

**THE FIFTEENTH HUGH J. CLAUSEN LECTURE IN
LEADERSHIP*:
LEADERSHIP IN HIGH PROFILE CASES**

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* This is an edited transcript of a lecture delivered by Professor Thomas W. Taylor to members of the staff and faculty, their distinguished guests, and officers attending the 58th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on 12 May 2010. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, U.S. Army, from 1981 to 1985 and spent over thirty years in the U.S. Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood, Texas; Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court of Military Review; The Assistant Judge Advocate General; and, finally, The Judge Advocate General (TJAG). On his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

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Professor Taylor received a B.A. in history with high honors from Guilford College, Greensboro, North Carolina, in 1966, and a J.D. with honors in 1969 from the University of North Carolina at Chapel Hill, where he was a Morehead Fellow and a member of the *North Carolina Law Review* and the Order of the Coif. He was the Distinguished Graduate (first in class) of the Graduate Legal Course, The Judge Advocate General's School, in 1979, and graduated from the Industrial College of the Armed Forces in 1987.

Professor Taylor began his legal career as an Army Judge Advocate General's Corps (JAG Corps) officer, trying criminal cases in Alaska and Germany, before serving as an Associate Professor in the Law Department of the U.S. Military Academy at West Point, where he was promoted to Major. His first Pentagon assignment was in The Judge Advocate General's Administrative Law Division before he joined the Office of the General Counsel, where he was promoted to lieutenant colonel before leaving active duty in 1982 to accept a civilian position in that office. He served in successive positions of greater responsibility following his appointment in the Senior Executive Service in 1987. Meanwhile, as a Reserve colonel during annual training, he served as the Academic Department Director of The Judge Advocate General's Legal Center and School until he retired from the U.S. Army Reserve. He has lectured at law schools and professional conferences throughout his career and published law review notes and articles.

Professor Taylor served as the senior legal official of the Army during various transition periods since the Reagan Administration, including a one-year period during the Bush and Clinton Administrations. Upon his retirement, he received the National

I. Introduction

At the outset, it is an honor and privilege to be here this morning in Charlottesville. This event commemorates the career and contributions of Major General Hugh J. Clausen, The Judge Advocate General of the Army from 1981 to 1985. The first lecture in this series was given to the 43d Judge Advocate Officer Graduate Course and the 136th Judge Advocate Officer Basic Course on 22 February 1995, for the dedication of the Hugh J. Clausen Academic Chair of Leadership. Since that time, speakers invited to give this lecture have come from various backgrounds and positions, but all of us share a common respect and admiration for General Clausen and his enormous and lasting contributions to the Army legal community.

I am grateful to your commander, Brigadier General Miller, and to your Dean, Colonel Burrell, for their invitation to speak today, and especially grateful to the Deputy Judge Advocate General, Major General Tate, for suggesting today's topic of providing leadership and advice in high profile cases. General Tate recommended that I provide you some practical advice based on my years in the Pentagon handling high profile cases, rather than a more theoretical lecture about leadership. I am honored that Lieutenant General Chipman, The Judge Advocate General of the Army, drove down from Washington to be with us today. I would like to provide special recognition and thanks to Major General (retired) Altenburg for his presence this morning; John and I were classmates in the 27th Graduate Course, where we formed a life-long personal and professional friendship. He was my battle buddy in the Pentagon during his years serving in the position now known as the Deputy Judge Advocate General. I would also like to thank my long time friends and colleagues, John Sanderson and David Graham, for their intellectual and leadership contributions to the Army and The Judge Advocate General's Legal Center and School over many years. I am

Intelligence Distinguished Service Medal, the Department of Defense Medal for Distinguished Civilian Service, and his fourth award of the Army's Decoration for Exceptional Civilian Service. He also received four Presidential Rank Awards under three different Presidents, as well as numerous military decorations, including the Legion of Merit. He is a consultant to the General Counsel of the Army and an active participant in national security matters. At Duke, graduating students have elected him twice as their faculty speaker for Masters in Public Policy hooding ceremonies, and his faculty colleagues have elected him to serve on both the Academic Council of Duke University and the Executive Committee to the Dean of the Sanford School. He chairs the Sanford School of Public Policy Honor Board and received Sanford's outstanding teacher-mentor award for graduate students in 2009.

honored to have two special outside guests: Colonel (retired) Tom Strasburg, a former Commander of this School at critical times, and Colonel (retired) Greg Block, a former Dean here at the School.

My introduction to the Army and the JAG Corps occurred here in Charlottesville many years ago at the old JAG School, located on the historic part of Mr. Jefferson's grounds, where I completed the basic course. Those were exciting times, as the Army rushed us into courtrooms around the world to implement changes to the *Manual for Courts-Martial* that mandated more attorneys in the legal system, including the then-revolutionary concept of requiring that the accused have a lawyer at every special court-martial. Of course, I have returned many times since then at various stages of my military and civilian career, including a year at the Graduate Course and several active duty training tours as the Individual Mobilization Augmentee (in reality, the Reserve backup) for the Dean. However, I never tire of this place and always look forward to coming here to talk with other lawyers, greet old friends, and make new ones.

As I indicated, I want to share with you some lessons learned from my twenty-seven years of Pentagon experience providing advice to our most senior Army and Department of Defense (DoD) leaders on managing high profile cases. However, my first experience with high profile events came while teaching at West Point in 1976, when the U.S. Military Academy both admitted the first women cadets and endured the largest cheating scandal in Academy history, neither of which was related to the other. Since leaving the Pentagon four years ago, I have continued to provide advice as a consultant to the Army General Counsel on management, intelligence, and personnel issues, as well as legislative and public affairs. Given the size and composition of our force, as well as the missions that our Soldiers perform, the Army will likely continue to have a significant number of these cases.

The reality is that, by the time a case becomes of concern to our senior leaders in the Pentagon, it is already a high profile case in some respects. Otherwise, we wouldn't be talking about it. On the other hand, as I always cautioned my clients, not all cases that come to the Pentagon's attention deserve—or even require—the help of higher headquarters to manage them properly. I have reminded my bosses in every Administration that lawyers could help them address their concerns, that there must be no hint of command influence, and that sometimes their best course of action is patience—a virtue in short

supply in Washington—allowing normal rules and procedures that we all understand to control the process and work toward an outcome. It is a fact of life that our senior leaders generally want to be personally and professionally involved in handling high profile cases, and your job as lawyers is to provide them comprehensive advice and often to serve as a buffer for the system to work as designed. For example, you may recall that the Secretary of the Army and the Chief of Staff travelled to Fort Hood to demonstrate their concern for the Soldiers, civilians, and families, and held a press conference on 6 November 2010, just one day after the tragic shootings.¹ However, they carefully refrained from speculating about the details.²

II. First Things First: Identifying a High Profile Case

You are probably already asking yourself a key question at this point: How do you identify a high profile case—one of those special cases that will dominate newspaper, television, and radio coverage; light up the blogosphere; and provoke extensive public interest? Some facts and circumstances are so compelling that you will know immediately that the case will achieve a high profile status. A recent example is the Fort Hood shootings that I just mentioned. Just look at a few of the many elements of the case: the cruel irony of the deaths of soldiers and civilians going through a processing station on a stateside military installation; the heroism of the first responders; the professional background and alleged ideology of the accused; the questions about intelligence failures at various levels; and the promotion and assignment policies governing a highly-stressed force.

Another example is the alleged Christmas Day bomber last December, who attempted to ignite explosives during a flight bound for Detroit. This case contained some of the same elements that marked the Fort Hood case: the heroism of the passengers on board; the background and ideology of the accused; the question of intelligence failures at various levels; and the oversight of air transportation safety. And, finally, just eleven days ago, another botched terrorist bombing occurred

¹ C. Todd Lopez, McHugh, Casey, *Entire Army Family Stand with Fort Hood After Unthinkable Tragedy* (Nov. 7, 2009), available at <http://www.army.mil/-news/2009/11/07/29998-mchugh-casey-entire-army-family-stand-with-fort-hood-after-unthinkable-tragedy/> (last visited May 18, 2010).

² *Id.*

in Times Square, with many of the same factors: alert street vendors and professional first-responders and police work; the background and ideology of the accused; the oversight of air transportation safety and coordination of threat information; and, eventually, the question of whether there were intelligence failures, now that government officials suspect that the Pakistani Taliban appear to have had a role in the planning and execution of the failed attempt.³

A. Look Under the Radar

It is far more difficult to identify the other category of high profile cases, those that begin with a somewhat random news story, grow under the radar for awhile, and emerge full-blown as high profile cases. The challenge for us as lawyers is to spot just that kind of case, one that first appears routine but—as the media would say—has “legs” and continues to play out day after day. Although I’ll say more later about dealing with the media in high profile cases, my point is that some high profile cases don’t start that way, but surface routinely in the clutter of other news and information. For example, the Abu Gharib cases were first reported on 16 January 2004, through a U.S. Central Command press release: “An investigation has been initiated into reported incidents of detainee abuse at a Coalition Forces detention facility. The release of specific information concerning the incidents could hinder the investigation, which is in its early stages. The investigation will be conducted in a thorough and professional manner.”⁴ Although *The New York Times* and *Philadelphia Inquirer* reported this news contemporaneously, there was certainly no particular media interest or splash. Meanwhile, investigations continued throughout the spring by the Criminal Investigation Division, General Taguba, and the Army Inspector General. However, the story largely disappeared from the public eye until the CBS news program, *60 Minutes II*, “broke” the story in a television broadcast, complete with lurid pictures, on 28 April 2004.⁵ Once again proving the old adage that a picture is worth a thousand words, the story and its images haunted the Bush Administration and

³ Kathleen Hennessey & Richard A. Serrano, *Militants Believed Behind N.Y. Bomb*, L.A. TIMES, May 10, 2010, at A1.

⁴ Sherry Ricchiardi, *Missed Signals*, AM. JOURNALISM REV., Aug./Sept. 2004, at 22 (citing press release).

⁵ *Id.*

DoD for months and became part of the continuing national conversation about the conduct of the war and the treatment of detainees.

But this is not just a military phenomenon. Recall the example from the civilian world just three years ago, when Don Imus made a racially and sexually derogatory comment about the Rutgers University women's basketball team that lost the NCAA championship game. The comment might have gone unnoticed, but for a media watchdog organization that posted the video on YouTube. The video prompted protests by some African-American leaders, but it took another week before the mainstream media brought the matter to the attention of the wider public audience. Although Don Imus lost his nationally-syndicated radio show as a result of the kerfuffle, the subsequent discussion about the roles of race, hip-hop culture, and the media created a firestorm of controversy.⁶

Similarly, several years earlier, Senator Trent Lott made a comment about Senator Strom Thurmond at a party celebrating Thurmond's 100th birthday. Referring to Thurmond's presidential bid in 1948, Lott said: "I want to say this about my state: When Strom Thurmond ran for president, we voted for him. We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years, either."⁷ Of course, the problem was that Thurmond had run as a Dixiecrat on a segregationist platform that would have continued denying fundamental rights to people of color. Although the mainstream media initially ignored or downplayed Lott's comments, the story thrived in the blogosphere and made its way back into a high profile case that cost Senator Lott his leadership role in the Senate.⁸ Thus, the challenge is not only to recognize the high profile case as early as possible when it occurs, but also to spot the case that at first appears routine, but rapidly develops into a high profile case.

As I tell my graduate students at Duke, in our information age and twenty-four-hour news cycle, supplemented by blogs, tweets, and various social media, you can never assume that a bad-news story will

⁶ See generally ESTHER SCOTT, KENNEDY SCH. OF GOV'T CASE PROGRAM STUDY C15-08-1920.0: CROSSING THE LINE: DON IMUS AND THE RUTGERS WOMEN'S BASKETBALL TEAM (2008).

⁷ Allen Johnson, *Harry Reid's Tangled Tongue Told Us a Lot More Than You Might Think*, NEWS & REC. (Greensboro, N.C.), Jan. 17, 2010, at H2

⁸ See generally ESTHER SCOTT, KENNEDY SCH. OF GOV'T CASE PROGRAM STUDY C14-04-1731.0: "BIG MEDIA" MEETS THE "BLOGGERS": COVERAGE OF TRENT LOTT'S REMARKS AT STROM THURMOND'S BIRTHDAY PARTY (2004).

stay under the radar. Rather, you must assume just the opposite: That someone, somewhere, sometime, will have a cell-phone camera photo, e-mail, text message, or some other record of practically every questionable event that occurs, just waiting for the right moment to burst on to the public stage and play itself out in the media. For example, recall how the “macaca moment” hurt the senatorial campaign of Senator George Allen of Virginia in 2006.⁹ I’ll say more about how to avoid that mistake later in my remarks.

B. Typical Fact Patterns for High Profile Cases

For now, I would urge you, as you go about your daily work, to remain alert for the facts and circumstances that will propel a local issue into the national media. As you might have already concluded, as a very practical matter, almost every case you handle as lawyers could have the potential for turning into a high profile case if enough public interest develops. However, we have learned from experience that certain types of cases always have potential for that level of scrutiny that I have described. Here are some of the types of cases with potential to achieve a high-profile status.

First, suicides and friendly fire incidents are prime examples of potential high profile cases. Families are usually reluctant to accept the finding that death resulted from either. It is commonplace for families to suspect foul play, a conspiracy, or a cover-up. Their feelings are understandable, so we must go the extra mile to leave no stone unturned in finding the truth. A recent example is the Tillman friendly fire investigation, now the subject of Jon Krakauer’s latest book, *Where Men Win Glory: The Odyssey of Pat Tillman*, which dissects and criticizes decisions made at all levels.¹⁰ Unfortunately, almost all of you in this room has probably been, or will be, involved in one of these tragic cases during the course of your professional careers.

⁹ Editorial, *Allen Concedes in Virginia Senate Race*, MSNBC.COM, Nov. 9, 2006 <http://www.msnbc.msn.com/id/15635543/>. A turning point in Senator Allen’s unsuccessful campaign for re-election, according to many analysts, was his use of “macaca,” a racially-charged epithet captured on video, to refer to a student of Indian descent who was videoing Allen on the campaign trail while supporting his opponent, Senator Jim Webb. *Id.*

¹⁰ JONATHAN R. KRAKAUER, *WHERE MEN WIN GLORY: THE ODYSSEY OF PAT TILLMAN* (2009).

Second, crimes which involve the abuse of a special relationship are always disconcerting. These crimes might involve misconduct by chaplains, doctors, recruiters, cadre, teachers, or guards—anyone with a special obligation to provide services in a protected setting where there is an unequal status. Because these crimes involve an abuse of a trusted relationship, often in addition to some other underlying crime (such as sexual assault), we can predict an outpouring of media and congressional interest. The recurring stories of detainee abuse are prime examples, but stories persist about abuse of our own military personnel in training and recruiting environments, as well.

A third example includes crimes that involve racist, extremist, and similar motives, often referred to generically as “hate crimes.” Because these motives are contrary to the core values of our country and our military, when they surface as part of a crime, everyone pays attention. You may recall allegations of these types of crimes at Fort Bragg and Fort Campbell several years ago. Moreover, whenever skinhead, neo-Nazi, or militia groups make the news, investigative reporters always focus on any group members who might have served in the military or received military-type training in some other setting, such as law enforcement courses.

A fourth example consists of crimes or other types of misconduct that involve high-ranking officials, officers, non-commissioned officers (NCOs), and civilians. During 2005 alone, the Pentagon had cases involving improper sexual relationships that embarrassed a former Air Force TJAG¹¹ and an Army four-star commanding general.¹² Of course, each year brings a new rogues’ gallery of government officials: governors like Mark Sanford of South Carolina, who gave us a whole new connotation to “walking the Appalachian Trail,” and former senators like John Edwards of North Carolina, whose personal lives become fodder for *Oprah* and *GQ*. Again, these leaders occupied positions of

¹¹ Josh White, *General Is Sanctioned for “Unprofessional” Affairs*, WASH. POST, Jan. 11, 2005, at A13. An inspector general investigation found that Major General Thomas J. Fiscus had affairs with several women, including active duty judge advocates and paralegals, over a ten-year period. Because of his misconduct, he was retired as a colonel. *Id.*

¹² David S. Cloud, *Adultery Inquiry Costs General His Command*, N.Y. TIMES, Aug. 11, 2005, at 16. General Kevin P. Byrnes had commanded the U.S. Army Training and Doctrine Command prior to being relieved. General Byrnes reportedly had been separated from his wife and filed for divorce; his lawyer stated that General Byrnes’s relationship was “with a woman who is not in the military, nor is a civilian employee of the military or the federal government.” *Id.*

special trust, and the public rightfully expects them to follow the highest standards of conduct in their personal and professional lives.

Finally—and this by no means exhausts the list—there are cases that become high profile because of the way that we may have handled or mishandled an otherwise-routine case that catches the public’s attention and sympathy. Some typical examples that perennially lurk just under the radar include the following: holiday displays and public prayers in military settings, which raise freedom of religion issues; compelling Soldier stories about child custody issues during deployments and services for wounded warriors at home; claims of discrimination based on the usual suspect categories of race, gender, religion, and so forth; and, of course, investigations leading to discharges based on controversial personnel policies, such as “Don’t Ask, Don’t Tell.”

III. Two Questions

My first and most important tip in handling high profile cases is to ask yourself and your client two questions: First, what would we normally do in a situation like this? And, second, why would we do anything different in this case? I have found that these two questions put most cases in perspective and are the best possible protection against claims arising later that someone got special treatment. In other words, begin with the presumption that the normal rules will prevail.

Those claims of special treatment usually arise in one of two ways. Either someone got especially good treatment, and thus got away with something for which they should have been held accountable; or someone got especially bad treatment, and thus was unfairly investigated and punished by the system. You can probably think of instances where that claim was made in the last several years in both military and civilian contexts at home and abroad. For example, I can recall a number of Army cases in which someone claimed that a family or staff member of the commanding general was stopped on post by the military police, but not charged, or otherwise treated, as any other person would have been. This happens in the civilian community, as well. Just last month, a North Carolina highway patrol captain was stopped while driving extremely drunk early in the morning. After his supervisor arrived at the scene, the two officers had the captain’s Mustang towed, drove him to a local hotel,

and filed no report. The captain and the two officers were fired following an investigation.¹³

Another variation on this theme is that lower ranking Soldiers or officials were held accountable, in a way that senior officers and officials were not. The public watches for examples of favored treatment, application of the so-called double standard, and scapegoating in either the investigation or disposition of allegations. The number of cases where this claim arises is too numerous to mention, but I'll point to Abu Gharib in the military world and the Scooter Libby case in the civilian world. But I'll say more about accountability later in my remarks.

For now, the thing to remember is that someone is always watching to see whether we will do the right thing. A quick story to illustrate this point: One of my best friends and former Pentagon clients, Mike Ackerman, was a three-star general and Inspector General of the Army a few years back. He was flying back from Korea to Washington, coach class, which is a government requirement, and had a seat in the middle of the plane, even though he had recently undergone back surgery and could clearly have justified a better seat if he had been willing to ask for a doctor's approval. Several hours later, as Mike hobbled to the restroom, a sergeant who had served under Mike years earlier, said, "Hey, Sir. You won me a case of beer." When Mike asked how that could be the case, the story unfolded of a bet between the sergeant and his seatmate, also a non-commissioned officer.

After the plane was loaded and ready for takeoff, the sergeants (also in coach but several rows back from Mike) observed a flight attendant offer Mike an upgrade to business class because he was a three star general and the flight was long. The sergeant who did not know Mike had bet his seatmate a case of beer that he would take the upgrade. The sergeant who had served under Mike knew about his character and bet that Mike would not accept the upgrade. In addition to being a great illustration of the idea is that someone is always watching, this is also a great story about leadership and integrity: Doing the right thing when no one is watching, because—you know what—someone is always watching.

¹³ Cullen Browder, *State Trooper, Police Officers Fired After DWI Probe*, WRAL.COM, May 13, 2010, <http://www.wral.com/news/local/story/7599024/>.

A. The Rule of Law

Following the normal rules also means that we maintain both the appearance and the reality of the most important and critical aspect of the criminal and administrative process: the rule of law. The public expects its officials to adhere to the laws, rules, and regulations that govern the normal disposition of allegations. After all, as Americans, we have professed our belief in the rule of law and equal justice under law. And, as Soldiers and lawyers, you have dedicated your professional lives to making that vision a reality.

Why am I placing so much emphasis on the importance of following the rules? In every case in which you deviate from your normal rules, you will probably be called upon to explain why you did not follow your normal rules and to justify why you made an exception. Your best defense almost all the time is that you handled the high profile case just like any other case. Hence, my advice is to follow the rules that normally apply and to consider carefully the rationales for any exceptions. Moreover, any exceptions may also set precedents that could prove troubling in future cases.

B. Questioning Authority

I do not mean to imply, however, that lawyers should blindly accept standard solutions or conventional wisdom without questioning whether the laws, regulations, and policies that might govern the disposition of allegations make sense as they apply to a particular case. Rather, lawyers should be the ones asking the hard and critical questions to ensure that the processes are transparent and the outcomes, just. Among the reasons this Nation came into existence was the suspicion that Americans have harbored toward the exercise of authority. You may recall from our history that King George III's abuse of judicial and police powers contributed to the American Revolution. Our Founding Fathers were so suspicious of the potential authority of a centralized government that many states would not ratify the Constitution until there was agreement that the Bill of Rights would be added, guaranteeing rules that some of you have provided advice on every day, such as the Fourth Amendment protections against unreasonable searches and seizures and the Fifth Amendment protections against self-incrimination. My point is that you have a responsibility as lawyers to question authority, especially when the questions may not be welcomed. After all, even Thomas

Jefferson, when he was President, blamed his problems with the Congress on “one hundred and fifty lawyers, whose trade it is, to question everything, yield nothing, and talk by the hour.”¹⁴ Thus, lawyers have a proud heritage of asking bothersome questions.

In fact, military lawyers arguably have a greater obligation than most Soldiers and civilians to raise questions about authority because of the hierarchical rank structure of a military organization that does not always appreciate or encourage questions, the special staff relationship that military lawyers have with their commanders, and our responsibility as licensed attorneys to uphold the rule of law. It is clear that the current leadership of DoD wants you to ask questions. Just last month, in a speech at the U.S. Naval Academy, Secretary of Defense Gates encouraged the midshipmen to challenge conventional wisdom and institutional tradition. Secretary Gates pointed to examples of junior officers who had the nerve and courage to push for the development of amphibious landing craft, aircraft carriers, and nuclear submarines in the face of opposition or indifference from their more senior leaders.¹⁵

C. Liberty v. Security

We also must recall that one of the basic tensions in our society is that Americans are conflicted about the extent to which we want our government to solve our problems. On the one hand, we want our civil liberties and our privacy protected by and from the government; on the other, we want government to provide us security, law and order. Indeed, a debate has raged since 9/11 about where to strike this balance between liberty and security. The frontline issues for the debate have included the vexing question of what to do with detainees, including whether a special terrorist court should be formed to authorize preventive detention without trial for those too dangerous to release; what level of interrogation can be justified to avert the “ticking time bomb” scenario; and how much surveillance of our e-mails and library records we are willing to accept to have a greater sense of security.

¹⁴ Thomas Jefferson, 1821, *available at* http://www.dojgov.net/Liberty_Watch.htm (last visited May 19, 2010).

¹⁵ Earl Kelly, *Gates: Defy Authority When Needed*, THE CAP. (Annapolis, Md.), Apr. 8, 2010, at A1.

Just look at the reaction to the attempted attack on Northwest Flight 253 outside Detroit on Christmas Day. Five days later, former Vice-President Cheney claimed that America is less safe because President Obama was “trying to pretend we are not at war.”¹⁶ Others criticized law enforcement authorities for advising the accused of his rights and processing his case through the Federal system instead of turning him over to a special interrogation team and using a military commission to try him. The Obama Administration was forced to defend itself on all these counts in the weeks that followed. And similar grumbling about treatment of the alleged Times Square bomber is already on the airwaves.

Thus, the public policy discussion about where to draw the line between civil liberties and security is alive and well. A current example of the debate has centered on the recent Arizona law requiring law enforcement officers to check immigration documents based on a reasonable suspicion.¹⁷ While some argue that, given the failure of the Federal Government to address the problem of illegal immigration, the Arizona law is the best policy solution, others contend that this law attempts to usurp Federal authority and legitimize racial profiling. As you know, a number of lawsuits have already been filed, and the Administration seems to find itself on the hook to do something, even though the law has not yet taken effect.

The fact is that our society is interested in what our justice system does and how we lawyers manage the system. Our civilian and military justice systems are not “bottom-line” organizations where the only thing that counts is the results. We are given a special trust when we become officers of the court as licensed attorneys, in addition to the special trust and responsibility as military officers. In exchange, we have a special obligation to support the rule of law.

Hence, my bottom line up front consists of the two questions that will generally lead you to follow your own rules and depart from them rarely, if ever, with full knowledge that you will have to account to someone, somewhere, for why you did not follow your own rules. The central theme becomes adherence to the rule of law, which requires

¹⁶ Mike Allen, *Cheney: Obama ‘Trying to Pretend,’* POLITICO, Dec. 30, 2009, <http://www.politico.com/news/stories/1209/31054.html>.

¹⁷ Editorial, *Arizona Governor Signs Immigration Bill*, CNN.COM, Apr. 24, 2010, <http://www.cnn.com/2010/POLITICS/04/23/obama.immigration/index.html>.

lawyers and our clients to make independent and impartial judgments to maintain the credibility of our system of justice.

IV. Who Else Needs to Know?

My second tip for handling high profile cases is to ask yourself this question: “Who else needs to know?” We must pay attention to the old adage that bad news never improves with age. Of course you should ensure that your supervisors, your own command public affairs office, your own technical legal channels, and your higher headquarters are tightly in the loop. They will be able to coordinate notifications to the Pentagon’s oversight community, as well as the oversight committees of Congress. I mentioned some examples of these types of cases earlier—those involving suicides, friendly fire, abuses of trusted relationships, hate crimes, and high-level officials. While laws and policy directives may require some of these reports, I recommend that you always err on the side of reporting in close cases. You may be surprised how much help you can receive from other investigative organizations, like the Federal Bureau of Investigation (FBI) and your DoD counterparts.

A. Report Early and Often

Why is it so important to keep your higher headquarters up to speed on bad news? Reporting unfolding crises gives them the heads-up they need in our information age. Your bosses will be receiving calls from the senior Pentagon leadership, the Hill, and the media asking what is going on. They need the information to help ensure that others will have confidence in your investigation and disposition of the allegations. As a by-product of our information age, the days are long past when leaders can delay breaking the bad news to the boss until they have “all the facts” or a “solution.” Additionally, your credibility increases when you achieve a reputation for reporting the bad news, as well as the good.

Moreover, your higher headquarters can leverage support from their oversight bodies, and get their buy-in on your strategies to some extent. I have seen some controversies fizzle, instead of blossom, when you can show that you made a timely notification of a problem that appeared routine to all at the time, but turned out to be high profile. When one of those “sleeping giant” cases suddenly achieves a high profile, everyone starts asking the proverbial question, “What did you know, and when did

you know it?” That was the very type of question that made the Pat Tillman and Jessica Lynch cases so explosive.

Wholly aside from any actual requirements to report incidents to higher headquarters, it just makes good sense for you to be the first one to deliver the bad news. It gives you the opportunity to identify the potential crimes, frame the issues, lay out your investigative plan, and establish timelines for, and obstacles to, completing the investigation. Your oversight bodies will be more inclined to let your investigation proceed without their interference if they see that you have a plan in which they have confidence.

For at least the past thirty years, the Army has generally been diligent in disclosing unfavorable stories to senior DoD officials, the DoD Inspector General, and oversight committees on the Hill. No matter how unfortunate or ill-advised the incident may be that is the subject of the report, at least the Army could take some credit for being forthright, rather than facing accusations of a lack of candor, or worse yet, a cover-up. High-profile crises are particularly susceptible to the charge of cover-ups, because many details may not be immediately apparent or releasable to the general public and may, in fact, be privileged or classified.

B. Learn from the Experience of Others

There is a second compelling reason to ask who else needs to know: You can tap into the expertise and experience of others. Experts from outside of your command can help you begin to size the situation and provide you additional resources or a school solution. The idea is to tap into their experience, as well as expertise. Rarely are there situations that someone has not seen before, although when they happen, they challenge all of us. I suppose that the attacks on 9/11, the devastation of Hurricane Katrina, and the massive oil spill in the Gulf last month would be in that category. As someone once said, experience is what you find—when you are looking for something else.

The perhaps apocryphal story attributed to Sam Walton—the extremely rich founder of WalMart—describes a conversation at Harvard Business School between a student and Mr. Walton during a question-and-answer session, as follows:

Student: What's your secret? How did you become the richest man in America?

Walton: It's easy. Good decisions.

Student: But how? How do you know the good decisions?

Walton: That's easy too. Experience.

Student: Well, then, how do you get that kind of experience?

Walton: That's the easiest part of all. Bad decisions.¹⁸

The point is to learn from the mistakes that others have made, as well as our own. In other words, you need not bruise your own leg on every rock to learn that rocks are hard. Is there anyone among us, who has not silently thought, when we hear of someone else's mistake, "There, but for the grace of God, go I." In fact, the worst thing you can do is try to handle the many aspects of a high profile case by yourself. The tragic story of Karl Wallenda is an example of a leader's taking on too much responsibility and not trusting others to help. He led a famous circus family called the "Flying Wallendas," which thrilled audiences by their bold acrobatics and balancing acts on wires high above the center ring. He eventually would not let anyone else perform all the crucial checks before each performance that would ensure the safety of the equipment. His insistence on doing everything himself eventually caused him to fall to his death, because he did not discover during his checks that several ropes securing the wire were not properly connected.¹⁹

Teamwork is the key, and all of us are players. And you can never tell where you will find the best idea. Hence, reaching out to others becomes an imperative. During a speech a couple of years ago at West Point, Secretary Gates said that he had found it invaluable in his trips to the field to meet with and listen to lower-ranking soldiers to help shape his approach to decisions. He advised everyone in senior positions to

¹⁸ Versions of this apocryphal story appear in various sources. See, e.g., Pat Williamson, *Delivery Route*, Sept. 17, 2008, available at <http://www.mufranchisee.com/article/457/> (last visited July 28, 2010).

¹⁹ MARSHALL SASHKIN & MOLLY G. SASHKIN, *LEADERSHIP THAT MATTERS: THE CRITICAL FACTORS FOR MAKING A DIFFERENCE IN PEOPLE'S LIVES AND ORGANIZATIONS' SUCCESS* 47 (2003).

“listen to enlisted soldiers, NCOs, and company and field-grade officers. They are the ones on the frontline, and they know the real story.”²⁰

I can guarantee that you can expect to make mistakes if you are engaged in the front lines of our business. The key is to identify the mistakes early on. I have found that the best way to do that is to cultivate open and honest relationships with your subordinates, peers, and superiors, who will keep you out of trouble by pointing out something you missed. In other words, always listen to the other players, especially in high profile cases. You can never tell who will have the best idea, but it may be from the player on the field, who is closest to the action and understands the terrain.

And don't be wedded to a course of action that you previously supported, especially when facts and circumstances begin to shift in a way that makes you question whether your initial assumptions or previous judgments are still correct. For example, after I had objected to a course of action proposed by one of my Pentagon client organizations, their staff members would occasionally show me a somewhat similar action that I had approved years earlier in an effort to persuade me (or perhaps embarrass me) so that I would withdraw my objection. When that happened, thankfully not too often, I usually told them that I was not bound by my previous opinions because one of three things could have happened: the law and regulations could have changed, the facts and circumstances might be different, or I had learned from my earlier mistake and would not repeat it for the sake of being consistent.

V. Be Prepared for an Investigation of the Investigation

That gets me to the third tip: Handle your case as if you might have to explain your investigative plan, decisions, and results to outside organizations, such as the DoD Inspector General or FBI, or to a House or Senate Committee conducting their own investigation into what you did. I have been in the position of having to account to every one of these organizations for some Army investigation during my time in the Pentagon. You need to expect oversight by others, and plan for it, so that when someone comes to “investigate the investigators,” you are prepared

²⁰ *Text of Secretary of Defense Robert Gates' Speech at West Point*, STARS & STRIPES, Apr. 22, 2008, <http://www.stripes.com/news/text-of-secretary-of-defense-robert-gates-speech-at-west-point-1>.

to show that you followed the rules. The price of your independence is your accountability to the rule of law, which involves answering questions posed by others with some authority and responsibility over your organization. Don't resent the questions or the questioners, even if you are tempted to do so as a normal human response.

A. Congressional Relations

I mentioned earlier that one of the first notifications should be to your congressional oversight committees. Depending on the relationships between the President's Administration and the Congress—and these relationships vary greatly from Administration to Administration (and sometimes within the same Administration when there is a change in the composition of the Congress)—you might be able to leverage both internal and external congressional support for your position. Public statements of support from key congressional leaders can provide a public shield for your investigations and their results. For example, information, such as classified documents, that you cannot release to the public might be legitimately shared with oversight committees, enabling them to affirm to the public that they have looked into the matter and are satisfied that the military's handling of the situation was reasonable under the circumstances, even if they too disagreed with the ultimate outcome.

Sharing information about high profile cases early on, and regularly thereafter, with congressional oversight committees serves other overlapping purposes. First, it gives our congressional oversight community a heads-up about a subject that will eventually be on their radar screens anyway. My experience is that you can either take the initiative and give the members and staff a chance to prepare a hopefully-supportive statement about a case, or, instead, you can wait until they call and complain about being blindsided about a case that falls within their jurisdiction. Second, the military should take advantage of every opportunity to educate members and staff about what you do. A shrinking number of veterans serve as elected representatives, and many staffers have no firsthand understanding—and therefore no contextual knowledge—of the military or of the military judicial system. Thus, each case can become a famed “teachable moment” and learning experience about the role of a general court-martial convening authority and the central relationship between that responsibility and good order and discipline. If members and staff understand the independent nature

of your prosecutorial, defense, and judicial functions, and how well insulated they are from unlawful command influence, they may be willing to forego, or at least postpone, their own inquiry or investigation into the matters at hand.

Several encouraging signs have emerged over the past few years. First, the debate over various versions of military commissions bills has exposed members and staff to the details of the court-martial system and people like you who make it work. Second, we are now seeing more and more former military members seek elective office and staff positions on the Hill, trends that should bode well for the future support for our military forces. Third, the recent elevation of the Military Service Judge Advocates General to Lieutenant General is clear evidence and affirmation of the important role that military lawyers play in our system of justice. However, the lesson I learned is that we have a continuing duty to educate others. We cannot take for granted that everyone understands and accepts the need for independence that we follow as our fundamental operating principle.

B. Congressional Investigations

A recurring challenge in ongoing investigations, especially if there is intense media or congressional interest, is handling requests from congressional oversight committees for access to information before the criminal investigation and proceedings are complete. According to news reports in the past few weeks, for example, Senator Lieberman has demanded access to certain information regarding the investigations surrounding the Fort Hood shootings. Although the Pentagon reportedly has made some information available, other information and witnesses have not been made available so as not to interfere with the ongoing criminal investigation. In many cases, some compromise can be reached, but if not, congressional subpoenas are possible.²¹ If the military is participating with the FBI in a joint investigation, I have also found it useful to request that FBI officials visit with members and staff to explain our joint concerns.

Full-blown congressional investigations are always a possibility in high profile cases. A recent example is the exhaustive inquiry by the

²¹ Otto Kreisher, *Oversight Panel Leaders Push on Fort Hood Inquiry*, CONG. DAILY, Apr. 28, 2010, <http://www.govexec.com/dailyfed/0410/042810cdpm2.htm>.

Senate Armed Service Committee into the abuse of detainees. Their report, issued in December 2008, detailed the history of policies and procedures from the White House, Department of Justice, DoD, and Central Intelligence Agency based on comprehensive interviews and document searches. The report concluded that “senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”²² On the other hand, a spokesman for Secretary Rumsfeld called it “regrettable that Senator Levin has decided to use the committee’s time and taxpayer dollars to make unfounded allegations against those who have served our nation,” based on a “false narrative . . . unencumbered by the preponderance of the facts.”²³

C. Plan for Full Transparency

No matter where you come out on the report’s conclusions, the point is very clear that you need to prepare for intense outside scrutiny in any high profile case. For planning purposes, you must assume that eventually all the information surrounding an incident, including your own legal advice and opinions, will surface and be made public. No matter how confidential, classified, or privileged you may think that discussions you have about investigations and their disposition may be, count on everything becoming public some day and act accordingly.

During the years that I worked on intelligence operations and projects, many of the most secret and highly classified operations on which I provided advice eventually became public for one reason or another. An example is the then-secret underground facility built during the construction of the West Virginia Wing of the Greenbrier Hotel in West Virginia. The new wing provided cover for an independently functional, concealed alternative site for the relocation of the senior leaders of the Federal Government in the event of a nuclear strike. Conceived during the Eisenhower Administration, the contingency facility was built from 1959 to 1962 and remained a closely guarded

²² SENATE ARMED SERVICES COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, EXECUTIVE SUMMARY, at xii (Dec. 2008), *available at* http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS_For%20Release_12%20December%202008.pdf.

²³ Joby Warrick & Karen DeYoung, *Report on Detainee Abuse Blames Top Bush Officials*, WASH. POST, Dec. 12, 2008, at A1.

secret until *The Washington Post* broke the story in 1992.²⁴ This story illustrates that we should never assume that, because something is known by only a few select individuals today, the world won't know it by tomorrow. E-mails, text messages, and social media virtually guarantee transparency, if mainstream media do not.

VI. Help the Media Frame the Story

My fourth tip is for you to consider how to frame the story, to handle press inquiries, and to provide enough information so that news organizations will be able to understand and report on your story. As a general rule, the Army routinely publicizes most of its activities and seeks forums in which to tell Soldier stories. As an exception, the Army generally does not comment on operational matters, ongoing investigations and litigation, even in response to media inquiries. However, there are times when comments may be appropriate, and in those times, you must be careful to consider three basic principles:

A. Be Honest and Open with the Media

First, tell the media as much as you can as soon as possible. If information and records would be releasable under the Freedom of Information Act, you generally should encourage your clients to initiate the release of those facts, rather than require the media to submit a written request. If you don't know the answer, say that you don't. Despite efforts by your clients to "go directly to the public" with their story, the media will inevitably interpret the story based on their own understanding. As a lawyer, you can provide valuable background and legal context that will educate the media and enable fair and balanced reporting. Indeed, legal background by subject matter experts became routine for high profile cases during my time at the Pentagon. Although the media may not report the story the way that you framed it for them, you will be on the record with your interpretation of the events.

For obvious ethical and practical reasons, your clients should never lie to, or mislead, the media. I even recommend against "spinning" a story in such a way that might call your credibility into question. The

²⁴ Ted Gup, *The Ultimate Congressional Hideaway*, WASH. POST, May 31, 1992, <http://www.washingtonpost.com/wp-srv/local/daily/july/25/brier1.htm>.

long term trust between the DoD and the media is more important than the temporary advantages one may think will accrue from parsing the truth in a particular case. We Americans remain sensitive to the notion that our government, and especially our military, might somehow try to manage the news that we receive. The lessons learned from the fall-out of the Jessica Lynch and Pat Tillman stories, during the course of which many felt that false stories either were propagated, or allowed to linger, should always be at the forefront of our minds.

Just look at the concern generated by media reports in August 2009 that DoD had a contract with a public relations firm, whose job was to review applications by reporters to embed with our military units and grade their past reporting as neutral, positive, or negative. Although the Pentagon denied that these reports were crucial to decisions about future embeds, the controversy surfaced again the following December during the confirmation process of Douglas Wilson, the nominee for Assistant Secretary of Defense for Public Affairs. Mr. Wilson told the Senate Armed Services Committee that he opposed the rating system for reporters' coverage, as well as any discrimination against "unfriendly reporters" during the credentialing process for reporters who want to embed with our troops. In his written statement to the Committee, Mr. Wilson said, "In my view, we should never be a party to efforts to place so-called 'friendly reporters' into embeds while blocking so-called 'unfriendly reporters.'"²⁵ The Senate confirmed him in February 2010, but the message is clear that fairness and credibility are essential in dealing with the media at all times, especially in high-profile cases.

Most of us recognize that strategic information and communications operations are crucial to our fight against threats posed by al Qaeda and its affiliates, who use the Internet and other media to promote their propaganda, mobilize support, and radicalize followers. As several pundits have humorously observed, the U.S. often seems to be out-communicated by folks whose material originates from caves in Afghanistan and Pakistan. Despite our desperate need for better communications strategies, the Pentagon has reportedly ordered at least two reviews in the past six months of their information operations programs to get a better handle on how much money is spent and for what, especially in light of the recent allegations that contractors were

²⁵ Leo Shane III, *Pentagon Nominee Promises Reporters Won't Be Rated Before Embeds*, STARS & STRIPES, Dec. 18, 2009, <http://www.stripes.com/news/pentagon-nominee-promises-reporters-won-t-be-rated-before-embeds-1.97430>.

locating insurgents while pretending to be gathering information.²⁶ A recurring theme in these reviews is the extent to which information operations overseas are openly attributed to the U.S. Government and apparent to the consumers of the information.

B. Defend the System

Second, step up the plate and defend our system of justice, even when it is difficult to understand or justify a particular result. In any legal system governed by the rule of law, but administered by all of us humans, you will sometimes get results that are unpopular and hard to accept, as when a jury seems to ignore evidence establishing guilt, or a commander decides to take little or no apparent action in a case where others are screaming for heads to roll. At those times, particularly in high profile cases, the public understandably may question whether we have a fair and independent system that reaches the right results.

This push for a public explanation often presents a dilemma. For a lot of reasons that have to do with the way that our government leaders have made decisions in the past, the public and the Congress demand a fair amount of transparency, arguing for the maximum disclosure of information. On the other hand, there are legitimate privacy interests at stake, as well as the independence of those exercising judicial and administrative authority. Should we put those who play critical roles in our judicial system—judges, juries, and commanders exercising judicial functions—in the position of having to defend the exercise of the discretion allowed them by law to do justice, especially if the public doesn't like the outcome? Isn't that one reason that Federal judges have lifetime appointments, so that they can do the right thing and uphold the rule of law without fear of recriminations? On the other hand, don't we expect public officials to be held accountable for their exercise of authority, especially when justice is at stake? Again, the key is to strike the right balance between providing as much information as possible to ensure public confidence in the military and its decisions, on the one hand, and preserving important principles, on the other.

²⁶ Walter Pincus, *Pentagon Reviewing Strategic Information Operations*, WASH. POST, Dec. 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/26/AR2009122601462.html>; Craig Whitlock, *Gates Seeks Review of Information Programs*, WASH. POST, Mar. 24, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/23/AR2010032302787.html>.

This will be a test of your leadership. These dilemmas require you as lawyers to step up as leaders and make the case on behalf of the system in which you work, a system based on the rule of law. When it comes to talking about or defending the outcomes in particular cases or classes of cases, you should say as much as you comfortably can, within the rules of professional conduct and privacy considerations. But here is the key point: You should be able to defend and explain the system even when you have difficulty explaining the specific outcome that has aroused the public's interest or, perhaps, anger. As I mentioned earlier, any public statements of support from key congressional leaders can also help reassure the public that the system was working as designed and in accordance with the rule of law.

As a practical matter, that means that your leaders at your immediate commands and your higher headquarters must continue to rely—as they have in the past—on the outstanding work that you do as leaders and lawyers every day in your locations around the world. They must rely on, and have faith in, the premise that you are following the laws, regulations, and policies that control the procedures and outcomes in all cases—routine and high profile. When it is necessary for your senior leadership to explain to the Office of the Secretary of Defense, the DoD IG, the Congress, the media, and the general public what you have done in a particular case, they will have faith that you will have done the right thing, and no one will be embarrassed. They will have faith that you have followed the rules, even when the rules were time consuming and seemed to impede the progress of your work at the time.

C. Calculate Your Media Responses

Third, take the long view of media issues. Time and again, I have advised public affairs officers not to respond to a frivolous one-day story in the paper. I have found that some stories interest only folks inside the Capital Beltway, and there will be little or no interest outside the Beltway. Responding will only make this kind of story a two or three day story, because, once you respond, the reporter will write another story. Some stories will die of their own weight if you let them. As always, the most difficult task is identifying which story has “legs” and high-profile potential.

VII. Coordinate Multiple Investigations and Ensure Their Credibility

My fifth tip is for you to assume leadership in coordinating the multiple and overlapping investigations that almost always accompany a high profile case. Your command sometimes must begin to examine a management, safety, or leadership problem before you have had time to investigate fully the allegations that brought the problem to the command's attention. This happens often in safety investigations following aircraft accidents or friendly fire incidents. Although it is important to know who or what was responsible for the mishap, the most immediate challenge is to prevent another tragic recurrence. As lawyers, you are in the best position to exercise leadership and influence involving investigations, to give advice about the types of investigations that may be appropriate, and to avoid conflicts among ongoing investigations.

If it is fairly certain that the incident might lead to criminal charges, you can ensure that any informal inquiry, Army Regulation 15-6 or other administrative investigation, or IG investigation will not muddy the water and interfere with your criminal investigation and eventual prosecution. Lawyers are uniquely positioned to coordinate investigations so that they complement each other, pursue the proper lines of inquiry, and preserve the option of prosecution where appropriate. Otherwise, investigators may be tripping over each other, creating conflict among witnesses, and otherwise breeding evidentiary problems. A recent example of this unfortunate outcome involved the infamous shootings by private security contractors, resulting in the deaths of fourteen Iraqi citizens in a traffic circle in Baghdad in September 2007. Judge Urbina dismissed the charges against five Blackwater employees in January 2010 because of the botched investigations and prosecutions.²⁷ Although the Department of Justice is appealing the dismissal, the lesson about coordinating multiple investigations is clear. Where several investigative efforts are proceeding simultaneously, my advice is simple and to the point: The criminal investigative effort should have a green light, and every other investigation should have a flashing yellow caution, which requires the lawyer's approval to proceed.

²⁷ Del Quentin Wilber, *Charges Dismissed Against Blackwater Guards in Iraq Deaths*, WASH. POST, Jan. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/31/AR2009123101936.html>.

Another factor to think about as you decide how to approach the investigation is whether your organization can investigate the allegations at all with any credibility. Depending on the size and scope of the case, the President or Secretary of Defense may form a commission of outsiders, typically former senior officials from all three branches of Government with the background and experience to lend credibility to their findings and recommendations. The deliberations of these commissions may be subject to the provisions of the Federal Advisory Committee Act, a point often overlooked at the beginning in the eagerness to buy the time and cover that these commission often provide.

Even so, because the military is often criticized for investigating itself, you should consider whether you should refer the matter to higher headquarters or another appropriate agency, such as the FBI or the Defense Criminal Investigative Service. As unfair as this criticism may be, and although our clients understandably resent having some outsiders come into their organizations and take care of their dirty laundry, I have recommended to my Pentagon clients from time to time that the most practical and efficient course of action was to ask the FBI, DoD Inspector General, or a sister service to come in and conduct an investigation. This was because I knew that the Congress and the public would never accept the credibility of an investigation by any Army element. On the other hand, you must remain alert to discourage other investigative agencies without clear authority from expanding their jurisdiction creatively into Army activities when the Army is clearly capable of a credible investigation. A comfortable middle ground in some cases might be a joint investigation with the FBI or other agencies with which there is overlapping jurisdiction.

When your organization is conducting an investigation, watch for conflicts that may develop for investigating officers and agents because of preexisting relationships. If an agency is—or had been—too close to the functions or people under investigation, look for alternatives. Similarly, you should alert investigative officers to identify issues uncovered during the course of their investigations that are not within the scope of their inquiry but should be referred to another agency or office for follow up.

VIII. Whom Do You Hold Accountable?

Finally, my sixth tip is to think about accountability as you come to closure. When you think about accountability in today's environment, you cannot ignore the events of the past couple of years. Consider the public interest in accountability in our national security community:

--the questions raised about the National Security Agency's terrorist surveillance program, and the issues of how much information was shared and who objected during high level briefings to a small number of key congressional leaders;

--the questions raised by the Judiciary and Armed Services Committees of the Senate about senior leaders' and lawyers' accountability for the interrogation rules and policies that the Senate Armed Service Committee found contributed to coercive interrogation practices;

--the continuing questions about who was responsible for intelligence and air safety failures in connection with the alleged Detroit bomber; and

--the questions under review by a special prosecutor about whether Central Intelligence Agency (CIA) agents violated Federal laws during overseas interrogations of detainees.²⁸ (You may recall that former Vice President Cheney opposed the decision as a political move to satisfy the liberal wing of the Democratic Party and expressed concern that the review might hamper the willingness of agents in the future to do their jobs.²⁹ On the other hand, the appointment of the special prosecutor was based on the findings of the CIA's own Inspector General that agents had exceeded the limitations in effect at the time of the interrogations and used

²⁸ Siobhan Gorman et al., *Special Prosecutor to Probe CIA Handling of Terror Suspects*, WALL ST. J., Aug. 25, 2009, at A3, col. 1.

²⁹ Editorial, *Cheney: Justice Review of Interrogation Methods Is Political*, CNN.COM, Aug. 25, 2009, <http://www.cnn.com/2009/POLITICS/08/30/cheney.cia.interrogations>.

“inhumane” tactics, justifying the review by a special prosecutor.³⁰)

My point is that we cannot afford to overlook the accountability piece of the equation. There are a lot of Monday morning quarterbacks out there, and as Norman Augustine, former Chief Executive Officer of Lockheed Martin, once wrote about people like auditors, inspectors, and Monday morning quarterbacks, “Murphy taught that if anything can go wrong it will, but it was left to Evans and Bjorn to point out in their law, ‘No matter what goes wrong, there will always be someone who knew it would.’”³¹

If you look at the track record of the current Secretary of Defense, you will see clear evidence of his willingness to hold senior officials accountable. Secretary Gates remarked back in February, when he replaced the major general in charge of the Joint Strike Fighter program, “If I’ve set one tone at the Department of Defense, it’s that when things go wrong, people will be held accountable.” Indeed, the list of senior officials he has relieved is impressive, including the top U.S. commander in Afghanistan in 2009, the Air Force Secretary and Chief of Staff (on the same day) in 2008 in connection with the control of nuclear weapons, and the Secretary of the Army in 2007 as an outgrowth of the treatment of wounded warriors at Walter Reed Army Medical Center.³²

What this means to us—as practicing lawyers—is that we should think through accountability issues and identify them for our leaders and clients. This requires brutal honesty, at times, because our leaders—and even we—may bear some responsibility. I believe that our clients in the highest levels of the Executive Department and our officials in the oversight community expect and deserve our best effort—a procedure for fair investigation, analysis, and review. They will be more likely to accept our judgments, even if they do not agree with them, if we can show that the accountability process was open and even-handed.

A word of caution: All of us who are players get roughed up from time to time. This is especially a problem for lawyers. When things go

³⁰ Peter Finn et al., *CIA Report Calls Oversight of Early Interrogations Poor*, WASH. POST, Aug. 25, 2009, at A1.

³¹ NORMAN R. AUGUSTINE, *AUGUSTINE’S LAWS* 316 (6th ed. 1997).

³² Craig Whitlock, *Gates to Major General: You’re Fired*, WASH. POST, Feb. 2, 2010, at A4.

wrong, our clients have an annoying and predictable tendency to blame us, in addition to relying on us to get the command or them out of a box. As unfair as this often may be, we cannot turn away from the action; we cannot play it so safe that we become irrelevant and ineffective. We must not be intimidated by those looking over our shoulders, but must continue to do what government attorneys always should do: Speak truth to power.

IX. Conclusion

So to summarize my thoughts, I am leaving you with six suggestions about how you can exercise leadership and provide advice after you have identified a case with high profile potential:

1. Ask what the normal rules are and why you would not follow them in the high profile case. That becomes your best defense against later claims of preferential treatment or double standards.
2. Ask the question, "Who else needs to know?" Keep your headquarters and oversight bodies in the information loop. Err on the side of over-reporting to enhance your credibility. And take advantage of the expertise and experience of others who have "been there, done that, and have the t-shirt."
3. Conduct your investigation as if you will have to account to an oversight authority for every decision and action you take.
4. Consider how to frame stories and handle press inquiries without misleading the media. Step up to defend the system, even when you cannot defend the specific decision.
5. Exercise leadership in coordinating multiple investigations, and keep a balanced perspective on who should conduct investigations.
6. Think carefully about accountability.

In closing, I want to thank all of those who made the arrangements for this event and for your hospitality during my stay here. I also want to thank the staff and faculty for the outstanding service that you provide our legal community and our Nation. This Legal Center and School has clearly become the epicenter of military legal education. I wish to

congratulate all the members of the 58th Graduate Course, to thank you for your continuing service, and to wish you the best in your new assignments around the world. And, finally, I want to offer a word of special thanks to those who have served in harm's way, and those going to assignments where an overseas deployment is on your radar. You and your families will always have our deepest appreciation for your sacrifices and will remain in our prayers.