WERE THE RAMZI BIN AL-SHIBH TAPES ALTERED LIKE THE ABU ZUBAYDAH TAPES WERE?

Given that the AP has filled in some details about the Ramzi bin al-Shibh tapes someone had hidden under a desk at CIA, I wanted to look back at the letter DOJ wrote to Leonie Brinkema in 2007, when the government first admitted it had been sitting on those tapes.

AP says the tapes were found all at once while DOJ only learned about them over a month's time

As you recall, DOJ sent this letter on October 25, 2007, to tell Judge Leonie Brinkema (who had presided over the Zacarias Moussaoui trial) and a judge who had presided over appeals in that case that two CIA declarations DOJ had submitted—on May 9, 2003 and on November 14, 2005—"had factual errors."

Here's how the AP describes the tapes and their discovery:

> The CIA has tapes of 9/11 plotter Ramzi Binalshibh being interrogated in a secret overseas prison. Discovered under a desk, the recordings could provide an unparalleled look at how foreign governments aided the U.S. in holding and questioning suspected terrorists.The two videotapes and one audiotape are believed to be the only remaining recordings made within the clandestine prison system.
>
> [snip]
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> When the CIA destroyed its cache of 92 videos of two other al-Qaida operatives, Abu Zubaydah and Abd al-Nashiri, being waterboarded in 2005, officials believed

> they had wiped away all of the agency's interrogation footage. But **in 2007, a staffer discovered a box tucked under a desk in the CIA's Counterterrorism Center and pulled out the Binalshibh tapes**.
>
> [snip]
>
> The CIA first publicly hinted at the existence of the Binalshibh tapes in 2007 in a letter to U.S. District Judge Leonie M. Brinkema in Virginia. The government twice denied having such tapes, and recanted once they were discovered. But the government blacked out Binalshibh's name from a public copy of the letter. [my emphasis]

The DOJ letter describes a slightly different (though not necessarily inconsistent) chronology. It claims the CIA informed DOJ first of one videotape, and then roughly a month later, of the second videotape and audiotape.

> **On September 13, 2007, an attorney for the CIA notified us of the discovery of a video tape** of the interrogation of [1.5 lines redacted] On September 19, 2007, we viewed the video tape and a transcript [redacted] of the interview. The transcript contains no mention of Moussaoui or any details of the September 11 plot. In other words, the contents of the interrogation have no bearing on the Moussaoui prosecution. The evidence of the video tape, however, is at odds with the statements in two CIA declarations submitted in this case, as discussed in detail below.
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> After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue

> in this case. **CIA's review, which now appears to be complete, uncovered the existence of a second video tape, as well as a short audio tape**, both of which pertained to interrogations [redacted]. On October 18, 2007, we viewed the second video tape and listened to the audio tape, while reviewing transcripts [redacted] Like the first video tape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution—they neither mention Moussaoui nor discuss the September 11 plot. **We attach for the Courts' review ex parte a copy of the transcripts for the three recordings**.
>
> At our request, CIA also provided us with intelligence cables **pertaining to the interviews recorded on the two video tapes**. Because we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations. Based on our comparison of the cables to the [redacted] videotapes, and **keeping in mind that the cables were prepared for the purposes of disseminating intelligence**, we found that the intelligence cables accurately summarized the substance of the interrogations in question. [my emphasis]

So the AP's sources suggested that a staffer simply pulled out a box [Christmas in September!] and found all three tapes—presumably at the same time—whereas DOJ only found out about one tape at first, then sent CIA back to see if there were more. If, as the AP suggests, the CIA found the tapes all at once, then it suggests that the CIA withheld two of the tapes from DOJ until DOJ asked for them specifically. Given that DOJ reviewed the first tape on September 19 and the second and third on October

18, there seems to have been a delay in getting those second two tapes, which might either suggest the tapes weren't found at the same time, or CIA was very slow in turning over tapes they already knew existed.

The DOJ's explanation of why CIA didn't mention the tapes assumes CIA didn't check with CTC before writing the Declarations

Now, the AP reports that John Durham has expanded his investigation to cover the Ramzi bin al-Shibh tapes as well.

> A Justice Department prosecutor who is already investigating whether destroying the Zubaydah and al-Nashiri tapes was illegal is now also probing why the Binalshibh tapes were never disclosed.

The Brinkema letter provides this explanation why the people who wrote the Declarations in 2003 and 2005 didn't mention the tapes.

> Unbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted. We asked the CIA to ascertain the reason for such an error. [1.5 lines redacted] As best as can be determined, it appears that the authors of the Declarations relied on assurances of the component of the CIA that [one line redacted] unknowing that a different component of the CIA had contact with [one line redacted]

While this passage is heavily redacted, it seems to suggest DOJ claims the authors of the Declarations didn't know which components of the CIA had had contact with Ramzi bin al-Shibh (and, potentially, Abu Zubaydah). But the AP reports the tapes were found lying around the Counterterrorism office. That seems to suggest (though we can't be sure with all the redactions) that the people who wrote the Declarations had no clue that CTC was running

the torture program.

Which is really only plausible if you ensure the people who wrote the Declarations were completely compartmented out of the most basic information about the interrogation program.

But I guess ensuring unbelievable levels of ignorance on the part of the CIA Declarants would be a good way to ensure none of the tapes were released pursuant to discovery in the Moussaoui trial.

The reviews DOJ did of the tapes recall the earlier CIA whitewash of the tape content

What I'm particularly interested in—particularly given the news that John Durham has expanded his investigation to cover the obstruction involved with these tapes—is the description of the review that DOJ conducted of the tapes.

On September 13, 2007, DOJ learned of the first tape. On September 19, they viewed the videotape and a transcript—the provenance of which they redact (so we don't know if it was contemporaneous or whether it were done for the benefit of DOJ, and we don't know who did it or whether it also involves translation). Then on October 18, CIA admitted it had another "video tape" and an "audio tape." Once again, DOJ reviewed the tapes and read the transcript. Then, DOJ reviewed the intelligence cables based on just the "video tapes," but not, apparently, the "audio tape," "to ensure that the cables accurately captured the substance of the interrogations." After assuring themselves that the version of the tapes they had reviewed the first time—the cables—was close enough "keeping in mind that the cables were prepared for the purposes of disseminating intelligence," they then gave Brinkema the transcripts for all three tapes, but not the tapes themselves, to review.

I've got a couple of questions about DOJ's actions here:

- Why would they review the

cables at all?

- Why would they review the cables for the "video tapes" but not the "audio tape"?
- Why would they give Brinkema the transcripts but not the videos?

I'd love to have the lawyer folks—or anyone else—weigh in in comments. But here is one possible explanation. It's possible that when DOJ reviewed the tapes they **saw** something on the tapes that they thought might be pertinent, even if it did not constitute a mention of Moussaoui or 9/11. You know—like the physical condition of al-Shibh, or some physical coercion? If so, that might explain why they didn't review the cables from the "audio tape"—because they "saw" nothing on those tapes. (Alternately, it's possible that CIA withheld the cables based on the audio taped interrogation when DOJ did its discovery review, which would be damning all by itself.)

They say they wanted to review the cables "[b]ecause we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations." This sounds, partly, like CYA: they wanted to make sure the representations DOJ had made—as distinct from the CIA Declarations—were accurate and fair. But the fact they even **did** the review of the cables suggests they had their doubts. Add in the heavily caveated judgment that the cables did reflect the content of the interrogation (they seem to conclude the cables reflect the intelligence gained during the interrogation, but not some other aspects of it), and it sure seems like there's a discrepancy between the "video tapes" and the cables. Just not one DOJ felt they were responsible for, given the terms of Brinkema's order on discovery, at least not after Moussaoui had already plead guilty.

Now onto the description of the three tapes: 2

“video” tapes and 1 “audio” tape. Which, in plain language, would seem to suggest that the CIA had means to both record video (as they did with Abu Zubaydah and Rahim al-Nashiri in the same time period) as well as means to record audio. There are no indications the torturers in Thailand made audio tapes. There is, however, proof that by late 2002, the CIA had already altered the Zubaydah tapes such that the video in some of them had been destroyed; they showed nothing but snow.

In other words, I think it distinctly possible—particularly given that the tapes showed up in a box under a desk in the same CTC department that had knowingly tried to cover up the earlier tampering with the Zubaydah tapes—that the one “audio” tape didn’t start out that way, that it got altered in similar fashion to the Zubaydah tape.

That’s all wildarsed speculation, mind you.

But there is some evidence that Durham is not only investigating the 2005 destruction of the torture tapes but also the earlier, 2002, tampering with them. (And his investigation seems to have taken on new energy when he gave John McPherson—who was involved in CIA’s first attempt at covering up this tampering—immunity.) If Durham is collecting evidence that the CIA engaged in a cover-up of torture in its treatment of the Zubaydah tapes, then both the condition of the al-Shibh tapes (if they still exist) and CIA’s earlier treatment of them (including such things as making sure those who wrote Declarations for Brinkema were ignorant of who was running the torture program) would serve to round out his case (and potentially provide the forensic evidence now lacking for the Zubaydah tapes).

All of which probably answers my third question, why DOJ didn’t give Brinkema the tapes themselves. Mind you, I’m sure they accounted for that in the name of protecting sources and methods (you know? methods? fly them to Morocco for the scalpel-on-penis treatment!). But by

withholding the tapes themselves, they prevented Brinkema from seeing whatever it is they saw when they decided they needed to review the cables to see if they were accurate.

Note how carefully the AP's sources claim that the tapes show no "harsh interrogation methods" like waterboarding.

> But current and former U.S. officials say no harsh interrogation methods, like the simulated drowning tactic called waterboarding, were used in Morocco. In the CIA's secret network of undisclosed "black prisons," Morocco was just way station of sorts, a place to hold detainees for a few months at a time.
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> "The tapes record a guy sitting in a room just answering questions," according to a U.S. official familiar with the program.

But if Binyam Mohamed is telling the truth about the scalpel-on-the-penis treatment in Morocco (and thus far, his claims have held up against the documentary evidence), we know the claim that "Morocco was just a way station of sorts" is an out and out lie. But it still may be true that the tapes don't show—or didn't, before one of them became an audio tape, if that's what happened—the approved methods of the CIA program itself. That doesn't rule out the tapes showing other things—like the outright beatings that Mohamed describes having happened in Morocco.

Which appears to be one way the DOJ review of these tapes exactly matches McPherson's review of the Zubaydah tapes in 2002. Both reviewed the tapes and the cables to see whether the cables were a reasonably accurate version of what appeared on the tapes. But both apparently stopped short of comparing the tapes to the limits on interrogation DOJ laid out in 2002. Because if you're DOJ, it would sure suck to be looking at evidence of torture, huh?

Update: papau's comment about the implausibility

that CIA found the tapes under a desk reminded me I wanted to note one more difference between the DOJ version and the AP one. DOJ says the "CIA came into possession of the three recordings under unique circumstances involving separate national security matters unrelated to the Moussaoui prosecution." AP almost suggests the discovery was accidental.

> But in 2007, a staffer discovered a box tucked under a desk in the CIA's Counterterrorism Center and pulled out the Binalshibh tapes.

There seems to be a related story here about why they were looking and discovering boxes full of torture evidence in 2007.