The Unique Challenges of Defending a Terrorism Prosecution

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Defending a terrorism prosecution presents a number of challenges, some of which are unique to cases involving national security issues, and some of which mirror—but in amplified form—those arising in conventional criminal cases. Also, because terrorism cases often are high-profile, the difficulties attendant to intense media coverage must be addressed as well.

This article discusses those elements that distinguish terrorism prosecutions. Some are substantive; others are procedural. Some are statutory or regulatory, while others are constitutional. Some implicate defense counsel's relationship with the prosecution, while others affect counsel's relationship with the client. Together, all of these distinctions constitute a daunting matrix that often intimidates the uninitiated, stymies even the experienced, and creates a playing field that is tilted so demonstrably in favor of the prosecution that it feels perpendicular.

Also, while most of the more fundamental constitutional issues affecting the statutory framework have yet to be addressed, much less decided, by the Supreme Court, the lower courts have been nearly uniform in deferring to the government on an entire roster of issues that reinforce secrecy, ex parte communications, evidentiary restrictions, and onerous conditions of pretrial confinement. In that context, this article also provides some guidance for practitioners assuming responsibility for such cases, as well as some prescriptions for making the process fairer and more transparent, and ultimately more likely to generate more accurate and just results.

The Substantive Law

The substantive law applicable in terrorism cases is a subject too complex to cover in a short article, but the principal problem is the elasticity of the proscriptions on providing "material support" for terrorism, which is the conduct underlying the primary statutes used by prosecutors.

Nearly anything (except religious materials or medical supplies) can qualify as "material support," no matter how de minimis and, in some instances, no matter the knowledge or intent on the defendant's part. For example, 18 U.S.C. § 2339B, which penalizes material support to a designated foreign terrorist organization (FTO), applies regardless of whether the defendant's intent in providing the "material support"—which a Department of Justice (DOJ) official once famously confirmed in a congressional hearing could constitute merely a "glass of water"—was for terrorist activities or whether the defendant knew of its ultimate use.

As a result, even humanitarian aid can be "material support" if it is provided to or for the benefit of an FTO. The other popular material support statute, 18 U.S.C. § 2339A, makes it a crime to

provide material support, among other things, in aid of a conspiracy to murder, maim, or kidnap overseas. Yet, section 2339A does not require a specific identification of that conspiracy, or of the victims, or proof that the defendant joined the conspiracy or its aims in any manner.

In addition, the effectively unlimited nature of "material support" has had serious First Amendment implications, as the Supreme Court, in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), denied constitutional protection to even political speech—for example, an op-ed article—if it is made in coordination with an FTO.

Another statutory regime, the International Emergency Economic Powers Act, 50 U.S.C. § 1705 *et seq.*, prohibits essentially any financial transactions, no matter how simple or mundane, with persons or organizations designated by the Department of the Treasury as specially designated global terrorists (SDGTs) or FTOs without requiring malicious or criminal intent.

These substantive aspects make terrorism offenses—which just by the description of the charges themselves prejudice the defendant—easier to charge and easier to prove than ordinary offenses in the federal criminal justice system.

The Gathering of Evidence

Among the most significant differences from normal criminal cases that terrorism cases present is in the manner in which evidence is gathered—in some instances, by both the prosecution and defense. Chief among those distinctions are certain statutory provisions that regulate the acquisition and admission of evidence that implicates national security. The advantage afforded the government as a result of the asymmetrical nature of those provisions, and how they deviate from practice in ordinary cases, is considerable.

The Foreign Intelligence Surveillance Act. For example, the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 *et seq.*, constitutes a statutory regime for wiretapping, search and seizure, and collection of records wholly separate from the ordinary criminal justice authority granted by Title III of the U.S. Code (18 U.S.C. § 2518 *et seq.*) and traditionally permitted under the Fourth Amendment.

FISA offers the government both substantive and procedural advantages. FISA demands only a diluted form of probable cause—only probable cause, as certified by DOJ officials and for practical purposes unreviewable as a result, that the target is an agent of a foreign power. Thus far, in its nearly 40-year history, this standard has been impregnable to defense efforts to review any of the underlying materials—the warrants, the applications (including affidavits) for those warrants, and those DOJ certifications. Nor has any constitutional challenge to FISA, either

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A Judge Comments

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In "The Unique Challenges of Defending a Terrorism Prosecution," Joshua Dratel has provided a bird's-eye and a worm's-eye view of what lawyers can expect when representing a defendant charged in a "terrorism" case. I use quotation marks deliberately. Relatively few of the case abstracts in the Federal Judicial Center's most recent compendium of all cases brought under the material support and related statutes portray a mature conspiracy or involve the commission of dangerous acts. R.T. Regan, Fed. Judicial Ctr., National Security Case Studies—Special Case Management Challenges (2015). Instead, those that have even reached toddler stage have been, as in the two "terrorism" cases I have had on my docket, nurtured early on by government investigators.

To label defendants "terrorists," as government press releases and the media commonly do, is, to say the least, an overstatement, much more often than not. It is, however, this highly prejudicial and ill-fitting label that invariably attaches and sticks to the case throughout its existence. It is a label, moreover, that defense counsel can expect the government to highlight repeatedly in its approach to the case outside and inside the courtroom. But the press release, headlines, and breathless commentary that accompany the indictment and arrests are one thing; the risk that the judge potentially may be influenced, albeit only subconsciously, is another.

So, in addition to the unique and manifold other challenges Mr. Dratel accurately describes that confront defense counsel, there is one that he did not touch on: the effect on the judge of being at the center of a high-profile, attention-grabbing, and closely observed—but typically wrongly labeled—"terrorism" case. This is not a matter of the bias that we bring to the bench—which, I believe, we are able to consciously shed when we step up to it. It is, rather, the risk that results from being engaged during a prolonged pretrial period and lengthy trial in a setting in which terms like "terrorist," "terrorism," "national security," and "the Global War on Terrorism" can be recurrent motifs. Even where the jury rarely hears those terms, the judge will encounter them, or variants of them, often, whether in briefs, exhibits, and otherwise in standard pretrial proceedings or in ex parte hearings under the Classified Information Procedures Act. Indeed, there is a not-so-subtle underscoring that occurs where the judge and his or her staff undergo security clearance background checks.

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with respect to the diminished probable cause standard or its procedural framework, been successful (although the Supreme Court has yet to address any aspect of the statute). The Foreign Intelligence Surveillance Court, composed of a rotating group of federal district court judges, entertains the government's applications ex parte in a classified setting. In 2015, the court approved all 1,457 requests made by the government to intercept communications, including emails and telephone calls. *See US Foreign Intelligence Court Did Not Deny Any Surveillance Requests Last Year*, Reuters, Apr. 30, 2016, http://www.reuters.com/article/us-usa-cybersecurity-surveillance-idUSKCN0XR009.

Thus, FISA litigation for defense counsel is a futile game of blindman's bluff. The defense's challenge to the sufficiency or accuracy of a FISA warrant is made without access to the government's factual predicate. Also, until quite recently, the government did not reveal the particular FISA authority for the surveillance, thereby further precluding a precise or effective motion to suppress.

For example, in a case of mine in the Southern District of California (now pending in the Ninth Circuit), we did not learn until months *after* trial that the initial basis for the FISA interceptions was the USA PATRIOT Act section 215 bulk telephony metadata collection program, which Congress has since revamped considerably in the wake of learning, along with the U.S. public, of the program's scope.

The disclosure of the breadth of the section 215 program was made in mid-2013 by Edward Snowden, who also revealed not only that the government in FISA litigation relied on secret facts presented ex parte, but also that there had been secret *law* promulgated by FISA court opinions that had remained classified and therefore available to government prosecutors, but not defense counsel.

[CRD Art Credit]

Of course, the government's perfect record in defending FISA surveillance and searches—not a single piece of FISA-generated evidence has been suppressed in the history of the statute—is not surprising given the entirely one-sided nature of the litigation. If I too could deprive my adversary of the operative facts *and* the law, I could easily amass an equally impressive and unblemished record.

Compounding the defense frustration in litigating FISA motions is that FISA itself affords district courts discretion to disclose the materials to defense counsel—many of whom in terrorism-related cases have security clearances (required because the government provides classified discovery) equal in level to that of prosecutors—yet, with one exception, reversed two years ago in a heartbeat by the Seventh Circuit, not a single court has ordered such disclosure to defense counsel. *United States v. Daoud*, 2014 U.S. Dist. LEXIS 10716 (N.D. Ill. Jan. 29, 2014), *rev'd*, 755 F.3d. 479 (7th Cir. 2014).

FISA can also present other difficulties. In some cases, the intercepted communications have remained classified, thus depriving defendants—who in terrorism cases, of course, cannot obtain a security clearance—of the ability to review the contents of their own conversations. Consider the effect that embargo has on preparation of the defense, and how it creates an insurmountable hurdle to a defendant testifying, in part because the government can overnight declassify conversations in order to use them during cross-examination on a defendant who has not been afforded a prior opportunity to review the conversation.

The Classified Information Procedures Act. Operating parallel to FISA, but never harmonized with it, is the Classified Information Procedures Act (CIPA), 18 U.S.C. app. III, enacted in 1980 and designed to regulate the use of classified information in federal criminal trials. CIPA was a response to mid-1970s post-Watergate and Church Committee prosecutions of government intelligence officials who "gray-mailed" prosecutors by threatening to use classified information in their defense, forcing dismissals as the only alternative to disclosure of such information at trial. Because of that, CIPA was initially directed at cases in which the defendant knew and had access to the classified information, not the cases in which application of CIPA proliferates now: terrorism prosecutions in which defense counsel, but *not* the defendant, enjoy access to the classified discovery.

That circumstance can drive a wedge between lawyer and client, particularly when the defendant is a foreign national—who perhaps has never been in the United States before being apprehended overseas for prosecution here—unfamiliar with the U.S. criminal justice system, when the lawyer is court-appointed (as is most often the case in terrorism-related prosecutions due to the resources required to defend them), and the defendant is isolated in solitary confinement or other stringent conditions of pretrial confinement.

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In this context, defense counsel must be alert to and counteract—subtly and deferentially, of course—the potential effects on the judge of the "atmospherics" that can pervade all phases of the case.

Counsel must see to it that, no matter how vociferously and vigorously the government uses the "terrorist" label when speaking of the defendants, the proceedings remain true throughout to the Constitution and its guarantee of fair and impartial judgment. Before and during the trial or plea, and most certainly at sentencing, defense counsel should—even though the government may not and the media won't—strive to make clear to the court that the labels "terrorist" and "terrorism" simply do not apply to his or her client. An unfulfilled and typically unattainable desire to help, or even become a member of a foreign terrorist organization, is not the same as actually committing acts of terrorism. Just as planning a bank robbery is not the same as putting a gun in a teller's face, so plotting (often with government-sponsored encouragement) to help a terrorist organization is not the same as providing money or munitions to the organization, laying a roadside bomb, or bringing down a building. While both wanting to do so and actually doing so are evil and reprehensible and require deterring, they are not the same. Denominating both as terrorism, and those who engage in both as terrorists, can distort the process of adjudication of those whose thoughts and plots never matured, or could have matured, into dangerous acts.

Most often, as one peels away the layers of rhetoric and deals with the peculiarities (which Mr. Dratel so capably describes) often pervading these cases, one sees that the defendants are ensnared in a gossamer web. Though they wove the first strands, its enlarging and expanding were the government's handiwork.

Not unimportant work: Given the deadly effects of a plot that is put into action, we want our government to be alert—and, as importantly, to be seen as alert, vigilant, and vigorous—in its efforts to prevent those deadly consequences. And, to be sure, not every charge of conspiring or attempting to provide material support to overseas terrorists, or acting in furtherance of their objectives, is of the sort I am describing. A passenger attempting to detonate a shoe bomb in fact is a terrorist and deserves denunciation as such.

Indeed, the government should respond effectively to those who, in fact, are in the early stages of putting together and into action plots that, if they came to fruition, would be as dangerous or more dangerous than igniting an explosion in an airplane, driving a truckload of explosives into a Marine barracks,

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CIPA practice is relatively straightforward, though, and generally involves defense counsel reviewing the classified discovery to identify that which is useful for the defense at trial and then moving, in nonpublic proceedings, to use it at the eventual public trial. If the court agrees that the evidence is favorable to the defense, the government is compelled to choose between declassifying the material, offering substitutions that provide the defense the substance of the information, or suffering sanctions imposed by the court if the government refuses to declassify or propose acceptable substitutions.

This process does provide certain opportunities to the defense. For example, sometimes the classified information itself is of a character that is difficult to prove without access to the sources—witnesses, documents, intercepted communications. The government's refusal to grant that access makes the information evidentiary, regardless of whether the witness would testify at trial or whether the documents were available or technically admissible, thus affording the defense ways to present information through stipulated substitutions without the danger that a witness will prevaricate or evade or that documents or conversations would not have a means of admission.

Also, because the government's failure to produce a witness, or the source of information, precludes cross-examination by the defense, the Sixth Amendment's right to confrontation prevents the government from using any *in*culpatory aspect of that classified information the defense seeks to use at trial. As a result, only the *ex*culpatory portions of statements or documents or other materials are admissible under those circumstances.

In addition, substitutions and stipulations can enable the defense to present its theory, rather than what otherwise might merely be disjointed or unclear testimony, or documents without accompanying explanation. Consequently, imaginative and aggressive pursuit of favorable classified evidence in the CIPA context can provide the defense a tactical advantage.

For example, in one case of mine, the government introduced evidence that in 1991 my client may have been involved in arranging transport of Stinger missiles on behalf of Osama bin Laden. An opportunity existed to cross-examine a government witness with material that could have created the inference that the Stingers were legitimately in Bin Laden's possession. However, rather than permit that line of cross-examination, the government offered instead to stipulate that (as the U.S. government had previously acknowledged in a prior case) during the anti-Soviet jihad in Afghanistan, the United States had provided Stinger missiles to those forces opposing the Soviets. That stipulation converted an indirect inference into a declarative statement endorsing our defense theory: that Bin Laden may well have possessed those Stinger missiles legitimately.

Nonetheless, CIPA does provide the government a significant loophole that often threatens to swallow any ameliorative provisions of the statute. Section 4 of CIPA allows the government to move ex parte for permission to withhold certain classified discovery. As with FISA, while CIPA does not require the court to entertain a CIPA section 4 motion ex parte, no court has provided the government's legal rationale, much less the content of the classified discovery, to even security-cleared defense counsel.

The government often avails itself of the CIPA section 4 option, thereby placing on the court the burden of determining whether certain classified information is favorable and therefore required to be produced to the defense (either in raw form or via an appropriate substitution). Yet, the ability of the court to make that evaluation is substantially impaired. The court's review invariably occurs at an early stage of the case, before it has much of an idea of the facts and no idea of the possible defenses being considered. Consequently, the court is in a poor position to recognize favorable information within the volume of raw material usually provided in the context of section 4 motions.

> Rule 15 depositions are often the only means of obtaining testimony that could be essential to the defense.

As CIPA litigation has evolved, and defense counsel have grown more comfortable with it and more aware of the section 4 process, we have developed a countermeasure that the courts have increasingly adopted as routine. To educate the court about projected defenses and to identify for the court the types and subject matters of information it should be looking for in its section 4 review, defense counsel request their own ex parte audience with the court.

During that session, the defense can articulate for the court defense theories and concepts, although at such an early stage in the case, even defense counsel are often not fully familiar with all the ordinary discovery, have not been provided witness statements (which are usually provided, pursuant to 18 U.S.C. § 3500, at the earliest only on the veritable eve of trial), and are in the nascent stages of the defense investigation. Having not explored all the avenues of viable defenses at that juncture, even the defense's ex parte presentation is preliminary. However, it is better than nothing at all and, more often than not, yields

results in the form of further classified discovery or substitutions ordered by the court or both.

CIPA practice for defense counsel is aided immeasurably by the Court Information Security Officers (CISOs), who are technically DOJ employees but operate as neutrals in the context of their role in cases. They are classified information professionals, and one is assigned to each case in which classified materials are present or implicated. They are knowledgeable, accessible, trustworthy, and helpful with logistical and technical issues. They take their responsibility to be impartial quite seriously, including maintaining confidentiality of their communications with defense counsel, and have performed in that manner despite occasional government pressures to do otherwise.

For instance, in one case of mine, the government appeared at the defense's SCIF (the Secure Compartmented Information Facility set up in the courthouse as the repository for classified materials produced to the defense and where defense counsel must review the materials and compose and maintain any notes or pleadings) rather vigorously demanding entry and return of classified materials it claimed it had provided inadvertently. The intervention of the CISO was instrumental in impressing upon the government the sanctity of our SCIF as a privileged defense location into which the government could not intrude. As a result, the government was compelled to make a formal motion for return of the materials (which, alas, prevailed).

The ex parte facets of CIPA (as well as FISA) are anathema to the adversary system of justice that is supposed to exist. That, as well as the embargo on sharing information with the client, makes CIPA practice difficult and opaque, notwithstanding the relative procedural simplicity of the statute itself. Nevertheless, like FISA, CIPA has been impervious to constitutional attack, although, like FISA, CIPA has yet to be reviewed by the Supreme Court.

Federal Rule of Criminal Procedure 15 depositions. Another typical element of terrorism cases, but rare in ordinary cases, is resort to Federal Rule of Criminal Procedure 15, which permits depositions in foreign countries for admission in federal criminal trials. Rule 15 presents another double-edged sword. The rule is available to both sides; therefore, the government or the defense can seek to depose someone outside the United States who is either unwilling or unable to travel to the United States to testify at trial.

In terrorism cases, it is an invaluable tool for the defense because many witnesses will not travel to the United States to testify, either out of fear they will be prosecuted here—and many harbor that fear regardless of whether it is a legitimate concern—or inability to travel to the United States because they are in custody in other countries. As a result, access to witnesses outside the United States is imperative in preparing and presenting a defense. However, the government can do the same, and

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or flying airplanes into the Twin Towers. Investigating and successfully prosecuting plotters of that mindset long before they become truly dangerous is a worthy, indeed necessary, governmental function and endeavor.

It is also an undertaking that necessarily relies on infiltration and undercover work. All conspiracies are subterranean, doing their work out of public view. It has been a mark of the government's successful use of its agents as, in effect, monitors and *faux* cohorts, that has produced the successful prosecutions reported in the Federal Judicial Center's compendium. To the extent that those prosecutions, their high conviction rate, and their lengthy sentences have had a deterrent effect on others who might have been similarly inclined, that work and those convictions have well served our national interest.

But the label of "terrorist," nonetheless, has no place in the chambers or the courtroom, or in what happens in either. Defense counsel must see to it that the judge's perception of the job he or she must do is not clouded over by the atmospherics of the case. In making this suggestion, I do not underestimate at all the difficulty of the task, which is, at bottom, one of reminding the judge to be fair and impartial, no matter how often the government emphasizes its view of the defendants as terrorists. It's not just the nomenclature: The evidence the government may present may create its own risks of influence. In a case that went to trial before me, the principal among five defendants had sought out and downloaded from the Internet a vast assemblage of jihadist videos. To show the defendant's intent and dedication to his alleged plans to become trained to join the insurgency in Iraq, the government (with my concurrence) showed a sample of those videos. Some were even more gruesome and inhumane than those that judges and jurors see in a child pornography prosecution.

But no judge can let his or her human response to what the government displays diminish the judicial duty to be fair and impartial.

So what defense counsel can expect to encounter when called on to defend a "terrorist" in a "terrorism" case is not just what Mr. Dratel predicts and details. There is the need to peel those labels from the case so that the government's use of those terms does not cloud the judge's vision of what the case actually is about.

I certainly hope that no lawyer ever feels the need to attempt that unwelcome chore; but if it becomes necessary to do so—to ensure that the judge does not let the government's labels affect his or her job and judgment—that is a task that, no matter how unwelcome, counsel must undertake. ■

while that creates logistical complications—courts have refused to permit incarcerated defendants to attend such depositions in person—the courts, again, have not found the right to confrontation an impediment.

In response, defense counsel, with the courts' assistance, have at least arranged for videoconferencing, with the defendant produced either in the courtroom or other secure location, so that the defendant can view the deposition as it occurs. Courts have also attempted, sometimes with success, to provide secure telephone or other communication lines between the defendant (still in the United States) and the defense counsel examining the witness in a foreign locale.

Finding and cajoling witnesses overseas is a delicate matter involving both political and personal diplomacy on counsel's part.

While these accommodations ameliorate to some extent the practical shortcomings of Rule 15 depositions, they do not resolve the constitutional questions (which, again, the Supreme Court has not reached in the context of the rule itself). However, even the phone connections are not a substitute for in-person consultation and too often do not function properly. Also, there is an understandable wariness that clients have about the confidentiality of electronic communications made through equipment provided by the U.S. government.

Strategically, a Rule 15 deposition requires two visits: the first, in a confidential interview, to determine whether the prospective witness will be helpful to the defense; and the second for the deposition itself. Certainly, defense counsel should not schedule a Rule 15 deposition without first vetting the potential witness. Rule 15 motions should also be made as soon as practicable in a case, as untimeliness has been a basis for denying them.

Moreover, even when defense counsel have had the opportunity to evaluate a possible witness sufficiently, a Rule 15 deposition can have a downside. For example, if at trial the defense decides—due to a variety of possible factors—not to use a particular Rule 15 deposition, that does not foreclose the government from introducing the deposition. It also sometimes happens that, after cross-examination by the government during the deposition (or simply a direct that did not achieve the desired objective), the defense might decide not to use the deposition at trial. Yet, the government has the option of admitting it at trial if it believes it will benefit its case.

As with so many aspects of litigation, how depositions proceed, and how they might affect the trial once it is under way, are not predictable. Nevertheless, Rule 15 depositions are, for the defense, often the only means of obtaining testimony that could be essential to the defense. Consequently, they are almost always worth the risk if a defense witness can be identified, located, and interviewed in advance.

Another problem with Rule 15 depositions in terrorism cases that does not exist in ordinary cases is that the witness's home government can interfere because of the nature of the case and because the potential witness may have genuine reason to fear being identified as a pro-defense witness for someone accused of terrorism (or as someone acting contrary to the interests of the powerful U.S. government). That makes finding and cajoling witnesses overseas a delicate matter involving both political and personal diplomacy on counsel's part.

The globalization of criminal investigations and prosecutions. The need for Rule 15 depositions in many terrorism cases also highlights the increased globalization in federal criminal cases generally, although that has always been a prominent feature of terrorism cases. Inter-country cooperation—not only among law enforcement officials but also intelligence agencies—makes defense investigations overseas in U.S. terrorism cases problematic.

Secrecy laws in other countries, resistance to assist defendants charged with terrorism, or a reluctance to displease the United States (which often has close relationships with law enforcement and security and intelligence institutions in those countries) often hinder the defense investigation. To overcome these obstacles, defense counsel need to consider whether to file for letters rogatory, 28 U.S.C. § 1781 *et seq.*, or avail themselves of the other statutory mechanisms that the government routinely uses to obtain evidence from foreign governments. *See, e.g.*, 18 U.S.C. §§ 3491–3496, 3505 & 3506.

While these provisions are helpful, they do have the disadvantage of putting the government on notice of the defense's strategies. Thus, obtaining the materials directly through informal channels better preserves defense confidentiality, but it is not always feasible for the reasons noted above.

Protective orders. Protective orders, a feature of federal criminal practice that has proliferated in the past decade, first gained widespread use in terrorism cases. Protective orders govern the defense's use of discovery and limit those to whom discovery can be disclosed—sometimes even precluding disclosure to the defendant. In terrorism cases, that usually involves

classified information, while in ordinary cases it could be personal identifying information (for example, Social Security numbers in an identity theft case).

However, in terrorism cases, protective orders invariably restrict defense counsel's use of *non*-classified information as well. In certain prosecutions, fire-walled Assistant U.S. Attorneys are assigned the task of approving (or rejecting) requests by defense counsel to share defense materials with potential witnesses and others outside the defense team.

Obviously, that type of disclosure to the government, even to an ostensibly fire-walled prosecutor, makes defense counsel uncomfortable and can make defense counsel hesitant to pursue certain investigative means fully for fear of alerting the government to defense strategies. Indeed, in one case of mine, the fire-walled prosecutor ultimately assumed responsibility for the case itself for subsequent trials of the same indictment after other prosecutors had left the U.S. Attorney's Office.

The contents of protective orders also often vary from case to case and district to district. As a result, defense counsel must be vigilant in reviewing the proposed orders and in ensuring they do not include particularly onerous limitations. If they do, negotiation, as well as providing prosecutors samples of other protective orders that do not contain the offending provisions, often succeeds in resolving the issue. In that context, it is important that defense counsel insist on a definition of the "defense team" having unfettered access to discovery as broad as possible to include experts, interpreters, investigators, and other case preparation resources.

Client Relationships

Terrorism cases often present different issues with respect to relationships with clients. Many defendants in terrorism cases are not familiar with the United States or its criminal justice system; indeed, many have been brought to the United States for the first time solely for the purpose of criminal prosecution. Some defendants do not speak English. These circumstances create barriers that require defense counsel to be patient, tolerant, and thoughtful.

Also, defendants in terrorism cases are rarely granted bail. Even if they are U.S. citizens with roots in the community and capable of posting financial assets, judges are reluctant to release defendants charged with material support of terrorism or other terrorism-related offenses, even when the defendants do not have prior criminal records or a history of violence, and even when they are not charged with committing acts of violence or plotting to do so. The political climate alone prejudices the defendant sufficiently to foreclose the possibility of bail for defendants who would be prime candidates for release if charged with any other offense.

In addition, because defense counsel in many terrorism cases are court-appointed, it is not unusual—and it is even understandable—for defendants to be suspicious (as they often are in ordinary cases involving indigent defendants) of counsel's loyalty and ultimate objectives in the case.

Counsel can overcome such suspicions through being reliable, through making an effort to attend to the needs of the client while in custody, and by demonstrating a zealous commitment to achieving a favorable result in the case. Also, sensitivity to cultural and religious elements of the client's profile is essential.

Defendants in terrorism cases are often isolated while in custody, which makes counsel's job more difficult. In addition to increasing the number of issues related to conditions of confinement, and the corresponding amount of time counsel must devote to addressing those issues, defense counsel becomes the only outlet for the defendant socially, emotionally, and intellectually. Usually cut off from their families and surroundings, defendants have no alternative but to rely on their lawyers for a full range of resources that extend beyond legal assistance.

These problems are aggravated if the government has deemed the defendant subject to special administrative measures (SAMs), which are regularly based solely on the nature of the charges (rather than some misconduct while in custody) and result in solitary confinement and communications restricted to lawyers and immediate family. SAMs also impede defense preparation, as they limit the defendant's ability to assist in investigation (for example, a defendant under SAMs cannot write a letter to a possible witness vouching for the attorney's bona fides) and preparation of the defense.

Recently, there has been a watershed recognition of the deleterious effects of solitary confinement, but those findings are not news to lawyers who have represented persons accused of terrorism offenses. Those of us who are familiar with the arc of solitary confinement know that over time, certainly within several months if not sooner, a defendant's cognitive and psychological deterioration are inevitable.

That degeneration can adversely affect not only counsel's relationship with the client but also the client's ability to concentrate on the merits of the case, as opposed to idiosyncratic conditions of confinement that are heightened in importance for those suffering solitary confinement. Moreover, the notion that a defendant who has spent 18 to 24 months in solitary (a typical pretrial period for a terrorism case) can be suddenly be successful in a social situation—on the witness stand before the 12 people who will decide his or her future—is fanciful. Consequently, SAMs and solitary confinement have the effect of eliminating any possibility of the defendant testifying at trial.

Jury Selection and Juror Bias

Public attitudes in the United States toward terrorism are, of course, emotional and infused with anger, fear, and grief. Add

to that environment constant negative and frightening media coverage generally and about the specific case in particular (as many terrorism prosecutions attain high-profile status in the communities in which they are tried), and the resulting atmosphere makes selecting an impartial jury nearly, if not altogether, impossible.

In certain jurisdictions, such as New York City, fundamental irremediable juror bias exists due to shared experiences, such as 9/11, which traumatized and still affects many New Yorkers (and Americans) and which create a barrier to fair consideration of a particular defendant and the specific facts of the individual case.

While juror questionnaires and a more extensive, probing voir dire can help alleviate some of the problem in finding impartial jurors, they cannot, in my experience, overcome the prejudice that has been established and that endures through world events, media reports, and political pandering, as a result of the impact of terrorism on potential jurors.

> Defendants have no alternative but to rely on their lawyers for a full range of resources that extend beyond legal assistance.

Certain measures that are employed disproportionately in terrorism cases exacerbate the problem. For example, an anonymous jury is a clear signal to jurors that there is an element of danger in the case—from, of course, the defendant. The same is true for what is denominated as "partial sequestration," which involves the U.S. Marshals Service picking up jurors each day from an undisclosed common location for transportation to and from the courthouse.

While judges often attempt to provide jurors with a less prejudicial excuse for anonymity and partial sequestration, i.e., to keep the media from contacting jurors in a high-profile case, such explanations are transparently incredible to jurors, who know from their own experience as well as from media coverage that even the most high-profile cases do not require either juror anonymity or partial sequestration.

Thus, from the outset, even before opening statements, defendants in terrorism cases are operating at an insurmountable disadvantage.

Compensation Issues

While counsel in many terrorism cases are court-appointed, there are issues related to attorney compensation that need to be considered. If a client or defendant has been designated an specially designated global terrorist or FTO, a privately retained lawyer must obtain a license from the Treasury Department's Office of Foreign Assets Control (OFAC) to provide legal services to a designated person or entity. Even court-appointed attorneys should, as a precaution, inform OFAC via letter of representation of a designated person or entity (although in my experience there would not be any attendant formal or ongoing administrative obligations connected with court-appointed representation).

There are thousands of persons and organizations on the various published designation lists. As a result, counsel must be careful to check those lists before accepting any engagement or compensation. While the OFAC regulations are somewhat dense and technical, and the license application is, like most bureaucratic requirements, cumbersome and time-consuming, the process is navigable, and the office itself is accessible to answer questions and provide guidance with respect to the licensing requirement. Also, if a license is granted, counsel should be aware of and comply with the continuing OFAC reporting requirements that exist during the pendency of the representation.

Conclusion

The elements discussed above are not all necessarily exclusive to terrorism cases, but they appear so often, and in combination, in them that they present challenges not confronted in ordinary cases. However, many of these elements, such as classified information, protective orders, and globalized criminal investigations, are leaching into other areas of criminal defense, including Foreign Corrupt Practices Act cases, cyber crime and cyber espionage cases, commercial cyber theft cases, and arms trafficking, international narcotics, and so-called narco-terrorism prosecutions.

The spread of the elements of terrorism cases into other categories of cases, presents broad systemic challenges. Defense lawyers must actively confront and halt the trend toward secrecy, ex parte proceedings and submissions, and restrictions on the defense function that impair the ability of the criminal justice system to reach fair, just, and accurate dispositions. ▪