ON THE MANNING ART. 32, COURT SECRECY & NAT. SEC. CASES

I somehow stumbled into an article for The Nation by Rainey Reitman entitled *Access Blocked to Bradley Manning's Hearing*. To make a long story short, in a Twitter exchange today with Ms. Reitman and Kevin Gosztola of Firedoglake (who has done yeoman's work covering the Manning hearing), I questioned some of the statements and inferences made in Ms. Reitman's report. She challenged me to write on the subject, so here I am.

First, Ms. Reitman glibly offered to let me use her work as "foundation" to work off of. Quite frankly, not only was my point not originally to particularly go further; my point, in fact, was that *her foundation* was deeply and materially flawed.

Reitman starts off with this statement:

> The WikiLeaks saga is centered on issues of government transparency and accountability, but the public is being strategically denied access to the Manning hearing, one of the most important court cases in our lifetime.

While the "WikiLeaks saga" is indeed centered on transparency and accountability for many of us, that simply is not the case in regard to the US Military prosecution of Pvt. Bradley Manning. The second you make that statement about the UCMJ criminal prosecution of Manning, you have stepped off the tracks of reality and credibility in court reportage and analysis. The

scope of Manning's Article 32 hearing was/is were the crimes detailed in the charging document committed and is there reason to believe Manning committed them. Additionally, in an Article 32 hearing, distinct from a civilian preliminary hearing, there is limited opportunity for personal mitigating information to be adduced in order to argue for the Investigating Officer to recommend non-judicial punishment as opposed to court martial trial. That is it. There is no concern or consideration of "transparency and accountability", within the ambit suggested by Ms. Reitman, in the least.

Calling the Manning Article 32 hearing "one of the most important court cases in our lifetime" is far beyond hyperbole. First off, it is, for all the breathless hype, a relatively straight forward probable cause determination legally and, to the particular military court jurisdiction it is proceeding under, it is nothing more than that. The burden of proof is light, and the issues narrow and confined to that which is described above. The grand hopes, dreams and principles of the Manning and WikiLeaks acolytes simply do not fit into this equation no matter how much they may want them to. Frankly, it would be a great thing to get those issues aired in this country; but this military UCMJ proceeding is not, and will not be, the forum where that happens.

Moving on, Reitman raises the specter of "the death penalty" for Manning. While the death penalty remains a technical possibility under one of the charges, the prosecution has repeatedly stated it will not be sought and, after all the statements on the record in that regard, there is simply no reason to embellish otherwise. Reitman next states:

> This case will show much about the United States's tolerance for whistleblowers who show the country in an unflattering light.

No, it most certainly will not. In fact, the

Manning criminal military prosecution has nothing whatsoever to do with “whistleblowers”. Despite the loose and wild eyed use of the term “whistleblower” in popular culture, not to mention by supporters of Bradley Manning, the concept and protection simply do not legally apply to Manning, nor to most any of the situations it is commonly invoked in regards to. Despite all the glittering generality with which the term is bandied about, a whistleblower defense does not particularly exist at common law; but, rather, is a statutory justification defense which must be affirmatively pled. In the scope of military jurisdiction, the sole availability of the defense is set out in The Military Whistleblower Protection Act, codified in 10 USC 1034, which provides, *inter alia*:

> (a) Restricting Communications With Members of Congress and Inspector General Prohibited.—
> (1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.
> (2) Paragraph (1) does not apply to a communication that is unlawful.
> (b) Prohibition of Retaliatory Personnel Actions.—
> (1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing—
> (A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or
> (B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to—
> (i) a Member of Congress;
> (ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;

> (iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;
> (iv) any person or organization in the chain of command; or
> (v) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.

Bradley Manning, as admirable as we may find his purported acts, did not release to and/or through a member of Congress, Inspector General, nor any other permitted/authorized person in his chain of command or otherwise. Not even close. Bandying about the term "whistleblower" in terms of Bradley Manning's UCMJ prosecution is simply disingenuous. A whistleblower defense has neither been affirmatively pled by Manning's defense, nor is it even remotely available.

Next, there is a complaint by Ms. Reitman that there is "No Transcript Available". Yeah, welcome to the world of military law; this is not unusual. In fact, the answer of maybe in "three to four months" she got from some authority at Ft. Meade is actually responsive and impressive considering she was neither a party nor counsel of record. This is simply not unique to Manning, nor particularly nefarious in the least; it is the way it is in this jurisdiction. Same goes for "Computers and Recording Devices Banned", which she also complained of.

Buck up sister, and understand whose sandbox you are playing in. You are subject to the rules, procedures and whims of the court in any given jurisdiction; and that is the way it has long been in courts martial proceedings under the UCMJ. To be honest, it is often not much, if any, better in many Article III Federal courts. Transcripts are the property of the court and court reporter unless and until filed on the docket; you can get one, but you pay a steep price for that pleasure. Further, although it

has gotten much better since Marcy Wheeler and Jane Hamsher opened up the can of liveblogging worms via the Scooter Libby trial, it is still hit and miss as to whether federal court houses and rooms across the country permit computers and "recording devices" at all.

Ms. Reitman also complains that limited portions of Mr. Manning's Article 32 proceeding were conducted in a closed court, with the public and press excluded. It is hard to discern whether she simply does not understand court process in relation to classified and protected information, or if it simply offends her rose colored view of how things would be in an utopian world. The fact, however, is that the federal government takes classified information seriously in court proceedings, and always have. And courts do too; in fact, the one place you *never* hear about leaks coming from are federal and military courts. That is the single best argument for limiting the use of the "state secrets privilege" in federal civil courts and the CIPA process in federal criminal courts.

In fact, without the CIPA process, it would be nearly impossible to prosecute breaches in government security and classified information that truly are legitimate and in the interest of national security; otherwise, every defendant would escape via a graymail defense. Yes, legitimate instances of appropriate posecutions do indeed exist. And, yes, the CIPA process is indeed embedded into UCMJ law via Military Rule of Evidence 505. Notably, the full panoply of Rule 505 CIPA like procedures do not vest until the trial process, after the case is referred from an Article 32 hearing; however, the direct provision for the closed proceedings utilized in Pvt. Manning's Article 32 are so promulgated in Rule 505 (C)(3):

> Article 32 proceedings, like courts-martial, are open to the public. This means that Article 32 investigations may only be closed in accordance with the procedures discussed in the next

> chapter. Under M.R.E. 505, the assertion of the classified information privilege may not occur at the Article 32 stage of the court-martial proceeding. Instead, under M.R.E. 505(d)(5), the convening authority may chose to withhold disclosure of the information, if disclosure would cause identifiable damage to the national security. Where the information is withheld, the investigating officer does not hold a hearing under M.R.E. 505(i) to determine the classified information's relevance and necessity to an element of an offense. Those provisions all apply post- referral, in front of the military judge. If the convening authority provided classified information to the defense in discovery, it is entirely possible that classified information will be introduced during the Article 32 proceeding, by one of the parties or through witness testimony, without substantive discussion of their contents. This is most commonly referred to as the "silent witness" rule. Alternatively, the parties may decide to introduce the evidence in a closed session. When that happens, the IO will need to conduct a closure hearing under R.C.M. 806(b)(2), as discussed in Chapter Ten.

Well, Ms. Reitman, that is exactly what was done by the Convening Authority and Investigating Officer in Pvt. Manning's article 32 process. Whether you approve or not is irrelevant; that is the well established and statutory procedure. It is what is mandated Ms. Reitman, not some nefarious conspiracy by Big Brother to deny you.

The rest of Ms. Reitman's gripes are ticky tack, as opposed to substantive, although I would like to address briefly her beef regarding the security procedures at Ft. Meade. This simply borders on the absurd. Ft. Meade is not just a

United States Army military installation, but is the headquarters of United States Cyber Command, the National Security Agency, and the Defense Courier Service. Yes, they have strict security for access and traverse of *any* portion of the installation. It is unclear why Ms. Reitman finds this notable, much less shocking.

One last thing that is more of a pet peeve of mine than direct point of Ms. Reitman's, although she prominently mentions him. Daniel Ellsberg. Both Ellsberg himself, and the legion of Bradley Manning supporters, have compared Manning to Ellsberg. Mr. Ellsberg is a mythic figure to the anti-war and progressive left, and while it is easy to see how many would have that admiration for his freeing of the Pentagon Papers, in many ways it is a false paradigm to compare him with Manning. While I think they are fairly distinguishable in detail, I will leave that for another day. What they ought to keep in mind is that Daniel Ellsberg was guilty of the criminal charges filed against him and, but for the fortuitous intervention of inexplicably egregious prosecutorial misconduct causing dismissal, Ellsberg would have been convicted in 1973 and would quite likely just recently have gotten out of federal prison. Ellsberg himself admits as much. Manning supporters would do well to keep this in mind for perspective.

There is an abundance of misinformation and hyperbole regarding Pvt. Bradley Manning and WikiLeaks coursing through the internet ether already, it does neither the public, nor Mr. Manning's enthusiastic supporters, any favor or service for Ms. Reitman to add yet more.