

November 3, 2014

Margaret Hawkins
Director, Records and Management Services
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Re: Comments on CIA Schedule N1-263-14-1

Dear Ms. Hawkins:

The undersigned organizations write to ask that the National Archives and Records Administration (NARA) reconsider its pending approval for the CIA's proposed schedule, N1-263-14-1. We believe the proposal could be interpreted to allow the destruction of crucial documentary evidence regarding the CIA's activities before Congress, the public, or the courts have any opportunity to access them. It calls for preservation of too few officials' emails, for too short a period. It leaves too many key terms undefined, and relies too heavily on the CIA's good faith instead of NARA's own careful appraisal of CIA recordkeeping.

We request the opportunity to submit additional comments after receiving responses to the questions below, and after the public release of a forthcoming Senate report.

A. COMMENTS

1. The proposed schedule appears to allow destruction of emails from high-level CIA officials, regarding subjects of great historical importance and intense public interest.

The CIA's proposal designates 22 officials whose emails would be permanently retained, out of a total work force of over 21,000 civilians and an unknown number of contractors.¹ Under the proposal, the agency appears to have the discretion to destroy the following individuals' emails on the day they depart the agency, if not before:

- Every single official in the National Clandestine Service other than the Director of the National Clandestine Service, including:
 - the Deputy Director of the National Clandestine Service
 - the head of the Counter Terrorism Center and all of the Counter Terrorism Center's employees
 - the head of the Special Activities Division, which is responsible for the CIA's covert paramilitary operations, and all Special Activities Division employees
 - the head of the Counterintelligence Center, and all of the Center's employees
 - the head of the Counterproliferation Division, and all of the Division's employees
 - the head of the Latin America, Europe, Central Eurasia, East Asia, Africa, Near East, and Iran Operations Divisions

¹ See *The Black Budget*, Washington Post, August 29, 2013, available at <http://www.washingtonpost.com/wp-srv/special/national/black-budget/>.

- the Chief of Station for all overseas CIA posts
- Every CIA attorney other than the General Counsel
- Every official in the CIA Office of Medical Services
- Every CIA contractor, including those under contract with the National Clandestine Service

Particularly troubling is the exclusion of all but one employee of the approximately 5000-person² National Clandestine Service from the list of officials whose emails on important policy decisions must be permanently preserved. The National Clandestine Service, formerly known as the Directorate of Operations and the Directorate of Plans, is responsible for carrying out all covert actions and clandestine human intelligence collection.³ Since its founding, it has engineered and supported coups, carried out invasions and assassinations, supported insurgencies, and sought to influence foreign elections. It recruits spies and maintains relationships with foreign intelligence services.⁴ After September 11 it carried out the CIA's rendition, detention and interrogation/torture program and its targeted killing program, and had a major role in the invasions of Iraq and Afghanistan.⁵ As former CIA Director Robert M. Gates has said, "The clandestine service is the heart and soul of the agency. It is also the part that can land you in jail."⁶

The historical significance of the clandestine service's activities is difficult to overstate. Historian and journalist Tim Weiner, the author of the National Book Award-winning CIA history *Legacy of Ashes*, noted that records of the CIA's clandestine activities are important "historical records relating not only to intelligence but to diplomacy, military action and even presidential decisionmaking."⁷ Weiner said that CIA records are increasingly "crucial" to the *Foreign Relations of the United States* series, the legally mandated, government-produced history of U.S. foreign policy that began in 1861. According to Weiner, while the series is legally mandated to be completed within 30 years, and "we should be up to 1984 by now... they're still working on documents from the 60s and 70s. The primary reason for that is the withholding and destruction of documents by the CIA."⁸

Weiner noted that "[t]hey've had to go back and redo entire volumes" of the *Foreign Relations Series* from the 1950s when previously secret CIA documents were finally released. Without access to those CIA documents, historians had been unable to comply with the statutory

² See Matthew Aid, *Intel Wars: The Secret History of the Fight Against Terror* (2012) at 45. The precise size of the National Clandestine Service is classified. Most estimates range from 4000 to 6000 staff employees, augmented by an unknown number of contractors. OpenTheGovernment.org interview with Tim Weiner, October 23, 2014.

³ See Central Intelligence Agency, Clandestine Service: Frequently Asked Questions, available at <https://www.cia.gov/offices-of-cia/clandestine-service/faqs.html> (accessed October 31, 2014).

⁴ See generally Tim Weiner, *Legacy of Ashes* (2008)

⁵ E.g. Jeff Stein, *Nice Invisibility Cloak!*, Newsweek, October 11, 2013, available at <http://www.newsweek.com/2013/10/11/nice-invisibility-cloak-238088.html>.

⁶ Tim Weiner, *Legacy of Ashes* (2008) at 477.

⁷ OpenTheGovernment.org interview with Tim Weiner, October 23, 2014.

⁸ *Id.*

requirement to compile a “thorough, accurate, and reliable documentary record of major United States foreign policy decisions.”⁹

Those documents, of course, predate email. But the CIA clandestine service’s email records likely contain equally significant information about the agency’s covert counterterrorism activities. These include the agency’s rendition, detention and torture programs; its role in covert targeted killings that have killed thousands of foreigners and four Americans in Yemen and Pakistan; and its role in the wars in Afghanistan and Iraq. Emails from CIA attorneys likely contain crucial records about the legal authorization for the torture, rendition, and targeted killing programs, as well as other covert actions. Significant information about the programs’ origins and execution is likely located in email records from the Office of Medical Services, and from contractors like Blackwater and Mitchell, Jessen and Associates.

Weiner said that the proposed destruction of the overwhelming majority of CIA email records, long before historians or the public can access them, “has the potential of eradicating the history of the CIA...unless unique copies are preserved, there goes the official record of what the agency does.”¹⁰

2. Given the CIA’s history of document destruction based on questionable legal interpretations, the agency’s representations about its emails duplicating evidence preserved in other files should not be accepted without independent evaluation and verification.

NARA’s tentative approval of the CIA’s proposed schedule is based on assertions that permanent federal CIA records found in email accounts will also be preserved elsewhere:

- “It is unlikely that permanent records will be found in [all but 22 CIA officials’] email accounts that is not filed in other appropriate files appraised as permanent, per current Agency policy or the new policy to be issued upon approval of this schedule.”
- “Remaining email not captured in other recordkeeping systems is routine or administrative in nature; transitory; or personal in nature.”
- “It is deeply embedded in Agency culture” to appropriately preserve emails and other records
- There are robust “internal controls in place in the event an employee was engaged in malicious activities.”

It is unclear what the basis for these conclusions is. The schedule fails to adequately convey exactly what changes are being proposed with respect to email storage. There is no indication that NARA reviewed any sample of CIA emails to verify that they do not contain unique, historically valuable records. There is no evidence that NARA interviewed CIA employees about how they treat their email records, or received clarification from the Office of General Counsel

⁹ *Id.*
¹⁰ *Id.*

about how the agency interprets its obligations under the National Records Act. There is no description of the internal controls in place that prevent destruction of evidence, other than a vague reference to “current Agency policy or the new policy to be issued upon approval of this schedule.”

It is essential that NARA thoroughly investigate and publicly clarify all these issues before approving the schedule. As CIA historian Tim Weiner said, “the regulation as proposed relies on the good faith of the CIA” to preserve the history of its activities. But in the past, the CIA has repeatedly destroyed records that “are embarrassing,” “disclose mistakes,” or “reflect poorly on the conduct of the CIA.”¹¹ Weiner continued, “It cannot be left to the CIA to determine what is a record of historical significance...this regulation cannot be allowed to be promulgated unless there is a systemic, orderly, legally enforced way to systematically preserve these documents.”¹²

In many cases, the CIA has justified the destruction of evidence by using an extremely narrow definition of what constitutes a “permanent record.” Documents with unique, historical value have been categorized as “nonrecords”, eligible for immediate destruction, or “working papers,” which may be destroyed at regular intervals if not incorporated into a final version and circulated to high-level CIA officers.¹³ This has contributed to incidents where crucial documents were destroyed, and the CIA has refused to acknowledge that their destruction violated any law.

a. Case study: the CIA’s claim that torture videos were “not federal records”

In a 2000 report on CIA records management, NARA found that the CIA was taking the position that all Operational Activity Files held at clandestine service field sites were “non-record,” and they were not legally required to preserve them.¹⁴ This prompted NARA to conduct a more thorough review of the clandestine service’s files, including “the examination of a large number of files as well as a detailed and extensive review of agency regulations and guidance.”¹⁵ NARA found that “files and documents that warrant permanent preservation” and “document some of the most important and sensitive activities of U.S. government” were being destroyed as “nonrecords.”¹⁶

In response, NARA recommended a revised schedule, which required that CIA operational files be preserved as permanent.¹⁷ But despite NARA’s best efforts, the CIA did not agree to that schedule for over five years.¹⁸ In the interim, the CIA destroyed crucial evidence stored in

¹¹ *Id.*

¹² *Id.*

¹³ See generally Douglas Cox, *Burn After Viewing: The CIA’s Destruction of the Abu Zubaydah Tapes and the Law of Federal Records*, Journal of National Security Law And Policy (June 2011), available at http://jnslp.com/wp-content/uploads/2011/06/04_Cox.pdf.

¹⁴ National Archives and Records Administration, *NARA Evaluation: Records Management in the Central Intelligence Agency* (2000) at 54, available at <http://fas.org/sgp/othergov/naracia.pdf>.

¹⁵ Letter from Michael J. Kurtz, Assistant Archivist for Records Services, NARA, to Edmund Cohen, Director, Office of Information Management, CIA, February 8, 2001, available at <http://www.dcofiles.com/governmentattic/8.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Central Intelligence Agency, Records Schedule N1-263-06-1: Operational Activity Files (2006), available at <http://www.docxdocs.com/n1263061.pdf>.

Operational Activity Files: videotapes of the agency's waterboarding and use of other torture techniques at a black site in Thailand.¹⁹

On November 8, 2005, Jose Rodriguez, then the head of the CIA's clandestine service, sent a cable ordering the destruction of videos of the "enhanced interrogations" of Abu Zubaydah and Abd al Rahim Al Nashiri, using an industrial strength shredder. Both Rodriguez and his CIA superiors maintained afterwards that the destruction of the tapes was legally permissible.²⁰ Soon after the tape destruction became public, a spokesperson told *Newsweek* that "[t]he bottom line is that these videotapes were not federal records as defined by the Federal Records Act."²¹ Then-CIA Director Michael Hayden said that the tapes were destroyed "in the absence of any legal or internal reason to keep them," and "in line with the law."²²

Jose Rodriguez did eventually receive an administrative reprimand over the incident, but as described in his memoirs, the reprimand did *not* state that his destruction of the tapes violated any laws, and its practical effect "is nil." He wrote, "If the Agency ever declassifies my letter of reprimand and gives me a copy, I'll have it framed. To me it says: Courage to Act."²³

The CIA has never publicly changed its position on the legality of the tapes' destruction. The agency has also failed to respond substantively to inquiries from NARA about the destruction of the videos on December 10, 2007 and November 18, 2010.²⁴ The CIA has not submitted a report to NARA under 36 CFR §1230.14, as it would be required to do if it determined that an unlawful destruction of records had occurred.

¹⁹ See, e.g., Mark Mazzetti, *U.S. Says CIA Destroyed 92 Tapes of Interrogations*, New York Times, March 2, 2009, available at http://www.nytimes.com/2009/03/03/washington/03web-intel.html?_r=0.

²⁰ Jose Rodriguez, *Hard Measures* (2012) at 181-218; John Rizzo, *Company Man* (2014) at 17-19; Central Intelligence Agency Press Release, *Director's Statement on the Taping of Early Detainee Interrogations*, December 6, 2007, available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/taping-of-early-detainee-interrogations.html>. See also Douglas Cox, *Burn After Viewing: The CIA's Destruction of the Abu Zubaydah Tapes and the Law of Federal Records*, Journal of National Security Law And Policy (June 2011), available at http://jnslp.com/wp-content/uploads/2011/06/04_Cox.pdf.

²¹ Michael Isikoff, *The CIA and the Archives*, Newsweek, December 20, 2007, available at <http://www.newsweek.com/cia-and-archives-94445>.

²² Central Intelligence Agency Press Release, *Director's Statement on the Taping of Early Detainee Interrogations*, December 6, 2007, available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/taping-of-early-detainee-interrogations.html>.

²³ Jose Rodriguez, *Hard Measures* (2012), at 260-262.

²⁴ Letter from Paul M. Wester, Director, Modern Records Programs, NARA, to Joseph Lambert, Director, Information Management Services, CIA, Dec. 10, 2007, available at <http://www.dcofiles.com/1.pdf>; Letter from Joseph W. Lambert, Director, Information Management Services, CIA to Paul M. Wester, Director, Modern Records Programs, NARA, Jan. 10, 2008, available at <http://www.dcofiles.com/10.pdf>; Letter from Paul M. Wester, Director, Modern Records Programs, NARA, to Joseph Lambert, Director, Information Management Services, CIA, November 18, 2010, available at <http://www.dcofiles.com/11.pdf>; Letter from Joseph W. Lambert, Director, Information Management Services, CIA to Paul M. Wester, Director, Modern Records Programs, NARA, December 7, 2010, available at <http://www.dcofiles.com/10.pdf>; Douglas Cox, "Yes, the CIA Really Would Have Destroyed the Panetta Review," March 17, 2014, available at <http://www.docexblog.com/2014/03/yes-cia-really-would-have-destroyed.html> (stating that the CIA failed to respond to the National Archives' inquiry about the tapes even after the closure of all criminal investigations regarding its interrogation program).

b. Other incidents of document loss or destruction

Even without the CIA's defense of its legality, the destruction of the torture videos could not be dismissed as an isolated incident. There are too many other cases where the CIA has lost or destroyed crucial records. A partial list of examples is below.

- Certain portions of the Abu Zubaydah and Abd al Rahim Al Nashiri interrogation videos were erased or damaged years before Rodriguez destroyed the rest, although it is not clear whether this was deliberate or accidental. In 2003, the CIA Office of the Inspector General (OIG) reviewed videotapes of interrogation sessions at a CIA black site, and found that the tapes from 21 hours of interrogations were not viewable:

OIG found 11 interrogation videotapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. OIG compared the videotapes to [redacted] logs and cables and identified a 21-hour period of time, which included two waterboard sessions, that was not captured on the videotapes.²⁵

- On November 4, 2003, a CIA "ghost detainee" named Manadel Jamadi was killed during an interrogation at Abu Ghraib. Based on press and government reports, CIA personnel lost or destroyed a key piece of physical evidence in Jamadi's death: a bloodstained sandbag that was used to "hood" Jamadi during his interrogation.²⁶ The CIA Office of the Inspector General found that CIA employees' explanation for their removal of the hood was "not believable" and could not be corroborated.²⁷
- Many CIA records regarding the Iran-Contra scandal were deliberately destroyed. As Tim Weiner said, "the people directly involved in the Iran Contra affair fed so many records into the shredder that they jammed the shredder."²⁸ Colonel Oliver North, the National Security Council officials who oversaw the "shredding parties," testified that he did so after CIA director William J. Casey told him to "clean up the files."²⁹

²⁵ Central Intelligence Agency Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities, September 2001-October 2003* (May 2004), at 37, available at http://media.luxmedia.com/aclu/IG_Report.pdf.

²⁶ Adam Zagorin, *Haunted by Homicide: Federal Grand Jury Investigates War Crimes and Torture in Death of 'the Iceman' at Abu Ghraib, Plus Other Alleged CIA Abuses*, *Time*, June 13, 2011, available at <http://nation.time.com/2011/06/13/haunted-by-homicide-federal-grand-jury-investigates-war-crimes-and-torture-in-death-of-the-ice-man-at-abu-ghraib-and-other-alleged-cia-abuses/>

²⁷ *Report of the Constitution Project Task Force on Detainee Treatment* (April 2013) at 97, available at <http://detainee-taskforce.org/read/#/114/zoomed>.

²⁸ OpenTheGovernment.org interview with Tim Weiner, October 23, 2014.

²⁹ William M. Welch, *North Portrays Casey as Godfather of His Covert Operations*, Associated Press, July 9, 1987, available at <http://www.apnewsarchive.com/1987/North-Portrays-Casey-As-Godfather-of-His-Covert-Operations-With-PM-US-Iran-Contra-Rdp-Bjt/id-fdc7c08ba205450d4c8bed6637dd7671>; William M. Welch, *Testimony Stirs Curiosity About Casey's Role*, Associated Press, July 20, 1987, available at <http://news.google.com/newspapers?nid=1876&dat=19870720&id=6y0sAAAAIIBAJ&sjid=c84EAAAIAIBAJ&pg=6877.1334303>. Casey died of a brain tumor several months before North's testimony, so it is impossible to know whether he would have disputed this claim.

- The CIA lost or destroyed most of its documents on its role in the 1953 coup in Iran. According to former CIA historian Nick Cullather, the “culture of destruction” of records at the agency resulted in the loss of many Cold War records. “Iran—there’s nothing. Indonesia—very little. Guyana—that was burned,” Cullather told the *New York Times*.³⁰ In response, former CIA director R. James Woolsey said that “If anything of substantive importance that was an only copy was destroyed at any time...this is a terrible breach of faith with the American people and their ability to understand their own history.”³¹ But the CIA’s official response to the National Archives was that its Iran records, and other destroyed records from the same period, were “working files eligible for disposal.”³²
- In 1972, CIA Director Richard Helms ordered the complete destruction of the files of the MKULTRA project. MKULTRA, as described by the Supreme Court, involved “the research and development of chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior.”³³ Some of the experiments are known to involve the administration of LSD and other drugs to prisoners without their consent. The program has been linked to several deaths, but its history will never be fully known due to the destruction of most relevant documents.³⁴ Tim Weiner said of the destruction of “25 years of records” from MKULTRA: “the national security of the United States was not the issue. It was the violation of the laws of God and man that were at issue.”³⁵

c. The need for a more thorough assessment

To ensure that the CIA does not exploit ambiguities in the proposed schedule to justify destruction of unique, essential records, NARA should take several steps before granting the CIA increased authority to destroy its email records.

First, NARA should require a substantive response from the CIA to its inquiries about the destruction of interrogation videos in 2005. In the past, the CIA has argued that it cannot answer NARA’s questions because of pending criminal investigations. But the last Department of Justice investigation into the CIA program closed in 2012, without any criminal charges filed. Nine years have passed since the tapes were destroyed; nearly seven years have passed since NARA asked the CIA to account for their destruction; and two years have passed since the last criminal investigation into the incident ended. It is well past time for the CIA to provide an explanation of why it believed such crucial documents were “not federal records,” how it understands its obligations under the Federal Records Act, and what measures it has taken to prevent a repeat of the tape destruction incident.

³⁰ Tim Weiner, *CIA Destroyed Files on 1953 Iran Coup*, *New York Times*, May 29, 1997, available at <http://www.nytimes.com/1997/05/29/us/cia-destroyed-files-on-1953-iran-coup.html>

³¹ *Id.*

³² National Archives and Records Administration, *Records Management in the Central Intelligence Agency* (March 2000) at 29, n.1, available at <http://fas.org/sgp/othergov/naracia.pdf>.

³³ *CIA v. Sims*, 471 U.S. 159 (1985), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=471&invol=159>.

³⁴ Tim Weiner, *Legacy of Ashes* (2008) at 73-74.

³⁵ OpenTheGovernment.org interview with Tim Weiner, October 23, 2014.

Second, before approving a schedule that increases the CIA's authority to destroy emails, NARA should undertake an assessment of the CIA's email records comparable to its thorough examination of the agency's Operational Activity Files in 2000 and 2001. NARA should:

- Review a large, representative sample of emails, particularly from accounts of high level officials who are *not* among the 22 listed in the proposed schedule.
- Review a sample of other files that email records are said to duplicate, to ensure that emails are in fact being permanently stored there when appropriate.
- Review in detail both the CIA's existing policy guidance and new policy guidance on email records.
- Consult with the CIA's Office of the General Counsel and Office of Information Management Services, to ensure that the CIA and NARA are interpreting key terms in the proposed schedule the same way.
- Interview CIA employees about how they manage email records in practice.
- Consult with the agency's Chief Historian and history staff, Office of the Inspector General and his staff, Inspector General's office staff, the CIA Historical Review panel, and the agency's congressional overseers.

3. The retention period should be increased to ensure the preservation of relevant documents for litigation and Congressional oversight.

Deleting CIA employees' and contractors' emails immediately upon their separation from the agency—as this proposal appears to authorize—would likely lead to the loss of records that are essential for Congressional oversight and for court cases with high public interest. There are two major reasons for this.

First, due to classification, the public often does not learn the details of CIA covert actions and clandestine collection programs for years or decades after they occur. This delays the commencement of Freedom of Information Act suits, other civil suits, habeas corpus and criminal cases for many years.³⁶

In many cases, there is also a significant delay before the CIA informs Congress of its most sensitive activities—even members and staff of the intelligence oversight committees. For example, the full Congressional intelligence committees were not informed of the CIA's rendition, detention and interrogation program until September 2006. The Senate Intelligence

³⁶ In some cases this classification is warranted by national security concerns. In many others, it is not. *See generally* J. William Leonard, *Yet Again, CIA is Concealing Information Americans Should See*, Defense One, August 20, 2014, available at <http://www.defenseone.com/ideas/2014/08/cia-torture-report-just-latest-information-americans-should-see/91979/> (former head of NARA's Information Security Oversight Office writes that "my 40 years of experience in the world of government secrecy taught me that the CIA rarely if ever acts in good faith when it comes to transparency").

Committee's full study of program did not begin until 2009.³⁷ If this email schedule had been in place, many relevant records could have been destroyed before Senate investigators had a chance to review them.

Similar restrictions have applied to other programs. The CIA withheld details of a contemplated plan to hire Blackwater to kill or capture members of Al Qaeda from the intelligence committees for seven years.³⁸ There are at least five or six Office of Legal Counsel opinions on targeted killing that no member of Congress has been allowed to see. Members of the Senate Intelligence Committee have said that they do not fully understand what surveillance operations the intelligence community—including the CIA—is conducting under the Executive Order 12333.³⁹ There are even greater restrictions on the information provided to Senators and Representatives who do not sit on the intelligence committees.

Second, in many instances the CIA has resisted its obligation to preserve and turn over relevant records even after a court case or a Congressional investigation begins. The following is a partial list of examples:

- The CIA destroyed the interrogation videotapes despite their relevance to multiple court cases and to the 9/11 Commission's investigation.⁴⁰
- As Senator Dianne Feinstein described in a speech this March, on at least three occasions, documents relevant to the Senate Intelligence Committee's investigation of the CIA's torture program disappeared from Senate computers without explanation.⁴¹
- Over the past few months, government attorneys represented multiple times to both federal courts and military commissions that the Executive Branch did not possess a copy of the Senate Intelligence Committee's full, over-6000 page study on the CIA's detention

³⁷ Senator Dianne Feinstein, Floor Statement on Intel Committee's CIA Detention, Interrogation Report, March 11, 2014, available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>.

³⁸ Mark Mazzetti, *CIA Sought Blackwater's Help to Kill Jihadists*, New York Times, August 19, 2009, available at <http://www.nytimes.com/2009/08/20/us/20intel.html>.

³⁹ Barton Gellman and Ashkan Soltani, *NSA Collects Millions of Address Books Globally*, Washington Post, October 14, 2013, available at http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_print.html (quoting Senate Intelligence Committee staff member's statement that "In general, the committee is far less aware of operations conducted under 12333"); Kim Zetter, *Pro-Privacy Senator Wyden on Fighting the NSA From Inside the System*, Wired, October 23, 2014, available at <http://www.wired.com/2014/10/senator-ron-wyden-q-a/> (quoting Senator Ron Wyden's statement that "I'm not sure we're at the bottom or close to it" in understanding how Executive Order 12333 is used).

⁴⁰ Transcript of August 1, 2011 Contempt Hearing before Judge Alvin Hellerstein, *American Civil Liberties Union v. Department of Defense* (04-cv-4151), available at https://www.aclu.org/files/assets/20110801_transcript_of_contempt_hearing.pdf; *Abdullah v. Bush*, 534 F. Supp. 2d 22, 23 (D.D.C. 2008); *U.S. v. Moussaoui*, 591 F.3d 263, 305-307 (4th Cir. 2010); Thomas H. Kean & Lee H. Hamilton, *Stonewalled by the CIA*, New York Times, January 2, 2008, available at <http://www.nytimes.com/2008/01/02/opinion/02kean.html>.

⁴¹ Senator Dianne Feinstein, Floor Statement on Intel Committee's CIA Detention, Interrogation Report, March 11, 2014, available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>.

and interrogation program.⁴² In early October, the Department of Justice admitted that these claims were inaccurate, and the CIA had received the full Senate report some time ago. The only explanation given for the government's prior statements to the contrary was that the CIA "didn't realize that they had it" due to a "miscommunication" or the fact that the report was stored on a compact disc.⁴³

- In the Guantanamo military commissions, the accused September 11 and U.S.S. Cole plotters' torture by the CIA is likely to be crucial to their attorneys' arguments against a death sentence. But according to defense lawyers, the government refuses to turn over crucial evidence about the CIA torture program in discovery, although defense counsel hold Top Secret-SCI clearances. Instead, to date, the prosecution has offered summaries of classified evidence that the CIA determines that defense lawyers have a "need to know." Defense counsel have said these summaries are "false," "misleading," and "woefully inadequate for any meaningful presentation in a capital trial."⁴⁴

Based on this history, NARA should not approve the proposed schedule without a detailed examination of how the CIA intends to preserve relevant emails in case they become necessary to litigation and/or Congressional investigations.

Before approving the schedule, NARA should also review the forthcoming Executive Summary of the Senate Select Committee on Intelligence's study of the CIA's detention and interrogation program, to determine to what extent the intelligence committee relied on emails that might be eligible for deletion under this schedule. The undersigned organizations request permission to supplement these comments after the Senate report is released.

4. Even if the CIA's emails are archived elsewhere, they may be saved in files that are not subject to the Freedom of Information Act and the Mandatory Declassification Review process.

NARA's appraisal of the proposed records schedule states that information in emails is likely "[c]aptured elsewhere in permanent records" such as "Finished Intelligence Reports; Operational Activity files; Policy and Planning files; and Intelligence Collection and Operation files." But some of those collections are exempt from Freedom of Information Act (FOIA) searches under the CIA Information Act of 1984, and from mandatory declassification review requests under

⁴² E.g. Transcript of September 4, 2014 Status Conference before Judge James Boasberg, *American Civil Liberties Union v. Central Intelligence Agency* (13-cv-1870), available at https://www.aclu.org/sites/default/files/assets/leopold_aclu_v_doj_9-4-14.pdf; Government's Third Notice Relating to the SSCI Report, AE206J, *United States v. Al Nashiri*, September 29, 2014, available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE206J\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE206J).pdf).

⁴³ Josh Gerstein, *CIA Didn't Know it Had Senate 'Torture' Report*, Politico, October 7, 2014, available at <http://www.politico.com/blogs/under-the-radar/2014/10/cia-didnt-know-it-had-senate-torture-report-196713.html>.

⁴⁴ Redacted Transcript of the Closed Session Dated June 14, 2013, *United States v. Al Nashiri*, 19, available at <https://www.scribd.com/doc/149295188/AI-Nashiri-II-TRANS14June2013-ClosedSession>.

Executive Order 13,526.⁴⁵ These include the clandestine service's Operational Activity Files and its Policy and Management Files.⁴⁶

In contrast, CIA emails are subject to FOIA and mandatory declassification review requests. Such requests are often denied on national security or other grounds—but not always. The following are a few examples of CIA emails produced under the Freedom of Information Act or through mandatory declassification review, and news stories citing to those emails:

1. Emails regarding the “Panetta Review” of the CIA’s detention and interrogation programs, available at <http://images.politico.com/global/2014/03/11/ciarevgrpdocs.html>. Cited in Josh Gerstein, *Exclusive: CIA Emails Reveal Tension Over Terrorism Probe*, Politico, March 12, 2014, available at <http://www.politico.com/story/2014/03/exclusive-cia-emails-reveal-tension-over-terrorism-probe-104561.html>.
2. Emails regarding the destruction of interrogation videos, available at https://www.aclu.org/files/assets/cia_release20100415_p01-09.pdf (pp. 1, 20); https://www.aclu.org/files/assets/cia_release20100415_p10-18.pdf (pp. 32-33); https://www.aclu.org/files/assets/cia_release20100415_p19-27.pdf (pp. 4-6, 16-21, 30-34)
3. Emails indexed, though not produced, regarding the destruction of interrogation videos and the CIA’s interrogation program generally, available at http://www.aclu.org/files/assets/20091124_Chronology_of_Videotapes.pdf; <http://ccrjustice.org/files/2008-06-25%20Vaughn%20Index%20Chart%20FILED.pdf> http://www.aclu.org/files/assets/20091120_Govt_Para_4_55_Hardcopy_Vaughn_Index.pdf
4. Email correspondence between reporters and the CIA Office of Public Affairs, available at <https://firstlook.org/theintercept/document/2014/09/04/email-correspondence-reporters-cia-flacks/>. Cited in Ken Silverstein, *The CIA’s Mop-Up Man: L.A. Times Reporter Cleared Stories With Agency Before Publication*, The Intercept, September 4, 2014, available at <https://firstlook.org/theintercept/2014/09/04/former-l-times-reporter-cleared-stories-cia-publication/>.
5. Email correspondence regarding CIA cafeteria complaints, available at <https://www.muckrock.com/news/archives/2014/jul/14/doc-note-cia-cafeteria-complaints/>. Cited in Abby Phillip, *Russian Menus, Grapeless Jazz Salad, and Other Top-Secret Cafeteria Complaints from Inside the CIA*, Washington Post, July 14, 2014, available at <http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/07/14/russian-menus-grapeless-jazz-salad-and-other-top-secret-cafeteria-complaints-from-inside-the-cia/>.

⁴⁵ 50 U.S.C. § 3141, available at <http://www.law.cornell.edu/uscode/text/50/3141>; Executive Order 13,526, § 3.5, December 29, 2009, available at <http://www.whitehouse.gov/the-press-office/2009/12/29/eo-13526-classified-national-security-information>.

⁴⁶ Central Intelligence Agency, Background Paper: Decennial Review of CIA Operational File Exemptions, June 28, 2005, available at http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0001309355.pdf.

Admittedly, records of the CIA’s cafeteria complaints have little if any research or historic value (though the fact that they received press coverage demonstrates Americans’ interest in nearly any information about the agency, no matter how mundane or trivial). But the opposite is true of CIA emails regarding the interrogation tapes and the Panetta review, both major sources of controversy between the legislative and executive branches.

In the words of CIA historian Tim Weiner, “the records of the government of the United States belong to the people of the United States.”⁴⁷ Preservation of documents in files that are categorically inaccessible to the public is not an adequate substitute for preservation of documents in files that may be searched, reviewed, and potentially released.

B. QUESTIONS

1. The proposed schedule states:

Agency policy requires users to retain email that meet the definition of a record requiring longer retention in an approved recordkeeping system. Agency policy also allows disposal of temporary, transitory, or nonrecord email requiring shorter retention in accordance with General Records Schedule 23 Item 7 and other relevant GRS or Agency Records Control Schedule citations

- a. Is this a description of current CIA email retention policies, or a description of what the policies would be if the schedule is adopted?
- b. What is the CIA’s current working definition of a “record” email? What is the CIA’s current working definition of a “temporary, transitory, or nonrecord” email?
- c. What guidance does the CIA provide to employees and contractors as to which emails “meet the definition of a record,” and how long those emails must be retained?
- d. Other than General Records Schedule 23, Item 7, what are the relevant “GRS or Agency Control Schedule citations” that currently govern email retention periods?

2. Has NARA requested or reviewed any interpretations or analyses by the CIA General Counsel’s office of the CIA’s obligations under the Federal Records Act?

3. The proposed schedule provides for “Non-Senior Email” to be treated as follows:

Temporary: After separation of staff employee, contractor, or other category of personnel, destroy at 3 years or when no longer needed, whichever is sooner.

⁴⁷ OpenTheGovernment.org interview with Tim Weiner, October 23, 2014.

- a. Is email of a staff employee, contractor, or other personnel required to be retained until “separation”, or may it be deleted sooner?
- b. What is the criteria for determining whether email is “no longer needed”? Will the default assumption be that all of an employee’s or contractor’s emails are no longer needed upon his or her separation?
- c. Before separation, is email currently maintained in electronic form or in hard copy? Will the adoption of this proposal mean that email is required to be maintained in hard copy?
- d. If a CIA staff employee becomes a contractor, is that a “separation”?
- e. Why is three years after separation the ceiling, rather than the floor, for preservation of emails?

4. The proposed schedule excludes emails “that document the formation of significant policies, decisions or actions of senior leadership” in 22 listed positions, “which may include supporting personnel if they perform functions on direct behalf” of the 22 officials?

- a. Does this mean that emails will be preserved permanently only if they both document significant policies, decisions or actions *and* come from the accounts of the 22 listed officials? Or are all emails from the 22 listed accounts preserved?
- b. Under what circumstances, if any, would the proposed schedule require preservation of an email that documented a significant policy, action or decision, but was not sent to or from one of the 22 listed officials?

5. NARA’s description of its Record Schedule Review Process states that proposed schedules should include “citations to older schedule items if a proposed schedule has disposition instructions superseding or replacing older items,” and “justifications for changes in the retention period or dispositions for series already scheduled.”⁴⁸ What older schedule items does the CIA proposal supersede? How exactly does it change retention periods, and what is the justification for the change?

6. How does the proposed records schedule interact with:

- a. Schedule N1-263-03-2, Working Files
- b. Schedule N1-263-95-1, Investigative Files
- c. Schedule N1-263-06-1, Operational Activity Files?

⁴⁸ National Archives and Records Administration, Records Schedule Review Process, available at <http://www.archives.gov/records-mgmt/policy/records-schedule-review-process.html>.

7. Did NARA request to review CIA emails or any sample of them before approving the proposed schedule?

- a. If so, how did the CIA respond to the request? What emails and files did NARA review, and what were the results of that review?
- b. If NARA did not review a sample of CIA emails, how did NARA determine that they have “little or no research value”?

8. NARA’s appraisal states that any historically valuable information found in CIA emails will likely be “captured elsewhere in permanent records,” such as “Finished Intelligence Reports; Operational Activity files; Policy and Planning files; and Intelligence Collection and Operation files.” Did NARA request access to those files to evaluate that CIA employees had preserved emails there when appropriate? If so, was that request granted?

9. NARA’s appraisal states that the CIA’s “current email policy is to print and file,” and this records schedule is preparation for “implementing a Capstone approach for their temporary email.” However, the proposal also states that “the Agency is not implementing Capstone for their permanent email.”

- a. How will the CIA store permanent email, if not using Capstone?
- b. Why did the CIA reject a Capstone approach for its permanent records?
- c. Does the CIA’s proposed “Capstone approach for their temporary email” mean that emails will be required to be maintained in electronic period for longer than is presently the case? If not, how does this proposal comport with the goals of the Capstone program?

10. NARA’s appraisal states that “It is unlikely that permanent records will be found in these email accounts that is not filed in other appropriate files appraised as permanent, per current Agency policy or *the new policy to be issued upon approval of this schedule.*” Has NARA received a final copy of the proposed new policy to be issued upon approval of this schedule? If so, can it be made public (in redacted form if necessary)?

11. Did either NARA or the CIA consult with any of the following regarding this proposal? Did they concur that the proposed schedule would adequately preserve records?

- a. The CIA Inspector General and staff?
- b. The CIA’s Historical Review Panel?
- c. The CIA’s Chief Historian and staff?

12. Has the CIA ever submitted a report to NARA under 36 CFR § 1230.14, regarding improper destruction of federal records? Has it submitted any such reports in the past 10 years? The past 20 years?

13. The CIA first sent this proposed schedule to NARA on January 22, 2014, in the midst of a dispute with the Senate Select Committee on Intelligence about the propriety of the Senate's access to CIA documents popularly known as the "Panetta Review."⁴⁹ Could the proposed schedule authorize destruction of any emails that were part of or otherwise relevant to the Panetta Review? Could it authorize destruction of emails related to the CIA's unlawful search of Senate computers earlier this year, or the CIA's dispute with its oversight committee more generally?

14. Why did the CIA decide to change its email storage rules?

Thank you very much for your consideration. Again, we respectfully request the opportunity to submit further comments after receiving the response to these questions, and after the public release of the Executive Summary of the Senate Select Committee on Intelligence's review of the CIA's detention and interrogation program.

Sincerely yours,

American Civil Liberties Union
American Library Association
Appeal for Justice
Bill of Rights Defense Committee (BORDC)
Center for Media and Democracy
Center for Victims of Torture
Citizens for Responsibility and Ethics in Washington (CREW)
Constitutional Alliance
Defending Dissent Foundation
Government Accountability Project
Human Rights Watch
National Religious Campaign Against Torture
National Security Archive
OpenTheGovernment.org
PEN American Center
Project on Government Oversight (POGO)
Sunlight Foundation

⁴⁹ See Letter from CIA Director John Brennan to Senator Dianne Feinstein, January 27, 2014, available at <http://images.politico.com/global/2014/03/11/brennanltrreview.pdf>; Senator Dianne Feinstein, Floor Statement on Intel Committee's CIA Detention, Interrogation Report, March 11, 2014, available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>; CIA Office of the Inspector General, Summary of Report Prepared at the Request of the Congressional Intelligence Committees, July 31, 2014, available at <http://images.politico.com/global/2014/07/31/cia-senateigrdisumm.pdf>.