NASHIRI ASKS FOR THE TARGETING PACKAGE ON THE OTHER USS COLE MASTERMIND

Things just got interesting in the pre-trial hearing for Abd al Rahim al-Nashiri in Gitmo. According to Charlie Savage and Carol Rosenberg, he has asked for the targeting package used to kill Abu Ali al-Harithi in Yemen in November 2002.

While I have no confidence he'll get the package, he has very good reason to demand it. Here's what I wrote about the al-Harithi killing two and half years ago.

> I find it rather interesting that that 2002 assassination was rationalized in the name of killing al-Harithi, accused of organizing the USS Cole bombing. That strike happened not long after the US started torturing a guy—Rahim al-Nashiri—whom we're about to try in military commission for organizing the USS Cole bombing. **[10/24/12: Correction, we actually started torturing Nashiri in earnest 13 days later]** (And remember, al-Nashiri had been in custody in Dubai for a month by the time the US took custody.) Who was the mastermind of the Cole bombing, then? al-Harithi, who doesn't even merit a mention in the 9/11 Commission report (though reports from when he was killed said he was among the 12 most senior al Qaeda figures), or al-Nashiri, who does, and is about to be tried for it? Note, too, that the Bush Administration did not announce it had custody of al-Nashiri until several weeks laterin November.
>
> Now compare al-Harithi, with his loosely accused role in the Cole, with Kamal

> Derwish, whom the US accused of recruiting a number of Lackawanna youth into al Qaeda. Not only was Derwish accused of being an ongoing threat—the standard purportedly used to put Americans on kill lists now. But he was accused of training Americans in al Qaeda. Which is not all that different than what the government is accusing al-Awlaki of now.
>
> And note, too, that Priest and maybe Miller [ed. changed per MD's comment] both now report that the CIA knew Derwish was in the car when they targeted (they say) al-Harithi. When Miller first reported this in 2002, he didn't mention Derwish's presence (nor did Pincus). When Priest broke the story of Derwish's presence in the car, she stated it was unclear whether CIA knew he was there or not.
>
> > It was unclear whether the CIA operatives who fired the missile from hundreds of miles away knew that an American citizen was among their targets. It also was unclear whether that would have made any difference.
>
> I guess I'm suggesting that, first of all, it would seem unnecessary to kill a guy for planning the Cole bombing if you knew you had the guy who—you say—planned the Cole bombing in custody. But that claiming a tie between him and the Cole bombing might provide the excuse to target a car carrying your real target, Derwish.

Basically, one of two things is likely true: al-Harithi is the mastermind of the Cole strike, and we knew that before we started torturing Nashiri, in the name of his role as the USS Cole mastermind, in earnest. Or, Nashiri is the real

mastermind of the Cole bombing, in which case the al-Harithi story was probably a cover story so we could kill an American citizen, Kamal Derwish, with no due process.

I suspect the second is true (though Nashiri has also asked for the FBI investigative file on the attack; it's rather stunning he hasn't gotten it yet—maybe this is the reason he's being inappropriately tried in a military commission?). In which case this is a kind of graymail, the knowledge that the US can't turn over the targeting package for al-Harithi because it would show Derwish was the real target.

In any case, it was an interesting legal move.

LINDSEY GRAHAM MUST WANT THE TERRORISTS TO HAVE KITTENS AND BEARD DYE

In the last week, we've had two stories about how terrorists at Gitmo have made themselves comfortable.

First there was Michelle Shephard's investigation into whether Majid Khan has a cat.

> A week-long investigation into Guantanamo's feline affairs couldn't determine the case for sure.
>
> "No detainees are provided pets, and detainees are not authorized to keep animals, as they present a health and sanitation hazard," wrote Navy Capt. Robert Durand, the director of Joint Task Force Guantanamo's Public Affairs, in a lengthy response to my cat query.

> "Wild animals often carry diseases and pests such as rabies, lice, mites and other infections."
>
> However: "Recreation yards are surrounded by security fences that keep detainees in and unauthorized people out, but small animals can and do squeeze through any gaps."
>
> Durand's emailed response goes on to describe the island's wildlife: "The Cuban Rock Iguana is a protected species, and banana rats and feral cats lack natural predators, so these populations thrive in the areas immediately adjacent to the various camps."Yes, but does *Khan*have a cat?
>
> "We do not discuss the details of any individual detainee."

And now there's Carol Rosenberg's story explaining that Khalid Sheikh Mohammed hennaed his beard with berries and juice.

> Tuesday, Army Lt. Col. Todd Breasseale said in response to a five-month-old question that Mohammed "did craft his own natural means" inside the prison camps to concoct his self-styled beard dye.
>
> "I don't have his exact procedure," Breasseale said, "but can confirm the use of at least berries and juice to create a kind of harmless dye."

We paid Halliburton a lot of money to build this prison—and still shell out $800,000 a year to keep terrorists there. But apparently Halliburton couldn't even keep feral cats out?

I'm guessing Jose Padilla doesn't have a kitten in Florence SuperMax. And even when Umar Farouk Abdulmutallab was held at the local minimum security prison in Milan, he didn't show up in court in a camo vest and dyed beard (he asked to

wear a Yemeni dagger, mind you, and he looked too young to grow one, mind you).

So I'm beginning to think that Lindsey Graham and all the others that insist terrorists must be held in Gitmo rather in the real prisons in the US want the terrorists to have kittens.

Upate: h/t to joanneleon for alerting me that, by my spelling, I tried to kill KSM's beard rather than color it.

LATIF'S UNEXPLAINED DEATH: YEMENI GOVERNMENT FACILITATES US STALL

Jason Leopold has an important story on Adnan Farhan abd al Latif's unexplained death. He provides more detail of Latif's struggles with his 1994 head injury the government claimed wasn't the reason for his 2001 trip to Pakistan. He describes how Latif's family—including his 14 year old son Ezzi Deen—responded to the news Latif had died at Gitmo.

But most importantly, Leopold adds more details to those reported by ProPublica on Latif's death and subsequent limbo.

When Latif died, people—including me—suggested he might have finally found a way to kill himself. But as Leopold points out, with every suicide at Gitmo, DOD has released details on the obvious signs of that suicide. And a Gitmo spokesperson has repeatedly confirmed there was no immediately apparent evidence of suicide.

> But in a statement to the Associated Press two days after Guantanamo officials announced the death of a prisoner without naming him, Durand

> said, “There is no apparent cause, natural or self-inflicted.”
>
> Durand explained to Truthout at the time he made that statement he was responding to a reporter’s query: “Would you call it an apparent suicide or natural causes?”
>
> Now, however, “It would be inappropriate to speculate on the cause of death at this time.”
>
> There was nothing to “immediately suggest ‘apparent suicide,'” Durand said, and the death is being investigated by “multiple entities.”

A Yemeni official reflecting information presumably passed from John Brennan to Yemeni President Abed Rabu Mansour Hadi when they met on September 28 confirms the government appears to have ruled out suicide.

> The Yemeni government official told Truthout that US officials appear to have ruled out suicide as the manner of his death.

Leopold quotes Cyril Wecht suggesting convulsions (possibly associated with his brain injury) or drugs may have had a role in Latif’s death.

Meanwhile, no one can perform independent analysis on Latif’s body, because the government has stashed it at Ramstein Air Base in Germany. The US and Yemeni governments continue the same story shared with ProPublica: the Yemenis won’t accept the body until they get a report on why he died, the US hasn’t provided that, so the body decays in US custody.

> [Latif’s brother] Muhammed said the family was told by Yemen’s Ministry of Foreign Affairs that his brother’s remains would be sent home within two weeks after his death. The Ministry of

> Foreign Affairs, according to Muhammed, obtained that information from the Yemen Embassy in Washington, DC.
>
> But according to a Yemeni official, the Yemen government refused to accept Adnan's body until they receive a full accounting of the cause of his death.
>
> [snip]The Yemeni government official's comments about Adnan were obtained during an interview late last month when President Hadi visited the United States. His statements about Adnan were made in the context of discussions Hadi had with top US officials in the White House about the remaining Yemeni detainees in Guantanamo and Afghanistan.

Tick tock.

Tick tock.

Latif died 40 days ago. Just 19 days remain before the election. Between them, the US and Yemeni governments have forestalled the time when the US has to admit a man—the sole evidence against whom was a flawed intelligence report written while Pakistanis were trying to convince us to pay a bounty for Latif—died of unnatural causes in their custody. Possibly, they will have to admit complications of the same head injury they claimed, in court, was not all that serious, killed him.

And it appears John Brennan may be buying Hadi's complicity on this front with promises he may not be able to keep. Leopold's Yemeni source makes clear that the US and Yemeni government have tied discussions of the release of the other Yemenis in Gitmo and Bagram to the fate of Latif's body.

> "President Hadi was in Washington, DC, and met with President Obama's cabinet ministers," the official said. "The remaining Yemeni detainees was one of the talking points. President Hadi has

> made Guantanamo and Bagram [prison in Afghanistan] a high priority for Yemen. We are emphasizing talks and opening up a dialogue to ensure the timely release and transfer and rehabilitation of those remaining detainees to Yemeni custody and we are working closely with the US government. These discussions took place with high-level officials in the Obama administration." [brackets original]

I can imagine a quid pro quo that goes this way: Hadi agrees to refuse to accept the body, helping to forestall announcements of how Latif died, until after the election. And then the US will enter discussions to do what they should have done 2 years ago: release the Yemenis who don't pose a threat to the US.

But all that's premised on getting Congressional support to release roughly 60 Yemenis, after the Administration already neutralized the one point of leverage—detainee wins in habeas proceedings—that has worked to override Congressional intransigence in the past.

To some degree, I can't blame Hadi for doing the bidding of the superpower that put him in power, on whose continued military support he relies. I can't blame Hadi for trading Latif's decaying corpse for the fate of 60 other Yemenis unjustly held at Gitmo.

But if that's the trade-off, I do question Hadi's judgment for believing Obama will do in a second term what he had easier ways of doing—habeas proceedings—in the first.

DC APPEALS COURT

THROWS OUT HAMDAN CONVICTION

Back in 2009, then Assistant Attorney General David Kris predicted that appellate courts might throw out material support military commission convictions because material support is not a law of war crime.

> There are two additional issues I would like to highlight today that are not addressed by the Committee bill that we believe should be considered. The first is the offense of material support for terrorism or terrorist groups. While this is a very important offense in our counterterrorism prosecutions in Federal court under title 18 of the U.S. Code, there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions and leading to questions about the system's legitimacy.

Today, the DC District Court did just that, though making a slightly narrower ruling. In a ruling overturning Salim Hamdan's conviction on material support, conservative judge Brett Kavanaugh notes that material support still is not a law of war crime, and did not become a crime covered by military commissions in the US until the 2006 Military Commissions Act.

> First, despite Hamdan's release from custody, this case is not moot. This is a direct appeal of a conviction. The Supreme Court has long held that a defendant's direct appeal of a conviction is not mooted by the defendant's release from custody.
>
> Second, consistent with Congress's stated intent and so as to avoid a serious Ex Post Facto Clause issue, we interpret the Military Commissions Act of 2006 not to authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred. Therefore, Hamdan's conviction may be affirmed only if the relevant statute that was on the books at the time of his conduct – 10 U.S.C. § 821 – encompassed material support for terrorism.
>
> Third, when Hamdan committed the relevant conduct from 1996 to 2001, Section 821 of Title 10 provided that military commissions may try violations of the "law of war." The "law of war" cross-referenced in that statute is the international law of war. See Quirin, 317 U.S. at 27-30, 35-36. When Hamdan committed the conduct in question, the international law of war proscribed a variety of war crimes, including forms of terrorism. At that time, however, the international law of war did not proscribe material support for terrorism as a war crime. Indeed, the Executive Branch acknowledges that the international law of war did not – and still does not – identify material support for terrorism as a war crime. Therefore, the relevant statute at the time of Hamdan's conduct – 10 U.S.C. § 821 – did not proscribe material support for terrorism as a war crime.

> Because we read the Military Commissions Act not to retroactively punish new crimes, and because material support for terrorism was not a pre-existing war crime under 10 U.S.C. § 821, Hamdan's conviction for material support for terrorism cannot stand. We reverse the judgment of the Court of Military Commission Review and direct that Hamdan's conviction for material support for terrorism be vacated.

Hamdan has already been released. Only one other detainee has been convicted on just material support, Ibrahim al-Qosi, who has been repatriated to Sudan and is in a reintegration program [oops—I forgot David Hicks, though he too has been released]. As Carol Rosenberg points out, three other Gitmo detainees were convicted of material support: Majid Khan, Noor Uthman Muhammed, and Ali al-Bahlul, but they were also convicted of other crimes. So assuming the Administration doesn't appeal this, it probably doesn't affect all that much.

Then again, the Administration could appeal this and have SCOTUS decide whether material support should be covered by military commissions more generally.

Update: I was wondering how this would affect al-Bahlul's appeal. Steve Vladeck says it might affect it significantly.

> And that's where the *next* military commission case, *al-Bahlul*, comes in—one of the claims al-Bahlul raises in his appeal is that *conspiracy* was not recognized as a violation of the laws of war when the MCA was enacted, and so, as in *Hamdan*, the commission could not try him for that offense, either.
>
> [snip]
>
> Judge Kavanaugh adopts Justice Stevens's reasoning for the plurality in *Hamdan I* as the law of the D.C. Circuit

> in *Hamdan II*. As a result, an individual can only be tried in a military commission under the MCA for conduct that, prior to 2006, was *clearly* in violation of international law. Applying that standard, the *Hamdan II* majority easily brushes aside various Civil War-era examples, suggesting that, whatever their implications, they hardly meet such a requirement for a "firmly grounded" norm proscribing MST.
>
> If this is the standard that the D.C. Circuit applies in *al-Bahlul*, then the government will have an uphill battle in convincing that panel that conspiracy satisfies it, especially given the *Hamdan I* plurality's conclusion that it does not. And if conspiracy is knocked out, as well, that will probably preclude most of the non-9/11 cases going forward—or at least require the government to find more conventional charges.

LATIF: INDEFINITELY DETAINED EVEN IN DEATH

ProPublica reports that Adnan Farhan abd al Latif's body remains in limbo—in an undisclosed location.

> His body hasn't been sent back to his home country of Yemen, and it's no longer at Gitmo.
>
> It's being held in an undisclosed location.
>
> "Mr. Latif's remains are being handled

> with the utmost care and respect by medical professionals and are being maintained in an appropriate facility designed to best facilitate preservation," said a Defense Department spokesman, Lt. Col. Todd Breasseale. "His remains are no longer at JTF-Guantanamo Bay."

Breasseale blames the delay on the Yemenis, who have insisted on autopsy and investigation reports into why he died.

> Lt. Col. Breasseale said the U.S. is responding to Yemen's "wishes that we maintain the remains until a time when they are prepared to receive them."
>
> A Yemeni official said his government "will not accept the remains until we get an official autopsy and an investigation report. We just want to know what happened." The official, who declined to be named, also said that the government was in touch with Latif's family.

Latif died on September 8—26 days ago, or 44% the period until the election. if the sole explanation for the delay is that the US is unwilling to turn over an explanation of how Latif died, it makes it far more likely that Latif died of something other than suicide.

So are they going to hold Latif on ice until the election? Is that the idea?

NOW THAT LATIF HAS DIED BUT HIS

PRECEDENT LIVES, DOD RELEASES LIST HE WOULD HAVE BEEN ON

As Josh Gerstein reported, the government has released a list of 55 Gitmo detainees who have been cleared for release.

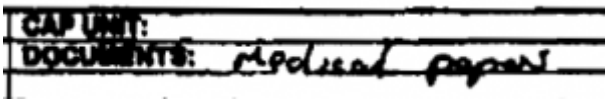
The list was dated September 21—almost two weeks after Adnan Farhan abd al Latif died. Note, the list makes it clear there are others who have been cleared, but the names of the others "approved for transfer" are "protected by sealed orders issued by the Court of Appeals." I assume, from that, that these others are the men who have lost habeas cases, probably in the DC Circuit, and the government doesn't want to admit how many detainees' habeas cases it fought after having decided on their own account they could release it.

That is, they don't want to admit how many other detainees are in the position Latif was in: cleared for release, but held on one dodgy intelligence report.

And now that Latif is dead and that Latif precedent is still valid in the DC Circuit, many of the others on the list are presumably facing that same limbo: held on the basis of what the CIA or DOD dubiously claim when they don't need to be.

LATIF'S DEATH: A BLOW TO THE HEAD OF OUR SYSTEM OF JUSTICE

I'd like to take



issue with Ben Wittes' post on the sadness of Adnan Farhan abd al Latif's death. I certainly agree with Wittes that Latif's death is terribly sad. But I object to Wittes' take on three related grounds. Wittes,

- Provides a problematic depiction of the justification for Latif's detention
- Misstates the importance of Latif's clearance for release
- Assigns responsibility for Latif's continued detention to the wrong people

Wittes tries hard to downplay how much Latif's death in custody damns Gitmo. But he does so by obscuring a number of key facts all while accusing Gitmo foes of building up "myths."

A problematic depiction of the justification for Latif's detention

Before he talks about how sad this is, Wittes tries to refute the "myths" Gitmo opponents have spread. First, he argues, we should not be arguing Latif was innocent.

> Guantanamo's foes **are building up a lot of myths** about the Latif case—many of which I don't buy at all. While I have criticized the D.C. Circuit's opinion in the case, **it does not follow** from the decision's flaws that Latif was an innocent man wrongly locked up for more than a decade. Indeed, as I argued inthis post, **it is possible** both that the district court misread the evidence as an original matter and that the D.C.

> Circuit overstepped itself in reversing that decision. The evidence in the case—at least what we can see of it—**does not suggest to me** that Latif had no meaningful connection to enemy forces. [my emphasis]

After twice using the squirreliest of language, Wittes finally settles on a lukewarm endorsement of the argument that Latif had some "meaningful connection" to the enemy. Curiously, though, he exhibits no such hesitation when he describes Latif this way:

> Latif—a guy whose mental state was fragile, **who had suffered a head injury**, and who seems to have had a long history of self-injury and suicide attempts. [my emphasis]

That's curious because whether or not Latif continued to suffer from his 1994 head injury was a central issue in whether or not Latif was credible and therefore whether he should be released. Moreover, it is one area where—as I explained in this post—Janice Rogers Brown fixed the deeply flawed argument the government made, thereby inventing a new (equally problematic, IMO) argument the government had not even plead to uphold the presumption of regularity that has probably closed off habeas for just about all other Gitmo detainees.

As you'll recall, Henry Kennedy found Latif's argument he had traveled to Afghanistan for medical treatment for his head injury credible because DOD's own intake form said he had medical records with him when they took custody of him in Kandahar.

> Furthermore, there are indications in the record that when Latif was seized traveling from Afghanistan to Pakistan, he was in possession of medical records. JE 46 at 1 (noting that Latif was seized in a "[b]order [t]own in [Pakistan]"

> with “medical papers”); JE 66 (unidentified government document compiling information about Latif) at 2 (stating that “[Latif] had medical papers but no passport or weapon” when he “surrendered himself to [Pakistani] authorities”).12

David Tatel, too, pointed to that in his dissent: “the most plausible reason for why Latif would have had medical papers in his possession when first seized is that his trip in fact had a medical purpose.”

Yet the government argued that Latif offered no corroboration for his story.

> The court improperly gave no adverse weight to the conclusory nature of Latifs declaration, and the lack of corroboration for his account of his trip to Afghanistan, both factors which should have weighed heavily against his credibility.
>
> [snip]
>
> Latif also provided no corroboration for his account of his trip to Afghanistan. He submitted no evidence from a family member, from Ibrahim, or from anyone to corroborate his claim that he was traveling to Pakistan in 2001 to seek medical treatment.

That’s a laughable claim. Latif submitted one of the government’s own documents as corroboration for his story. The government, however—in a brief arguing that all government documents should be entitled to the presumption of regularity—dismissed that corroborating evidence by implying that government document didn’t mean what it said—which is that Latif had medical papers with him when captured.

> Respondents argue that these indications are evidence only that Latif said he had

> medical records with him at the time he was seized rather than that he in fact had them.

The claim is all the more ridiculous given that, unlike the CIA interrogation report the government argued should be entitled to the presumption of regularity, there's a clear basis for the presumption of regularity of Latif's intake form: the Army Field Manual. It includes instructions that intake personnel examine documents taken into custody with detainees. They don't just take detainees' words for it, they look at the documents.

I'm not suggesting that the government's claim—that the screener just wrote down whatever Latif said—is impossible; I think it's very possible. But they can only make that argument if they assume the intake screener deviated from the AFM, and therefore a document created under far more regulated conditions than the CIA report, and one created in US—not Pakistani—custody, should not be entitled to the presumption of regularity. The government may be right that the intake form was not the result of the screener examining the claimed medical documents as directed by the AFM, but if they are, then their entire appellate argument falls apart. Their biggest attempt to discredit Latif is also proof that these documents created in a war zone should not be entitled to the presumption of regularity.

They went even further than that, though. They dismissed altogether the notion that Latif had a persistent head injury. From Kennedy's opinion:

> They argue that records from his arrival at Guantanarno Bay undercut his assertions of being disabled by indicating that Latif had "no significant medical illness or injuries while detained at Kandahar detention facility" and "denie[d] significant medical [history]." JE 54 at 1, 3. Furthermore, they submit a declaration

> from a physician who concluded that Latif was physically able to be a fighter. JE 55 (Decl. of Col. Greogy M. Winn, M.D. (May 25, 2010).

Latif's Gitmo file says only "Detainee is in fair health," which, given how rosy these tend to be, translates into significant but undisclosed health issues. It then goes on to dismiss his complaint about a head injury based on a visual inspection by an interviewer for scars or defects.

But Latif submitted a doctor's evaluation describing evidence of a skull fracture and **lingering** symptoms.

> Latif has submitted a declaration from another physician who noted that because "medical screening for transfer by air or inprocessing is expedient and time sensitive," such screening "often do[es] not identify clinical problems that later become apparent.'· PE 6 (Decl. of Stephen N. Xenakis, M.D. (June 6, 2010) 115. This physician looked at Latif's medical records and found that the evidence of a "linear skull fracture" and lingering "symptoms of headaches, impairments in memory and concentration, and losses in hearing and vision" would disqualify Latif from United States military service. *Id* 119.

While this passage is unclear (and Dr. Xenakis was unable to tell me more because of a protection order), it suggests Latif continued to suffer from the same persistent symptoms that led him to go to Afghanistan in the first place **while he was at Gitmo**. If that's right, his records at Gitmo disproved the government's claims made to discredit him.

Now, setting aside the way the government denied its own document the presumption of regularity so as to win this case—which by itself

undermines everything the government says about Latif's credibility—consider the way Rogers Brown tries to get them out of this hole.

> The only piece of extrinsic evidence the district court relied on does nothing to weaken the presumption of regularity. The district court found Latif was captured with medical records in his possession. based on a government document's statement to that effect.
>
> [snip]
>
> This evidence corroborates Latif's assertions about his medical condition and incidentally corroborates the Report's description of his medical trip to Jordan-but it does nothing to undermine the reliability of the Report. The Government is tasked with proving Latif was part of the Taliban or otherwise detainable-not disproving Latif's asserted medical condition. There is no inconsistency between Latif's claim that Ibrahim promised him medical treatment and the Report's statement that Ibrahim recruited him for jihad. Both may be true. For example, Ibrahim could have promised Latif the medical treatment he needed to induce him join the Taliban.

In her improper Appellate level fact-finding, Rogers Brown accepts that Latif had medical records with him and that it supported the argument he had a head injury.

Ignoring the fact that no affirmative evidence supports the government's claim that Ibrahim Alawi was a recruiter, even if he were, Rogers Brown argues that a guy induced to travel to Afghanistan to get medical treatment should be held as a Taliban warrior. This, even in the absence of any evidence that Latif fought (the contested report records him as saying he did not fight, and no detainees have ever placed him

credibly at a battle site). So while Rogers Brown has cleaned up the fatal problem with the government's presumption of regularity argument, she introduced the premise that a guy suffering from a persistent head injury who traveled to fix it could be held as a fighter for having done so.

The importance of the detail that Latif had been cleared for release

Now, even ignoring the standard Wittes originally uses to detain someone for life—"it does not follow," "it is possible"—the fact that this is either a case where the government violated its own appellate principle to prove its point or that Latif got held because he sought medical treatment—feeds into the importance of the fact that Latif had been cleared.

Wittes makes a generalized argument—divorced the known facts of Latif's case—that it is not necessarily an injustice that Latif had been cleared yet remained in custody.

> One also shouldn't read into the fact that Latif was cleared for released that the government believed he posed no danger—as many seem to be doing. The government clears people for release for a lot of reasons, and some of the people cleared for release get cleared even though the government believes they *do* pose some danger. To be cleared for release merely means that the government has determined that whatever threat a detainee is believed to pose can be mitigated by some means short of detention—and that it has decided that the policy advantages of a release outweigh the risks. It is a prudential judgment, not a character judgment or an adjudication on the merits. And it is not necessarily an injustice to be cleared for release and then not released.

It is true that the government has cleared people whom they believed to be dangerous (lots of whom went into the Saudi deradicalization program).

But let's clarify what's at issue here.

Latif was cleared on at least three occasions (there are more suggested in court documents, but I'll look at just these three). JTF-GTMO recommended he be transferred on December 18, 2006. And they recommended he be transferred on January 17, 2008. While there are ambiguities about those recommendations—the 2008 assessment upgraded him to "medium" intelligence value, yet he hadn't been interrogated since February 22, 2006—they do claim he remained a threat. That's based in part on the same CIA report at issue in his case (and some other non-credible claims). And it's based in part on his conduct at Gitmo, some of which has been explained by his psychological difficulties. So thus far, the specific details in this case suggest that Latif was considered an ongoing threat primarily because of a single questionable report and his psychological problems, yet had been cleared for transfer.

But those aren't the approvals for transfer that really matter. The one that matters it the one the Obama Administration made as part of its Gitmo Task Force review which culminated in a January 22, 2010 report. That's true because the report was more thorough than the earlier Bush reviews, with unanimous approval among all national security agencies.

But it's also important because of how the Task Force sorted out the 97 Yemenis still in custody at the time. It found that 38 Yemenis were correctly detained in Gitmo, another 30 had to be "conditionally" detained because of the chaos in Yemen, and a final 29 could be transfered. Just 17 days before the release of the report, however, Obama decided they could not be transfered to Yemen because of the UndieBomb.

> 29 are from Yemen. In light of the

> moratorium on transfers of Guantanamo detainees to Yemen announced by the President on January 5, 2010, these detainees cannot be transferred to Yemen at this time. In the meantime, these detainees are eligible to be transferred to third countries capable of imposing appropriate security measures.

Latif, the confirmation DOD made the other day makes clear, was one of those 29 Yemenis.

Among the things the Task Force used to distinguish detainees who could be transfered and who couldn't was whether "continued detention without criminal charges is lawful" and the strength of "the government's case for defending the detention in any habeas litigation." It described assessments that were revised because they relied on "raw intelligence reporting of undetermined or questionable reliability," which is all Latif was held on. And while the report insists that for many detainees approved for transfer, there was sufficient evidence to detain them, it clearly indicated that for some, the transfer decision amounted to recognition the US didn't have the legal evidence to detain them.

Particularly given the fact that the government had, in the past, claimed that Latif had not been known to have received Taliban training, it suggests the government had its own doubts about whether this single report amounted to adequate proof to hold him.

The chances are very high that Latif was one of the detainees for whom the Task Force found insufficient evidence to hold him.

Obama's responsibility for Latif's continued detention to the wrong people

Which is why I find it sad that Wittes blames Congress for Latif having not been transferred.

> I suspect that had Congress not eventually made it virtually impossible

> to transfer people from Guantanamo, Latif would not have remained in custody until his presumably self-inflicted death.

Now, I think informed observers need to look no further than Bagram, where few Congressional restrictions are in place, but Obama quintupled the number of prisoners, and resisted even the review mandated by Congress, to believe that Congress has become a convenient excuse for Obama on Gitmo.

But that's for Gitmo generally.

In this case, it's even more clear that Obama deserves much of the blame.

After all, less than 2 months before Kennedy granted Latif habeas, he had granted Mohamed Mohamed Hassan Odaini habeas. Like Latif, Odaini is Yemeni, Like Latif, there was little evidence against Odaini; much of the government's case consisted of assailing Odaini's credibility as they did with Latif by denying the persistence of his head injury.

But rather than appeal the District Court ruling, the Obama Administration let Odaini go. John McCain and Lindsey Graham didn't even object to his release.

Nothing Congress did prevented Obama from doing the same with Latif two months later in 2010. He could have simply said Kennedy forced his hand and do what two Administrations had already decided should be done: transfer Latif.

Perhaps the best explanation for why Obama didn't do that comes from WIttes' own blogmate, Bobby Chesney, as quoted in this Charlie Savage article from a month before Kennedy granted Latif's habeas petition.

> Robert Chesney, a national-security law specialist at the University of Texas, said the Yemeni moratorium had created a difficult policy dilemma.

> If the administration lifts the moratorium to avoid losing those cases, it could be attacked by conservatives for sending detainees to Yemen whom it had not been ordered to release, he said. But if it keeps the moratorium, it could face a string of defeats that will undercut its effort to keep holding other detainees.
>
> "The coverage of the Odaini case made them look ridiculous," Mr. Chesney said. "Imagine them experiencing some 50-plus individual defeats. By the time they are done, the narrative of the innocent detainee being blindly or stupidly detained by the administration would be so entrenched that there would be real strategic harm to the administration's case that there are people they actually need to and can justify keeping in military detention."

So instead of looking ridiculous in 2010, when they had a legal out to the continued detention of a bunch of men who had been cleared, they instead went for broke with the Latif case, arguing that a badly flawed document provided sufficient evidence to hold Latif, arguing that a head injury that seems to be recorded in Latif's Gitmo medical records didn't exist.

Obama didn't want to look bad two years ago and so it made an appeal (several actually, but we can focus on this one) that gutted habeas—for all the detainees at Gitmo and anyone else in the DC Circuit.

And now their efforts to avoid looking bad have resulted in a dead body on their watch.

I have none of the squirrely qualms Wittes has: I have little doubt the government had no credible evidence to hold Latif. So I know it was a tragedy for Latif.

But it's also a tragedy for our system of justice, that the government let this man die

rather than serve the interests of justice.

JUDGE LAMBERTH UPHOLDS GITMO DETAINEES' RIGHT TO COUNSEL

I'm a bit cranky, so reading this scathing opinion from Royce Lamberth rejecting the government's effort to impose a new Memorandum of Understanding concerning Gitmo detainees' right to counsel was just the ticket. The operative ruling reads,

> The court, whose duty it is to secure an individual's liberty from unauthorized and illegal Executive confinement, cannot now tell a prisoner that he must beg leave of the Executive's grace before the Court will involve itself. The very notion offense the separation-of-powers principles and our constitutional scheme.

But the part where Lamberth lists the differences between the existing Protective Order and the MOU the government proposed.

> For example, the Protective Order assumes that counsel for the detainees have a "need to know," which allows them to view classified information in their own and related Guantanamo cases. Counsel for detainees are also specifically allowed to discuss with each other relevant information, including classified information, "to the extent necessary for the effective representation of their clients. And, the Protective Order assures that

> counsel have continuing access to certain classified information, including their own work-product.
>
> The MOU, on the other hand, strip counsel of their "need to know" designations, and explicitly denies counsel access to all classified documents or information which counsel had "previously obtained or created" in pursuit of a detainee's habeas petition. Counsel can obtain access to their own classified work product only if they can justify their need for such information to the Government. "Need to know" determinations for this and all other classified information would be made by the Department of Defense Office of General Counsel (DoD OGC), in consultation with the pertinent classification authorities within DoD and other agencies. However, there is no assurance that such determinations will be made in a timely manner. As this Court is keenly aware from experience, the inter-agency process of classification review can stretch on for months. It is very likely that this provision would result in lengthy, needly and possibly oppressive delays. It would also require counsel to divulge some analysis and strategy to their adversary merely to obtain their past work-product.
>
> [snip]
>
> While this Court is empowered to enforce the Protective Order, all "disputes regarding the applicability, interpretation, enforcement, compliance with or violations of" the MOU are given to the "final and unreviewable discretion of the Commander, Commander, Joint Task Force-Guantanamo Bay" (JTF-GTMO). The MOU further gives the JTF-GTMO Commander complete "authority and

> discretion" over counsels' access to classified information and to detainees, including in-person visits and written communications. Apparently, the MOU also gives the Government to unilaterally modify its terms.
>
> [snip]
>
> Unlike the Protective Order, which repeatedly states that the Government may not unreasonably withhold approval of matters within its discretion, the MOU places no such reasonableness requirement on the Commander of JTF-GTMO. Because the MOU does not come into effect until countersigned by the Commander at JTF-GTMO, the Commander could presumably refuse to sign the MOU, leaving a detainee in the lurch without access to counsel. The MOU also states that both the "operational needs and logistical constraints" at Guantanamo as well as the "requirements for ongoing military commissions, periodic review boards, and habeas litigation" will be prioritized over counsel-access. This provision is particularly troubling as it places a detainees' access to counsel, and their constitutional right to access the courts, in a subordinate position to whatever the military commander of Guantanamo sees as a logistical constraint. [citations removed]

This is a better summary of all the potential abuses in the new MOU than any I've seen in commentary on this issue. Rather than treating the government as an entity that has always acted in good faith in the history of Gitmo litigation (and other counterterrorism cases), Lamberth lays out all the big loopholes that the government would use to infringe on habeas corpus.

It's worth a read. Cause I'm sure the government

will appeal, and who knows what this will look like after someone like Janice Rogers Brown gets ahold of it.

OBAMA LOOKING FOR STRUCTURES TO ENSURE HE ABIDES BY RULE OF LAW

Noah Shachtman does a good job of fact checking Obama's claims about his drone program in a recent interview with Jessica Yellin.

But I'd like to push further on his comments about Obama's claims to give Anwar al-Awlaki and Samir Khan (to say nothing of Abdulrahman al-Awlaki) due process by pointing to the way he ends this bit:

> Our most powerful tool over the long term to reduce the terrorist threat is to live up to our values and to be able to shape public opinion not just here but around the world that senseless violence is not a way to resolve political differences. And so it's very important for the President and for the entire culture of our national security team to continually ask tough questions about, are we doing the right thing? Are we abiding by rule of law? Are we abiding by due process? And then set up structures and institutional checks so that you avoid any kind of slippery slope into a place where we're not being true to who we are.

Having started by saying that drones are just a tool, he ends up by saying that we will vanquish

terrorism by upholding our values—rule of law and due process.

And then the Constitution Professor President describes "set[ting] up structures and institutional checks" to make sure that we deliver rule of law and due process.

This, from the guy whose Administration refused to litigate a suit from Anwar al-Awlaki's father to make sure it was upholding the standards Obama claimed in this interview in Awlaki's case.

This, from the guy whose Administration has claimed state secrets to make sure no court can review the claims of people who have been rendered or tortured or illegally wiretapped.

This, from the guy who wouldn't do the politically difficult things to have Khalid Sheikh Mohammed tried—and surely, convicted—before a civilian court in NYC.

He's looking for structures and institutional checks to make sure we don't go down that slippery slope where we forget rule of law. And yet his Administration has repeatedly avoided the one mandated by the Constitution: courts.

Which, according to his own logic, means he's not using the tool that would best work to keep us safe from terrorism.

JUDGE KOLLAR-KOTELLY SEES NO EVIL, HEARS NO EVIL

Yesterday, Colleen Kollar-Kotelly upheld the government's right to withhold cables already released via WikiLeaks under FOIA (see my earlier posts on this FOIA here and here). Her logic seems to have a fatal flaw: she says the

State Department has proven (and the ACLU has not rebutted the claim) that the US Government owns the cables.

> **The ACLU simply offers no rejoinder to the State Department's affirmative showing that all the information at issue** (1) was classified by an original classification authority, (2) **is owned, produced, or controlled by the United States**, and (3) falls within one or more of the eight relevant categories. [my emphasis]

But then she says (noting that ACLU made no mention that these cables had also been released via WikiLeaks and therefore pretending that they might be different) that the government has not officially acknowledged these cables are authentic.

> No matter how extensive, the WikiLeaks disclosure is no substitute for an official acknowledgement and the ACLU has not shown that the Executive has officially acknowledged that the specific information at issue was a part of the WikiLeaks disclosure.

I guess they should let Bradley Manning go free, then, since the State Department isn't prepared to say the cables he is accused of leaking were authentic?

But that's not the most troubling part of this ruling. As I lay out below—and as Kollar-Kotelly presumably knows well—the cables are full of admissions of crime, including murder, torture, and kidnapping. Thus, had she reviewed them to see whether the government's claims that they were properly classified are valid, she would have seen that—in addition to information properly classified to protect foreign relations—a lot of the original classification and the government's refusal to officially release them (which would presumably make them

admissible in a court) serve to hide confessions of criminal activity.

So Kollar-Kotelly chose not to review these cables in camera, choosing instead to rely on the State Department declaration that makes no mention of the criminal admissions included in the cables.

> In this case, because the State Department's declarations are sufficiently detailed and the Court is satisfied that no factual dispute remains, the Court declines to exercise its discretion to review the embassy cables in camera.

It was a cowardly ruling. But all the more cowardly, given that Kollar-Kotelly prevented herself from officially reviewing a bunch of evidence of criminal wrong-doing.

Here are details on the cables Kollar-Kotelly doesn't want to read:

The famous meeting at which Ali Abdullah Saleh promised to lie about our strikes in Yemen

Kollar-Kotelly agreed to keep what has become perhaps the most famous cable ever, in which David Petraeus and Ali Abdullah Saleh discuss the missile strikes we conducted in Yemen in late 2009.

Mind you, the government likely has a very good legal reason to keep this cable secret. The cable makes it clear we were targeting Anwar al-Awlaki (as well as Nasir al-Wuhayshi) in those strikes. And releasing that would constitute official acknowledgement of the targeting of Awlaki that the government has tried so hard to avoid. Furthermore, as I'll show in a follow-up post, it also shows that we targeted Awlaki for death before we had evidence implicating him in a crime.

Plus, the cable shows we were getting false intelligence from someone—and not the Yemenis—which raises real questions about who

fed us the intelligence that led us to kill a Bedouin clan in the name of terrorism.

Mohammed bin Nayef admits the Saudis were involved in 9/11

There's a lot that's interesting in this cable (in addition to the revelation that the names of attendees were redacted in some releases of the cable). It's one of the cables in which we scold the Saudis for failing to stop terrorist fundraising. It features Mohammed bin Nayef suggesting they would prefer military rule in Pakistan over democracy—though he promises Richard Holbrooke the Saudis won't support a coup. And it's one of the cables in which the Saudis sell us on counterterrorism involvement in Yemen in the name of pursuing the Shia Houthis.

But I'm particularly interested in this comment from bin Nayef:

> It had not been easy to see Saudi involvement in 9/11 and other terrorist incidents, he said.

Now, perhaps he was only speaking of the participants. But at a meeting where he basically claims to be helpless to stop terrorist financing, it sure seems to be acknowledgment there was more direct involvement. And that's a detail we've been keeping secret since 9/11.

Proof we knew detainees were being tortured after transfer from Gitmo

Then there's the cable showing we knew that detainees released from Gitmo were tortured by our allies in Tunisia. It relates the opinions of German, Italian, French, British, and Canadian diplomats about whether the now-overthrown Tunisian government tortures. According to Canadian Ambassador to Tunisia Bruno Picard, Tunisian claims they did not torture were "crap" and "bullshit." But the really sensitive detail likely has to do with

the treatment of two GItmo detainees we had transferred to Tunisia two years earlier, Abdullah bin Omar and Lufti Bin Swei Lagha.

> [US] Ambassador Godec noted that there are credible reports of one of the first two transferees being mistreated, including information from the lawyer, the family and statements in open court.

Here's a report from Clive Stafford Smith detailing the treatment bin Omar got in Tunisia. Bin Omar was freed last year after the fall of the Tunisian government.

Another cable reflects similar apparent concerns in Libya, as the Embassy pressured the Libyans to explain some injuries sustained in Libyan custody after their return.

Condi Rice's efforts to exonerate herself for conspiring to kidnap Khalid al-Masri

I've written about this cable before. Not only does it show us strong-arming the Germans to prevent them from subpoenaing anyone in their investigation of our kidnapping and torture of their citizen Khalid al-Masri. But it also seems to show that Condi Rice lied to Germany's Foreign Minister to exonerate herself from any role in al-Masri's kidnapping and torture.

> Condi and John Bellinger may well have personal liability in el-Masri's kidnapping and torture. But it appears, in addition, that Condi lied to her German counterpart to create the public appearance that the US had no concerns about the arrest warrants, and then sent her subordinate to correct that statement. That is, Condi used her counterpart to create the false impression that she, personally, had no concerns about the arrest warrants.

Evidence the Canadian intelligence service "vigorously harass[es]" suspects in response to

terror alerts

In addition to describing Canadian Security Intelligence Service Director Jim Judd whine about CSIS having to comply with the law in Canada, this cable discusses shared US and Canadian pessimism about Pakistan and Canada's efforts to set up a back channel with Iran.

But it might be most interesting because it's one of those cables that appeared in unredacted form, then got redacted along the publication process, and has since appeared in unredacted form. That is, it is one of the cables the government might like to claim exists in authentic and inauthentic forms.That would provide them a way to deny that CSIS Director Judd really said the following:

> Responding to Dr. [Eliot] Cohen's query, Judd said CSIS had responded to recent, non-specific intelligence on possible terror operations by "vigorously harassing" known Hezbollah members in Canada.

Silvio Berlusconi bitching about the court for prosecuting Americans for the Abu Omar rendition

In an meeting early in the Obama Administration with Silvio Berlusconi, Defense Secretary Robert Gates asked that Colonel Joseph Romano, who had been convicted in the Abu Omar rendition, be given US jurisdiction as a NATO officer. The cable describes Silvio's response:

> Berlusconi and Cabinet Advisor Letta assured SecDef the GOI was working hard to resolve the situation. Berlusconi gave an extended rant about the Italian judicial system – which frequently targets him since it is ""dominated by leftists"" as the public prosecutor level. Berlusconi predicted that the ""courts will come down in our favor"" upon appeal,

Not only does this expose Berlusconi's efforts (to say nothing of Gates') to overturn the prosecution of a bunch of Americans for kidnapping, but Silvio goes so far as to call overturning the convictions "our" side.

Pakistan's Prime Minister complaining about inefficacy of drone strikes in Pakistan

I suppose this cable was not released because it shows Prime Minister Youssef Raza Gilani acknowledging and complaining about the inefficacy of drone strikes in Pakisan. Or perhaps it's because of his request that we transfer Aafia Siddiqui back into Pakistani custody (and his allegation she is ill).

What's most interesting about Judge Kollar-Kotelly's decision it could be withheld, though, is that it is classified Confidential, not Secret (as all the other cables are). At least according to the people who first classified it, then, the material it includes isn't all that sensitive.

Here are the other cables withheld in full:

- A discussion about whether Spain could convict Omar Deghayes and Jamil al Banna
- A discussion about the rules the US has to follow to use UK bases to operate intelligence flights that will be shared with third parties; the rules were imposed in response to concerns about our renditions
- A discussion about new rules Ireland imposed for our use of Shannon Airport (a discussion which ended with strategizing about how to

get the Irish to pay for the damage done by five protestors who damaged a US plane)

- The Swiss Deputy Political Director of Foreign Affairs giving us a heads up about an investigation into our renditions, including the suggestion that we broke Swiss law by flying Abu Omar over Swiss airspace when we kidnapped him