

ENEMY COMBATANT: HONORING BEN DAVIS, SCHOLAR-ACTIVIST OF THE FOREVER WAR

*By Geoffrey Christopher Rapp**

What would be the single greatest compliment a person could pay a scholar-activist?

Perhaps it would be that they brought attention to something others had missed. Perhaps it would be that they brought about some lasting change. Perhaps it would be that they mentored a future generation to embrace heterodoxy even at personal cost. Perhaps it would be that they brought an unquestionably big heart to everything they did. No doubt such contributions could be touted with awards, honorary issues of storied publications, and celebratory conferences.

But there may in fact be a higher form of compliment. For a scholar-activist who reinvented himself as a champion of human rights and an early voice against the private contractor-industrial complex that has at times seemed so entrenched during the so-called Global War on Terror, perhaps the single greatest compliment that could be paid is to accuse the scholar-activist of being an enemy combatant.

My colleague Ben Davis has reinvented himself three times in two decades in legal education (itself a reinvention after a career greasing the wheels of global commerce as part of the International Chamber of Commerce)¹. He began as a scholar of arbitration and contracts, an advocate for online dispute resolution,² and an entrepreneurial instructor able to build new ways for students to learn about the intricacies of international commercial arbitration.³ But when I met him in 2004 when I joined the faculty at Toledo, where Ben had arrived a year earlier after decamping from sunny Fort Worth, Texas, Ben had gotten himself a bit wound up about something.

That something was the conduct of certain leaders prosecuting the war in Iraq and the broader Global War on Terror.⁴

Ben led efforts to get the American Society for International Law to adopt a resolution condemning torture as its centenary resolution.⁵ Through this work, Ben left a lasting mark on the organization. One law professor, meeting a Toledo

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1. Benjamin G. Davis, *Mentoring and Meaning*, 47 U. TOL. L. REV. 15, 16-17 (2015).

2. See generally Benjamin G. Davis, *A Pioneer's Vision of the Promise of Online Dispute Resolution*, reviewing ONLINE DISPUTE RESOLUTION FOR BUSINESS, 10 DISP. RESOL. MAG. 24 (Fall 2003).

3. See generally Benjamin G. Davis, *Walking Along the Mission*, 38 U. TOL. L. REV. 1 (2006).

4. See generally Benjamin G. Davis, *A Citizen Observer's View of the U.S. Approach to the War on Terrorism*, 17 TRANSNAT'L L. & COMTEMP. PROBS. 465 (2008).

5. *Id.* at 499 n. 142.

colleague of mine who was visiting at another school, said that Ben's work in the area had "put Toledo on the map." Ben was on the right side of history on this issue – but no doubt ruffled some feathers along the way. But he wasn't done – he would go on to develop a plan for prosecuting Bush administration officials in state court for criminal conduct.⁶

This activism made some friends; demonstrably, it also led Ben to cause some upset.

But my titular example of the upset was one quite unreasonable article by a then-Visiting Professor at the United States Military Academy (West Point) and former law professor. Published in a 2015 issue of the *National Security Law Journal*, the article took the laughable, if it weren't so disturbing, position that a group of law professors had engaged in "scholarship and advocacy [that] constitute information warfare" and "tilts the battlefield against U.S. forces."⁷ Ben made the list of supposedly treasonous professors based on three of his law review articles⁸—joining a fairly distinguished roster of international law scholars.

As such, argued the article, the scholars on the "treasonous professor" list should be viewed as "lawful targets" for the U.S. military—as would be the "law school facilities, scholars' home offices and media outlets where they give interviews."⁹ The professors, argued the article, "are subject to coercive interrogation"¹⁰ (that is, torture), among a broader range of available sanctions, kinetic or otherwise.

The journal would later apologize for the article¹¹ and its author would resign his position.¹² Ben's passionate advocacy for human rights and rule of law in a time of war inspired what *Above the Law* would call an "insane" reaction¹³ and what another law professor would simply call "bonkers."¹⁴

6. See generally Benjamin G. Davis, *United or Untied: On Confronting Presidential Criminality in the Savage Wars of Peace*, 84 TENN. L. REV. 671 (2017); BENJAMIN G. DAVIS, *State Criminal Prosecution of a Former President: Accountability Through Complementarity Under American Federalism*, 24 FLA. J. INT'L L. 331 (2012); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503 (2008).

7. William C. Bradford, *Trahison des Professeurs: The Critical Law of Armed Conflict Academy as an Islamist Fifth Column*, 3 NAT'L SEC. L.J. 278 (2015).

8. *Id.* at 353 n. 297, 368 n. 371, and 375 n. 405.

9. *Id.* at 450.

10. *Id.*

11. Joe Patrice, *Law Journal Apologizes for Article About Executing Law Professors, Professor Resigns: Insane Law Review Article Prompts Professor's Resignation...But How Did He Get Hired in the First Place?*, ABOVE THE LAW (Aug. 31, 2015), <https://abovethelaw.com/2015/08/law-journal-apologizes-for-article-about-executing-law-professors-he-resigns/> ("This past spring the Journal made a mistake in publishing a highly controversy article...[W]e want to address concerns regarding Mr. Bradford's contention that some scholars in legal academia ... could be targeted as unlawful combatants. The substance of Mr. Bradford's article cannot fairly be considered apart from the egregious breach of professional decorum that it exhibits.").

12. *Id.*

13. *Id.*

14. Jeremy Rabkin, *A Betrayal of Rational Argument*, <https://www.nslj.org/wp-content/uploads/Betrayal-of-Rational-Argument.pdf> ("When an article proposes to arrest law

Ben has always brought the same level of passion to his teaching he brought to his activism. And that same passion to the “service” role he played as a faculty member, on committees, and as part of the faculty governing the law school. The qualities that have made Ben such an effective scholar-activist—persistence, brilliance, rowdiness, and evident enthusiasm when speaking truth to power—also have a tendency, at times, to rub people the wrong way even if they don’t drive folks bonkers. There were times when I found myself on the opposite side of an issue from Ben where I’m sure I yearned for a more malleable or less passionate counterparty. But the law school was better off thanks to his voice; as were its leaders, held accountable in ways Ben thinks some national leaders have not been. After entering administrative service six years ago, I know I was a better leader because Ben was there to help make sure I remained true to the ideals that called me to serve.

Ben also brought this stubbornness and sense of purpose to what I would describe as his third reinvention in legal academia (and fourth of what I expect will be many in life). In 2015, the law school was hit with some bad bar results; things got worse in 2016. For the spring 2017 term, I’d pulled together a group of four full-time professors to teach a new early bar preparation course using a curriculum developed by a commercial bar preparation company.

Not all teachers would love that experience, but for Ben, it was a perfect fit. He took the course on solo the next year and continued to teach it for the final three years of his teaching career. No one could bring the positive, pep-talk enthusiasm to an occasionally if not often dry set of review materials like Ben. And he brought the same stubbornness to his bar teaching he brought to efforts to hold accountable government officials and politicians he viewed as responsible for the worst excesses of the War on Terror. Now, though, it wasn’t a conviction that leaders had done wrong, but a conviction that each of his students could be successful on the bar exam that was Ben’s chosen cause.

The true enemy was failure for his students and for the law school he’s made a part of his life’s work. Ben has always been there to make sure that enemy is defeated.

professors and bomb law schools and nearby TV studios, it’s not engaging in ‘controversy,’ but slipping into an alternate universe. It’s not ‘discomforting.’ It is bonkers. The journal could not reasonably have expected readers to ‘respond’ – unless to ask, ‘Are you out of your minds?’”).