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FINAL REPORT

**An Assessment of Defense and Prosecutorial
Strategies in Terrorism Trials:**

Implications for State and Federal Prosecutors

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EXECUTIVE SUMMARY

An Assessment of Defense and Prosecutorial Strategies in Terrorism Trials: Implications for State and Federal Prosecutors

After the attacks of September 11, 2001, the Department of Justice published several reports claiming success in prosecuting terrorists (e.g., DOJ, 2006). Some academics, politicians, and government officials challenged those claims.¹ During this time, there was a dramatic increase in public interest in the outcome of federal terrorism cases, and an increase in the level of attention paid to how the government handles cases.² Determining whether government has been successful in the war on terrorism is difficult because defendants accused of “terrorism-related” offenses are tried in numerous federal district courts and state courts each year. Few prosecutors have ever faced a politically motivated offender at trial. Those who have, found themselves responding to persons and issues that were very different from those faced in traditional trials. Other than findings from the American Terrorism Study (Smith and Damphousse 1996; 1998; 2003; Smith et al., 2002), little empirical information has been available to provide guidance relative to the prosecution of these offenders.

Existing research, which primarily consisted of terrorism cases filed before 9/11, indicated that federal criminal cases involving terrorism defendants differ from other criminal cases in significant ways.³ For example, defendants who were labeled terrorist were more likely to go to trial than non-terrorists, and terrorist defendants were sentenced to significantly longer

¹ See, for example, GAO, 2003; and Eggen and Tate, 2005.

² Different media outlets have levied charges alleging prosecutorial misconduct (Detroit Free Press, 2006) and witness coaching (NPR, 2006).

³ See, for example, Smith and Orvis 1993; Smith 1994; Smith and Damphousse 1996; 1998; Smith et al., 2002.

prison sentences than similarly situated non-terrorist defendants.⁴ Those studies also suggested that there may be important differences between terrorists and non-terrorists with regard to characteristics and processing – that is, prosecuting attorneys and defense attorneys have developed legal strategies unique to federal terrorism cases.

This research project involved an examination of federal criminal court cases (1980 - 2004) that were filed after defendants were referred to U.S. Attorneys by the Federal Bureau of Investigation following an official terrorism investigation.⁵ The study focused on the court room processes and legal strategies that were used by federal prosecutors and criminal defense attorneys from the moment of indictment until the case reached final disposition. Analyses of these events provide state and federal prosecutors with information to assist them in the efficient prosecution of terrorism cases. This research included an examination of the relationships between prosecutorial and defense strategies for the purpose of determining their relationship to case outcomes in terrorism trials. This study also included an analysis of pre- and post-9/11 federal terrorism cases to determine whether terrorism prosecutions have been more or less successful in the post-9/11 era.

METHOD

To accomplish these goals, data for this project were extracted from several sources: (1) the “American Terrorism Study” (ATS), which includes a statistical database of federal

⁴ Smith and Damphousse, 1996; 1998; Damphousse and Shields, 2007; Bradley, Damphousse and Smith, 2008

⁵ Lists of terrorist defendants were compiled by the FBI upon request of either the House Judiciary Subcommittee on Crime or the Senate Judiciary Committee and forwarded to ATS project personnel for further data collection on each case. The lists include only those federal indictments resulting from investigation by the FBI for terrorism-related activities under the “terrorism enterprise” section of the *Attorney General Guidelines on General Crimes, Racketeering Enterprises, and Domestic Security/Terrorism Investigations* and subsequent editions (1983, 1989, 2002) or in the case of international terrorists, those persons indicted in federal courts as a result of investigation under the *Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counter intelligence Investigations*.

indictments resulting from official FBI terrorism investigations for the period 1980-2004; (2) federal court case records (indictments, dockets, etc.); and (3) information from other open sources, such as newspaper accounts of the trials. The ATS database contains information on over 700 terrorists indicted for 9,633 violations of federal criminal law from 1980-2004.

In addition, a former Assistant U.S. Attorney served as a subject matter expert⁶ to identify important pleadings, motions, and other key events that occur in federal terrorism trials. One hundred-forty new variables were created to measure those factors. Among the new variables are measures that track information about the type of defense attorney used. The database includes variables that measure whether the defendant received bail, and if not, the reason bail was denied. One set of variables track whether a superseding indictment was filed in each case, and another set of variables track the number of counts added or dropped from the original indictment. 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 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, these new data track prosecution motions and outcomes (e.g. whether CIPA protection was sought, motions to exclude defense evidence, challenges to defense strategies, etc.). Data were collected from each case in the ATS database by examining the court case records. The new variables were then coded and entered into a flat-file database. Analysis focused on the following two research questions:

- 1. Is there a relationship between prosecutorial and defense strategies, and if so, what impact does it have on case outcomes?**
- 2. How did 9/11 impact the way the federal government responds to terrorism?**

⁶ Joe McLean, Former Assistant U.S. Attorney and Head of the Criminal Division (retired 10/04) for the Northern District of Alabama.

1. PROSECUTION AND DEFENSE STRATEGIES

Prosecutors sometimes politicize terrorism cases by drawing attention to terrorist defendants' ideological beliefs or terrorist group membership. In the most politicized cases, prosecutors pursue indictments that tie the defendants' ideological motivation to the elements of the case. In effect, prosecutors seek to prove that the defendants engaged in a criminal act to further terrorist goals. In other cases, prosecutors pursue conventional charges that avoid tying the defendants' ideological motivation to the elements of a case, but those prosecutors, nonetheless, attempt to introduce the defendants' terrorist "affiliation" at some point in the case. Finally, some prosecutors treat terrorist defendants as conventional criminal defendants, avoiding any mention of terrorist group affiliation.

As prosecutors developed new strategies to prosecute terrorist defendants, terrorist defendants (and their defense attorneys) developed counter defense strategies. Some defense teams used politicized defenses in an effort to portray the government's pursuit of terrorist defendants as something akin to a political witch hunt. Other defense teams focused on the prosecution's attempt to link the defendants to a terrorist group or ideology, and pursued strategies designed to disassociate the defendants from group affiliation. Some defense teams ignored the politicized nature of their cases and pursued a traditional criminal defense. Finally, some terrorists actually modified their precursor behavior and tactics to frustrate the investigation and prosecutorial process (Dampousse and Smith, 2004).

Of course, it is important to note that the cause and effect relationship may not be so cut and dried. It is probably unknowable how variables such as "strength of evidence" and other contexts might affect decision-making by both the prosecutors and the defendants. A case with

very strong evidence (e.g., tape recordings of a conspiracy) likely affect how both prosecutors and defendants decide how to handle a case. Similarly, a case with high notoriety may be more politically difficult for a prosecutor to plea bargain. Unfortunately, access to these kinds of data is currently not available (although we do try to address strength of evidence with a proxy variable). Still, discovering the extent to which such strategies are used (and measuring the success of these strategies, alone and in combination) is an important first step in understanding how terrorist trials work differently from traditional criminal trials. To the extent that terrorism-related crimes are tried in criminal courts (cite Chermak and Freilich, criminology and public policy 2009, forthcoming), these findings have important implications for both state and federal prosecutors.

Key Findings

- **The more politicized the prosecution strategy, the more likely the case will go to trial and the more likely it will result in acquittal or dismissal.**
- **Treating terrorist defendants like traditional offenders results in the highest plea and conviction rates.**
- **The most explicitly politicized prosecution strategies double the likelihood of acquittal and dismissal.**
- **Highly politicized defense strategies are associated with an increase the likelihood of conviction.**

To measure the impact of prosecutorial strategies, this study examined *prosecutorial method*. This variable was coded in three categories (see Table 1). The first category, *conventional criminality*, involves cases in which defendants were charged with conventional criminal charges and the prosecution made no attempt to link the defendants to a terrorist

organization or a terrorist act. Slightly over 20 % of the defendants were prosecuted using this approach. The next category, *political innuendo*, is composed of cases in which defendants were indicted on conventional criminal charges and the prosecutor linked the defendants, expressly or impliedly, to a terrorist group or ideology. The final and most widely used category was *explicit politicality*. It involves counts that draw into question the defendants' motives for committing a crime (e.g. sedition, conspiracy to murder, etc.). Typically, defendants in these cases are publicly linked to a terrorist group. Prosecutors chose this method to use against defendants slightly over half the time.

Table 1: Prosecution Methods Used

Prosecution Methods	Number of Defendants	Percent
Conventional criminality	149	21.2
Political innuendo	170	24.2
Explicit politicality	385	54.6
Total	704	100.0

Similar to prosecution strategy variables, this study examined *defense method*. Once again, three basic strategies emerged. The most frequently used method (about 45%) involved situations where defense attorneys used a *traditional* criminal defense. Slightly over one fourth of the defendants used a second method, *disassociation*, in an attempt to distance themselves from other members and/or an ideology. Finally, about 17 % of the defendants chose to claim that they were innocent and being prosecuted because of their political and/or religious beliefs. Additional defense strategies were identified, but analyses were conducted with the three most common, listed below. Table 2 provides the frequency distribution for defense strategies.

Table 2: Frequency Distribution: Defense strategies used

Defense Methods	Number of Defendants	Percent
Political persecution	120	17.0
Disassociation	179	25.4
Traditional	318	45.2
Other strategies used	87	12.4
Total	704	100.0

As Table 3 below shows, the overall conviction rate (either through guilty plea or trial conviction) for defendants in federal terrorism trials is approximately 84 %. That is over 10 % lower than traditional federal criminal cases. Portraying defendants as conventional criminals approximates the national conviction rates in other federal criminal cases. However, it appears that as more prosecutors politicize these cases, their conviction rates drop. The relationship between prosecutorial and defense strategies is situational. The results also indicate that defense strategies do not have as much of an impact on overall conviction rates, with one possible exception. The conviction rate for highly politicized defenses tended to be higher than the model average. While some strategies produce higher conviction rates and others produce lower conviction rates, the effect of how much lower or higher depends on the combination. Analyses showed that, despite being the most common combination of prosecution strategy and defense strategy, *conventional criminality* and *traditional defense* did not produce the highest conviction rates. The combination of a *conventional criminal* prosecution strategy and either the *dissociation* defense method, or the *political persecution* defense method produced the highest conviction rates. *Conventional criminality* produced the highest conviction rates among all prosecution strategies. *Political innuendo* was slightly less successful, overall, than *conventional criminality*.

Table 3: Frequency Table of Prosecution Strategy and Defense Strategy Conviction Percentages

		Prosecution Strategy			Overall conviction percentage by defense strategy
		Conventional Criminality	Political Innuendo	Explicit Politicality	
Defense Strategy	Political Persecution	5/5* 100% (conv rate)	29/30 96.7 %	57/68 83.8%	91/103 88.3%
	Disassociation	2/2 100 %	31/37 83.7%	97/122 79.5%	130/161 80.7%
	Traditional Defense	117/127 92.1%	45/51 88.2%	82/115 71.3%	244/293 83.2%
Overall conviction percentage by prosecution strategy		124 /134 92.5%	105/118 88.9%	236/305 77.4%	485/577 84.1%

* #convictions / #cases

Even though the *conventional criminality* prosecution strategy proved to be the most successful strategy overall, it did so only in a handful of cases where defendants used either the *political innuendo* or *dissociation* defense strategies. The *political innuendo* prosecution strategy, when used in cases relying on the *political persecution* defense produced the highest, statistically reliable results. The results suggest that this outcome was most likely due to the *political persecution* defense strategy, which had a positive effect on the probability of conviction. The lowest conviction rate occurred in the combination of *explicit politicality* prosecution strategy and *traditional* defense strategy.

In fact, among all prosecution strategies, *explicit politicality* produced the lowest conviction rate (77.4%). Similarly, the *disassociation* defense strategy produced the lowest conviction rates among all defense strategies (80.7%). *Explicit politicality* and a *traditional*

defense strategy was the combination that resulted in the lowest conviction rate. That trend did not continue across the different combinations. The findings showed that the *disassociation* defense strategy was more successful than the *traditional* defense strategy when used against the *political innuendo* prosecution strategy. Most likely this result occurred because of the nature of *political innuendo* cases and the amount and type of evidence that is used to link defendants to terrorism.

The results indicate that using the *explicit politicality* prosecution strategy presents prosecutors with the biggest challenge for gaining convictions. The findings produced a statistically significant negative effect on the likelihood of conviction even when the impact of evidentiary strength, case complexity, and count severity are controlled. Likewise, defendants who use the *political persecution* strategy, regardless of prosecution method, are statistically more likely to be convicted than when using an alternative defense strategy.

A Note About Seditious Conspiracy

Terrorism cases that have been explicitly politicized sometimes involve seditious conspiracy charges under 18 USC §2384, a statute that has been used infrequently over the last 60 years outside of terrorism cases. Between 1983 and 2004 thirty-eight persons indicted in FBI terrorism investigations included charges of seditious conspiracy. Such charges, by their very nature, result in explicitly politicizing the trial process and limiting prosecutorial options. Cases in which these charges occurred involved: (1) the trial of four FALN members in Chicago in 1983; (2) the 1988 trial of thirteen members of extreme right wing groups tried in Fort Smith, Arkansas, ten of whom were charged with seditious conspiracy; (3) the 1989 trial of the eight members of the United Freedom Front in Boston; (4) the 1995 case involving fifteen defendants

in the New York City landmarks bombing conspiracy; and (5) the 2005 conviction of Ali al-Timimi for his role in leading the Virginia Jihad Network.

These cases stand out due to the contrast in convictions rates for “domestic” terrorists charged with seditious conspiracy compared with “international” terrorists charged with this offense. In the two cases involving purely domestic groups (the right wing group leaders and the UFF members), the overwhelming majority were either acquitted of the charges outright or the charges were dismissed. Of the eighteen defendants charged with seditious conspiracy in these two cases, only two were convicted (both by early plea). In the Fort Smith case, all ten right wing group members were acquitted; while in Boston, three of the UFF members saw this charge dismissed and three were acquitted of it at trial.

Conviction rates in seditious conspiracy cases involving “foreigners” were dramatically higher. All four members of the FALN in the 1983 case were convicted at trial; thirteen of the fifteen Islamic extremists in the New York City landmarks case were convicted, ten at trial; and the leader of the Virginia Jihad Network was also convicted at trial in 2005. In comparison, for cases involving “international” terrorism, conviction rates for seditious conspiracy stand at 90% (18 of 20 defendants), while only 12.5% (2 of 16) of domestic terrorists charged with seditious conspiracy were convicted of this charge.

While it may be argued that American juries are more likely to perceive a greater threat from “international” terrorists than “homegrown” terrorists, other factors may have contributed to this disparity in conviction rates. In particular, the defendants in the two left- and right-wing domestic cases had been previously tried and convicted for crimes that later comprised the overt acts in the seditious conspiracy charges. This was also true of a 1989 conspiracy case involving members of the May 19th Communist Organization with similar results. In all of these domestic

cases, jurors (and even one judge) expressed the sentiment that “haven’t these defendants already been convicted of these crimes.” In contrast, the seditious conspiracy charges against most of the international terrorists were part of the original indictments in the first cases against these defendants. Regardless of the relative importance of these issues, both of these factors seem strongly correlated with conviction rates in seditious conspiracy cases: (1) whether the case involved “international” versus “homegrown” terrorists, and (2) whether the defendants had been tried and previously convicted of “overt acts” included in the seditious conspiracy charges.

2. PRE- AND POST-9/11

The events of 9/11 ushered in a number of policy changes that were aimed at improving U.S. antiterrorism policy. Among the changes that affected the FBI and the Executive Office of U.S. Attorneys was a mandate issued by former Attorney General John Ashcroft that directed both agencies to intercept, interrupt and prosecute suspected terrorists before another event like 9/11 could take place.⁷ Reports issued by Department of Justice concerning the effectiveness of these policy changes have been the subject of intense criticism. This study indicates that some of that criticism may be misplaced.

The findings suggest that the FBI and the EOUSA pursued two types of terrorism-related cases before 9/11 and added a third type afterwards. Before 9/11 almost all terrorism cases involved defendants who were linked to a terrorist group or ideology, and a majority of those defendants were linked to a planned or completed act of terrorism. After 9/11, and consistent with the new policy changes, the FBI and EOUSA began pursuing certain types of criminality in an effort to diffuse terrorist acts before they could occur. Hence, this new strategy is referred to as “diffusion.” To target international terrorist groups, officials focused on identification fraud

⁷ Ashcroft, John, (2002), Ashcroft fact sheet on new FBI investigative guidelines, Politechbot.com, September 21, 2002

that could be used to get human assets into the United States, and financial fraud that might be used to fund terrorist activity both here and abroad.

Key Findings

- **After 9/11, the government pursued a dramatically smaller proportion of cases that linked defendants to a group/ideology and a completed/planned act of terrorism (85 % before 9/11 to 28 % after 9/11).**
- **Plea bargain rates increased 32.7 % while acquittal rates decreased by 6.8 % in the post-9/11 era—resulting in an overall increase in conviction rates after 9/11.**
- **Prosecutors made a significant shift away from explicitly politicized prosecution strategies in the post-9/11 era (66.1 % to 25.3%).**
- **Prosecutors treated terrorist defendants like traditional offenders significantly more often in the post-9/11 era (52.4 %) than in the pre-9/11 era (11.2 %).**
- **After 9/11, in nearly half of all terrorism prosecutions, prosecutors pursued an entirely new type of terrorism case (diffusion) based in large part on changes mandated in post-9/11 antiterrorism policy.**

Cases in the study were divided by case type using the scheme in Figure 1.⁸ The *event-linked* category was composed of cases that linked defendants to a terrorist group or ideology and provided demonstrable links to a planned or completed act of terrorism. *Pretextual* cases were those where the government had some reason to suspect defendants were linked to a terrorist group/ideology, but no evidence linking them to an *act* of terrorism. In these cases, the prosecutor pursued any criminal charges that happened to be available as a pretext to get terrorists off the street. After the 9/11 attacks, public and congressional pressure demanded that the FBI become proactive with a renewed focus on intelligence gathering and terrorism prevention. Inevitably, criminal cases emerged out of terrorism investigations that lacked any

⁸ Robert Chesney (2007) created the scheme for the case type categories, but this research is the first to examine each in detail.

known links to terrorism. These are referred to as “diffusion” cases. Diffusion cases also occurred when the government pursued particular forms of criminality (e.g. identification/immigration or financial fraud) but lacked evidence that linked defendants to a particular terrorist threat or ideology. In effect, government officials became engaged in passive-defense and target-hardening measures. Potential terrorist threats are diffused, so the argument goes, because terrorist groups routinely engage in certain types of criminality, so cracking down on everyone interrupts terrorist planning.

Figure 1: Case Type by Terrorism Link

Case Type	Linked to Extremist Group or Ideology	Linked to a completed or planned act of terrorism
Event-linked	Defendant(s) linked in case documents	Defendants Linked in Case Documents
Pretextual	Defendant(s) linked in case documents	No Link
Diffusion	No Link	No Link

After the case types were established, analyses were performed dividing the cases into pre- and post-9/11 samples with the year 2001 deleted. Nearly 85 % of the terrorism cases in the pre-9/11 era were *event-linked*, with prosecutors pursuing *pretextual* cases against the remaining defendants. After 9/11, the proportion of *event-linked* cases dropped to just 30% while the percent of *pretextual* cases increased to 22 %. The results show that the push to be more proactive had a strong impact on prosecutors, as nearly half of the terrorism cases filed in the post-9/11 era were *diffusion* cases. With *diffusion* cases removed from the analysis, only 57% of the terrorism cases were event-linked, while the percentage of pretextual cases increased to 43%. This is to be expected. The policy shift ushered in by Attorney General Ashcroft

refocused law enforcement efforts towards intercepting and interrupting terrorist groups before those groups could successfully plan an attack. By charging potential terrorists as soon as criminal violations occurred, logically, there would be less evidence available for prosecutors to link defendants with terrorist acts.

As the results in Tables 4 and 5 reveal, there was also a change in the prosecution strategies used between the two eras. Notably, the use of *explicit politicality* dropped from 66 %

Table 4: Case Type by Prosecution Strategy Pre-9/11

Case Type	Prosecution Strategy			Total
	Conventional criminality	Political innuendo	Explicit politicality	
Event-Linked	24 5.6%	101 23.5%	305 70.9%	430 84.1%
Pretextual	33 40.7%	15 18.5%	33 40.7%	81 15.9%
Total	57 11.2%	116 22.7%	338 66.1%	511 100.0%

$X^2 = 88.7$, df 2, $p < 001$

Table 5: Case Type by Prosecution Strategy Post-9/11

Case Type	Prosecution Strategy			Total
	Conventional criminality	Political innuendo	Explicit politicality	
Event-Linked	5 10.0%	15 30.0%	30 60.0%	50 30.1%
Pretextual	11 29.7%	16 43.2%	10 27.1%	37 22.3%
Diffusion	71 89.8%	6 7.6%	2 2.6%	79 47.6%
Total	87 52.4%	37 22.3%	42 25.3%	166 100.0%

$X^2 = 98.2$, df 4, $p < 001$

to just above 25 %, while the use of *political innuendo* remained relatively unchanged between eras. The use of conventional prosecution strategies rose dramatically (from just over 11% to over 52%). Based on what we now know about the negative effects of using an explicitly politicized prosecution strategy, this shift accounts, at least partially, for the increased conviction rate in the post-9/11 era.

Some notable trends emerged within case types. For instance, among event-linked cases, those most likely to be explicitly politicized before 9/11 (71%), prosecutors used explicit politicality just 60 % of the time after 9/11. While the overall use of *political innuendo* as a prosecution strategy remained virtually unchanged between eras, there was a dramatic increase in its use among pretextual cases (from 18.5 % to 43 %) and a corresponding decrease in the use of *explicit politicality*. Even though *political innuendo* prosecution strategies had a negative impact on the likelihood of conviction compared to *conventional* prosecution strategies, the effect was smaller than the negative effect of *explicit politicality*.

After 9/11, prosecutors chose less politicized prosecution strategies than we expected. We theorize that by pursuing cases sooner, per post-9/11 antiterrorism policy, prosecutors had less evidence available to prosecute defendants using highly politicized strategies. That would explain the increased reliance on political innuendo and conventional criminality prosecution strategies in both event-linked and pretextual cases. It would also partially explain the higher conviction rate in the post-9/11 era. The diffusion cases we observed in the post-9/11 era also help explain the increased conviction rate. There were no diffusion cases listed by the FBI prior to 9/11, yet this category represents almost half of the cases filed afterwards. As Table 5 reveals, almost 90 % of the defendants in diffusion cases were prosecuted using conventional prosecution

strategies. Again, treating defendants as traditional offenders results in the highest conviction rates.

Taking the diffusion cases out of the post-9/11 sample is important because the resulting mix of event-linked and pretextual cases closely resembles the composition of cases filed prior to 9/11. This allowed a comparison of similar cases before and after 9/11 while placing diffusion cases in a category that could be considered separately. The average number of defendants indicted, per year, in event-linked cases was slightly lower in the post-9/11 era, decreasing from approximately 22 to 17 annually.⁹ The average number of defendants indicted in pretextual cases increased from 4 to 13 annually. In this study, the total number of defendants who were indicted in cases that were linked to a terrorist ideology (total of event-linked and pretextual cases)

Table 6: Case Type by Defense Strategy Pre-9/11

Case Type	Defense Strategy			
	Political Persecution	Disassociation	Traditional	Total
Event-Linked	88 23.8%	125 33.8%	157 42.4%	370 82.4%
Pretextual	5 6.3%	30 38.0%	44 55.7%	79 17.8%
Total	93 20.7%	155 34.5%	201 44.8%	449 100.0%

$\chi^2 = 12.5$, df 2, p = 002

increased slightly from 26 to 30 per year.¹⁰ Once again, the increase in pretextual cases coupled with less politicized prosecutions strategies probably accounts for much of the increase in plea bargain rates and conviction rates observed in the post-9/11 era.

⁹ It should be noted that there are more terrorism cases to be collected from the 2002 to 2004 FBI list (ATS and PADS). Anecdotally, the proportion of pretextual vis-à-vis event-linked cases should not change dramatically.

¹⁰ The total number of event-linked and pretextual cases in the post-9/11 era will increase as the remaining cases are collected and added to the database, and, anecdotally speaking, the total number of defendants indicted in event-

Table 7: Case Type by Defense Strategy Post-9/11

Case Type	Defense Strategy			Total
	Political Persecution	Disassociation	Traditional	
Event-Linked	7 20.6%	8 23.5%	19 55.9%	34
Pretextual	12 32.4%	6 16.2%	19 51.4%	37
Diffusion	1 1.4%	5 6.8%	68 91.9%	74
Total	20 13.8%	19 13.1%	106 73.1%	145 100.0%

$\chi^2 = 31.5$, df 4, p < 001

Analyses of defense strategies produced a few noteworthy trends. First, defendants relied on traditional defense strategies at a higher rate after 9/11 than before (73 % compared to 44 %), and the use of political persecution defense strategies decreased overall, with one notable exception (see Tables 6 and 7). The proportion of defendants using political persecution defense strategies increased in the post-9/11 era among defendants in pretextual cases. Recall again, compared to the other defense strategies analyzed, political persecution increased the odds of conviction.

CONCLUSIONS

The results indicate that prosecutors who explicitly politicize terrorism cases faced the biggest challenge for gaining convictions. The findings produced a statistically significant

linked cases after 9/11 will remain close to the average for the pre-9/11 era. Similarly, we expect the average number of defendants indicted for pretextual cases to climb slightly higher than the figures reported.

negative effect on the likelihood of conviction even when the impact of evidentiary strength, case complexity, and count severity are controlled. Ironically, defendants who explicitly politicize their trials by claiming *political persecution* are statistically more likely to be convicted than when using an alternative defense strategy regardless of prosecution method. Although not always the case, defendant who chose this route did so as a last ditch effort, in the face of overwhelming evidence and with minimal plea options, to avoid conviction

The analyses of the case types suggest that after 9/11 prosecutors relied less heavily on highly politicized prosecution strategies and filed fewer terrorism event-linked cases. As a result, plea bargain rates and conviction rates increased. This occurred despite the finding that the seriousness of the average count (count severity) in the post-9/11 era was only slightly lower than it was in the previous era. The decision to file less politically charged counts is probably a significant factor accounting for higher plea bargain rates and conviction rates in the post-9/11 era. The case type categories provide a useful tool for analyzing antiterrorism policy by allowing research to be conducted among similar cases. In the aftermath of the major policy changes that occurred in the months following 9/11, in which policy objectives and goals were reset, the case type variable exposes the flaws in earlier research which lumped all terrorism cases into one category and based any findings on pre-9/11 policy goals.

This study revealed that no *diffusion* cases were filed before 9/11, yet they made up the greatest proportion of cases filed afterwards. Our analysis suggests that diffusion cases were not the product of poor record keeping, as some critics have suggested but the result of policy changes implemented after 9/11. Attorney General Ashcroft directed the FBI and the EOUSA to prosecute cases sooner for the purpose of interrupting terrorists before they could complete attacks. Due to constraints caused by prosecuting cases sooner, prosecutors attempted to diffuse

potential terrorism threats by targeting crimes that they determined were precursors to terrorism.

Perhaps the most important benefit of using case type to isolate diffusion cases, is that it is possible to empirically evaluate similar cases before and after 9/11 providing a more reliable measure of antiterrorism policy.

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I: INTRODUCTION

In the years following the attacks of September 11, 2001, the Department of Justice published several articles reporting success in prosecuting terrorists (e.g., DOJ, 2006). Academics, politicians, and government officials have challenged those claims (e.g., GAO, 2003; Eggen and Tate, 2005). During this same time, public interest in the outcome of federal terrorism cases increased dramatically, as has the level of attention paid to how the government handles cases. Amid increased scrutiny, charges arose alleging prosecutorial misconduct (*Detroit Free Press*, 2006); witness coaching (NPR, 2006); and unexpectedly, some communities demonstrated support for alleged terrorist defendants (*Seattle Times*, 2006). Following the events of 9/11 and the subsequent implementation of the USA PATRIOT Act, public interest in the manner in which terrorist defendants are investigated, detained, and prosecuted has increased dramatically. Similarly, prosecutors at both the state and federal level have been called upon to prepare for a significant increase in the prosecution of “politically motivated” offenders. Unfortunately, little empirical information has been available to guide these efforts. Recent research has revealed that terrorist defendants behave very differently than traditional defendants at trial, most revealed by their propensity to not plead guilty (Smith and Orvis 1993; Smith 1994; Smith and Damphousse 1996; 1998; Smith et al., 2002). Unfortunately, the identification of specific defense strategies that may provide prosecutors with information necessary to more effectively prosecute these cases has not been forthcoming.

For example, we are now well aware that terrorists are much more likely to go to trial than non-terrorists (Smith and Damphousse, 1998; Smith et al., 2002). We note, of course, that the guilty plea decision also depends on the prosecutor - who may be less willing to offer “good” plea bargains because of the evidentiary strength or because of political realities. Still, we focus

here on the decision by the terrorist defendants because of their unique motivations. Terrorists may be less likely to accept a plea bargain due to their unwillingness to cooperate with the federal government whose authority they refuse to acknowledge. In addition, they may prefer a public trial that will expand the reach of their claims of injustice. Finally, they may not be able to reconcile their belief in their work as “freedom fighting” with having committed a crime.

Furthermore, we have learned that changes in terrorist tactics, such as the implementation of leaderless resistance by extreme right wing groups, have affected the charges with which these defendants are accused, as well as their decision-making, during the adjudication process (Damphousse and Smith, 2003). These findings, however, underscore our lack of understanding about the dynamics of these events. For example, how do terrorist demands for trial affect the manner in which prosecutors should pursue these cases? Does greater “commitment” among “lone wolf” terrorists affect the manner in which these terrorist defendants present themselves at trial or the types of motions they file in defense of their conduct?

This project examined these and other questions specifically related to how prosecutors depict terrorist defendants at trial, how terrorist defendants attempt to portray themselves, and their use of various motions to achieve this end. In particular, we were interested in understanding whether these attempts affect case outcomes or conviction rates. The project involved an examination of the federal court case records of criminal cases stemming from FBI investigations from 1980-2004 where an “official” terrorism investigation was conducted under the auspices of the Attorney General’s Guidelines for terrorism investigations.¹¹ The findings in

¹¹ This method should not be confused with counting persons investigated for “terrorism-related” activities using either the FBI or Executive Office of U.S. Attorneys classification scheme. For reference on the latter, see “Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics,” Washington, DC: Government Accounting Office, 2003.

this project should be useful for both state and federal prosecutors in understanding how terrorist defendants are likely to react to indictment and what methods they will use to defend themselves.

The ultimate goal of the project was to provide state and federal prosecutors with information that could assist in the efficient prosecution of terrorism cases. Findings from the project and on-line access to selected court documents in previous terrorism cases should be of considerable utility to both state and federal prosecutors. For example, right-wing terrorists associated with the “common law courts” movement¹² have filed almost identical arguments relative to constitutional authority and jurisdiction in several federal court cases. Government responses, however, have varied from case to case. Understanding the strategies used by terrorists in their defense (in addition to having on-line access to copies of defense motions used by various terrorist defendants and the government’s response to those motions) will increase prosecutorial success rates while reducing expenses associated with these trials. To accomplish this goal, three objectives were accomplished.

First, we assessed the relationship between prosecutorial and defense strategies and case outcomes in terrorism trials. Although some previous research suggests that prosecutors are more apt to be successful (and efficient) using a strategy that depicts terrorists as conventional criminals, little information has been available relative to how terrorists or their defense attorneys attempt to portray themselves to the judge and jury. Preliminary data available from the American Terrorism Study indicate that a significant relationship exists between how terrorists attempt to portray themselves during trial proceedings and the trial outcome (Smith et al., 2005). The strategies used by defense lawyers in these cases appear to be associated with the filing of various types of motions, particularly *in limine* filings, to prevent prosecutors from

¹² This includes the sovereignty movement, jural society movement, and certain anti-tax groups such as Sheriff’s Posse Comitatus.

using certain terms that might depict them as terrorists. Other common motions include questioning the authority of the court and severance motions aimed at distancing defendants from more outspoken members of terrorist conspiracies. The relationships among these issues have never been explored. One goal of the proposed project was to examine these issues in greater detail. Our fundamental research question for this objective was “What is the relationship between prosecutorial and defense strategies, and do those strategies affect case outcomes?”

Second, we provided an overview of changes in terrorism cases since the September 11, 2001 attacks. The FBI has provided to ATS staff a complete list of terrorism cases for the three year period immediately following the 9/11 attacks. This is the only complete list made available for public scrutiny and analysis. Data collection on the overwhelmingly majority of these cases was complete by the start of this project. This project provides an analysis of the number and demographic characteristics of those indicted, types of federal charges, and the outcomes of these cases; comparing these patterns to pre-9/11 cases. Our fundamental research question for this objective was “How has 9/11 impacted the ways the federal government responds to terrorism?”

Third, the project added variables to the American Terrorism Study (ATS) database that includes information on prosecutorial and defense strategies for terrorism cases to provide a complete record for the period 1980-2004. The project director began collecting data on FBI terrorism cases in 1988 going back to 1980. When NIJ began funding the ATS project in 1999, new variables relating to prosecutorial and defense strategies were added to the research protocol. Unfortunately, some of the most important, precedent-setting terrorism cases in American history occurred in the late-1980s and 1990s. Data collection on additional court

records on all of these older cases was funded by DHS/MIPT over the past five years. For the current project, ATS staff review these older cases (1980-1998) and added information on prosecutorial and defense strategies to the dataset.

1. ORGANIZATION OF THE REPORT

Chapter 2 describes the relevant theory that informs the hypotheses that developed from our two main research questions. The chapter begins with an explanation of structural contextual theory and the hydraulic effect and provides justification for why these theoretical approaches were used in the study. After a literature review, discussion turns to the development of hypotheses that were used to analyze the research questions. Chapter 3 describes the data and methodology used to test the hypotheses - the American Terrorism Study (ATS) and the Prosecutorial and Defense Strategies (PADS) database. The discussion explains how the data were collected, how variables were coded, and which variables are analyzed to test each hypothesis. Chapter 3 also includes a discussion of the various statistical techniques that were used. In addition, general descriptive statistics for the database are provided.

Chapter 4 describes the findings. This chapter is divided into two main sections, each providing a description of the analyses for the two main research questions. The next two chapters are split among the two research questions. Chapter 5 provides a discussion of the findings for research question one: an analysis of the prosecutorial and defense strategies used in terrorism cases. Included in this chapter is a description of the outcomes of each prosecution strategy, each defense strategy, and the outcomes that these strategies produced when used in combination. Chapter 6 follows with a discussion of research question two: How has 9/11 changed the strategies used by prosecutors and defendants in federal terrorism cases, and what

impact have those strategies had on case outcomes? The chapter ends with a discussion of theoretical implications. Chapter 7 concludes the study, including a discussion on policy implications and an outline of suggested future research.

II: REVIEW OF RELEVANT RESEARCH

This chapter begins by discussing generally the relationship between defense and prosecutorial strategies in the terrorism context. We then turn to a discussion of the problem of defining terrorism and our solution. The next section provides context for understanding the relationship between defense and prosecutorial strategies by describing how changes in U.S. antiterrorism policy have evolved over the past four decades. Discussion centers on two critiques that have been raised challenging the impact of antiterrorism policy implemented after 9/11 and on the changes made over the past 25 years to the United States Attorney General Guidelines authorizing terrorism investigations. The chapter then turns to each of the research questions and provides the hypotheses that emerged from the review of two key theories: structural-contextual theory and the hydraulic effect.

1. THE RELATIONSHIP BETWEEN DEFENSE AND PROSECUTORIAL STRATEGIES

Although some research has been initiated on the effect of changing state statutes on prosecutors' abilities to respond to terrorism,¹³ virtually no research exists that examines the dynamic nature of terrorism trials. This study examines three issues that have emerged in recent research on the prosecution of terrorists in the United States. First, findings from the American Terrorism Study have indicated that: (a) prosecutors have been more successful when terrorist defendants are portrayed as "conventional" criminals than when depicted as "terrorists" or "politically motivated" offenders (Smith and Damphousse 1996; 1998b); and (b) that terrorist defendants who attempt to "disassociate" themselves from the terrorist group and its ideology have significantly lower conviction rates than those who do not employ this strategy (Smith et

¹³ Elaine Nugent, "Local Prosecutors Respond to Terrorism: Responsibilities, Priorities, and Challenges," an NIJ project funded under the 2003 solicitation.

al., 2005). This research examines these relationships and their interactions in greater detail. Second, preliminary findings by Smith and Damphousse (2003) indicated that changes in terrorist tactics have spilled over into how they defend themselves at trial. Third, research has indicated that unlike traditional offenders in the federal court system, terrorist defendants are significantly more likely than traditional federal defendants to take their cases to trial (Smith and Damphousse 2003; Smith et al. 2002). These differences are so dramatic that examination of the plea process is warranted for this group of “crime-specific” offenders.

Terrorist groups are not static. They constantly learn new tactics in an effort to increase the destructive power of their weaponry and to develop more effective ways to avoid detection, arrest, and prosecution. Part of this process involves efforts by group leaders to insulate themselves from civil and criminal liability through the development of new organizational structures. New models, like “leaderless resistance,” have emerged to combat the prosecutorial successes of the past. Terrorists have learned, primarily by word of mouth, which techniques work best and which are doomed to failure. Despite the importance of understanding the changing dynamics of this phenomenon, empirical examination of these issues has been virtually nonexistent.

When prosecuting terrorists, research has indicated that prosecutors typically begin by choosing between one of two polar types. They may engage in what Turk (1982) refers to as “exceptional vagueness” by advocating to the jury that these defendants are nothing more than “common” criminals. In contrast, they may choose the opposite extreme and attempt to “explicitly politicize” their conduct (Turk 1982; Smith 1994). These strategies are reflected not only in the language used during the course of the trial, but also in charging decisions. With the exception of the highly publicized seditious conspiracy trial of the 1993 World Trade Center

bombers, federal prosecutors in the 1990s were much more likely to depict terrorists as conventional criminals.¹⁴

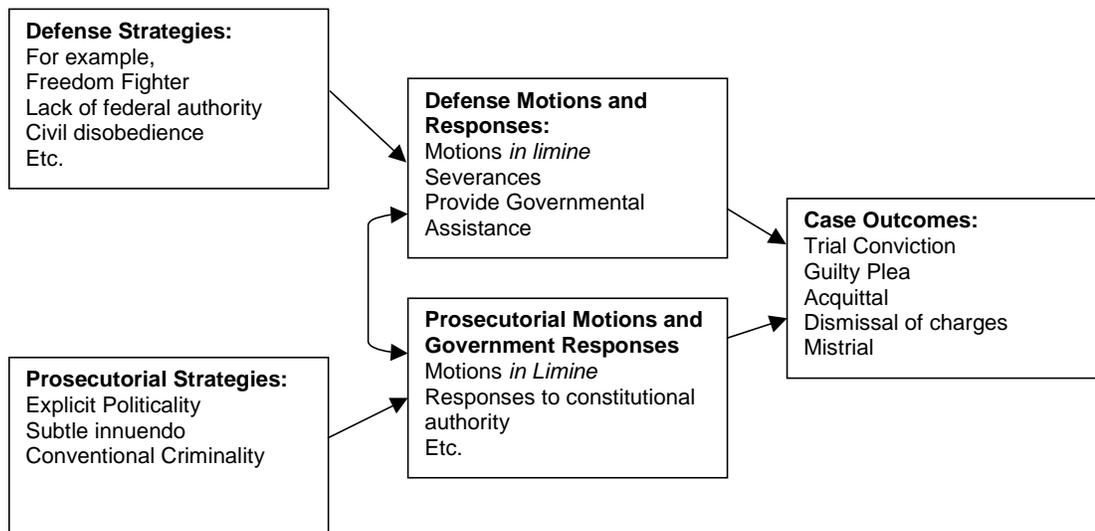
Compared with the prosecution of domestic terrorists, prosecutors have been much more likely to politicize the indictment and trials of international terrorists, particularly since the September 11, 2001 attacks (Smith et al., 2002). Frequently, prosecutors moderate these extremes during the course of the trial by using what Smith and Damphousse (1998b) have described as “subtle innuendo” – comments intended to “hint” to jurors that these persons, while committing conventional crimes, are more committed ideologically, and hence, of greater danger to the public. Generally, though, prosecutors have had greater conviction success by portraying terrorists as traditional offenders.

In contrast, little is known about the strategies used by defense counselors in terrorism cases. Does the manner in which terrorist defendants attempt to portray themselves affect the outcome of their cases? A preliminary examination of data collected on 1990s terrorism cases revealed that 40% of defendants who attempted to “disassociate” themselves from the group and its ideology were either acquitted, the case resulted in mistrial, or all charges were dismissed (Smith et al., 2005). How this effort was accomplished varied from case to case, but it frequently entailed the use of severances and motions in limine to restrict prosecutors from using language linking the defendant to specific terrorist groups or ideological concepts.

Some of the interactions of these various efforts by the prosecution and defense are depicted in Figure 1. It appears that avoiding the issue of “political motive” benefits both the prosecution and the defense. The irony of this apparent contradiction suggests that such oversimplification is not only unwarranted, but unwise and potentially costly as well.

¹⁴ USA v. Salameh, et al. (93-CR-180), U.S. District Court, Southern District of New York; USA v. Elgabrown et al. (93-CR-181) U.S. District Court, Southern District of New York.

**Figure 2a:
Potential Predictors of Defense and Prosecutorial
Strategies on Case Outcomes**



Many questions emerge from this discussion: What combination of defense and prosecutorial strategies result in the highest conviction rate? Conversely, what combination of defense and prosecutorial strategies are most likely to result in acquittal, dismissal, or mistrial? When various strategies are implemented, what types of motions/filings have been most effective for the prosecution and the defense? For example, have prosecutors been more successful by allowing defendants to sever cases or try defendants together? What contributes to the success of “ideological disassociation” for terrorist defendants? Does filing motions in limine to restrict prosecutorial use of terms that might link the defendant to a particular group or ideology have a measurable (negative) effect on prosecutorial success?

Our attempts to answer these questions are informed by two theories: structural contextual theory and the hydraulic effect (both described below). These theories result in several hypotheses that we tested to more fully understand the relationship between prosecutorial

and defense strategies that are used during terrorism trials. Before we discuss our hypotheses, however, it is important to define what we mean by “terrorism.” We provide context for our study by describing the difficulties (and subsequent controversies) associated with defining terrorism and our efforts to overcome these obstacles.

2. THE PROBLEM OF DEFINING TERRORISM

Defining terrorism has been the subject of unresolved debate within academia and political circles (Burgess, 2003). Negative images associated with the term, and the media’s use of any number of sympathetic concepts (e.g., freedom fighter) have confounded the matter (Rapoport, 1977). As Laqueur (1987:149) stated, “even if there were an objective, value-free definition of terrorism, covering all its important aspects and features, it would still be rejected by some for ideological reasons.” Ideological objections have prevented the UN General Assembly from establishing a clearly stated definition. Until 2001, the Security Council had adopted a range of measures addressing terrorist threats to peace and security without defining the term. After September 2001, the Security Council adopted measures against terrorism that contained serious legal consequences, but again they failed to define the term. Instead the UN encouraged states to define terrorism in their national bodies of law, which allowed wide and divergent variations among definitions (Saul, 2004). The Security Council adopted a non-binding definition in 2004, but critics claim that it “fails to remedy the serious difficulties caused by the lack of an operative definition in Council practice” (Saul, 2004:41).

Defining terrorism in the United States is complicated as well. Each division of the government uses its own definition. For example, the Department of Defense defines terrorism as: “The calculated use of unlawful violence to inculcate fear, intended to coerce or to intimidate

governments or societies in the pursuit of goals that are generally political, religious, or ideological”(U.S. Department of Defense, 2003:1). The Department of State defines terrorism as: “[P]remeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience” (Office of the Coordinator for Counterterrorism, 2002:4).

Each of those definitions has several factors in common with most definitions of terrorism: the terrorists’ motives, methods, and targeting noncombatants. But not all scholars agree on those concepts, so the debate continues (Burgess, 2003). Some scholars argue that political motive is too limiting because some individuals act for criminal or religious reasons. Stern (1999) argues that any definition of terrorism should be unlimited with regard to perpetrator and purpose. Stern’s approach does not exclude political goals as a terrorist aim, it simply allows for other motivations. The “deliberate evocation of dread is what sets terrorism apart from simple murder or assault” (Stern,1999:11). The assumption that terrorists are motivated to create a psychological impact among their victims has also been debated, as some attacks could easily be attributed to revenge (Gueke, 1998).

Each of these debates illustrates the difficulty inherent in conceptualizing terrorism, and perhaps as important, it sheds some light on how onerous the task of theorizing, identifying, gathering, and measuring data can be regarding terrorism research. Considering the vast amount of resources that are being directed to fight the “war on terror” in Iraq, in Afghanistan, and through the creation of the Department of Homeland Security, the importance of reliable research is more important than ever, but scholarly and political agreement on a universal definition of terrorism is not imminent.

Due in part to the lack of a universal definition, antiterrorism policy is frustratingly difficult to evaluate, and the effectiveness of domestic terrorism policy has been the subject of a lot of controversy and criticism since 9/11. Two years after passage of the USA PATRIOT Act, officials working for the United States government recognized that American antiterrorism policy was in need of a major overhaul (Perl, 2003). Policy programs put in place in the wake of the September 11 attacks lacked any specific requirements for the FBI or Executive Office of United States Attorneys (“EOUSA”) to develop mechanisms for evaluation. Those that have been put in place (*Zeus* in the FBI, and *LION* in the EOUSA) have proven problematic. The GAO issued a report in 2003 critical of the EOUSA and the FBI. The report mirrored the data validity critique that had been appearing in the media for over a year. Researchers argued that the DOJ included cases in its annual accountability report that should not have been classified “terrorist” because no link to terrorism appeared in the case documents (Fazlollah & Nicholas, 2001). The GAO found that each unit’s internal mechanisms for reporting terrorism-related statistics were decidedly inaccurate—overestimating some measures and underestimating others (GAO-03-266).

Oddly, even after the GAO found the FBI’s reporting more accurate than the EOUSA’s, the DOJ opted to begin using the EOUSA data (GAO-04-411). The Office of the Inspector General (“OIG”) issued a report in 2007 finding unresolved problems. The OIG claimed that DOJ “components did not accurately report terrorism-related statistics in their annual budgets, financial statements, performance plans, and statistical reports. For most statistics we tested, the component either could not provide support for the numbers reported or could not identify the terrorism link used to classify statistics as terrorism-related. Some of the statistics were significantly overstated and some understated. We concluded that the components lacked

effective internal controls to ensure accurate reporting of terrorism-related statistics” (OIG-07-04:2).

The data validity is not the only criticism the DOJ has faced. In December 2001, a story in the *Philadelphia Inquirer* questioned the reliability of data used by the DOJ and it raised a new critique—the soft-sentence critique. An example of the soft sentence critique comes from TRAC at Syracuse. Researchers gathered data on DOJ terrorism referrals for two years prior to September 11, 2001 and two years following. In December 2003, TRAC released a report of its findings, concluding that the DOJ was over-reporting how effective it has been in the war on terrorism (TRAC, 2003). The TRAC report based this conclusion on findings that more than half of the referrals received no prison time, and those who received a sentence, received a short sentence. TRAC found the median sentence for defendant convicted of international terrorism was 14 days, domestic terrorism was 3 months, and financial terrorism was just under 4 months (TRAC, 2003; 2006).

Chesney (2007) considered both critiques and pointed out that the 2001 DOJ policy change (i.e., Ashcroft guidelines) directed the FBI and EOUSA to proactively disrupt terrorist groups before they can act. In his study, Chesney used data from the American Terrorism Study (ATS) and other sources to address the two criticisms raised above. First, he argued that it is important to separate what most people universally agree to be terrorism cases (where defendants are directly linked to terror groups and are engaging in acts of terrorism) from *pretextual* prevention cases and *diffused* prevention cases. Pretextual prevention cases are those where the government has some reason to suspect an individual is linked to a terrorist group, but there is no evidence linking him/her to an act of terrorism (See Figure 2). In these cases the prosecutor pursues any criminal charges that happen to be available. According to Chesney, diffused

prevention cases occur when the government lacks evidence linking any particular person to particular terrorist threat, so the government engages in passive-defense and target-hardening measures (Chesney, 2007, referencing Heymann, 1998). 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.¹⁵

Figure 2b
Case Type by Terrorism Link

Case Type	Linked to Extremist Group or Ideology	Linked to a completed or planned act of terrorism
Event-linked	Defendant(s) linked in case documents	Defendants Linked in Case Documents
Pretextual	Defendant(s) linked in case documents	No Link
Diffusion*	No Link	No Link

* some prosecutors have attempted to use circumstantial evidence to link a defendant to a terrorist organization/ideology.

3. OUR APPROACH TO DEFINING TERRORISM

As mentioned above, neither academics nor politicians have agreed on a universal definition of terrorism. Smith (1994) avoided the definition problem by using the FBI’s “Terrorism Enterprise” investigation data. The Federal Bureau of Investigation defines terrorism as: “[T]he unlawful use of force and violence against persons or property to intimidate or coerce

¹⁵ Like Chesney, TRAC categorizes cases as Terrorism and Anti-Terrorism (TRAC, 2003; 2006). The first category contains cases that provide demonstrable links to a planned or complete terrorist act, and the second category includes cases similar to Chesney’s diffused prevention and pretextual prosecution cases.

a government, the civilian population, or any segment thereof, in furtherance of political or social objectives” (Counterterrorism Threat Assessment and Warning Unit, 1999:5). Using the FBI’s terrorism enterprise data provides a consistent measurement of the federal government’s response to terrorism over time. That measurement has remained relatively unchanged for almost three decades.

Authority for the FBI to open a terrorism enterprise investigation is provided in guidelines promulgated by the U.S. Attorney General. For 25 years, the FBI compiled the names of persons who were indicted in United States District Court after being the subject of such an investigation. The FBI released those names to Brent Smith, who created the American Terrorism Study database (ATS). The data for the database were gathered from public documents for each of the names provided. The ATS includes information on almost every person indicted as a result of a terrorism enterprise investigation from 1980 through 2004.¹⁶ From 1980 until September 11, 2001, the FBI’s list provided one of the most consistent and complete records of counterterrorism responses by the federal government.

Smith received names from the FBI in a series of lists. The early lists, containing names from 1980 to 1998, contained each defendant’s name and the name of the group with which that defendant was affiliated. That changed with the 1998-2002 list. For the first time and only in a handful of cases filed after September 11, 2001, the list contained a new designation: *no link to terrorism*. Subsequently, the 2002 to 2004 list did not contain group affiliation for any of the defendants.

Another pattern emerged. Data collection revealed that the FBI routinely referred cases to U.S. Attorneys for prosecution regardless of whether there was evidence linking a defendant to an act of terrorism. Since 1980, the FBI had referred both event-linked cases and pretextual

¹⁶ A more detailed explanation of the ATS database is provided in Chapter 3.

cases for prosecution. After September 11, however, the FBI began referring cases with no clearly stated link to terrorism - a majority of those cases involved immigration and financial fraud. The OIG (2007) reported some similar cases, but did not indicate how many it found (OIG-07-04).¹⁷

4. CONTEXT: U.S. ANTITERRORISM POLICY

Many experts believe that the events of September 11 were the result of an intelligence failure (e.g.,Porch and Wirtz, 2002). Indeed, one of the key findings of the 9/11 Commission Report focused on the lack of communication between two federal agencies with similar but seemingly competing missions - the FBI and the CIA (National Commission on Terrorist Attacks Upon the United States, 2004). To address that conclusion, Congress passed the USA PATRIOT Act in October 2001. The Act expanded law enforcement authority to investigate suspected terrorists, loosened restrictions on surveillance procedures, strengthened controls on international money laundering, and authorized disclosure of foreign intelligence information obtained in criminal investigation to intelligence and law enforcement agencies.

With the tools provided by Congress, America's terrorism policy is interpreted and implemented by the executive branch in four distinct chains of command. The first chain of command begins with the President and runs through the National Security Council, which is responsible for implementing international terrorism policy (Perl, 2003). The second chain of

¹⁷ These cases might be evidence a broader policy shift. While coding data, an ATS staff member found the affidavit of an FBI field agent who stated that immigration cases had been assigned to the JTTF. The timing corresponds with a policy shift inside both the FBI and DHS to coordinate investigations between the former and the Bureau of Immigration & Customs Enforcement (the immigration investigative arm of DHS). The timing also corresponds to a dramatic increase in the number of JTTF field offices (34 to 66) and personnel assigned by the FBI to its terrorism teams (600 to more than 7,000).

command runs from the President through the Director of the Department of Homeland Security (DHS). The third chain of command runs from the President to the Secretary of State who heads the U.S. State Department which contains the Office of the Coordinator for Counterterrorism. The fourth chain runs from the President to the U.S. Attorney General who heads the U.S. Department of Justice (DOJ). The FBI and the Executive Office of United States Attorneys (EOUSA) are located within the DOJ. It is in the fourth chain of command that policies centered on the investigation and prosecution of domestic terrorism are created and implemented.

Until the 1980s, the United States avoided practices that might result in terrorists being viewed by the public as anything but common criminals. Responding to public consternation over the Watergate scandal and COINTELPRO, Attorney General Edward Levi implemented guidelines for the FBI that dramatically limited its authority to engage in domestic security investigations (Levi Guidelines, 1976). Domestic security investigations dropped from 20,000 per year in 1973 to less than 300 in 1976 (Smith et al., 2002). When an investigation *did* occur, terrorists were charged and prosecuted like traditional offenders (Smith and Damphousse, 1998).

In the early 1980s, a policy shift occurred in the wake of a string of armored-car robberies perpetrated by leftist groups. Congress pressured Attorney General William F. Smith and the FBI to implement new guidelines for terrorism investigations. In 1983, the Smith Guidelines provided new authority for the FBI to investigate domestic terrorism groups (Smith Guidelines, 1983). After opening an official terrorism investigation, the FBI could investigate groups for longer periods of time than possible under a “general crimes” investigation. A separate set of counterintelligence guidelines gave the FBI expanded authority to investigate international terrorists.

In the wake of September 11, Attorney General Ashcroft implemented new guidelines that expanded the FBI's authority to investigate domestic terrorism. The Smith Guidelines 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 a terrorism investigation, he had to report that fact to the Office of Intelligence Policy and Review. The Smith 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.¹⁸ The field office was required, within one year, to report to FBIHQ any terrorism investigations it initiated and provide reports. Permission to open an investigation, however, was no longer necessary. The new guidelines also centralized the analysis of fieldwork at FBI headquarters. The Ashcroft guidelines remained in place through the end of this study.

It would be logical to assume that decentralizing the authority to open terrorism investigations has changed what types of cases the FBI labels "terrorist." That, coupled with Attorney General Ashcroft's directive to the FBI and the EOUSA to interrupt, arrest and prosecute suspected terrorists before an act of terrorism can be committed should have fundamentally altered the timing of when cases are formally entered into United States District Courts. The proactive nature of the policy also suggests that the FBI may not be able to wait to collect enough evidence to convict defendants of complex conspiracies, so the type and severity of charges with which terrorist defendants have been indicted may have changed as well.

¹⁸ But unlike the Smith Guidelines, the Ashcroft Guidelines allow the Special Agent in Charge to renew the investigation without interference from FBIHQ.

5. THEORETICAL FOUNDATIONS

Given our previous discussion of terrorism and changes in the federal response to terrorism over the past four decades, we now describe two theories that inform our research questions. The first describes how social systems (such as the American justice system) become loosely or more tightly “coupled” and the effect these changes have on how the system and its actors function. The second theory similarly describes how changes in the justice system (such as bail reform) can have dramatic effects on how discretion is used. These changes can affect how both the prosecution and the defense behave in court proceedings.

5.a. Structural Contextual Theory. While conducting research on sentence disparity, Hagan (1980) theorized that our ability to predict sentence outcomes is substantially better for certain types of crimes than it is for others. With structural contextual theory, Hagan suggested that the justice system was made up of “loosely coupled components” that work independently of one another. Normally, those components compete for resources and occasionally pursue different objectives. Hagan then suggested that some forms of crime catch the public’s attention. When that happens, the public increases pressure on elected officials and individuals working in criminal justice system to respond. Hagan argued that when political power is directed towards particular forms of criminality, the system tightens in response through proactive techniques (Hagan, 1989:118). When tightened coupling occurs, components of the criminal justice system pool their resources and increase their focus on those forms of criminality. When that happens, the disparity in sentence outcomes is reduced.

A number of studies have applied structural contextual theory to examine sentencing outcomes. Using a structural contextual perspective, Smith and Damphousse (1998:88) theorized that if terrorism was seen as a serious problem by members of the public, politicians,

and actors within the criminal justice system, one would expect increased levels of cooperation between components of the criminal justice system. Cooperation, they argued, should limit discretion as criminal justice actors investigate, prosecute and determine prison sentences after a conviction. Therefore, the more seriously the public perceives terrorism, the more evidence of “coupling” one should find. Smith and Damphousse found support for structural contextual theory, reporting that nearly four times as much sentencing variance could be explained in terrorism cases than non-terrorism cases. Additionally, they suggested that a proactive political environment may be a more important predictor of sentence length than crime severity.

5.b. Trickle-up/Hydraulic Effect. After 9/11, Congress passed a number of measures (discussed in more detail below) aimed at strengthening American counter- and antiterrorism efforts and making punishment more severe for individuals who engage in terrorism. According to Walker (1994), “get-tough” policy changes have a number of unintended consequences. Walker theorized that, despite the increased focus, “get tough” measures would have no measurable impact on the more serious crimes for which they were intended. Rather, he argued, the majority of resources were already directed towards more serious crimes; thus, adding resources would not increase the effectiveness of fighting more serious crimes.

Walker suggested that changes in policy directed towards serious offenses have the greatest impact on lower-level offenses. According to the hydraulic effect, a “get tough” policy shift raises less serious offenses to a more serious level by lowering the opportunities for mitigation. In other words, a “get tough” policy change reduces a defendant’s opportunity to plead to a lesser charge. Walker also argued that law enforcement personnel would engage in net-widening. In an effort to appear more proactive and more effective, Walker argued, law

enforcement personnel and prosecutors investigate and charge defendants with crimes that would have been ignored before. Because these policies reduce the chances for mitigation, the sentences of lower-level defendants tend to rise above what those individuals would expect to receive under normal circumstances.

Following this line of reasoning, the “war on terror” policy changes implemented after 9/11 should not have a dramatic effect on the more serious, targeted, crimes. Evidence of the hydraulic effect should come in the form of defendants being charged with lower-level crimes, and receiving longer sentences after a “get tough” policy is implemented. One would also expect to find a higher frequency of low-level charges filed against a broader range of defendants after a policy change. Damphousse and Shields (2007) tested the hydraulic effect and found some support. Their analyses, however, were limited to testing a handful of cases filed between September 11, 2001 and August 16, 2002.

6. RESEARCH QUESTIONS AND HYPOTHESES

Changes in how the FBI was allowed to investigate domestic security/ terrorism enterprise cases brought about a change in the methods used by U.S. Attorneys to prosecute terrorists. Until the 1980s, prosecutors followed the same philosophy that investigators used: they treated terrorists like traditional offenders. In the 1960’s and 1970’s, a few prosecutors experimented with politicizing a terrorism cases, but the practice was generally avoided (Smith et al., 2002). Based on an analysis of political crime laws, Turk suggested that prosecutors used one of two methods, *explicit politicality* or *exceptional vagueness*, to prosecute “political” defendants (Turk, 2002). Explicit politicality was characterized by the government’s use of a terrorist label in trial documents and the portrayal of the defendant as a terrorist to the public

through the news media. This strategy involved an extensive discussion of the defendants' motives and the use of charges that include an element of conspiracy—alleging that the defendant engaged in some type of politically motivated behavior. The most extreme example of this type of charge would be seditious conspiracy or treason.

When the exceptional vagueness strategy was employed, the government avoided describing the defendant as a terrorist. Instead, the defendant was depicted as a traditional offender. Smith and Damphousse referred to this strategy as *conventional criminality*. Subsequent research by Smith and Damphousse expanded Turk's typology to include a third prosecutorial strategy (Smith et al., 2002). After considering the challenges (i.e., acquittals) that prosecutors faced in earlier, highly politicized terrorism cases, they pointed out that federal prosecutors sometimes used a middle-ground approach, which they coined *subtle innuendo*. In this strategy the government charged defendants under either a presumed liability statute or with some "traditional" crime where motive was not an issue. At trial, the researchers found that prosecutors "dropped" a series of subtle hints that the defendant was part of a terrorist group. Later research by Damphousse and Shields (2007) found evidence that prosecutors sometimes did more than drop subtle hints. On occasion defendants were labeled terrorists or directly linked to groups known to be terrorist groups, but unlike explicit politicality cases, the prosecution had no need to delve into political motive directly. For the purposes of this study, the middle group will be called *political innuendo*.

The government's foray into politicizing cases led defense attorneys to develop a number of counter-strategies unique to terrorism cases. According to Smith and Damphousse (1998), defense attorneys had success challenging politicized trials using due process claims. The most successful strategy, however, involved defense attorneys who tried to distance their clients from

an alleged political ideology and/or group. A common technique used in *disassociation* strategies involved filing motions to sever a defendant's trial from a co-defendants' trial. A preliminary examination of data collected on 1990s terrorism cases revealed that 40 percent of defendants who employed a disassociation strategy were either acquitted, received a mistrial, or had all charges dismissed (Smith et al., 2005). The specific methods used to accomplish those results varied from case to case, but it frequently involved using severances and motions *in limine* to restrict prosecutors from using language that linked the defendant to a group or ideological concept.

Other defendants have claimed that they were the target of *political persecution*. The rationale for this strategy is to defeat the "motive" element alleged by the prosecutor by showing that, instead of possessing a terrorist motive, the defendants' beliefs were benign and they were the target of an overzealous witch hunt because their beliefs fell outside of the mainstream. A number of other defense methods have been tried with mostly unremarkable results.¹⁹ Anecdotally, it appears as though the majority of defendants do not employ any "politicized" defense strategy, their attorneys use strategies that are standard in other criminal cases (i.e. *traditional defense*).

Research Question 1. What is the relationship between prosecutorial and defense strategies, and do those strategies affect case outcomes?

Well over 90 percent of traditional federal criminal cases result in convictions (Bureau of Justice, 2004). Prior research has found that acquittal rates are higher, and guilty plea rates are

¹⁹ Some defense attorneys have pursued a *freedom fighter* strategy, where the defendant claims that he or she was part of a legitimate effort to replace an existing, but corrupt, government. Another defense strategy attempted to portray the defendant's actions as acts of *civil disobedience*: Here, the defendants are portrayed not as criminals (or terrorists) but as citizens who were exercising freedom of expression.

lower, for terrorism cases than for traditional criminal cases. For that reason, terrorism cases that are prosecuted like traditional criminal cases (e.g. conventional criminality) should result in higher conviction rates than terrorism cases that are highly politicized. Because non-politicized prosecution methods provide the defendant with little reason and/or incentive to use non-traditional defenses, prosecution methods that center on *conventional criminality* will most likely be met with a *traditional defense* strategy. The combination of the conventional criminality and *traditional defense* will most resemble non-terrorism cases and should result in the highest conviction rates.

Likewise, cases that are the explicitly politicized should result in the lowest conviction rate. By definition, *explicit politicality* involves motive as an element of the case that must be proved, opening the door to defense tactics and claims that are designed to raise reasonable doubt. Because explicit politicality involves linking the defendant to a terrorist ideology, disassociation should be the most successful defense strategy.

H₁=A *conventional criminality* prosecution method and a *traditional defense* strategy will produce the highest conviction rates.

H₂= An *explicit politicality* prosecution method and the defense strategy, *disassociation*, will produce the lowest conviction rates.

Research Question 2. How has 9/11 impacted the ways the federal government responds to terrorism?

ATS data, TRAC data, and DOJ reports all suggest that the number of terrorism cases grew substantially after 9/11. According to structural contextual theory, an event like 9/11 will heighten public awareness to the perceived threat of terrorism, causing actors within the criminal justice system to work more closely together, in a proactive fashion, to allay public fears. This “tightened coupling” should be measurable in terms of reduced discretion. Testing structural contextual theory in terrorism cases, Smith and Damphousse (1998) found that plea bargain rates were substantially lower in terrorism cases than non-terrorism cases (*see also*, Shields, et al, 2006, and, Damphousse and Shields, 2007). Bases on the application of structural contextual theory in prior terrorism research, similar patterns should be found here.

H₃=If tightened coupling has occurred, Prosecutors will voluntarily drop fewer counts (charge bargaining) in the post-9/11 era.

H₄= If tightened coupling has occurred, the percentage of plea bargained cases will decrease among pretextual prosecutions in the post- 9/11 era.

The hydraulic effect suggests that “get tough” policies implemented in the wake of 9/11 will result in net widening. Net widening occurs in two different ways. First, offenders who engaged in minor offenses that were ignored before the triggering event will receive new attention from investigators and prosecutors. Second, because the level of serious criminal activity is likely to remain relatively unchanged, investigators and prosecutors will seek to

prosecute offenders on new or novel charges. Damphousse and Shields (2007) found some preliminary support for both of these propositions, but their analysis was limited to cases filed prior to August 2002. If the hydraulic effect does occur, evidence of net-widening should be present.

H₅=If net widening has occurred, cases in the post-9/11 era will involve a higher proportion of low-level offenses than cases filed before 9/11.

H₆=If net widening has occurred, there will be higher proportion of pretextual prosecutions as compared to event-linked prosecutions post-9/11.

Similarly, by intercepting cases sooner, the FBI is less likely to have time to develop relationships with informants or infiltrate groups with government agents. As a result, there should be a decrease in the amount of evidence available to put together large conspiracy cases.

H₇=The number of defendants per case will decrease in the post-9/11 era.

H₈= The proportion of event-linked cases involving confidential informants will be smaller post-9/11.

Because prosecutors are bringing cases to trial sooner, they will be forced to file “kitchen sink” indictments which contain counts alleging serious crimes, and counts that allege more traditional and less serious charges.

H₉= Conviction rates on more serious charges will decrease in the post-9/11 era

III: DATA AND METHODS

This project used data from two sources: the American Terrorism Study and the Prosecution and Defense Strategies database. Both databases are housed at the Terrorism Research Center in Fulbright College at the University of Arkansas. The first database, the American Terrorism Study (ATS), was created after the FBI released to Brent Smith the names of persons indicted as a result of terrorism enterprise investigations from 1980 to 1989. The Department of Justice matched the list of terrorist defendants with federal court docket numbers assigned throughout the United States and Puerto Rico. Smith began collecting demographic and sentencing data in each of the federal district courts where the trials occurred. Those data were then supplemented by information provided by the Administrative Office of the U.S. Courts.²⁰

That first list of names was supplemented by four additional lists. The ATS includes the names of persons who have been indicted as the result of a FBI terrorism investigation (under the Attorney General's Guidelines) from 1980 through 2004. The ATS database contains information on 706 indictees charged with 9,633 criminal violations in 254 court cases. In addition, there are data on approximately 75 different terrorist groups.

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

²⁰ After receiving the FBI list, data collection teams visited the federal courthouses and archive facilities to review the identified cases and copy documents. Data gleaned from those documents were then coded into approximately 80 variables and entered into the American Terrorism Study database. (Smith and Damphousse, 2004).

methods, defense methods, and amount of community sympathy). While the coding of many of the variables is straightforward (e.g., age, gender, sentence length), the coding of other latent variables (e.g., prosecution and defense strategy) requires more attention. These variables are coded through a vetting process conducted by the research team. After the case material has been carefully inspected, the team determines by consensus how each of the latent variables should be coded.

1. ATS DATA DESCRIPTION

This project uses several of the ATS demographic variables. *Gender* is a nominal level variable. For this study male is coded 1, and female is coded 0. The database population is 89.1 percent male. *Race* is a nominal level variable, and it is coded into 6 categories in the ATS. For the purposes of this study, *race* was recoded into three categories: Caucasian, Black, and Hispanic/Other. Caucasians make up 69.2

Table 3.01
Frequency Distribution: ATS Race

	Race	Frequency	Percent
	Caucasian	443	69.2
	Black	66	10.3
	Hispanic /Other	98	15.4
	Total	607	94.8
Missing	System	33	5.2
Total		640	100.0

percent of the population. Unfortunately, Middle Eastern defendants of Arabic descent are included as Caucasian (N = 129). For regression models the variable was coded into dummy variables. One dummy variable was created for Caucasian defendants and one was created for

black defendants. *Age* is a ratio level variable and coded in years of age at the date of indicted.

The mean age for the population is 37.8 years.

Year of Indictment is an ordinal level variable and measured at the time the indictment was filed. For analyses comparing pre-9/11 defendants to post-9/11 defendants, individuals indicted in 2001 were eliminated (n=27). Of the remaining indictees (N=679), those who were indicted in 2000 or before were coded 0, whereas indictees indicted in cases filed in 2002 or after were coded 1. Table 3.02 presents the size of the pre- and post-9/11 samples. *Total counts* is an ordinal level variable

Table 3.02
Size of Pre-and Post-9/11 Samples

	Era	Frequency	Percent
	Pre 9/11	512	72.5
	Post-9/11	167	23.7
	Total	679	96.2
Missing	System	27	3.8
Total		706	100.0

and measures the total number of counts filed against each defendant. The range for the data set is 1 count to 652 counts. Over 50 percent of the defendants in the database were charged with 3 counts or less, and 90 percent of the defendants were charged with 16 counts or fewer. There are only 4 court cases in the database where defendants were charged with 60 or more counts.

Group Type is a nominal level variable, coded into 6 categories: domestic right-wing groups (1), domestic left-wing groups (2), international groups (3), environmental groups (4), single issue (5) and lone wolf (6). Individuals not linked to a group in the FBI list, or in case documents, were coded system missing unless

Table 3.03
Frequency Distribution: Group Type

Group Type		Frequency	Percent
	Rightwing	115	18.0
	Leftwing	201	31.4
	International	210	32.8
	Environmental	14	2.2
	Single Issue	6	.9
	Lone Wolf	4	.6
	Total	550	85.9
Missing	System	90	14.1
Total		640	100.0

internet searches of media documents revealed a link. Table 3.03 contains the frequencies, and indicates that 86 percent of the defendants in the database are linked to a group or ideology. *Role* is a nominal level variable and is coded in the ATS database to capture the varied and unique roles that individuals hold in their organizations (e.g. leader, recruiter, bomb maker, subordinate, Holy man). For this study, *role* was recoded into a dummy variable. Persons identified as having a leadership role were coded 1 and all others were coded 0.

Target is a dummy variable that will be created out of *actual primary target* and *intended target*. *Actual primary target* is a nominal level variable (categorical) and it indicates the first target the group was charged with successfully attacking. *Intended Target* is a nominal level variable (Categorical) and indicates the first target the group intended to attack but did not hit. If case documents indicate that the defendant either intended or actually hit a target, the variable *target* will be coded 1, and all other cases will be coded 0. 48 percent (N=344) of the defendants in the sample were indicted after attacking a target of some kind, another 21 percent (N= 147)

were indicted before they could attack their intended targets. As Table 3.04 shows, 30 percent of the defendants in the sample were not linked to an actual or intended target.

Table 3.04
Frequency Distribution: Defendant Linked to a Target

	Link or not	Frequency	Percent
	Linked to target	491	69.5
	No target	215	30.5
	Total	706	100.0

Overall case outcome (*case_res*) is a nominal level variable. In the database, this variable is coded into more than 20 possible outcomes. In order to use case result in bivariate analyses with prosecutorial method (*pros_meth*), defense method (*def_meth*), and case type (*case_type*), it was recoded to have three values. The frequencies are found in table 3.05. There were 87 cases in the system missing category. The majority

Table 3.05
Frequency distribution: Case Outcomes

		Frequency	Percent
	Trial conviction	182	25.8
	Pleaded guilty	336	47.6
	Dismiss or acquit	101	14.3
	Total	619	87.7
Missing	System	87	12.3
Total		706	100.0

of the missing cases are defendants who were indicted but remained fugitive at the time data were collected. Some cases involve defendants who were indicted in more than one federal district court and were subsequently transferred. The case outcome variable was also recoded into two dummy variables. The first dummy variable, *conviction*, coded cases that resulted in any type of conviction as 1, and cases which resulted in acquittal, mistrial or dismissal as zero.

The second dummy variable, *plead_guilty*, was coded to include cases where a conviction of any kind resulted in the absence of a trial. The final outcome dummy variable, *trial_conv*, includes only cases where the defendant was convicted at trial (both bench trials and jury trials).

This study also uses a measurement of count severity (*ct_sev*). An interval level variable, it measures the severity of each count with which a defendant is charged. Count severity is coded on a scale of increasing severity from 1 to 29 (see appendix 1). To measure sentence length, this study uses a ratio level variable (*sent_mon*) measuring the total time (months) that a defendant is sentenced to prison. The sentence variable includes life sentences and the death penalty. To give those sentences a numerical value, a frequency distribution was performed. The longest sentence in months was 2,880 months. Life sentences were recoded to 2,881 months, and the death penalty was recoded to 2,882 months.

Sever is a nominal, dichotomous variable and indicates that a defendant has employed a disassociation defense strategy. A defendant who filed a motion to have his or her case tried separately from another defendant in the case was coded 1. If no severance motion was filed, the variable was coded 0. About 22 percent of the defendants in the sample attempted to sever their cases. *Verbiage* is a nominal, dichotomous variable. The variable was coded 1 if a defendant filed a motion *in limine* to block the prosecution from using words or references that might link the defendant to a known terrorist, a terrorist group, a particular ideology/religious belief or a particular terrorist act. About 28 percent of the defendants in the sample attempted to limit verbiage. *Sever_ct* is a nominal, dichotomous variable that measures whether the defendant attempted to sever a count from the indictment, as some defendants attempt to remove counts that include references to terrorism. If a defendant filed a motion to sever a count, the variable

was coded 1, and if not, the variable was coded 0. *Number of Motions* is a ratio level variable indicating the number of motions filed by each defendant (median = 11).

The ATS variables listed above provide basic demographic information for this study. In addition, data from the ATS permitted analyses of case outcomes, sentence lengths, and count severity. Unfortunately, ATS data allow only a limited inquiry into the legal strategies used in federal terrorism trials. For example, the ATS tracks the total number of motions filed by defendants during a trial (*motions*), but it does not differentiate between the types of motions filed nor does it track their outcomes. Similarly, the ATS contains a dichotomous variable that measures if any defendants in a case turn state's evidence (i.e. testified on behalf of the prosecution). That variable (*prosevid*) does not indicate what kind of testimony/evidence the defendant provided, and it does not indicate which defendant testified. In effect, one can only determine whether a defendant turned state's evidence. It is impossible to identify the defendant, and therefore, it is impossible to measure whether the defendant received any benefit from doing so. These are only a few of the ATS limitations. Thus, this project led to the creation the Prosecution and Defense Strategies database.

2. PROSECUTION AND DEFENSE STRATEGY (PADS) VARIABLES

For this project, the ATS was supplemented with data from the Prosecution and Defense Strategies project (PADS). The PADS project built a database from cases that had been collected as part of the ATS database. Because the PADS database uses the same cases at the ATS, the demographic information is the same. Over 150 *additional* variables that measure trial specific data were created and coded (thereby fulfilling our fourth objective). The PADS

database contains 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. The database also includes variables that measure whether the defendant received bail, and if not, the reason bail was denied. One set of variables track whether a superseding indictment was filed in each case, and another set of variables track the number of counts added or dropped from the original indictment. These counts are coded by statute number and by United States Code Chapter. These data also track defense motions and their outcomes, for example: defense challenges to 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 protection was sought, motions to exclude defense evidence, and challenges to defense strategies).

3. PADS DATA DESCRIPTION

This project used a number of variables that measured legal strategies. The variable *prosmeth* exists in the ATS database and was recoded for PADS.²¹ Prosecutorial Method (*prosmeth_recode*) is an ordinal level variable. This variable is coded into three categories (see table 3.06). The first category is *conventional criminality* (coded 1) and involves cases in which the defendant has been charged with conventional criminal charges (i.e. no motive element) and the prosecution makes no attempt to link the defendant to a terrorist organization or a terrorist act. The next category, *political innuendo*, (coded 2) is composed of cases in which a defendant

²¹ The ATS variable *prosmeth* contained four categories: the three discussed here, and a fourth, *material support*, that was coded system missing for this study.

has been indicted on conventional criminal charges and in which the prosecution has linked the defendant, expressly or impliedly, to a terrorist group or act of terrorism. The final category is *explicit politicality* (coded 3) and is comprised of cases involving counts that draw into question the defendant’s motive for committing a crime (e.g. sedition, conspiracy to murder, etc.), and cases where the defendant is publicly linked to a terrorist group.

Table 3.06
Frequency Distribution: prosecution methods used

Prosecution Methods		Frequency	Percent
	Conventional criminality	149	21.1
	Political innuendo	170	24.1
	Explicit politicality	385	54.5
	Total	704	99.7
Missing	System	2	.3
Total		706	100.0

Similar to prosecution strategy variables, this study uses defense strategy variables (*defmeth*) from the ATS and recoded them into a new variable.²² The Defense strategy variable (*defmeth_recode*) is a nominal level variable. For bivariate analyses, the three most common defense methods from the ATS were used. The first defense strategy, *political persecution*, (coded 1) consists of those cases where the defendant claims that he or she is innocent and being prosecuted because of his or her political and/or religious beliefs. Second, the defense strategy *disassociation* (coded 2) is comprised of cases where the defendant attempted to distance herself/himself from group members and/or an ideology. Finally, *traditional* (coded 3) consists of cases where the defense used a traditional criminal defense. The remaining defense strategies

²² The three most common defense strategies were retained, as explained here. The remaining *defmeth* categories (civil disobedience, freedom fighter, jurisdiction challenge, etc) were coded “system missing” because of their low frequency (N=61).

were coded system missing (n =89). Table 3.07 provides the frequency distribution for the *defmeth_recode*.

Table 3.07
Frequency Distribution: defense methods used

Defense Methods		Frequency	Percent
	Political persecution	120	17.0
	Disassociation	179	25.4
	Traditional	318	45.0
	Total	617	87.4
Missing	System	89	12.6
Total		706	100.0

Link Made is a nominal level variable with 4 categories (*linked to group; not linked non-immigration; not linked immigration, and; associated with known member*) in the PADS database. For this study, it was recoded into a dummy variable with linked coded 1, and all others coded 0. For cases that were identified on the FBI lists from 1980 to 2002, coding was based exclusively on the FBI's group designation information to determine whether the defendant was linked to a group. For post-9/11 cases, defendants were coded as linked to terrorist groups if a reference to such an affiliation was made in the case documents or after if an internet search of media stories provided a link. This means that the post-9/11 group may be more under-inclusive than the pre- 9/11 group, but that is the best alternative currently available. *Bail* is a nominal level variable measuring whether or not a defendant was released on bail. If the defendant was released, the variable was coded 1. If the defendant remained incarcerated, the variable was coded 0. Research by Albonetti (1990) found that the reason bail is denied can impact the severity of sentence a defendant receives. Namely, when a defendant is deemed dangerous, and held without bail, Albonetti found that he or she is more likely to receive a longer sentence. The variable *baildeny* was coded to measure the reasons why a defendant was held

without bail. Defendants remanded to custody because of an immigration hold were coded 1. Defendants remanded to custody because they posed a flight risk were coded 2. Defendants who were found to pose a risk to the community were coded 3. Defendants released on bail were coded 0. The frequency distribution for bail is presented in Table 3.08. Of those defendants for which we had information, 66 percent were denied bail. The frequency distribution for the reason bail was denied is found in table 3.09. In 73 cases no reason could be determined for why bail was denied. Of the remaining cases, exactly half were retained because they were deemed dangerous.

Table 3.08
Frequency Distribution: Was Bail Granted

Bail Granted		Frequency	Percent
	Bail denied	427	60.5
	Bail granted	212	30.0
	Total	639	90.5
Missing	System	67	9.5
Total		706	100.0

The PADS database contains the variable *attorney_type*; it is a nominal level variable categorizing the type of counsel employed by each defendant. Information on attorney type was available in 79 percent of the sample (N = 557). Attorneys appointed under the Criminal Justice Act to represent indigent defendants were coded 0, federal public defenders were coded 1, private attorneys were coded 2, and defendants who act *pro se* were coded 3. The results of the frequency distribution for attorney type are presented in table 3.10.

Table 3.09
Frequency distribution: reason bail was denied.

Reason Bail Denied		Frequency	Percent
	Held by another jurisdiction or BICE/INS	105	14.9
	Flight	72	10.2
	Danger	44	6.2
	Flight <u>and</u> danger	133	18.8
	Total	354	50.1
Missing	System	352	49.9
Total		706	100.0

Table 3.10
Frequency distribution: attorney type

Attorney type		Frequency	Percent
	CJA appointment	174	24.6
	Federal public defender	164	23.2
	Private attorney	160	22.7
	<i>Pro se</i>	59	8.4
	Total	557	78.9
Missing	System	149	21.1
Total		706	100.0

Many studies have found that witnesses affect whether a case goes to trial or results in a plea bargain. For example, LaFree (1980) found that plea bargain rates were affected by evidentiary variables: as the number of witnesses available to the prosecutor increases, so does the probability of a guilty plea. LaFree's findings are consistent with other studies (e.g. Harris and Springer, 1989; Emmelman, 1996). Albonetti (1990), however, found that an increase in the number of eyewitnesses exerted a negative effect on pleading guilty. 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.

To analyze the impact of a defendant turning state's evidence, the variable *def_test* was used. *Def_test* is a dichotomous variable. The variable was coded 1 if a defendant testified (or agreed to testify) against his co-defendants at trial. All other instances were coded 0. The confidential informant variable (*info_mem*) is a dichotomous variable. It measures whether a confidential informant (not indicted, and non-law enforcement) provided the prosecution with any information, evidence, or sworn testimony in the case (1 = yes, 0 = no). In almost 40 percent of the cases studied the prosecution had a confidential informant in place.

Similarly, the government agent variable (*infil_gov*) is a dichotomous variable that indicates whether the prosecution had information from a law enforcement official who infiltrated the terrorist group. The government successfully infiltrated groups in 17 percent of the cases in the sample. The latter two variables also include ordinal level variables (government agents = *infil_assist*; confidential informants = *infor_assist*) that indicate what kind of information was provided. Both variables were coded in ascending order: *information only* = 1; *recordings* = 2; *sworn testimony* = 3; and, *recordings & sworn testimony* = 4. While the information was not available for every case, the level of assistance provided by confidential informants is displayed in table 3.11. Likewise, the level of assistance provided by government agents who infiltrated groups is provided in table 3.12.

Like the existence of witnesses, the strength of physical evidence available to a prosecutor is also an important factor that shapes how cases are resolved. Champion (1989) found that 34 percent of prosecutors would intensify punitive severity when they believed they

Table 3.11
Level of assistance provided by confidential informants

Informant Assistance Level		Frequency	Percent
	Information only	28	11.0
	Recordings	16	6.3
	Sworn testimony	23	9.1
	Recordings and sworn testimony	17	6.7
	Unknown assistance	17	6.7
	Total	101	39.9
	N/A*	153	60.1
Total		254	100.0

* court records did not reveal the involvement of a confidential informant

Table 3.12
Level of assistance provided by undercover government agents

Agent Assistance Level		Frequency	Percent
	Information only	4	1.6
	Recordings	2	.8
	Sworn testimony	5	2.0
	Recordings and sworn testimony	31	12.2
	Unknown Assistance	11	.5
	Total	53	17.0
	N/A*	211	83.0
Total		254	100.0

* court records did not reveal the involvement of an undercover agent

had strong evidence. Similarly, 82 percent of prosecutors would decrease punitive severity in plea bargains if they believed the evidence against the defendant was weak, (Champion, 1989). La Free (1980) found that as the amount of evidence available to a prosecutor increased so did the probability of a guilty plea (*see also*, Albonetti, 1990). This study uses several PADS variables that measure evidentiary strength.

One imperfect proxy measure of evidentiary strength is its ability to survive a suppression hearing. This study analyzes a variable that measures attempts to suppress evidence (*sup_evid*). The suppression variable is a nominal level variable measuring whether a defendant filed a motion to suppress physical evidence and the grounds for the motion. For example, if the grounds for suppression are illegal searches and seizures, the variable was coded 1. If the grounds for suppression are violations of the Federal Rules of Evidence (F.R.E.) 403/404 where the focus is on whether the potential prejudice to which the evidence exposes the defendant is outweighed by probative value of the evidence, then the variable was coded 2. Likewise, *sup_stmt* is a nominal level variable measuring whether a defendant filed a motion to suppress his or her own statement (1), a co-defendant's statement (2), or a witnesses statement (3).

Most often, data on motions to suppress were found on the case dockets. Some older cases were missing dockets, and those were coded system missing for both variables. Only in cases with dockets or an otherwise complete case record, were either of the suppression variables coded. Table 3.13 provides the frequency distribution for motions to suppress evidence. Over half of the defendants in the sample (for which we had information) filed a motion to suppress.

Table 3.13
Frequency distribution: motion to suppress evidence

Motion to Suppress Evidence		Frequency	Percent
	None filed	268	38.0
	Motion filed - search and seizure violations	305	43.2
	Motion filed - 403 challenge (prejudicial)	16	2.3
	Total	573	81.2
Missing	System	133	18.8
Total		706	100.0

Those motions were denied in 76 percent of the cases, and granted in 6 percent. 18 percent of the suppression motions were pending when the case was settled. Perhaps settling the case was hurried in an attempt to avoid having the evidence thrown out.

Table 3.14 displays the frequency distribution of motions to suppress or exclude statements. Defendants filed these motions in 37 percent of the cases in which we had information. As the table shows, the majority of those motions dealt with the defendants own statements. About 71 percent of the motions to suppress statements were denied, and 7 percent were granted. As with motions to suppress evidence, 10.5 percent of the motions to suppress statements were pending when the case was settled. Both of these findings will be explored in Chapter 4.

Table 3.14
Frequency Distribution: motion to suppress statements

	Motion Suppress Statements	Frequency	Percent
	None filed	367	52.0
	Motion in limine to suppress own statements	99	14.0
	Motion in limine to exclude co-defendant statements	8	1.1
	Motion to exclude witness statements	28	4.0
	Combination 1 and 3	78	11.0
	Combination 1,2 & 3	3	.4
	Motion to exclude expert witness statements	3	.4
	Total	586	83.0
Missing	System	120	17.0
Total		706	100.0

4. CASE TYPE

Chesney (2007) provides the basic framework that this project will use to categorize cases. Categorization will bypass the confusion concerning whether a case should be labeled

“terrorist” by separating defendants who are linked to a terrorist group or ideology from those who are not. Even though Chesney’s study was limited to cases involving material support charges, he recognized that post-9/11 antiterrorism policy directed the FBI and the EOUSA to intercept and disrupt terrorist planning before an act of terrorism could occur. According to Chesney, the FBI and EOUSA targeted immigration and financial fraud in a strategy unique to this policy shift. These cases involved defendants who were neither linked to a terrorist group/ideology nor an act of terrorism; these cases are at the center of the over-estimation controversy.

Chesney refers to them as *diffusion* cases. They are “diffused” in that the DOJ identified financial fraud and identification/immigration fraud as types of crime that international terrorist groups must engage in order to plan and carry out attacks on American soil. Making it more difficult for anyone to engage in these types of criminality, the argument goes, will disrupt a necessary avenue of planning and preparation used by terrorists. Anecdotally, we believe that cases of this nature were included in the post-9/11 list of names that the FBI provided to the ATS. If those cases can be identified, they can be separated from cases that have historically been “accepted” as terrorism cases allowing a more accurate measure of pre- and post-9/11 case differences.

While Chesney identifies some general characteristics of the three different types of cases, he made no attempt to analyze all three. This study begins by establishing distinct parameters for each category. The first category, *event-linked*, includes defendants linked to a terrorist group (or a terrorist philosophy as in the case of lone wolves) and linked to a planned or completed act of terrorism. A second category of terrorism cases is composed of what Chesney calls “pretextual” prosecutions. Those are cases in which a defendant is linked to a terrorist

group/ideology but not charged with a crime linked to an act of terrorism. As noted above, the FBI has reported both types of cases prior to 9/11. Finally, the third category includes “diffusion” prosecutions. In these cases the defendant is neither linked to a terrorist group/ideology nor to an act of terrorism.

The variable *case_type* was created using the following coding scheme: *Event-linked* is comprised of defendants who are linked to terrorists groups (*link_made* = 1) and who were indicted on charges related to an intended/completed act of terrorism. To achieve the second qualification, the ATS variables for intended target (*int1targ*) and actual target (*act1targ*) were recoded into one dichotomous variable (*target_recode*). If there were actual or intended targets identified in the case documents, the *target_recode* variable was coded 1. If there were no targets, it was coded 0. The second category, *pretextual*, includes defendants who are linked to a terrorism group (*link_made* = 1), but not linked in the case documents to a particular act of terror (*target_recode* = 0). The third category, *diffusion*, is comprised of defendants who are not linked to a group (*link_made* = 0) nor an act of terrorism (*target_recode* = 0).

Table 3.15
Frequency Distribution: case type

	Case Type	Frequency	Percent
Valid	Event linked	491	69.5
	Pretextual	129	18.3
	Diffusion	86	12.2
	Total	706	100.0

Table 3.16 provides the frequency distribution for case type within the data set. Approximately 70 percent of defendants in the study were linked to a group or ideology and some type of target. 13 percent of the defendants in the study were linked to a group or

ideology, but fell into the pretextual category. Just over 12 percent of the defendants in the sample fell into the diffusion category. As expected, all of the diffusion cases were filed after 9/11. Appendix 7 contains the frequency distribution for the types of crimes with which defendants were charged in diffusion cases. Nearly 85 percent of all the counts filed in diffusion cases involved some form of financial or identity fraud.

Conversely, only 1.3 percent of cases involve firearms, explosives, or hazardous materials charges. These findings support Chesney's observations (2007) as mentioned in Chapter 2. Analyses presented in Chapter 4 on the pre- and post-9/11 samples were performed using this coding scheme.

Both the ATS and PADS datasets are constructed in flat files, and SPSS version 15.0 was used to perform the analyses. The basic unit of organization for both datasets is the criminal count. That means that data for each individual are coded for each count in which he or she has been indicted. The following pages refer to different levels of analysis (e.g., count level, person level, case level). The different levels of analysis were conducted by performing "select if" functions to narrow them. Rather than repeat those steps for each hypothesis, Table 3.16 provides a coding key.

Table 3.16
Select if coding table

Analysis level	Select if functions performed	Output
Person level	<i>ct_num=1 & ind_num =1</i>	One line of data per person on 1 st count in 1 st indictment. Only one entry regardless of the number of indictments.
Indictee level	<i>ct_num = 1</i>	One line of data on 1 st count in each case that a person has been indicted.
Group level	<i>grp_sel = 1</i>	One line of data on 1 st count in 1 st indictment for each group. Only one entry regardless of the number of indictments filed against group.
Case level	<i>Case =1</i>	One line of data per case on 1 st count in 1 st indictment filed against the first person in each case.

5. Research Question One

The following section describes the methods we used to determine what the most significant prosecutorial and defense strategies have been over the past two decades. This section also describes the methods used to determine whether any significant relationships exist between prosecution methods, defense methods and overall conviction rates.

H₁=A *conventional criminality* prosecution method and a *traditional defense* strategy will produce the highest conviction rates.

H₂= An *explicit politicality* prosecution method and the defense strategy, *disassociation*, will produce the lowest conviction rates.

To test the first two hypotheses, we limited the database to the indictee level analysis. We then ran two sets of crosstabs between the defense method (*defmeth_recode*) and prosecution method (*prosmeth_recode*) by the dichotomous variable *conviction* (0 = no conviction, 1 = conviction). The chi-square indicated that the conviction rates for both models were random ($p < .001$ for each). The results of both models were combined in one table to provide frequencies and an estimate of conviction rates. The results will be discussed in detail in Chapter 4, but they suggest that prosecutors who employed an explicit politicality strategy suffered a penalty in net conviction rates. The results also suggested the same for defendants who employed the political persecution defense strategy.

Because *conviction* is a dichotomous variable, and because we wanted to predict the effect of the different prosecution and defense strategies on likelihood of conviction, we used binary logistic regression. We entered *conviction* (yes = 1, no = 0) as the dependant variable.

The variable *race* (0 = non-white, 1 = white) and gender (0 = female, 1 = male) were entered. As a surrogate measure of evidentiary strength, we included the variable for whether a government undercover agent was used (*infil_gov*) and the dichotomous variable for whether a confidential informant was used (*inform_mem*). We included *conspiracy* (conspiracy charge used = 1, not used = 0) to provide a surrogate measure of case complexity, as conspiracy cases are typically considered more complex than traditional cases. We also entered the ordinal variable *count_sev* (see appendix 1 for coding) as a measure of the seriousness of the charges.

To test strategies, we included the dummy variables for political persecution defense strategy and disassociation defense (leaving traditional defense out of the model to serve as a reference category). Finally, we included the dichotomous variables for explicit politicality prosecution strategy and political innuendo prosecution strategy (We left out conventional criminality to serve as the reference category). The model was run a second time including traditional defense in the analysis and leaving disassociation out as a reference. We also substituted conventional criminality prosecution method with political innuendo. The results are presented in Chapter 4.

6. Research Question Two

The following section describes the methods used to determine what impact 9/11 had on the way the government responds to terrorism cases. The results generally support hypothesis based on structural contextual theory and the hydraulic effect. However, an exception emerged in the form of lower plea bargain rates in the post-9/11 era.

H₃=If tightened coupling has occurred, prosecutors will voluntarily drop fewer counts (charge bargaining) in the post-9/11 era.

H₄= If tightened coupling has occurred, the percentage of plea bargained cases will decrease among pretextual prosecutions in the post- 9/11 era.

H₅=If net widening has occurred, cases in the post-9/11 era will involve a higher proportion of low-level offenses than cases filed before 9/11.

H₆=If net widening has occurred, there will be higher proportion of pretextual prosecutions as compared to event-linked prosecutions in the post-9/11 era.

H₇=The number of defendants per case will decrease among event-linked cases in the post-9/11 era.

H₈= The proportion of event-linked cases involving informants will be smaller in the post-9/11 era.

H₉= Conviction rates on more serious charges will decrease in the post-9/11 era

We tested Hypothesis 3 at the indictee level. Because dismissals can be measured in two ways, two analyses were performed. The variable *date* was recoded into a dichotomous variable. Cases indicted prior to January 1, 2001 were coded 0 and cases filed after December 31, 2001 were coded 1. In the first analysis, the variable *case_outcome* was coded into a dichotomous variable with *dismissed* =1, and all other values = 0. We then ran a bivariate analysis comparing means for the two groups. For the second analysis we used *cts_drop*. It is an ordinal level measuring the total number of counts dropped for each defendant. A bivariate analysis compared the mean number of counts dropped for both groups. Hypothesis 4 was tested using

the same sample. A select if was performed further limiting the data base to only pretextual cases in both pre- and post-9/11 groups. The variable for case outcome was recoded into a dummy in order to isolate plea bargains. If a case ended as a result of a plea bargain, it was coded 1. All other outcomes were coded 0. We then ran a bivariate analysis comparing the proportion of plea bargained cases in each group.

To test hypothesis 5, we ran the analysis at the indictee level using the pre- and post-9/11 dummy variable as the predictor. To measure the level of offense, we used the variable for count severity (*ct_sev*). Then we ran a bivariate analysis comparing the means of both groups. To control for the possible impact of diffusion cases in the post-9/11 sample, we ran the analysis a second time with diffusion cases removed. We tested Hypothesis 6 with two analyses. We ran a crosstabs in the first analysis at the indictee level. We used the pre-9/11 and post-9/11 dummy variable as the predictor and case type as the dependent. For the next analysis, a select if was performed to limit the data base to the case level. Then we ran a crosstabs between case type and the 9/11 dummy variable.

For hypothesis 7, we used case level analysis. After performing a “select if” to limit the sample to event-linked cases (*group_type = 1*), we used the same 9/11 dummy variable as the previous hypotheses. We used the variable *defend#*, and ran a bivariate analysis comparing the means of the pre- and post-9/11 samples. To test hypothesis 8, we again limited the database to event-linked cases. To compare the means of the pre- and post-9/11 samples, we used the dichotomous variable *gov_infor* and ran it as the dependant variable with the 9/11 dummy variable as the predictor. Next, we ran the same model using *gov_infil* to determine the average number of undercover agents available per case before and after 9/11.

Because some cases involve multiple confidential informants and undercover agents, and logic suggests that as the number of witnesses who are available to testify goes up, so do the chances of a successful conviction, we ran both models again using a second set of variables. In the third model we analyzed the variable *infor_num* to compute the average number of confidential informants. Before we ran the model, we performed a select if to limit the database so that only cases in which a confidential informant was used. In the fourth model we analyzed the variable *infil_num* to determine the average number of undercover agents. Like we did above, the database was limited to cases where an undercover agent was used.

Finally, because not all confidential informants and undercover agents provide the same amount and type of information, we ran two additional models. In the next model, we used the ordinal level variable *infor_level*. As a reminder, *infor_level* is coded as follows: 1 = *information only*; 2 = *recordings*; 3 = *sworn testimony*, and; 4 = *all the above*. For interpretation purposes, those values were labeled as follows: 1 = low; 2 = low-moderate; 3 = high-moderate, and; 4 = high. In the final model, we ran the analysis again using *infil_level*. The variable *infil_level* is coded using the same scheme as *infor_level*.

To test hypothesis 9, we ran two logistic regression models. In the first, we limited the cases to pre-9/11 by running a select if function in SPSS. We used *convict* (yes = 1, no = 0) as the dependent variable and selected count severity, an interval variable ranging increasing severity from 0 to 28, as the predictor. In the second model, we limited the cases to post-9/11 by performing a select if function in SPSS. We used *convict* as the dependent variable and selected count severity as the predictor.

IV: FINDINGS FORTWO RESEARCH QUESTIONS

1. RESEARCH QUESTION ONE

This section contains the results from analyses conducted to determine whether a relationship between prosecutorial and defense strategies exists, and if so, what effect those strategies might have on case outcomes. The results generally support the hypotheses. Hypothesis 1 predicted that a conventional criminality prosecutorial strategy and a traditional defense would produce the highest conviction rate.

The conviction rates for the nine possible combinations of prosecutorial and defense strategies were calculated. Those results are provided in Table 4.01, and indicate that the conventional criminality prosecution strategy and the traditional defense strategy was the most common combination in the model, but the combination did not produce the highest conviction rate. Conventional criminality and a traditional defense were used in 127 cases with a 92.1 percent conviction rate—well above the overall conviction rate of 84.1 percent. Independent of any defense strategy, conventional criminality produced the highest conviction rates among all prosecution strategies (92.5 percent). However, 100 percent conviction rates occurred when conventional criminality was combined with either disassociation (N=2) or political persecution (N=5).

There was another prosecution /defense strategy combination that produced higher conviction rates than the hypothesis predicted. The political innuendo prosecution strategy and the political persecution defense produced a conviction rate of 96.7 percent (n=30). As an overall prosecution strategy, political innuendo was slightly less successful than conventional criminality, producing a conviction rate of 88.9 percent compared to 92.5 percent for the latter.

The only other significant combination that produced results higher than the overall model conviction rate was the political innuendo prosecution strategy combined with a traditional defense. That combination resulted in convictions in 88.2 percent of the cases (N=51).

Table 4.01
Frequency Table of Prosecution Strategy and Defense Strategy conviction rates²³

		Prosecution Strategy			Overall conviction rate by def method
		Conventional Criminality	Political Innuendo	Explicit Politicality	
Defense Strategy	Political Persecution	5/5* 100% (conv rate)	29/30 96.7 %	57/68 83.8%	91/103 88.3%
	Disassociation	2/2 100 %	31/37 83.7%	97/122 79.5%	130/161 80.7%
	Traditional Defense	117/127 92.1%	45/51 88.2%	82/115 71.3%	244/293 83.2%
Overall Conviction rates by Prosecution Method		124/134 92.5%	105/118 88.9%	236/305 77.4%	485/577 84.1%

* #convictions / #cases

The second hypothesis predicted that the prosecution strategy explicit politicality and the defense strategy disassociation would produce the lowest conviction rates. The results indicated some support for the hypothesis, but one prosecution strategy and defense method produced a lower conviction rate than hypothesized. Explicit politicality and disassociation were both used

²³ An attempt was made to test the interaction effects for each combination of prosecution method and defense method using traditional defense and conventional criminality as reference categories. Multicollinearity was an issue between political innuendo and explicit politicality (.642, $p < .05$), so the categories were reduced further, into politicized prosecution strategy (political innuendo X explicit politicality) and politicized defense strategy (political persecution X disassociation). Unfortunately, a crosstab revealed only 7 cases existed (out of 99) when a politicized defense method was combined conventional criminality. The variance, then, was too small to perform logistic regression.

in 122 cases, and the combination produced a conviction rate of 79.5 percent. That is nearly 5 percent lower than the model average. In fact, explicit politicality produced the lowest conviction rates (77.4%) of all prosecution strategies, and disassociation was the most successful defense strategy (80.7%) used. Explicit politicality and a traditional defense strategy produced a lower conviction rate of 71.3 percent.

Explicit politicality was the most frequently used prosecution strategy in the sample (N=305). It only produced a conviction rate 7 percent below the model average (77.4% compared to 84.1%). Even when used with the least successful defense strategy, political persecution, explicit politicality produced convictions below the model average (83.8% to 84.1%). That result is remarkable considering that political persecution is the only defense strategy, regardless of the prosecution strategy used, to result in a higher conviction rate (88.3%) than the overall model average. Political persecution, overall, was the least successful defense strategy. When used, political persecution produced a conviction rate of 88.3 percent. That is well above the overall model conviction rate.

The disassociation defense strategy appears to be a more promising defense strategy for defendants. The conviction rate for the disassociation defense, regardless of prosecutorial method used, was only 80.7 percent, 3.4 percent below the overall model average. Similarly, defendants using a traditional defense were slightly better off than the overall model average, as they were convicted 0.9 percent less than the model average and significantly less than defendants using the political persecution defense.

The examination turned to logistic regression in order to determine the effect that prosecution strategies and defense strategies have on the odds being convicted. Because the dependant variable, *conviction*, is dichotomous (0 = no, 1 = yes), binary logistic regression was

used. Recall from Chapter 3 that prosecution strategy (*prosmeth*) is coded as a categorical variable with three categories. To test the effect of prosecution methods against each other, then, each category was coded into a dummy variables, as follows:

Table 4.02
Coding scheme for Prosecution Strategy

<i>conventional criminality prosmeth</i>	(0=no, 1=yes)
<i>political innuendo prosmeth</i>	(0=no, 1=yes)
<i>explicit politicality prosmeth</i>	(0=no, 1=yes)

Similarly, defense strategy (*defmeth*) is also a categorical variable with three categories. Defense strategy was coded into three dummy variables as follows:

Table 4.03
Coding scheme for Defense Strategy

<i>traditional defmeth</i>	(0=no, 1=yes)
<i>disassociation defmeth</i>	(0=no, 1=yes)
<i>political persecution defmeth</i>	(0=no, 1=yes)

For the first regression, the prosecution strategy variables for political innuendo and explicit politicality were plugged into the model. The variable for conventional criminality was withheld to serve as the comparison. The defense strategy variables for diffusion and political persecution were included in the model, while the traditional defense variable was withheld to serve as the comparison. Some additional predictor variables were added based on the literature (see Chapters 2 and 3). Among those entered were *race* (0 = non-white, 1 = white) and *gender* (0 = female, 1 = male). The variable *count severity* (see Appendix 1 for coding) was included.

The variable *informant* (0 = no, 1 = yes), which measures whether a confidential informant was available in a case, was used as a surrogate (though imperfect) measure of evidentiary strength.

The first regression produced a Nagelkerke R^2 of .105, but the variables *race*, *gender*, and *informant* were not significant. The same model was performed with those variables removed. The R^2 improved very slightly to .109, indicating a stronger model. For the sake of model parsimony, the second set of results, presented in Table 4.03, were retained.

Table 4.04
Logistic Regression for Conviction by prosecutions strategy and defense strategy

Variables	Coefficients	Odds Ratio / exp(B) (sig)
Political innuendo prosmeth	-1.179	.308 (.053)
Explicit politicality prosmeth	-1.834	.160 (.002)
Count severity	-.032	.969 (.065)
Political persecution defmeth	.653	1.920 (.081)
Disassociation defmeth	.590	1.804 (.059)

$\chi^2 = 30.233$, df 5, $p < .001$
 Nagelkerke $R^2 = .109$

The logistic regression presented in Table 4.04 produced a R^2 of .109, so almost 11 percent of the variance surrounding whether a defendant received a conviction is explained by the model. Of the variables entered, *explicit politicality prosmeth* was significant at the 99 percent confidence level. Each of the remaining variables was significant at the 90 percent confidence interval.

The variable *political innuendo prosmeth* had a negative coefficient and the odds ratio was < 1 , indicating a negative relationship between using the political innuendo prosecution method and the likelihood of being convicted. That means in cases for defendants who were prosecuted using a political innuendo strategy (as compared to conventional criminality), the

odds of not being convicted (because 0=not convicted, 1 = convicted and the latter is being modeled) increased by a factor of .308, controlling the effects of the other variables in the model.

Similarly, *explicit politicality prosmeth*, had a negative coefficient and the odds ratio was less than one. In cases where defendants were prosecuted using an explicit politicality strategy (as compared to conventional criminality), their odds of not being convicted increased by a factor of .160, controlling the effects of the other variables in the model. The variable *count severity* also indicates a negative relationship with the likelihood of conviction. Count severity is an ordinal variable, measured from lowest to highest severity (1 to 29). For each increment that count severity increases, the odds that a defendant will not be convicted increases by a factor of .969, controlling the effects of the other variables in the model.

The predictor *political persecution defmeth* produced a positive coefficient and an odds ratio of less than one, indicating a positive relationship between the use of the political persecution defense strategy and receiving a conviction. Defendants who employed a political persecution defense (compared to those who used a traditional defense strategy) increased their odds of conviction by 1.920, controlling the effects of the other variables in the model. Compared to using a traditional defense strategy, defendants who used a disassociation defense strategy also had increased odds of conviction. The coefficient for *disassociation defmeth* was positive and the odds ratio was greater than one. That means that defendants who used disassociation (compared to a traditional defense) increased their odds of conviction by 1.804, controlling the effects of other variables in the model.

A second binary logistic regression was run to determine whether the political innuendo prosecution strategy effected the likelihood of conviction (compared to explicit politicality), and to determine whether the disassociation defense strategy effected the likelihood of conviction

(compared to the political persecution strategy). In order to do this, *conventional criminality prosmeth* was included in the model and *explicit politicality prosmeth* was removed for comparison. For defense strategies, *traditional defmeth* was included and *political persecutoin defmeh* was removed for comparison. This logistic regression produced a Nagelkerke R² of .109: the model explains approximately 11 percent of the variance associated with whether a defendant is convicted.

Table 4.05
Logistic Regression for Conviction by prosecutions strategy and defense strategy

Variables	Coefficients	Odds Ratio / exp(B) (sig)
Conventional criminality prosmeth	1.834	6.257 (.002)
Political innuendo prosmeth	.655	1.925 (.061)
Count severity	-.032	.969 (.065)
Traditional defmeth	-.653	.521 (.081)
Disassociation defmeth	-.062	.939 (.874)

$\chi^2 = 30.233$, df 5, p< .001
 Nagelkerke R² = .109

The result of the logistic regression, presented in Table 4.05, indicate that *political innuendo prosmeth* is significant at a 90 percent confidence interval (p= .061). This is above the generally accepted .05 level, but just slightly. The coefficient was positive and the odds ratio was >1. This means, compared to the explicit politicality prosecution strategy, the odds of conviction increased by 1.925 for defendants prosecuted with a political innuendo strategy, controlling the effects of the other variables in the model. While *disassociation defmeth* (compared to *political persecution defmeth*) produced a negative coefficient and an odds ratio of <1, it was statistically insignificant (p=.874). That means there is not a statistically significant difference in the odds of being convicted for defendants who used either strategy.

2. RESEARCH QUESTION TWO

The next task was to determine how 9/11 impacted the federal government’s response to terrorism. Recall that data from the year 2001 were not included in these analyses. We divided the remaining population of terrorist defendants into a pre-9/11 sample (consisting of all database cases filed prior to 2001) and a post-9/11 sample (consisting of cases filed in and after 2002). For some analyses, we divided the cases in both eras by case type. Before any hypotheses were tested, we ran descriptive statistics on the “case type” variable.

2.a. CASE TYPE DESCRIPTIVE STATISTICS

We first determined the overall frequencies for case type with the year 2001 deleted. Case outcomes for 679 defendants were evaluated. Information was missing for 85 defendants—most of the missing defendants were fugitive, awaiting trial, or had been transferred to another jurisdiction—leaving 594 valid cases. There were a total of 481 defendants indicted in event-linked cases in the sample. There were 119 defendants indicted in pretextual cases, and 79 defendants indicted in diffusion cases. Table 4.06 provides the distribution of frequencies

Table 4.06
Case Type Frequencies pre- and post-9/11

Case Type		Pre-9/11	Post-9/11	Total
	Diffusion	0	79	79
	Pretextual	81	38	119
	Event-linked	431	50	481
Total		512	167	679

between the pre- and post-9/11 samples. In the pre-9/11 sample there were no diffusion cases, but there were 81 (15.8%) pretextual cases and 431 (84.2%) event linked cases. In the post-9/11 sample there were 79 (47.3%) diffusion cases, 38 (22.8%) pretextual cases and 50 (29.9%) event-linked cases.

Because they are categorical variables, we ran a crosstab between *case_type* and *outcome_recode*, to determine the frequencies between case types and case outcomes for both samples. Those results are presented in Table 4.07 (pre-9/11) and Table 4.08 (post-9/11). The pre-9/11 model (n = 450) produced a significant chi-square ($\chi^2 = 39.0$, df 3, $p < .001$), revealing that the variation between expected counts and observed counts across the model is substantial and there is less than one chance in a thousand that these results occurred randomly.

Table 4.07
Crosstab Case Type by Outcome Pre-9/11

Case Type	Case Outcome				Total
	trial conviction	plea guilty	acquitted at trial	dismissed	
Event-Linked	156 40.9%	149 39.1%	40 10.5%	36 9.4%	381 100.0%
Pretextual	8 11.6%	52 75.4%	0 .0%	9 13.0%	69 100.0%
Total	164 36.4%	201 44.7%	40 8.9%	45 10.0%	450 100.0%

$\chi^2 = 39.0$, df 3, $p < .001$

Table 4.08
Crosstab Case Type by Outcome Post-9/11

Case Type	Case Outcome				Total
	trial conviction	plea guilty	acquitted at trial	dismissed	
Event-Linked	5 12.5%	28 70.0%	2 5.0%	5 12.5%	40 100.0%
Pretextual	3 11.1%	22 81.5%	0 .0%	2 7.4%	27 100.0%
Diffusion	5 6.5%	68 88.3%	1 1.3%	3 3.9%	77 100.0%
Total	13 9.0%	118 81.9%	3 2.1%	10 6.9%	144 100.0%

$\chi^2 = 7.53, df 6, p = .275$

Running the post-9/11 sample (n = 167) through the same model (see Table 4.06), produced an insignificant chi-square ($\chi^2 = 7.53, df 6, p = .275$). The significance level is probably the result of the missing cases (n = 23) and the smaller sample size. When the system missing variables were recoded into a fifth category (5 = pending/fugitive), the model produced a large and significant chi-square ($\chi^2 = 24.763, df 8, p = .002$). The large chi-square reveals that there is significant variation between the expected case outcomes by case type, and that there only two chances in a thousand (when the 5th category is added) that these results would occur randomly. For the sake of clarity, the first model, with only four outcomes, is presented below. For reference, the five-outcome model is provided in Appendix 9.

As Table 4.07 indicates, there were no diffusion cases filed in the pre-9/11 era. That left 381 event-linked cases (85%) and 69 pretextual cases (15%). In the post-9/11 sample there were 40 event-linked cases (28%) and 27 pretextual cases (19%). The majority of cases filed after 9/11 were diffusion cases; there were 77 diffusion cases making up 53 percent of the sample.

In the pre-9/11 sample, 36.4 percent of the defendants were convicted at trial, and another 44.7 percent entered a guilty plea. Of the remaining defendants, 8.9 percent were acquitted of all charges and 10 percent saw all charges against them dropped. The numbers were dramatically different in the post-9/11 sample, where 82 percent of the defendants entered a plea of guilty. After 9/11, only 9 percent of the defendants went to trial, another 2.1 percent were acquitted, and charges were dropped against the remaining 6.9 percent (see Table 4.08).

The dramatic increase in the percentage of defendants who entered a guilty plea was among the more interesting trends. The plea rate increased 37.2 percent for defendants indicted after 9/11. As a result, the percentage of defendants going to trial was lower by 27.4 percent. One would expect that as fewer cases go to trial, fewer defendants are acquitted; that was the case here. The acquittal rate dropped by 6.8 percent after 9/11. Finally, the number of cases where all charges were dropped against a defendant dropped slightly, from 10 percent to 6.9 percent.

Another interesting trend was the drop in event-linked cases: 85 percent of the defendants in the pre-9/11 era were tied to a terrorist group/ideology and they were charged with attacking or attempting to attack a target. That number dropped to just 28 percent of cases after 9/11. Prosecutors filed the first diffusion cases in the post-9/11 era. Importantly, diffusion cases make up 53 percent of the cases filed after 9/11.

Next, we ran a crosstab between *case_type* and *pros_meth*, to determine the frequencies between case types and prosecution strategies. The preliminary model for the full database (both pre- and post-9/11 samples, without cases from 2001) produced an enormous and highly significant chi-square ($\chi^2 = 315.0$, df 4, $p < .001$). The high chi-square statistic is not surprising. Case type and prosecution method are highly correlated (Pearson correlation = .624, $p < .001$).

There is a strong relationship between the type of case filed, and the prosecution strategy used to pursue it.

Because the preliminary model indicated a very strong relationship between case type and prosecution method, the same model was run for the pre-9/11 sample and then again for post-9/11 sample. As Table 4.09 shows, there were a total of 511 defendants in the pre-9/11 model and it produced a very high and very significant chi-square ($\chi^2 = 88.7$, df 2, $p < .001$).

Table 4.09
Crosstab Case Type by Prosecution Strategy Pre-9/11

Case Type	Prosecution Strategy			Total
	conventional criminality	political innuendo	explicit politicality	
Event-Linked	24 5.6%	101 23.5%	305 70.9%	430 100.0%
Pretextual	33 40.7%	15 18.5%	33 40.7%	81 100.0%
Total	57 11.2%	116 22.7%	338 66.1%	511 100.0%

$\chi^2 = 88.7$, df 2, $p < .001$

Table 4.10
Crosstab Case Type by Prosecution Strategy Post-9/11

Case Type	Prosecution Strategy			Total
	conventional criminality	political innuendo	explicit politicality	
Event-Linked	5 10.0%	15 30.0%	30 60.0%	50 100.0%
Pretextual	11 29.7%	16 43.2%	10 27.1%	37 100.0%
Diffusion	71 89.8%	6 7.6%	2 2.6%	79 100.0%
Total	87 52.4%	37 22.3%	42 25.3%	166 100.0%

$\chi^2 = 98.2$, df 4, $p < .001$

That suggests that there was tremendous variation between expected and observed counts in each of the cells, and there is less than one chance in a thousand that the variation occurred randomly.

Table 4.10 contains the results for the post-9/11 sample (n = 166). The post-9/11 chi-square indicates a very large and significant amount of variation between expected and observed counts ($\chi^2 = 98.2$, df 4, $p < .001$). Prosecutors tried 66.1 percent of the pre-9/11 defendants using an explicit politicality prosecution strategy, 22.7 percent were tried by political innuendo, and just 11.2 percent by conventional criminality. After 9/11, prosecutors tried the majority of the defendants, 52.4 percent, with a conventional criminality strategy, 22.3 percent were tried by political innuendo, and 25.3 percent were tried using the explicit politicality strategy.

The largest single factor accounting for the drop in the percentage of explicit politicality prosecutions would appear to be the inclusion of diffusion cases in the post-9/11 era. However, even after removing the diffusion category the percentage of explicit politicality cases was 60 percent, a decrease of 10.9 percent from the pre-9/11 era. Prosecutors used the conventional criminality strategy in 52.4 percent of the post-9/11 cases. That is an increase of 41.2 percent. Removing diffusion cases from the model reduced the percentage to 18.4 percent, but that still means that prosecutors relied on this strategy 7.2 percent more often than in the previous era. Finally, prosecutors used the political innuendo strategy in 22.3 percent of the cases they filed in the post-9/11 era. That is a 0.4 percent decline from the pre-9/11 era. But when diffusion cases were removed, the percentage use of conventional criminality actually increased by 12.9 percent (to 35.6 %).

Among defendants indicted in event-linked cases before 9/11, 70.9 percent were prosecuted using an explicit politicality strategy, 23.5 percent were prosecuted using political innuendo, and 5.6 percent were prosecuted using conventional criminality. After 9/11, the

percentage of event-linked prosecutions relying on an explicit politicality strategy dropped to 60 percent. The percentage of conventional criminality prosecutions increased to 10 percent, and political innuendo cases increased to 30 percent.

In the pretextual category, results from the pre-9/11 model show that defendants were prosecuted using both conventional criminality and explicit politicality equally (40.7 percent each). The remaining 18.5 percent of all pretextual cases were prosecuted using the political innuendo strategy. In the post-9/11 sample, the use of political innuendo increased to 43.2 percent, up 24.7 percent from the pre-9/11 level. During the same time frame, the use of explicit politicality decreased to 27 percent, and the use of conventional criminality decreased to 29.7 percent.

For the pre-9/11 model, the largest portion of the chi-square was explained in four cells. The cell for pretextual case type and conventional criminality prosecution methods produced an expected frequency of 9 and an observed frequency of 33—an increase of 24 cases (266%). The observed frequency for pretextual case type and explicit politicality prosecution strategy was lower than the expected frequency by 23 cases (-41.1%). The cell for event-linked case type and conventional criminality prosecution strategy had an lower observed frequency by 24 cases—a decrease of 24 cases (-50%). The observed frequency for event-linked case type and explicit politicality prosecution strategy was higher than expected by 11 cases (7.3%). The two remaining cells differed in observed versus expected frequencies by less than 4 cases.

In the post-9/11 model, the cells for diffusion case type and each of the prosecution strategies produced significant variance. The variance between observed and expected frequencies for diffusion case type and conventional criminality differed the most (+30 cases, 73%), followed by explicit politicality (-18 cases, -90%), and then political innuendo (-11 cases,

-64%). The cell containing event-linked case type and conventional criminality produced 21 fewer cases than expected(-81%). The observed frequency for event linked case type and explicit politicality was higher than expected by 17 cases (17%). The remaining cells produced variation between expected and observed frequencies of less than 9 cases.

For the next analyses, we substituted prosecution method with defense method (*def_meth*) and ran the same models. The number of defendants remained the same in both sets of analyses. The pre-9/11 model produced a chi-square of 12.47 (df 2, p = .002) and the post-9/11 model produced a chi-square of 31.5 (df 4, p <.001). The chi-square statistic for both models were large and significant at the 99 percent confidence interval. Meaning, there is a significant relationship between defense strategy and case type. As compared to the prosecution strategy models, though, the lower chi-square statistics reveal that defense strategies are not correlated as strongly to case type.

The results for the pre-9/11 crosstab are presented in Table 4.11. The overall frequencies indicate that 44.8 percent of the defendants in this sample used a traditional defense strategy to avoid conviction, 34.5 percent of the defendants relied on a disassociation strategy, and 20.7 percent employed political persecution.

Table 4.11
Crosstab Case Type by Defense Strategy Pre-9/11

Case Type	Defense Strategy			Total
	Political Persecution	Disassociation	Traditional	
Event-Linked	88 23.8%	125 33.8%	157 42.4%	370 100.0%
Pretextual	5 6.3%	30 38.0%	44 55.7%	79 100.0%
Total	93 20.7%	155 34.5%	201 44.8%	449 100.0%

$\chi^2 = 12.5$, df 2, p = 002

In the post-9/11 model (see Table 4.12), 73.1 percent of the defendants used a conventional defense strategy and 13.1 percent used the disassociation strategy. The remaining 13.8 percent of the defendants relied on political persecution. That means after 9/11 the percentage of defendants using a traditional defense increased by 28.3 percent. If diffusion cases are removed from the model, the percentage of defendants using a traditional defense drops to 53.5 percent. That is still an increase of 8.7 percent.

Table 4.12
Crosstab Case Type by Defense Strategy Post-9/11

Case Type	Defense Strategy			Total
	Political Persecution	Disassociation	Traditional	
Event-Linked	7 20.6%	8 23.5%	19 55.9%	34 100.0%
Pretextual	12 32.4%	6 16.2%	19 51.4%	37 100.0%
Diffusion	1 1.4%	5 6.8%	68 91.9%	74 100.0%
Total	20 13.8%	19 13.1%	106 73.1%	145 100.0%

$\chi^2 = 31.5$, df 4, $p < .001$

The proportion of defendants using a disassociation defense strategy decreased by 21.4 percent in the post-9/11 era. When diffusion cases were removed, the percentage of defendants using disassociation increased to 19.7 percent, but that is still an overall decrease of 14.8 percent from the pre-9/11 model. Table 4.12 also shows a decrease in the number of defendants using the political persecution defense strategy from the pre-9/11 model to the post-9/11 model. After 9/11, only 13.8 percent of the defendants relied on political persecution. However, when diffusion cases were removed the results show an increase of 6.1 percent for a total of 26.8 percent.

When considering case type, some noteworthy trends emerge. Of the defendants who were prosecuted in event-linked cases, fewer used political persecution and disassociation as defense strategies after 9/11 than before. The percentage of defendants using political persecution dropped slightly from 23.8 to 20.6 (although this change is not significant), and the proportion of defendants using disassociation changed from 33.8 to 23.5 percent. The percentage of defendants in event-linked cases who relied on a traditional defense increased from 42.4 to 55.9 - an increase of 13.5 percent.

The trends were different for defendants who were indicted in pretextual cases. Fewer defendants in the post-9/11 era used a traditional defense. Before 9/11, defendants in pretextual cases used a traditional defense 55.7 percent of the time, but afterwards, that percentage dropped to 51.4 percent. More dramatically, 38 percent of the defendants used a disassociation defense before 9/11, but only 16.2 percent used that defense afterwards. The percentage of defendants using a political persecution strategy increased from 6.3 to 32.4 in the post-9/11 era. Finally, we will note that in diffusion cases, 91.9 percent of the defendants used a traditional defense. Similarly, 89.9 percent of defendants were tried using a conventional criminality prosecution strategy. The discussion now turns to the results of hypothesis testing.

2.b. TESTS OF HYPOTHESES

Hypothesis 3 predicted that, if structural contextual theory is correct and tightened coupling has occurred among components of the criminal justice system, prosecutors would voluntarily dismiss fewer cases/counts than in the post-9/11 era. There are two ways to measure dismissal: cases dismissed and counts dismissed (i.e. charge bargaining) from cases. Independent samples t-tests were used for both analyses. The results for case dismissals are

found in Table 4.13, and indicate that there was a statistically significant ($p < .001$) decrease in the proportion of cases dismissed from the pre-9/11 era (.09, $SD = .285$) to the post-9/11 era (.02, $SD = .143$). However, if diffusion cases are removed from the model, the results show no significant difference between eras.

Table 4.13
Number of Cases Dismissed Pre- and Post-9/11

Era	proportion	N	Std. Deviation
Pre-9/11	.09	450	.285
Post-9/11	.02	144	.143

$t(466) = 3.8, p < .001$

The results for counts dismissed per case were not as expected. As Table 4.14 shows, the number of counts dismissed increased. While the average number of counts appears to have decreased, the t-test indicates an extremely high probability that the difference between eras is not statistically significant. The results do not support this hypothesis.

Table 4.14
Number of Dismissed Counts per Case Pre- and Post-9/11

Era	proportion	N	Std. Deviation
Pre-9/11	1.37	402	1.37
Post-9/11	1.17	138	1.17

$t(538) = .339, p = .735$

Hypothesis 4 predicted that if tightened coupling had occurred, the percentage of plea bargained cases would decrease among pretextual prosecutions in the post-9/11 era. The t-test reveals that there is not a statistically significant ($p = .382$) difference in the guilty plea rate between eras (see Table 4.15). Though the results are not statistically significant, they suggest

that the guilty plea rate may have increased between eras. The results do not support hypothesis 4.

Table 4.15
Percentage of Plea Bargains in Pretextual Cases

	proportion	N	Std. Deviation
Pre-9/11	.69	35	.471
Post-9/11	.79	28	.418

$t(61) = -.88, p = .382$

Hypothesis 5 tested the hydraulic effect, and this hypothesis predicted that if net widening had occurred, cases in the post-9/11 era would involve a higher proportion of low-level offenses than in cases filed before 9/11. This analysis tested by independent samples t-test. The average for severity was taken from the lead offense for each defendant in both samples. We used lead offense because prosecutors normally list the counts in an indictment in order of severity. The results are presented in Table 4.16. The t-test revealed a significant decrease in average count severity between the pre-9/11 era ($M = 19.38, SD = 9.15$) and the post-9/11 era ($M = 15.71, SD 9.321$).

Table 4.16
Average Count Severity before and after 9/11

Era	Mean	N	Std. Deviation
Pre-9/11	19.38	403	9.149
Post-9/11	15.71	153	9.321

$t(554) = 4.20, p < .001$

When diffusion cases were removed from the analysis (model not shown) to compare only pretextual and event-linked cases from both eras, the results were not significant $t(134) = .180, p = .858$. That means, when looking at similar case types between eras, there was not a

statistically significant change in count severity. Results for the overall model (all case-types) support the hypothesis, but results from the second model do not.

Hypothesis 6 predicted that, if net widening has occurred, there would be a higher proportion of pretextual prosecutions compared to event-linked prosecutions in the post-9/11 era. We removed the diffusion cases from the samples, and tested the hypothesis with two analyses. In the first analysis, shown in Table 4.17, we analyzed the total number of defendants using crosstabs (indictee level analysis). In the second analysis, shown in Table 4.18, we analyzed the proportion of pretextual cases in each era using crosstabs (case level analysis).

Table 4.17
Crosstab Defendants in Pretextual Cases

ERA	Case Type		Total
	Event -Linked	Pretextual	
Pre-9/11	431 84.2%	81 15.8%	512 100.0%
Post-9/11	50 56.8%	38 43.2%	88 100.0%
Total	481 80.2%	119 19.8%	600 100.0%

$\chi^2 = 35.4$, df 1, p <.001

As can be seen in Table 4.17, the chi-square was large and significant ($\chi^2 = 35.4$, df 1, p <.001). There were a total of 512 defendants in the pre-9/11 sample and 88 in post-9/11 sample. Of all the defendants who were indicted in the pre-911 sample, 15.8 percent were indicted in pretextual cases. As predicted, the percentage of defendants indicted in pretextual cases increased 27.4 percent to 43.2 in the post-9/11 era.

We found a similar trend in the second model. There were a total of 209 cases in this model: 157 in the pre-9/11 sample and 52 in the post-9/11 sample. As the results in Table 4.18

show, before 9/11, only 12.1 percent of the cases filed were pretextual. That percentage increased by 22.1 percent for a total of 44.2 in the post-9/11 era.

Table 4.18
Crosstab Pretextual Cases

Case Type	Event -Linked	Pretextual	Total
Pre-9/11	138 87.9%	19 12.1%	157 100.0%
Post-9/11	29 55.8%	23 44.2%	52 100.0%
Total	167 79.9%	42 20.1%	209 100.0%

$\chi^2 = 25.1$, df 1, $p < .001$

Hypothesis 7 predicted that, in event-linked cases, the total number of defendants per cases would be smaller in the post-9/11 era. After limiting the database to event-linked cases, we ran an independent samples t-test to compare the means for the average number of defendants per case in both the pre- and post-9/11 samples. The results, presented in Table 4.19, are statistically significant ($p = .001$). That means there was a significant drop in the average number of defendants in event-linked cases between the pre- and post-9/11 eras. The results support Hypothesis 7.

Table 4.19
Average Number of Defendants in Event-linked Cases

Era	Proportion	N	Std. Deviation
Pre-9 /11	3.43	138	4.278
Post-9/11	1.72	29	1.667

$t(114) = 3.56$, $p = .001$

Hypothesis 8 predicted that the proportion of event-linked cases involving informants would be smaller in the post-9/11 era. We planned to use six different models to test this

hypothesis, but as we will explain below, we ultimately ran four. In the first, we determined the proportion of cases using confidential informants in the first model using the dichotomous variable, *informant* (0 = no informant, 1 = had informant) in an independent samples t-test. The results in Table 4.20 show that the proportion of cases that involved confidential informants decreased significantly between the pre/9/11 era (58%) and the post-9/11 era (20%). The results support hypothesis 8.

Table 4.20
Proportion of Cases with Confidential Informant

Era	Proportion	N	Std. Deviation
Pre-9 /11	.58	120	.886
Post-9/11	.20	25	.408

t(40.2)= 4.02, p < .001

The results for undercover agents are presented in Table 4.21. As with confidential informants, the proportion of cases that made use of an undercover agent decreased dramatically. Undercover agents were used in 31 percent of cases filed before 9/11, and in only 4 percent of case filed afterwards (p < .001). That is a decrease of 27 percent after 9/11. These findings support Hypothesis 8, but we must note that there was only one event-linked case in the post-9/11 era that involved an undercover agent so the results of the t-test were not significant. We will nonetheless present these findings for discussion.

Table 4.21
Proportion of Cases with Undercover Agents

Era	Proportion	N	Std. Deviation
Pre-9 /11	.31	118	.462
Post-9/11	.04	25	.200

t(86.4) = 4.5, p < .001

Among cases where at least one confidential informant was used, the average number of informants per case decreased after 9/11. The model was statistically significant. The results in

Table 4.22 indicate that before 9/11 the prosecution used an average of 4 informants in these cases. After 9/11 the average decreased to 1.2. The model testing the number of undercover agents is not presented here. Since there was only one case in the post-9/11 era that made use of an undercover agent we chose not to include the results. We will note, however, that in event-linked cases filed prior to 9/11, there was an average of 2.67 agents in cases in which at least one undercover agent was used.

**Table 4.22
Number of Confidential Informants per Case**

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.

In the final model, we determined the average amount of assistance provided by confidential informants before and after 9/11. Those results are presented in Table 4.23. The results are significant at a .10 level. As a reminder, the variable we used was *infor_level*. It is an ordinal variable coded from 1 to 4 (low to high). The results show that the level of assistance provided by confidential informants in event-linked cases decreased after 9/11 by .37. These results support Hypothesis 8.

**Table 4.23
Average Level of Assistance Provided by Confidential Informants per Case**

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

T(6) = 2.7, p < .05.

Hypothesis 9 predicted that conviction rates on more serious charges would decrease after 9/11. We ran two bivariate analyses. Count severity was recoded into a dichotomous variable divided on the mean (19), and independent sample t-tests were run. The first column in

Table 4.24 shows the results for the pre/11 sample. The difference in means is statistically significant and indicates that low severity crimes resulted in conviction approximately 88 percent of the time, while high severity crimes resulted in conviction at a lower rate of 76 percent. Conversely, results in the second column (post-9/11) were not statically significant. That means in the post-9/11 era, there was not a statistically significant difference in conviction rates between high and low severity offenses. Comparing two models, one will also note that conviction rates were higher, regardless of severity, in the post-9/11 era. The results do not support Hypothesis 9.

**Table 4.24
Conviction Rate by Count Severity**

Severity	Conviction rate	
	Pre-9/11*	Mean Post-9/11**
Low Severity	.88 (sd = .331)	.90 (sd = .331)
High Severity	.76 (sd = .429)	.92 (sd = .429)

* p = .005

**p = .75

V. PROSECUTORIAL AND DEFENSE STRATEGIES IN TERRORISM CASES

The discussion first focuses on the general outcomes and characteristics of prosecution strategies. In this section, explicit politicality emerges as a very risky prosecution strategy when compared to its alternatives. In the next section, the discussion turns to defense strategies. One important finding presented is that the disassociation defense strategy produces the lowest conviction rates overall, but its success proves to be situational. Another finding presented is the positive impact the political persecution defense strategy has on the likelihood of conviction. Finally, results of the hypothesis testing are presented along with explanations on why some prosecutorial and defense strategy combinations produce high conviction rates, while others do not.

1. GENERAL PROSECUTION STRATEGIES

In Chapter 2, we argued that terrorism cases are very different from traditional criminal cases in that prosecutors have developed different strategies to prosecute them. But then in Chapter 4, we reported that 23 percent of all terrorism cases are treated no differently than traditional criminal cases. This begs the question: do either the prosecutors or the defendants know that the investigation was conducted under a terrorism enterprise investigation by the FBI? We believe they do.

Case documents reveal that many defendants are aware that they were either targeted prior to arrest, or investigated after arrest, by law enforcement officials working for, or with, a Joint Terrorism Task Force (“JTTF”). Former Assistant United States Attorney Robert Mclean, who prosecuted cases in the Northern District of Alabama, agrees. During a 2007 interview, he stated that it is common practice for defendants to become aware of JTTF involvement during

the discovery process (the phase of a court case where the government must provide the defendant with all the evidence it intends to use to prove its case). Moreover, McLean suggested that prosecutors always know when a case is referred by the FBI, and they know whether it was subject to a terrorism investigation. The use of a conventional criminality prosecution strategy would appear to be a conscious and carefully considered decision.

There are several reasons why prosecutors may use a conventional criminality prosecution strategy over another approach. First, the cases typically involve simple charges (e.g. strict liability charges) and may be easier to prove and require fewer resources than more complex cases. In effect, a prosecutor may decide that it is better to get the defendant off the street on a low-severity charge that can be proved, than to risk acquittal on a more severe charge where the evidence is questionable. On a scale of increasing severity from 1 to 28, the average count severity for conventional criminality cases in this study was 17.81, compared to 18.20 for political innuendo and 23.27 for explicit politicality (see appendix 2). In essence, the more serious the charges, the more likely defendants will be explicitly labeled as terrorists.

Second, prosecutors may have little choice. Rule 403 of the Federal Rules of Evidence (FRE 403) was written to prevent the use of prejudicial evidence in court cases where that evidence does not aid in the determination of guilt. For example, if the only charge prosecutors believe can be proven is related to narcotics possession, they may feel they do not have legal standing to introduce evidence that the defendant was sympathetic to the white supremacy movement. Third, prosecutors may want to avoid giving the defendant a stage from which to advocate his or her cause. As mentioned in Chapter 2, Terrorism cases can garner tremendous attention from the press.

Regardless of the reason for using it, conventional criminality was the most successful prosecution strategy tested, generating a conviction rate of 92.5 percent. That is a much higher conviction rate than when all other prosecution strategies were combined (84.1%). In fact, the 92.5 percent conviction rate more closely mirrors non-terrorist cases in the federal system (see Chapter 2). The similarity is probably not a coincidence, as conventional criminality cases are treated much like non-terrorist cases. For example, defendants may be charged with any number of criminal violations, but at no time do those charges involve proving that the defendant was engaged in attacking (or planning to attack) a target for political reasons.

It is also true of conventional criminality cases that prosecutors avoid any attempt to link a defendant to a terrorist group or ideology. On occasion, prosecutors have fought to keep politics out of their cases. For example, in *US v Merrell*, prosecutors wanted to avoid politicizing the terrorist cause to the degree that they filed motions to block the defendant from making any reference to his political affiliation (*see US v Merrell*, 96-CR-257 WFN, E.D. Washington, 1996). But typically, if a prosecutor avoids politicizing a case, the defendants will not force the issue. Recall, in Table 4.02, that prosecutors used a conventional criminality strategy against 134 defendants from 1980 to 2004. During that time, only 7 defendants attempted to use a politicized defense strategy and all ended up convicted.

As a prosecution strategy, political innuendo was almost as successful as conventional criminality. The political innuendo strategy resulted in convictions 88.9 percent of the time, versus 92.1 for the latter. Political innuendo cases typically involve less serious offenses than explicit politicality cases, but slightly more serious charges than conventional criminality (see Appendix 2). In total, prosecutors chose the political innuendo strategy over other prosecutorial strategies 21 percent of the time.

Like the conventional criminality strategy, political innuendo is characterized by charges that resemble traditional criminal cases. While they involve conspiracy charges twice as often (6 percent compared to 3 percent) as conventional criminality cases, those charges do not involve proving that the defendant was engaged in attacking, or planning to attack, a target for political reasons. Recall that with the political innuendo strategy the prosecution attempts to link the defendant to terrorism in cases where the defendant is charged with non-politicized criminal violations. In some instances the prosecution provides only a subtle hint, but in others the prosecution blatantly makes the claim.

For an example of using a subtle hint, consider *US v Norris* (85 CR 0010, U.S. District Court for the Northern District of Alabama). In the *Norris* case, the prosecution mentioned the group “The Order” and implicated the defendants in hiding notorious Order member, Robert Matthews, but the defendants were not called terrorists in the record, and the prosecution did not claim they were members of the Order. For an example of more blatant reference, consider the case of *US v Fernandez* (84 CR 0134, U.S. District Court for the Southern District of New York). In a prior case, Eduardo Arocena (Omega 7) decided to cooperate with the government. Arocena told authorities that Defendant Fernandez had taken part in one machine gun murder, and that Omega 7 used Fernandez’s store to construct bombs used in an attempted car bombing of a Cuban Ambassador. The government offered Fernandez immunity and ordered him to testify before the Grand Jury. He refused, and was held in civil contempt for 18 months until the United States brought charges against him in the above case. While the indictment read like a simple “failure to appear,” at Fernandez’s bond hearing, the AUSA called the defendant a terrorist and recounted the above information in open court.

Not only do prosecutors expose a defendant's link to terrorism in different ways, subtly or blatantly, prosecutors appear to do so for different reasons and at different points during a case. Sometimes the connection between a defendant and a terrorism group happens at the sentencing phase of a case in what is likely a calculated move to increase the sentence imposed. In *US v Walid* (87 CR 78, U.S. District Court for the District of Vermont), the defendants were linked to explosive devices found near a railroad track where they had been seen. From the opening statements to the closing arguments, no mention of the word terrorism, political ideology, or an act of terrorism appeared in the record. That changed during the sentencing phase. The sentencing memorandum not only asserted a connection between the defendants and a group, the Syrian Social Nationalist Party, but it defined terrorism and made a political argument about the dangers of terrorism. In fact, an affidavit attached to the sentencing memorandum provided a history of the SSNP since 1930.

In other cases, the government may allege the defendant's membership in a notorious group to sway the jury. Such was the case in *US v Schweitzer* (95-CR-117, U.S. District Court for the District of Montana). In this case, the government charged the defendants with conspiracy to commit fraud on banks and the government, but never mentioned the political purposes of the defendants. Instead, prosecutors simply told the jurors that the defendants were members of a notorious group, the Freemen. It is clear from the court record that the Freeman were well known in the media and among the jury members.

Prosecutors have also used the political innuendo strategy very early in a case to prevent defendants from being released on bail. In the *Fernandez* case above, the record shows that the prosecutor asked that bail be set at a level that the defendant could not pay. After hearing about the defendant's possible connection to terrorism, the Magistrate said on the record that \$500,000

was probably beyond what the defendant could raise, but if he should find it, the AUSA could advise the court and the court would reconsider the amount. In *US v Siddiqui* (01-CR-393, U.S. District Court for the District of North Carolina), the defendant was indicted on simple ID Fraud. The indictment did not contain any information or allegations linking the defendant to terrorism, but at the bond hearing, the prosecution raised the specter of the defendant's potential involvement with 9/11. He was denied bail on the grounds of being a danger to the community. At one point, the defendant took a polygraph on his connection with 9/11 - it was inconclusive. Regardless, the judge found that Siddiqui was a danger to the community and refused to grant his bail, even before the INS had perfected an immigration hold.

In one more example, *US V Budiman* (02-CR-74, U.S. District Court for the Eastern District of Virginia) the defendant was indicted for ID fraud. The indictment did not mention any terrorist activity. At his arraignment, however, the prosecution suggested that Budiman knew the 9/11 hijackers and may have further involvement with the attack. A court appointed attorney, in open court, requested to be removed from the case immediately. After Budiman was appointed a new attorney, the government asked that he not be released on bail because he was a flight risk. Again, the assertion that he may have been associated with the 9/11 hijackers was raised. Without addressing the flight risk issue, the court found that he posed a danger to the community and denied his bail.

Unlike when using the political innuendo strategy, explicit politicality makes the defendant's political motive a core component of the case. Cases in which the explicit politicality strategy is used involve more serious charges than cases tried using the other prosecution strategies (see Appendix 2). In addition, these cases are more complex, as 20 percent of all counts filed are conspiracy charges (see Appendix 3). Explicit politicality was also

the most frequently used prosecutorial strategy, accounting for almost 55 percent of all prosecutions. Explicit politicality cases tend to draw the most media attention, and unfortunately, that exposes prosecutors and law enforcement to the potential of bad press. Explicit politicality is by far the least successful prosecution method, generating an overall conviction rate of just 77 percent. As Tables 4.03 and 4.04 show, explicit politicality has a statistically significant and strong negative impact on the likelihood of conviction. That negativity continues to exist even when the effects of crime severity and case complexity are controlled.

As previously mentioned, a defendant's political motive is central to the explicit politicality prosecution strategy, but even that is subject to nuances. These nuances may be the result of prosecutors attempting to find a balance between politicizing a case and generating a conviction. In *US v Whitehorn* (88 CR 0145, United States District Court for the District of Washington, D.C.), the sentencing segment of the case was far more politicized than the previous segments. Linda Evans and Laura Whitehorn were members of the May 19 Communist Organization, a fact that the prosecutor mentioned repeatedly throughout the case. The government's sentencing memorandum goes much further. The prosecutor compares the defendants' actions to violent acts committed by the KKK and the Neo-Nazi's. Interestingly, the description of the defendants' actions and goals are exceptionally close to the FBI's definition of terrorism.

Four years later, prosecutors in Arizona tried a different approach in a case filed against members of the Provisional Irish Republican Army. In *US v Maguire* (92 CR 587, United States District Court for the Northern District of Arizona), prosecutors attempted to politicize the case while trying to prevent the defendants from doing the same. Prosecutors went to the Grand Jury

with a conspiracy case clearly identifying the Provisional Irish Republican Army and suggesting that explosive materials recovered during the FBI investigation would be used to kill foreign nationals. Fearing juror empathy, prosecutors then tried to block the defendants from bringing up the political and religious history of the PIRA. At the same time, the defendants sought to bring in PIRA history and, moreover, they wanted to introduce evidence of political persecution perpetrated by the British Government. The court was in a conundrum over the competing motions (nearly 270 motions filed in the case), but eventually it ruled that the government had opened the door. The court allowed both sides to bring in their political evidence.

2. GENERAL DEFENSE STRATEGIES

Introducing politicality in terrorism cases adds to the contentiousness that already exists in criminal trials. It also poses new challenges to defense attorneys trying to defend their clients. To counter the strategies created by prosecutors, defense attorneys have tried a number of strategies of their own. This study focused on the three most common. First, the disassociation strategy was employed by defendants who tried to distance themselves from other group members, extremist ideologies, or sometimes, simply the most politicized counts in a given indictment. Second, the political persecution strategy was used by defendants who attempted to claim that they were the subject of political crusades that had targeted them for having alternative political views. And third, like prosecutors who avoid using a political prosecution strategy, some defendants took their chances by avoiding the political issue altogether and relied on a traditional defense strategy. It should be noted that “traditional” does not mean a particular defense strategy has been employed, as there are hundreds of defense tactics. Rather it means that the defendant has a defense strategy that ignores or avoids the political issues altogether.

Over the past 20 years, the disassociation strategy has proven to be the most effective of the three strategies for defendants to avoid conviction. In 20 percent of the cases where disassociation has been used, defendants have been acquitted of all charges or have had all charges against them dismissed. In addition to having all counts dropped or being acquitted on all counts, sometimes a few counts from an indictment are dropped or result in conviction even when a defendant is convicted on other counts. The table in appendix 4 shows that 74.3 percent of all counts that resulted in acquittal (n=101) occurred when the defendant employed a disassociation strategy.

In addition, counts are sometimes dropped when a prosecutor charges a defendant in a superseding indictment. Sometimes called charge bargaining, counts that appeared in an original or preceding indictment against a defendant are left off of a subsequent indictment. The table in Appendix 5 shows that prosecutors dismiss counts much more often, nearly 2 counts per defendant (1.91), when those defendants used a disassociation strategy than compared to defendants who used other defense strategies (.19 counts per defendant in political persecution cases, .77 counts per defendant in traditional defense case).

Disassociation occurs in several different ways. A common method is for a defendant to file a motion *in limine* to sever his or her case from other defendants. This is particularly popular among rank and file group members who have been indicted with group leaders or more notorious members. Sometimes a defendant attempts to limit the government's use of certain terms (such as "terrorism" or "KKK") that might connect a defendant to a particular ideology or event. In other cases, defendants attempt to sever highly politicized charges from their indictment, arguing that by including the politicized charges with more mundane counts, the defendants are prejudiced. Finally, some events and some groups are so notorious in a particular

area that defendants believe that the jury pool is likely tainted, so they request not only a severance, but also a change of venue.

Examples of each of these methods occurred in *US v Schweitzer* (95-CR-117, U.S. District Court for the District of Montana). Defendant Dana Dudley filed a number of motions to distance herself from the other defendants and from the group ideology. Her first was a motion to limit verbiage—to prevent the government from using the term “compound” when referring to the property on which the defendants lived. She filed a second motion to prohibit the government from using the term “Freemen” when describing the defendants. Other defendants in the Schweitzer case filed motions to sever their cases from one another, and several filed motions to sever the robbery counts from the fraud counts. The Schweitzer jury found itself hung on three counts during the first trial, so the government retried the defendants some 3 months later. During that time, the defendants filed dozens of motions to sever, basing some of those motions on the proposed testimony of a proposed witness for another defendant. At least 5 defendants attempted to have the venue changed as they believed that the bad press about the Freeman would prejudice the jury. As the second trial neared, two defendants tried again to limit verbiage.

In an argument typical of defendants who attempt to limit verbiage, Dana Dudley relied on Federal Rules of Evidence 403 (“FRE 403”). Dudley argued that the use of the words “compound” and “Freemen” would introduce prejudice beyond any probative value. In effect, she argued that the words themselves offered nothing that would help the jury decide her guilt, but those words were likely to inflame jury members. The government responded to her motions by arguing the nature of the defendants’ property was in fact a compound, and the government pointed out that the defendants used the term “Freemen” to describe themselves. In the opinion

denying her motion, the court noted that Dudley had filed an earlier *pro se* petition requesting a “White Christian Judge” and she signed the petition “a Free White Christian Woman.”

The political persecution defense strategy is another popular method used in terrorism cases, invoked by 18 percent of the defendants in this study. Political persecution is similar to an affirmative defense in that the defendant is arguing that he or she has been indicted because of his or her political beliefs; that, in actuality, they have done nothing but live according to their belief system and should not be punished for it. Political persecution is not a recognized affirmative defense, such that the burden of proof shifts to the defendant to prove they are being persecuted. But it nonetheless asks the jury to sympathize with their situation. The strategy is a gamble that rarely works.

Defendants who rely on the political persecution strategy are convicted at the highest rate of all defendants in this study, 88.3 percent of the time. As Appendix 4 indicates, those numbers are even stronger when one looks at count outcomes rather than case outcomes. When using political persecution as a defense strategy, 41 percent of all counts result in a jury conviction, compared to 20.5 percent of all counts defended by disassociation. In other words, not only do defendants get convicted more frequently, they get convicted on more counts.

It is also the case that defendants who employ this strategy are more likely to go to trial and therefore, less likely to plead guilty. Similarly, prosecutors faced with a political persecution defense strategy have dropped fewer counts (i.e. engaged in less charge bargaining) when filing superseding indictments (see Appendix 5). It should also be noted that the higher conviction rate for political persecution is not due to count severity either. As Appendix 6 shows, the average count severity faced by each of the defense strategies is approximately the same.

A traditional defense strategy was used by more than 50 percent of the defendants in this study. Those defendants were convicted at a higher rate (83.2%) than were defendants who used a disassociation defense (80.7%), but they did much better than defendants who relied on a political persecution strategy (88.3%). Additionally, prosecutors dropped an average of .77 counts from each indictment via charge bargaining. While this is a much lower average number of counts dropped than when defendants used the disassociation defense, it is over 4 times higher than defendants who used the political persecution defense.

3. THE RELATIONSHIP BETWEEN PROSECUTORIAL AND DEFENSE STRATEGIES

In Hypothesis 1, we predicted that a conventional criminality prosecution strategy would produce the highest conviction rates in those cases where defendants used a traditional defense strategy. The findings indicate that to be only partially correct. While the combination of conventional criminality and traditional defense did produce a conviction rate of 92.1 percent, conventional criminality and political innuendo each produced higher conviction rates when defendants used a political persecution strategy. When analyzed by regression model, the political persecution defense strategy slightly increased the odds of conviction compared to a traditional defense—a result we had not foreseen. The trend was the same regardless of prosecution method.

One of the cases in which defendants used a political persecution strategy to win acquittals provides one possible explanation for why defendants have relied on this defense. It also provides some insight into why the defense fails more often than other defense strategies. In *U.S. v Maguire*, discussed above, the defendants successfully introduced evidence of the political and religious persecution allegedly committed by the British Government after the prosecutors

politicized the defendants' connection to the Irish Republican Army. At the trial's conclusion, each defendant was acquitted.

From studying the documents in the case file, it is not possible to know exactly why the jury returned acquittals. What is known, though, is how volatile the prosecution felt the information would be to a jury. Prosecutors filed dozens of motions attempting to block the defendants' evidence, citing fears that it would inflame the jury. Smith and Damphousse have argued that terrorism defendants might go to trial more often than non-terrorist defendants because trials provide a stage from which terrorists can raise awareness of, and generate sympathy for, their cause. For an ideologically committed defendant indicted in a politicized case, the potential of having a jury decide the defendant's actions were justified is probably quite attractive.

As mentioned above, political persecution is a strategy and not a recognized affirmative defense.²⁴ Defense attorneys are aware of available defenses and strategies and are likely to advise their client of those options. But if the goal of an ideologically committed defendant is vindication, he or she might feel the political persecution strategy is worth the risk. The low success rate for most defendants who use this defense suggests that juries are not receptive to claims of political persecution by the U.S. Government. Moreover, the findings in this study indicate that juries may actually penalize defendants who assert those claims. Here is where the *Maguire* case is different: the alleged government oppression was being conducted by a foreign government. That might have made the argument easier to accept for the *Maguire* jury.

Political innuendo was another prosecution strategy that produced a high conviction rate (96.7%) in cases where the defendant used a political persecution strategy. Because the alleged

²⁴ Although, a defendant using a political persecution strategy might employ any number of affirmative defenses, such as duress, necessity, entrapment, and etc.

connection between a defendant and terrorism is little more than a suggestion in political innuendo cases, using a highly politicized defense probably increases the likelihood of conviction in two ways. First, FRE 403 limits the amount of prejudicial evidence that may be introduced by prosecutors. In cases where charges are not related to terrorism, prosecutors may be limited to using subtle hints. When defendants claim that they are the subject of political persecution, they may inadvertently bolster the prosecution's claims.

Second, political innuendo cases involve traditional criminal violations in which guilt is proved irrespective of a defendant's political motivations. Sometimes, those counts are strict-liability offenses. Because political motivation is irrelevant in these cases, there is very little basis for defendants to claim they are being prosecuted due to their political ideologies or because of group memberships. Indeed, the findings in table 4.02 suggest that using a political persecution defense strategy to counter a political innuendo prosecution strategy results in a much higher conviction rate than the overall model average.²⁵

The combination of conventional criminality with both political persecution and disassociation defense strategies produced 100 percent conviction rates, but the number of cases was very small. Political persecution was used to counter a conventional criminality prosecution strategy by 5 defendants, and the disassociation defense was used by just 2 defendants. The number of cases is too small to test the relationships statistically. However, in the case of political persecution, it is likely that defendants raise the same issues in conventional criminality cases that defendants raised in political innuendo cases.

Defendants who used a traditional defense method to counter a political innuendo prosecution method were convicted 4.1 percent more often than the overall model conviction rate

²⁵ A binary logistic regression model with political innuendo and political persecution was not significant (.12 and .09, respectively), probably due to the small number of case (n=30).

(Table 4.01), representing the final combination of strategies to produce convictions above the model average. However, the logistic regression model in Table 4.04 indicated a traditional defense method, compared to political persecution defense, lowered the odds of conviction. The results indicate that political innuendo is not a significant predictor of the likelihood of conviction. But as discussed above, it probably has a strong impact on whether a defendant is released on bail, and that in turn, may have an impact on the likelihood of conviction.

In hypothesis 2, we predicted that an explicit politicality prosecution strategy would produce the lowest conviction rate in cases where the defendants relied on the disassociation strategy. As with the first hypothesis, the results only partially support that prediction. The results showed that, overall, explicit politicality was used by prosecutors with the least success, producing a conviction rate of just 77.4 percent. Likewise, the results showed that the disassociation defense produced the lowest conviction rate of all defense methods, at just 80.7 percent. However, the combination produced only the second lowest conviction rate. The combination of a traditional defense and explicit politicality resulted in a model-low conviction rate of 71.3 percent (n=115).

Those results indicate that defendants who attempt to disassociate from their group or ideology are generally more successful than those who claim to be the subject of political persecution, but ignoring the political nature of the prosecutor's case and focusing on traditional defense methods is the most successful course of action. Given the lower conviction rate when a traditional defense strategy was used, there are a few possible explanations concerning the effect of disassociation. First, explicit politicality is affecting the outcomes and disassociation might have no effect, or actually increase the odds of conviction. Second, disassociation does lower the potential for conviction, but it does not lower the probability as strongly as a traditional defense.

Results of the logistic regression help answer the question. In Table 4.03, we saw that, compared to traditional defense, disassociation increased the odds of conviction. An in Table 4.04, disassociation did not alter the chances of conviction compared to the political persecution defense strategy.

Those results also show that using an explicit politicality prosecution strategy has a negative effect on conviction rates. In the logistic regression analysis, explicit politicality increased the odds of conviction compared to the conventional criminality prosecution methods. Conversely, using a politicized defense strategy had the opposite effect. Defendants who used political persecution were convicted at a higher rate than those who used other defense strategies. Logistic regression indicated that the political persecution defense strategy increased the odds of conviction compared to a traditional defense. Political persecution defense strategy and explicit politicality combined to produce a slightly lower conviction rate than the overall model conviction rate, and that would be consistent with the regression results. When considering that the overall success rate for explicit politicality was low (77.4%), it appears that using a political persecution strategy improved the conviction rate for that prosecution strategy. Unfortunately, the number of cases in the samples was too small to permit testing the interaction effect between political persecution defense strategy and explicit politicality.

Looking at the results of cases where the disassociation strategy was used to counter political innuendo, and comparing those cases where a traditional defense was used, another interesting fact emerges. Disassociation produced lower conviction rates than a traditional defense. Even though disassociation was the most successful when used to counter explicit politicality, defendants who employed a traditional defense fared better. But when compared to other defense strategies, disassociation was the most successful in political innuendo cases. The

results suggest that the difference between the type and amount of evidence offered by the prosecution regarding a defendant's motive, group membership, or ideology may be the key.

Recall that with the political innuendo strategy the prosecution attempts to link the defendant to terrorism in cases where the defendant is charged with non-politicized criminal violations. In some instances the prosecution provides a subtle hint, but in others the prosecution blatantly makes the claim. Importantly, the prosecution's references to terrorism typically end there. By contrast, in explicit politicality cases the prosecution has introduced the defendant's motive as a question of fact, so evidence of a defendant's involvement with a group may be offered. In a case where the defendant's involvement with a group or ideology is an element of the charges, the prosecution has a much greater chance of being permitted by the court to use evidence of affiliation/ideology. In political innuendo cases, FRE 403 can be used to block evidence that is prejudicial to the defendant if it is not materially related to the charges. That means in political innuendo cases a defendant has a stronger argument to prevent the introduction of terrorist group affiliation. It might also be the case that jurors are sympathetic to the disassociation strategy in cases where the prosecution makes the allegation but is unable to offer supporting evidence.

4. SUMMARY

In this chapter, the relationships between the different prosecutorial and defense strategies used in federal terrorism case were presented. The conventional criminality prosecution strategy proved to be the most successful strategy overall, and it produced the highest conviction rates, albeit only in a handful of cases where defendants used either the political innuendo or dissociation defense strategies. However, the political innuendo

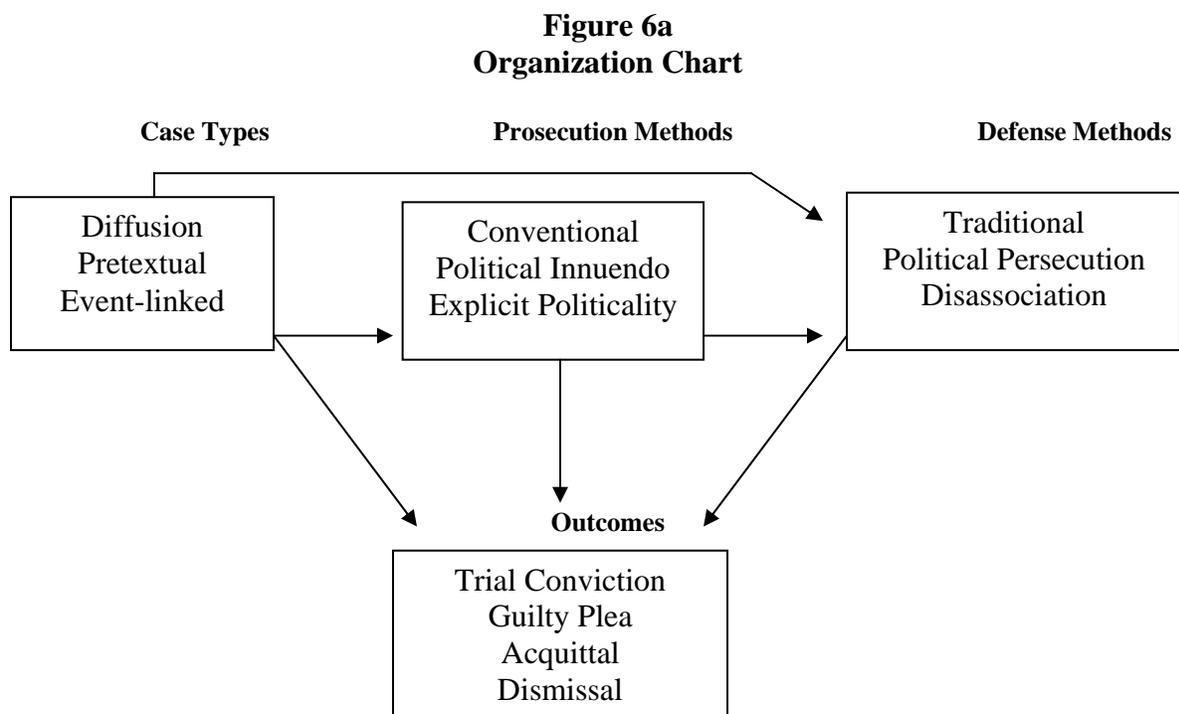
prosecution strategy, when used in cases relying on the political persecution defense produced the highest, statistically reliable results. The results showed that this outcome was most likely due to the political persecution defense strategy, which had a positive effect on the probability of conviction.

Among all prosecution strategies, explicit politicality produced the lowest proportion of successful prosecutions (convictions), as did the disassociation defense strategy. When compared to the overall model average, the two strategies resulted in a lower proportion of convictions compared to other strategies. Explicit politicality and a traditional defense strategy, on the other hand, was the combination that resulted in the lowest proportion of convictions. That trend did not continue across the different combinations. The findings showed that the disassociation defense strategy was more successful than the traditional defense strategy when used against the political innuendo prosecution strategy. Most likely this result occurred because of the nature of political innuendo cases and the amount and type of evidence that are used to link defendants to terrorism.

The results indicate that using the explicit politicality prosecution strategy presents prosecutors with the biggest challenge for gaining convictions. The findings produced a statistically significant negative effect on the likelihood of conviction even when the impact of evidentiary strength, case complexity, and count severity are controlled. Likewise, defendants who use the political persecution strategy, regardless of prosecution method, are statistically more likely to be convicted than when using an alternative defense strategy. But as discussed, that may be situational, as it appears easier for defendants to convince a jury that they are the victims of political persecution when there is a foreign government involved.

VI: HOW 9/11 CHANGED PROSECUTORIAL AND DEFENSE STRATEGIES USED IN FEDERAL TERRORISM CASES

In this chapter, the discussion centers on the findings for research question two - an analysis of how 9/11 impacted the federal government's response to terrorism. The first three sections focus on the different categories of case type and their relationship to prosecution strategies, defense strategies, and how those strategies affect case outcomes. Figure 6a provides a diagram of the relationships that will be discussed.



The first section contains a brief description of the three case type categories. The second section focuses on the policy changes that occurred in the aftermath of 9/11 and provides an explanation for why pretextual and event-linked cases were analyzed separately from diffusion cases. Attention in the next section turns to the explicit politicality prosecution strategy and its relationship with pretextual and event-linked cases. That is followed by a section on the political

innuendo strategy in pretextual and event-linked cases. Then, concentration shifts in the fifth section to the relationship between defense strategies and case type. After a discussion of diffusion cases in the sixth section, the seventh section provides a discussion of the findings obtained from hypothesis testing in Chapter 4. The chapter concludes with a discussion of theoretical implications.

1. CASE TYPE

Recall that in Chapter 2, two separate critiques have challenged the FBI's claims of success in prosecuting defendants linked to terrorism since 9/11. The "data reliability" critique questioned the data used by the FBI because some of the cases listed in FBI annual reports contained defendants with no link to a terrorist ideology/group and those defendants were charged with violations of law that did not appear to be related to terrorism. The "soft sentence" critique focused on the defendants' prison sentence lengths, reporting that the war on terror was not as successful as the DOJ claimed because "terrorists" were receiving sentences of just a few months. Chesney (2007) addressed both critiques, arguing that one must make a distinction between the different types of terrorism cases in order to evaluate the effectiveness of antiterrorism policy.

Chesney appears to be partially correct, as case types are indeed important. But to evaluate the effectiveness of antiterrorism policy, one must first understand the post-9/11 changes in antiterrorism policy and identify the new policy goals. Shifting away from the goal of infiltrating terror groups, Attorney General Ashcroft directed the FBI and the EOUSA to intercept and disrupt terrorist planning before an act of terrorism could occur. While developing his case type categories, Chesney mentions that the FBI and EOUSA targeted immigration and

financial fraud after 9/11. These cases involved defendants who were neither linked to a terrorist group/ideology nor an act of terrorism by the FBI. He called those cases “diffusion prevention”, because making it difficult for anyone to engage in immigration and financial fraud would make it difficult for terrorists, who relied on both forms of criminality, to succeed in gathering the resources and personnel necessary to carry out future attacks. Those cases are at the center of the above mentioned critiques.

Chesney provided the basic framework for establishing case type categories, but goes no further. After describing what diffusion cases were, Chesney turned the remainder of his attention to cases involving 18 USC §2332, the statute making it unlawful to provide material support to terrorist groups. Conversely, this study focuses on everything but material support cases (see Figure 6b for description of case type and prosecution method categories). Building on Chesney’s description, we defined and analyzed case type in Chapter 4. The following case type categories were used: the *event-linked* category was comprised of cases where the defendant was linked to a terrorist group or ideology and was indicted on charges related to an act of terrorism (planned or completed); the *pretextual* category contained cases where the defendant was linked to a terrorist group or ideology, but was charged with crimes not directly related to an act of terrorism, and; the *diffusion* category contained cases where the defendant was neither linked to a group or ideology, nor a crime related to an act of terrorism (see Chapter 3 for coding).

Figure 6b
Case Type and Prosecution Method Reference Chart

	Diffusion Case	Pretextual Case	Event-linked Case
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<p>Conventional Criminality Prosecution Method</p>	<p>Not linked to Act of terrorism in case documents</p> <p>No hint or accusation of ideology by prosecutor in case.</p> <p>No evidence of group/ideology after FBI investigation/before indictment</p> <p>Charged with non-politicized criminal counts</p>	<p>Not linked to Act of terrorism in case documents</p> <p>No hint or accusation of group/ideology by prosecutor in case.</p> <p>* FBI linked Defendant to Group/Ideology</p> <p>Charged with non-politicized criminal counts</p>	<p>Linked to Act of terrorism in case documents (actual or planned)</p> <p>No hint or accusation of group/ideology by prosecutor in case.</p> <p>FBI linked Defendant to Group/Ideology</p> <p>Charged with non-politicized criminal counts</p>
<p>Political Innuendo Prosecution Method</p>	<p>Not linked to Act of terrorism in case documents</p> <p>Hint or accusation of group or ideology in case.</p> <p>No evidence of group or ideology after FBI investigation/before indictment</p> <p>Charged with non-politicized criminal counts</p>	<p>Not linked to Act of terrorism in case documents</p> <p>Hint or accusation of group or ideology in case</p> <p>FBI linked Defendant to Group/Ideology</p> <p>Charged with non-politicized criminal counts</p>	<p>Linked to Act of terrorism in case documents (actual or planned)</p> <p>Hint or accusation of group or ideology in case</p> <p>FBI linked Defendant to Group/Ideology</p> <p>Charged with non-politicized criminal counts</p>
<p>Explicit Politicality Prosecution Method</p>	<p>Not linked to Act of terrorism in case documents</p> <p>** (Circumstantial) Evidence of group or ideology presented in case</p> <p>No evidence of group or ideology after FBI investigation/before indictment</p> <p>Charged with conspiracy or similar counts, implicates motive</p>	<p>Not linked to Act of terrorism in case documents</p> <p>Evidence of group or ideology presented in case</p> <p>FBI linked Defendant to Group/Ideology</p> <p>Charged with conspiracy or similar counts, implicates motive</p>	<p>Linked to Act of terrorism in case documents (actual or planned)</p> <p>Evidence of group or ideology presented in case</p> <p>FBI linked Defendant to Group/Ideology</p> <p>Charged with conspiracy or similar counts, implicates motive</p>

* Information derived from all FBI case lists created prior to August 2002, case documents and press releases on cases filed after September 2002.

** We use the term “circumstantial” here because there is typically no concrete evidence of the defendant’s membership in a group or his/her ties to an extremist ideology. Nonetheless, prosecutors have attempted to get juries to draw a connection between these defendants and terrorism based on other factors.

2. PRETEXTUAL AND EVENT-LINKED CASES

The analyses conducted in Chapter 4 demonstrate the effects of the antiterrorism policy shift in 2001. There were no diffusion cases listed by the FBI prior to 9/11, yet this category represents almost half of the cases filed afterwards (see Table 4.03). Taking the diffusion cases out of the post-9/11 sample is important because the resulting mix of event-linked and pretextual cases closely resembles the composition of cases filed prior to 9/11. This allows a comparison of similar cases before and after 9/11 while placing diffusion cases in a category to be studied separately.

Before 9/11, 85 percent of all terrorism cases were event-linked, while only 15 percent were pretextual. After 9/11, when diffusion cases were removed, only 57 percent of the terrorism cases were event-linked, while the percentage of pretextual cases increased to 43 percent. This is to be expected. The policy shift ushered in by Attorney General Ashcroft refocused law enforcement efforts towards intercepting and interrupting terrorist groups before those groups could successfully plan an attack. By charging potential terrorists as soon as criminal violations occurred, logically, there would be less evidence available for prosecutors to link defendants with terrorist acts.

The average number of defendants indicted, per year, in event-linked cases was slightly lower in the post-9/11 era, decreasing from approximately 22 to 17 annually.²⁶ The average number of defendants indicted in pretextual cases increased from 4 to 13 annually.

In this study, the total number of defendants who were indicted in cases that the FBI linked to a terrorist ideology (total of event-linked and pretextual cases) increased slightly from 26 to 30 per year.²⁷ These trends fit within the theoretical framework of the hydraulic effect. The

²⁶ It should be reiterated that there are more terrorism cases to be collected from the 2002 to 2004 FBI list (ATS and PADS). Anecdotally, the proportion of pretextual vis-à-vis event-linked cases should not change dramatically.

²⁷ The total number of event-linked and pretextual cases in the post-9/11 era will increase as the remaining cases are collected and added to the database, and, anecdotally speaking, the total number of defendants indicted in event-

hydraulic effect predicts that get-tough policy changes have very little impact on the crimes they target because the government's resources are already directed towards stopping the most serious forms of crime. Here, the more serious forms of terrorism crime would be terrorism attacks—event-linked cases. According to the hydraulic effect, law enforcement officials and prosecutors have no choice but to target less serious crimes. Even in the absence of diffusion cases, that trend is present in the form of an increased number of pretextual cases.

3. EXPLICIT POLITICALITY IN PRETEXTUAL AND EVENT-LINKED CASES

After 9/11 prosecutors relied on the explicit politicality prosecution method substantially less than before 9/11. Overall, the percentage of cases prosecuted with this method dropped from 66.1 percent to 25.3 percent. Even when diffusion cases were removed, prosecutors used explicit politicality 48 percent of the time. Among event-linked cases, the use of explicit politicality dropped from 70.9 percent of the cases to 60 percent in the post-9/11 era. In pretextual cases, prosecutors used explicit politicality method only 27 percent of the time compared 40.7 percent of the time before 9/11.

This change could be the result of prosecutorial choice, but it may have been a direct result of the shift towards prosecuting defendants sooner rather than later. Recall that average count severity did not experience a similar decrease between eras. That means that defendants in the post-9/11 era were being charged with counts of similar severity, but prosecutors were not explicitly politicizing the cases. It is likely that as cases were referred to prosecutors sooner, the FBI and other law enforcement personnel were providing prosecutors with less evidence that prosecutors might use in the more highly politicized prosecution method.

linked cases after 9/11 will remain close to the average for the pre-9/11 era. Similarly, we expect the average number of defendants indicted for pretextual cases to climb slightly higher than the figures reported.

In explicit politicality cases, prosecutors typically charge defendants with counts that make motive a component of the government's case. As Smith and Damphousse (1998) have pointed out, prosecutors in America have historically avoided raising motive. It may be the case that prosecutors in the post-9/11 era have enough evidence to prosecute terrorist defendants for crimes just as severe as before 9/11, but have not had enough evidence to use explicit politicality. If this is what has happened, it could be viewed as an unintended benefit. The use of explicit politicality decreases the odds of a conviction, so prosecuting defendants earlier might help explain the higher conviction rate in the post-9/11 era.

4. POLITICAL INNUENDO IN PRETEXTUAL AND EVENT-LINKED CASES

Before 9/11, prosecutors used political innuendo just 22.7 percent of the time. After 9/11 prosecutors used the strategy 22.3 percent of the time overall. However, removing diffusion cases revealed a much greater reliance: political innuendo was used against 35 percent of all defendants indicted in pretextual and event-linked cases. There was an increase of 6.5 percent in event-linked cases, representing a total of 30 percent of all defendants indicted for such cases after 9/11.

Pretextual cases saw the largest increase in the use of the political innuendo prosecution strategy. Before 9/11 prosecutors used political innuendo against only 18.5 percent of the defendants charged in pretextual cases. That total increased by 24.6 percent to a rate of 43.1 percent of all defendants in the post-9/11 era. This lends support to the possibility that prosecutors were beginning criminal cases sooner and without the evidence necessary to pursue an explicit politicality prosecution strategy. Recall that FRE 403 requires that the amount of evidence necessary to pursue explicit politicality strategy, and thereby connect a defendant to an

act (or planned act) of terrorism, is much higher than the evidence needed to use the political innuendo strategy.

Like the results in event-linked cases, prosecutors who filed pretextual cases enjoyed higher conviction rates in the post-9/11 era than before. Defendants who were indicted in pretextual cases before 9/11 were convicted 87 percent of the time. The conviction rate for defendants indicted in pretextual cases after 9/11 increased to 92.6 percent. While the percentage of defendants who were convicted at trial remained about the same (see Tables 4.05 and 4.06), the rate of defendants who entered guilty pleas increased from 75.4 percent to 81.5 percent. Similarly, the dismissal rate decreased by from 13.0 percent to 7.4 percent (there were no acquittals in either era). Those numbers are consistent with the trends reported by Damphousse and Shields (2007), who found that defendants who were indicted after a major terrorism event were more likely to plead guilty than to take their chances with a jury.

5. DEFENSE STRATEGIES IN PRETEXTUAL AND EVENT-LINKED CASES

The higher conviction rates for pretextual cases and event-linked cases in the post-9/11 era may have also occurred, in part, because of defense tactics: namely, a shift away from the disassociation defense strategy to the traditional defense strategy used by defendants indicted in event-linked cases, and; a shift from the disassociation strategy to the political persecution strategy by defendants indicted in pretextual cases. With regard to the first relationship, our findings provide evidence that defendants who relied on a traditional defense strategy were 5 percent more likely to be convicted than defendants who relied on a disassociation strategy in political innuendo cases. As mentioned above, there was an increase in the use of the political innuendo prosecution strategy in event-linked cases. Defendants charged in event-linked cases

used a disassociation defense 10.3 percent less often in the post-9/11 era, while they used the traditional defense 13.5 percent more often. In other words, while prosecutors began using a more successful prosecution strategy, defendants relied more heavily on a less successful defense strategy.

Regarding the second relationship, recall that the least successful defense strategy, in terms of winning acquittals and dismissals, was the political persecution strategy—defendants who relied on this strategy increased their likelihood of being convicted (see Table 4.03). In the post-9/11 era, there was a 27.7 percent increase in the proportion of pretextual cases filed (after diffusion cases were removed from the sample). Of those defendants charged in pretextual cases, there was a 26.1 percent increase in the proportion of defendants who relied on the political persecution defense strategy, and a 21.8 percent decrease in the proportion of defendants who relied on disassociation. Meanwhile, prosecutors relied on the political innuendo prosecution strategy 24.6 percent more often. In other words, while prosecutors tried more pretextual cases using the political innuendo prosecution strategy in the post-9/11 era, defendants shifted from the most successful defense strategy (disassociation) to the least successful defense strategy (political persecution) in large numbers.

6. DIFFUSION CASES

In the post-9/11 era, 79 defendants were indicted in diffusion cases. As expected with cases where the FBI did not link the defendant to a completed or planned act of terrorism, prosecutors relied almost exclusively on the conventional criminality prosecution strategy. Unlike in other case types, only a few prosecutors attempted to use politicized strategies in diffusion cases. Six defendants were tried using the political innuendo strategy, and 2 defendants

were tried using the explicit politicality strategy. The overall conviction rate for diffusion cases was 94.8 percent—the highest of all case types.

The high conviction rate is predictable, given that 91.9 percent of the defendants relied on traditional defense strategies. When combined with conventional criminality, this defense strategy produced an overall conviction rate of 92.5 percent (see Table 4.01). Recall that when conventional criminality was combined with either political persecution or disassociation, it produced 100 percent conviction rates. The high conviction rates for this particular case type are similar to overall federal conviction rates (see discussion in Chapter 2) because diffusion cases are most similar to traditional cases in that the defendants are not typically linked to terrorism by the FBI. The guilty plea rate in diffusion cases is 88.3 percent. In fact, only 6 defendants indicted in diffusion cases took their cases to trial.

Both structural contextual theory and the hydraulic effect can help explain the number of diffusion cases in the post-9/11 era despite the lack of them in the pre-9/11 era. First, structural contextual theory is based on the premise that when some forms of crime are perceived as a problem, public pressure forces components of the criminal justice system to focus their attention on that criminality. The criminal justice system, which is normally composed of loosely coupled parts that compete for resources, begins to operate more cohesively. As applied to terrorism cases (*see* Smith and Damphousse, 1998, Damphousse and Shields, 2007), that increased cohesion sometimes leads to net widening, or aggressively pursuing offenders.

Diffusion cases can be seen, partially, as a product of net widening that occurred as a direct result of 9/11. The events of 9/11 raised the national consciousness of terrorism attacks to a record level (Silverlieb, 2008). Those events also resulted in the government making an enormous commitment of resources to fight terrorism. The events of 9/11 also led to increased

efforts to improve collaboration between the many investigative components of the federal and state governments. One result of these changes was an increase in the number of defendants the DOJ claimed to have prosecuted. The number of defendants listed by the FBI as having been indicted in terrorism-related cases in the three years following 9/11 was larger than the combined number of terrorist defendants indicted during the previous 20 years (Damphousse and Shields, 2007).

However, as the above findings show, the average number of terrorism defendants indicted in event-linked cases did not increase when compared to the previous 20 years. The dramatic increase occurred through prosecuting defendants in diffusion cases. Again, to diffuse possible acts of terrorism, diffusion cases were filed against defendants who engaged in criminality that the government viewed as a prerequisite for engaging in terrorism. However, the government's pursuit of diffusion cases was not merely the result of "tightened coupling," it was also the product of specific policy changes.

The hydraulic effect suggests that get-tough policy changes directed at a given form of criminality will not impact the target criminality as substantially as it will less serious, but related types of criminal behavior (see Chapter 2 discussion). Damphousse and Shields (2007) used the hydraulic effect to describe the impact that get-tough policy changes, enacted after the Oklahoma City bombing in 1995,²⁸ had on the way the government prosecuted terrorism cases. They found that prosecutors engaged in net widening by charging defendants with violations of law that prosecutors had seldom used, or simply ignored before the bombing.

Unlike that 2007 study, the focus here is not necessarily what charges federal prosecutors used before and after 9/11, but the change in the U.S. Attorney General's guidelines that led prosecutors to begin pursuing diffusion cases. When Attorney General Ashcroft directed the FBI

²⁸ While Damphousse and Shields did analyze post-9/11 cases in that 2007 study, they did so with a small sample.

and EOUSA to proactively prosecute defendants with the purpose of interrupting future acts of terrorism before they could occur, prosecutors probably had little choice but to cast a wider net. As noted above, even with increased manpower provided to the FBI and other law enforcement agencies, and broader legal authority for them to engage in surveillance, the average number of event-linked cases did not increase. Even the average number of pretextual cases saw only a slight increase. As a result, prosecutors devoted more attention to diffusing potential acts of terrorism by focusing on immigration and financial fraud.

7. CASE CHARACTERISTICS BEFORE AND AFTER 9/11

Focus now changes from case type and legal strategies to specific changes in case characteristics. Seven hypotheses, based on structural contextual theory and the hydraulic effect, were tested in Chapter 4. Hypothesis 3 predicted that if tightened coupling had occurred among components of the criminal justice system in the post-9/11 era, prosecutors would voluntarily dismiss fewer counts than they did in the pre-9/11 era. When diffusion cases were included, results supported the hypothesis. However, when diffusion cases were removed, results showed an increase in the number cases dismissed. Similarly, Hypothesis 4 predicted that tightened coupling would result in lower plea bargain rates among pretextual cases in the post-9/11 era. The opposite occurred.

These hypotheses were based on findings in previous studies (e.g. Smith and Damphousse, 1998) that found that tightened coupling occurred differently in terrorism cases than Hagan's drug cases. In particular, plea bargain rates were dramatically lower among terrorism cases than in other federal criminal cases. Hagan found that tightened coupling in drug cases increased the likelihood that prosecutors would engage in plea bargains in order to ensure

convictions. Why then did terrorist defendants demand trials as such a high rate before 9/11, and why did that change afterwards?

This study provides some likely answers. Terrorism cases, especially event-linked, are as much a challenge to a defendant's political (and frequently religious) beliefs as they are an indictment of his/her criminal behavior. Unlike drug cases, which typically focus on the defendant's criminal behavior only, pleading guilty in terrorism cases means not only "doing time," but it also means that one gives up fighting for his/her political (and/or religious) beliefs.

Before 9/11, terrorism cases were comprised only of pretextual and event-linked cases: most of those cases were the latter. Prosecutors also relied on the explicit politicality prosecution strategy in the majority of cases. Even if prosecutors had aggressively sought plea bargains among terrorist defendants, the type of cases they filed and the prosecution strategies they used lowered the chances of plea bargaining. In the post-9/11 era, much of that changed. The Ashcroft Guidelines affected that change in two ways.

First, requiring the FBI and EOUSA to intercept and prosecute cases sooner likely lowered the amount of evidence necessary to pursue event-linked cases. Second, the lower amount of evidence may be responsible for the dramatic reduction in the percentage of cases in which prosecutors used an explicit politicality prosecution strategy. So it is possible that the Ashcroft Guidelines inadvertently made it easier for prosecutors to secure guilty pleas by taking some of the politics (and religion) out of terrorism cases. As noted above, the more that terrorism cases resemble traditional criminal cases, the more likely that terrorism defendants will behave like traditional criminal defendants. Couple that with the likelihood that 9/11 left terrorist defendants less willing to take a chance with a jury, and higher plea rates make sense.

The increased number of dismissed cases may also be related to the Ashcroft Guidelines. Even though the rate of guilty pleas increased and the number of acquittals decreased, the number of cases dismissed went up in the post-9/11 era (when diffusion cases were removed). Moreover, the average number of counts dismissed per case doubled (these figures do not include counts dismissed due to plea bargaining, see Table 4.11). There are at least two reasons for this. First, the increase in the number of cases dismissed may be the direct result of prosecutors having less evidence. Second, it is possible that net widening resulted in prosecutors charging defendants with extra counts while planning to dismiss some in order to negotiate a guilty plea.

Hypothesis 5 tested the hydraulic effect and predicted that get-tough policy changes in the post-9/11 era would cause prosecutors to cast a wider net and charge defendants with less severe crimes than in the pre-9/11 era. This was clearly the case when diffusion cases were included in the analysis. However, when diffusion cases were removed, there was no statistically significant change.

Compared to event-linked cases, Hypothesis 6 predicted that net widening would result in a higher proportion of pretextual cases being filed in the post-9/11 era. The proportion of defendants indicted in pretextual cases nearly tripled in the post-9/11 era. Taken together, the tests of Hypotheses 5 and 6 demonstrate that prosecutors not only pursued less serious charges (via diffusion cases) but they also relied on less politicized prosecution strategies (across all case types). Both are likely results of the Ashcroft Guidelines and federal prosecutors desire to appear more proactive to the general public. Therefore, both results are consistent with the net widening components of the hydraulic effect and structural contextual theory.

Hypothesis 7 predicted that policy changes implemented after 9/11 would result in a smaller average number of defendants indicted in event-linked cases. In fact, the results showed that the average number of defendants indicted in event-linked cases dropped by half, to less than two people per case. Even though the Ashcroft Guidelines continued the trend of the preceding guidelines and defined terrorism as a group activity, the number of individual defendants, even in event-linked cases, grew. One explanation is found elsewhere in the Ashcroft Guidelines.

Recall the discussion from Chapter 2, which detailed the process the FBI followed to open domestic security/terrorism enterprise investigations prior to 2002. FBI field agents were required to get permission from the FBI headquarters before a terrorism investigation could be opened. The Ashcroft Guidelines placed complete authority for opening those investigations into the hands of field agents. Remember also that a terrorism investigation could be conducted over a much longer timeframe than a general crimes investigation, and terrorism investigations also provided legal authority via the USA PATRIOT Act (among others) for field agents to use more invasive techniques (*e.g.* roving wire taps, secret records checks, etc.). Consistent with net widening, the combination of the new guidelines and the Attorney General's mandate to prosecute cases sooner led to the FBI referring cases to prosecutors that contained fewer defendants.

Similarly, Hypothesis 8 predicted that the proportion of event-linked cases involving informants would be lower in the post-9/11 era. It was suspected that the "early prosecution" mandate demanded by Attorney General Ashcroft would impede the government's ability to infiltrate extremists 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. The hypothesis was tested using a number of models evaluating the

number of confidential informants, the number of undercover agents, and the average level of assistance per case that each provided.

All of the findings supported the hypothesis: Attorney General Ashcroft's mandate had a strong negative impact on the number of informants who provided evidence for the government. Similarly, the shift nearly eliminated the government's ability to infiltrate terrorist groups with undercover agents. Finally, even when informants could be secured, the amount of evidence they provided was lower than in the pre-9/11 era. These findings support other points discussed above: namely, that the policy shift may have been responsible for limiting the amount of evidence available to prosecutors. Lower amounts of evidence probably caused a shift in the type of cases prosecutors pursued and the type of prosecution strategies they employed. Finally, lower levels of evidence might be the cause of the increase in the number of case dismissals.

Hypothesis 9 predicted that conviction rates on more serious charges would go down after 9/11. The results did not support the hypothesis. In fact, conviction rates among *high severity* charges increased significantly in the post-9/11 era. Moreover, there was no statistical difference between high and low severity case in the post-9/11 era (*see* Table 4.21). It is possible that the overall increase in conviction rates in the post-9/11 era is tied to marked decrease in the use of highly politicized prosecution strategies in that era, leading to an increase in the number of guilty pleas. The relationships between case type, prosecution strategy, defense strategy and count severity require further study.

8. THEORETICAL IMPLICATIONS AND NEW CONCEPTS

Many of the hypotheses used to test structural contextual theory were confirmed, while others were not. Relying on the findings of previous terrorism studies, predictions were

formulated to explain that 9/11 was likely to lower plea bargain rates. The findings indicate that plea bargain rates increased after 9/11, and that, in turn, provided a possible explanation for why plea bargain rates in terrorism cases filed prior to 9/11 were dramatically different than plea bargain rates in non-terrorism criminal cases.

As the findings in this chapter suggest, when prosecutors introduced politicality into terrorism cases, they increased the likelihood that the defendant would demand a jury trial. We recognize that causality may well have worked in the opposite direction - that a defendant who demanded a jury trial would result in the prosecutor having to politicize the trial to make the conviction more probable. That said, the timing of the politicalization process suggests otherwise. In most cases, for example, the introduction of politicality was made in the indictment itself or during some other pre-trial stage of the process. The defendant's decision to go to trial was not made until after the trial had become politicized. Thus, logic suggests that the decision by the prosecutor to express more politicality in the case affected how the defendant acted (or "reacted"). During the pre-9/11 era, prosecutors relied on politicized prosecution strategies a majority of the time. For the reasons discussed at length above, after 9/11 prosecutors relied less on politicized strategies. In turn, plea bargain rates and conviction rates increased. We refer to this as the *ideology effect*. The ideology effect can be explained as follows: as prosecutors increase the level of politicality in a case, they increase the contentiousness of the case as defendants become more defensive of their beliefs and values. As the contentiousness increases, so to do the chances a case will result in a trial.

The implications of our findings suggest an interesting interpretation of the relationship between the prosecution and defense teams in terrorism cases. Prosecutors increase the politicality of a case when they increase the focus of the case on a defendant's motive and/or

ideology in addition to the facts of the case. In the terrorism cases we have studied, increased politicality may be drawing into question not only a defendant's culpability with regard to law breaking, but also his/her ideological belief system. It may be that the more that a terrorist's ideological belief system is questioned, the less likely that he/she will enter a guilty plea. It is a simple matter of cognitive dissonance. A guilty plea in a non-politicized case merely requires a defendant to admit culpability for illicit behavior in exchange for a lower sentence. A guilty plea in a politicized case not only includes an admission of culpability, it also requires the defendant to stop fighting for his/her beliefs. Some defendants may see a guilty plea as a tacit agreement that they agree with the government.

The ideology effect may impact jury decisions in two ways. First, prosecutors who relied on explicitly politicality suffered the highest number of acquittals. Second, defendants who employed the political persecution strategy suffered the highest conviction rates. Interestingly, defendants who relied on the disassociation strategy (an anti-politicality strategy, if you will) in political innuendo cases were awarded acquittals and dismissals in very high numbers. It is possible that juries react negatively to politicizing cases, regardless of which party is responsible. While the relationship between politicality and acquittal rates was not tested in this study beyond running crosstabs, this is an interesting area for future research.

The ideology effect provides a better understanding of how plea bargain rates may be affected in the future. If, in long periods of time between major terrorism events, the FBI and EOUSA return to infiltrating terrorism groups rather than interrupting them, and prosecutions become more politicized, one would expect lower plea bargain rates, and lower conviction rates. If, however, the focus of the FBI and EOUSA continues to be one of prosecuting defendants

early, and cases remain less politicized, one would expect plea bargain rates and, therefore, conviction rates to remain high.

Combining structural contextual theory, the hydraulic effect and the ideology effect helps to explain terrorism prosecution in the United States. In the absence of a major attack, terrorism cases nonetheless received heightened scrutiny, but unlike other crimes where structural contextual theory has been used to explain higher plea rates, the ideology effect explains why the plea rates are low when politicality is high. The hydraulic effect helps to explain how a major terrorism event, like 9/11, results in “get tough” policy changes. Those policy changes can bring about net widening, which may dramatically alter how the government responds to terrorism. After 9/11, net widening resulted in the creation of new policy goals and an entirely new case type—diffusion cases.

9. SUMMARY

This chapter began with a discussion of the three case type categories that were first described by Robert Chesney (2007). Chesney developed the categories in response to the soft sentence critique and the data validity critique that had been raised to question the DOJ’s claims of success in its antiterrorism policy. Rather than focus on one type of criminal violation, as Chesney did, to answer the critiques, this study focused on the policy changes that occurred in the aftermath of 9/11. Specifically, attention was directed towards two policy changes: first, the Attorney General’s Guidelines on opening terrorism investigations, and; secondly, Attorney General Ashcroft’s mandate (cite needed) for the FBI and EOUSA to begin interrupting terrorist groups by prosecuting defendants as soon as a criminal case could go forward.

The discussion then turned to the analyses of the case types conducted in Chapter 4. The results suggested that after 9/11 prosecutors relied less heavily on highly politicized prosecution strategies and they filed fewer event-linked cases. As a result, plea bargain rates and conviction rates increased. This, despite the finding that the average count severity in the post-9/11 era was only slightly lower than it was in the previous era. While the decision to file less politically charged cases could have been a conscious decision on the part of prosecutors, it was more likely the result of less evidence: an unintended consequence of Attorney General Ashcroft's "prosecute early" policy. Results presented later in the Chapter, showing a dramatic drop in the number of informants used in the post-9/11 era, provided support for that position.

Next, concentration was placed on diffusion cases. The results showed that no diffusion cases were filed before 9/11, yet they made up the majority of cases afterwards. Cases that make up the diffusion category are not the product of poor record keeping as some critics have suggested. Rather, they are the product of policy changes implemented after 9/11. Attorney General Ashcroft directed the FBI and the EOUSA to prosecute cases sooner for the purpose of interrupting terrorists before they could complete attacks. Due to constraints caused by prosecuting cases sooner, prosecutors began trying to diffuse potential terrorism treats by targeting crimes that they determined were precursors to terrorism.

After the section on diffusion cases, discussion turned to hypotheses testing. While the results supported a majority of the hypotheses that were based on structural contextual theory, some of the hypotheses were not supported. Discussion of the unsupported hypotheses provided a potential answer to one of the questions that has lingered in previous terrorism research: why were guilty plea rates in terrorism cases so low in the pre-9/11 era? The results suggest that the

highly politicized prosecution strategies that dominated federal terrorism trial in the pre-9/11 era may be the answer.

The concept of the *ideology effect* was introduced to explain how highly politicized cases increase the contentiousness of terrorism trials because they implicate the belief systems of terrorist defendants. The implication is that tightened coupling, a component of structural contextual theory, does not operate differently in terrorism cases than it does in non-terrorism cases (leading to lower plea bargain rates in the former while leading to higher plea bargain rates in the latter), it is simply masked by the ideology effect. Future research on this topic is warranted.

VII: POLICY IMPLICATIONS AND CONCLUSION

As this study began, two post-9/11 critiques of US antiterrorism policy were identified. In both cases, the critiques were levied against the Department of Justice and its subordinate bureaus. The critiques question the effectiveness of U.S. antiterrorism/counterterrorism policy and the accuracy of DOJ reports, and the critiques call into question policy changes made in the years after 9/11. After a brief summary of the policy changes mentioned in this study, this Chapter will focus on public policy theory, and then tie theory to the GAO and OIG criticisms. This section concludes with a discussion of policy implications as they pertain to this study. The next section turns to a synopsis of the project which is followed by a short discussion suggesting future research possibilities.

1. SELECTED POLICY CHANGES SINCE 9/11

In recent years, the revised version of the Anti-Terrorism and Effective Death Penalty Act and the USA PATRIOT Act (Patriot Act) were written to extend and strengthen U.S.

antiterrorism policy. In broad terms, our antiterrorism policy is currently focused on terrorist organizations, affiliated networks, and state sponsors in an effort to identify potential terrorist threats and proactively prevent future attacks. In a statement released after September 11, Attorney General Ashcroft (2002) explained that the policy of the United States government changed from prosecuting terror-related crimes that had already occurred, to thwarting attacks before they happen.

In the wake of September 11, Attorney General Ashcroft implemented new guidelines that expanded the FBI's authority to investigate domestic terrorism (Ashcroft, 2002). Section (B)(4)(a) of the Ashcroft Guidelines loosened the prior standards by allowing field agents to authorize a terrorism investigation for a period of up to one year—permission from the FBI Headquarters to open investigations and renew them was no longer necessary. In addition to the new guidelines, Attorney General Ashcroft *directed* the FBI and EOUSA (among other agencies) to intercept, interrupt, and prosecute potential threats early in order to prevent attacks.

Policy implementation brought a shift of resources to the FBI. There was a dramatic increase in the number of JTTF field offices (from 34 to 66) and the number of personnel assigned by the FBI to its terrorism teams (from 600 to more than 7,000) (Rolince, 2003a). In addition, DHS provided assistance to coordinate investigations between the FBI and the Bureau of Immigration & Customs Enforcement (Rolince, 2003b). Within a few years, the DOJ began claiming unprecedented success in fighting the war on terror. The critiques of those claims surfaced soon afterwards.

The critiques were rooted in the difficulty associated with evaluating antiterrorism policy. The effectiveness of domestic terrorism policy has been the subject of much controversy and criticism, and for good reason. Policy programs hastily put in place after the 9/11 attacks lacked

any specific requirements for the FBI or EOUSA to develop mechanisms for evaluation. Those that have been put in place since have proven problematic. As early as 2002, the General Accountability Office (GAO) and the Office of the Inspector General (OIG) began issuing reports critical of the DOJ (see Chapter 2).

In 2004, and at the request of Congress, the GAO completed an assessment of national terrorism strategies (GAO-01-408T). The GAO report determined that those strategies were so inadequately defined and implemented that the GAO could not provide an assessment on whether they were working. Congress addressed the issue of record keeping by requiring the DOJ to implement several internal controls (OIG-07-04). Responding to a series of negative reports by the GAO, Congress mandated changes in internal record keeping. The requirements were issued in the form of a mandate, a top-down approach, with Congress relying heavily on GAO findings. In a 2007 report, the OIG found unresolved problems, stating that DOJ components did not accurately report terrorism-related statistics in their annual budgets, financial statements, performance plans, and statistical reports (OIG-07-04). Without accurate data, the OIG claimed, it was not possible to evaluate whether the antiterrorism policies were effective. The inability to evaluate a policy's effectiveness is a hallmark of implementation failure.

In policy theory, several scholars have addressed implementation failure. Since the policy initiatives have come in the form of legislation and directives from the Attorney General, discussion turns to the "top-down" perspective of policy implementation. From a top-down perspective, Sabatier and Mazmanian (1979) argue that six criteria need to be met for effective implementation: 1) make policy objectives clear and consistent; 2) the program must be based on a valid causal theory; 3) the implementation process must be structured adequately; 4) implementing officials must be committed to the program's goals; 5) interest groups and

(executive and legislative) sovereigns are supportive; and 6) there are no detrimental changes in the socioeconomic framework conditions. Mazmanian and Sabatier (1983) acknowledged that perfect hierarchical control over the implementation process is difficult to achieve.

One of the issues facing antiterrorism policy is that there appears to be a breakdown in establishing definitions, goals and objectives on which the different components of the government can agree. Moreover, there is a fundamental disagreement between the FBI/EOUSA and the GAO/OIG over the sufficiency of the terrorism-link measurement. Lipsky (1971) rejects the idea of “hierarchical guidance.” In his view, it is impossible for Congress to draft statutes with unequivocal policy goals and to control the implementation process from top to bottom. Indeed, the goals and objectives of post-9/11 antiterrorism policy came from Attorney General Ashcroft, not Congress.

Hjern (1982) argues that street level bureaucrats are the key to successful implementation. Hjern claims that implementation occurred only when those who were primarily affected were actively involved in the planning and execution of these programs. In this approach, policy makers (Congress) and street level bureaucrats (FBI/EOUSA and OIG/GOA) would be involved in policy formation. Ripley and Franklin (1982) suggest that, even with this approach, the challenge is defining the problem in a way that satisfies each set of stakeholders.

According to Rochefort and Cobb (1994), defining issues or problems is one of the most crucial aspects of policymaking and also one of the most complicated. Problems find their way onto the agenda in many different ways and are always viewed through the eyes of the beholder. That is certainly the case here. The GAO and OIG define the problem as a lack of internal

controls (on the part of the FBI²⁹ and the EOUSA³⁰) to accurately track cases and provide unequivocal proof those cases are clearly related to terrorism. The lack of controls has resulted in over- and under-estimates of the number of terrorism cases both agencies handle each year. The FBI and EOUSA, conversely, claim the GAO and OIG ignore explanations and overestimate the number of discrepancies.

The GAO found discrepancies between DOJ's official statistics: namely, that the DOJ overestimated the number of defendants in terrorism cases they processed.³¹ This is an issue repeated in each assessment of the DOJ and its components. Interestingly, these complaints are centered on what this project calls diffusion cases. Both the OIG and the GAO have reported that when case materials they reviewed did not support a terrorism label, they contacted the

²⁹ We could find no information regarding the specifics of how the FBI tracks terrorism investigations. Section (B)(4)(a) of the Ashcroft Guidelines requires that all terrorism investigations be reported to the Office of Intelligence Policy and Review, but it makes no further demands of the FBI. The GAO report refers to a tracking system used by the FBI called *Zeus*. The specifics of that system are classified, but the GAO states that *Zeus* is the primary vehicle the FBI uses to track and relay terrorism investigation information internally, to other law enforcement agencies, and to the government. In addition, the FBI reports the number of terrorism incidents the Agency investigates in its budget justification each year. After discovering a number of discrepancies in the number of cases the FBI reported in 2004, the GAO asked an official with the department. The official said that FBI relies on the originating FBI units to enter all the data in the database. The official responsible for accumulating the statistic said that when she began her job in February 2004 there were no formalized procedures on how to collect, verify, and report the Intelligence Assessments issued and no formalized procedures have been developed since.

³⁰ The EOUSA maintains a statistical monitoring system called *LIONS*. The EOUSA is responsible for tracking and analyzing data related to the work of the 94 United States Attorney's Offices (USAOs) in the development of budget and litigation priorities. The *LIONS* system is a database with on-line capabilities that permit the USAOs and EOUSA to compile, maintain and track information relating to defendants, crimes, criminal charges, court events, and witnesses. According to the GAO, the USAOs are responsible for entering data into *LIONS*, and each USAO is responsible for certifying, semi-annually, the classifications given in each case. Apparently, there are problems. The Office of the Inspector General, an oversight agency, stated "that terrorism-related statistics reported by EOUSA and the USAOs were not accurately reported. This indicates that stronger internal controls for verifying the accuracy of the *LIONS* data are needed."

³¹ The EOUSA reported processing 1,876 defendants in terrorism-related cases from 2002-2004 (365 defendants in 2002, 786 in 2003, and 725 in 2004). By contrast, the FBI provided the Center for Terrorism Research with the names of 525 defendants from September 11, 2001 to August 15, 2004. Using the EOUSA's own numbers, the OIG found that the number of terrorism-related cases handled by the department were overstated by 421 people in 2003 and 2004. During that same period the OIG found that the EOUSA overstated the number of terrorism-related convictions by 402.

EOUSA and the FBI. The EOUSA and FBI, in turn were asked to provide supporting documentation. In many cases, the OIG and GAO reported that DOJ officials either declined to provide documentation, citing the classified nature of the information, or they provided explanations without documentation. Often, the OIG/GAO would disregard those explanations because the OIG/GAO disagreed with the FBI/EOUSA on what a “viable” link to terrorism meant.

Either way, it brings up an important problem: an agreed definition of “linked to terrorism”—or more precisely, an agreement on the goals and objectives of post-9/11 antiterrorism policy and the proper place for diffusion cases. As mentioned above, Attorney General Ashcroft stated that the objective of the DOJ was to intercept terrorist threats before they could materialize. While internal memoranda sent to the FBI and EOUSA are not available, the evidence suggests that diffusion cases were created for the purpose of following the Attorney General’s mandate. While this might have occurred among the street-level bureaucrats, as a result of them implementing a vague policy, available evidence suggests that it was a top-down initiative.

Consider that the timing of the first diffusion cases corresponds to the dramatic increase in the levels of cooperation between Bureau of Immigration and Customs Enforcement (ICE), a bureau inside the Department of Homeland Security, and the FBI’s many JTTF offices. Also consider that diffusion cases have been investigated and referred for prosecution by nearly every JTTF office in the country. Finally, the first diffusion cases were filed within a month of Attorney General Ashcroft’s announcement that the objective of antiterrorism policy had become proactive. The theory behind pursuing diffusion cases comports with Ashcroft’s objectives.

With the available data, one cannot determine whether diffusion cases have been successful in preventing acts of terrorism. It is a matter of debate whether the pursuit of diffusion cases is a sound antiterrorism strategy and an efficient use of resources. It is also a debate that is beyond the scope of this research. One question that is easier to answer, however, is whether or not these cases are consistent with existing policy. The answer is yes. As explained in Chapter 6, the Attorney General's guidelines authorizing terrorism investigations and the mandate to prosecute cases sooner to prevent acts of terrorism, probably necessitated the pursuit of diffusion cases. As mentioned in the previous paragraph, evidence suggests that pursuing diffusion cases was a conscious and deliberate decision by policy makers.

The implementation failure, if any, occurs between the DOJ and the independent agencies charged with auditing the DOJ's work: the OIG and GAO. The former is pursuing post-9/11 antiterrorism objectives through new goals established by the executive branch. The latter does not answer to the executive branch, and appears to be evaluating the DOJ's work under pre-9/11 measures. Those measures require concrete connections linking those accused to acts of terrorism and/or an extremist ideology.

This report provides another method of evaluating the policy objectives. By categorizing cases by type, one can ascertain whether post-9/11 policies have been more effective (i.e., resulting in a larger proportion of convictions) than those in place before. As the results show, even if one ignores diffusion cases altogether, the government has prosecuted slightly more defendants per year after 9/11. Most of those cases are pretextual, and that is exactly what one should expect given the mandate to prosecute cases earlier. In addition to more defendants being prosecuted, the plea bargain rate and the conviction rate have increased in the post-9/11 era. Again, this effect, while desirable, was probably an unintended consequence of the policy

changes. It may be the result of different (less politicized) prosecution strategies used by prosecutors who handled cases with less available evidence.

2. REVIEW OF RESEARCH QUESTIONS AND BACKGROUND

This project began by asking three fundamental research questions. First, what is the relationship between prosecutorial and defense strategies, and do those strategies affect case outcomes? Second, how has 9/11 impacted how the federal government responds to terrorism? Previous research revealed interesting trends indicating that cases involving terrorism defendants differed from other criminal cases in significant ways. For example, Smith and Damphousse (1998, 2002) discovered that terrorists were more likely to go to trial than similarly situated non-terrorists. Existing research had also found that terrorist defendants were sentenced to significantly longer prison sentences than similarly situated non-terrorist defendants (e.g., Smith and Damphousse, 1996; 1998; Bradley, Damphousse and Smith, 2008). Such studies suggested that there may be important differences between terrorists and non-terrorists with regard to characteristics and processing.

This project focused on policy changes that occurred after 9/11. After that attack, Congress changed a number of policies to provide tools for combating terrorism. Some policies expanded the DOJ's legal authority to intercept, investigate and prosecute domestic 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. In a statement released after September 11, Attorney General 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 happen (Ashcroft, 2001).

In broad terms, post-9/11 antiterrorism policy is focused on terrorist organizations, affiliated networks, and state sponsors in an effort to identify potential terrorist threats and proactively prevent future attacks. These policy changes were met with criticism levied by government entities, like OIG and the GAO, and members of academia and the media. The study focused on two critiques specifically—the soft sentence critique, and the data validity critique. The former maintains that the DOJ has been overstating its success because those who have been convicted receive short prison sentences. The latter critique states that the success of the DOJ is questionable because it routinely includes the convictions of defendants who are not linked to terrorism groups or acts of terrorism in its terrorism reports.

3. REVIEW OF RESEARCH QUESTION ONE: PROSECUTORIAL AND DEFENSE STRATEGIES

Overall, the relationship between prosecutorial and defense strategies is situational. While some strategies produce higher conviction rates and others produce lower conviction rates, the effect of how much lower or higher depends on the combination. Analyses showed that despite being the most common combination of prosecution strategy and defense strategy, conventional criminality and traditional defense did not produce the highest conviction rates. The combination of conventional criminality and either the dissociation defense method, or the political persecution defense method produced the highest conviction rates. Conventional criminality produced the highest conviction rates among all prosecution strategies. Political innuendo was slightly less successful, overall, than conventional criminality.

Even though the conventional criminality prosecution strategy proved to be the most successful strategy overall, it did so only in a handful of cases where defendants used either the political innuendo or dissociation defense strategies. The political innuendo prosecution strategy, when used in cases relying on the political persecution defense produced the highest, statistically reliable results. The results showed that this outcome was most likely due to the political persecution defense strategy, which had a positive effect on the probability of conviction. The lowest conviction rate occurred in the combination of explicit politicality prosecution strategy and traditional defense strategy.

In fact, among all prosecution strategies, explicit politicality produced the lowest conviction rates. Similarly, the disassociation defense strategy produced the lowest conviction rates among all defense strategies. When compared to the overall model average, the two combined to produce a very low conviction rate, but explicit politicality and a traditional defense strategy was the combination that resulted in the lowest conviction rate. That trend did not continue across the different combinations. The findings showed that the disassociation defense strategy was more successful than the traditional defense strategy when used against the political innuendo prosecution strategy. Most likely this result occurred because of the nature of political innuendo cases and the amount and type of evidence that is used to link defendants to terrorism.

The results indicate that using the explicit politicality prosecution strategy presents prosecutors with the biggest challenge for gaining convictions. The findings produced a statistically significant negative effect on the likelihood of conviction even when the impact of evidentiary strength, case complexity, and count severity are controlled. Likewise, defendants who use the political persecution strategy, regardless of prosecution method, are statistically more likely to be convicted than when using an alternative defense strategy. But as discussed,

that may be situational, as it appears easier for defendants to convince a jury that they are the victims of political persecution when there is a foreign government involved.

4. REVIEW OF RESEARCH QUESTION TWO: EFFECT OF 9/11

Chapter 6 began with a discussion of the three case type categories that were first described by Robert Chesney (2007). Chesney developed the categories in response to the soft sentence critique and the data validity critique that had been raised to question the DOJ's claims of success in its antiterrorism policy. Rather than focus on one type of criminal violation, as Chesney did, this study focused on the policy changes that occurred in the aftermath of 9/11. Specifically, attention was directed towards two policy changes: first, the Attorney General's Guidelines on opening terrorism investigations, and; second, Attorney General Ashcroft's mandate for the FBI and EOUSA to begin interrupting terrorist groups by prosecuting defendants as soon as a criminal case could go forward.

The analyses of the case types suggested that after 9/11 prosecutors relied less heavily on highly politicized prosecution strategies and filed fewer event-linked cases. As a result, plea bargain rates and conviction rates increased. This occurred despite the finding that the average count severity in the post-9/11 era was only slightly lower than it was in the previous era. While the decision to file less politically charged cases could have been a conscious decision on the part of prosecutors, it was more likely the result of less evidence—an unintended consequence of Attorney General Ashcroft's "prosecute early" policy. The results, showing a dramatic drop in the number of informants used in the post-9/11 era, provided support for that position.

Turning to diffusion cases, analysis revealed that no diffusion cases were filed before 9/11, yet they made up the majority of cases filed afterwards. Cases within the diffusion

category may not be the product of poor record keeping as some critics have suggested. Rather, they appear to be the product of policy changes implemented after 9/11. Attorney General Ashcroft directed the FBI and the EOUSA to prosecute cases sooner for the purpose of interrupting terrorists before they could complete attacks. Due to constraints caused by prosecuting cases sooner, prosecutors began trying to diffuse potential terrorism threats by targeting crimes that they determined were precursors to terrorism.

While the results of hypothesis testing supported a majority of the hypotheses that were based on structural contextual theory, some of the hypotheses were not supported. Analysis of the unsupported hypotheses provided a potential answer to one of the questions that has lingered in previous terrorism research: why were guilty plea rates in terrorism cases so low in the pre-9/11 era? The results suggest that the highly politicized prosecution strategies that dominated federal terrorism trials in the pre-9/11 era may have decreased the likelihood of plea bargaining.

The concept of the *ideology effect* was introduced to explain how highly politicized cases increase the contentiousness of terrorism trials because they question the belief systems of terrorist defendants. The implication is that tightened coupling, a component of structural contextual theory, does not operate differently in terrorism cases than it does in non-terrorism cases (leading to lower plea bargain rates in the former while leading to higher plea bargain rates in the latter), it is simply masked by the ideology effect.

5. SUGGESTED FUTURE RESEARCH

While this project makes a significant contribution to existing terrorism research in two different areas, there are questions raised in each that deserve closer study. With regard to prosecutorial and defense strategies, analyses were performed using the broad categories of

pleadings (motions) that were available. A more in-depth analysis of motion type and their outcomes could provide better explanations on what effect specific motions have on prosecution strategies and defense strategies. This level of analysis could also help to improve our understanding of whether defense attorney type plays a significant role in the type of defense strategies used.

In addition, the defense strategies included in this project were limited to the three most common strategies. Future analysis could include each defense strategy to further pinpoint how defense strategies play into case outcomes. It is also the case that defendants sometimes employ hybrid defense strategies—they use components of more than one strategy. For this study, defense strategies were coded for each defendant according to which strategy was used the most. Creating hybridized categories would probably improve our understanding of the subject.

As with defense strategies, prosecution strategies could be divided further. Recall that the political innuendo prosecution strategy is used in different degrees and introduced at different times by prosecutors. Variables measuring when the strategy was employed and how it was employed would provide a better understand of why this strategy was highly successful when the explicit politicality strategy was overwhelmingly less successful.

The findings provide valuable insight into what effect 9/11 had on federal antiterrorism policy. The case type categories provide a useful tool for analyzing antiterrorism policy by allowing research to be conducted among similar cases. In the aftermath of the major policy changes that occurred in the months following 9/11, in which policy objectives and goals were reset, the case type variable exposes the flaws in earlier research which lumped all terrorism cases into one category and based any findings on pre-9/11 policy goals. But the findings provided in this study are preliminary.

The most promising area of future study is plea bargaining. It will be important to test the ideology effect, and the most promising method of doing that is an in-depth analysis of guilty plea rates. Beyond the predictors that are typically used to explain the decision to enter a guilty plea, a future analysis should include prosecutorial and defense strategies variables. In addition, future research should distinguish between the three case types and the various terror types (right-wing, left-wing, environmental, etc.). It might be possible to construct a surrogate measure of how devoted a defendant is to his/her ideology by using some of the factors identified here.

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Appendix 1
Count Severity Codes

(Federal A.O. code is in parentheses):

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

Appendix 2
Average Count Severity by Prosecution Strategy

prosmeth recode	Mean	N	Std. Deviation
conventional criminality	17.81	1917	5.109
political innuendo	18.20	947	8.784
explicit politicality	23.27	6438	5.175

N= 9302, F(2 , 9229)= 866.1, p < .001

Appendix 3
Percentage of Conspiracy Counts by Prosecution Strategy

prosmeth recode	Mean	N	Std. Deviation
conventional criminality	.03	2015	.171
political innuendo	.06	1012	.238
explicit politicality	.19	6598	.391
Total	.14	9625	.349

N =9625, F (2, 9622) = 196.5, p < .001

**Appendix 4
Crosstab Count Outcome by Defense Strategy**

Defense Strategy		ctresult_recode					Total
		convict	plead	dismiss after guilty plea	dismiss	acquit	convict
political persecution	Count	372	70	181	263	21	907
	% within defmeth	41.0%	7.7%	20.0%	29.0%	2.3%	100.0%
	% within ctresult	48.1%	13.2%	7.0%	54.6%	15.4%	20.1%
disassociation	Count	208	145	458	103	101	1015
	% within defmeth	20.5%	14.3%	45.1%	10.1%	10.0%	100.0%
	% within ctresult	26.9%	27.3%	17.7%	21.4%	74.3%	22.5%
traditional	Count	193	316	1942	116	14	2581
	% within defmeth	7.5%	12.2%	75.2%	4.5%	.5%	100.0%
	% within ctresult	25.0%	59.5%	75.2%	24.1%	10.3%	57.3%
Total	Count	773	531	2581	482	136	4503
	% within defmeth	17.2%	11.8%	57.3%	10.7%	3.0%	100.0%
	% within ctresult	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Pearson $\chi^2 = 1450.5$, df 8, P < .001

Appendix 5

Average number of counts dropped per defendant in Superseding Indictments

Defense Method	Mean	N	Std. Deviation
political persecution	.18	93	.488
disassociation	1.91	164	6.253
traditional	.77	253	5.323
Total	1.03	510	5.197

N = 6813, F (2, 4162)= 29.432, p < .001

Appendix 6
Average Count Severity by Defense Strategy

defmeth_recode	Mean	N	Std. Deviation
political persecution	19.92	1,137	7.523
disassociation	19.56	1,001	8.394
traditional	19.76	3,013	5.973

N= 5161, F(2, 5158)= .757, p= .469

Appendix 7
Counts Charged in Diffusion Cases by USC Chapter

		Frequency	Percent
Valid	crimes/general provisions	3	.2
	claims & services in matters affecting gov't	1	.1
	counterfeiting & forgery	1	.1
	embezzlement & theft	1	.1
	explosive materials	2	.1
	firearms	16	.8
	fraud/ false statements	29	1.5
	mail fraud	185	9.6
	passports & visas	39	2.0
	racketeering	144	7.5
	RICO	54	2.8
	stolen property	17	.9
	release & detention pending judicial proceedings	1	.1
	immigration & nationality	8	.4
	drug abuse prevention & control	19	1.0
	machine guns, destructive devices, other firearms	4	.2
	crimes, other offenses & forfeitures	7	.4
	monetary transactions	1,312	68.0
	social security	13	.7
	aviation programs	32	1.7
	nationality & citizenship	7	.4
	bribery/graft	22	1.1
	food stamp fraud	2	.1
	interfere fair housing	3	.2
	transporting hazardous material	3	.2
	prohibited transactions	2	.1
	Total	1,927	99.9
Missing	System	2	.1
Total		1,929	100.0

Appendix 8

Average Number of *Pro se* Motion Filed RW Cases

ERA	Mean	N
Pre-Leaderless Resistance	4.91	35
Leaderless Resistance	8.95	60

$t(93) = -1.75, p < .10$

Proportion Right-wing Defendants who Filed *Pro se* Motions

ERA	Mean	N
Pre-Leaderless Resistance	.14	95
Leaderless Resistance	.40	134

$t(227) = -4.681, p < .001$

Appendix 9
Crosstab case-type X Case outcome 5th category added

			Case Outcomes					Total
		Case Type	trial conviction	plea guilty	acquittal	dismiss	charges pending /Fugitive	
case type	event linked	Count	5	28	2	5	10	50
		Expected Count	3.9	35.3	.9	3.0	6.9	50.0
		% within case type	10.0%	56.0%	4.0%	10.0%	20.0%	100.0%
		% within outcome1	38.5%	23.7%	66.7%	50.0%	43.5%	29.9%
		% of Total	3.0%	16.8%	1.2%	3.0%	6.0%	29.9%
	pretextual	Count	3	22	0	2	11	38
		Expected Count	3.0	26.9	.7	2.3	5.2	38.0
		% within case type	7.9%	57.9%	.0%	5.3%	28.9%	100.0%
		% within outcome1	23.1%	18.6%	.0%	20.0%	47.8%	22.8%
		% of Total	1.8%	13.2%	.0%	1.2%	6.6%	22.8%
	diffusion	Count	5	68	1	3	2	79
		Expected Count	6.1	55.8	1.4	4.7	10.9	79.0
		% within case type	6.3%	86.1%	1.3%	3.8%	2.5%	100.0%
		% within outcome1	38.5%	57.6%	33.3%	30.0%	8.7%	47.3%
		% of Total	3.0%	40.7%	.6%	1.8%	1.2%	47.3%
Total		Count	13	118	3	10	23	167
		Expected Count	13.0	118.0	3.0	10.0	23.0	167.0
		% within case type	7.8%	70.7%	1.8%	6.0%	13.8%	100.0%
		% within outcome1	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
		% of Total	7.8%	70.7%	1.8%	6.0%	13.8%	100.0%
