

Defense Strategies For Politically Charged Prosecutions

By **Kenneth Notter** (February 20, 2025, 1:49 PM EST)

From the prosecutions of President Donald Trump and Hunter Biden, to the cases against former Sen. Robert Menendez, D-N.J., and former Illinois House Speaker Mike Madigan, there's been no shortage in recent years of politically charged criminal cases.

Beyond the headline-grabbing cases against public officials or their families, a range of criminal cases can have a political element. Campaign finance prosecutions have an inescapable political dimension, as did the prosecutions involving the Jan. 6 storming of the U.S. Capitol.

Even seemingly routine cases can carry a political undercurrent, such as the prosecutions against academics and researchers of Chinese descent brought as part of the first Trump administration's "China Initiative."^[1]

Politically charged cases present distinct problems — and opportunities — for defense counsel.

Most people, jurors included, make certain assumptions about political issues and figures, and are reluctant to accept facts or arguments that do not fit with those assumptions. A trial strategy must account for those perceptions, as an ordinarily persuasive strategy may fail in a case infused with politics.

But at the same time, the same forces can amplify the power of a trial strategy that accounts for the influence of politics.

For defense counsel, the best way to avoid politically driven pitfalls and seize politically fueled opportunities is to learn from recent cases and follow certain best practices.

Recent Cases

U.S. v. Madigan

The 16-week trial against Madigan for racketeering, bribery, conspiracy, wire fraud and other charges presented defense counsel with a near-impossible task — humanize someone who had been an almost-mythical fixture of Illinois politics for more than 50 years.

Riding those tailwinds, throughout trial in the U.S. District Court for the Northern District of Illinois,



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prosecutors capitalized on a public perception of Madigan as a ruthless, all-powerful political manipulator by playing recordings of Madigan recounting how he "put the knife into" a political rival, former Illinois Senate President John Cullerton.[2]

Perhaps recognizing that the government's allegations of corruption played into jurors' preconceptions about him, Madigan took the high-risk, high-reward step of testifying in his own defense.

That strategy may have shown jurors a different side of him and helped convince jurors to convict on only 10 of the 23 charges against him on Feb. 12.

The China Initiative

During the first Trump administration, the U.S. Department of Justice launched the China Initiative, a program marketed as a crackdown on national security threats from China by encouraging prosecution of acts of espionage.

In practice, the initiative appeared to target professors and researchers of Chinese descent who had omitted details in their immigration paperwork or on grant applications — conduct arguably out of proportion with prosecutors' allegations that the defendants were, in effect, spies for the Chinese Communist Party.[3]

Feng "Franklin" Tao, formerly a professor at the University of Kansas, was one of scores of individuals charged as part of the China Initiative. Like several other China Initiative defendants who were acquitted at trial or after appeal, Tao and his lawyers wove a compelling trial narrative of a biased investigation, inviting jurors, and then judges, to conclude that the charges against Tao may have been motivated by politics, not evidence.[4]

The jury acquitted Tao of several charges in April 2022 in the U.S. District Court for the District of Kansas, and the court subsequently dismissed all remaining charges against him.

Jan. 6 Cases

The government charged more than 1,500 individuals with federal crimes related to the Jan. 6 storming of the U.S. Capitol.[5] Though about 1,000 defendants pled guilty, more than 260 defendants — roughly 20% — went to trial.[6] That is itself remarkable given that fewer than 3% of federal criminal cases go to trial in a typical year.[7]

Of the defendants who faced trial, four were acquitted of all charges, and 76 had a mixed verdict — that is, a guilty verdict on some charges and a not guilty on others.[8]

As discussed below, whether a mixed verdict offered these defendants any practical benefit is uncertain, though mixed verdicts may prove more beneficial in political cases.

Best Practices

As these examples showcase, politically charged cases may present defense lawyers both challenges and opportunities. With preparation and forethought, following a few best practices can help defense counsel mitigate those risks and exploit the openings.

Accounting for Juror Scripts

First, pay attention to juror "scripts." The psychological concept known as "script theory" teaches that people do not evaluate facts individually, but instead fit new information into a preexisting picture and, as a result, are more likely to believe facts that fit that picture and reject those that do not.[9]

For example, a listener who hears "I went to the movie theater and had a snack" is primed to believe that the snack was popcorn, because that fits with preexisting information regarding a movie theater experience.[10] By contrast, trying to convince the listener that the snack was a steak would prove difficult because steak does not fit the movie theater script.

Scripts are at work in every litigation, but they are particularly powerful in politically charged cases, where there are so many publicized, broadly reinforced scripts — e.g., the dishonest politician or the power-hungry political donor.

The Madigan case is a good example. Nearly everyone in the Chicago jury pool had heard of Madigan, who was long seen as an ultrapowerful political boss of Illinois. Even the few jurors who may not have heard of Madigan, specifically, likely held preformed and potentially unfavorable views of Illinois politics.

Most jurors were therefore primed to believe the government's allegations because they fit with the script of "Madigan, the shadowy political boss."

Given that powerful script, the defense faced a steep uphill climb trying to change jurors' perception of Madigan. Even when he testified, social science suggests that jurors likely fit his testimony through their preformed picture of who he was, and discredited information that did not fit that picture.

But the defense could, and did, work to defuse the power of the script, which has power largely because it is automatic. Indeed, scripting is an unthinking process that leaves jurors feeling as if they arrived at a view independently, rather than merely because it fits with a preconception.

Madigan's counsel called attention to that process — asking jurors to **resist** the government's efforts to exploit "the cynicism we have around our public officials." Calling attention to jurors' potential biases can sap those biases of power.

Politically charged cases also offer scripts that a defendant can exploit. The defense in the Madigan case, for example, relied on the script of the unscrupulous politician to undermine the credibility of the government's key witnesses — who were also long-tenured politicians — and suggest that their negative testimony was driven by self-interest and grudges, rather than facts.[11]

Lawyers for Tao also used scripts to great success. Most people assume the government would not go to the trouble of investigating and prosecuting someone unless there was overwhelming evidence of guilt. Yet many people simultaneously believe that criminal investigations are sometimes driven by political motives, and that those motives can blind investigators to the facts.

By tapping into that script, Tao's lawyers persuaded jurors to render a mixed verdict — guilty on four counts and not guilty on four counts. They then persuaded the district court to acquit Tao of three counts after trial, and the U.S. Court of Appeals for the Tenth Circuit to reverse his conviction on the sole remaining count last July.[12]

Playing The Long Game

The Tao case and the Jan. 6 prosecutions illustrate two additional features of political cases that defense counsel must account for: (1) creative application of criminal statutes, and (2) jurors' inclination toward so-called compromise verdicts.

Prosecutors charged Tao with wire fraud for omitting details on a university form, and many Jan. 6 defendants were charged with obstruction of justice for storming the U.S. Capitol.[13]

Neither set of facts fit what most people would first imagine when thinking of wire fraud or obstruction of justice. And, as it turned out, a jury and a judge found that Tao did not commit wire fraud, and the U.S. Supreme Court ruled in its June 2024 *Fischer v. U.S.* decision that storming the U.S. Capitol was not obstruction of justice.[14]

But those ultimate victories could not have happened had defense counsel failed to preserve their challenges to prosecutors' creative application of criminal statutes to unusual facts. It is imperative to consider whether there are arguments that might fail in the short term, but nevertheless carry the day after trial, including on appeal.

It is particularly important to do so in politically charged cases, where the odds are greater that posttrial developments — such as Supreme Court decisions or a change in administration — may open new paths to acquittal or exoneration that did not previously exist.

Similarly, fact-finders — often juries, but also judges in bench trials — may be inclined in close cases to render mixed verdicts, as they did in the *Madigan* and *Tao* cases and in 76 of the Jan. 6 trials.[15]

Juries may feel they are giving both sides a victory, but this is rarely true. Because of the varying statutory maximum sentences, the sentencing guidelines and other factors, a split verdict almost always gives one side a complete win, and the other side little or nothing.

Defense counsel must therefore carefully consider the consequences of a mixed verdict for their client and craft a trial strategy to maximize the chances of a good outcome.

For example, one count may be legally vulnerable to appellate reversal, and the second count may be weaker on the facts at trial. In that case, counsel may focus trial strategy on getting an acquittal of the second count at trial, knowing that, even if the jury compromises and convicts on the first count but not the second, there will remain a path to complete victory on appeal.

Alternatively, an acquittal on just one of several counts might dramatically reduce a defendant's potential sentencing exposure, making that count the most important focus at trial in hopes that a jury will acquit on that count even if it delivers a mixed verdict.

Caution Toward Conventional Wisdom

The conventional wisdom that applies to most cases does not always apply in political cases.

For example, conventional wisdom holds that lawyers may make for bad jurors because they are too legally technical. Maybe that is true. But this is a risky assumption in political cases, which can, in fact, turn on legalistic concepts like the defendant's intent. Lawyers may be more equipped to accept that the

defendant did some otherwise criminal act, but lacked the necessary intent to sustain a criminal conviction.

Similarly, it may backfire to assume that favorable jurors will be those of the same political party as the defendant or witnesses. Political labels necessarily paint with a broad brush and may not correspond to a juror's actual beliefs, or have any predictive power in how that person will assess evidence or receive certain arguments.[16]

Conclusion

The bounty of politically charged criminal cases in recent years has offered an equally plentiful number of lessons for defense lawyers. Future cases will undoubtedly offer still more for practitioners seeking to learn from and implement those lessons.

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[1] See, e.g., *United States v. Tao*, 107 F.4th 1179 (10th Cir. 2024).

[2] Jason Meisner & Megan Crepeau, *A Disappearing Witness, an Odd Choice of Hold Music and the Fighting Irish: 5 Strange Things You Might Not Know About the Madigan Trial*, (Feb. 2, 2025).

[3] See U.S. Dep't of Justice, *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, <https://shorturl.at/qZLyw>; Ryan Lucas, *The Justice Department Is Ending Its Controversial China Initiative*, NPR (Feb. 23, 2022), <https://shorturl.at/D3dUx>; Mike German, *The "China Initiative" Failed U.S. Research and National Security. Don't Bring It Back*, Brennan Center for Justice (Sept. 23, 2024), <https://shorturl.at/1vaWe>.

[4] See, e.g., *Opening Brief 1-4, United States v. Tao*, No. 23-3013 (10th Cir. Apr. 3, 2023).

[5] NPR, *The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History* (updated Jan. 20, 2025), <https://shorturl.at/s7aMC>.

[6] *Id.*

[7] John Gramlich, *Fewer than 1% of Federal Criminal Defendants Were Acquitted in 2022*, Pew Research (June 14, 2023), <https://shorturl.at/I05yF>.

[8] NPR, *supra*, n.5.

[9] Steven Lubet & J.C. Lore, *Modern Trial Advocacy* 44 (6th ed. 2020).

[10] *Id.* at 45.

[11] See *id.*

[12] See Tao, 107 F.4th at 1190 (reversing last remaining conviction).

[13] On Jan. 20, Trump pardoned or commuted the sentences of those convicted in connection with the Jan. 6, 2021, storming of the U.S. Capitol, <https://www.whitehouse.gov/presidential-actions/2025/01/granting-pardons-and-commutation-of-sentences-for-certain-offenses-relating-to-the-events-at-or-near-the-united-states-capitol-on-january-6-2021/>.

[14] See *id.* at 1183-84; *Fischer v. United States*, 603 U.S. 480, 497-98 (2024).

[15] See Dennis J. Devine, *Jury Decision Making* 207-08 (2012).

[16] See Robert W. McGee et al., *Democrats v. Republicans: Is Political Affiliation a Significant Demographic Variable in Jury Selection?*, 17 *Charleston L. Rev.* 153 (2022) (finding political affiliation played no meaningful influence in most criminal cases).