Patterns of Intervention in Federal Terrorism Cases

Interim Report to Human Factors/Behavioral Sciences Division, Science and Technology Directorate, U.S. Department of Homeland Security

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3300 Symons Hall • College Park, MD 20742 • 301.405.6600 • www.start.umd.edu

About This Report

This report is part of a series sponsored by the Human Factors/Behavioral Sciences Division in support of the Counter-IED Prevent/Deter program. The goal of this program is to sponsor research that will aid the intelligence and law enforcement communities in identifying potential terrorist threats and support policymakers in developing prevention efforts.

The authors of this report are Brent L. Smith (Terrorism Research Center, Fulbright College, University of Arkansas), Chris Shields (Terrorism Research Center, Fulbright College, University of Arkansas) and Kelly R. Damphousse (University of Oklahoma).

Questions about this report can be directed to Brent L. Smith at bls@uark.edu.

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Citations

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America's response to terrorism has changed dramatically over the past thirty years. Changes have included everything from the way in which terrorism is portrayed politically, to the manner in which terrorists are investigated, prosecuted, and punished. Modifications to governmental interventions also have affected the manner in which terrorists plan and conduct terrorist activities as well as the manner in which they defend themselves in court. Although it would be difficult to address all of these changes in a single paper, the purpose of the current manuscript is to provide an overview of the most significant events that evoked changes in the manner in which terrorists are portrayed, pursued, and prosecuted as well as the way in which terrorists and their defenders have responded to federal prosecutorial efforts. The specific ways in which federal agencies respond to terrorism, however, are rooted in much larger political and social issues.

American Terrorism and Governmental Response in Historical Context

For whatever reason, the United States has avoided the concept of "political crime" and "political criminality." Some have contended that this is due to ideological considerations – that America has tried to portray itself as a nation characterized by consensus and, as a result, America is simply immune to violent political conflict (Ingraham and Tokoro, 1969; Turk, 1982). For many years, terrorism and political crime were associated almost exclusively with the extreme left and Marxist revolutionaries. The Cold War, communism, Fidel Castro's support of revolutionaries in the United States, and the civil rights and student anti-war movements of the 1960s and 1970s shaped America's views on those who sought political change through violence and terrorism. Terrorists came to be described as exclusively young, Marxist, urban, educated revolutionaries who were bent on destroying capitalism (Russell and Miller, 1977; Smith and Morgan, 1994). The potential threat posed by these revolutionaries was not lost on the FBI. Efforts to suppress the activities of the Black

Panthers and other leftist groups through the FBI's now infamous counterintelligence program (COINTELPRO) of the late 1960s and early 1970s is well documented (Poveda, 1990).

Abuses within these programs and the impact of Watergate in the mid-1970s severely tarnished the public's image of the FBI. Confidence in the agency was shaken, and Congress and the American people demanded change. In the wake of the post-Watergate investigation, two significant events occurred that helped shape the definition of American terrorism and how the federal government responds to it. First, in April 1976, new FBI investigative guidelines were implemented under the guidance of then Attorney General Edward Levi. The guidelines identified the standards by which internal security investigations could be initiated and the length of time they could last (Hearings, 1978). As evidence of this change, the number of domestic security investigations dropped from more than 20,000 in 1973 to less than 200 in 1976 (Elliff, 1979). Second, in August 1976, the FBI dismantled its domestic intelligence units, moving investigations of domestic terrorism from its Intelligence Division to the General Investigative Division (Kelley and Davis, 1987; Poveda, 1990). This move limited the types of investigative techniques that could be used in terrorism cases to the standards used for traditional crimes.

The impact of these changes was two-fold. First, it reaffirmed that terrorism in the United States was to be viewed as "conventional crime" and that terrorists were to be treated as such. Second, it marked the end of an era in FBI history in which the agency focused on domestic intelligence gathering. The next generation of FBI agents generally was trained to avoid data collection on American citizens. The FBI adopted a much more "reactive" stance, investigating terrorist groups only when a "criminal predicate" could be established. The more pro-active "intelligence gathering" days of the pre-Watergate and COINTELPRO era were replaced with a desire

to restore the FBI image and characterized by a reluctance to invade the "personal privacy" of domestic extremist groups.

Domestic terrorist groups who survived the FBI's COINTELPRO operated almost with impunity during the late 1970s and early 1980s. During this time, the number of terrorism incidents in the United States reached its zenith according to the FBI's annual reports on *Terrorism in the United States*.[11] Leftist terror continued unabated, Puerto Rican separatists targeted both the island and the U.S. mainland, and far-right terrorism emerged partly as a response to gains made by African Americans as part of the civil rights movement. But like Watergate and COINTELPRO, which triggered the changes described above, new events would swing the pendulum the other direction.

The Impact of President Reagan on Counterterrorism Policy

With the election of Ronald Reagan in 1980, a substantially different trend in federal response to terrorism began to emerge. A staunch conservative, President Reagan saw leftist and Puerto Rican separatist groups as significant threats to American security. The FBI, however, was reluctant to reengage in domestic intelligence. Congressional criticism of the FBI subsequently mounted. A seminal event would trigger renewed FBI vigilance. In October 1981 in Nyack, New York, an armored truck was robbed in an incident that left two police officers dead. The robbery involved members of the long-forgotten Weather Underground and Black Liberation Army, which had also been providing assistance to the Puerto Rican separatist group, the Armed Forces of National Liberation (FALN). Later that year, members of another holdover leftist group from the mid-1970s, the United Freedom Front, killed a New Jersey state trooper. The leftist threat suddenly appeared to be quite real.

[1] The title of the reports has changed over the years. Initially, they were called *FBI Analysis of Terrorist Incidents in the United States*. In 1984, the title was changed to *FBI Analysis of Terrorist Incidents and Terrorist Related Activities in the United States*. The 1986 report reverted to the pre-1984 title. In 1987, the FBI adopted the title *Terrorism in the United States* followed by the year of the report.

These and other events resulted in revision of the Levi guidelines for FBI investigations. The new guidelines, issued by Attorney General William French Smith in 1983, set the standard for FBI investigations of domestic terrorism groups for the next twenty years. Although minor modifications were made by subsequent attorney generals, the theme and spirit of the "Smith Guidelines" remained intact until modifications after the September 11 attacks in 2001. After the Smith guidelines were issued in the spring of 1983, the FBI implemented a series of counterterrorism initiatives, including the creation of counterterrorism task forces around the country to combat specific regional and local threats. The success of these efforts was remarkable. Leftist groups like the Weather Underground and its radical East Coast offshoot, the May 19th Communist Organization, the United Freedom Front, and the Puerto Rican groups, the Macheteros and the FALN, were decimated by arrest, indictment, and convictions in federal courts. The extreme right met a similar fate. Leading members of the Order, the Sheriff's Posse Comitatus, the White Patriot Party, and the Aryan Nations, among others were indicted and convicted in a series of dramatic trials in the mid- to late 1980s.

The Smith Guidelines were quite explicit – terrorism investigations were to be "concerned with the investigation of *entire enterprises, rather than individual participants* [emphasis added]." Furthermore, terrorism investigations could not be opened unless "circumstances indicate that *two or more persons* [emphasis added] are engaged in an enterprise for the purpose of furthering political or social goals. . . that involve force or violence and a violation of the criminal laws of the United States" (Office of the Attorney General, 1983). Although the Smith Guidelines provided an opportunity for the FBI to reestablish itself in collecting domestic intelligence, the new policy was clearly intended to prevent a return to the abuses of the past. Furthermore, the FBI continued to self-impose restrictions on when terrorism investigations could be opened. Although the new guidelines did not mandate the

necessity of a "criminal predicate," the term came to be the standard descriptor used by agents when discussing the threshold for opening a terrorism enterprise investigation.

For domestic terrorists, the Smith Guidelines had a significant impact in four major ways. First, a "focus on groups, rather than individuals" would later lead terrorist groups in the U.S. to implement "leaderless resistance" or lone wolf strategies in an effort to avoid terrorism investigations. Second, the guidelines made it clear that dismantling a terrorist organization, primarily by decimating its leadership, was more important than convicting the actual perpetrators of specific terrorist incidents. This approach had a significant impact on negotiated pleas as a result of plea offers to cadre members in exchange for governmental cooperation against key leaders. Third, the FBI continued its "reactive" policy begun under Levi, as evidenced by a reluctance to get involved in domestic intelligence gathering. The number of active terrorism investigations generally ranged from eight to twelve in any given year (although the actual number and names of groups investigated is classified) from 1983 to the end of the century. Finally, the FBI and Department of Justice continued to maintain the position that terrorists should be perceived, portrayed, tried, and punished as "conventional" criminals (Smith and Damphousse, 1996).

Complicating this scenario was a new emphasis on international terrorism under Reagan's administration. As a result of the bombing of the U.S. Marine Corps barracks in Beirut in 1983 and the bombing of the LaBelle Disco in Germany, which targeted American service members, Reagan pushed for greater authority and jurisdiction in dealing with terrorism overseas. With passage of the Comprehensive Crime Control Act of 1984 and the Omnibus Diplomatic Security and Antiterrorism Act of 1986, the federal courts now assumed jurisdiction over terrorists who committed acts of terrorism against U.S. citizens or property overseas. These persons were typically investigated under a different set of FBI investigative guidelines – the *Attorney General Guidelines for FBI Foreign*

Intelligence Collection and Foreign Counterintelligence Investigations (FBI, 1998). While classified, it is clear that investigations involving international terrorists provided greater latitude to investigators than investigations under the domestic guidelines. Essentially, a "dual system" was emerging in which domestic terrorists were portrayed as "common criminals," while international terrorists were much more likely to be portrayed and described as "terrorists" (Smith, 1994). This line of reasoning emerged in the 1990s and was in place when international threats to the U.S. homeland began to become a reality.

America Awakens to the Threat of Terrorism

Despite having a long history of domestic terrorism, prior to the 1990s, most Americans viewed terrorism as something that happened in Europe and the Middle East. We typically viewed ourselves as immune from the leftist-anarchist terror associated with the Red Brigades, Black September, and the Baader-Meinhof Gang. The first World Trade Center bombing in 1993 and the Murrah Federal Building bombing in 1995 awakened the American public to the catastrophic damage that terrorists can inflict on a nation. Although the latter event precipitated significant focus on the extreme right and the so-called "militia movement" in the late 1990s, the first WTC attack was a seminal event for federal officials. Islamic extremists had targeted Americans overseas since the Iranian Revolution in 1979, but the U.S. mainland had remained relatively secure. That perception changed for federal officials in 1993. Subsequent plots uncovered over the years that followed relating to the bombing of New York City landmarks further emphasized that the threat of international terrorism on American soil was no longer merely a "threat."

Congress responded by passing the Antiterrorism and Effective Death Penalty Act of 1996. One of the most notable provisions of the Act involved the designation of "foreign terrorist

organizations" (FTOs) and penalties for providing material support to any group on this official list. For scholars studying those indicted for terrorism-related activities in the United States, the law created a new, and fairly large, group of persons indicted in federal courts. Over the next decade (1996-2006) over 325 persons would be indicted for providing material support to foreign terrorist groups. Emphasis on identifying these perpetrators blurred the previously rather simple distinctions between "domestic" and "international" terrorism. In the past, almost all domestic terrorists had been American citizens, while the overwhelming majority of international terrorists had been non-citizens. By the turn of the century, identifying who was being investigated under which set of Attorney General (AG) guidelines was becoming "muddied." After the attacks of September 11, 2001, it became even more difficult to distinguish.

Prior to 9/11, most domestic terrorists were portrayed in court as common criminals. In most cases, every effort was made to avoid raising the specter of a "political trial." Common practices used by both defense and prosecutors included filing motions "in limine" to avoid mention of the word "terrorist," the name of the terrorist group, or the ideology to which the group adhered; avoiding seditious conspiracy charges; and using "presumed" or "strict liability" counts that did not require mention of the terrorists' intent in order to obtain a conviction. Prosecutors had learned over the past twenty years that discussion of "motive" in terrorism trials could be extremely hazardous to conviction rates.

In contrast, international terrorists were usually portrayed quite differently. In many cases their trials were explicitly politicized and the defendants were frequently called "terrorists," "revolutionaries," and other terms that evoked a threat to national security. The successful conviction of the first WTC bombers and their associates in 1995 represented the first successful prosecution of terrorists on seditious conspiracy charges in over a decade.

Policy Changes after September 11

After September 11, the strategies used to combat terrorism in the United States underwent dramatic change. In broad terms, American antiterrorism policy is now focused on terrorist organizations, affiliated networks, and state sponsors in an effort to identify potential terrorist threats and *proactively prevent* future attacks. In a seminal statement released after September 11, Attorney General John Ashcroft explained that the policy of the United States Government changed from prosecuting terror-related crimes that had already occurred to thwarting attacks before they could happen (Ashcroft, 2001).

Prior to this time, the FBI had remained primarily a "reactive" agency – in which "preventive" intelligence gathering played second fiddle to the more conservative standard associated with a "criminal predicate." After September 11, 2001, Congressional and public complaints regarding why the FBI did not have an intelligence apparatus in place to prevent such an attack were commonplace, and the nation moved quickly to encourage intelligence gathering and intelligence sharing.

With these new proactive goals in mind, the U.S. Congress and Executive Branch agencies changed a number of policies to provide new tools for combating terrorism. The creation of fusion centers, the National Counterterrorism Center, and passage of new, less restrictive investigative guidelines by Attorney General Ashcroft reflected this paradigm shift. Some policies expanded legal authority to engage international terrorism that occurs away from American soil (Perl, 2003). Other policies expanded legal authority to intercept, investigate and prosecute domestic terrorists.

The research presented here focuses on changes in domestic policies that affected the prosecution of terrorists. For example, the Anti-Terrorism and Effective Death Penalty Act was revisited and the USA PATRIOT Act of 2001 (Patriot Act) was created to extend and strengthen U.S. antiterrorism policy. In addition, the Executive Branch changed Department of Justice policy on how

the FBI and U.S. Attorneys would handle the investigation and prosecution of terror suspects, namely through the aforementioned Ashcroft guidelines.

Pre-9/11 guidelines (Smith) had required FBI field offices to refer potential terrorism investigations involving two or more persons to the director or assistant director of the FBI; they, and only they, could authorize a "terrorism enterprise" investigation. Once the director authorized such an investigation, he had to report that fact to the Office of Intelligence Policy and Review. The prior Guidelines also required the director or another top official to monitor the progress of the investigation at 180-day intervals. Section (B)(4)(a) of the Ashcroft Guidelines loosened those standards by allowing agents in the field to authorize a terrorism investigation for a period of up to one year.[2] While a field office was required, within one year, to report to FBI HQ any terrorism investigations it initiated and provide reports, permission to open an investigation was no longer necessary. The research that follows examines how these changes impacted government interventions in, and outcomes of, federal terrorism cases.

Data and Methods

The basic American Terrorism Study (ATS) data set is comprised of approximately 80 variables that measure defendant demographic information (e.g., *race, sex, age, income, education level, marital status,* etc.), general case information (e.g., *number of counts, year of indictment, criminal statute, length of case, case outcome, sentence length,* etc), terrorism-specific information (e.g., *type of terrorism, group affiliation, length of membership, role in group, how recruited, intended targets, actual targets,* etc.), and some case information unique to terrorism (*e.g., prosecution methods, defense methods, amount of community sympathy*).

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[2] But unlike the Smith Guidelines, the Ashcroft Guidelines allowed the Special Agent in Charge to renew the investigation without additional authorization from FBI HQ.

The Prosecutorial and Defense Strategies (PADS)[3] database is a complement to ATS and contains supplemental variables that measure the strategies used by legal counsel as well as other legal nuances. For example, PADS variables track information about the type of attorney used and the database includes variables that measure whether the defendant received bail, and if not, the reason bail was denied. One set of variables tracks whether a superseding indictment was filed in each case, and another set of variables tracks the number of counts added or dropped from the original indictment. These counts were coded by statute number and by United States Code chapter. These data also track defense motions and their outcomes, for example: defense challenges to the Federal Intelligence Surveillance Act (FISA); motions to suppress physical evidence; motions to suppress electronic surveillance; motions to sever counts; motions to suppress statements, and; an entire range of *pro se* motions. Similarly, PADS data track prosecution motions and outcomes (e.g., whether CIPA[4] protection was sought, motions to exclude defense evidence, challenges to defense strategies, etc.).

As part of START's project focused on creating an Integrated U.S. Security Database (IUSSD), data from PADS have been integrated into ATS, expanding the depth of information available on federal terrorism cases, and PADS data are also being included for newly coded cases. These efforts have expanded by more than 10% the number of terrorism defendants included in ATS. By the completion of the IUSSD project, we estimate that the size of both databases will roughly double, providing a nearly complete trial record of federal terrorism cases from 1980 to 2011. The current sample of almost 800 cases represents almost the entire population of federal terrorism cases from 1980-2004, while the sample from 2005-2011 represents only about 25% of terrorism cases during

[3] The PADS dataset and codebook were originally created as part of a National Institute of Justice grant that was completed in 2009NIJ Award # 2005-92495-AR-IJ. An Assessment of Defense and Prosecutorial Strategies in Terrorism Trials: Implications for State and Federal Prosecutors.
[4] Classified Information Protection Act.

this period. Thus, the findings we present in this manuscript are only preliminary, but they are exciting.

We used a number of variables that measured legal strategies. Prosecutorial Method is an ordinal level variable coded into three categories. See Table 1 for the frequency distribution of prosecution strategies.

Table 1
Frequency Distribution: prosecution methods used

Prosecution Methods	Frequency	Percent (excluding missing cases)
Conventional criminality	180	23.05
Implicit politicality	172	22.02
Explicit politicality	429	54.93
Missing	2	
Total	783	100%

The first category is *conventional criminality* and involves cases in which the defendant was charged with conventional criminal charges (i.e., no motive element) and the prosecution made no attempt to link the defendant to a terrorist organization or a terrorist act. The next category, *implicit politicality*, is comprised of cases in which a defendant was indicted on conventional criminal charges and in which the prosecution linked the defendant, expressly or impliedly, to a terrorist group or act of terrorism. The final category is *explicit politicality* and is comprised of cases involving counts that drew into question the defendant's motive for committing a crime (e.g., sedition, conspiracy to murder, etc.), and cases where the defendant was publicly linked to a terrorist group. Overall, of the 783 defendants in the database, slightly over half (54.9%) were explicitly labeled as terrorists by federal prosecutors.

Similar to prosecution strategy variables, we also analyzed defense strategy variables from the PADS database. For bivariate analyses, the three most common defense methods were used. The

first defense strategy, *political persecution,* consists of those cases where the defendant claimed that he or she was innocent and being prosecuted because of his or her political and/or religious beliefs. Second, the defense strategy *disassociation* is comprised of cases where the defendant attempted to distance herself/himself from group members and/or an ideology. Finally, the third defense strategy, *conventional,* consists of cases where the defense used a traditional criminal defense. The remaining defense strategies[5] were coded system missing (n =81).

Table 2
Frequency Distribution: defense methods used

Defense Methods	Frequency	Percent (excluding missing cases)
Political persecution	134	19.1
Disassociation	183	26.1
Conventional	385	54.8
Other/Missing	81	
Total	783	100.0%

Table 2 provides the frequency distribution for defense strategies. In contrast to prosecutors, defense counselors chose a conventional defense for slightly over one half of the defendants. Another one-quarter (26.1%) made efforts to disassociate their clients from the terrorist group, usually by filing motions *in limine* to prevent prosecutors from using the name of the terrorist group or by requesting severance from other indicted members of the group. The remaining 19.1% chose the opposite route – choosing instead to acknowledge their allegiance to the terrorist group, but claiming that they were the victims of political persecution because of their beliefs and actions.

[5] Those defense strategies included portraying oneself as a freedom fighter, claiming the federal government lacked jurisdiction, and a variety of affirmative defenses (e.g., insanity). They comprise less than 7% of the sample.

The remainder of this paper focuses upon potential changes in the behavior of federal prosecutors and defense attorneys after 2001. In particular, we were interested in examining how the events of September 11 may have affected the manner in which federal investigators pursued these cases; how prosecutors and defense attorneys portrayed their clients; and conviction rates in terrorism trials. To determine whether changes occurred in the wake of 9/11, we divided the database into two samples – pre- 9/11 and post- 9/11(excluding cases from 2001) – and explored potential differences in these samples related to our variables of interest.

Results

Our examination of terrorism cases revealed that not only do prosecutors treat terrorists differently at trial, and not only do terrorist defendants behave differently than traditional offenders, but the types of cases that prosecutors bring against defendants are often driven by policy goals set by the Executive Branch. Responding to the aforementioned guidelines put in place by Attorney General Ashcroft, the FBI investigated and referred, and Assistant United States Attorneys prosecuted, an entirely new type of terrorism case in the wake of 2001. Robert Chesney (2007) coined the term *Diffused Prevention*, to describe cases in which the government, lacking evidence linking any particular person to a particular terrorist threat, engages in passive-defense and target-hardening measures. According to Chesney, diffused prevention cases involve charges like immigration fraud and financial fraud. The argument is that terrorist groups routinely engage in both types of behavior, so cracking down will interrupt terrorist planning.

We found evidence to support Chesney's proposition. Focusing on defendants in cases that involved either financial fraud or immigration, and cases that did not explicitly or implicitly link the defendant to a terrorist group or individual, we found no cases that matched Chesney's typology before September 11, 2001. By contrast we found that defendants in these cases made up more than 33% of our post 9/11 sample (see Table 3).

Table 3
Case Type Frequencies Before and After 9/11 (by Defendant)

Case Type	Pre-9/11	Post-9/11	Total
Immigration & Financial Fraud	0 0%	90 33.2%	90
All Others	512 100%	181 66.8%	693
Total	512 100%	271 100%	783 100%

Investigative Changes

The PADS database includes variables measuring three different types of witnesses common in many terrorism cases: the defendant who turns state's evidence, the un-indicted group member who works as a confidential informant, and the federal law enforcement officer who infiltrates the group as undercover agent. We focused on the last two categories in the following analyses to determine whether investigative strategies changed after 9/11 as terrorism policy shifted to become more proactive.

The confidential informant variable measures whether a confidential informant (not indicted, and non-law enforcement) provided the prosecution with any information, evidence, or sworn testimony in a case (1 = *yes*, 0 = *no*). Similarly, the government agent variable indicates whether the prosecution had information from law enforcement officers who had infiltrated the terrorist group. Both variables, confidential informant and government agent, include an ordinal-level measure of the

level of assistance provided. Both variables were coded in ascending order: *information only* =1; *recordings* =2; *sworn testimony* = 3; and, *recordings & sworn testimony* = 4.

We determined the proportion of cases using confidential informants in an independent samples t-test. We analyzed 219 cases in the database for which we had data on confidential informants (there was insufficient data to code the remaining 60 cases). The results in Table 4 show that the proportion of cases that involved confidential informants decreased significantly between the pre-9/11 era (59%) and the post-9/11 era (14%).

Table 4
Proportion of Cases with Confidential Informant

Era	Proportion	Total N	Std. Deviation
Pre-9 /11	.59	133	.493
Post-9/11	.14	86	.349
Total		219	

t(102.2)= 7.430, $p < .001$, Missing data=20 cases for pre-9/11, 40 cases for post-9/11

The results for undercover agents are presented in Table 5. As with confidential informants, the proportion of cases that made use of an undercover agent decreased dramatically after 9/11. Undercover agents were used in 29% of cases filed before 9/11, and in only 3% of case filed afterwards ($p < .001$). Among cases where at least one confidential informant was used, the average number of informants per case decreased after 9/11, although for the overall model, the results were not significant. (Model not shown.)

Table 5
Proportion of Cases with Undercover Agents

Era	Proportion	Total N	Std. Deviation
Pre-9 /11	.29	130	.457
Post-9/11	.03	86	.185
Total		216	

t(185.9) = 4.96, $p < .001$, Missing data=23 cases for pre-9/11, 40 cases for post-9/11

The analyses in table 6 and 7 focused only on confidential informants in *event-linked* cases (cases in which the defendants were linked to a planned or completed act of terrorism). There were a total of 126 event-linked cases and 24 event-linked cases in the pre- and post-9/11 samples respectively.[6] Of those, we were able to code *the number of confidential informants* in 55 pre-9/11 cases and 5 post-9/11 cases. The results in Table 6 indicate that before 9/11 the prosecution used an average of 4 informants in these cases, and just 1.2 after 9/11, but the sample is too small to draw definitive conclusions.

Table 6
Number of Confidential Informants in Event-linked Cases

Era	Mean #	N	Std. Deviation
Pre-9 /11	4.00	55	13.264
Post-9/11	1.20	5	.447

t(35) = .895, *p = .377*

Next, we determined the average amount of assistance provided by confidential informants before and after 9/11 in event-linked cases. Our sample size on this variable was smaller in the pre-9/11 group by four cases. As mentioned above, the coding for “Level of Confidential Informant Assistance" is *information only* =1; *recordings* =2; *sworn testimony* = 3; and, *recordings & sworn testimony* = 4. Thus, the variable is technically an ordinal variable. Comparison of the pre-9/11 data with post-9/11 data can be conducted two ways. Technically, the most appropriate test is the Mann-Whitney U test, which allows us to compare median values for two different groups. The test assumes ordinal or continuous data in two independent groups. The null hypothesis of the test is that the medians for the two groups are equal. A significant result suggests that there is a difference between the two groups. The median score for "Level of CI Assist" during the period prior to 9/11 is 3

[6] The remaining 129 cases involved defendants who were linked to a terrorist group or extremist ideology, though not an event (pretextual cases), or engaged in a specific type of crime targeted by the FBI, but not directly linked to a group or specific event (diffusion cases).

while the median for that same variable after 9/11 is 2. While this is a small difference, we conducted a Mann-Whitney U test. Not surprisingly, the results were not significant (p=0.33), suggesting that the amount of CI assistance was the same before and after 9/11. Given that we have so few post-9/11 cases (n=5) and a relatively limited number of categories (i.e., four), we added an additional set of analyses to provide additional insight into the issue. Even though the "Level of CI Assist" variable is ordinal and not normally distributed, we also conducted a t-test on the same data. The results of the t-test (shown in Table 7) suggest some support for the notion that the amount of CI assistance decreased after 9/11. The mean score for "Level of CI Assist" was 2.71 before 9/11 and 2.0 after 9/11 (significant at the .05 level). Of course, these findings are somewhat tempered by the fact that we only have 5 cases in the post-9/11 era.

Table 7
Average Level of Assistance Provided by Confidential Informants in Event-linked Cases

Era	Mean	Number of Cases	Std. Deviation
Pre-9/11	2.71	51	1.113
Post-9/11	2.00	5	.707

$t(6) = 2.7, p < .05$ Missing data for 4 pre-9/11 cases with CIs

We suspected that the “early prosecution” mandate demanded by Attorney General Ashcroft might impede the government’s ability to infiltrate extremist groups with agents, and likewise, it would limit the amount of time government agents had to develop relationships with potential informants who were associated with group members. While these results are preliminary, and could change significantly when the remaining post 9/11 cases are coded and analyzed, the findings suggest there was a significant shift in the way the government pursued suspected terrorists after 9/11.

The policy shift may have been responsible for limiting the amount of evidence available to prosecutors. Less evidence probably caused a shift in the type of cases prosecutors pursued and the

type of prosecution strategies they employed—ergo, an increase in negotiated pleas. Finally, lower levels of evidence might be the cause of the increase in the number of case dismissals we describe below.

Prosecutorial Strategies

To determine what changes occurred in case outcomes in the wake of 9/11, we divided the database into two samples (excluding cases from 2001) and ran a crosstab of case outcome among defendants in both samples (See Table 8). Overall, conviction rates for indicted defendants increased slightly from 77.1% in the pre-9/11 era, to 78.1% in the post-9/11 era among the 728 defendants in the sample whose cases were completed. The most dramatic finding from Table 8, however, is the reduction in the number of jury trials and the increase in the number of guilty pleas in the post-9/11 era. While less than one-half (43.2%) of the defendants prior to 9/11 pleaded guilty, this proportion increased to two-thirds (66.5%) after 9/11.

Table 8
Disposition of Defendants Before and After 9/11

Era	Dismiss/ Mistrial	Acquittal at Trial	Jury Conviction	Plead Guilty	Total
Pre-9/11	73 14.7%	40 8.1%	168 33.9%	214 43.2%	495
Post-9/11	48 20.6%	3 1.3%	27 11.6%	155 66.5%	233
Total	121 16.6%	43 5.9%	195 26.8%	369 50.7%	728 100.0%

$X^2 = 62.148$, df = 3, $p < .0001$ 55 system missing (fugitive, transferred, etc)

Next we looked at prosecution strategies between each era to determine whether prosecutors were doing anything different. The model produced a large and highly significant chi-square (X^2 =

135.9, df = 2, p < .001), indicating a tremendous variation between expected and observed counts in each of the cells, with less than a one in a thousand chance that the variation occurred randomly. The results (see Table 9) show a marked decrease (from 64.0% to 33.9%) in the governments' use of the "explicit politicality" prosecution strategy after 9/11. Prosecutors' use of the middle-ground strategy, "implicit politicality," also dropped from pre-9/11 (24.9%) to the post-9/11 sample (15.9%). Conversely, the use of a "conventional criminality" prosecution strategy more than quadrupled from pre-9/11 (10.7%) to post-9/11 (50.2%). These findings raise the possibility that prosecutors have altered their strategies, focusing more on traditional legal approaches, and in turn, have been more successful in reaching guilty pleas, rather than taking cases to trial.

Table 9
Prosecution Strategy Before and After 9/11

Era	Conventional criminality	Implicit politicality	Explicit politicality	Total
Pre-9/11	57 10.7%	132 24.9%	340 64.0%	529
Post 9/11	117 50.2%	37 15.9%	79 33.9%	233
Total	174 22.8%	169 22.2%	419 55.0%	762 100.0%

X^2 = 135.970, df = 2, p < .0001 21 system missing (fugitive, awaiting trial, etc)

Defense Strategies

We used similar analyses to determine whether changes had occurred in defense strategies (see Table 10). This model produced a large chi-square value (62.258) and was statistically significant (p < .0001). Here, we noted a dramatic decrease in the use of political persecution and disassociation strategies, and more reliance on traditional defense strategies.[7] After 9/11, defendants

[7] We ran a separate model, not presented here, where we removed immigration and financial fraud cases. The percentage of defendants using a conventional defense did drop to 54%, but there was, nonetheless, a significant increase in the use of a conventional defense in the post-9/11 era.

used a conventional criminal defense in more than three-quarters of all cases (76.4%), compared to defendants who used the same defense in less than half the cases (44.6%) prior to 9/11. Defendants used the political persecution defense less often in the post-9/11 era (13.9%) than in the pre-9/11 era (22.5%), but defendants' use of disassociation dropped even more dramatically after 9/11. Before 9/11, defendants relied on the disassociation defense in about one-third of all cases (32.8 %), but in less than one out of ten cases after 9/11 (9.6%). This is probably due to federal prosecutors' decreased use of the explicit politicality prosecution strategy, and their increased reliance on prosecuting terrorist defendants like traditional offenders in the post-9/11 era. Shields (2011) has observed that the use of highly politicized prosecution strategies is significantly correlated with the defendant's use of specialized defenses, such as disassociation and political persecution.

Table 10
Defense Strategy Before and After 9/11

Era	Political Persecution	Disassociate	Conventional	Total
Pre-9/11	105 22.5%	153 32.8%	208 44.6%	466
Post 9/11	29 13.9%	20 9.6%	159 76.4%	208
Total	134 19.9%	173 25.7%	367 54.5%	674 100.0%

$X^2 = 62.258$, df= 2, $p < .0001$ 109 system missing

Not only were defendants more likely to use a conventional defense strategy, an independent sample t-test ($p < .0001$) (results not shown) revealed that they filed fewer motions in the post-9/11 era (M=9.54, SD 17.04) than in the pre-9/11 (M=38.3, SD = 60.4). The size of cases was smaller as well. The results, presented in Table 11, are statistically significant ($p < .001$), and show there was a significant drop in the average number of defendants per case between the two samples. Before

9/11, cases involved an average of 10.6 defendants, but in the post-9/11 era, that average dropped by more than one-half to just 4.2 defendants per case. Both of these findings are suggestive of proactive, early intervention efforts by investigative and prosecutorial agencies.

Table 11
Average Number of Defendants per Case Before and After 9/11

Era	Proportion	Number of Cases	Std. Deviation
Pre-9 /11	10.57	531	9.202
Post-9/11	4.19	233	3.873

t(764) = 10.182, p < .0001 19 system missing

Upon learning that prosecutors were treating defendants like traditional offenders more often in the post-9/11 era than before, and also knowing that defendants were more likely to plead guilty and use traditional defenses in the post 9/11 era, we felt it necessary to determine whether prosecutors were charging defendants with less severe charges in the post-9/11 era. Analyzing the case severity of every lead offense filed against each defendant from both eras, we discovered a statistically significant drop (see Table 12). Using a scale of 1 to 29, with the latter being the most severe charge (e.g., Treason & Sedition; see appendix), the independent samples t-test revealed a slight but statistically significant decrease in average count severity between the pre-9/11 era (M=18.91, SD=9.260) and the post-9/11 era (M = 16.04, SD 8.775). When immigration and financial fraud cases were removed from the model (not shown), the results were not statistically significant [t(134) = .180, p = .858]. To summarize, when looking at terrorism cases across eras, there was a slight statistically significant decrease in count severity, but this difference dissipated when the expanded scope of what the government now considers terrorism-related (mostly immigration, financial fraud, and

identification fraud cases with no known link to terrorism, but which are investigated and tried as terrorism cases) was excluded from the analysis

Table 12
Average Count Severity Before and After 9/11

Era	Mean	Number of Cases	Std. Deviation
Pre-9/11	18.91	420	9.260
Post-9/11	16.04	212	8.775

t(630) = 3.803, p < .0001 151 system missing

Sentencing

Next, we looked at the sentencing differences between eras. We recoded *life in prison* and the *death penalty* to 720 months (60 years) and ran an independent sample t-test, the results of which are presented in Table 13. While conviction rates went up after 9/11, and ostensibly, defendants were being charged with slightly less severe lead offenses, the average prison sentence dropped from 203.3 to 65.0 months, a gap of approximately 138 months. When immigration and financial fraud cases were eliminated (results not shown), the gap narrowed to approximately 120 months, or 10 years (p=.03), but it remained a rather dramatic and statistically significant difference between eras.

Table 13
Average Sentence in Months Before and After 9/11

Era	Mean	Number of Cases	Std. Deviation
Pre-9/11	203.31	371	411.960
Post-9/11	64.95	164	124.355

t(533) = 4.215, p < .0001 248 system missing (including non-convictions)

It should be noted that it is somewhat inappropriate to simply use “sentence in months” as an indicator of changes in sentence length over the past thirty years due to changes in federal sentencing procedures. One goal of the federal sentencing guidelines was to reduce disparity among “similarly situated” defendants. Some of our previous work has addressed this issue. Specifically, we

had originally found that individuals involved in terrorism cases received sentences that were, on average, about 3 ½ times longer than others convicted of the same lead offense (Smith, 1994; Smith and Damphousse, 1996). A later examination of post-sentencing guidelines in terrorism cases found that this disparity had dropped considerably, but that it remained significant (Smith and Damphousse, 1998). Although a more sophisticated test of sentence disparity is beyond the scope of this paper, the current findings suggest that this trend continues.

However, the magnitude of the reduction in sentencing disparity in the post-9/11 era suggests that a number of other factors may be at work. First, there was a small, but significant decrease in count severity in lead offenses (when including immigration and financial fraud cases) in the post-9/11 cases. This likely had a small but significant impact on the average sentence length. Second, one would expect shorter prison sentences for defendants who plead guilty compared to those who are convicted at trial. As mentioned above, prosecutors and defendants agreed to guilty pleas in two-thirds of all post-9/11 cases, a 23% increase from pre-9/11. Third, Jackson (2011) determined that prosecutors were more likely to accept guilty pleas on fewer counts within an indictment in the post-9/11 era, reducing the opportunity for consecutive sentences. Jackson found the percentage of unconvicted counts per indictment pre-9/11 was roughly 37% while the percentage of unconvicted counts per indictment post-9/11 was about 82%. In essence, a chain of events is probably responsible for this rather dramatic decline in sentence length. As the FBI has moved to a “proactive” rather than “reactive” stance regarding terrorism after 9/11, they have begun to interdict earlier in investigations. This frequently means evidentiary strength is not as great in these cases (Jackson, 2011), which results in greater willingness among prosecutors to negotiate a plea agreement. The ultimate outcome appears to be a reduction in sentence length among terrorists. More direct testing, however, is needed to confirm this line of reasoning.

Appendix: Count Severity Codes

Listed in order of severity. (Federal A.O. code is in parentheses.)

Count	Severity of Count *(scale=1-29)*
Treason, sedition (9754)	29
Murder, 1st (0100)	28
Kidnapping, hostage (7611)	27
Racketeering (7400)	26
Explosives (994)	25
Firearms (7380)	24
Robbery, bank (1100)	23
Murder, 1st, conspiracy (0101)	22
Embezzlement, bankruptcy (4990)	21
Counterfeiting (5800)	20
Robbery, conspiracy (1400)	19
Manslaughter (0300)	18
Firearms, machine guns, conspiracy (7800)	17
Drugs, cocaine (6701)	16
Drugs, distribution marijuana (6501)	15
Auto theft (5100)	14
Embezzlement, other (4990)	13
Theft, bank (3100)	12
National defense (9790)	11
Racketeering, arson, conspiracy (7410)	10
Embezzlement, postal/wire (4700)	9
Theft, transportation, conspiracy (3600)	8
Escape (7312)	7
Aiding escapee (7320)	6
Theft, U.S. property, conspiracy (3400)	5
Embezzlement, false claims (4991)	4
Firearms, possession (7820)	3
Contempt (9921)	2
Miscellaneous (9999)	1

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