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