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## Treatment of Government Interest on the Supreme Court of Canada after 9/11

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### Zusammenfassung

*Nach den Terroranschlägen vom 11. September 2001 sah sich der Oberste Gerichtshof Kanadas, ähnlich wie andere Gerichtshöfe der Welt, mit der Frage konfrontiert, wie viel Spielraum der exekutiven Gewalt bei der Terrorismusbekämpfung eingeräumt werden sollte, um mit der neuen Sicherheitslage umzugehen. Welchen Schutz sollen bürgerliche Freiheiten im Angesicht der Sicherheitsbedenken genießen? Dieser Aufsatz analysiert die Auswirkungen der Terroranschläge auf den Grad des Handlungsspielraums, den die Richter des Obersten Gerichtshofes von Kanada der kanadischen Bundesregierung bei ihrer Reaktion auf die Terroranschläge gewährt haben. Eine systematisch-quantitative Analyse der Entscheidungen für oder gegen die Regierungsposition vor und nach den Anschlägen, sowie die Auswertung von Interviews mit Spitzenjuristen in Kanada zeigen eine Judikative, die nach wie vor die Regierung in Schach hält und individuelle Rechte schützt, wobei Bürgerrechtler und Anwälte argumentieren, dass der Gerichtshof nicht entschieden genug gegen die Bedrohung der Verletzung von bürgerlichen Freiheiten unter dem Mantel der Terrorbekämpfung vorgeht.*

### Résumé

*Après les attentats du 11 septembre 2001, la Cour suprême du Canada, tout comme d'autres Cours suprêmes dans le monde, s'est vu confrontée à la question de savoir quelle marge de manœuvre elle devait accorder à l'exécutif dans la lutte contre le terrorisme afin de convenablement gérer la nouvelle situation sécuritaire. Dans quelle mesure les libertés des citoyens devaient-elles être protégées face aux exigences sécuritaires ? Le présent article se propose d'analyser comment les attentats du 11 septembre 2001 ont influencé le degré de marge de manœuvre accordée par la Cour suprême du Canada au gouvernement canadien pour réagir aux attentats. Une analyse systématique et quantitative des décisions pour ou contre la position du gouvernement avant et après les attentats ainsi que l'évaluation d'interviews menés avec des juristes canadiens de grande renommée mettent en évidence un pouvoir judiciaire qui tient en échec le gouvernement et protège les droits individuels. Retenons que les militants pour les droits civiques et les avocats soulignent, de leur côté, que la Cour*

*suprême n'en fait pas assez contre la menace d'une violation des libertés civiles sous le prétexte de la lutte contre le terrorisme.*

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*"The conflict between human rights and national security is truly a clash of titans"*  
– Justice Ian Binnie, 2004, p. 38

## I.

Justice Binnie's remark vividly depicts the situation courts have faced in the past years. The Supreme Court in Canada has, as have the courts in the U.S. and Great Britain, among others, had to walk the thin line between protecting individual rights while providing enough latitude to the executive to implement security measures aimed at terrorist threats after 9/11. While the protection of individual rights may be seen as the highest achievement of a free democratic society, the protection against attacks reigns supreme as the most basic of advantages favouring the creation of a society. Much ink has been spilled by scholars debating what the correct position by the courts in times of crisis should be (mostly in regards to the U.S. judiciary), and the justices themselves have been vocal in their assessment – both in speeches as in their written opinions. Recognizing that rhetoric and behaviour are not necessarily one and the same, scholars have attempted to identify how courts have behaved in walking the thin line between civil liberties and collective security by analyzing war related jurisprudence. The analysis presented in this article addresses the impact of war on the behaviour of judges sitting on the Supreme Court of Canada. More specifically, I will investigate whether the degree of deference afforded to the executive has been set more conservatively in the aftermath of 9/11, presenting an empirical analysis of decisions by the Supreme Court of Canada on cases involving the government before and after the terrorist attacks on September 11, 2001.

## II.

Justices have acknowledged the potential conflict between security oriented policies and rights protection, as Chief Justice McLachlin writes in the opening paragraphs of the majority judgment in *Charkaoui v. Canada (Citizenship and Immigration)* ([2007] 1 S.C.R. 350):

One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on infor-

mation that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

In their attempts to resolve this tension, the Court has provided rationales in favour of both decisions; at times emphasizing the responsibility the government has in providing security, at others the importance of the protection of liberties for the survival of the democracy.

The reasons given for deferring to the executive are not very different from reasons brought forward in judgments by the U.S. Supreme Court and the U.K. High Court. The executive is privy to information that the Court does not possess, and therefore in a better position to determine which acts are necessary to keep the nation secure:

[...] the relative expertise of the decision-maker, [...] favours deference. As stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, '[t]he fact that the formal decision-maker is the Minister is a factor militating in favour of deference' (para. 59). The Minister, as noted by Lord Hoffmann in *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.), at para. 62, 'has access to special information and expertise in . . . matters [of national security]'. The third factor – the purpose of the legislation – again favours deference. This purpose, as discussed in *Pushpanathan*, supra, at para. 73, is to permit a 'humanitarian balance' of various interests – 'the seriousness of the danger posed to Canadian society' on the one hand, and 'the danger of persecution upon refoulement' on the other. Again, the Minister is in a superior position to a court in making this assessment (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, para. 31).

A similar point is advanced by the Court's judgment in *Canada (Prime Minister) v. Khadr* ([2010] 1 S.C.R. 44): "[J]udicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged" (para. 37). The quotes trace the Supreme Court's acknowledgment of the crown's 'prerogative power over foreign affairs. The im-

pact of security concerns, these statements suggest, is clearly in favour of increased deference to the executive.

At the same time, however, the Justices of the Supreme Court of Canada have affirmed the importance of preserving the rule of law and individual rights. In *Suresh v. Canada (Minister of Citizenship and Immigration)* ([2002] 1 S.C.R. 3, para. 4), the opinion states: "In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values."

The executive may be privy to information that the Court does not have, but they cannot be trusted to give proper consideration to individual rights as they contemplate the extent of security measures they implement or the extent to which secret evidence is used in court (Townley 2007). The fear is that "anti-terrorism measures adopted for quite legitimate purposes are expressed in overly broad terms, and are then utilised by the government for quite legitimate purposes beyond the scope of what was originally intended" (Binnie 2004).

The Court has been willing and able to limit government action where, in the Court's opinion, it has clearly (and unjustifiably) nullified individual rights, such as it did in *Charkaoui v. Canada (Citizenship and Immigration)* ([2007] 1 SCR 350), where it declared the process of issuing 'security certificates'<sup>1</sup> unconstitutional, because they did not provide the defendant an opportunity to challenge the crown's case:

Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to [it] [...] The judge's activity on behalf of the named person is confined to what is presented by the ministers. The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that

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1 A security certificate is used within the process of extraditing people who may pose a security threat. According to the Canadian government webpage: "The objective of the process is the removal from Canada of non-Canadians who have no legal right to be here and who pose a serious threat to Canada and Canadians. [...] The Government of Canada issues a certificate only in exceptional circumstances where the information to determine the case cannot be disclosed without endangering the safety of any person or national security. [...] In some cases, a judge may order the person detained during the security certificate removal process to protect national security or public safety. However, a person subject to a security certificate is free to leave Canada at any time and return to their country of origin" (see <http://www.publicsafety.gc.ca/prg/ns/seccert-eng.aspx>). The use of these certificates has come under scrutiny because it does not provide the same due process protections afforded to criminal defendants, particularly because the accused is not allowed to directly question the evidence presented against him or her.

principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know? (para. 53-64)

While rights, as the previous quotes suggest, are part of the equation in determining executive powers in times of war, their value is not absolute. The Court does not rule out that there might be situations in which the executive could go further when it declared in *Charkaoui* that “the right to know the case to be met is not absolute” and might be limited in the interests of national security (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, para. 57).

The Court’s judgment in *Charkaoui* echoes Justice Dickson’s opinion in *Operation Dismantle v. The Queen* ([1985] 1 S.C.R. 441, para. 100):

Even an independent, substantive right to life, liberty and security of the person cannot be absolute. For example, the right to liberty, which I take to be the right to pursue one’s goals free of governmental constraint, must accommodate the corresponding rights of others [...] In the same way, the concept of ‘right’ as used in the Charter must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state’s citizens. Such steps, it seems to me, cannot have been contemplated by the draftsman of the Charter as giving rise to violations of s. 7.

Whether the Court has given increased deference to the elected branches after 9/11 and whether they were unchanged by the threats that accompanied the attack, or where in between these two positions the court positioned itself, is, as the above quotes bear witness, far from settled.

Quotations, however, can only provide a starting point at understanding the Court’s role and actions in times of war. In attempting to understand how judges behave, we have to move beyond the normative concerns to consider what incentives judges may have to approach cases in a different manner in times of crisis.

### III.

Scholars have questioned whether the exigencies of wartime have changed the behaviour of courts. The question of whether courts are guardians of rights during times of war or whether rights protection by the courts is muted in times of

crises is not a recent one. Cicero's maxim that *silent enim leges inter arma* (during war, the laws are silent) has long been debated by legal scholars who argued that the U.S. Supreme Court's politically isolated nature (Fortas 1968; Barak 2002; Stone 2003) allowed them to be the guardians of rights at all times and those stating that the amplified interest for security comes at the expense of rights in the face of crises (Rossiter 1951; Linfield 1990)<sup>2</sup>. While proponents of both views generally acknowledge that times of crisis trigger more repressive acts by the elected branches of government, the two sides disagree on whether such change extends to the judicial branch. Court opinions legitimize the balance between security and liberties. In a country preoccupied by security concerns, the courts are there to protect individual rights and liberties – who else, if not them?

In a first attempt to systematically analyze whether the guardian view (i.e. the view that courts remain “guardians” of rights in times of war) or the crisis thesis (stating that as security concerns increase, courts become less protective of individual rights) is applicable to the U.S. Supreme Court, Epstein, Ho, King, and Segal (2005) provide an investigation into U.S. Supreme Court behaviour in civil liberties and criminal rights cases during times of crisis. Their study suggests that the U.S. Supreme Court tends to decide civil liberties and criminal rights cases more conservatively during those times than in times of peace, though this effect does not exist for cases related to war. In other words, though Epstein et al. (2005) did not find any change in Supreme Court behaviour in times of war for cases related to the war, their analysis showed that the court shifted in times of crises and became more conservative in cases unrelated to crises. As they hypothesized, the Court underwent a general shift in balancing individual and collective rights in times of war. Epstein et al. (2005) suggest that the changes caused by crisis are a reflection of either a sincere change of behaviour or a strategic change of behaviour.

A sincere change of behaviour is explained by the fact that judges are people, too, and might just as others be swept up by the ‘rally round the flag’ syndrome. Their changed behaviour is a “behavioral mechanism, [...] [taking] the form of a patriotic fervor on the part of justices, rather than a guardian impulse, and manifests itself in a response to repress rights” (Epstein et al. 2005, 35). Just like everybody else (Davis/Silver 2004), judges may be more inclined to trade off civil liberties against security with a heightened sense of threat.

Strategic considerations, on the other hand, assume judges realize that they are working under these changed conditions. As a consequence, they re-evaluate their position and change their behaviour for strategic reasons. Such strategic reasons may include the fear of deciding against the executive in times of high popular support for the government during the ‘rally round the flag’, risking that the executive ignore the decision. If the decisions of the court are ignored, their

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2 Epstein, Ho, King, and Segal (2005) provide a detailed overview of the debate between legal scholars on pages 10-41.

legitimacy is questioned – a result that must be weighed against a decision that may not reflect sincere preferences, but, in showing deference to the executive, ensure its application. Judges might be “inclined to avoid locking horns with a popular executive” in order to preserve the court’s “independence, tacit authority, and effectiveness” (Yates 2002, 18). Judges may be hesitant to take unpopular stands in favour of civil liberties in times of intense conflict for fear of damaging the long term legitimacy of the court. “In such situations there is a need for the Court both to protect itself as an institution by supporting popular government policies, and to avert a clash with a popular president who might decline to follow an adverse judicial ruling and thus expose its institutional weakness” (Grossman 1997). The range of cases in which the court might defer to the executive for strategic reasons may go beyond cases concerning national security and swap over to non-war issues.

Extending the inquiry on the effects of war to the lower courts, Clark (2006) analyzes the treatment of executive interest in times of war by the U.S. Courts of Appeals. He derives his theory not, as in the Epstein et al. (2005) article, from the normative debate on the crisis theory by legal scholars, but from the application of the “two presidencies” (Wildavsky 1966) literature on wartime. He theorizes that the “two presidencies” thesis, which suggests that the executive enjoys greater deference in defense and foreign policy issues, may be applied to times of war.<sup>3</sup>

The “two presidencies” thesis posits that the executive is more successful in foreign and defense policy than in domestic politics, “because the consequences of events in foreign affairs are potentially more grave, faster to manifest themselves, and less easily reversible than in domestic affairs, [thus] presidents are more willing to use up their resources” (Wildavsky 1966, 8). The executive, furthermore, has informational and institutional advantages that allow them to move faster than the legislature or the courts (Wildavsky 1966; Canes-Wrone/Howell/Lewis 2008). Clark (2006) extrapolates from that hypothesis and suggests such deference might be present not only in issues of foreign policy, but also for all issues in times of foreign policy crisis: “[B]y strategically associating the president’s role as commander-in-chief with his role as chief executive, the president may bring the deference paid to him in the foreign policy arena to bear on his role in the domestic arena [in times of war]” (401). By Clark’s reasoning, then, it is not only the issue category that determines whether the court will pay deference to the government’s position. Instead, the context under which the court rules in a case involving the government becomes the crucial criterion. If the case is decided in times of war, the executive enjoys a greater advantage than if the same case were brought to the court in times of peace – regardless of the issue. Clark’s reasoning

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3 While the “two presidencies” framework was first applied to the relationship between the legislature and the executive, Ducat/Dudley (1989); Yates/Whitford (1998); Randazzo (2011) applied the “two presidencies” theory to the courts and have shown that U.S. courts are more likely to defer to the executive in matters of foreign policy.

is that the executive will not let a 'good crisis go to waste', and instead "try to capitalize on the 'rally 'round the flag' effect that generally accompanies national crises," (2006, 400) and make "efforts to blur the distinction between foreign and domestic policy [which] should benefit the executive in legal cases" (2006, 400).

Both empirical studies by Epstein et al. (2005) and Clark (2006) thus suggest that the likely change in behaviour by the court after 9/11 is toward increased deference to the government – whether as a result of a sincere change of preference or a strategic reaction.

These mechanisms also suggest that the effect may go beyond cases that deal explicitly with the crisis and point towards a more general shift of the court in deciding how much deference to afford to the government in times of crisis. Judges may be more reluctant to restrict government's discretion in times of war on the cases that governments are involved in, since they mainly concern individual versus collective interests.

Perhaps the courts then become less protective of procedural rights in criminal cases, or they may be less inclined to tie the government's hands in dealing with immigration, deportation, or even issues that deal with discrimination or in other ways limit government's determination of its role towards its citizens.

In order to gain a first look at whether a general shift in the degree of deference afforded to the government can be witnessed in the post-9/11 court, we can compare the rate of government favourable outcomes on the Supreme Court of Canada pre and post 9/11. As a second analysis, I offer a more detailed look into the cases dealing directly with the war on terror through the eyes of legal elites who were personally involved in their resolution. While the first approach gives an indication of whether a general shift occurred, the second provides an answer to the question how far, and why judges may have been impacted by concerns created by 9/11.

#### IV.

To provide a first look at the impact of 9/11 on the Canadian Supreme Court, I conduct a difference of means test on Supreme Court treatment of cases involving the government. I use the High Courts Judicial Database, comprising the universe of published decisions from 1969-2003.<sup>4</sup> I updated the database to reflect all

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4 The High Courts Judicial Database (HCJD), funded by two grants from the National Science Foundation: "Collaborative Research: Fitting More Pieces into the Puzzle of Judicial Behavior: a Multi-Country Database and Program of Research" (SES-9975323); and "Collaborative Research: Extending a Multi-Country Database and Program of Research" (SES-0137349) was created by C. Neal Tate, Donald R. Songer, Stacia Haynie, and Reginald S. Sheehan, Principal Investigators. The data are available for public download at [http://sitemason.vanderbilt.edu/site/d5YnT2/data\\_sets\\_available](http://sitemason.vanderbilt.edu/site/d5YnT2/data_sets_available).



cases up to and including 2007. Variables in the database capture, among others, the parties bringing the cases and the outcome of the case. I am interested in seeing whether the court has become more deferential to the government or whether it has provided a check to government action in times of war. I calculate the percentage of government favourable decisions separately for six years before and six years after 9/11 (1997-2005) and conduct a difference of means test in order to see whether the difference is statistically significant. *Table 1* and *Figure 1* depict the results. The p-value for a two tailed test is below 0.05 (0.014) and thus suggests that the difference between pre and post 9/11 decisions is statistically significant. The first row in *Table 1* presents the average of wins on the Supreme Court by the government before 9/11 as well as the 95% confidence interval around the mean. Row 2 presents the same values for post 9/11 decisions. *Figure 1* graphically depicts the results. The upper, lightly grey bar depicts the probability of a government favourable decision in the Supreme Court of Canada before 9/11, whereas the dark grey bar represents the time after. The whiskers represent 95% confidence intervals around it. In the five years leading up to 9/11, the government had a 0.63 probability of achieving a favourable decision in court. After 9/11 the same figure dropped to 0.53. In other words, the government was ten percentage points less likely to win a case in front of the Canadian Supreme Court after 9/11.<sup>5</sup>

These results do not seem to support the 'crisis' theory. The court was not more likely to rule in favour of the government after 9/11 than before. Instead, it ruled more often against the government post-9/11, and the difference reaches statistical significance. In other words, the difference of means between pre- and post-9/11 decisions is outside of the range of differences expected to happen by chance.

Understanding what the results tell us about the impact of 9/11 on judicial behaviour is less straightforward. Do the results imply that the court has become less deferential to the government, i.e. are we witnessing a move by the Court? Or are perhaps the cases brought to the court systematically different, i.e. has the government's position moved, and what we are witnessing is the Court's attempt to keep the government from moving too far? Both are observational equivalents. In both cases we would witness more rulings against the government. Perhaps the Court has moved and is less likely to favour the government. More likely, however, is that the government has been more aggressively implementing security protections and limiting individual rights, pushing a position that the Court is unwilling to sanction.

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5 While the difference of means test does not take into account other potential covariates, a logit regression controlling for party identity congruence between the court and the government does not significantly change the results (see appendix).

I spoke to several legal elites in criminal law and immigration law that have dealt with cases related to security concerns after 9/11. The interviews allow insight into this question and Supreme Court behaviour in the post-9/11 world.

## V.

In May 2011 I conducted interviews with legal elites in Canada on Supreme Court behaviour in times of crisis.<sup>6</sup> The interviewees were involved in cases argued in front of the Canadian Supreme Court and dealing with issues related to 9/11 and security concerns, such as deportation and security certificates.

The attorneys I interviewed in Canada generally<sup>7</sup> agreed that 9/11 made a difference in Supreme Court decisions: "I think there's been a rightward shift in the world in the last decade, particularly in the West. And if there is a trigger event, it's 9/11. That changed the approach of government to citizens and the rule of law" (Interviewee Canada#6). "In Canada, the answer to the question if war has an impact is: yes. Social and political dissent is viewed from a different perspective in times of war [...] I'd say there's a difference between non-war and war period. During war, there tends to be a less critical look at the preservation of fundamental freedoms" (Interviewee Canada#2). Interviewee #6 echoes these sentiments: "The problem is that we distort things in the name of public security and protection. The line of balance between security and the rule of law, of individual and group rights is transgressed in the name of public safety."

The interviewees thus generally agreed that the post-9/11 Court moved the balance between individual and collective rights protection towards the latter, giving the government wider authority and less judicial scrutiny. They were particularly concerned about the use of 'Security Certificates' and the low standards of rights protection to the defendants in the evidentiary hearings as well as harsh bail conditions placed upon those subject to a certificate. Interviewee #6 provides one example:

The bail conditions imposed here were so harsh, in one of the cases, the defendant actually chose to go back to jail. The conditions were very tough on relationships and marriages. Could any of this stuff have survived in a non-emergency state (during public and political panic)? None of this would have passed muster in ordinary times.

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<sup>6</sup> The interviews were made possible by the Doctoral Dissertation Grant from the Canadian Council of Studies.

<sup>7</sup> One of the lawyers I interviewed argued that rights were receiving the same protection in times of war as in times of peace in Canada, and that the Supreme Court was not hesitant in disagreeing with the executive. He was the only person I spoke to who took that position.

Interviewee #1 criticizes the emphasis on security and resulting limitation on rights protection during evidence review in the process of issuing security certificates:<sup>8</sup>

The Special Advocates are not permitted to have communication with the individual once they have been exposed to the material. Imagine an ordinary case: disclosure of the material is made to the individual. You can say: "Were you in place X in June of 1985?" or "Did you know this person?" And you get a response. With this regime, you do not know whether the info that is in your hands is essential. It could be that an allegation or some evidence is important which I will never see, nor the defendant will have the opportunity to see.

Interviewee #6 expresses a similar sentiment: "Great Britain had already been using Special Advocates, and the system still doesn't work. How can it, if there is a lawyer on the outside and the Special Advocate on the inside, and they are without communication after the evidence is presented; if the lawyer cannot learn what the evidence is?"

The shift towards security is not only visible in cases dealing directly with 9/11. The first decision by the Supreme Court after 9/11 that dealt with national security "had nothing to do with 9/11 itself [...] But it was of political and social impact. The judiciary took it very seriously. We passed our own anti-terror provision shortly after the PATRIOT Act. There was the conscience that there needed to be something to show how serious they were taking national security. [...] There was a shift in mentality that would not have been there otherwise" (Interviewee Canada#2).

When it comes to national security, according to Interviewee #1, the Court is not only willing to curtail rights in favour of security, but also glad to defer to the judgment of the government: "[There is] a deep reluctance of the court to tread into matters they will never have full record, full understanding of. A deep fear of their own institutional prominence." His view implies that the Court eschews the responsibility of balancing rights and security. On the contrary, the Court seems more at ease within a more bounded role of the Court: "There is a sense of what has to be compromised: boundaries of their own institution. A sense of lack of institutional competence" (Interviewee Canada#1). This view seems to echo the

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8 Neither the defendant nor his or her lawyer are allowed to review security sensitive material presented by the Minister's counsel in support of their case. A Special Advocate for the defendant is present as the sensitive material is reviewed. However, while the Special Advocate is allowed to confer with the defense before the evidence is reviewed, he or she is not allowed to have contact with either defendant or their counsel after viewing the material. Critical as the interviewees have been of the use of Special Advocates, before the addition of a Special Advocate (a result of the Charkaoui decision), there was no lawyer present at the proceedings to represent the defendant's interest (apart from the judge).

judgments of the Court itself, presented earlier in this paper, which show a reluctance by the Court to review the facts on which the government bases its claim that the case involves matters of 'national security' or that measures adopted were necessary in the name of 'national security'.

## VI.

Justice McLachlin remarked that "[t]errorism is an ongoing phenomenon that every democratic society must confront and must continue to confront" (2008). The War on Terror will still go on after the Afghanistan and Iraq Wars are over. With no end in sight, it becomes paramount the courts find a balance that does not permanently comprise individual liberties, yet leaves enough room to the government to protect the country from harm. Justice Binnie stresses that deterrence of terrorism cannot be done with classical criminal justice tools: "The need requirement of proof beyond a reasonable doubt may be simply unattainable in the murky world of counter-intelligence. The goals of punishment and deterrence are turned on their head when applied to individuals whose method of operation embraces suicide. If the goal is prevention of terrorist acts more than punishment, what is the role of the presumption of innocence?" (2004). Does that mean that courts have to accept a limitation of individual rights?

Scholars have either argued that courts are 'guardians' of liberties in times of crisis, or that they become less protective of rights and liberties, setting the balance between individual and collective rights towards the latter in times of crisis. The Supreme Court of Canada does not neatly fall into either of these categories.

The difference of means test points to a Court that is unwilling to sanction government's expansion of power in the name of security. Similarly, none of the interviewees argued that the Supreme Court is the right arm of the executive. However, almost all were of the opinion that it has not gone far enough in protecting the rights against a powerful, security-oriented executive. While limiting the government's actions, the Court has been reluctant in pronouncing some rights absolute. In *Charkaoui* the Court declared the process in which Security Certificates are issued not to be conform with the Charter, but affirmed indefinite detention, provided there was a "meaningful detention review process" in *Charkaoui v. Canada (Citizenship and Immigration)* ([2007] 1 SCR 350). In the same case, as cited before, the Court declared that "the right to know the case to be met is not absolute" and might be limited in the interests of national security (para. 57). Similarly, the Court decided that it was *generally* unconstitutional to deport to a country where there is a risk of torture, leaving open the possibility of circumstances in which it is not (*Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, para. 5).

Without declaring some rights untouchable, the Court leaves room for the executive to argue that the circumstances in particular cases justify the infringement of rights. The proposed ad-hoc review, then, leaves room for the abuse of power by the government.

The quantitative and qualitative findings appear, at first view, to be contradictory, but may be capturing two different dimensions of change caused by 9/11. Whereas the outcome-focussed quantitative findings indicate that the court continues to function as a check on the government, the qualitative findings can provide some context as to how far the continued check goes. According to the interviewees, there are areas in which the Court does not protect the rights of individuals forcefully enough. One possible interpretation of these findings is that the quantitative findings capture the movement of the government, demanding a higher degree of deference by the court. The resulting drop in average decisions supporting the government after 9/11 may thus only be the Court's attempt to stop the government from straying too far from the status quo antebellum.

Of course, neither the data I have collected in the empirical analysis nor the knowledge gained from interviews proves that the government has indeed moved towards increased rights repression. However, as Interviewee #6 remarked: "States have almost uniformly made over-broad claims based on national security. They have zeal – it is not a deliberate, evil, Machiavellian move. There is a Roman saying that the greatest evils are done by people with good intentions". Whether the increase in rulings against the government witnessed after 9/11 is enough to counterweigh the movement by the government, however, cannot be deducted from the data and invites further study. My modest goal with this analysis is to test whether 9/11 led to a shift in Supreme Court decision making regarding cases involving the government.

Testing the explanations that I offer in the conclusion requires going beyond the examination of the judiciary to incorporate executive (and legislative!) behavior following 9/11. Furthermore, while the question of whether the judiciary upheld the rule of law post-9/11 is important in itself, the broader question of whether it does so successfully and to what degree is equally interesting and important.

This is particularly true when considering that though courts in Canada, the U.K., and Strasbourg have declared the processes in obtaining 'Security Certificates' (Canada) or 'Control Orders' (U.K.) to be in violation of due process rights, courts and governments continue to struggle with the question of how the protection of security sensitive material can be harmonized with the right of a defendant to test the evidence against him or her. Though changes have been made (e.g. the use of Special Advocates, similar to the British system in Canada; temporary limits on the Control Orders in the U.K.; processing of a few chosen Guantanamo cases in the U.S.), the advances are minimal and not reflective of the – in

some cases very forceful and eloquent – judgments against these practices issued by the justices of the Supreme Court of Canada.

## Tables and Figures

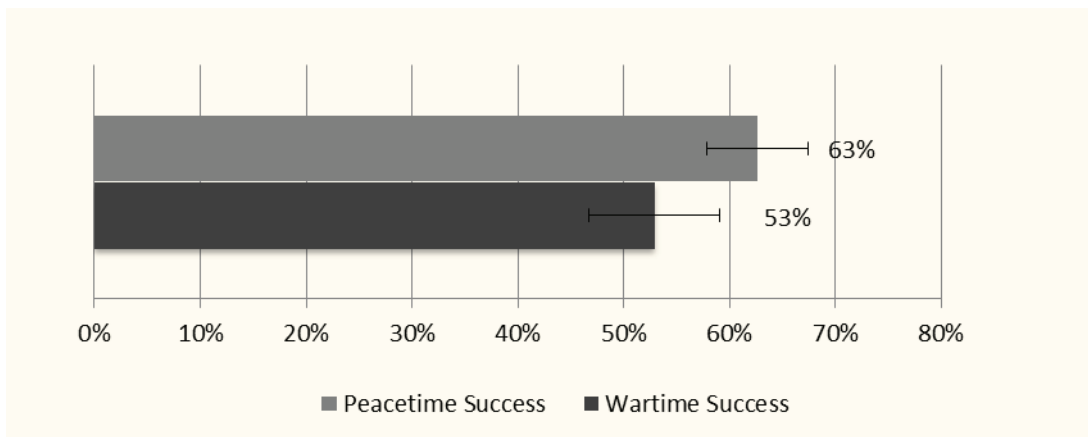
**Table 1**  
**Difference of Means Test for Government Success Pre- and Post-9/11 (1995-2007)**

	# Observ.	Mean	Std. Error	Std. Dev.	95% Conf. Interval
Peacetime	396	0.626	0.024	0.484	0.578 – 0.674
Wartime	257	0.529	0.031	0.500	0.468 – 0.591
<i>Combined</i>	<i>653</i>	<i>0.588</i>	<i>0.019</i>	<i>0.493</i>	<i>0.550 – 0.626</i>
<i>Difference</i>		<i>0.097</i>	<i>0.039</i>		<i>0.020 – 0.174</i>
Degrees of Freedom	651				
Pr( T > t )	0.014				

Difference = mean (Peacetime) – mean (Wartime)

Ho: Difference = 0

**Figure 1**  
**Government Success in the Supreme Court of Canada, 1995-2007**



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## Appendix

**Table A1**  
**Impact of War on Supreme Court of Canada Decisions for cases involving the Government as a Party, 1995-2007**

	Government Win Logit Coefficient	Standard Error
Wartime	-0.610*	(0.170)
Different Party	-0.318	(0.220)
Liberal Gov. Position	-0.187	(0.528)
Different Party x Liberal Position	-0.276	(0.520)
War Case	0.935	(1.172)
Constant	0.907*	(0.230)
Observations	632	
Log Pseudolikelihood	-421.31	

Logit regression models with clustered standard errors in parentheses

\*  $p < 0.001$

Table 1A depicts the results of a logistic regression on the data used for the difference of means test in the article. The dependent variable is a decision in favor of the government (1) or against it (0) on the Supreme Court of Canada. The variable *Wartime* remains the main variable of interest and indicates whether the case was decided after 9/11 or before.

While measures capturing ideology are useful in predicting likelihoods of liberal outcomes, they are not as likely to be clear predictors of government success in court. The government does not always stand for the conservative outcome in a given case, nor for the liberal outcome. Their ideological position is dependent on issue. Government success in the courts may arguably be more dependent on the difference in preferences between the court and the government than the ideological composition of the court.

I therefore included the measure *Different Party* to indicate whether the median judge participating in the case was appointed by a prime minister of the party composing the current government (0) or not (1). In order to account for the effect that more liberal justices tend to vote for the government when the government advances a liberal position – regardless of whether the appointing prime minister was Conservative or Liberal – I include a term denoting whether the government advances a liberal or conservative position (*Liberal Government Position*). An interaction term between these two variables (*Different Party x Liberal*



*Position*) controls for the potential effect that justices are more likely to vote with the government when the appointing prime minister's party is in power, provided the position they are advancing is in line with the justice's ideology. Lastly, the variable *War Case* is added to the model to control for cases that involve national security questions or are directly related to war. The variable was created by searching all cases included in the analysis for the expressions 'war', 'national security', and 'emergency' using the Lexis-Nexis database. The cases were then read to exclude cases that did not relate to a specific war or did not relate to national security. Errors are clustered by year.

As the coefficients show, the only variable that exerts a statistically significant impact on the propensity of a decision in favor of the government is the indicator for whether a decision was handed down after 9/11 or before. As the difference of means test showed, the government was less likely to secure a favorable decision by the Supreme Court of Canada after 9/11 than it was before. The change in predicted probability of a win in Court by the government in times of war is -15 percentage points<sup>9</sup>. In other words, the government is 15 percentage points less likely to win in Court after 9/11.

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<sup>9</sup> The change in predicted probability was calculated using *CLARIFY* for STATA (Tomz/Wittenstein/King 2003). The confidence interval around the -0.15 percentage point change is -0.07 and -0.23.