Organization* 30, no. 1 (2014): 104–137.
46. Voigt, Gutmann, and Feld, "Economic Growth and Judicial Independence, a Dozen Years on"; see note 46.
47. Cases that are heard but not decided on the merits are included due to the potential for a court using dismissal as a strategy.
48. Charles C. Ragin and Sean Davey. *Fuzzy-Set/Qualitative Comparative Analysis 2.5.* Department of Sociology, 2014.
49. For a more extensive explanation of how these solutions are constructed through truth table algorithms, see Charles C. Ragin, *Redesigning Social Inquiry: Fuzzy Sets and Beyond* (Chicago, IL: University of Chicago Press, 2008) and Benoıt Rihoux and Charles C. Ragin, *Configurational Comparative Methods: Qualitative Comparative Analysis (QCA) and Related Techniques* (Thousand Oaks, CA: Sage Publications, 2009).
50. Epstein et al., "Supreme Court during Crisis: How War Affects Only Non-war Cases"; see note 24.
51. *Thomas v. Mowbray*. 2007. HCA 33. Accessed 22 October 2015. Full text accessible at www.austlii.edu.au/au/cases/cth/HCA/2007/33.html, p. 9.
52. Satish and Chandra, "Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-related Adjudication"; see note 7.
53. Mersel, "Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary during the Terror Era"; see note 10.
54. Tim Lindsey, "Indonesia's New Anti-Terrorism Law: Damned if You Do, Damned if You Don't," Accessed 7 December 2015. http://law.unimelb.edu.au/__data/assets/pdf_file/0008/1546316/Indonesias_new_Anti_Terrorism_Law_Damned_if_you_do_Damned_if_you_dont1.pdf.
55. At times, courts are not legally allowed to rule in particular areas, or are able to strike down actions taken by the policy-making branches. However, there is considerable evidence that courts are willing to ignore these constraints, and choose to adjudicate in these areas regardless. For instance, the UK Supreme Court has no authority to strike down primary legislation, or can adjudicate foreign affairs. However, there have been an abundance of instances where they have ruled against the government in areas of primary legislation on foreign affairs. See Fiona de Londras. "Judicial Responses to Counter-Terrorist Detention: Rights-based Resistance?," in *Detention in the War on Terror: Can Human Rights Fight Back?*, Cambridge University Press (2011). Some specific examples are taken from (2001) 11 BHRC 435 and [2007] 3 WLR 33, 260–261, 272.