

A Justice Manager's Guide to Navigating High Profile Cases

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I. Introduction

Bang! Bang! Bang! You are an infantry platoon leader conducting a combat patrol receiving fire from the enemy. You must react now. Because you are a highly trained infantryman, you recall repeatedly practicing actions on contact¹ throughout your military career. In fact, you rehearsed this very scenario at your convoy brief. Now that the adrenalin is coursing through your veins, it is time to put your training into action—you must act with precision and without hesitation. You know exactly what to do and you neutralize the threat. Your subordinates and superiors alike are satisfied that you know how to do your job.

Stop day dreaming. That was back in the good old days. Now you are the chief of military justice (COJ) at pick-a-post and you receive a phone call from a Criminal Investigation Command (CID) special agent. You learn there has just been a serious shooting on post. Several are likely dead and the situation is chaotic. What do you do? It is time for action and you likely do not have an established plan for this. You have not trained for this, and your staff judge advocate (SJA) and deputy staff judge advocate (DSJA) have not trained for this. There is no field manual, pamphlet, or regulation on which you can rely. You turned your Manual for Courts-Martial inside and out, you have desk books from the basic course, the Trial Counsel Advocacy Program, the Criminal Law Advocacy Course, the Graduate Course, and the Military Justice Manager's Course lining the walls of your office, but you are pretty certain the answer is not in any of those books. To add to your growing stress—unlike the firefight you engaged in downrange that never

saw the front page of the newspaper—what is happening right now down the street will make international news before you can get the trial counsel to the scene. What do you do? As capable Soldiers, not wanting to appear reliant on others, the answer has traditionally been to make it up on the fly—in-house. A COJ may have called another COJ or the school house, but the response was not planned or rehearsed. Developing a plan from scratch as the situation evolves is no longer sufficient.

With the intense scrutiny on discipline in the force² and an unending stream of cases making headlines,³ the Army needs a cogent set of tactics, techniques, and procedures (TTPs) for managing high profile cases. This article addresses the gap in the Army's military justice practice in the field of high profile cases. It identifies certain types of cases the media is traditionally drawn to, identifies the major deficiencies in management of high profile cases, provides the relevant rules and regulations pertaining to those deficiencies, and incorporates lessons learned from the field. This article also offers TTPs for offices of the staff judge advocate (OSJAs) to consider or implement to either prevent a case from becoming high profile or minimize negative media perceptions on already high profile cases. Finally, this article provides a framework to assist the OSJAs in planning for or avoiding high profile cases along with a series of checklists for the practitioner as appendices.⁴ This is not a comprehensive analysis of every aspect of high profile cases, but it will put the reader in the right frame of mind to prepare for these cases. The first step is identifying those cases with a greater propensity to become high profile.

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¹ U.S. DEP'T OF ARMY, FIELD MANUAL 1-02, OPERATIONAL TERMS AND GRAPHICS 1-2 (21 Sept. 2004) ("A series of combat actions, often conducted simultaneously, taken upon contact with the enemy to develop the situation.").

² See, e.g., Charles Hoskinson, *Army: Lack of Discipline Could Grow 'Cancerous,'* POLITICO (Oct. 15, 2011, 11:11:21 AM), <http://www.politico.com/news/stories/1011/65206.html> (quoting U.S. Army Europe Commanding General); Adam Ashton, *Platoon Lost to Lack of Discipline,* THE OLYMPIAN (Oct. 16, 2011), <http://www.theolympian.com/2011/10/16/1840223/platoon-lost-to-lack-of-discipline.html> (discussing 5-2 Stryker Brigade Combat Team stationed at Joint Base Lewis-McChord, Washington); U.S. ARMY, HEALTH PROMOTION, RISK REDUCTION, SUICIDE PREVENTION REPORT 3 (2010) [hereinafter SUICIDE REPORT] ("Crime is on the rise and discipline is seemingly going unchecked.").

³ See, e.g., Marisa Taylor, *Army Probes Crime Lab Workers After Critical News Reports,* MCCLATCHY NEWS (Feb. 3, 2012), <http://www.mcclatchydc.com/2012/02/03/137846/army-probes-crime-lab-workers.html>; Mathew Barakat, *Lawmakers Question Pace of Arlington Probe,* ARMY TIMES (Feb. 3, 2012, 18:46:51 EST), <http://www.armytimes.com/news/2012/02/ap-arlington-cemetery-lawmakers-question-pace-probe-020312/>; Adam Ashton, *Army Drops Murder Charge Against Last Soldier Tied to "Kill Team" Cases,* THENEWSTRIUNE.COM (Feb. 3, 2012, 19:25 PST), <http://www.thenewstribune.com/2012/02/03/2011437/army-drops-murder-charge-against.html>; Associated Press, *Army Officer Orders Court-martial for WikiLeaks Suspect,* FOXNEWS.COM (Feb. 3, 2012), <http://www.foxnews.com/us/2012/02/03/army-officer-orders-court-martial-for-wikileaks-suspect/>.

⁴ See *infra* apps.

II. Defining High Profile Cases

*[A]lmost every case . . . could have the potential for turning into a high profile case if enough public interest develops.*⁵

The first step in developing a contingency plan for high profile cases is defining what makes a case “high profile.” With a solid understating of the various types of high profile cases, the practitioner can more quickly identify and manage them. High profile cases are generally those cases receiving significant and persistent media attention. It could be any case, but some cases are more susceptible to attracting media attention than others. Knowing what to look for will help facilitate the implementation of prophylactic (offensive) measures or hasten remedial (defensive) actions based on the state of the case. Professor Thomas W. Taylor, who had advised seven Secretaries of the Army and seven Chiefs of Staff of the Army from 1982 to 2006 as a senior civilian attorney, formulated a categorization of cases, explained below, which helps accelerate that identification process.⁶

While not mutually exclusive, and frequently overlapping, high profile cases fall into two general categories.⁷ The first category includes cases with “facts and circumstances so compelling that [the legal advisor] will know immediately that the case will achieve high profile status.”⁸ Murder and cases involving national security generally occupy the first category. These are the cases that will gain media attention regardless of what the government does, but the government’s response can color the tone and intensity of the reporting. The second, and more challenging, category includes those cases “that begin with a somewhat random news story, grow under the radar for a while, and emerge full-blown as high profile cases.”⁹ This category appears to occupy the full spectrum of possible cases, but Professor Taylor further identifies specific types of cases that tend to gain more media traction than others.

⁵ Thomas W. Taylor, *The Fifteenth Hugh J. Clausen Lecture in Leadership: Leadership in High Profile Cases*, 204 MIL. L. REV. 343, 349 (2010).

⁶ *Id.* at 343 n.† (“Professor Taylor assumed his current position, teaching graduate students at Duke University’s Sanford School of Public Policy, upon retiring in June 2006 as the senior career civilian attorney in the Department of the Army. He served as the senior leader of the Army legal community during extended transition periods between successive political appointees. Professor Taylor provided legal and policy advice to seven Secretaries and seven Chiefs of Staff of the Army. During his twenty-seven years in the Pentagon, Professor Taylor addressed a wide variety of operational, personnel, and intelligence issues, including military support to civil authorities following the attacks on 11 September 2001, and during disaster relief operations.”).

⁷ *Id.* at 346–47.

⁸ *Id.* at 346.

⁹ *Id.* at 347.

First, suicides and friendly fire incidents are two types of cases with high profile potential.¹⁰ These can become high profile if the families are dissatisfied with the investigation or their treatment by officials, or they “suspect foul play, a conspiracy, or a cover-up.”¹¹ The friendly fire death of Pat Tillman, initially reported as a hostile fire death, is one example of this type of high profile case.¹²

Cases that “involve the abuse of a special relationship” are also common high profile candidates.¹³ In March 2010, members of the CID made national news when they allegedly “kidnapped a civilian, took him to a remote location on Fort Bragg and threatened to kill him.”¹⁴

The next two types of cases with high profile potential are those involving hate crimes and those implicating senior ranking officials.¹⁵ In the former category, there are cases like the suicide of Danny Chen, a nineteen year-old private allegedly hazed and bullied because he was Chinese.¹⁶ The court-martial of the commander of the 173d Airborne Brigade, Colonel Jim Johnson, illustrates the latter category.¹⁷ If a junior enlisted Soldier engaged in conduct similar to what Colonel Johnson engaged in, he would be disciplined, but it would likely not make the front page of the *Army Times*.¹⁸

¹⁰ *Id.* at 349; *see, e.g.*, Kirk Semple, *Army Charges 8 in Wake of Death of a Fellow G.I.*, N.Y. TIMES (Dec. 21, 2011), http://www.nytimes.com/2011/12/22/us/8-charged-in-death-of-fellow-soldier-us-army-says.html?_r=1. Private Danny Chen, nineteen, was allegedly bullied by members of his unit until he ultimately chose to take his own life and was found dead in a guard tower in Afghanistan with a gunshot wound to the head. *Id.*

¹¹ Taylor, *supra* note 5, at 349.

¹² Associated Press, *Documents Shed Light on Tillman’s Death*, MSNBC.COM (July 27, 2007, 8:21:05 PM EST), http://www.msnbc.msn.com/id/19984732/ns/us_news-military/t/new-documents-shed-light-tillmans-death/ (reporting on the death of Pat Tillman and subsequent investigations).

¹³ Taylor, *supra* note 5, at 350.

¹⁴ *Bragg CID Agents Suspended; FBI Investigating Kidnap Allegations*, FAYOBSERVER.COM (Apr. 1, 2010, 07:29 AM), <http://fayobserver.com/articles/2011/03/31/1083011?sac=Home>.

¹⁵ Taylor, *supra* note 5, at 350.

¹⁶ Jennifer Gonnerman, *The Life and Death of Pvt. Danny Chen*, N.Y. MAG. (Jan. 6, 2012), <http://nymag.com/news/features/danny-chen-2012-1/>; *see also* Ernesto Londoño & Christian Davenport, *8 U.S. Soldiers Charged in Death of Comrade in Afghanistan*, WASH. POST (Dec. 21, 2011), http://www.washingtonpost.com/world/8-us-soldiers-charged-in-death-of-comrade-in-afghanistan/2011/12/21/gIQAXmE380_story.html.

¹⁷ Henry Cuninghame, *Col. James H. Johnson III Spared Prison, Reprimanded, Ordered to Pay \$300,000 Fine at Court-martial Trial*, FAYOBSERVER.COM (June 20, 2012, 08:05 AM), <http://www.fayobserver.com/articles/2012/06/14/1184467?sac=fo.military>.

¹⁸ Jennifer Hlad & Steven Beardsley, *Outrage over Perceived Light Sentence for Convicted Colonel*, STARS & STRIPES (June 15, 2012), <http://www.stripes.com/news/outrage-over-perceived-light-sentence-for-convicted-colonel-1.180437>.

Taylor also includes “child custody issues during deployments and services for wounded warriors at home” as examples of potentially high profile cases.¹⁹ The treatment received by the Oregon National Guard upon redeployment from Iraq in 2010 is a very recent case where the Army’s alleged mishandling of National Guardsmen during medical out-processing quickly found its way into the press.²⁰ During medical out-processing at Joint Base Lewis-McChord, Washington, members of the Oregon National Guard perceived they were being treated as second class Soldiers and were not receiving proper medical attention prior to being released from active duty.²¹ The outcry was immediate and caught the attention of the Under Secretary of Defense and Chief of Staff of the Army.²²

The final type of cases Taylor identifies are those “that become high profile because of the way that [officials] may have handled or mishandled an otherwise-routine case that catches the public’s attention and sympathy.”²³ This type of case can be something as simple as a trial counsel being rude to a victim’s mother or a victim talking to a friend or relative about allegations she reported to criminal investigators. When those family members or friends have connections to senior ranking officials and or choose to contact the media, cases can quickly get attention.²⁴ Suddenly, the SJA is getting an email from the commanding general asking why the Chief of Staff of the Army is concerned about a particular case. Sexual assault cases often fall into this category as illustrated in ongoing civil litigation alleging the Department of Defense is turning a blind eye on sexual assaults.²⁵ Under this category, no one can accurately predict which case on the tracker will turn into a high profile case; however, good manners and adherence to the rules can prevent a seemingly routine case from becoming high profile on account of mismanagement or loss of public confidence.

When it comes to identifying and managing potential high profile cases, the key is to focus on what can be controlled—professionalism, adherence to rules and regulations, and preparation—because every case can

become a high profile case. Chances are high that the OSJA will be in reaction mode because there is very little a command can do to stop a Fort Hood shooting, for example.²⁶ The OSJA and the command, however, can have a plan in place to manage their reaction. With that in mind, the remainder of this article speaks generally to all types of high profile cases but focuses on the more easily identifiable version—those involving deaths.

III. Institutional Deficiencies in Managing High Profile Cases

*Since the Tailhook episode in 1991, the armed forces have faced a near- constant parade of high-profile criminal investigations and courts-martial . . . each a threat to morale and a public relations disaster.*²⁷

By addressing three frequently criticized areas of military justice practice, the resources available to improve those areas, and methods to employ those resources, the Army may be able to reduce the “public relations disaster[s]” the Cox Commission Report identified over a decade ago.²⁸ The Army is not going to stop the media from reporting on serious cases, but it can prepare for media coverage on cases likely to spark interest and it can take steps to avoid mistakes susceptible to criticism.

The Army does not have a comprehensive regulation, manual, or publication on how to manage high profile cases. The decisions on how to manage high profile cases are largely left to each OSJA. Understandably, the approaches vary as do the results. Without a plan, the Army is setting itself up for a negative press. The challenges associated with high profile cases are not novel. Practitioners have been writing on various aspects of high profile cases for over a decade.²⁹ In 1999, the Army held the first, and last, course

¹⁹ Taylor, *supra* note 5, at 351.

²⁰ Adam Ashton, *Defense Undersecretary Says Oregon Guard Soldiers Received Substandard Care at JBLM*, TACOMA NEWS TRIB. (Apr. 14, 2011, 11:35 PST), <http://blog.thenewtribune.com/military/2011/04/14/defense-undersecretary-says-oregon-guard-soldiers-received-substandard-care-at-jblm/>; see also Hal Bernton, *Army Chief of Staff Visits Lewis-McChord*, SEATTLE TIMES (June 11, 2010, 09:32 PST), http://seattletimes.nwsourc.com/html/localnews/2012095116_casey12m.html.

²¹ Ashton, *supra* note 20.

²² Bernton, *supra* note 20.

²³ Taylor, *supra* note 5, at 351.

²⁴ In addition, cases can quickly spiral out of control when victims, Soldiers, or family members contact their elected officials. See *infra* Part IV.C.2.

²⁵ Ashley Parker, *Lawsuit Says Military is Rife with Sexual Abuse*, N.Y. TIMES, Feb. 15, 2011, <http://www.nytimes.com/2011/02/16/us/16military.html>.

²⁶ Arguably prohibiting all weapons, fully searching every vehicle and body entering the installation, and having metal detectors on every door could have prevented the death of twelve individuals and injury of 31 others, but those safeguards would have caused daily operations to grind to a halt. See, e.g., NBC & MSNBC.com, *Gunman Kills 12, Wounds 31 at Fort Hood*, NBCNEWS.COM (Nov. 5, 2009, 10:48:47 PM EST), http://www.msnbc.msn.com/id/33678801/ns/us_news-crime_and_courts/t/gunman-kills-wounds-fort-hood/ (reporting on incident).

²⁷ WALTER T. COX III ET AL., NAT’L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001) [hereinafter COX COMMISSION REPORT].

²⁸ *Id.* at 3.

²⁹ See, e.g., Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1 (2000) (providing comprehensive analysis of the rights of and role the media plays in military justice practice.); Lieutenant Commander Stephen C. Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military*, ARMY LAW., Oct. 2010, at 5 (advocating for learned counsel requirement for capital courts-martial); Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital*

on high profile cases at the Judge Advocate General's Legal Center and School.³⁰ Despite the occasional pushes to address various aspects of high profile case management, there is still no institutional plan.

Like the War Department appointing a committee to improve the military justice system after World War II³¹ and, to a far lesser, yet important, degree, like the Judge Advocate General of the Army creating a Special Victim Prosecutor program³² to address deficiencies in the sexual assault prosecutions, the Army needs to address systematic shortcomings in managing high profile cases. If the Army does not, it is possible that legislation similar to the one recently proposed by Congresswoman Speier—which, in part, removes a commander's authority to handle sexual assault cases—may actually become law and take military justice completely out of the hands of commanders and judge advocates (JA).³³

The first deficiency in managing high profile cases is the Army's public affairs response to cases from the lowest to the highest levels. The timing, type, and quality of Army's responses, at times, draw negative media coverage, reducing public trust in the military justice system. Second, the perceived or actual lack of experience in both trial and defense counsel draws regular criticisms. Third, the complexity and inconsistencies of the casualty notification and victim/witness liaison process cause unacceptable stress

Litigation, 189 MIL. L. REV. 1 (2006) (providing analysis of the preceding two decades of capital litigation).

³⁰ Lind, *supra* note 29, at 6 (noting “[t]he first Joint Service High Profile Case Management Course was held from 10–12 May 1999 at the Army Judge Advocate General's School in Charlottesville, Virginia.”). There is no record of this course being taught subsequently.

³¹ See, e.g., ARTHUR T. VANDERBILT ET AL., REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE (Dec. 13, 1946), http://www.loc.gov/tr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf [hereinafter VANDERBILT REPORT] (stating that the committee was to “study the administration of military justice within the Army and the Army's courts-martial system, and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices which the Committee considers necessary or appropriate to improve the administration of military justice in the Army”); see Selective Service Act of 1948, 62 Stat. 604, 627-44 (1948) [hereinafter the Elston Act] (implementing many of the Vanderbilt Report's recommendations).

³² Policy Memorandum 09-3, Office of the Judge Advocate General, U.S. Dep't of Army, subject: Special Victim Prosecutors-POLICY MEMORANDUM 09-3 (29 May 2009) [hereinafter Policy Memorandum 09-3] (establishing special victim prosecutors).

³³ Sexual Assault Training Oversight and Protection Act, H.R. 3435, 112th Cong. (2011). See also Press Release, Congresswoman Jackie Speier Proposes New Justice Process to Combat Sexual Assault Crisis in the Military, http://speier.house.gov/index.php?option=com_content&view=article&id=517:congresswoman-jackie-speier-proposes-new-justice-process-to-combat-sexual-assault-crisis-in-the-military&catid=1:press-releases&Itemid=14 (last visited Oct. 15, 2012) (discussing proposed legislation that “takes the reporting, oversight, investigation, and victim care of sexual assaults out of the hands of the military's normal chain of command and places jurisdiction in the newly created, autonomous Sexual Assault Oversight and Response Office comprised of civilian and military experts.”).

and confusion for the grieving victims and loved ones. As a result, the victims and witnesses turn to the media or their elected officials with negative impressions and pleas for help.

Once the media attaches to a case, for whatever reason, and elevates the case to a high profile status, the Army has an opportunity to change public perception about the military justice system rather than to simply absorb the blows from the public. By addressing the deficiencies through a uniform process, adaptable to the unique requirements of each set of facts, the Army can project the requisite level of preparation and professionalism required in all cases.

The media plays a large role in which cases become high profile. The facts or circumstances of each case drive the media's decision. Accordingly, this section first addresses the media and ways to minimize negative press.

A. Media Considerations

*The global information environment and continually evolving information communication technologies make it imperative that information and messages be consistent at all levels. The personal comments made by a deployed [S]oldier in a remote area of operations and the official statements released by [the Department of Defense] at the Pentagon must be mutually supporting.*³⁴

Staff synchronization is most critical when the media takes note and adds an extra layer of interest and criticism. With that said, a positive and persistent relationship between the command's public affairs office (PAO) and the OSJA can help send the right message to the public and address allegations, such as incompetence, corruption, or cover-up.

Judge advocates must first know where to look when assessing what can be done with respect to the media and then understand how to work with the media. Judge advocates studying acceptable media practices should start with the Office of the Judge Advocate General's Policy Memorandum 06-3, dated 10 January 2006.³⁵ From there, the JA will quickly realize that there are Privacy Act

³⁴ U.S. DEP'T OF ARMY, FIELD MANUAL 3-61.1, PUBLIC AFFAIRS TACTICS, TECHNIQUES AND PROCEDURES para. 2-1 (1 Oct. 2000) [hereinafter FM 3-61.1].

³⁵ Policy Memorandum 06-3, Office of the Judge Advocate General, U.S. Dep't of Army, subject: Relations with News Media—POLICY MEMORANDUM 06-3 (10 Jan. 2006) [hereinafter Policy Memorandum 06-3].

issues,³⁶ Freedom of Information Act issues,³⁷ Rules of Professional Conduct issues,³⁸ and issues with approval authorities for speaking to the press. A mistake in any of these areas could jeopardize the accused's right to a fair trial or have an adverse impact on the commander.³⁹

1. Acceptable Disclosures

*Among the goals of the government in military criminal cases are to secure justice, protect legitimate safety, personal privacy, national security, and fair trial interests, and to ensure that the public is accurately informed about, and confident in, the fair functioning of the military justice system.*⁴⁰

Knowing the disclosure rules will help the OSJA work with the PAO. As Policy Memorandum 06-3 states, the PAO should "answer all news media inquiries," but OSJA must "establish local procedures with the PAO for handling media inquiries concerning legal matters."⁴¹ If the PAO can authoritatively state, for example, "the law says we cannot release that information" versus "we are not going to release that information," the media has less room to attack the PAO and the command. Knowing the rules also helps to build credibility between the legal advisor and the PAO. Instead of saying "no" to the PAO, the legal advisor can explain what can be released and why something cannot be released.⁴²

³⁶ U.S. DEP'T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM (5 July 1985) [hereinafter AR 340-21]. The Privacy Act of 1974 is codified at 5 U.S.C. § 552a (2012).

³⁷ U.S. DEP'T OF ARMY, REG. 25-55, DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1997).

³⁸ U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, r. 3.6 (1 May 1992) [hereinafter AR 27-26] ("A lawyer shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.").

³⁹ See, e.g., Lind, *supra* note 29.

⁴⁰ *Id.* at 5.

⁴¹ Policy Memorandum 06-3, *supra* note 35.

⁴² Privacy Act of 1974, 5 U.S.C. § 552a(j) (2012) ("The [Army] may promulgate rules . . . to exempt any system of records within the agency from [almost] any part of this section . . . if the system of records is . . . maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage

Moving from TJAG guidance, the Army's Rule of Professional Conduct for Lawyers (RPC) Rule 3.6(b)⁴³ indicates what information may not be released and RPC Rule 3.6(c)⁴⁴ identifies general legal information acceptable for release subject to applicable law and regulation.

For Army personnel, Army Regulation (AR) 340-21 states "[a] Privacy Act request for access to records will be processed also as a Freedom of Information Act [(FOIA)] request."⁴⁵ Pursuant to FOIA, the AR broadly permits disclosure of a servicemember's "[n]ame, rank, date of rank, gross salary, present and past duty assignments, future assignments that are officially established, office or duty telephone number, source of commission, promotion sequence number, awards and decorations, military and civilian educational level, and duty status at any given time."⁴⁶ Army Regulation 340-21, also exempts several types of records from disclosure.⁴⁷

Finally, JAs should look to the PAO's own regulations for limitations. For example, AR 360-1 states, "Public release of information on injured or deceased personnel (including names) will be made as soon as possible, within Privacy Act constraints, after the local casualty assistance officer has confirmed that the next of kin have been officially notified."⁴⁸ Publicly releasing a charge sheet before making casualty notifications can run afoul of this provision.

While it is the PAO's job to know the disclosure rules, the OSJA should also know them.⁴⁹ Knowing the rules is the first step. The next step is working with the PAO to send the right message to the media.

of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.").

⁴³ AR 27-26, *supra* note 38.

⁴⁴ *Id.*

⁴⁵ AR 340-21, *supra* note 36, para. 2-3.

⁴⁶ *Id.* para. 3-3.

⁴⁷ *Id.* para. 5-5 (listing examples such as Inspector General reports, prosecutorial files, and Criminal Investigator Accreditation files).

⁴⁸ U.S. DEP'T OF ARMY, REG. 360-1 THE ARMY PUBLIC AFFAIRS PROGRAM para. 5-20 (25 May 2011).

⁴⁹ The Office of the Staff Judge Advocate (OSJA) can identify an administrative law attorney as the subject matter expert on this area for the Chief of Justice (COJ) to consult with. The administrative law attorney should have a solid working knowledge of criminal law as well.

2. *Methods to Work with Media*⁵⁰

*[Y]our credibility increases when you achieve a reputation for reporting the bad news, as well as the good.*⁵¹

In practice, the OSJA should be intimately involved with the PAO on potential high profile cases. The OSJA can provide assistance on anything from press releases to media access to the courtroom. Training the PAO personnel in advance of a high profile case is one approach to ensure the media receives the proper message.⁵² Another technique is identifying a JA distinct from the trial team who can serve exclusively as the OSJA's media liaison for a particular high profile case.⁵³ With someone knowledgeable explaining the process, either a JA or a PAO representative, the command can better educate the press on the process. Such knowledge will result in a more accurate story and possibly avoid factual errors. As pointed out in the Public Affairs (PA) doctrine, "Army leaders at all levels need to educate media representatives and facilitate their efforts to provide an accurate, balanced and credible presentation of timely information."⁵⁴ The field manual states, "leaders do this by integrating public affairs into the planning process and synchronizing PA operations with other facets of the operation."⁵⁵ The brigade judge advocate and trial counsel have the opportunity to begin synchronizing and educating the PAO immediately; the OSJA does too. This partnership at the brigade and higher levels will help keep the message

accurate and consistent from the bottom to top, wherever the top may be for a particular case.⁵⁶

As a former corps level PA Officer and current member of the Army's Office of the Chief of Public Affairs (OCPA), Major Kathleen Turner advocates developing relationships early and to make sure that the command team, PAO, OSJA, the provost marshal and CID are all synchronized.⁵⁷ For example, if the OSJA knows of an upcoming preferral of charges on a case with potential of becoming high profile, the PAO should be notified in advance and given an opportunity to pre-position products to either respond to queries or to get ahead of the media.⁵⁸ This synchronized effort will enable the commander to see what could be reported and to notify the higher headquarters; it will force the OSJA and PAO to work on what language is proper—what is releasable and what should be released; and it will better facilitate accuracy and commonality of the message.⁵⁹ As a result, the command provides the media with one consistent message rather than several different messages.

The U.S. Army CID PAO will also play a part in media relations. As the agency responsible for felony investigations in the U.S. Army, CID is uniquely situated to collect information from agents, counsel, and PAOs in the field. More importantly, the CID PAO has situational awareness of where national media interests lay on a particular case. The keys for success, according to Mr. Chris Grey, the CID Chief of Public Affairs, are: (1) getting the information to the PAO as quickly as possible; (2) working with the Agents, CID commanders, and Army leadership to unify the

⁵⁰ At one point, the Air Force and the Army published a guide for media relations in high profile cases entitled, *MEDIA RELATIONS IN HIGH VISIBILITY COURT MARTIAL CASES, A PRACTICAL GUIDE* (Feb. 1998 and Nov. 1998 respectively). See Lind, *supra* note 29, at 5–6 ("Both the Air Force and the Army have developed manuals to guide lawyers and other military officials in media relations in high profile cases. These manuals provide media fact sheets on routine procedures in the military justice system. They also provide guidance on releasing information and how to interact effectively with the media. Prior to the publication of these manuals, no service had a singular source to assist attorneys and other military officials involved in criminal trials with media relations issues.") (internal citations omitted).

⁵¹ Taylor, *supra* note 5, at 356.

⁵² E-mail from Colonel Jeffrey C. McKittrick, Staff Judge Advocate, U.S. Forces Korea/Combined Forces Command/United Nations Command/Eighth Army, to author (Jan. 6, 2012, 02:26 EST) [hereinafter McKittrick e-mail] (on file with author).

⁵³ Telephone Interview with Colonel Stuart W. Risch, Staff Judge Advocate, III Corps and Fort Hood (Dec. 19, 2011) [hereinafter Risch Interview]. In the ongoing case of *United States v. Hasan*, Colonel (COL) Risch has employed two Majors to provide factual information regarding proceedings to the media. While the media, for example, had the opportunity to observe the Article 32, Uniform Code of Military Justice (UCMJ), Investigation and provide its own opinions, the judge advocates (JAs) provided a fact neutral statement of what occurred in the day's proceedings. This also enabled the command to create its own record in the event the media misstated something. McKittrick e-mail, *supra* note 52 (also suggesting using a JA if resources permit).

⁵⁴ FM 3-61.1, *supra* note 34, para. 1-2.

⁵⁵ *Id.* para. 1-3.

⁵⁶ McKittrick e-mail, *supra* note 52 (stressing importance of ensuring unity of message between all levels of command and the SJAs importance in that task. He also stressed keeping higher headquarters involved early on the chance higher may want to shape the message at its level.).

⁵⁷ Telephone Interview with Major Kathleen Turner, Pub. Affairs Officer, Office of the Chief of Pub. Affairs, Wash., D.C. (Oct. 18, 2011) [hereinafter Turner Interview]. Major Turner is currently a planner at the Office of the Chief of Public Affairs in Washington, D.C. Her previous assignment was as a Public Affairs Officer for I Corps at Joint Base Lewis-McChord, Washington, where she worked hand in hand with the OSJA through several high profile cases. Recent cases I Corps has managed include *United States v. Davila*; see, e.g., Luke Duecy, *Army Specialist Sentenced to Life in Prison for Double Murder*, KOMO NEWS (Aug. 24, 2010, 5:23 PM PST) <http://www.komonews.com/news/local/101436214.html> (story describing case); *United States v. Russell*; see e.g., Michelle Tan, *Sgt. Charged in Shooting Deaths of 5 at Liberty*, ARMY TIMES (May 12, 2009, 15:13:17 EDT), http://www.armytimes.com/news/2009/05/army_shooting_update3_051209w/ (story describing case); "Kill Team" cases out of 5th Stryker Brigade Combat Team, 2d Infantry Division, Adam Ashton, *Jury Finds Sergeant Guilty on all 'Kill Team' Charges*, THENEWSTRIEBUNE.COM (Nov. 11, 2011, 6:15 AM PST), <http://www.thenewstribune.com/2011/11/10/1900794/jury-finds-sergeant-guilty-on.html>; see also Adam Ashton, *Key Dates for Brigade that was Investigated*, THENEWSTRIEBUNE.COM (Oct. 16, 2011, 7:26 AM PST), <http://www.thenewstribune.com/2011/10/16/1866966/key-dates-for-brigade-that-was.html> (stories describing cases); McKittrick e-mail, *supra* note 52.

⁵⁸ Turner Interview, *supra* note 57.

⁵⁹ McKittrick e-mail, *supra* note 52.

message; and (3) being cognizant of what can and cannot be released.⁶⁰

Given the relative infrequency of high profile cases at a particular installation, the local PAO personnel may not have the experience to know what can and cannot be released. That lack of experience can be compounded if the agents or trial counsel provide unfiltered information to the PAO representative who then releases it to the media assuming that the information was releasable. This mistake can also create inconsistencies across the Army which can draw criticism.⁶¹ There is a balance, Mr. Grey says, between “transparency” and preserving the rights of the accused.⁶² The rights of the accused must come first and must always be considered.⁶³

By working together, the unit PAO, CID PAO, and the OSJA can provide as much detail as is prudent under the circumstances while at the same time protecting the rights of the accused and preserving the case for agents and counsel.⁶⁴ Ideally, the CID PAO, or an experienced unit PAO, can help remove an obstacle for both the agent and counsel by shielding them from the often incessant media queries, thereby allowing the counsel and agent to focus on the mission and possibly avoid making their own mistakes.⁶⁵

While building the relationship with the PAO, JAs should also consider the way information will flow and stress consistency and accuracy with each staff section or organization sending information to higher. The PAO develops and provides regular updates on high profile cases for higher commands and for release to the press. The updates will likely cover charges, procedural posture, recent rulings, court dates, and decisions—all information held by the OSJA. The PAO will (or should) send those updates to the commander first and then to higher through technical

channels for situational awareness before releasing to the public. The OSJA should be doing the same. The OSJA and the PAO do not want to send a conflicting message to the commander and to their higher counterparts. The information from different organizations ultimately consolidates at some level and it must match. Likewise, if the information is known by, and originates from, the commander’s unit, the commander should know about it before his higher headquarters does.⁶⁶ The only way to mitigate a disjointed message is to coordinate. To facilitate coordination, the OSJA can request the PAO for courtesy copy of any updates sent to the commander and higher.

Apart from releasing information to the media, the PAO supports the media logistically. While not directly relevant to the case, the professionalism and the competence in managing the logistics for the press may impact media perceptions. Some areas to consider include courtroom layouts, closed circuit television for overflow rooms, what the media can bring into the overflow rooms, management of physical security, and whether there will be live interviews.⁶⁷ An experienced team is going to know what works best for a particular location and a particular case, but inexperienced PAOs and JAs should be aware of these issues and work on a plan with the appropriate staff sections and the military judge.⁶⁸ Again, the media is going to find out at some point. The question is, does the commander—through his PAO and SJA—want to set the conditions and tell the story the way he wants or does the commander want to let the media fill in the blanks on its own and how it sees fit? The staff has an obligation to help the commander to do the former. If there is a plan in place for working with the media, even if it is restrictive, the command may avoid future criticism by the press.

Part of the III Corps SJA’s plan to work with the media in the aftermath of the Fort Hood shooting was—after complying with TJAG policy⁶⁹—to attend a lunch with the press where he explained, in general terms, the military justice process, the different levels of convening authorities, and the reason why the general court-martial convening authority (GCMCA) was not immediately taking direct action.⁷⁰ This media engagement helped avoid having to immediately train the unit PAO on the military justice

⁶⁰ Telephone Interview with Chris Grey, Chief of Pub. Affairs, U.S. Army Criminal Investigation Command (Nov. 18, 2011) [hereinafter Grey Interview].

⁶¹ If, for example, a national news agency reports on a case at post X and that the Public Affairs Office releases the charge sheet, and the next week that same news agency reports on a case at post Y and that PAO refuses to release the charge sheet, the news agency is going to want answers.

⁶² Grey Interview, *supra* note 60.

⁶³ *Id.*

⁶⁴ *Id.* The Criminal Investigation Command (CID) PAO is available to assist if local units need assistance or guidance. Mr. Grey has been involved in every recent high profile case to some degree or another for the last nine years of service as the CID PAO. *Id.* According to the III Corps SJA, Mr. Grey was on the ground shortly after the shooting at Fort Hood, Texas, and was integral to developing the Public Affairs message necessary to protect the rights of the eventual accused. Risch Interview, *supra* note 53.

⁶⁵ E-mail from Chief Warrant Officer Four William J. Tokash, Jr., Operations Officer 1002d Military Police Battalion (CID), to author (Jan. 19, 2012, 12:17 EST) [hereinafter Tokash e-mail] (Chief Tokash recalls the CID PAO assisting the local PAO with understanding what parts of the investigation could be released. This enabled the agents to focus exclusively on the case rather than take the time to explain the rules to the PAO.).

⁶⁶ Risch Interview, *supra* note 53.

⁶⁷ Turner Interview, *supra* note 57; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 806 (2012) [hereinafter MCM] (permitting public trials and mechanics for access).

⁶⁸ McKittrick e-mail, *supra* note 52. Along with the PAO, media access will necessarily involve, among others, the military judge for approval of media access, assistance from the communications section to wire closed circuit television, the intelligence section to assess the level of force protection required, the supply section to procure any required equipment and supplies, the unit comptroller to find the money, and the provost marshal to actually run the security.

⁶⁹ Policy Memorandum 06-3, *supra* note 35.

⁷⁰ UCMJ art. 22 (2012).

system, and it helped to illustrate the fairness of the system by explaining some of its intricacies.⁷¹ Additionally, because the government is strictly limited to providing facts, the OSJA referred the media to the National Institute of Military Justice,⁷² a nonprofit organization familiar with military justice system, if the media sought factual and neutral analysis or comment regarding the case.⁷³ Providing the media with an outlet familiar with military justice for editorial comments and information relieved some of the pressure for information from the command.⁷⁴

To assess public interest and the effects of PAO efforts in Korea, the Eighth Army's PAO scans internet chat rooms, blogs, and local media outlets.⁷⁵ If press releases are creating more interest or confusion, the PAO can adjust the message accordingly. This proactive assessment and engagement helps the PAO and the command to either avoid creating a high profile event out of a case that would not otherwise receive media attention or to respond properly to a case which is gaining public interest.

The PAO has excellent regulations, manuals, and pamphlets providing solid guidance for working with the media. What the PAO lacks is legal experience. By preparing fact sheets on the basics of military justice ahead of time, by helping the PAO draft press releases, and by integrating with the PAO personnel before a high profile case, the OSJA will help the PAO best serve the commander and best assist in getting timely and accurate facts in front of the media.

If the OSJA or command insists on withholding information from the press, it is possible a small issue can become a big issue, thereby causing the commander to redirect his or her focus from something critical (such as the mission) to something that could have been easily handled with a simple press release to the local media.⁷⁶ As Professor Taylor indicates, giving the good news as well as the bad will help those farther from the fight feel confident in the direction the case is going.⁷⁷

Understanding the rules pertaining to releasing information and how the PAO and the media fit into the military justice process can help SJAs keep the trial counsel focused in the right area and help the commander properly inform the media. By taking these actions, the command opens the door for the public, beginning the process of building public's confidence in the military justice system. Building confidence also requires adjustments to the systems behind the door.

B. Managing Trial Counsel

*The Army's military justice (MJ) system suffers from a lack of experienced practitioners.*⁷⁸

*Inadequate counsel is a serious threat to the fairness and legitimacy of a capital courts-martial, made worse at court-martial by the fact that so few military lawyers have experience in defending capital cases.*⁷⁹

Staff judge advocates and COJs should expect their new trial counsel (TC) to know little to nothing about military justice practice generally and high profile cases specifically. From that position, a COJ or a senior trial counsel (STC) should focus on training the fundamentals. Simultaneously, from that position, the OSJA leadership should also plan to leverage outside talent to handle high profile cases. Even if some of the TC are military justice experts, others will be new. To combat the criticism surrounding the TC's competence, the OSJA leadership must identify those experienced practitioners and help the less experienced TC achieve the requisite competency. While this is an area frequently under attack, the criticism may be misplaced given how high profile cases have been handled in the past and are currently managed. Nevertheless, the successes are not publicized as well as the criticisms. The following statistics illustrates the systemic issues faced by the Judge Advocate General's (JAG) Corps.

To assess the experience level of military justice practitioners, in 2009, Major (MAJ) Derrick Grace conducted a survey, receiving 107 responses.⁸⁰ Relevant to what COJs and SJAs will likely encounter, the survey revealed that "54% of TC tried less than ten total cases; 78% prosecuted less than five contested courts-martial."⁸¹ Also relevant is the experience level of the defense counsel (DC). As Major Grace found, "[43%] of [DC] responding to the

⁷¹ Risch Interview, *supra* note 53.

⁷² See NAT'L INST. OF MIL. JUST., <http://nimj.org/nimjblog/> (last visited Oct. 17, 2012) ("The National Institute of Military Justice (NIMJ) is a District of Columbia non-profit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. The NIMJ is not a government agency. NIMJ's boards of directors and advisers include law professors, private practitioners, and other experts.").

⁷³ Risch Interview, *supra* note 53.

⁷⁴ *Id.*

⁷⁵ McKittrick e-mail, *supra* note 52.

⁷⁶ *Id.*; Grey Interview, *supra* note 60.

⁷⁷ Taylor, *supra* note 5, at 356; McKittrick e-mail, *supra* note 52.

⁷⁸ Major Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, ARMY LAW., Dec. 2010, at 24.

⁷⁹ COX COMMISSION REPORT, *supra* note 27, at 10.

⁸⁰ Grace, *supra* note 78, at 24 n.3.

⁸¹ *Id.* at 25.

survey have less than one year of [military justice] experience; 39% have tried fewer than five total courts-martial; and 62% have less than five contested cases (81% have less than 10).⁸² This lack of experience is not a new phenomenon. In 1994, then MAJ Lawrence Morris, in his primer on military justice, premised his paper by asserting “[a 69%] drop in courts-martial [between 1980 and 1992], accompanied by an [11%] increase in the size of the JAG Corps, translates into a Corps with markedly less trial experience.”⁸³

If the SJA and COJ know the experience level of available TC, they can prepare for high profile cases accordingly. And, as is often the case, the high profile case will strike during the unending process of educating TC and while the office is fully engaged in other important matters.⁸⁴

Chiefs of justice do not always get to pick their lineup for trying cases. Generally, the unit’s TC tries the unit’s cases. But, the dynamics can change in high profile cases. When needed, the JAG Corps does put together specialized teams to try cases.⁸⁵ The pending court-martial of MAJ Hasan is but one case where this is evident.⁸⁶ In *United States v. Hasan*, the III Corps SJA requested two counsel inorganic to III Corps from the Personnel Plans and Training Office (PP&TO).⁸⁷ The trial team was not constructed from “above” but, upon request, PP&TO made the experienced counsel available for the SJA to detail.⁸⁸ Similarly, the SJA detailed his COJ to the case rather than deploy him with the rest of the OSJA.⁸⁹

⁸² *Id.* at 26.

⁸³ Lieutenant Colonel Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15 (addressing military justice practice in general from panel selection to advising commanders).

⁸⁴ Chiefs of Justice have a wealth of resources available to train trial counsel. In addition to traditional school house courses and the Trial Counsel Assistance Program, the Criminal Law Department of The Judge Advocate General’s Legal Center and School has a Facebook account at <https://www.facebook.com/#!/pages/Criminal-Law-Department-Army-JAG-School/215084825230386>, a Twitter feed at www.twitter.com/#tjaglcsad and access to advocacy training video through Stetson University for COJs to continue training advocates in the field.

⁸⁵ Interview with Colonel Michael Mulligan, Chief, Gov’t Appellate Div., U.S. Army Legal Servs. Agency, in Fort Belvoir, Va. (Dec. 19, 2011) [hereinafter Mulligan Interview] (revealing that XVIII Airborne Corps built a team to prosecute the case of *United States v. Akbar* and later *United States v. Hennis* and that the III Corps built a team to try the *Abu Graib* cases and currently the case of *United States v. Hasan*).

⁸⁶ CBS & Associated Press, *Lead Prosecutor Named in Fort Hood Case*, CBSNEWS.COM (Dec. 12, 2009, 03:13 PM), <http://www.cbsnews.com/stories/2009/12/12/national/main5972078.shtml>.

⁸⁷ Risch Interview, *supra* note 53. Prior to being detailed to the case, COL Mulligan was deployed to Iraq and Lieutenant Colonel Steven Henricks was the Deputy Staff Judge Advocate at Fort Sill, Oklahoma.

⁸⁸ *Id.*; Mulligan Interview, *supra* note 85.

⁸⁹ Risch Interview, *supra* note 53.

By calling PP&TO, the SJA had the opportunity to select TC from a larger pool. More importantly, the SJA recognized the need for experienced DC to represent the accused. With that in mind, the SJA contacted the chief of the Army’s Trial Defense Service and offered his support to help the defense meet its personnel and logistical needs.⁹⁰

Building trial teams to prosecute and defend the toughest cases does not address the criticism surrounding the lack of experience in the TC generally, but it does mitigate arguments that these trial teams are inexperienced or unable. The real issue is ensuring the JAG Corps maintains and improves opportunities for junior counsel to obtain the training and exposure to step into the shoes of the current experts.⁹¹

The III Corps SJA ensures company grade JAG officers are exposed to the handling of the case to develop their broad base of experience.⁹² The SJA also requires these officers to observe hearings and become familiar with the case. While these captains may not argue a motion or call any witnesses, they are exposed to the process and complexities of a high profile case.⁹³

Other OSJAs find success in pairing experienced counsel with more junior counsel.⁹⁴ Similar to how the special victim prosecutors work with unit counsel to try sexual assault cases, the more experienced counsel can coach, train and mentor the junior counsel as they work on the case together.⁹⁵ The Trial Counsel Assistance Program (TCAP)⁹⁶ is another option for the OSJA when the unit has a high profile case not necessarily requiring a full time team but requiring specialized skills.

The JAG Corps may not have enough experienced counsel with exposure to high profile cases, but it does have incredibly capable counsel. The pressing challenge is developing systems which enable supervisors to provide junior counsel with the requisite skills and find avenues to

⁹⁰ *Id.*; Interview with Colonel Mark Cremin, Chief, U.S. Army Trial Defense Service at Fort Belvoir, Va. (Feb. 3, 2012) [hereinafter Cremin Interview].

⁹¹ McKittrick e-mail, *supra* note 52; Risch Interview, *supra* note 53; e-mail from Colonel Walter M. Hudson, Legal Advisor, Int’l Security Assistance Force Joint Command, to author (Dec. 16, 2011, 05:51 EST) [hereinafter Hudson e-mail] (stating that all in favor of using organic resources when possible to ensure junior counsels have the opportunity to gain experience).

⁹² Risch Interview, *supra* note 53.

⁹³ *Id.*

⁹⁴ Hudson e-mail, *supra* note 91.

⁹⁵ Interview with Major Larry Babin & Major Dan Kicza, Students, 60th Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & Sch., in Charlottesville, Va. (Jan. 11, 2012) (Both served as Special Victim Prosecutors and emphasized the importance of pushing junior counsel to learn how to prosecute cases with their support and guidance.). *See also* Policy Memorandum 09-3, *supra* note 32.

⁹⁶ *See infra* Part. IV.C.

expose counsel to complex and high profile cases. Finally, the OSJA must put the right counsel on the cases.

C. Victim/Witness Responsibilities

*Without the cooperation of victims and witnesses, the system would cease to function effectively.*⁹⁷

The interaction with victims and witnesses is one of the most sensitive areas of a military justice practitioner's craft. An uncooperative witness can be worse than no witness at all. A reticent victim could jeopardize the case completely.⁹⁸ Moreover, the practitioner's job becomes much more difficult when a disgruntled victim or witness elevates the matter to higher headquarters or goes to the media. This area of military justice practice is a potential weak link that can quickly attract media attention. A strong victim witness program and casualty notification apparatus will mitigate possible negative media attention and public criticism.

In most cases, the victim is easily identifiable—the one reporting the offense. In death cases, it can also include the deceased's spouse, offspring, or parent. In many high profile cases, however, the victim pool can expand beyond what the Army recognizes as primary and secondary next of kin.⁹⁹ Accordingly, the COJ must look to AR 27-10 for a complete definition of "victim."¹⁰⁰ With more victims involved, they are likely to be geographically, socioeconomically, intellectually, and culturally diverse and may require varying degrees of assistance. The victim/witness liaison (VWL) must not only identify the victims but must also provide necessary services with sensitive to such diversity.¹⁰¹ In addition, in death cases, the VWL will frequently not be the first government representative the victim or witness encounters. Accordingly, the TC should know the unit's

⁹⁷ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-2 (2 Oct. 2011) [hereinafter AR 27-10].

⁹⁸ Sexual assault cases are the primary area where this becomes an issue. If the victim is not committed to reliving the trauma at an Article 32, UCMJ, investigation and/or at a court-martial, the government may be unable to prove its case. The victim/witness liaison (VWL) can assist in these cases by nurturing the victim and providing appropriate support.

⁹⁹ U. S. Dep't of Def., DD Form 93, Record of Emergency Data (Jan. 2008), see also U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM paras. 5-1, 5-3, and 5-4 (30 Apr. 2007) [hereinafter AR 600-8-1] (explaining line of succession and how to identify and notify primary and secondary next of kin (NOK)).

¹⁰⁰ AR 27-10, *supra* note 97, para. 17-5a (defining "victim" as "[a] person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the UCMJ, or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DOD components").

¹⁰¹ *Id.* para. 17-7c.3. One source of accurate information is the casualty assistance office. Because the CAO will be required to make notification with the next of kin, the CAO will have verified contact information for the VWL.

casualty notification process and its main actors, understand their roles, and know when to meaningfully insert the VWL.

1. Identify or Develop the Victim/Witness Liaison Program

*The role of the VWL is one of facilitator and coordinator. The VWL will act as a primary point of contact through which victims and witnesses may obtain information and assistance in securing valuable victim/witness services.*¹⁰²

Many, if not most, installations have outstanding Victim/Witness Assistance Programs. Others may need improvement, and all may find their capabilities insufficient to handle a major high profile case with multiple victims and witnesses.¹⁰³ Staff judge advocate offices need to assess the quality of their programs before an imminent need arises. This is an area the OSJA can control through training the existing VWL(s) and planning for contingencies.¹⁰⁴ Chapter 17 of AR 27-10 details what each general court-martial jurisdiction should have for VWL support and what the OSJA must do to support that mission.¹⁰⁵

As a starting point, the incoming COJ or SJA can review the VWLs' written appointment orders, assess all VWLs' level of training and experience, and review the nature of their duties.¹⁰⁶ If the VWLs have not been trained, the Office of The Judge Advocate General (OTJAG) Criminal Law Division (CLD) provides formal training for VWLs.¹⁰⁷ In addition, the SJA should review the existing relationships with the federal, state, and local agencies with respect to victim/witness liaison and cultivate necessary interagency relationships where they are lacking through interagency agreements.¹⁰⁸ If deploying, it is important to train deploying Soldiers to serve as VWLs. If already

¹⁰² *Id.* para. 17-7c.

¹⁰³ Mulligan Interview, *supra* note 85 (stating that the Army VWL system was not equipped to handle the volume of victims and witnesses in the Fort Hood shooting); see also Telephone Interview with Lieutenant Colonel Steve Henricks, Trial Counsel, Fort Hood, Tex. (Jan. 6, 2012) [hereinafter Henricks Interview]; see also Telephone Interview with Mr. Charles Cosgrove, Chief, Programs Branch, Dep't of the Army, Office of The Judge Advocate Gen. (Jan. 6, 2012) [hereinafter Cosgrove Interview].

¹⁰⁴ Cosgrove Interview, *supra* note 103 (stating many victim witness liaisons perform VWL tasks as additional duties meaning the VWLs focus is not solely dedicated to VWL duties. In addition, at present there is no instruction on interactions with the casualty assistance office or on how to manage death cases).

¹⁰⁵ AR 27-10, *supra* note 97, ch. 17.

¹⁰⁶ *Id.* para. 17-7a. Victim witness liaison duties are frequently additional duties performed along with the employees primary mission. See also Cosgrove Interview, *supra* note 103.

¹⁰⁷ AR 27-10, *supra* note 97, para. 17-7a.-b.

¹⁰⁸ *Id.* para. 17-9a.

deployed and without a VWL, OTJAG CLD can provide the OSJA with a list of all VWLs from nearby GCMCAs.¹⁰⁹ In a high profile case, it may be necessary to reach out to OTJAG CLD even if the GCMCA has a robust VWL program.¹¹⁰ In other cases, the OSJA may need to reach outside the Army to find the necessary support.

In the case of the Fort Hood shooting, the trial team, with the Department of Justice's assistance, obtained a volunteer to manage the case's victim witness needs.¹¹¹ By working with professional victim services specialists from the federal, state, or local level, the OSJA can better address the victims' needs: each U.S. Attorney has at least one victim/witness specialist; the FBI has highly trained crisis intervention teams; and local prosecutors, along with the state's attorney general's office, may also have highly trained experts available to assist.¹¹² If the VWL is not already familiar with the federal, state, or local victim/witness services, the OSJA can facilitate VWL's access to these services and resources through key leader engagements with these agencies.¹¹³ At a minimum, the OSJA and VWLs can learn about useful techniques and resources available from outside agencies.

In addition to encouraging the VWL to identify available resources outside of the Army, the OSJA should involve the VWL in the pending cases early.¹¹⁴ An informed

VWL can keep families up to date and prepared for potential press coverage and prevent breaks in support between the various agencies.

Along with clear lines of communication between trial counsel and VWLs for every case, death cases require the VWL to coordinate with the multiple organizations providing various services to the victims. The organizations responsible for providing next of kin (NOK) services are likely to make contact before the VWL, so the OSJA and VWL must understand how the notification process works, the services the victim/witness will receive, and who to contact to integrate into that process. If the victim/witness transition from agency to agency goes smoothly, the victim's experience will be more positive and perhaps avoid critical media involvement highlighting avoidable mistakes.

2. Next of Kin Notifications

*The Army's requirement to provide timely and accurate information [regarding the death of a service member] is often at odds with synchronizing the diverse set of organizations working worldwide under a high operational tempo.*¹¹⁵

Victim witness liaisons will have to understand the Army casualty notification process to effectively assist victims in death cases. By regulation, within sixteen hours of discovering a death, a casualty notification officer (CNO) makes the formal notification to the next of kin.¹¹⁶ The CNO then notifies the primary next of kin (PNOK) that a casualty assistance officer (CAO) will "contact them as soon as possible to provide assistance."¹¹⁷ The Casualty Assistance Center (CAC) "having responsibility for the geographical area in which the PNOK or [person authorized to direct disposition] resides will appoint a CAO from trained and certified active duty personnel."¹¹⁸ The CAO will "[c]all the NOK within 4 hours (but not between 10 p.m. and 6 a.m.) following initial notification to schedule an appointment to visit the PNOK."¹¹⁹ The CAO has a host of responsibilities from "[d]etermining the immediate needs or problems"¹²⁰ to helping the family obtain a "copy of any fatality or

¹⁰⁹ *Id.* para. 17-7a.

¹¹⁰ *Id.* para. 17-8b.

¹¹¹ Risch Interview, *supra* note 53; Mulligan Interview, *supra* note 85. See also Telephone Interview with Mrs. Mary Jo Speaker, Victim Witness Specialist, U.S. Attorney's Office, E. Dist. Okla. (Jan. 10, 2012) [hereinafter Speaker Interview]. Based on prior experience with a U.S. Attorney Victim Witness Specialist, COL Mulligan knew to reach out to the Department of Justice Victim Witness Specialists again. He was directed to Mrs. Speaker with whom he had also worked with many years earlier. Upon a request from the SJA, Mrs. Speaker, with the consent of her supervisor, volunteered to provide her nearly thirty years of victim witness experience to the Fort Hood shooting case.

¹¹² Speaker Interview, *supra* note 111. According to Mrs. Speaker, these federal, state, and local offices are trained on how to open family assistance centers, that can serve as a one-stop location to receive information about the case, information about available resources, and any necessary care. The Army VWL program is not equipped to perform these functions. As a result, victims suffer. Mrs. Speaker also noted that victims have far more rights in the federal system under the Crime Victims Act of 2004, 18 U.S.C. § 3771(2011). See also OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES ON VICTIM AND WITNESS ASSISTANCE (2011 ed., rev. May 2012), available at http://www.justice.gov/olp/pdf/ag_guidelines2012.pdf.

¹¹³ One excellent resource is the Department of Justice's Office for Victims of Crime. Dep't of Justice, Office for Victims of Crime, <http://www.ojp.usdoj.gov/ovc/> (last visited Jan. 11, 2012). The FBI also has a website dedicated to Victim Assistance. Victim Assistance, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/stats-services/victim_assistance (last visited Jan. 11, 2012).

¹¹⁴ Telephone Interview with Mrs. Ginny Clausen, Victim Witness Liaison, Joint Base Lewis McChord, Wash. (Jan. 5, 2012) [hereinafter Clausen Interview] (Mrs. Clausen stressed the importance of keeping the VWL informed early and often because the families call the VWL and the VWL does not want to give incorrect information. Moreover, the VWL can help

soften any bad press that may come from actions taken by counsel. In her opinion, communication between VWL and trial counsel would help the VWL keep the victims informed and avoid much of the anxiety.).

¹¹⁵ SUICIDE REPORT, *supra* note 2, at 195.

¹¹⁶ AR 600-8-1, *supra* note 99, para. 3-17 ("The [initial] casualty report is submitted . . . within 12 hours of the incident."), para. 5-2 ("[M]ake notification to the NOK within 4 hours of receipt of the [initial] casualty report . . .").

¹¹⁷ *Id.* para. 5-2h.

¹¹⁸ *Id.* para. 6-3a.

¹¹⁹ *Id.* para. 6-7a(2).

¹²⁰ *Id.* para. 6-7a(5).

investigative report pertaining to the death of the Soldier.”¹²¹ In practice, the CAO will tailor his level of involvement to the NOK’s needs.

The VWL, or members of the OSJA, frequently become involved with the victim/witness through the CAO who can prove invaluable to the prosecution team in assessing the victim/witness’s desire or willingness to discuss relevant issues.¹²² Knowing some background about the victim’s notification experience will help the VWL and prosecution team approach the victim/witness.¹²³ For example, the CAO is going to have information on the victim’s personality and state of mind. If the TC and VWL know this information in advance, they can better tailor their approach to the victim and start the relationship in the most positive manner.

Reaching out to CAOs before high profile cases through briefings at CAO training or periodic interaction can help CAOs understand the importance of access to victims.¹²⁴ If each OSJA consistently trained the CAOs at their respective installations, conceptually all CAOs would understand why and how to involve VWLs and TC in the process regardless of where the crime occurred or which CAO was closest to the victim.¹²⁵

If the CAO does not introduce the VWL to the victim, the next most likely introduction will occur after CID appoints a casualty liaison officer (CLO).¹²⁶ The CID battalion commander in charge of the investigating or reporting field element will appoint the CLO.¹²⁷ The CLO is generally the special agent in charge (SAC) or the

detachment commander at the location of the incident.¹²⁸ The CLO will “contact the CAO within five calendar days of the date CID received notification of the death in order to establish initial contact with the NOK.”¹²⁹ This coordination assists in maintaining consistency of message between the “government” and the victim/witness and reducing stresses on the victim/witness. Once coordinated, the CLO is responsible for “briefing the NOK on the progress and result of [the] death investigation[] . . . and procedures to follow to obtain the final [report of investigation] under the [Freedom of Information Act].”¹³⁰

In at least one instance, the CLO-NOK relationship turned an already emotionally charged case into a high profile event. In January of 2008, Staff Sergeant Ryan Maseth was “electrocuted while taking a shower at the Radwanayah Palace Complex in Iraq.”¹³¹ The CLO in that case sent an e-mail to the deceased’s mother indicating that the cause of death was “negligent homicide” and that KBR was at fault.¹³² While the ensuing news article cited a miscommunication,¹³³ this episode illustrates how one inartfully crafted e-mail to a NOK can trigger massive political and media attention.¹³⁴ Since that time, CID has amended its internal regulation—CID Regulation 195-1—to read, “All CID responses (e.g., periodic case updates, answers to specific questions, etc.) to the NOK via e-mail must be forwarded through CID channels (battalion) and approved by the group commander following a legal sufficiency review by the Group Judge Advocate.”¹³⁵

In criminal death investigations, the CLO’s mission officially continues until “the investigation is finalized and forwarded to the supporting legal office for disposition of the offender.”¹³⁶ Only then will “the CLO [relinquish] all responsibilities for that particular investigation to the legal

¹²¹ *Id.* para. 6-7a(19).

¹²² Clausen Interview, *supra* note 114 (The VWL at JBLM developed a relationship with the casualty assistance officer (CAO) by chance and indicated she had never been trained or advised to develop that relationship. She ranks her relationship with the CAO as the most important key to success when dealing with high profile death cases.).

¹²³ Geoff Ziezulewicz, *Military’s Casualty Notification System Often Frustratingly Uneven for Families*, STARS & STRIPES, Aug. 5, 2010, <http://www.stripes.com/military-s-casualty-notification-system-often-frustratingly-uneven-for-families-1.113548> (explaining inconsistencies in casualty notification process).

¹²⁴ The Legal Assistance Office can, if it is not already, begin teaching portions of the CAO course on post. In addition, the COJ and Chief of Administrative Law can sit in on the CAO training to find out what information is being delivered.

¹²⁵ Henricks Interview, *supra* note 103 (In one instance during LTC(P) Henricks’ victim briefing process, a CAO filed a complaint regarding contact between the trial counsel and the victim and demanded all communication be cleared through the CAO.)

¹²⁶ ALCID Memorandum 011-11, U.S. Army Criminal Investigation Command, U.S. Dep’t of the Army, subject: ALCID Memorandum 011-11, Casualty Liaison Officer para. 16-8a (14 Apr. 2011) [hereinafter ALCID 011-11].

¹²⁷ *Id.*

¹²⁸ *Id.* para. 16-8b. *See also id.* para. 16-8k (In some cases there may be a need for a casualty liaison officer (CLO) elsewhere as in the case where the incident occurred overseas and the NOK is located in the United States.).

¹²⁹ *Id.* para. 16-8i.

¹³⁰ *Id.* para. 16-8e.

¹³¹ Press Release, Senator Robert P. Casey Jr., Casey Presses Pentagon on Maseth Electrocution Investigation (June 22, 2009), available at <http://casey.senate.gov/newsroom/press/release/?id=ddd5e94d-28bf-45bd-8cb5-8b57711f2f3b>.

¹³² Jeff Schogol, *CID Disputes Death Finding*, STARS & STRIPES, Jan. 24, 2009, <http://www.stripes.com/news/cid-disputes-death-finding-1.87475>.

¹³³ *Id.*

¹³⁴ Lisa M. Novak, *Army Continues Criminal Probes into Iraq Electrocutions*, STARS & STRIPES, Oct. 4, 2009, <http://www.stripes.com/news/army-continues-criminal-probes-into-iraq-electrocutions-1.95354> (explaining how Maseth electrocution led to deeper investigation into electrocution cases).

¹³⁵ ALCID 011-11, *supra* note 126, para. 16-8h(2).

¹³⁶ *Id.* para. 16-8q.

office's [VWL]."¹³⁷ This, however, does not contemplate a criminal death investigation remaining open for an extended period of time or the need for the VWL to begin coordination before the end of the case.¹³⁸ Practically, the CLO should work with the CAO and involve the VWL at the earliest opportunity. To ensure proper communication, the TC should inquire with the servicing SAC to identify the CLO and determine if the CLO has made contact. If the CLO has made contact, the TC should encourage the CLO to coordinate with the VWL as soon as possible.

Adding to the list of organizations required to contact victims, the Armed Forces Medical Examiner (AFME) is statutorily required to notify the decedent's family of the forensic pathology investigation as soon as practicable, and promptly report the results to the official responsible for the death investigation.¹³⁹

Finally, the victim's unit should maintain contact with the family throughout the entire process. This is generally done by immediate supervisors, commanders, and the unit's family support group. The VWL and TC can reach out to the unit, just as they do with the CAO and CLO, to assess the victim's state of mind and also to ensure the victim's well being.

As the 2010 *Army Health Promotion Risk Reduction Suicide Prevention Report* concluded, "A revision to the current next-of-kin notification process is required to effectively coordinate and synchronize communications among reporting organizations."¹⁴⁰ Each representative has a vital role in providing important, but different, information and services to the victim/family member—information and services the family member is entitled to. But, with each representative comes a different personality and different agenda. Judge advocates must understand this dynamic in order to effectively interact with the various representatives and set the right tone with the victim/witness. They must review the current OSJA VWL program and then assess how the installation or command manages notifications. Finally, the OSJA must consider how to handle a case that will overwhelm the organic capacity by reaching out to federal, state, and local victim assistance resources in advance of the need. If the victim and witnesses are informed and educated on the state of the case, they may be less inclined to go to the press and complain—right or wrong—about government neglect.

¹³⁷ *Id.* See also U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 6-3a(3) (30 Mar. 2007) (explaining law enforcement officials "must ensure individuals are notified about . . . [p]rocedures to contact the staff judge advocate victim/witness liaison office for additional assistance.").

¹³⁸ Tokash e-mail, *supra* note 65 (recalling the OSJA and CID agreeing to allow the OSJA to handle NOK briefings instead of having the CLO conduct them).

¹³⁹ 10 U.S.C. § 1471(e)(3), (e)(5) (2012).

¹⁴⁰ SUICIDE REPORT *supra* note 2, at 197.

IV. Identifying Assets Available to Address Deficiencies

*Th[e] intense focus on military justice places great demands on judge advocates . . . but with proper training, mentorship, and access to superior resources, JAs can excel in this challenging environment.*¹⁴¹

Knowing where to turn will be the single most challenging aspect of managing a high profile case. Everything is happening all at once and these types of cases are not part of daily operations. Once identified, fully leveraging every relevant asset is critical. The friction comes when the case requires other agencies that are not under the OSJA's control to commit time and effort to the case. Thankfully, outside agencies will readily assist when approached with the right attitude and proper request. If that does not work, the SJA should request support from the commander and his chief of staff who can help motivate the staff or elevate the request for assistance. Chiefs of justice should not be afraid to use the resources identified below and get them involved early.

The OSJA cannot and should not do it all, but it must know where to turn. The remainder of this article addresses the resources available to address the three deficiencies discussed above, as well as ways to leverage those assets based on recent experiences in the field. Finally, it will propose suggestions for managing these cases.

A. Cooperating with Law Enforcement

Cooperating with law enforcement on a daily basis is the most effective way to build the right kind of relationship with a necessary—and indispensable—partner in justice. If counsel and law enforcement have a working relationship before serious cases arise, they can better respond to the immediate situation and potentially avoid missteps and subsequent media criticism. OSJAs must begin developing relationships with military and civilian law enforcement and prosecutors before high profile cases occur.¹⁴²

With a positive working relationship as the foundation, the next step is early engagement with law enforcement upon notification of a high profile case.¹⁴³ On the day of the

¹⁴¹ Colonel Charles N. Pede, *Military Justice, The Judge Advocate and The 21st Century*, ARMY LAW., Apr. 2011, at 32.

¹⁴² Federal, state, and local law enforcement frequently participate in serious cases that become high profile in addition to military law enforcement. Reaching out to those agencies at the outset of an assignment will avoid awkward introductions at the crime scene.

¹⁴³ Tokash e-mail, *supra* note 65 ("It was very beneficial to be able to immediately contact or coordinate with other agencies/departments with which we had worked in the past. At the same time, agencies/departments with which we had minimal contact previously were very responsive and didn't hesitate to contribute to the overall effort.").

Fort Hood shooting, 5 November 2009, the SJA recalls the SAC calling the COJ as the incident was occurring.¹⁴⁴ Special Agent Donald Hardison recalls seeing the III Corps COJ in the CID office working through the investigation almost immediately after the incident.¹⁴⁵

Strong working relationships between CID and the OSJA were likewise critical in 2009, when five service members were gunned down at the combat stress clinic at Camp Liberty, Iraq.¹⁴⁶ The accused's servicing JA was not located on the same installation as the incident¹⁴⁷ but within two days she was able to secure an office in the CID detachment and begin assisting the investigators.¹⁴⁸

The TC should provide an objective perspective to case agents from the outset. In over twenty-five years of investigating cases and working with TC, the common theme for success, in Mr. Hardison's experience, is the "partnership between the case agent and the TC well before trial."¹⁴⁹ He acknowledged, however, what most practitioners already know—"it takes a crisis to do what should have been done with every case."¹⁵⁰

Having a TC on the scene or in the CID office enables the counsel to provide guidance and suggestions.¹⁵¹ Just as a

¹⁴⁴ Risch Interview, *supra* note 53.

¹⁴⁵ Telephone Interview with Special Agent Donald Hardison, Assistant Operations Officer/Supervisory Criminal Investigator, 11th Military Police Battalion, Fort Hood, Tex. (Oct. 26, 2011) [hereinafter Hardison Interview] (Special Agent Hardison has twenty-five years of investigative experience. He joined CID in 1976, graduating from the "CID Basic Course" in 1977. He retired as a chief warrant officer five as the Battalion Operations Chief at the 11th Military Police Battalion located at Fort Hood, Texas. He came back onto Civilian Federal Service as the Assistant Operations Officer/Supervisory Criminal Investigator in 2005.); Risch Interview, *supra* note 53 (noting upon learning of the incident he sent the COJ and a team of trial counsel to the CID office to begin coordination efforts, draft warrants and search authorizations, and manage other legal issues).

¹⁴⁶ Timothy Williams, *U.S. Soldier Kills 5 of His Comrades in Iraq*, N.Y. TIMES, May 11, 2009, <http://www.nytimes.com/2009/05/12/world/middle-east/12iraq.html> (reporting on incident).

¹⁴⁷ The trial counsel, Captain Lisa Corcoran, was headquartered with the 555th Engineer Brigade at Joint Base Balad, Iraq. The incident took place at Camp Liberty, Iraq.

¹⁴⁸ This assertion is based on the author's recent professional experience as the Chief of Military Justice for I Corps and Multi-National Corps-Iraq from March 2009 to January 2010 [hereinafter Professional Experiences].

¹⁴⁹ Hardison Interview, *supra* note 145.

¹⁵⁰ *Id.*

¹⁵¹ Tokash e-mail, *supra* note 65 ("[The COJ and I] had developed a close working relationship and I had kept him informed of several other incidents in the past with positive results. Not only would [the COJ] keep the SJA informed, but he would send Trial Counsel's to advise at the onset of those other investigations if needed. I am a firm believer that if CID and Trial Counsels work closely together from the onset of an investigation it saves time and creates a better product for commanders."). In the Combat Stress Clinic Shooting case, the trial counsel also reviewed statements as they were generated and provided feedback on the agents' investigative plan. Without the trial counsel's persistence in requesting additional investigation, it is likely the agents would have closed the case prematurely.

TC may take certain things for granted and make a logical leap when questioning a witness or when making a closing argument, agents may overlook collecting a certain piece of evidence because what happened is "obvious" to them.

Once involved with the agents, counsel have a unique ability to serve as force multipliers in high profile investigations by removing obstacles for case agents. In the aftermath of the Fort Hood shooting, jurisdiction was initially unsettled between the Department of Justice and the Army but the investigation continued with participation from CID, the FBI, the Killeen Police Department, and other local law enforcement entities.¹⁵² With the size and nature of the crime scene, halting the investigation until the dust settled was inconceivable. At that moment, it was critical for the leadership to provide clear and unequivocal guidance to the case agents.¹⁵³

Trial counsel must help agents maintain the integrity of the investigation.¹⁵⁴ From the law enforcement perspective, Hardison emphasized the importance of the OSJA reviewing the press releases before public release, for example.¹⁵⁵ Prematurely releasing information taints the witnesses and makes the agent's job much more challenging. By properly vetting the press releases, the OSJA can provide the agents with some coverage and help preserve the evidence—

¹⁵² In light of the possible but eventually unfounded terrorist conspiracy aspect of the Fort Hood shootings, CID took the role of lead investigative agency, with the FBI taking a supporting role to CID. See U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (18 June 2007) (jurisdictional question is made locally whenever possible). See also AR 27-10, *supra* note 97, ch. 2-1 to 2-2 (referencing U.S. DEP'T OF DEF., DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (22 Jan. 1985) (rescinded by Instruction cited above).

¹⁵³ Hardison Interview, *supra* note 145. According to Hardison, the OSJA's assistance in writing search authorizations while the Assistant U.S. Attorney (AUSA) at the Waco Field Office worked with the FBI to obtain search warrants was very helpful. While a search authorization pursuant to Military Rule of Evidence (MRE) 315 may be acceptable to a military judge, the AUSA may have a different format or requirements in his jurisdiction. When jurisdiction is unsettled, the OSJA can work with the AUSA to satisfy both requirements and assist the investigators on the ground in so doing.

¹⁵⁴ Counsel for the government and defense can also turn to CIDs legal advisors for assistance. The servicing Group Judge Advocate (GJA) will monitor high profile cases and provide analysis to his or her commanders and agents. Coordination with that GJA can help settle procedural issues the agents may be hung up on and speed up the process. As the agents' legal advisor, the GJA can resolve disputes and assist the trial counsel.

¹⁵⁵ Hardison Interview, *supra* note 145. As mentioned Part III.A, above, with respect to the PAO function, there is a fine balance between releasing the bad news along with the good to get in front of the story, and at the same time preserving the integrity of a criminal investigation.

namely witnesses. As Hardison made clear, “the goal for CID is the truth, regardless of who benefits.”¹⁵⁶

Once COJs and TC understand that cases belong to the investigators while under investigation, the relationship between law enforcement and the OSJA will improve and all cases will benefit. The counsel are most effective when providing guidance, suggestions, and recommendations, while at the same time empowering agents to take charge. As one experienced agent notes, “the sooner [TC] engage and advise, the less likely there will be issues down the road. Their legal advice early on can prevent issues that may arise later on during prosecution.”¹⁵⁷

B. Interacting with Higher Echelons

*Your bosses will be receiving calls from the senior Pentagon leadership, the Hill, and the media asking what is going on. They need information to help ensure that others will have confidence in your investigation and disposition of the allegations.*¹⁵⁸

High profile cases can quickly catch the attention of senior Army officials, the executive branch, and members of Congress. Keeping them informed with timely and accurate information can help prevent a bad case from becoming worse. Along with pushing factual information up, OSJAs can leverage the capabilities of higher headquarters and obtain needed assistance.¹⁵⁹ In so doing, the OSJA can avoid issues with the media, counsel, and victim notification and support. Knowing which organizations to contact, and what those organizations are looking for, will help OSJAs provide the required information, instill confidence, and perhaps avoid excessive interference.

¹⁵⁶ *Id.* The agents do not want to interview a witness influenced by inaccurate reporting. That does not help the agent and it does not help the justice system. In addition, once the media interviews a witness, the likelihood for inconsistent statements increases.

¹⁵⁷ Tokash e-mail, *supra* note 65.

¹⁵⁸ Taylor, *supra* note 5, at 356.

¹⁵⁹ Mulligan Interview, *supra* note 85 (cautioning high profile cases can draw “unhelpful” help as well—namely meetings. He recommends dedicating one JA to serve as the face of the case and attend the meetings while allowing the trial team to focus on the case.); *see also* Risch Interview, *supra* note 53 (noting the Office of the Chief of Public Affairs (OCPA) sent a brigadier general to Fort Hood after the Fort Hood shootings and his presence greatly assisted the unit PAO. The unit PAO focused on day to day operations and the general focused on addressing questions from higher headquarters.)

1. Office of the Judge Advocate General Criminal Law Division (OTJAG CLD)

Staff judge advocates seeking assistance for high profile cases can turn to the OTJAG CLD. The CLD is responsible for insulating field elements from inquiries from the Army staff, the executive branch, and Congress.¹⁶⁰ The office is also responsible for providing policy and guidance to the field.¹⁶¹ When notifying TJAG of a potentially high profile case, the SJA’s technical chain runs straight to TJAG through TJAG’s executive officer (XO). Once notified, the XO informs TJAG and forwards the notification onto the CLD for action.¹⁶² The CLD then requests information from the field and responds to questions from higher headquarters.¹⁶³ By proactively working with CLD, the SJA can focus on the mission at hand and allow higher headquarters to focus efforts up and out.¹⁶⁴ The CLD assistance could include requesting more victim/witness support, preparing press releases for OCPA, or asking PP&TO to find DC or TC qualified to handle the case.

The CLD also works to improve military justice practices and procedures by developing programs and policy like the special victim prosecutors and highly qualified experts, the Best Practices in Military Justice for SJAs course, and a published handbook for SJAs.¹⁶⁵ These CLD initiatives emphasize the importance of military justice and equip SJAs with the tools to train, mentor, and lead judge advocates.

2. Office of the Congressional Legislative Liaison

Sharing information about high profile cases early on, and regularly thereafter, with congressional oversight committees . . . gives our congressional oversight community a heads-up about a subject that will eventually be on their radar screens anyway . . . [Y]ou can either take the initiative and give the members and staff a chance to prepare a

¹⁶⁰ Telephone Interview with Colonel Charles N. Pede, Chief, Criminal Law Div., Office of the Judge Advocate Gen. (Jan. 12, 2012) [hereinafter Pede Interview].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* There is no policy or regulatory requirement to notify the Criminal Law Division (CLD), but practically, OSJAs should simultaneously notify the CLD and Executive Officer as the CLD will be fielding questions and providing assistance.

¹⁶⁴ Pede Interview, *supra* note 160 (noting the magnitude of the situation or the time sensitivity of the information requested can impact the flow of information, but he stressed the CLD’s role is to absorb that mission and interface with higher commands and/or outside agencies thereby reducing the demands upon the unit in the field).

¹⁶⁵ *Id.* *See also* Pede, *supra* note 141, at 34.

*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.*¹⁶⁶

The Office of the Congressional Legislative Liaison (OCLL) has a significant role in managing the tone of high profile cases for members of Congress. Keeping OCLL reasonably informed will mitigate members' overreactions or reliance on potentially incorrect facts from the media and constituents. When the communication is clear from the crime scene through the respective chain of command and up to OCLL, the Army JA at OCLL can help the unit on the ground shape the message and better guarantee members of Congress have the right facts and perhaps avoid the case from gaining the wrong type of press. Conversely, if the unit with the facts is not satisfying Congress's need for information, members of Congress may turn to less reliable or less informed sources, causing more problems for the commander and the staff. Working with OCLL will ultimately help the commander and the OSJA focus on managing high profile cases. Leveraging OCLL first requires an understanding of OCLL's mission and explanation on how the process is supposed to work.

The OCLL both gathers information from the field to give to Congress and briefs the field on relevant action coming out of Congress. In short, the Chief of Legislative Liaison has "sole directive authority for [Department of the Army] congressional affairs to include formulating, coordinating, and supervising policies and programs on the Army's relations with Congress."¹⁶⁷ As the official single point of information collection and dissemination between the Department of the Army and Congress, OCLL can enhance "the Army's ability to provide a coordinated, consistent message."¹⁶⁸ In high profile cases, OCLL becomes involved in one of two ways. It will either receive a congressional request for information pertaining to the high profile case, or the field will notify OCLL of the high profile case likely to affect the members of Congress.¹⁶⁹ Knowing OCLL is responsible for funneling information to Congress, the next step is determining how OCLL gathers information, and how the field is supposed to assist.

When Congress submits a request for information to OCLL, the regulatory, and preferred, course of action in that situation is to provide a response. The regulation states "[s]pecial attention will be given to those inquiries in a compassionate or time-sensitive category such as: death, injury or sickness or other grave circumstances relating to service personnel or members of their families."¹⁷⁰ And, when the matter is of a sensitive nature, the response or initial notification to Congress will be expedited.¹⁷¹ In high profile cases, the facts and circumstances will probably not be fully developed by the time Congress wants a response.¹⁷² If that is the case, the unit may submit an interim report containing "as much information as is available at the time . . . and set a specific time for a final response."¹⁷³

In practice, when a congressional inquiry comes to the attention of OCLL, the OCLL representative will contact OTJAG or possibly the OSJA directly to request information. The OCLL representative will request an executive summary of the pertinent facts and then develop a product to provide to the relevant party. One effective technique in a recent high profile case was to submit an initial executive summary and update that summary periodically. As the III Corps SJA and the lead TC in the Hasan case stress, send the five "W's" to OCLL, OCPA, and OTJAG simultaneously, send it in a releasable fashion, and, if the initial information is wrong, correct it as soon as possible because the initial report will be widely circulated.¹⁷⁴

C. Trial Counsel Assistance Program

*The TCAP's mission is to provide assistance, resources, and support for the prosecution function throughout the Army and to serve as a source of resolution of problems encountered by trial counsel.*¹⁷⁵

As mentioned above, in light of the relative inexperience of TC, OSJAs may need to turn to outside resources to properly manage complex or high profile cases. The TCAP can supplement the resources on hand at an

¹⁶⁶ Taylor, *supra* note 5, at 360.

¹⁶⁷ U.S. DEP'T OF ARMY, REG. 1-20, LEGISLATIVE LIAISON para. 1-4a (20 Jan. 2004) [hereinafter AR 1-20].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* para. 1-4a(7); *see also id.* para. 6-1a (relating to requests from Congress, "[t]he Army Policy is to make information promptly available to Members, congressional committees and their staff."); *id.* para. 7-1 (relating to notifying Congress, "[t]he Army policy is to provide Members and congressional committees with timely information on significant developments involving Army policies, programs, operations, and developments.").

¹⁷⁰ *Id.* para. 6-3e.

¹⁷¹ *Id.* para. 6-3f.

¹⁷² *Id.* para. 6-3f (requiring an expedited report—presumably as fast as possible); *id.* para. 6-3i(2) (requiring suspense date of five working days after receipt); *id.* para. 6-3l(1-4) (timelines for telephone congressional inquiries range from two working days (five working days if overseas), the same day for "threatened suicide, abuse, violence, or threat to life," or shorter if OCLL needs it faster).

¹⁷³ *Id.* para. 6-3j.

¹⁷⁴ Mulligan Interview, *supra* note 85; Risch Interview, *supra* note 53.

¹⁷⁵ AR 27-10, *supra* note 97, para. 21-2.

OSJA through training, periodic publications, and technical assistance.¹⁷⁶

Staff judge advocates have capitalized on the benefits of TCAP in every recent high profile case.¹⁷⁷ For example, TCAP counsel assisted the I Corps OSJA with the 5-2 Striker Brigade Combat Team “kill team” cases and the case of *United States v. Davila*,¹⁷⁸ and III Corps availed itself of TCAP assistance in the Fort Hood shooting case.¹⁷⁹ While calling TCAP appears reflexive presently, there has been a stigma associated with requesting TCAP assistance throughout the years.¹⁸⁰ Colonel Mulligan, however, contends that at least since the cases of *United States v. Akbar*,¹⁸¹ and the Abu Graib¹⁸² cases, the reluctance to ask for help has diminished.¹⁸³ First, when Brigadier General (Retired) Dunn was serving as the XVIII Airborne Corps SJA, she requested assistance from TCAP to prosecute *United States v. Akbar*.¹⁸⁴ When Major General Tate was the III Corps SJA, he requested TCAP assistance to prosecute the Abu Graib cases.¹⁸⁵ Colonel Mulligan suggests the personalities and reputations of both SJAs dispelled the myth that asking for help was a sign of weakness, and, instead, highlighted the wisdom of asking for help when needed.¹⁸⁶ Asking for and receiving help did not prevent intense media scrutiny, but it did demonstrate the Army’s commitment to justice. By using this asset, the OSJA can identify and avoid issues that could cause the case to draw negative publicity.

¹⁷⁶ *Id.* paras. 21-4 to 21-5; see also *id.* para. 21-5b (“Counsel for TCAP are available for on-site assistance in unique or difficult cases. . . . The Chief, TCAP, and the requesting SJA will coordinate such assistance to include the specific involvement of TCAP counsel.”).

¹⁷⁷ E-mail from Lieutenant Colonel Jay Morse, Chief, Trial Counsel Assistance Program, Gov’t Appellate Div., U.S. Army Legal Serv. Agency, to author (Jan. 17, 2012, 2:53 PM EST) (As of the writing of the email all four action officers and the deputy at TCAP were detailed to ongoing courts-martial around the Army—clear evidence of both TCAPs value, and the field’s acknowledgment that asking for help is acceptable.) (on file with author).

¹⁷⁸ Hudson e-mail, *supra* note 91. See Duecy, *supra* note 57 (describing *United States v. Davila*); see also Ashton, *supra* note 57 (describing “kill team” cases).

¹⁷⁹ Mulligan Interview, *supra* note 85; Risch Interview, *supra* note 53.

¹⁸⁰ Mulligan Interview, *supra* note 85.

¹⁸¹ See, e.g., Neil A. Lewis, *A NATION AT WAR; Soldier Accused of 2 Murders with Grenade*, N.Y. TIMES, Apr. 5, 2003, <http://www.nytimes.com/2003/04/05/us/a-nation-at-war-soldier-accused-of-2-murders-with-grenade.html?ref=hasankakbar> (providing a story on the incident).

¹⁸² See, e.g., Seymour M. Hersh, *Torture At Abu Ghraib*, NEW YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact (providing a story on the Abu Ghraib incident).

¹⁸³ Mulligan Interview, *supra* note 85.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

D. United States Army Criminal Investigation Laboratory

Much like the JAG Corps has an organization dedicated to assisting TC in the field, the law enforcement community has a highly trained support system in the U.S. Army Criminal Investigation Laboratory (USACIL) waiting to assist agents and counsel.

The USACIL is the department under the USACIDC¹⁸⁷ responsible for “provid[ing] forensic laboratory assistance to U.S. Army investigative elements, other DoD investigative agencies, and Federal law enforcement agencies as appropriate.”¹⁸⁸ Chiefs of justice are likely familiar with USACIL in the realm of DNA testing, but USACIL operations are much broader in scope and its services can greatly assist units in the field.

As the organization responsible for servicing DoD law enforcement operations, the Forensic Analysis Division of USACIL created deployable crime scene teams to assist in particularly complicated cases.¹⁸⁹ These teams are able to perform sophisticated crime scene reconstruction, advise agents on taking forensic photographs, and advise on how to collect particular items for subsequent trace evidence examination.¹⁹⁰ USACIL is available around the clock to provide assistance to agents and counsel alike.¹⁹¹

As an example, in 2009, one of USACIL’s crime scene teams deployed to Iraq to preserve the combat stress clinic where five service members were killed.¹⁹² The TC, familiar with the capabilities of USACIL from a prior case, requested USACIL’s presence.¹⁹³ In turn, the field agents sent up a

¹⁸⁷ U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 2-1 (15 May 2009) (RAR, 6 Sept. 2011) [hereinafter AR 195-2].

¹⁸⁸ *Id.* para. 6-1.

¹⁸⁹ Telephone Interview with Mr. Mike Hill, Operations Chief, USACIL Forensic Analysis Div. (Jan. 6, 2012) [hereinafter Hill Interview] (Mr. Hill has over thirty years of law enforcement experience as an MP, CID Special Agent, and U.S. Army Criminal Investigation Laboratory (USACIL) employee. He has served as the Operations Chief at the Forensic Analysis Division since 2009.).

¹⁹⁰ *Id.* (The forensic examiners all have civilian education. Additionally, examiners at USACIL undergo a rigorous training program at USACIL before beginning casework because there is no institutional curriculum in most forensic examinations or forensic photography, for example.).

¹⁹¹ *Id.*

¹⁹² Professional Experiences, *supra* note 148.

¹⁹³ *Id.*

formal request for USACIL assistance.¹⁹⁴ Within days, USACIL deployed to Iraq and preserved the scene.¹⁹⁵

The USACIL is eager to assist, and can help both DC and TC analyze evidence, but COJs and senior defense counsel (SDC) cannot automatically expect agents to independently request assistance from specialized units such as the deployable crime scene teams. Nor should COJs or SDC expect their attorneys to know of the specialized assets available. As the justice manager, and the leader in these cases, the COJ should start asking those questions before the need arises.

The OSJA can consult four main sources to learn of USACIL capabilities. First, USACIL has a twenty-four hour phone line for fielding questions and consulting with law enforcement and counsel the field.¹⁹⁶ Second, CID special agents trained as Forensic Science Officers (FSO) are either located at the local CID unit or service every installation remotely.¹⁹⁷ These agents are trained to identify situations requiring more specialized casework and are required to coordinate with USACIL to obtain assistance.¹⁹⁸ Third, the TCAP and the Defense Counsel Assistance Program receive training at USACIL on USACIL capabilities.¹⁹⁹ Finally, whenever USACIL agents testify in court, they are instructed to make contact with the local CID office and offer training.²⁰⁰ In those situations, the TC or DC calling the USACIL examiner can request training as well.²⁰¹

¹⁹⁴ See AR 195-2, *supra* note 187, para. 6-5 (Once the OSJA identifies the need, the triggering mechanism to obtain support is simple—“[w]hen particular expertise is required to process crime scenes, the presence of laboratory examiners may be requested by USACIDC supervisors from the Director, USACIL.”).

¹⁹⁵ As of 30 November 2012, the case of *United States v. Russell* has not gone to trial. On 18 December 2011, all U.S. troops withdrew from Iraq. See, e.g., Tim Arango & Michael Schmidt, *Last Convoy of American Troops Leaves Iraq*, N.Y. TIMES, Dec. 18, 2011, <http://www.nytimes.com/2011/12/19/world/middleeast/last-convoy-of-american-troops-leaves-iraq.html?pagewanted=all>. In light of the logistical hurdles to enter Iraq, the 3D recreation of the crime scene could prove invaluable as demonstrative evidence. *Id.* Such a recreation also helps if trial counsel change out. Understanding the scene can help provide perspective to new counsel unfamiliar with the scene or facts. *Id.*

¹⁹⁶ Hill Interview, *supra* note 189.

¹⁹⁷ *Id.*; U.S. DEP’T OF ARMY, CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES para. 23-4d (22 Mar. 2010) [hereinafter CIDR 195-1].

¹⁹⁸ Hill Interview, *supra* note 189; see also CIDR 195-1, *supra* note 197 para. 23-4d (FSOs are responsible for, in part, “providing assistance to the crime scene processing team(s) . . . serv[ing] as the unit sex crimes expert . . . [r]eview[ing] investigative reports . . . to assure applicable forensic techniques are used . . . and [p]roved[ing] training to supported agents, SJA and installation Medical Treatment Facility personnel on forensic capabilities of CID, including USACIL.”).

¹⁹⁹ Hill Interview, *supra* note 189.

²⁰⁰ *Id.*

²⁰¹ *Id.*

E. Contracting Officer

The OSJA can expect defense requests for experts in many high profile cases. If done improperly, contracting for experts can have an adverse impact on the swift administration of justice. Also, if the high profile case has the potential to be referred as a capital case, a mitigation expert will be among the DC’s requests.²⁰² Therefore, understanding the contracting basics can help prepare for the requests in advance. Knowing the contracting procedures, contracting officials, and basic rules of contracting will help the COJ and TC explain to DC how the OSJA will process the request. By managing expectations with the DC, the OSJA builds a positive working relationship and can avoid unnecessary delay by obtaining all necessary information up front.

Understanding the convening authority cannot unilaterally contract for a particular expert is the most important point of contracting for experts.²⁰³ Even though the standard request goes from the DC through the OSJA to the convening authority for approval, the convening authority is merely acknowledging his agreement that the defense has met its burden under Rules for Courts-Martial (RCM) 703(d) for establishing a need for the expert.²⁰⁴ The rule indicates the convening authority is authorizing employment and fixing compensation,²⁰⁵ but his contracting officer will be creating the contract.²⁰⁶ That contracting process begins after the convening authority approves the expert request.

In general, contracting for services requires full and open competition.²⁰⁷ The Federal Acquisition Regulation (FAR), however, provides an exception for expert requests.²⁰⁸ Once the government agrees to a particular

²⁰² See generally MCM, *supra* note 67, R.C.M. 1004. See also *United States v. Kreutzer*, 61 M.J. 293, 305 (C.A.A.F. 2005) (“While the services of a mitigation specialist are commonly used in sentencing, in the appropriate case this expert assistance may be necessary to the defense on findings as well. As the Commentary to ABA Death Penalty Counsel Guideline 4.1 states, the mitigation specialist is an ‘indispensable member of the defense team throughout all capital proceedings.’”). Chiefs of Justice can ask local AUSAs and state prosecutors who they use as experts. From there the COJ can assess the services provided by those contacts, the costs of using those resources, and ultimately make an informed recommendation to the SJA and convening authority when the defense makes its request.

²⁰³ See FAR pt. 6.000 (2012) (stating that only warranted contracting officer’s can enter into contracts on behalf of the government) .

²⁰⁴ MCM, *supra* note 67.

²⁰⁵ *Id.* R.C.M. 703(d).

²⁰⁶ As soon as the government receives a defense request, someone from the OSJA must contact the contracting officer to start the process. There is no reason to wait for a signed approval from the convening authority to get the contracting office preparing the paperwork.

²⁰⁷ See FAR pt. 6.000 (Jan. 2012).

²⁰⁸ *Id.* pt. 6.302-3.

expert, the convening authority's contracting officer can enter into a contract with that expert.²⁰⁹

The unit's comptroller or G8²¹⁰ will be able to assist once the convening authority indicates his approval of the defense request. If not provided for in the initial request to the convening authority, the DC must provide specific details regarding the anticipated costs to the comptroller.²¹¹

Along with expert requests, high profile cases can require extensive travel and other logistical expenses which can quickly add up.²¹² With resource intensive cases, the OSJA will need to identify someone in the office who can research fiscal law issues and develop relationships with those personnel on the installation who can provide funding for whatever requirements arise.²¹³ The OSJA can save a great deal of time by identifying an action officer (and alternate) in the OSJA and requiring that action officer (and alternate) become, or at least find, the expert on fiscal issues before the high profile case arises.²¹⁴

V. Developing a Plan for High Profile Cases

Tactics always require judgment and adaptation to the unique circumstances of a specific situation. Techniques and procedures are established patterns that can be applied repeatedly with little or no

²⁰⁹ *Id.* pt. 6.302(a)(2)(iii) ("Full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order . . . [t]o acquire the services of an expert or neutral person for any current or anticipated litigation or dispute.").

²¹⁰ U.S. DEP'T OF ARMY, FIELD MANUAL 1-06, FINANCIAL MANAGEMENT OPERATIONS, at vii (4 Apr. 2011) ("The individual with singular responsibility for [financial management] at the theater Army, corps, and division level is the G-8, who consults with the Financial Management Center (FMC."); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS para. B-125 (18 Mar. 2011) [hereinafter FM 5-0] (The G-8 is also known as the Assistant Chief of Staff for Financial Management or Deputy Chief of Staff for Resource Management.).

²¹¹ For example, the expert will need to provide the amount of hours he or she expects to work, the hourly rate, and if that rate includes travel costs, lodging costs, and or meals. Another concern is going over budget. The expert and defense counsel must keep the government informed of anticipated budget shortfalls in order to allow time to get more money. Chiefs of Justice can remind defense counsel periodically to monitor the situation. Failure to do so can result in unnecessary delays.

²¹² Telephone Interview with Chief Warrant Officer Two Phyllis King, Legal Admin., Fort Hood, Tex. (Jan. 9, 2012) [hereinafter King Interview].

²¹³ *Id.* Chief Warrant Officer Two King has used funds from funds controlled by Garrison, funds controlled by the Chaplain and funds from higher headquarters. She credits her success in funding projects to the relationships she has developed at Fort Hood and her persistence in finding solutions.

²¹⁴ *Id.* Chief Warrant Officer Two King has no prior training in fiscal law and was able to learn enough to successfully accomplish her mission. This is an ideal task for the legal administrator to perform. The SJA should assess the legal administrator's ability to perform this mission early on and encourage training if the legal administrator is not already proficient.

*judgment in a variety of circumstances. Tactics, techniques, and procedures (TTP) provide the tactician with a set of tools to use in developing the solution to a tactical problem. The solution to any specific problem is a unique combination of these TTP or the creation of new ones based on a critical evaluation of the situation. The tactician determines his solution by a thorough mastery of doctrine and existing TTP, tempered and honed by experience gained through training and operations. He uses his creativity to develop solutions for which the enemy is neither prepared, nor able to cope.*²¹⁵

Treat high profile cases like any other military operation—develop TTPs. If the COJ knows what tools are at his disposal before a high profile case presents itself and knows how to use them (techniques and procedures), he can quickly employ those tools to the high profile case (tactical problem) rather than leaping into the fight with an ad hoc approach. The remainder of the article will suggest additional methods for addressing high profile cases using the resources mentioned above.

When setting the stage for his discussion on high profile cases, Professor Taylor argues that the practitioner should "begin with the presumption that the normal rules will prevail."²¹⁶ While this is sound advice, and a good starting point when considering the applicable rules and regulations, these cases are not "normal." The very fact the case has become high profile signifies something has taken the case beyond the routine. With a routine case, "normal" may mean preparing the SJA to brief the division commander. In a high profile case, "normal" may mean preparing TJAG to brief the Chief of Staff of the Army or a congressional committee. In a routine case, "normal" may mean calling the local CID office to photograph a crime scene before releasing it. In a high profile case, "normal" might mean fencing off the area for months.²¹⁷ The law does not change, nor do the regulations, but high profile cases incorporate additional laws, regulations, and resources.

A. Managing Expectations

No matter how the force makes contact, seizing the initiative is the overriding imperative. Prompt execution of battle

²¹⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 3-90, TACTICS para. 1-2 (4 July 2001) [hereinafter FM 3-90].

²¹⁶ Taylor, *supra* note 5, at 351.

²¹⁷ Hardison Interview, *supra* note 145 (The CID has no intention of releasing the crime scene at Fort Hood, Texas, where Major Hasan allegedly killed and wounded several individuals.).

*drills at platoon level and below, and standard actions on contact for larger units can give that initiative to the friendly force.*²¹⁸

The first objective for the COJ or the SJA is to ensure commanders and leaders within the entire organization understand that military justice operations are no different than movement to contact in the infantry world. The infantryman's mission is "to close with the enemy by means of fire and maneuver to defeat or capture him, or to repel his assault by fire, close combat, and counterattack."²¹⁹ The JA's mission is to provide "proactive legal support on all issues affecting the Army and the joint force, and deliver[] quality legal services to Soldiers, retirees, and their families."²²⁰ With respect to military justice, "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."²²¹

While the JAs mission is unique, there is no reason why JAs cannot plan and train for high profile cases much like that infantryman plans and trains for movement to contact. The challenge is making sure the commander is just as prepared for mobilizing assets for the high profile case as he is with sending a unit on patrol. Servicing JAs can assist in giving the initiative to the commander by explaining the process in advance of contact.

High profile cases generally carry large price tags and consume large quantities of time from nearly every staff section. The SJA can mentally prepare the commander for the costs in advance and ascertain where the commander is prepared to assume risk.²²²

In addition to financial and temporal costs, it is possible the commander, through his actions, may lose his ability to serve as a court-martial convening authority altogether. The demands of a commander to take care of his troops and serve as the face of the organization could lead to arguments that the convening authority is predisposed to a particular

outcome and therefore incapable of serving as a convening authority.²²³ One approach to mitigate this cost may be to encourage the commander to put the chief of staff or a deputy commander in charge of meetings and planning sessions pertaining to high profile cases to create some level of separation between the case and the commander until the case is at the right stage for the commander to make a recommendation as to disposition.²²⁴ Ultimately, this cost is a personal choice for the commander to make, but the SJA can help the commander make an educated and reasoned decision if done in advance of a high profile case.²²⁵

By managing expectations of commanders and their staffs and by preparing them for the requirements and pitfalls in high profile cases, the OSJA can spearhead the development of an effective plan for managing high profile cases with command support and involvement. That plan will have a mechanism for synchronizing the staff and for reaching out for additional assistance when necessary.

B. Synchronizing the Staff to Effectively Manage High Profile Cases

In the wake of draw downs and redeployments, the defining moments for many commanders will likely shift from prowess in combat to the ability to preserve good order and discipline at posts, camps, and stations while training for future operations. How the commander manages a high profile case—not necessarily the outcome in court—may make or break that commander's career. Hence, the OSJA must get the command and staff prepared for managing this fight.

1. Leader Development Program

First, servicing JAs should familiarize the command and staff with the concept of high profile cases through the commander's scheduled leader development programs (LDP).²²⁶ With a captive audience, the SJA can have the COJ provide a detailed explanation of a recent high profile

²¹⁸ FM 3-90, *supra* note 215, para. 4-3 (internal citation omitted).

²¹⁹ U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.8, THE INFANTRY RIFLE SQUAD AND PLATOON para. 1-1 (28 Mar. 2007).

²²⁰ U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 1-1 (15 Apr. 2009).

²²¹ MCM, *supra* note 67, pt. I, ¶ 1.

²²² U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMED FORCES para. C-26 (Aug. 11, 2003) [hereinafter FM 6-0] ("Commanders always retain the ultimate responsibility for final decisions. Staff officers contribute to achieving the commander's intent by fulfilling their functional responsibilities within the authority the commander delegates to them. Effective staff officers provide commanders with correct and timely relevant information (RI) and well-analyzed recommendations.")

²²³ Risch Interview, *supra* note 53 (The General Court-martial Convening Authority (GCMCA) at the time of the Fort Hood shooting addressed the press almost immediately after the shooting. Had he remained the GCMCA at the time of referral, defense counsel may have challenged his impartiality. Discussing this possibility with convening authorities before an event can help the convening authority determine possible courses of action in advance.)

²²⁴ McKittrick e-mail, *supra* note 52.

²²⁵ The commander must be particularly mindful of comments made by leaders in the unit. While commanders must always exercise good judgment when speaking about pending legal matters, in high profile cases the pressure to make statements and the media's ability to shape statements can have negative consequences on the outcome of the trial. This applies to commanders as well as deputy commanders and sergeants major. All will have audiences and each can create unlawful command issues if not careful.

²²⁶ McKittrick e-mail, *supra* note 52.

case and walk the staff through their roles. From the PAO interacting with the media, the chaplain providing comfort to grieving victims, or the command surgeon assisting in coordinating medical evaluations for the subject, this is an opportunity to educate the staff on the magnitude of high profile cases.²²⁷ These classes will also provide the sponsor of the class (commanding general, chief of staff, SJA) an opportunity to emphasize commander's intent with respect to high profile cases.

2. Training Exercises and Battle Drills

More operational than LDPs, the SJA, chief of operational law, or the COJ can coordinate with the operations cell to develop scenarios suitable for training the subordinate commands and staff sections on high profile case management. Servicing JAs can easily develop high profile case scenarios and practice managing them just like any other training scenario.²²⁸ Exercise dependent, the scenarios could touch one or all of the staff sections. By incorporating high profile case scenarios into the training, the staff will begin to recognize the importance of advanced planning versus reaction. This exercise will also help build relationships between the OSJA and other staff sections and help the OSJA identify and correct deficiencies in staff coordination. Much like the LDP, preparing scenarios for training exercises will force the OSJA to learn the rules and understand how the staff sections work together. From this training, the staff can develop battle drills.²²⁹

3. Incorporating Staff into Routine Cases

Most courts-martial will not make the front page or require outside assistance, but the staff sections can still learn by observing the process in routine cases. By requesting the PAO write an article for the post newspaper about a routine case, the OSJA can help train the PAO on finer points of military justice before that PAO receives media inquiries for a complex or high profile case requiring

²²⁷ This will also require the SJA and his or her office to learn how each section fits into the process before teaching the staff.

²²⁸ McKittrick e-mail, *supra* note 52 (U.S. Forces Korea implements "Rocks Drills" to practice responding to a variety of scenarios.). See, e.g., Mathew Cole, Luis Martinez & Mark Schone, *Army Says Parents of Soldier Never Called Inspector General to Warn of Thrill Kills*, ABCNEWS.COM (Oct. 1, 2010), <http://abcnews.go.com/Blotter/army-parents-soldier-called-inspector-general-warn-thrill/story?id=11775374> (illustrating consequences of not planning). In this case, a non-commissioned officer (NCO) in the Joint Base Lewis-McChord command center spoke with a Soldier's parents about possible criminal activity—specifically, murders—in Afghanistan, but the NCO on duty did not raise the matter to a supervisor or higher level. Units can implement training to ensure everyone manning the phones, or standing watch, knows when to report matters and how to respond.

²²⁹ FM 5-0, *supra* note 210, para. 3-38 (stating, "[e]ach CP requires procedures to react to a variety of situations."); see also *id.* para A-38 (Those procedures "should be defined in its [standard operating procedures] and rehearsed during training and operations.").

immediate responses. Law enforcement could likewise observe the escorts and bailiff at a court-martial to better understand how to handle a potentially violent accused or how to manage crowds. By setting the conditions for training, the OSJA can avoid missteps down the road and slowly educate the staff for high profile cases.

Including high profile cases into the commander's critical information requirements (CCIRs)²³⁰ is another way to keep the staff engaged. By creating a CCIR, the commander alerts the staff and subordinates alike to watch out for such issues. Ultimately, a high profile case CCIR can help the staff identify issues early on and work to prevent negative press by resolving the matter with a collaborative effort. The COJ should also inform the SJA of any cases with high profile potential.²³¹

At the same time the SJA is focusing on getting staff sections familiar with military justice operations and inserting training opportunities into already-scheduled command training, the SJA must equip the OSJA for success.

C. Managing the OSJA During High Profile Cases

The SJA should sit down with her leadership team and branch chiefs to discuss internal OSJA expectations in these cases.²³² High profile cases will draw intense media scrutiny on the command, and the SJA will undoubtedly have more missions to perform for the commander than time to accomplish those tasks. In high profile cases, there are certain responsibilities the SJA cannot delegate because the commander will expect the SJA to directly participate.²³³ When the SJA is pulled from the office, the DSJA must pick up the slack and assume the role of SJA along with carrying out the routine deputy tasks. The DSJA must know what is going on at all times because high profile cases can spring up at any time.²³⁴ In addition to the DSJA assuming the SJA role, the entire office will have to prepare for high profile cases. The following are examples of where the OSJA can focus attention when thinking through how to prepare for high profile cases. The enclosed appendices provide comprehensive checklists to guide the OSJA.

²³⁰ FM 6-0, *supra* note 222, para. B-68 ("Commanders designate [commander's critical information requirements] to let their staffs and subordinates know what information they deem necessary for decision making. . . . In all cases, the fewer the CCIR, the better the staff can focus its efforts and allocate scarce resources."). It is also important to make sure the right staff members are on the CCIR distribution list—the SJA, for example, are on the distribution list.

²³¹ Risch Interview, *supra* note 53.

²³² *Id.*

²³³ McKittrick e-mail, *supra* note 52.

²³⁴ *Id.*

1. Litigation Cells

There is no disputing the value of providing counsel with time to focus solely on one case.²³⁵ How to accomplish that with finite resources and an active caseload has been a matter largely left to the discretion of the SJA.²³⁶ While there is no regulatory or policy guidance on how to build litigation cells or trial teams for high profile or complex cases, many OSJAs have developed teams on an ad hoc basis.²³⁷ Some SJAs emphasize the importance of keeping the COJ involved in the decision making process but also advocate bringing in specialized skill when necessary to augment local talent.²³⁸

The severity or technical complexity of the case will shape the ultimate makeup of a litigation cell on both the government and defense side. The personnel assigned to the OSJA will also change based on the normal assignments cycle, thus influencing the litigation cell make-up or requirements. Discussing the model in general and thinking through how the OSJA could create a litigation cell will nonetheless assist the OSJA in preparing for specific high profile cases.²³⁹ For example, if the OSJA identifies a weakness in a certain area of criminal law, it can look to the local Reserve component to see if there is a JA with experience in that particular area. That thought process will naturally lead to questions about how to identify an asset and how to mobilize that asset. The next step is answering those questions in advance of the need to avoid delay when the OSJA needs the resources.

High profile cases will consume the vast majority of the OSJA's resources and personnel. That does not mean, however, everything else can be placed on hold. The OSJA can prepare for the worst case scenario—full OSJA involvement—and also lesser degrees of involvement by predetermining which personnel will handle the case and who will handle day to day operations. Once the leadership team identifies the personnel capable of filling critical roles, it can then assess its weaknesses and better anticipate what outside assistance, if any, it will require. The OSJA can then develop a plan on how to fill those gaps in capabilities. Again, the key is to identify the processes to supplement organic talent ahead of time.

²³⁵ Hudson e-mail, *supra* note 91.

²³⁶ Pede Interview, *supra* note 160.

²³⁷ *Id.* The Office of the Judge Advocate General (OTJAG) CLD is in the process of developing a recommendation for The Judge Advocate General to consider regarding capital litigation in general. That proposal will include recommendations on staffing trial and defense teams and the mechanism to obtain support.

²³⁸ McKittrick e-mail, *supra* note 52; Hudson e-mail, *supra* note 91.

²³⁹ A possible model, based on recent cases, includes a senior ranking, experienced counsel, a second senior and experienced counsel, a third counsel capable of writing, a legal administrator, and dedicated paralegal support. The third attorney can also assist with press matters and administrative tasks.

2. Legal Reviews and Collateral Investigations

The OSJA's Administrative Law Division (ALD) will have a surge in requirements during high profile cases. From performing magistrate reviews of search authorizations to writing legal reviews for AR 15-6 investigations, and potentially serving as part of investigative teams, the ALD must anticipate the increased workload. One unforeseen complexity following the Fort Hood shooting was the receipt of donations from concerned citizens.²⁴⁰ In anticipation of a multiple casualty case like that at Fort Hood, the ALD should think through how to handle overwhelming generosity from the community in the form of gifts and the required ethics opinions.²⁴¹ With the SJA focused on assisting the commander, the DJSA focused on managing the office and personnel, and the COJ focused on the criminal aspects of the case, the chief of administrative law will need to have a plan in place to handle a surge in workload.

In high profile cases, the OSJA can expect collateral investigations. Apart from the criminal investigation, the Army and Congress will be looking to investigate what went wrong and what must be corrected to avoid a repeat occurrence. The media and public will also want to know. Based on the magnitude of the situation, the scope of those investigations will frequently expand beyond the local command level to higher commands or outside agencies.²⁴² In some cases, JAs will be called upon to assist to serve as members of the investigation team.²⁴³ The OSJA should also have a plan for managing the investigations or, at least, for preserving the criminal investigation.

In the Fort Hood shooting case, investigators coordinated investigative activity through the SJA.²⁴⁴ In the collateral investigation that took place after the shootings at

²⁴⁰ Risch Interview, *supra* note 53.

²⁴¹ *Id.* (Tracking and managing gifts can consume the administrative law division and ultimately if not properly controlled, can lead to mismanagement of the gifts. The SJA can recommend methods to handle potential gifts—for example, identifying a reputable private organization outside of the command to handle all donations.)

²⁴² *See, e.g.,* U.S. S. COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, A TICKING TIME BOMB COUNTERTERRORISM LESSONS LEARNED FROM THE U.S. GOVERNMENT'S FAILURE TO PREVENT THE FORT HOOD ATTACK 15 (Feb. 3, 2011). The purpose of the investigation was to "assess the information that the U.S. Government possessed prior to the attack and the actions that it took or failed to take in response to that information" and "to identify steps necessary to protect the United States against future acts of terrorism by homegrown violent Islamist extremists" *Id.*

²⁴³ In 2009, a general officer conducted a AR 15-6 investigation into the security of combat stress clinics and the adequacy of the mental health services in Iraq after Sergeant Russell allegedly killed five service members inside of a combat stress clinic. A JA was appointed to serve as a member of the investigative team.

²⁴⁴ Risch Interview, *supra* note 53 (emphasizing the commander must issue the guidance directly to the investigating officer on how the investigation is conducted).

the combat stress clinic in Baghdad, Iraq, the JA detailed to the investigative team coordinated all witness interviews through the COJ.²⁴⁵ Whatever safeguards the OSJA implements, the key is to obtain command buy in and command support to preserve the criminal investigation and potential court-martial.²⁴⁶

In preparation for the likely administrative investigation, the OSJA can consider how the ALD will handle advisory responsibilities, who in the OSJA will serve as the legal advisor, and who in the OSJA is a likely candidate to serve on the investigative team if necessary. The OSJA can also discuss with the higher command's OSJA about support in the event the local OSJA is unable to provide assistance.

3. Conflicts Checks

Upon identification of the subject or subjects in a high profile case, the entire OSJA must run a conflict of interest check.²⁴⁷ High profile cases can quickly become a total office mission. Accordingly, the SJA or DSJA must determine who can and who cannot take part. If any members of the OSJA do have a conflict of interest, the SJA can detail that JA to focus on issues outside of the high profile case.²⁴⁸ While preparing for high profile cases, the COJ can check to make sure TC are doing the same conflicts checks in their day-to-day operations.

The conflicts check cannot stop on the government's side. It is crucial, particularly when there are multiple accused, that the COJ or SJA contact the SDC or regional defense counsel (RDC) with an up front and honest assessment of the anticipated level of disposition for each accused so that the defense can plan accordingly with the limited resources available.²⁴⁹ Neglecting to provide this

information could result in the most experienced DC on the installation being detailed to the wrong case.²⁵⁰ Such neglect will delay the case while the defense bar finds another appropriately qualified counsel.

Each high profile case will present different requirements, but developing a general plan of attack in advance will provide the OSJA with a baseline to build from.

VI. Conclusion

When an infantry platoon leader reacted to contact, he was able to rely on established doctrine and the techniques and procedures developed out of that doctrine to determine the best way to approach the situation. He did not have to retreat from the enemy to learn what the doctrinal answer was and then spend time evaluating how that would work in the current situation. To do so would have resulted in mission failure. He was successful because he had baseline knowledge of the resources available and how they worked together before entering the fight.

Unlike the infantryman, however, the Army does not have a manual or single point of reference for training and managing high profile cases upon which the OSJA and command can refer to and adapt to the current situation. Each case is treated as one of first impression. That approach leads to inconsistency across the Army and subsequent criticism from the press because it looks like the Army does not have a plan. Although the Army and the JAG Corps should create a regulation covering the practice of high profile cases, there are steps that commands and OSJAs can take in the interim to prepare a consistent installation level plan thereby preventing an ad hoc approach for at least that OSJA.

Each OSJA should begin training with high profile cases in mind. Through this training, the OSJA can begin dissecting past high profile cases, thinking about how the OSJA would address particular situations, and educating the command and staff on its roles and responsibilities. From there, the OSJA can develop the unit and installation plan by consolidating and synthesizing the different authorities and then training with the same intensity as the infantryman does for his battled drills. Although this will not completely eliminate the criticisms or the ad hoc approach currently in practice around the JAG Corps, it will start generating consistency across OSJAs and provide a foundation upon which military justice practitioners can build and share within the Corps.

²⁴⁵ Professional Experiences, *supra* note 148.

²⁴⁶ See U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 1-5d (2 Oct. 2006) [hereinafter AR 15-6] ("Appointing authorities, investigating officers, and boards of officers will ensure that procedures under this regulation do not hinder or interfere with a concurrent investigation directed by higher headquarters, a counterintelligence investigation or an investigation being conducted by a criminal investigative [unit].").

²⁴⁷ Risch Interview, *supra* note 53 (Prior to the Fort Hood shooting, the accused Soldier, as a mental health care provider and field grade officer, possibly sought legal guidance on a duty related, non-personal matter. Although this would not form an attorney-client relationship, in an abundance of caution, the SJA screened the DSJA from taking any part in the case.). See also AR 27-26, *supra* note 38, r. 1.7.

²⁴⁸ Risch Interview, *supra* note 53.

²⁴⁹ Cremin Interview, *supra* note 90. This is not a requirement under any rule, but the government can facilitate a smoother process by having a frank discussion with the senior defense counsel and/or regional defense counsel to give the defense a better idea of how to detail counsel. It is up to the SDC and/or RDC to make those detailing decisions, but early communication can avoid delays later in the process.

²⁵⁰ *Id.*

Appendix A

High Profile Case Checklist—Advanced Planning

OSJA MANAGEMENT

- Identify and develop plan to coordinate with higher
 - OCLL—Identify POC and preferred method of communication
 - OTJAG—Identify POC and preferred method of communication
 - Government Appellate Division/TCAP—Contact to schedule training at OSJA and build relationship
 - Higher GCMCA—Determine how much involvement higher SJA wants/needs
 - Identify who is going to make required products and communications
- Litigation team determination
 - Identify strong and weak counsel
 - Identify where OSJA is weak (financial crimes/sex assault/capital) and find support
 - Identify outside assets and means to incorporate into case to augment strengths
 - Identify process to obtain assets (mobilize reservist/TCAP request)
- VWL/casualty notification
 - Assess local VWL program and improve (AR 27-10, Ch. 17)
 - Develop plan to supplement local capacity in VWL program
 - Memorandum of understanding between federal, state, or local services
 - Annual/periodic training for VWLs and for installation support personnel
 - Servicing JAs should also identify and train unit victim advocates and ensure the victim advocates have the VWL contact information (AR 600-20, Chapter 8)
 - Ensure VWL engaged with all available resources and maintains working relationship (office calls, joint training, periodic e-mails)
- Administrative law/ethics considerations
 - Conflicts of interest check
 - Press liaison or POC for PAO training/guidance
 - Administrative investigation team member
 - Develop knowledge base on gifts rules

STAFF COORDINATION

- Explain complexities of high profile cases with commander(s) and chief(s) of staff to get buy in for training, rehearsals, cooperation (CDR, CoS, XO)
 - Schedule LDP for managing high profile cases (for command and for OSJA)
 - Schedule LDP for PAO/media relations (for command and for OSJA)
- Develop situational training exercise scenarios (company level up) (S/G3, staff)
 - Identify staff section roles and capabilities
 - Incorporate staff into process to test subordinate commands
- Emphasize staff integration with BJA and TC—push TC to brigades whenever possible (CDR, CoS, XO, BJA, TC)
 - Schedule office call with comptroller/contracting officer to discuss procedures for contracting for experts, witnesses, services—legal administrator can request training (comptroller)
- Develop fact sheets for the PAO and update as needed (PAO)
 - Acceptable disclosures (what can and what should be disclosed)
 - Basics of military justice
 - Common terms (with explanations)
 - Common questions (with common answers)
- Establish TTPs for press releases (PAO)
 - Who writes/reviews in OSJA
 - Who is release authority in OSJA
 - Identify POC in PAO
- Establish plan, with military judge (MJ)'s approval, for court room accessibility during public hearings (MJ, PAO, clerk of court)
 - Courtroom or overflow room
 - Electronic recording devices

- Audio or visual recording devices
- Internet access
- Live interviews
- Classified information plan for closing courtroom
- Develop court room security plan in advance (PMO, Directorate of Emergency Services, S/G2, S/G3, Comptroller, MJ)
 - Security
 - Identification requirements/badges
 - Storage for prohibited items
 - Metal detectors
 - Media parking
 - Door access
- Consult with unit chaplain regarding available spiritual services available and support plan (Chaplain Cell)
- Consult with unit surgeon regarding mental health support available (Surgeon Cell)
- Discuss with unit transportation/escort plan for accused (PMO, S/G3, S/G4, Comptroller, unit)

COORDINATION WITH OUTSIDE AGENCIES

- Identify and meet with installation POCs
 - Casualty Assistance
 - Casualty Liaison Officer (CID)
 - Family Advocacy Program
 - Behavioral Health (Command Surgeon can facilitate)
 - Provost Marshall Office
 - CID Office
 - Director of Emergency Services (DES)
- Identify and Meet with local law enforcement POCs
 - Local police department(s)
 - Local and state prosecutor(s)
 - Local Assistant United States Attorney(s)
 - Local FBI Office(s)
- Assess medical treatment facility capabilities and develop a plan to conduct R.C.M. 706 boards on site or elsewhere
 - Can local assets comply with R.C.M. 706
 - Where are nearest assets
 - If assets conflicted, who approves alternates
 - Who does OSJA call
 - If no health care providers able to provide assistance on installation, will assistance come to the installation or will unit send Soldier to location
- Request CID brief TCs on capabilities
 - Forensic Science Officer
 - Special agent in charge/CLO duties
 - Computer Crimes Investigative Unit (CCIU) capabilities
 - USACIL (when available) capabilities
- Request TCAP training on high profile cases
 - TCAP will have recent cases useful for developing a plan around
 - TCAP can provide any useful lessons learned
- Miscellaneous
 - If capital, can post support trial
 - Nearest confinement facility if not co-located
 - Use of MJ as Article 32, UCMJ IO
 - Speak with local MJ on process
 - Prepare request memo

Appendix B

High Profile Case Checklist—Top 10 Immediate Responses

- Take accountability of OSJA personnel and report higher
- Send Situation Report through higher OSJA, OTJAG XO, OCLL and OTJAG CLD with 5 Ws in releasable format. Update as needed
 - Contact responding law enforcement agency and deploy STC or COJ to crime scene to assist if safe and practicable
 - Remind CG and all leaders of importance of maintaining impartiality and composure
 - Start running conflicts check in OSJA
 - Notify Trial Defense Service—SDC, RDC or Chief, TDS (if capital) for conflicts check and detailing decision
 - Assess situation and determine best time to hold OSJA meeting to discuss implementation of established office management plan
 - Get VWL engaged and reaching out to outside agencies as appropriate
 - Have identified TC begin preparing the case/charge sheet/other documents
 - Contact PAO to assist with responses to query

Appendix C

High Profile Cases—Deployed

In addition to those tasks identified in Appendices A and B

- Assess what can practically be accomplished in theater
 - Evidence collection/witness interviews
 - Crime scene reconstruction
 - Necessary evaluations (physical or mental)
 - Any preliminary hearings
 - Trial
- For serious crimes—where is theater confinement facility
 - Who can escort to and from
 - What documents are required/who generates
 - Who will provide required screenings/documents
- What is required for air movement—who really approves
- Who is taking lead for orders to transport—MP planner, S3, unit
- Where is nearest mental health care provider (HCP)
 - Does HCP have necessary equipment
 - Can HCP be transported in
 - Does accused need to be transported to facility
- VWLs
 - Reach back capabilities
 - Enough
 - Capable
 - Availability of outside assistance
- Trying case in theater (cost benefit analysis)
 - Who in OSJA is capable of trying case in theater
 - How to preserve the crime scene in light of current situation on ground
 - CID
 - USACIL
 - How to get USACIL on scene
 - Where is service member going if/when redeployed from theater
 - With organic unit
 - With a different unit
 - May depend on host nation law from units installation
 - DC
 - Capital qualified DC
 - Location of counsel
 - IMC
 - Location of IMC counsel
 - Processing IMC request
 - Deploying IMC counsel
 - Civilian counsel
 - Visa requirements
 - Military air capabilities
 - Security clearance
- Where are the CAOs and how to locate and begin coordination
 - Does case involve multi-service victims
 - Which agency is managing CAO duties for other services
 - Who is POC for those other services
- Contact combatant command, service component command, and higher with SITREP