LEAK PROSECUTIONS: ENFORCING SECRECY ASYMMETRY DOES NOT EQUATE TO RULE OF LAW

Matt Miller has a piece in the Daily Beast defending the Obama Administration's prosecutions of leakers. Now, as Josh Gerstein notes, Miller makes his work easier by cherry-picking which cases to discuss; he doesn't mention Thomas Drake, who was pretty clearly trying to expose waste and fraud (as well as the government's choice to spend more money to provide less privacy protection). And he doesn't mention Bradley Manning, who is alleged to have leaked at least some materials that expose war crimes and a lot more than expose abuse (though note, DOD, not DOJ, is prosecuting Manning).

But Miller's argument suffers from a much bigger problem. He operates under the assumption that the sole crux of legitimacy arises from a distinction between whistleblower and leaker that he presents as absolute.

To start with, that distinction isn't absolute (as Manning's case makes clear). But even with John Kiriakou, whom Miller does discuss, it's not absolute. Recall what Kiriakou was charged with: leaking the identity of a still covert officer involved in the torture program, being one of up to 23 people who leaked that Deuce Martinez—who was not covert—was involved in the torture program (though didn't do the torture), and lying to the CIA Publication Review Board about the classification of a surveillance technique details of which have been readily available for decades (and which seems to be related to the Secret PATRIOT GPS application targeting American citizens in probable violation of the Fourth Amendment). In other words, two people involved in an illegal program

and one technique that was probably improperly classified and since become another questionably legal executive branch spying technique.

But the entire investigation arose because defense attorneys with Top Secret clearance used the covert officer's name in a still-sealed filing about the abuse their client had suffered at the hand of the US, possibly—though we don't know—at the hand of the covert officer (because he is covert, the defense attorneys did not use the officer's name or picture with their client).

Now, I have no way of knowing (nor does Miller) Kiriakou's motive, and his case will probably end in a plea, meaning we'll never get to learn it at trial. But the very genesis of the case—the defense attorneys' attempts to learn who had tortured their clients so as to be able to adequately represent them—arises from the government's failure to prosecute anyone for torture and its insistence on withholding arguably relevant information from legal teams, presumably in part to prevent them from attaining any redress for that torture in courts.

So regardless of Kiriakou's motive, to argue for the legitimacy of his prosecution as events have transpired is to distract from the larger system in which the government uses secrecy to avoid legal consequences for its own crimes—regardless of what that does for justice.

And it's not just with Gitmo detainees' lawyers that the government has withheld information to prevent justice being done. It did that with al-Haramain, the Maher Arar suit, Jeppesen Dataplan—the list of times when the government has claimed something, even a widely known fact, is super duper secret just so it can't be sued or prosecuted is getting quite long and tired. And, of course, it continues to do it with the Anwar al-Awlaki killing, preferring inconsistent claims of Glomar and state secrets to full accounting not just of Awlaki's killing, but of the claims about Presidential power more

generally.

As it becomes clearer and clearer that the government, at times, wields claims of secrecy precisely to void the principle that says no man is above the law, it gets more and more cynical for the government to, at the same time, prosecute others for violating this asymmetrical system of secrecy.

All that's made worse, of course, with the rampant selective prosecution of leaks. We know that senior Administration officials have leaked SCI information; where are those prosecutions? We know that Leon Panetta personally supported the investigation that led to Kiriakou's charges, and yet faces no consequences for confirming on TV not just that the CIA uses inoculation programs as cover, but also that Pakistani doctor Shikal Afridi who did just that to get information on Osama bin Laden's compound was working for the CIA. John Brennan had or has a personal stake in both the Drake and Jeff Sterling prosecutions, but he blabs more than just about anyone in Washington, and he does it with impunity.

The Obama Administration's prosecution of leaks is not just about—in some cases—the criminalization of whistleblowing. It's about turning secrecy that should serve a purpose into an arbitrary exercise of asymmetrical Presidential power. In this world, secrecy seems to matter when it serves to insulate the Executive Branch—and power more generally—from accountability, but it doesn't matter when there's political gain to be had.

Which brings me to why the Plame leak is an inapt comparison to Kiriakou's alleged leaks. I won't defend Kiriakou for leaking a covert officer's identity, though I'd be a lot more upset if DOJ had prosecuted a single soul who put us in the torture business. But when Cheney ordered Libby to leak classified information—including, almost certainly, Plame's identity—to Judy Miller, he was engaging in just this kind of arbitrary abuse of secrecy that

rots the core of a democracy. And Libby didn't get prosecuted for leaking Plame's identity (ironically, at least in part because the current Criminal Division head Lanny Breuer managed to help Kiriakou avoid telling the grand jury information that strongly suggested Libby knew Plame was covert). He got prosecuted for lying to cover up the fact that this is what the Executive Branch does: leak highly classified information, for political gain, with impunity.

This Administration and the last have gotten more and more brazen about using asymmetrical control over secrecy to undercut the rule of law in this country, even while arguing that leaks to the public generally are worse than leaks to our sworn enemies. The government has, by its own actions, made a mockery of our system of classification. To then prosecute others under that system really corrupts our democracy.

Update: In an update to Gerstein's post, Miller admits that the Drake case is not so clear cut.

UNIFORMS AND WIKILEAKS IN THE DISCUSSION OF THE ANWAR AL-AWLAKI KILLING

This panel discussion between former State Department spokesperson PJ Crowley, former Gitmo Chief Prosecutor Colonel Morris Davis, and ACLU's Jameel Jaffer is one of the more nuanced, interesting discussions on the Anwar al-Awlaki killing. Not surprisingly, it was shown on Al Jazeera English, not, say, NBC.

One highlight, for me, came when Davis pointed

out that the CIA, not JSOC, had targeted Awlaki. That's significant because it effectively made whoever pulled the trigger an unlawful enemy combatant, just as Omar Khadr was (the government argued in his military commission) for engaging in hostilities without wearing a uniform. Of course, Davis ended the discussion by noting that we're the big kid on the block, so we'll never be held accountable for the things we prosecute others for.

More interesting still came when PJ Crowley cited this WikiLeaks cable, reporting on a January 2, 2010 meeting between Ali Abdullah Saleh and David Petraeus back in his CentCom days, to show that Yemen was secretly supporting us on drone strikes, including the one that targeted Awlaki on December 24, 2009 (well before, it should be noted, the OLC had authorized his killing).

> AQAP STRIKES: CONCERN FOR CIVILIAN CASUALTIES ————————————
>
> ¶4.(S/NF) Saleh praised the December 17 and 24 strikes against AQAP but said that "mistakes were made" in the killing of civilians in Abyan. The General responded that the only civilians killed were the wife and two children of an AQAP operative at the site, prompting Saleh to plunge into a lengthy and confusing aside with Deputy Prime Minister Alimi and Minister of Defense Ali regarding the number of terrorists versus civilians killed in the strike. (Comment: Saleh's conversation on the civilian casualties suggests he has not been well briefed by his advisors on the strike in Abyan, a site that the ROYG has been unable to access to determine with any certainty the level of collateral damage. End Comment.) AQAP leader Nassr al-Wahishi and extremist cleric Anwar al-Awlaki may still be alive, Saleh said, but the December strikes had already caused al-Qaeda

> operatives to turn themselves in to authorities and residents in affected areas to deny refuge to al-Qaeda. Saleh raised the issue of the Saudi Government and Jawf governorate tribal sheikh Amin al-Okimi, a subject that is being reported through other channels.
>
> SHIFTING AIRSTRIKE STRATEGIES
>
> _____
>
> ¶5.(S/NF) President Obama has approved providing U.S. intelligence in support of ROYG ground operations against AQAP targets, General Petraeus informed Saleh. Saleh reacted coolly, however, to the General's proposal to place USG personnel inside the area of operations armed with real-time, direct feed intelligence from U.S. ISR platforms overhead. "You cannot enter the operations area and you must stay in the joint operations center," Saleh responded. Any U.S. casualties in strikes against AQAP would harm future efforts, Saleh asserted. Saleh did not have any objection, however, to General Petraeus' proposal to move away from the use of cruise missiles and instead have U.S. fixed-wing bombers circle outside Yemeni territory, "out of sight," and engage AQAP targets when actionable intelligence became available. Saleh lamented the use of cruise missiles that are "not very accurate" and welcomed the use of aircraft-deployed precision-guided bombs instead. "We'll continue saying the bombs are ours, not yours," Saleh said, prompting Deputy Prime Minister Alimi to joke that he had just "lied" by telling Parliament that the bombs in Arhab, Abyan, and Shebwa were American-made but deployed by the ROYG.

I find Crowley's citation of it notable because, while as State Department spokesperson, he

strongly argued for the humane treatment of Bradley Manning (and got fired for it), he also routinely criticized the WikiLeaks leaks of State Department cables.

Yet even **he** now finds himself relying on them to try to understand what the government did when it targeted an American citizen. And Crowley does so while calling for more transparency from the Administration.

Details about Yemen's role is, of course, one of the things the Administration invoked state secrets to hide back in 2010. But it is also now widely known and crucial to discussions of whether the attack on Awlaki was legal or not.

I can think of few better examples of how the Administration's own secrecy encourages not just the leaking of classified information, but the validation of those leaks. In a democracy, the Administration has an obligation to share a reasonable explanation about its claims that it can kill American citizens with no court review. In the absence of fulfilling that obligation, citizens will get that information one way or another.

The Administration's stonewalling on the Awlaki killing only serves to make leaks more necessary and justified. No matter how many whistleblowers it tries to prosecute to deny that fact.

RICKYLEAKS

In a post at the Document Exploitation blog, Douglas Cox reminds us of how Crazy Pete Hoekstra and Rick Santorum pressured the government to make all of Saddam's documents—including a plan for a nuke—available on the InterToobz.

> The drive towards this unprecedented doc dump arose in earnest in late 2005 and

> early 2006 when the continuing public debate over the justifications for the 2003 Iraq invasion turned towards the possibility of untapped evidence in the captured documents from Iraq. Could they contain, for instance, "smoking gun" evidence of links between Saddam and al-Qaeda? Stephen F. Hayes at the *Weekly Standard*, for example, had an impressive series of pieces during this period on his attempts to obtain access to some of the captured Iraqi documents both via the Pentagon press office and via repeated FOIA requests. He also covered growing calls in Congress for the release of the material. See in particular his "Where Are the Pentagon Papers?" in November 2005, "Down the Memory Hole: The Pentagon sits on the documents of the Saddam Hussein regime" in December, and both "Saddam's Terror Training Camps: What the documents captured from the former Iraqi regime reveal – and why they should all be made public" and "Read All About It: Prewar Iraqi documents are of more than academic interest" from January 2006.
>
> In March 2006, both then-Rep. Pete Hoekstra and then-Sen. Rick Santorum took action by introducing nearly identical bills in the House and Senate that required the "Director of National Intelligence to release documents captured in Afghanistan or Iraq during Operation Desert Storm, Operation Enduring Freedom, or Operation Iraqi Freedom."

This led Gawker to make the obvious analogy to WikiLeaks.

> Catholic scold Rick Santorum thinks Julian Assange is a "terrorist"—and ought to be prosecuted as such—for his role in releasing thousands of pages of classified documents on the internet. He

> ought to know: In 2006, Sen. Rick Santorum literally forced the U.S. government to dump thousands of pages of classified records concerning Iraq onto the web, including detailed plans for building a nuclear weapon, so that right-wing bloggers could search them for evidence of Saddam Hussein's phantom WMD.
>
> [snip]
>
> No less an authority than former Bush chief of staff Andrew Card said at the time that the release was stupid, and that Director of National Intelligence John Negroponte had opposed Santorum's push for release: "John Negroponte warned us that we don't know what's in these documents, so these are being put out at some risk, and that was a warning that he put out right when they first released the documents."
>
> ODNI of course took the documents down, but not before they were grabbed by anyone and everyone who may have been interested in designing a nuclear weapon.
>
> A spokesman for Santorum did not respond to a request for comment.

Maybe now that he has effectively called himself a terrorist Santorum will start campaigning against Obama's use of drones to target American citizens?

(Max Sawicky gets full credit for the post title.)

SO IT WAS THE FBI THREATENING TO TAKE DOWN THE INTERNET, THEN?

As soon as the news came out today that Sabu, the head of LulzSec, offered an FBI computer to facilitate the publication of Stratfor (no doubt set up a LulzSec-assisted indictment of Julian Assange in the future)…

> Hector Xavier Monsegur, an unemployed 28-year-old Puerto Rican living in New York, was unmasked as "Sabu", the leader of the LulzSec hacking group that has been behind a wave of cyber raids against American corporations including Rupert Murdoch's News Corporation, the intelligence consultancy Stratfor, British and American law enforcement bodies, and the Irish political party Fine Gael.
>
> [snip]
>
> In a US court document, the FBI's informant – there described as CW – "acting under the direction of the FBI" helped facilitate the publication of what was thought to be an embarrassing leak of conference call between the FBI and the UK's Serious and Organised Crime Agency in February.
>
> Officers from both sides of the Atlantic were heard discussing the progress of various hacking investigations in the call.
>
> A second document shows that Monsegur – styled this time as CW-1 – provided an FBI-owned computer to facilitate the release of 5m emails taken from US security consultancy Stratfor and which are now being published by WikiLeaks.

> That suggests the FBI may have had an inside track on discussions between Julian Assange of WikiLeaks, and Anonymous, another hacking group, about the leaking of thousands of confidential emails and documents.

…I though back to the threat Anonymous made to TAKE DOWN THE ENTIRE INTERNET!!! Which of course made more sense understood as a ploy to help fear monger than an actual threat from actual terrorists.

Was it the FBI making such threats?

Which makes this conversation Sabu had just two weeks before he was indicted all the more interesting.

> <SABU> You just said there was a claim that I may be a terrorist. You "researched" it and wrote the article
>
> <SABU> There re claims I am with the CIA pushing to get tighter / stricter cyber-laws passed
>
> <SABU> its literally the same shit, two different extremes.
>
> [snip]
>
> <SABU> The people are aware that our governments in the UK and the US have involved themselves in black operations in the past. it makes a lot of sense if lets say a rogue group of hackers suddenly began attaking national interests – spawning a massive overhaul of internet security, theoretically.
>
> <SABU> you're telling me thats not worse than some random jihadist who barely knows how to use a computer in the first place, "hacking"/
>
> <SABU> Also heres where your entire point is flawed into oblivion
>
> <SABU> why would a terrorist release and

> dump 90,000 INTELLIGENCE COMMUNITY MILITARY PERSONELL PASSWORDS AND EMAILS when they can just intercept military intelligence communications for the next year using this data ?
>
> <SABU> Why would osama bin laden go through all the work of hacking booz allan [a US government and defence consultancy], just to post a pastebin with an ascii art mocking the security of federal contractors.
>
> <SABU> Be realistic.
>
> <SABU> Think.

One other neat detail about the suggestion, of course, is that the CIA went around claiming to be FBI agents while they tortured people. Was this Sabu preparing to go around hacking for the FBI while hinting he was CIA?

ACCORDING TO DOD INSPECTOR GENERAL DEFINITION, BRADLEY MANNING DID NOT "LEAK"

The unclassified version of the DOD Inspector General report on leaks within DOD over the last three years (that is, during the Obama Administration) defines "leak" this way.

> Unauthorized disclosure of SCI [Secure Compartmented Information] to the public which is defined as: "A communication or physical transfer of [SCI]information to an unauthorized recipient." DoDD 5210.50, Section 3.2, "Unauthorized

> Disclosure of Classified Information to the Public," dated July 22, 2005. [second bracket original]

A leak is a leak of Secure Compartmented Information, not just classified information.

To be sure, the report's own insertion of that second bracket makes it clear this definition applies to this report. Congress focused on SCI information when it ordered the IG to do the report in a classified annex of this fiscal year's Defense Appropriation:

> The investigation shall contain the following: an inventory of the leaks of SCI data including those attributed to a "senior administration official" from the past three calendar years; the actions taken to investigation each of the events; which of the investigations were referred to the Department of Justice; and what additional actions were taken after the Department of Justice investigation.

The House Appropriations Committee didn't require the IG to inventory all classified leaks, just the SCI ones.

Nevertheless, as defined, Bradley Manning's alleged leaks are classified, not SCI.

Whereas this report shows that people from Obama's Administration, including at least one senior administration official, have been leaking SCI.

> We confirmed with DoD components that some unauthorized disclosures of SCI to the public did occur within DoD between December 23, 2008 and December 23, 2011. Among the unauthorized SCI disclosures to the public reported, a DoD Senior Official was directly attributed as a source of unauthorized SCI disclosures to the public. DoD components also

> reported that they followed established DoD guidance and procedures for forwarding unauthorized disclosure cases to the Department of Justice for action when appropriate.

Now, again, this report is the unclassified version; I'm sure the report provided more detail in the classified version sent to the Chair and Ranking Member of 10 different committees and subcommittees.

But note what this results paragraph doesn't say. While it confirms at least one of the leaks from a senior administration official was unauthorized, it only cataloged the **unauthorized** leaks, suggesting there may be more SCI leaks that were authorized (consider, for example, the leaks of a range of compartment names to Bob Woodward, which John Rizzo suggested were part of "one big authorized disclosure," or reported cooperation between DOD and CIA and Hollywood on the movie about Osama bin Laden's killing, itself the subject of a different investigation).

Further, while Congress mandated the IG do so, this unclassified report does not explain what happened to these SCI leak referrals at DOJ. Has DOJ been pursuing the SCI leaks by senior administration officials as diligently as it has pursued people like Thomas Drake, who was charged with *retaining* information, much of it of disputed classification?

One thing's clear: whether to make political hay or out of genuine concern about the Administration leaks, Congress is honing in on how many of these leaks were authorized and whether DOJ investigated the unauthorized ones. Granted, the most interesting results here remain classified (let's see whether the 10 committees and subcommittees can withstand the temptation of leaking a classified report on leaking).

But it does begin to show that the

Administration that has accused more leakers of "espionage" than all others combined itself leaks far more sensitive information.

(h/t Steven Aftergood who first reported on the IG Report)

BILL KELLER BLAMES LEAK ARRESTS THAT PRECEDED WIKILEAKS ON WIKILEAKS

Bill Keller has another narcissistic column attacking Julian Assange. The whole thing is rubbish not worth your time, but I did want to unpack the complaint with which Keller ends his column.

> "A lot of attention has been focused on WikiLeaks and its colorful proprietors," Aftergood told me. "But the real action, it turns out, is not at the publisher level; it's at the source level. And there aren't a lot of sources as prolific or as reckless as Bradley Manning allegedly was."
>
> For good reason. The Obama administration has been much more aggressive than its predecessors in pursuing and punishing leakers. The latest case, the arrest last month of John Kiriakou, a former C.I.A. terrorist-hunter accused of telling journalists the names of colleagues who participated in the waterboarding of Qaeda suspects, is symptomatic of the crackdown. It is this administration's sixth criminal case against an official for confiding to the media, more than all previous presidents combined. The

> message is chilling for those entrusted with keeping legitimate secrets and for whistleblowers or officials who want the public to understand how our national security is or is not protected.
>
> Here's the paradox the documentaries have overlooked so far: **The most palpable legacy of the WikiLeaks campaign for transparency is that the U.S. government is more secretive than ever**. [my emphasis]

The Obama Administration has charged 6 people with some kind of espionage charge for leaking:

- Thomas Drake was indicted on April 10, 2010, just days after the release of the Collateral Murder video and before Bradley Manning first contacted Adrian Lamo; he was charged for purported leaks going back to February 2006
- Shamai Leibowitz was first investigated in mid-2009, before Manning leaked anything to WikiLeaks; he was charged on December 4, 2009 and sentenced on May 24, 2010, the day the government was first learning about Lamo's conversations with Manning
- Stephen Jin-Woo Kim was indicted on August 19, 2010, around the time DOD first started trying to figure out what Manning allegedly sent

to WikiLeaks; he is alleged to have leaked in June 2009
- Manning was arrested on May 29, 2010 and will be formally charged this week for leaks allegedly starting in November 2009
- Jeffrey Sterling was indicted on December 22, 2010, around the time the government was trying to pressure Manning into testifying about Assange; his leaks allegedly started in 2001
- John Kiriakou was charged on January 23, 2012 for leaks dating back to 2007

All the non-WikiLeaks leaks allegedly took place before Manning's. All were formally charged before Manning, and all but two men were arrested before Manning.

And yet Bill Keller, in a demonstration of his typical reporting skill though not Newtonian physics, suggests that WikiLeaks caused the crackdown on leaks.

WikiLeaks **can't** be the reason the government has cracked down so harshly, because most of the crackdown preceded the key WikiLeaks publications.

Perhaps Keller is just looking for some easy explanation for why Kiriakou got busted. As I have shown, the most logical way to establish the case against Kiriakou (short of the now legal acquisition of journalist call records using NSLs) was through the NYT article reporting Deuce Martinez' role in interrogating Khalid Sheikh Mohammed. And while Kiriakou's recklessness—as a CIA guy who leaked a covert

officer's identity through apparently unencrypted email—rivals Manning's, security expert Chris Soghoian has pointed out how shoddy (and far inferior to WikiLeaks') the NYT's own security is.

The government is prosecuting leaks at a degree unheard of—and has been since before WikiLeaks. It is using new interpretations that strip journalists of the privacy expectations they once had. But along with that, journalists have taken a while to adjust to the new intrusiveness.

The government deserves most of the blame for it. But the NYT seems to deserve more of the blame for shoddy security than WikiLeaks does.

JAMIE DIMON: "I WAS SAFER IN BEIRUT"… MAYBE BECAUSE OF THOSE GOLD BULLIONS JPMC SENT IRAN?

The world's richest drama queen complains he was safer in Beirut than being confronted by Occupy Wall Street.

> For Jamie Dimon, the shelter of his Upper East Side mansion isn't enough to keep him safe from the Occupy protesters. Instead, the JPMorgan Chase CEO said he felt safer halfway around the world that October day when protesters occupied the sidewalk outside his Manhattan home.
>
> "That particular day, I was in Lebanon, Beirut doing business over there and I was probably safer over there too,"

> Dimon told Fox News.

Well, sure.

Dimon is the CEO of a company that materially supported Iran, Hezbollah's sponsor.

Of course he was safe in Beirut.

I mean, maybe if he'd start sending $20M in gold bullion to Americans, like JPMC did for a bank in Iran, he'd feel safer here.

> An apparent violation of the ITR consisting of a May 24, 2006 transfer of 32,000 ounces of gold bullion valued at approximately $20,560,000 to the benefit of a bank in Iran. JPMC did not voluntarily self-disclose this matter to OFAC.

But rather than sending gold bullion, JPMC is paying the cops that harass OWS.

Of course he's safer where JPMC has paid off the terrorists rather than paid off the cops infringing on free speech.

ALAN GROSS AND JACOB APPELBAUM

This AP story describing the backstory of USAID contractor Alan Gross's imprisonment in Cuba is interesting in its own right. Past reporting had made it clear that Cuba had declared Gross a spy because he was setting up secure communications technology for Cuba's Jewish community.

> Gross' company, JBDC Inc., which specializes in setting up Internet access in remote locations like Iraq and Afghanistan, had been hired by Development Associates International

> Inc. of Bethesda, Maryland, which had a multimillion-dollar contract with USAID to break Cuba's information blockade by "technological outreach through phone banks, satellite Internet and cell phones."

The AP story describes the vast array of telecom equipment Gross and some Jewish humanitarian groups he partnered with smuggled into Cuba, where some of it is explicitly prohibited:

> 12 iPods, 11 BlackBerry Curve smartphones, three MacBooks, six 500-gigabyte external drives, three Internet satellite phones known as BGANs, three routers, three controllers, 18 wireless access points, 13 memory sticks, three phones to make calls over the Internet, and networking switches.

And it explains what it was that finally got Gross arrested: his importation of a "discreet" SIM card that would make it impossible to track satellite phone transmissions.

> On his final trip, he brought in a "discreet" SIM card — or subscriber identity module card — intended to keep satellite phone transmissions from being pinpointed within 250 miles (400 kilometers), if they were detected at all.
>
> The type of SIM card used by Gross is not available on the open market and is distributed only to governments, according to an official at a satellite telephone company familiar with the technology and a former U.S. intelligence official who has used such a chip. The officials, who spoke on condition of anonymity because of the sensitivity of the technology, said the chips are provided most frequently to the Defense Department and the CIA, but

> also can be obtained by the State Department, which oversees USAID.

So Gross was arrested for trying to make sure a subset of Cuba's population could access the Internet in privacy.

Back when Alan Gross was "convicted," the White House officially condemned the decision, as they've condemned his treatment repeatedly since.

> Alan Gross has been unjustly detained and deprived of his liberty and freedom for the last 14 months. Instead of releasing Mr. Gross so he can come home to his wife and family, today's decision by Cuban authorities compounds the injustice suffered by a man helping to increase the free flow of information, to, from, and among the Cuban people.
>
> We remain deeply concerned for Mr. Gross' well being and that of his family and reiterate our call for his immediate release.

Gross' case would make you think the government inherently valued secure Internet communication.

But compare their treatment of Gross with the treatment they've given Jacob Appelbaum, the Tor researcher who they've treated like a suspected terrorist.

Tor, like the communications equipment Gross was installing, makes it easier for dissidents and other members of civil society to communicate freely.

> Tor is a network of virtual tunnels that allows people and groups to improve their privacy and security on the Internet. It also enables software developers to create new communication tools with built-in privacy features. Tor provides the foundation for a range of applications that allow organizations

> and individuals to share information over public networks without compromising their privacy.
>
> Individuals use Tor to keep websites from tracking them and their family members, or to connect to news sites, instant messaging services, or the like when these are blocked by their local Internet providers. Tor's hidden services let users publish web sites and other services without needing to reveal the location of the site. Individuals also use Tor for socially sensitive communication: chat rooms and web forums for rape and abuse survivors, or people with illnesses.
>
> Journalists use Tor to communicate more safely with whistleblowers and dissidents. Non-governmental organizations (NGOs) use Tor to allow their workers to connect to their home website while they're in a foreign country, without notifying everybody nearby that they're working with that organization.

And like Gross, Appelbaum has traveled internationally to help foster such private communications. If you follow him on Twitter, you can even see him tracking and responding to attacks on secure networks in the Middle East.

So if Administration expressions of concern about the free flow of information were sincere, you'd think they'd be celebrating Appelbaum's efforts.

Instead, partly because of his ties to WikiLeaks, they routinely harass him. Not only have they subpoenaed his Twitter IP information and a slew of other data as part of their WikiLeaks investigation, but every time he returns to the country, they temporarily detain him. Whereas with Gross in Cuba, authorities were looking for equipment that was actually

illegal under its laws, our border guards are trying to get to Appelbaum's First Amendment protected data (which, on a recent occasion of such harassment quite literally consisted of the First Amendment).

> • The CPB specifically wanted laptops and cell phones and were visibly unhappy when they discovered nothing of the sort.
>
> • I did however have a few USB thumb drives with a copy of the Bill of Rights encoded into the block device. They were unable to copy it.
>
> • The forensic specialist (who was friendly) explained that EnCase and FTK, with a write-blocker inline were unable to see the Bill of Rights.
>
> [snip]
>
> • All in all, the detainment was around thirty minutes long. They all seemed quite distressed that I had no computer and no phone.
>
> • They were quite surprised to learn that Iceland had computers and that I didn't have to bring my own.
>
> • There were of course the same lies and threats that I received last time. They even complemented me on work done regarding China and Iran.
>
> • I think there's a major disconnect required to do that job and to also complement me on what they consider to be work against police states.
>
> [snip]
>
> The CBP agent asked me for data – was I bringing data into the country? Where was all my data from the trip? Names, numbers, receipts, etc.

Our government, from the White House on down,

has decried the treatment of a man trying to ensure the free flow of information. And yet, it similarly—though not (thus far) as severely—criminalizing efforts to ensure the free flow of information.

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.
> …..
> 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.

WILLIAM WELCH PROBABLY NOT ONE OF THE ATTORNEYS WHO ENGAGED IN GROSS PROSECUTORIAL MISCONDUCT IN STEVENS CASE

As Ryan Reilly reported, Judge Emmet Sullivan is moving forward with his plan to release the scathing report on the Ted Stevens prosecution showing the prosecution was "permeated by the systematic concealment of significant exculpatory evidence."

Back when descriptions of this report first surfaced, I asked, "Why Is William Welch, Whose Team Is Accused of Intentional Prosecutorial Misconduct, Still at DOJ?"

Given Sullivan's latest order, I think the answer must be that Welch is not one of the four DOJ lawyers most badly implicated in the report. That's because DOJ, which after all still employs Welch to prosecute whistleblowers, had no objection to the report being released on March 15.

> The Department of Justice's Notice advised the Court that it "does not intend to file a motion regarding Mr. Schuelke's report" and that "[t]he government does not contend that there is any legal prohibition on the disclosure of any references in Mr.

> Schuelke's report to grand jury material, court authorized interceptions of wire communications, or any sealed pleadings or transcripts that have now been unsealed." Notice of Dep't of Justice Regarding Materials Referenced in Mr. Schuelke's Report, at 1-2 ("DOJ Notice"). In addition, the Department of Justice informed the Court that it was not asserting any deliberative process or attorney-work product privilege with respect to the information contained in Mr. Schuelke's Report.

Criminal Division head Lanny Breuer has already proven himself more than willing to hide the misconduct of his prosecutors; I have no doubt he'd do so here if it badly implicated any of his current attorneys.

So I'm guessing—though that is a guess—that Welch is not one of the four fighting to prevent this release.