

HONORABLE MILITARY WHISTLEBLOWER: WHY DANIEL DAVIS IS AND BRADLEY MANNING IS NOT

One of the hottest, and most important, stories of the last week has been that broken by Scott Shane in the New York Times, on February 5th, of Army Lt. Col. Daniel L. Davis' stunning report on the unmitigated duplicity and disaster that characterizes the American war in Afghanistan. It painted the story of a man, Davis, committed to his country, to his service and to the truth but internally tortured by the futility and waste he saw in Afghanistan, and the deception of the American public and their Congressional representatives by the Pentagon and White House.

And then, late last month, Colonel Davis, 48, began an unusual one-man campaign of military truth-telling. He wrote two reports, one unclassified and the other classified, summarizing his observations on the candor gap with respect to Afghanistan. He briefed four members of Congress and a dozen staff members, spoke with a reporter for The New York Times, sent his reports to the Defense Department's inspector general – and only then informed his chain of command that he had done so.

Concurrent with Shane's NYT article, Davis himself published an essay overview of what he knew and saw in the Armed Forces Journal.

The one thing that was not released with either Shane or Davis' article was the actual Davis report itself, at least the unclassified version thereof. The unclassified Davis report has now been published, in its entire original form, by Michael Hastings in Rolling Stone in *The*

Afghanistan Report the Pentagon Doesn't Want You to Read.

The report is every bit as detailed, factually supported and damning as the articles by Shane and Davis portrayed. It is a must, but disturbing, read. If the American people care about economic waste and efficacy and morality of their foreign military projection, both the Obama Administration and the Pentagon will be browbeat with the picture and moment of sunlight Daniel Davis has provided. Jim White has penned an excellent discussion of the details of the Davis report.

My instant point here, however, is how Davis conducted himself in bringing his sunlight, and blowing the whistle, on wrongful US governmental and military conduct. Davis appears to have attempted to carefully marshal his evidence, separated the classified from the unclassified, released only unclassified reportage himself and to the press, taken the classified reportage to appropriate members of Congress and the DOD Inspector General, and notified his chain of command. Davis insured that, while the classified information and facts were protected from inappropriate and reckless release, they could not be buried by leveraging his unclassified press publication. In short, Daniel Davis is the epitome of a true military whistleblower, both in fact, and in law.

As I have previously delineated, there is no common law "whistleblower defense" umbrella protection, whether under American military law or civilian law. Despite the indiscriminate bandying about of the term by commenters, pundits and analysts across the spectrum, the "whistleblower defense" is a creature of statute, and simply does not formally exist other than where specifically provided for as an available affirmative justification defense. There is, however, just such a specific statutory grant of a whistleblower defense for the US military, and it is spelled out in the Military Whistleblower's Protection Act,

codified in 10 USC 1034:

(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.

Daniel Davis may have a bit of a rough ride in spots with his military career from here on out because, well, they often just do not take well to the type of challenge from within the service

he has made. But there is little to no chance that he will be busted out of the Army or rank, much less arrested, charged, subjected to an Article 32 Investigation and court-martialed. Davis made a good faith attempt to conduct himself within the scope of the Military Whistleblower's Protection Act and honored his service and country in doing so.

That is not, however, how Army Pfc. Bradley Manning conducted himself (assuming *arguendo* that Manning indeed did what he is accused of, and the evidence to date, and reasonable inferences thereon, suggest he did). Although Manning appears to have released several classified items intentionally and specifically (for instance the "Collateral Murder video"), nearly all of the well over 250,000 classified documents, including the State Department cables, look to have been indiscriminately hoovered up and released just because they were there and he could. There is no evidence, nor reasonable view, by which Manning could have reviewed and understood exactly what the vast majority of documents were or what effect they may have.

Manning did not carefully prepare the material as Davis did, using only that which is necessary and taking precaution that classified information was protected and disseminated through legal avenues to Congress and the DOD IG pursuant to the Military Whistleblower's Act. No, Bradley Manning impetuously and indiscriminately dumped the lot of it to the uncontrolled whims of a flaky, at best, foreign entity, WikiLeaks. And then proceeded to chat about it with a mentally unstable, known felon hacker, Adrian Lamo.

Now, all that said, there has been much good and sunshine that has resulted from Bradley Manning's acts and, it appears, little in the way of grave harm as originally claimed. At this point, there is really not much dispute on that. Further, Manning appears to be a genuinely troubled kid who had his heart in the right

place in wanting to get, at least as to the items he knew and understood, important information out to make a difference; although, it is more than a stretch to say that is credible as to the vast majority of the classified documents, which he had no idea of what was really contained therein. Most all of the documents were just an indiscriminate and petulant classified information dump by Manning.

It is easy to admire Bradley Manning, in a way, for his righteous ideals, and to feel pity and sorrow for the pain and lot in life he has experienced emotionally and physically both before, and after, his acts leading to his charging and incarceration. And I feel that for him. But such a feeling does nothing to detract from the fact he appears to quite clearly have committed clear offenses as to data transfer and information protection, not to mention conduct unbecoming, all in direct contravention of the UCMJ. You can quibble about whether Manning's conduct constitutes "aiding the enemy", and while that may seem to be an extreme reach to many, the technical elements can be argued by the government and sent to a jury. The remainder of the charges, however, appear clear cut if the government's evidence is what it appears to be and is properly adduced at trial.

But, assuming Manning committed the acts, he is no heroic military whistleblower; in fact, he does not come close to even being legally eligible for the defense. Manning, instead – irrespective of what you think of him personally – a criminal who dishonored his service. There are laws under the UCMJ, and a military ethos and code of conduct against it, and for good reason. As Aaron Bady eloquently stated:

This is happening because Bradley Manning does not live in a democracy. He lives in the U.S. Army. The same is true when the "Manning hearing" gets called a "court case," which it is not: we forget that while the United States is a democracy, the U.S. military is

something different.

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I don't say any of this to justify what is being done to Bradley Manning, of course; I'm as appalled as anyone. But let's look clearly at why it's being done: the terms through which the military operates – where winning the war means giving up “normal” rights and concerns – make what is happening to him the very opposite of a scandal. It is normal for one person's rights to be subordinated to some larger social imperative, however defined. This is what the military is, does, and must be. And when we have always tolerated (usually venerated) this non-democratic space at the heart of our democracy, a permanent state of exception to the right of things like trial by jury, this is what will happen as a result. Soldiers don't live in a democracy; soldiers live in a military dictatorship, one ruled by martial law (in the most literal sense possible).

This is exactly right. No matter how much one admires Manning for what he did, the irreducible minimum is that there is a legitimate basis and need for military discipline and adherence to the code of conduct, and that was the system Bradley Manning swore to uphold, protect and live within.

Bradley Manning is a lot of things, but if he did the acts alleged, he is not innocent, and he is not a honorable military whistleblower. There was a path specifically laid out to where that could have been the case, the path Daniel Davis honorably followed. Bradley Manning went the opposite direction.