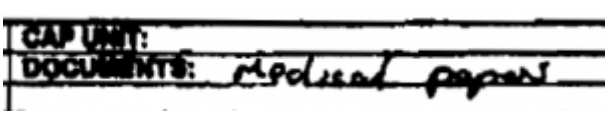
LATIF'S DEATH: A BLOW TO THE HEAD OF OUR SYSTEM OF JUSTICE



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 in this 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.
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> 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.
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> “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.