

## **Burn After Viewing: The CIA's Destruction of the Abu Zubaydah Tapes and the Law of Federal Records**

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### INTRODUCTION

On December 6, 2007, the Central Intelligence Agency publicly disclosed that in 2005 it had destroyed videotapes of CIA interrogations of alleged terrorist Abu Zubaydah conducted in 2002. It asserted that the destruction was “in line with the law.”<sup>1</sup> The disclosure resulted in calls for congressional investigations;<sup>2</sup> a motion for contempt in a Freedom of Information Act (FOIA) suit by the American Civil Liberties Union (ACLU);<sup>3</sup> emergency motions in Guantánamo detainee cases;<sup>4</sup> questions about the case of Zacharias Moussaoui;<sup>5</sup> and an angry op-ed from the chairmen of the 9/11 Commission.<sup>6</sup> The crux of these public reactions – as with the criminal investigation that resulted – was primarily the narrow

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1. See Press Release, Central Intelligence Agency, Director's Statement on the Taping of Early Detainee Interrogations (Dec. 6, 2007), <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/taping-of-early-detainee-interrogations.html> [hereinafter D/CIA 2007 Statement].

2. See, e.g., Letter from Sen. Patrick Leahy and Sen. Arlen Specter to Michael Mukasey, Attorney General (Dec. 10, 2007) (inquiring about the destruction of the tapes), available at <http://www.dcofiles.com/121.pdf> [hereinafter Leahy/Specter Letter].

3. See Plaintiffs' Motion for Contempt and Sanctions, *ACLU v. Dep't of Def.* (S.D.N.Y. Dec. 12, 2007) (No. 04-4151). The motion continues to be litigated in 2011. See Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Contempt and Sanctions, *ACLU v. Dep't of Def.* (S.D.N.Y. Feb. 15, 2011) (No. 04-4151).

4. See *Abdullah v. Bush*, 534 F. Supp. 2d 22, 23 (D.D.C. 2008) (finding that Guantánamo detainee had “made sufficient showing, un rebutted by [the government], of a likelihood that some of the destroyed videotapes were evidence” subject to a 2005 preservation order).

5. See *U.S. v. Moussaoui*, 591 F.3d 263, 305-307 (4th Cir. 2010) (discussing the relevance of the destroyed Abu Zubaydah tapes).

6. Thomas H. Kean & Lee H. Hamilton, Op-Ed, *Stonewalled by the C.I.A.*, N.Y. TIMES, Jan. 2, 2008, at A17.

issue whether the destruction of the tapes was illegal because they were relevant to pending or foreseeable cases or investigations.<sup>7</sup>

At the same time, but with much less publicity, the National Archives and Records Administration (NARA) quietly dispatched a letter to the CIA questioning its compliance with more general, institutional obligations under the federal records laws that require preservation of records regardless of their relevance to ongoing proceedings. “As you are aware,” NARA’s letter stated, “no Federal records may be destroyed except under the authorization of a records disposition schedule approved by the Archivist of the United States,” and NARA was “unaware of any CIA disposition authority” that covered the tapes.<sup>8</sup> The CIA’s response was both unequivocal and unexpected. “The bottom line,” a CIA spokesman asserted, “is that these videotapes were not federal records as defined by the Federal Records Act.”<sup>9</sup>

This article examines the legal arguments underlying the CIA’s assertion that the tapes were not federal records, an assertion which, despite its considerable significance, has thus far gone largely unexamined. The article argues that the CIA should have treated the tapes as records and, had it done so, the much publicized debates within the CIA and the White House over whether it was politically palatable to destroy them and questions about their relevance to ongoing cases and government inquiries would have been largely academic. The federal records laws, properly applied, would have required the preservation of the tapes even in the absence of FOIA requests by the ACLU, pending Guantánamo detainee cases, or document requests from the 9/11 Commission.

The federal recordkeeping statutes, collectively referred to as the Federal Records Act, are designed to ensure the “accurate and complete” documentation of the work of the government.<sup>10</sup> Under the law, a federal “record” includes any “documentary material” – including videotapes – that documents official government business and that is “appropriate for preservation.”<sup>11</sup> An agency may not destroy such records without approval from the Archivist of the United States, a requirement that recognizes that records may have value beyond the immediate needs of an agency and

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7. See Decl. of John H. Durham at ¶4, *James Madison Project v. CIA* (D.D.C. June 9, 2008) (No. 07-2306) (stating that the criminal investigation encompassed whether any person “obstructed justice,” “acted in contempt of court or Congress,” or whether “the destruction of the videotapes violated any order issued by any federal judicial officer”).

8. Letter from Paul M. Wester, Jr., Director, Modern Records Programs, NARA, to Joseph Lambert, Director, Information Management Services, CIA (Dec. 10, 2007), available at <http://www.dcofiles.com/1.pdf> [hereinafter 2007 Wester Letter].

9. Michael Isikoff, *The CIA and the Archives: Did Tape Destruction Violate Records Law?*, NEWSWEEK, Dec. 21, 2007, <http://www.newsweek.com/2007/12/20/the-cia-and-the-archives.html>.

10. 44 U.S.C. §2902(1) (2006).

11. 44 U.S.C. §3301 (2006).

acknowledges that, as the courts have noted, “agencies, left to themselves, have a built-in incentive to dispose of records relating to ‘mistakes.’”<sup>12</sup>

The CIA’s determination that the tapes were not “records,” however, avoided these requirements altogether. This interpretation of the law placed videotapes of Abu Zubaydah being waterboarded – the legality and efficacy of which constitutes one of the most important legal and moral debates in recent history – into the same category as “extra copies of documents preserved only for convenience of reference” and other “nonrecord” documents that can be destroyed without authorization.<sup>13</sup> The CIA’s analysis of the legal status of the tapes at the very least raises a red flag that suggests that either the CIA’s interpretation of the recordkeeping laws is too narrow or that such laws need revision, or both.<sup>14</sup>

Despite the implications of such issues for the CIA’s current and future obligation to preserve documentation of its intelligence operations, the Department of Justice (DOJ) criminal investigation into the destruction of the tapes put relevant inquiries by NARA and Congress on hold for nearly three years, a delay that had the effect of impairing their oversight. Criminal indictments for the past destruction of the interrogation tapes, even had they materialized, would not have remedied the more significant issue of the CIA’s *ongoing* interpretation of its recordkeeping responsibilities. Despite the November 2010 announcement that the DOJ would not seek criminal charges for the destruction of the tapes,<sup>15</sup> therefore, this article seeks to begin an examination of the CIA’s interpretation of its institutional responsibilities under the federal records laws in light of its treatment of the tapes, an examination that is not only ripe, but overdue.<sup>16</sup>

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12. *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 41 (D.C. Cir. 1983).

13. 44 U.S.C. §3301 (2006).

14. Moreover, the destruction of the interrogation tapes was not an isolated incident of questionable records preservation practices within the CIA. A NARA evaluation of CIA recordkeeping practices found, for example, a general tendency of CIA personnel to classify their documents improperly as nonrecord “soft” files that did not have to be preserved. NAT’L ARCHIVES AND RECORDS ADMIN., RECORDS MANAGEMENT IN THE CENTRAL INTELLIGENCE AGENCY 8, 25 (2000), *available at* <http://www.dcofiles.com/fas/nara.pdf> [hereinafter NARA EVALUATION].

15. Press Release, Dep’t of Justice, Statement on the Investigation into the Destruction of Videotapes by CIA Personnel (Nov. 9, 2010), *available at* <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html>.

16. Following the DOJ’s announcement, NARA notified the CIA that it was resuming its inquiry into whether “an unauthorized destruction” of federal records occurred. Letter from Paul M. Wester, Jr., Director, Modern Records Programs, NARA, to Joseph Lambert, Director, Information Management Services, CIA (Nov. 18, 2010), *available at* <http://www.dcofiles.com/11.pdf> [hereinafter 2010 Wester Letter]; *see also* Michael Isikoff, *CIA Faces Second Probe over Videotape Destruction*, MSNBC, Nov. 10, 2010, [http://www.msnbc.msn.com/id/40115878/ns/us\\_news-security/](http://www.msnbc.msn.com/id/40115878/ns/us_news-security/).

Part I of this article provides a timeline of the creation and destruction of the interrogation tapes based on publicly available CIA documents that repeatedly reference the issue whether the tapes were records. Part II briefly outlines the legal framework governing the creation, preservation, and disposal of federal records, and the exceptions for “nonrecords” and “working files,” and raises the troubling possibility that the CIA may arguably have a statutory exemption from certain portions of the federal records law that is not reflected in the current U.S. Code. Part III assesses the legal status of the interrogation tapes and argues that the tapes should have been considered records and that the CIA’s determination otherwise represents, at best, a questionable and highly aggressive interpretation of the law. Part IV argues that the destruction of the interrogation tapes should provide the impetus for modest, but crucial, amendments to the federal records laws. The law must ensure that the recordkeeping responsibilities of the intelligence community are sufficiently clear and transparent, that NARA’s supervisory and enforcement powers are sufficiently robust, and that documentation of intelligence operations is preserved to serve current and future intelligence needs and to protect the rights of both detainees and intelligence officers.

#### I. THE CREATION AND DESTRUCTION OF THE TAPES

The growing public narrative of the creation and destruction of the videotapes discloses certain basic facts.<sup>17</sup> The CIA began videotaping interrogations in April 2002 and stopped in December 2002, at which point ninety-two videotapes existed. The tapes primarily depicted the detention and interrogation of Abu Zubaydah, including eighty-three applications of “waterboarding.”<sup>18</sup> The CIA destroyed the tapes in November 2005.

The focus of this article is whether there was a baseline legal obligation to preserve the tapes as federal records. As described in detail below, publicly available documents indicate that the CIA’s initial guidance was to retain the tapes and treat them as records. By early 2003, however, the CIA had determined that the tapes were not records and the CIA’s General Counsel had “no objection” to the destruction of the tapes. This legal position left only specific determinations about whether the tapes were relevant to ongoing or foreseeable proceedings, such as the 9/11 Commission deliberations or Guantánamo habeas cases, as potential legal

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17. See generally THE CIA INTERROGATION OF ABU ZUBAYDAH, available at [http://www.aclu.org/files/assets/CIA\\_Interrogation\\_of\\_AZ\\_released\\_04-15-10.pdf](http://www.aclu.org/files/assets/CIA_Interrogation_of_AZ_released_04-15-10.pdf) [hereinafter CIA Abu Zubaydah Report]; see also American Civil Liberties Union, *Selected Chronology of the CIA’s Destruction of 92 Videotapes*, [http://www.aclu.org/files/assets/20091124\\_Chronology\\_of\\_Videotapes.pdf](http://www.aclu.org/files/assets/20091124_Chronology_of_Videotapes.pdf); Marcy Wheeler, *Torture Timeline*, EMPTYWHEEL, <http://emptywheel.firedoglake.com/timeline-collection/torture-tape-timeline/>.

18. A few tapes depicted interrogations of a second detainee, Abd al Rahim al Nashiri.

obstacles to their destruction.<sup>19</sup> In the end, although several administration officials and lawyers opposed destruction and “counseled caution,” according to Director of the Central Intelligence Agency (D/CIA) Michael V. Hayden it nevertheless remained “the agency’s view that there were no legal impediments to the tapes’ destruction”<sup>20</sup> and therefore the destruction was “in line with the law.”<sup>21</sup>

#### A. *The Creation of the Tapes*

In late March 2002, U.S. and Pakistani personnel raided a house in Faisalabad, Pakistan, during which Abu Zubaydah was shot twice and taken into custody.<sup>22</sup> Shortly thereafter the CIA transferred him to a “black site,” reportedly in Thailand, for interrogation.<sup>23</sup> CIA headquarters “had intense interest in keeping abreast of all aspects of Abu Zubaydah’s interrogation” and videotaping of his detention began soon after his capture.<sup>24</sup>

There were several explanations for the videotaping. First, the CIA wanted to document Abu Zubaydah’s medical condition and his treatment to avoid accusations of culpability in the event of his death.<sup>25</sup> Early on the videotaping was therefore nearly continuous, recording Abu Zubaydah’s “every moment: asleep in his cell, having his bandages changed, being interrogated.”<sup>26</sup> A second reason was to assist in preparing reports of the interrogations. Director Hayden stated that “it was thought the tapes could serve as a backstop to guarantee that other methods of documenting the interrogations – and the crucial information they produced – were accurate

19. Although an examination of these issues is beyond the scope of this article, such considerations are also relevant to the federal records laws. *See infra* Part III.C.

20. Joby Warrick & Walter Pincus, *Station Chief Made Appeal To Destroy CIA Tapes*, WASH. POST, Jan. 16, 2008, at A1.

21. D/CIA 2007 Statement, *supra* note 1.

22. CIA Abu Zubaydah Report, *supra* note 17; *see also* Tim McGirk, *Anatomy of a Raid*, TIME, Apr. 8, 2002.

23. *See* COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES: SECOND REPORT ¶70 (2007), <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> (stating that “Thailand hosted the first CIA ‘black site,’ and that Abu Zubaydah was held there after his capture”).

24. CENT. INTELLIGENCE AGENCY OFFICE OF INSPECTOR GEN., SPECIAL REVIEW, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES ¶77 (2004), *available at* [http://luxmedia.com.edgesuite.net/aclu/IG\\_Report.pdf](http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf) [hereinafter CIA OIG REPORT].

25. *See id.* (noting that “[o]ne initial purpose was to ensure a record of Abu Zubaydah’s medical condition and treatment should he succumb to his wounds and questions arise about the medical care provided to him by CIA.”); *see also* Scott Shane & Mark Mazzetti, *Tapes by C.I.A. Lived and Died To Save Image*, N.Y. TIMES, Dec. 30, 2007, at A1 (stating that if Abu Zubaydah were to have “died in American hands” CIA officers “knew that much of the world would believe they had killed him”).

26. *See* Shane & Mazzetti, *supra* note 25.

and complete.”<sup>27</sup> A senior CIA official at the time later added, “You couldn’t have more than one or two analysts in the room. You want people with spectacular language skills to watch the tapes. You want your top Al Qaeda experts to watch the tapes. You want psychologists to watch the tapes.”<sup>28</sup> A third reason was to ensure that the use of “enhanced interrogation techniques,” including waterboarding, complied with applicable legal guidance. As D/CIA Hayden stated, “this effort was new, and the Agency was determined that it proceed in accord with established legal and policy guidelines. So, on its own, CIA began to videotape interrogation.”<sup>29</sup>

On April 17, 2002, just weeks after Abu Zubaydah was captured, a CIA cable to the field mandated that the tapes “should not [repeat] not be taped over” and that “[e]ach of the tapes should be collected, logged and labeled, and sent to headquarters”<sup>30</sup> The next day, April 18, the field responded noting that with the “round the clock video taping” the officers on site were “quickly building an impressive mound of video tapes” and requested clarification about whether it was necessary to retain the tapes.<sup>31</sup>

On April 27, 2002, an email between CIA officers asked when “the tapes of the interrogations [would] arrive here” and expressly directed that the tapes “should all be catalogued and made into *official record copies*.”<sup>32</sup> A further cable on May 6, 2002, entitled “Guidance on Retention of Video Tapes of Abu Zubaydah” again repeated the earlier instructions: “Please do not tape over or edit videos of Abu Zubaydah’s interrogations” and “Please preserve all videos,” noting that “[t]hrough we recognize that the tapes may be cumbersome to store, they offer evidence of AZ’s condition/treatment

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27. See D/CIA 2007 Statement, *supra* note 1; see also Shane & Mazzetti, *supra* note 25 (stating that videotaping began because of the “interest in capturing all the information to be gleaned from a rare resource”). The CIA OIG noted, however, that the interrogation team advised that the tapes “rarely, if ever, were used for that purpose.” CIA OIG REPORT, *supra* note 24, at ¶77.

28. Shane & Mazzetti, *supra* note 25 (quoting A. B. Krongard).

29. See D/CIA 2007 Statement, *supra* note 1; see also Shane & Mazzetti, *supra* note 25 (stating that “[f]or many years the C.I.A. had rarely conducted even standard interrogation, let alone ones involving physical pressure, so officials wanted to track closely the use of legally fraught interrogation methods.”); Mark Mazzetti, *C.I.A. Destroyed Tapes of Interrogations*, N.Y. TIMES, Dec. 6, 2007 (stating that the videotaping was “ordered as a way of assuring ‘quality control’ at remote sites”).

30. A redacted copy of the April 17, 2002, cable is available at <http://www.dcofiles.com/judicialwatch/17.pdf> [hereinafter April 17, 2002, Cable].

31. A redacted copy of the April 18, 2002 cable is available at <http://www.dcofiles.com/judicialwatch/18.pdf> [hereinafter April 18, 2002, Cable].

32. A government index describing the email as “from a CIA officer to another CIA officer, with several additional CIA officers and attorneys copied” and a redacted copy of the email entitled “AZ Interrogations” is available at <http://www.dcofiles.com/aclu/27.pdf> (emphasis added) [hereinafter April 27, 2002 Email].

2011] THE CIA'S DESTRUCTION OF ITS INTERROGATION TAPES 137

while in [redacted] care that may be of value in the future (apart from actionable intelligence).”<sup>33</sup>

*B. Waterboarding, “Security” Risks, and the End of Recording*

From April until August 2002, discussions took place within the executive branch about the legality of various interrogation techniques, culminating in an August 1, 2002, DOJ Office of Legal Counsel (OLC) written memorandum.<sup>34</sup> The OLC concluded that, subject to several assumptions and conditions, certain interrogation techniques, including waterboarding, would not violate the federal anti-torture statute.<sup>35</sup> According to the CIA's Inspector General, interrogators subsequently “applied the waterboard” to Abu Zubaydah at least eighty-three times in August 2002.<sup>36</sup>

On August 20, 2002, concerns were raised about the retention of the videotapes. CIA officers in the field sent a cable to headquarters entitled “Risks of indefinite retention of videotapes” that discussed “the security risks of videotape retention” and suggested “new procedures for videotape retention and disposal.”<sup>37</sup> On September 5, 2002, a meeting of individuals from CIA headquarters made the crucial determination that preservation of the tapes was “not required by law” and that

their retention represents a serious security risk for [redacted] officers recorded on them, and for all [redacted] officers present and participating in [redacted] operations; they also recognized . . . the danger to all Americans should the tapes be compromised. In this possible circumstance, there also exists a clear danger that the officers pictured on the tapes could be subject to retribution from al-Qa'ida elements.<sup>38</sup>

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33. A redacted copy of the May 6, 2002, cable is available at <http://www.dcofiles.com/judicialwatch/6.pdf> [hereinafter May 6, 2002 Cable].

34. A declassified narrative of the history of the OLC memoranda relating to the CIA's detention and interrogation program prepared by Senator John D. Rockefeller is available at <http://intelligence.senate.gov/pdfs/olcopinion.pdf>.

35. See 18 U.S.C. §2340A (2006); Memorandum from U.S. Dep't of Justice, Office of Legal Counsel to John Rizzo, Acting General Counsel of the Central Intelligence Agency, Interrogation of al Qaeda Operative (Aug. 1, 2002), available at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf>.

36. CIA OIG REPORT, *supra* note 24, at ¶223.

37. A government index describing the August 20, 2002, cable is available at <http://www.dcofiles.com/aclu/20.pdf>.

38. The Sept. 5, 2002, meeting is described in an Oct. 25, 2002, cable entitled “Disposition of Videotapes.” A government index describing the Oct. 25, 2002, cable and a redacted copy of the cable are available at <http://www.dcofiles.com/aclu/25.pdf> [hereinafter

“Accordingly,” a cable to the field later reported, headquarters “determined that the best alternative to eliminate those security and additional risks is to destroy these tapes.”<sup>39</sup>

On October 25, 2002, a cable from headquarters discussed deploying a team to assist in “destroying the tapes completely.”<sup>40</sup> This cable also provided a new policy for the use of tapes:

Starting immediately, it is now [headquarters’] policy that [redacted] record one day’s worth of sessions on one videotape for operational considerations, utilize the tape within that same day for purposes of review and note taking, and record the next day’s sessions on the same tape. Thus, in effect, the single tape in use [redacted] will contain only one day’s worth of interrogation sessions.<sup>41</sup>

By mid-November 2002, however, CIA headquarters decided to conduct a “random independent review” of the tapes prior to their destruction.<sup>42</sup> Shortly thereafter, the CIA’s Office of General Counsel (OGC) dispatched an attorney to review them in order “to ascertain compliance with the August 2002 DOJ OLC opinion and compare what actually happened with what was reported to Headquarters.”<sup>43</sup> Based on the review, the attorney “concluded that the cable traffic did in fact accurately describe the interrogation methods employed and that the methods conformed to the applicable legal and policy guidance.”<sup>44</sup> According to D/CIA Hayden, the CIA thus “determined that its documentary reporting was full and exacting, removing any need for tapes. Indeed, videotaping stopped in 2002.”

On December 3, 2002, the plan to destroy the remaining tapes following the OGC review met an unexpected obstacle. CIA headquarters

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October 25, 2002 Cable].

39. *Id.*

40. *Id.*

41. *Id.*; see also Shane & Mazzetti, *supra* note 25 (stating that according to a CIA officer, by “late 2002, interrogators were recycling videotapes, preserving only two days of tapes before recording over them”).

42. A government index describing a Nov. 15, 2002, email from CIA headquarters to the field, “informing field of request to have a random independent review of the videotapes, before they are destroyed to ensure accuracy” is available at <http://www.dcofiles.com/aclu/15.pdf>.

43. CIA OIG REPORT, *supra* note 24, at ¶77; see also Matt Apuzzo & Adam Goldman, *Key Omission in Memo To Destroy CIA Terror Tapes*, BOSTON GLOBE, July 26, 2010, at 8 (stating that “CIA lawyer John L. McPherson was assigned to watch the videos and compare them with written summaries” and that if “the reports accurately described the videos, that would bolster the case that the tapes were unnecessary”).

44. CIA Abu Zubaydah Report, *supra* note 17, at 7; see also CIA OIG REPORT, *supra* note 24, at ¶77 (stating that the attorney “reported that there was no deviation from the DOJ guidance or the written record”).

exchanged several cables with the field including one entitled "Closing of Facility and Destruction of Classified Information" in which headquarters stated that officers in the field had made a "mistake" (the details of which are redacted) involving moving the tapes.<sup>45</sup> Headquarters therefore instructed that the tapes were not to be destroyed and that each was to be logged in by tape number and date.<sup>46</sup> An inventory the same day found ninety-two videotapes.<sup>47</sup>

### C. Storing the Tapes and Final Destruction

Throughout December 2002 and January 2003, CIA attorneys corresponded repeatedly about the possible destruction of the videotapes, including drafting a memorandum on the issue to then Director of Central Intelligence (DCI) George Tenet.<sup>48</sup> The CIA OGC advised that it "had no objection to the destruction of the videotapes, but strongly recommended" that Congress be "notified about the existence of the tapes and the reasons why the Agency has decided to destroy them."<sup>49</sup> Communications within the CIA discussed what would make the tapes an "official record."<sup>50</sup> On

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45. A government index describing the Dec. 3, 2002, cable entitled "Closing of facility and destruction of classified information" is available at <http://www.dcofiles.com/aclu/3.pdf>. A revised government index describing the same cable (in which the title is changed and "Closing of facility" is removed) and a redacted copy of the cable is available at <http://www.dcofiles.com/aclu/3a.pdf> [hereinafter Dec. 3, 2002 Cable]. Press accounts have made inconsistent claims regarding the timing of the closing of the field facility, which was reportedly in Thailand. Compare Matt Apuzzo & Adam Goldman, *CIA Whisked Detainees from Gitmo*, ASSOCIATED PRESS, Aug. 6, 2010 (stating that the "jail in Thailand known as Cat's Eye closed in December 2002"), with Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (stating that the "black site" in Thailand was closed in June 2003).

46. Dec. 3, 2002 Cable, *supra* note 45. Although relevant cables are unavailable or redacted, one possible explanation is that the "mistake" could have been moving the tapes from the field facility where interrogations were apparently conducted to the CIA station reportedly at the U.S. Embassy in Bangkok, where, according to press accounts, they were held later. See Warrick & Pincus, *supra* note 20. Had the tapes remained at the field facility when it closed, the CIA might have further justified their destruction as part of an "evacuation" of a field facility.

47. A redacted cable dated Dec. 9, 2002, and entitled "Eyes Only – Inventory and Review of Interrogation Videotapes" includes an inventory of the 92 tapes and is available at <http://www.dcofiles.com/aclu/9.pdf>.

48. A government index describing a memorandum "discussing the disposition of the videotapes" from the CIA General Counsel to the D/CIA dated Dec. 20, 2002, is available at <http://www.dcofiles.com/aclu/201.pdf>.

49. CIA Abu Zubaydah Report, *supra* note 17, at 7.

50. For example, a government index describing a memorandum dated Jan. 12, 2003, titled "Official Record Question Regarding Tapes," which discusses "what actions make the videotapes an official record," is available at <http://www.dcofiles.com/aclu/121.pdf> [hereinafter Jan. 12, 2003 Memo].

January 28, 2003, DCI Tenet signed new guidelines for future CIA interrogations involving “enhanced interrogation techniques” whose final provision, titled “Recordkeeping,” required only a written record.<sup>51</sup>

In January and February 2003 the decision to destroy the tapes was made more complex by two additional factors. First was the initiation by the CIA’s Office of Inspector General (OIG) of a “special review” of CIA detention operations, which would include an additional review of the interrogation tapes.<sup>52</sup> Second were the first reactions of government officials outside the CIA to the existence of the tapes and the CIA’s plans to destroy them. In early February 2003, for example, the CIA discussed the tapes with Representative Jane Harman, who revealed in a subsequent letter that the CIA had disclosed that

there is videotape of Abu Zubaydah following his capture that will be destroyed after the Inspector General finishes his inquiry. I would urge the Agency to reconsider that plan. *Even if the videotape does not constitute an official record that must be preserved under the law*, the videotape would be the best proof that the written record is accurate, if such record is called into question in the future. The fact of destruction would reflect badly on the Agency.<sup>53</sup>

In September 2003, a memorandum within CIA headquarters discussed “the possible legality of a proposal to destroy the tapes.”<sup>54</sup> In January 2004, a draft of the CIA OIG’s “special review” was available within CIA headquarters.<sup>55</sup> In February 2004, an email was circulated “concerning the legalities as to whether the CIA is legally required to retain the videotapes.”<sup>56</sup> On April 12, 2004, an email within CIA entitled “Handling

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51. CIA OIG REPORT, *supra* note 24, at App. E, ¶5. The guidelines provided that for interrogations in which “enhanced interrogation techniques” are used “a contemporaneous record shall be created setting forth the nature and duration of each such technique employed, the identities of those present, and a citation to the required Headquarters approval cable.” *Id.*

52. *See generally* Decl. of Constance E. Rea, Deputy Assistant Inspector General for Investigations, Office of Inspector General, CIA, ACLU v. Dep’t of Def. (S.D.N.Y. Jan. 10, 2008) (No. 04-4151) (describing the CIA OIG’s review) [hereinafter Rea Declaration].

53. Letter from Representative Jane Harman to Scott Muller, General Counsel, Central Intelligence Agency (Feb. 10, 2003) (emphasis added), *available at* [http://www.house.gov/apps/list/press/ca36\\_harman/harmanletter.pdf](http://www.house.gov/apps/list/press/ca36_harman/harmanletter.pdf).

54. A government index describing the memorandum dated September 12, 2003, is available at <http://www.dcofiles.com/aclu/126.pdf>.

55. A government index describing a 170-page draft of the review from January 2004 is available at <http://www.dcofiles.com/aclu/127.pdf>.

56. A government index describing the email dated February 19, 2004, discussing “whether the CIA is legally required to retain the videotapes” is available at <http://www.dcofiles.com/aclu/19.pdf>.

## 2011] THE CIA'S DESTRUCTION OF ITS INTERROGATION TAPES 141

of Tapes” again “discussed what actions would make tapes an official record.”<sup>57</sup>

On May 7, 2004, the CIA OIG issued the final version of the “special review,” which found, based on a review of the tapes and in contrast to the conclusion of the earlier review by a CIA OGC attorney, that “the waterboard technique employed at [redacted] was different from the technique as described in the [August 2002] DOJ opinion.”<sup>58</sup> In mid-May 2004, in a meeting at the White House, the disposition of the tapes was discussed in light of the then-recent public release of pictures depicting mistreatment at Abu Ghraib.<sup>59</sup> According to a CIA timeline, Vice President Cheney’s legal counsel David Addington and White House counsel Alberto Gonzales told the CIA not to destroy the tapes.<sup>60</sup> Subsequently additional officials, including John Negroponte, in the newly created position of Director of National Intelligence, also advised against the destruction of the tapes.<sup>61</sup>

In late October 2005, emails within CIA headquarters discussed the possible relocation or destruction of the videotapes, as well as the possible public acknowledgment of the CIA’s interrogation program.<sup>62</sup> At the time, the tapes were reportedly held in the safe of the CIA station chief in Thailand.<sup>63</sup> According to press accounts, the head of the CIA’s Directorate

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57. A government index describing the email dated April 12, 2004, is available at <http://www.dcofiles.com/aclu/12.pdf> [hereinafter April 12, 2004 Email].

58. CIA OIG REPORT, *supra* note 24, at ¶79.

59. Apuzzo & Goldman, *supra* note 43. The Abu Ghraib pictures appeared publicly for the first time in late April 2004. See Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, 60 MINUTES II, Apr. 28, 2004 (noting an Army investigation into detainee abuses and stating that “for the first time, 60 Minutes II will show some of the pictures”), available at <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

60. See “Timeline Regarding Destruction of Abu Zubaydah Videotapes,” available at <http://www.dcofiles.com/aclu/160.pdf>.

61. See *id.* (indicating in November 2005 that the Director of National Intelligence “as recently as a few months ago opposed the idea of destroying the tapes”); see also Warrick & Pincus, *supra* note 20 (stating that those “known to have counseled against the tapes’ destruction” included John B. Bellinger III, Harriet E. Miers, George J. Tenet, and Scott Muller “while serving as the CIA’s general counsel”).

62. A government index describing an October 28, 2005, email entitled “Authorization to destroy tapes” concerning “whether to send a cable to destroy or relocate videotapes” is available at <http://www.dcofiles.com/aclu/54.pdf>. A government index describing an October 31, 2005, email entitled “Potential Press Briefing” discussing whether to “publically acknowledge counterterrorism interrogation program” is available at <http://www.dcofiles.com/aclu/56.pdf>. Such discussions may have resulted from knowledge of an impending *Washington Post* article by Dana Priest, published on November 2, 2005, that alleged the existence of CIA “black sites,” including one reportedly in Thailand. Priest, *supra* note 45.

63. Apuzzo & Goldman, *supra* note 43.

of Operations asked a CIA attorney “whether there was any legal requirement to keep the tapes” and reportedly was told that there was not.<sup>64</sup>

Finally, on November 8, 2005, a CIA cable from the field requested final permission to destroy the tapes, citing “the fact that the Inspector General had advised . . . that [the] video tapes, were no longer required for his investigation and the determination by the Office of General Counsel that the [redacted] cable traffic accurately documented [redacted] activities recorded on video tape.”<sup>65</sup> On the same day, a cable in response approved the destruction of the tapes “for the reasons cited” in the request, namely “there is no legal or OIG requirement to continue to retain the tapes.”<sup>66</sup> On November 9, 2005, a final cable confirmed that the videotapes had been destroyed, noting that “[d]estruction activity was initiated at 0910 HRS and completed at 1230 HRS.”<sup>67</sup>

## II. THE CIA AND THE LAW OF FEDERAL RECORDS

The federal records laws create an integrated legal framework governing the creation, use, and destruction of federal records. The outline below briefly describes that framework, discusses significant exceptions for government documents known as “nonrecords” and “working files,” and explores the application of these standards to the CIA, including possible statutory exceptions unique to the CIA.

### A. *The Legal Framework for Federal Records*

Although the laws governing federal records are commonly referred to collectively as the “Federal Records Act,”<sup>68</sup> relevant statutory provisions derive from a number of different laws, including the Records Disposal Act of 1943,<sup>69</sup> the Federal Records Act of 1950,<sup>70</sup> and the Federal Records Management Amendments of 1976.<sup>71</sup> The interaction between the various

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64. *Id.*

65. A redacted copy of the Nov. 8, 2005, cable entitled “Request Approval to Destroy [Redacted] Videotapes” which requests approval to “follow through” on “original authority to destroy” the videotapes is available at <http://www.dcofiles.com/aclu/81.pdf>.

66. A redacted copy of the Nov. 8, 2005, cable entitled “DDO Approval to Destroy [Redacted] Videotapes” from DDO is available at <http://www.dcofiles.com/aclu/82.pdf>.

67. A redacted copy of the Nov. 9, 2005, cable entitled “Destruction of [Redacted] Videotapes” stating that all ninety-two videotapes were destroyed is available at <http://www.dcofiles.com/aclu/91.pdf>.

68. *See, e.g.,* *Armstrong v. Bush*, 721 F. Supp. 343, 346 n.2 (D.D.C. 1989).

69. Records Disposal Act, Pub. L. No. 78-115, 57 Stat. 380 (1943) (codified as amended at 44 U.S.C. §§3301-3314 (2006)).

70. Federal Records Act, Pub. L. No. 81-754, § 6, 64 Stat. 578 (1950) (codified as amended at chapters 21, 25, 27, 29 and 31 of Title 44).

71. Federal Records Management Amendments, Pub. L. No. 94-575, 90 Stat. 2724 (1976) (codified as amended at 44 U.S.C. §§2901-2907 (2006)).

provisions in these different laws and their differing legislative histories can make deciphering the “purpose” of the federal records laws difficult.<sup>72</sup> The two primary, relevant, and sometimes contradictory, purposes, however, are (1) governmental efficiency and (2) the preservation of the documentary history of the government.<sup>73</sup>

The federal records laws increase governmental efficiency in controlling the exponential growth in government documents by providing procedures for their management and disposal. This purpose is evidenced in the express statutory goals of controlling the “quantity and quality” of government records as well as the “[j]udicious preservation and disposal of records.”<sup>74</sup> The federal records laws also aim to preserve the historical record by requiring assessments of the “research” value of government records by both the agencies that create them and the Archivist of the United States (the “Archivist”) prior to their destruction.<sup>75</sup> Such requirements serve the statutory goal of preserving “[a]ccurate and complete documentation” of the “policies and transactions” of the federal government.<sup>76</sup>

Together, the federal records laws create an integrated framework governing the “life cycle” of agency records from their initial creation through their maintenance and use to their ultimate “disposition,” a term which includes both of the opposite fates of destruction or transfer to the National Archives for permanent preservation.<sup>77</sup> These laws also establish the respective roles and responsibilities of federal agencies, the Archivist, and NARA in the creation and destruction of records.

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72. See James D. Lewis, Note, *White House Electronic Mail and Federal Recordkeeping Law: Press “D” To Delete History*, 93 MICH. L. REV. 794, 802 (1995) (noting the “piecemeal enactment of the various provisions” of the federal records laws and their “fragmented” legislative history).

73. See *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1285 & 1287 (D.C. Cir. 1993) (citing “Congress’ evident concern with preserving a *complete* record of government activity for historical and other uses” but also noting “Congress’ oft-expressed intent to balance complete documentation with efficient, streamlined recordkeeping”) (emphasis in original); see also Lewis, *supra* note 72, at 802 (noting the “two basic yet potentially contradictory” purposes of the federal records laws). The Senate report for the Federal Records Act of 1950 notes that “[i]t is well to emphasize that records come into existence, or should do so, not in order to . . . satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them.” S. REP. NO. 81-2140 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3547, 3550. Cf. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 149 (1980) (citing the 1950 Senate Report and stating that the legislative history “reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole”).

74. 44 U.S.C. §2902 (2006).

75. 44 U.S.C. §§3303-3303a (2006).

76. 44 U.S.C. §2902 (2006).

77. See 44 U.S.C. §2901(5) (2006) (defining “records disposition”).

First, federal agencies are obligated to create records. The law mandates that agencies “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency.”<sup>78</sup> While this requirement provides agencies with discretion in determining what records are necessary to provide “adequate and proper documentation,” the same provision requires that such records be designed to “furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”<sup>79</sup>

Second, federal agencies must maintain and protect records by establishing “safeguards against the removal or loss of records” and by educating agency employees about recordkeeping responsibilities, including the requirement that agency records may not be “alienated or destroyed” except in compliance with the federal records laws.<sup>80</sup> The law places an affirmative duty on the agency head to “notify the Archivist of any actual, impending, or threatened unlawful removal . . . or destruction of records” within the agency and, with the assistance of the Archivist, to “initiate action through the Attorney General” for either the recovery of the records or “other redress within a reasonable period of time.”<sup>81</sup> If the head of the Agency fails to make this notification, the Archivist can unilaterally request action by the Attorney General and “shall notify the Congress when such a request has been made.”<sup>82</sup>

Third, agencies must dispose of the records they create, whether that disposition is destruction or eventual transfer to the National Archives, in accordance with the *exclusive* procedures provided by the federal records laws.<sup>83</sup> Agencies make initial determinations about whether the categories

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78. 44 U.S.C. §3101 (2006).

79. *Id.* The Archivist is tasked with providing “guidance and assistance” to agencies “with respect to ensuring adequate and proper documentation.” 44 U.S.C. §2904(a) (2006).

80. 44 U.S.C. §3105 (2006).

81. 44 U.S.C. §3106 (2006).

82. *Id.* An example of actual agency practice in the event of destroyed or missing records is illustrated by correspondence between NARA and the Defense Intelligence Agency (DIA), available at <http://www.fas.org/sgp/othergov/intel/padilla.pdf>, regarding a missing videotaped interrogation of Jose Padilla. In 2007, after Padilla had been charged criminally, the government disclosed to the court that the DIA was not able to locate a DVD of a specific interrogation. The DIA did not, however, notify the Archivist. Instead, based on news reports of the case, NARA wrote the DIA regarding the video, stating that there “is currently no approved schedule that covers this series of records” and therefore a “disposition action is not authorized.” The DIA reported back to NARA that DIA officials had “diligently searched all files” in order “to locate the DVD or its contents, to no avail” and advised that DIA officials were “using more rigorous control procedures to detail transfer of record custody” in order to “avoid accidental record disposal or destruction in the future.” NARA, satisfied with this response and DIA’s “corrective actions,” “close[d] out” its “examination of this matter” and did not refer the matter to the Attorney General.

83. *See* 44 U.S.C. §3314 (2006) (stating that the statutory procedures “are exclusive, and records of the United States Government may not be alienated or destroyed except under

of records they create should, based on an assessment of their likely value, be temporary or permanent.<sup>84</sup> Agencies then submit proposed lists or “schedules” describing categories or series of agency records to the Archivist with proposals for their disposition. Categories of records proposed for destruction should consist of records that “do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government” when they are no longer “needed by [the agency] in the transaction of its current business.”<sup>85</sup>

The Archivist examines the proposed schedules and independently evaluates whether the categories of records listed for eventual destruction “do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government.”<sup>86</sup> Upon making such a determination, the Archivist “empower[s] the agency to dispose of those records” in accordance with the schedule.<sup>87</sup> The Archivist may also “accept for deposit,” and in some circumstances “direct and effect the transfer of” records the Archivist determines to “have sufficient historical or other value to warrant their continued preservation by the United States Government.”<sup>88</sup>

Finally, the federal records laws contain two provisions that authorize the destruction of records in exigent circumstances. First, if the Archivist and the head of an agency jointly determine that records constitute a “menace to human health or life or property, the Archivist shall eliminate

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this chapter”); *see also* *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1278 (D.C. Cir. 1993) (stating the federal records laws prescribe “the exclusive mechanism for disposal of federal records”).

84. *See* NAT’L ARCHIVES & RECORDS ADMIN., *DISPOSITION OF FEDERAL RECORDS: A RECORDS MANAGEMENT HANDBOOK* 12 (1997) (describing temporary and permanent records) [hereinafter *NARA DISPOSITION HANDBOOK*].

85. 44 U.S.C. §3303 (2006). An agency records schedule might propose, for example, that contracts between the agency and outside contractors are temporary records that should be retained, for instance, for 7 years and then destroyed. Such a schedule might propose that correspondence between the head of the agency and members of Congress, in contrast, should be permanent records that will be transferred to the National Archives after a specified period. A number of records schedules approved by the Archivist are available at <http://www.archives.gov/records-mgmt/rcs/>.

86. 44 U.S.C. §3303a(a) (2006).

87. 44 U.S.C. §3303a(a)(2) (2006). The Archivist also promulgates generic records schedules that apply to all agencies covering the disposal of common and routine records. 44 U.S.C. §3303a(d) (2006).

88. 44 U.S.C. §2107 (2006). Despite a widespread public belief that the government is preserving a sizable portion of federal records for history, less than 3% of federal records are permanently preserved. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *GAO-08-742, FEDERAL RECORDS: NATIONAL ARCHIVES AND SELECTED AGENCIES NEED TO STRENGTHEN E-MAIL MANAGEMENT* 6 (2008) (“Of the total number of federal records, less than 3 percent are designated permanent”).

the menace immediately by any method he considers necessary.”<sup>89</sup> Second, the head of an agency can authorize the emergency destruction of records located outside the United States “[d]uring a state of war between the United States and another nation, or when hostile action by a foreign power appears imminent” if the retention of the records “would be prejudicial to the interests of the United States.”<sup>90</sup>

### B. Nonrecords and Working Files

The integrated legal framework governing federal records from birth to final disposition, however, is marked by two sizable asterisks based on the concepts of “nonrecords” and “working files.”

First, not all government documents are “records.” Documents created by government agencies can also be “nonrecords” that can be destroyed without the Archivist’s approval or even the Archivist’s awareness that the documents ever existed.<sup>91</sup> The concept of nonrecords arose out of the Records Disposal Act of 1943, which provided the definition of “records” and in which Congress wanted to “make it clear that [federal agencies] are not obligated to consider every scrap of paper on which writing or printing appears as a record.”<sup>92</sup> “Nonrecords,” therefore, are government documents that either fail to satisfy the definition of “records” or which fall within one of three categories of statutory exceptions.<sup>93</sup>

Federal law defines “records” broadly as including

all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization,

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89. 44 U.S.C. §3310 (2006).

90. 44 U.S.C. §3311 (2006). The agency official who directed such destruction “shall submit a written report to the Archivist” describing the circumstances of the destruction within six months. *Id.*

91. NARA DISPOSITION HANDBOOK, *supra* note 84, at 26. A third category not relevant for purposes of this article is personal papers. For a discussion of the distinction between personal papers and agency records see, for example, *Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 287-293 (D.C. Cir. 2006) (determining whether appointment calendars of agency officials were personal papers or agency records).

92. H.R. REPORT NO. 78-559 (1943), *reprinted in* 1943 U.S.C.C.A.N. 2-140, 2-141; *see also* NAT’L ARCHIVES AND RECORDS ADMIN., NARA AND FEDERAL RECORDS: LAWS AND AUTHORITIES AND THEIR IMPLEMENTATION 6 (1988) [hereinafter NARA TASK FORCE].

93. *See* NARA DISPOSITION HANDBOOK, *supra* note 84, at 26 (defining “nonrecords” as “US Government-owned documentary materials excluded from the legal definition of records . . . either by failing to meet the general conditions of record status . . . or by falling under one of three specific categories”).

## 2011] THE CIA'S DESTRUCTION OF ITS INTERROGATION TAPES 147

functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.<sup>94</sup>

The three statutory exceptions to the definition of "records" are (1) "[l]ibrary and museum material made or acquired and preserved solely for reference or exhibition purposes," (2) "extra copies of documents preserved only for convenience of reference," and (3) "stocks of publications and stocks of processed documents."<sup>95</sup>

The ambiguous concept of "nonrecords" invites both confusion and mischief. A NARA Task Force in 1988 noted, for example, that following the passage of the FOIA, which applies to agency "records," some agencies began classifying more documents as "nonrecords" to avoid FOIA disclosure requirements.<sup>96</sup> NARA's handbook on records disposition further warns that if the responsibility for determining record status is given "to officials at agency staff or operating levels" it "may lead to misuse of the nonrecord label, weaken the entire disposition program, and result in the loss of valuable records."<sup>97</sup> NARA, therefore, advises that "only the records officer should determine record or nonrecord status, after obtaining any necessary advice from the agency's legal counsel."<sup>98</sup>

Second is the concept of "working files," "working papers," or drafts.<sup>99</sup> The value of such documents, and whether they constitute records, depends on whether they provide additional information not in the "final" version or

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94. 44 U.S.C. §3301 (2006).

95. *Id.* NARA provides some additional possible examples of "nonrecord material" such as "[i]nformation copies of correspondence, directives, forms, and other documents on which no administrative actions is recorded or taken," "[r]outing slips and transmittal sheets adding no information to that contained in the transmitted material," "[t]ickler, follow up, or suspense copies of correspondence, provided they are extra copies of the originals," "[d]uplicate copies of documents maintained in the same file," "[e]xtra copies of printed or processed materials for which complete record sets exist," and "[p]hysical exhibits, artifacts, and other material objects lacking evidential value." NARA DISPOSITION HANDBOOK, *supra* note 84, at 24-25.

96. NARA TASK FORCE, *supra* note 92, at 6; *Cf.* Am. Friends Serv. Comm. v. Webster, 720 F.2d 29 (D.C. Cir. 1983) (finding that NARA "acquiesced in . . . FBI measures to escape the burdens of the Freedom of Information Act by disposing of some of its files" and that "it is clear that the FOIA influenced the drafting of the 1977 schedule and reflected an [impermissible] bias . . . in favor of the destruction . . . of governmental records.").

97. NARA DISPOSITION HANDBOOK, *supra* note 84, at 26.

98. *Id.* Further, NARA notes that the agency records officer "should seek NARA's guidance" regarding the status of "a questionable file or type of document" and advises that "[w]hen it is difficult to decide whether certain files are records or nonrecord materials, the records officer should treat them as records." *Id.*

99. *See generally* Philip G. Schrag, *Working Papers as Federal Records: The Need for New Legislation To Preserve the History of National Policy*, 46 ADMIN. L. REV. 95 (1994).

help explain the creation of the final product.<sup>100</sup> NARA regulations specifically provide that

working files such as preliminary drafts and rough notes . . . are records that must be maintained for purposes of adequate and proper documentation if . . . they were circulated or made available to employees, other than the creator, for official purposes . . . and [t]hey contain unique information . . . that adds to a proper understanding of the agency's . . . execution of . . . actions, or responsibilities.<sup>101</sup>

Applying the concept of “working files,” however, is difficult and can have significant consequences.<sup>102</sup> NARA notes, for example, that the destruction of drafts and working files has at times “left agencies unable to justify controversial decisions because they no longer have documentation of proposals and evaluations of alternatives.”<sup>103</sup> Moreover, the problem of “working files” is particularly acute in the context of intelligence operations, in which the term “working papers” has traditionally been used to refer to documents that not only do not need to be preserved, but that *must* be destroyed when they are no longer needed as a part of a larger information security strategy to keep the amount of classified material to a minimum.<sup>104</sup>

### C. CIA Exemptions, Statutory Duties, and Schedules

The current provisions of the federal records laws contain no explicit exemptions for the CIA from their coverage. The history of those laws,

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100. NARA guidance provides limited help, noting that “[n]ormally case working files are records because they generally need to be organized and maintained for some specified period of time” and that other “likely record categories include working files used in preparing reports or studies and preliminary drafts of policy documents circulated for comment.” NARA DISPOSITION HANDBOOK, *supra* note 84, at 24.

101. 36 C.F.R. §1222.12(c) (2011).

102. See NAT'L ARCHIVES AND RECORDS ADMIN., AGENCY RECORDKEEPING REQUIREMENTS: A MANAGEMENT GUIDE (1995) (noting that “[o]ne of the problem areas in distinguishing records from nonrecord materials is determining the status of drafts and other working papers”).

103. *Id.*

104. See, e.g., DEP'T OF DEF., DOD 5200.1-R, INFORMATION SECURITY PROGRAM §6-101 (1997) (defining “working papers” as “documents and material accumulated or created in the preparation of finished documents and material” and mandating that “working papers containing classified information shall be . . . [d]estroyed when no longer needed”) [hereinafter DOD INFORMATION SECURITY PROGRAM]. The issuance also mandates emergency planning “for the protection, removal, or destruction of classified material in case of . . . terrorist activities, or enemy action, to minimize the risk of its compromise” and that such plans should consider “[r]eduction of the amount of classified material on hand.” *Id.* at §6-303(a) and (c).

however, and the laws governing the CIA raise the possibility of certain exemptions unique to the CIA.<sup>105</sup> Whether the CIA's internal legal analysis of the interrogation tapes relied upon such exceptions remains unknown. Acknowledging the potential for such exceptions, however, is crucial to a thorough examination of the legal status of the tapes.

*1. A CIA Exemption to the Federal Records Act of 1950?*

Current statutory provisions that derive ultimately from the 1950 Federal Records Act include the basic legal obligation of agencies to create and preserve "adequate and proper documentation" of agency actions (designed to protect the legal rights of "the Government and of persons directly affected by the agency's activities"), the obligation to notify the Archivist of unlawful destruction, and the obligation to transfer records to the National Archives when directed by the Archivist to do so.<sup>106</sup> The application of such provisions to the CIA is potentially undermined, however, by a limited exemption to which the Federal Records Act was initially subject, but which, through various amendments, repeals and redrafts over the past sixty years, has disappeared from the U.S. Code. There remains, however, a legal argument, at least colorable and possibly compelling, that the exemption is still in force. The details of this complicated history are outlined below.

The Federal Records Act of 1950 was not a standalone piece of legislation, but was rather an amendment to the Federal Property and Administrative Services Act of 1949 (FPAS).<sup>107</sup> The FPAS established the General Services Administration and generally dealt with "procurement, utilization, and disposal of Government property."<sup>108</sup> The declared intent of the FPAS was to provide the Government with "an economical and efficient system" for, among other things, "records management."<sup>109</sup> The FPAS, however, contained a "saving provision" which stated that "[n]othing in this Act shall impair or affect the authority of" a number of specific entities including "the Central Intelligence Agency."<sup>110</sup>

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105. The CIA was established by the National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, and its powers and obligations were supplemented by the Central Intelligence Agency Act of 1949, Pub. L. No. 81-110, 63 Stat. 208.

106. 44 U.S.C. §§3101, 3106 (2006).

107. Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-288, 63 Stat. 377.

108. *Id.*

109. *Id.* at §2, 63 Stat. 378. In particular, the FPAS transferred the authority of the National Archives to the General Services Administration, and authorized the Administrator to "make surveys of Government records and records management and disposal practices and obtain reports thereon from Federal agencies." *Id.* at §104, 63 Stat. 381.

110. *Id.* at §502(d)(17), 63 Stat. 403.

A year later in 1950, Congress amended the FPAS by adding the Federal Records Act, which established a more detailed legal structure for the management of federal records.<sup>111</sup> The 1950 Amendment made certain modifications to the “saving provision” but the limited exemption for the CIA remained.<sup>112</sup>

The records management provisions of the Federal Records Act were initially codified at Chapter 11 of Title 44 of the U.S. Code. The exemption contained in the “saving provision,” however, was codified in Title 40, which governs government property. Early versions of the U.S. Code included cross-references in Title 40 and Title 44 to establish the relationship between the separated provisions. In the 1958 edition of the U.S. Code, for example, the exemption, which was codified at 40 U.S.C. §474, contains a cross-reference noting that “nothing in . . . Chapter 11 of Title 44” (where the Federal Records Act provisions were codified) would impair or affect the CIA.<sup>113</sup>

In 1968, however, Congress passed legislation to enact Title 44 of the U.S. Code into positive law that technically repealed the Federal Records Act portions of the FPAS and spread the newly drafted provisions that were based on the Federal Records Act throughout Title 44.<sup>114</sup> The 1968 legislation was part of a larger plan of “positive law codification,” still ongoing, to restate and reorganize the U.S. Code.<sup>115</sup> The Senate Report to the 1968 legislation stated unequivocally that the “purpose of this bill is to restate in comprehensive form, *without substantive change*, the statutes in effect . . . relating to public printing and documents.”<sup>116</sup> However, Title 40, where the exemption had been codified, was not similarly enacted into positive law at the same time. As a result of the 1968 amendments, therefore, the language in the exemption in Title 40 that cross referenced Title 44 was changed to state more generally that nothing in the “act” would “impair or affect” the CIA.<sup>117</sup> In turn, the codification indicated in a note that “act” referred to the FPAS and, while noting that the Federal Records

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111. Federal Records Act, Pub. L. No. 81-754, §6, 64 Stat. 578 (1950).

112. *Id.* at §6, 64 Stat. 583.

113. 40 U.S.C. §474 (1958).

114. Public Printing and Documents Act of 1968, Pub. L. No. 90-620, 82 Stat. 1238. The repeal is found at 82 Stat. 1309, which repeals section 6(d) of the Federal Records Act.

115. For a description of the process of positive law codification see Offices of Law Revision Counsel, U.S. House of Representatives, *Codification Legislation*, at <http://uscode.house.gov/codification/legislation.shtml>.

116. S. REP. NO. 90-1621 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4438, 4438-39 (emphasis added). The report further noted that “[i]t is sometimes feared that mere changes in terminology and style will result in changes in substance” and that such “fear might have weight” for “usual” legislation “where it can be inferred that a change of language is intended to change substance” but that “[i]n a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.” *Id.* at 4440.

117. 40 U.S.C. §474 (1976).

## 2011] THE CIA'S DESTRUCTION OF ITS INTERROGATION TAPES 151

Act had been repealed, stated that its subject matter was “now covered by chapters 21, 25, 27, 29 and 31 of Title 44.”<sup>118</sup>

Whether the 1968 technical repeal of the Federal Records Act in enacting Title 44 into positive law had any effect on the continued viability of the exemption is arguable, although the position of the CIA was clearly that it had none. In 1977, the General Counsel of the CIA responded to an inquiry from Congresswoman Bella Abzug “as to whether the Federal Records Act applies to the Central Intelligence Agency.”<sup>119</sup> The CIA’s response asserted that the “proviso” in the FPAS, as amended by the Federal Records Act, that “nothing therein ‘shall impair or affect any authority of . . . [the] Central Intelligence Agency’ . . . remains in force and therefore represents a continuing and valid limitation on the applicability of the Federal Records Act to the CIA.”<sup>120</sup> The letter did not mention the repeal of the Federal Records Act, noting only that its provisions, “as amended, now appear as Chapters 21, 25, 27, 29 and 31 of Title 44 of the U.S. Code.”<sup>121</sup>

The state of these provisions remained largely unchanged until 2002, when Title 40 of the U.S. Code was itself enacted into positive law.<sup>122</sup> Congress again stated that the purpose of the 2002 law was “to revise, codify, and enact *without substantive change* the general and permanent laws of the United States related to public buildings, property, and works, as title 40, United States Code.”<sup>123</sup> The “exemption” provision of the FPAS, however, was technically repealed.<sup>124</sup> The revised, substitute language states “nothing in this *subtitle* impairs or affects the authority of . . . the Central Intelligence Agency.”<sup>125</sup> In turn, “subtitle” is defined to mean only the immediate subtitle within Title 40 related to federal property and certain provisions of the FPAS unrelated to records management.<sup>126</sup>

Despite the fact, therefore, that the U.S. Code no longer contains any indication that there may exist an exemption for the CIA to provisions based on the Federal Records Act of 1950, the CIA could argue that this is an unintended omission and that, given the express congressional intent that

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118. *Id.*

119. Letter from Anthony A. Lapham, General Counsel, CIA, to Bella S. Abzug, Chairwoman of the Subcommittee on Government Information & Individual Rights, Committee on Government Operations, U.S. House of Representatives (Jan. 3, 1977), available at [http://www.foia.cia.gov/docs/DOC\\_0000724993/DOC\\_0000724993.pdf](http://www.foia.cia.gov/docs/DOC_0000724993/DOC_0000724993.pdf) [hereinafter CIA General Counsel Letter].

120. *Id.* at 1.

121. *Id.*

122. Pub. L. 107-217, 116 Stat. 1062.

123. H.R. REP. NO. 107-479 (2002), reprinted in 2002 U.S.C.C.A.N. 827, 827.

124. Pub. L. 107-217, 116 Stat. 1062, 1313 (repealing Section 602(d) of the FPAS).

125. 40 U.S.C. §113(e)(16) (2006).

126. 40 U.S.C. §111 (2006).

neither the 1968 nor the 2002 legislation substantively changed the law, such an exemption still exists.

Even if this exemption survives, however, it is limited. The legislative history of the FPAS indicates that Congress intended the exemption to be a narrow one. The House Report on the original FPAS stated that “[i]t is not intended by these exemptions that those administering the agencies or programs listed shall be free from all obligation to comply with the provisions of the act.”<sup>127</sup> The Report further stated that “[i]n other words, to the extent that compliance with the act . . . will not so ‘impair or affect the authority’ of the several agencies to which the subsection applies as to interfere with the operations of their programs, the act will govern.”<sup>128</sup>

Further, to the extent the exemption survives, it arguably only applies to those provisions that are based on the original Federal Records Act of 1950. Most notably, the provisions defining “records” and those relating to the disposal of federal records come not from the Federal Records Act of 1950 but from the Records Disposal Act of 1943.<sup>129</sup> Such provisions were never subject to the exemption contained within the Federal Records Act, a fact the CIA has acknowledged.<sup>130</sup> Given the later passage of the Federal Records Act of 1950, however, the fact that it mandates the basic duty of agencies to “make and preserve” records, and the interrelated nature of the federal records laws, the CIA could potentially argue that a legal obligation to preserve videotapes depicting covert CIA officers is just the type of obligation that might “impair or affect” CIA operations abroad and just the type of situation for which the limited congressional exemption was intended.

## 2. CIA Statutory Duties

An additional source of potential exemptions from the requirements of the federal records laws is found in the basic statutory duties of the CIA derived from the National Security Act of 1947 creating the CIA, and the

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127. H.R. REP. NO. 81-670 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1475, 1504.

128. *Id.* The CIA General Counsel accepted that the exemption was limited in his 1977 letter stating, “[w]e do not understand or consider that the proviso totally exempts the CIA from the requirements of the Federal Records Act, but only that the Agency is not bound by those requirements to the limited extent that they may be in conflict with the Agency’s basic authorities and missions.” CIA General Counsel Letter, *supra* note 119, at 1.

129. Records Disposal Act, Pub. L. No. 78-115, 57 Stat. 380 (1943) (codified as amended at 44 U.S.C. §§3301-3314 (2006)). Additional relevant provisions were added by the Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2723 (1976).

130. *See* CIA General Counsel Letter, *supra* note 119, at 1 (stating that the “matter of the disposal and destruction of Government records is governed not by the Federal Records Act but rather by those provisions of Chapter 33 of Title 44 of the U.S. Code. Those provisions apply broadly to all executive agencies, including CIA”).

Central Intelligence Agency Act of 1949.<sup>131</sup> The CIA has asserted that certain responsibilities contained within these laws should trump other statutory duties, including those relating to federal records. In his 1977 letter to Congress, for example, the CIA General Counsel stated that, in the view of the CIA, the laws governing the destruction of federal records “can and should be administered in a manner that is compatible with” the obligations under the National Security Act of 1947 that require protection of “intelligence sources and methods against unauthorized disclosure” as well as provisions of the Central Intelligence Agency Act that exempt the Agency from “any other law” that would require “the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency.”<sup>132</sup>

### 3. CIA Records Management and Records Schedules

Despite such possible exemptions, the CIA administers an active records management program that largely functions like similar programs in other federal agencies and includes over 120 records schedules approved by the Archivist.<sup>133</sup> The 2000 NARA evaluation report, part of a multi-year evaluation of CIA records management practices, found that the CIA had “many elements of a good records management program” including “formal recordkeeping requirements and guidance” and stated that the “agency’s major intelligence gathering and dissemination operations appear to be documented adequately.”<sup>134</sup> NARA also found, however, that the CIA’s recordkeeping program had “serious shortcomings that must be rectified to ensure the agency’s compliance with federal records management laws and regulations.”<sup>135</sup>

Records management at the CIA does present unique issues related to the sensitivity of its mission, and the CIA has previously invoked the exemptions described above. In 1985, for example, in a dispute over a

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131. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended beginning at 50 U.S.C. §401 (2006)); Central Intelligence Agency Act of 1949, Pub. L. No. 81-110, 63 Stat. 208 (codified as amended beginning at 50 U.S.C. §403a (2006)).

132. CIA General Counsel Letter, *supra* note 119, at 1-2; *see also* 50 U.S.C. §§403-1(i), 403g (2006).

133. NARA EVALUATION, *supra* note 14, at 19.

134. *Id.* at 1.

135. These shortcomings included the need for disposition schedules to cover electronic systems that include “such key records as finished intelligence products and records relating to covert operations and intelligence assets” for which there is “a serious risk” that, without approved schedules, “information of great value will not be preserved.” *Id.* at 1-2. NARA also found that the CIA had not issued sufficient guidance to address “nontextual records,” including videotapes. *Id.* at 2; *see also infra* notes 144-145 and accompanying text.

proposed records schedule covering broad categories of CIA records, NARA objected to language proposed by the CIA that stated vaguely that the CIA would eventually transfer its older records to NARA “when national security considerations permit.”<sup>136</sup> The CIA justified its position by stressing that “the need to protect names, sources and methods was paramount” and also expressly “cited the fact that the [CIA] was exempt from provisions of the Federal Records Act, *with which it was complying voluntarily.*”<sup>137</sup>

CIA records schedules approved by the Archivist also include schedules covering the highly sensitive operational files of the Directorate of Operations (DO) (now known as the National Clandestine Service), the category most likely relevant for the interrogation tapes.<sup>138</sup> When the CIA sought approval for the DO records schedule in 1988, it provided the Archivist only with a skeletal version of the schedule classified “Confidential”<sup>139</sup> and only allowed a NARA archivist to review on-site the full text of the schedule, as well as criteria classified “secret” that the CIA was using to decide whether certain categories of its operational records were chosen for permanent preservation.<sup>140</sup> At one point, NARA threatened to refuse to approve the DO schedule and to mandate that all such records

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136. Memorandum from Robert W. Krauskopf, NARA, to Garry D. Ryan, NARA, at 2 (Mar. 5, 1985), *available at* <http://www.dcofiles.com/852.pdf> [hereinafter Krauskopf Memo]. The dispute was over Records Schedule NC1-263-85-1, which NARA described in its 2000 review as an “agency-wide schedule” that “standardized the disposition instructions throughout the agency for many key ‘generic’ series that all or most agency components accumulate.” NARA EVALUATION, *supra* note 14, at 19. This schedule was recently declassified. CIA, Request for Records Disposition Authority, NC1-263-85-1, Mar. 26, 1985, *available at* <http://www.dcofiles.com/851.pdf> [hereinafter CIA General Records Schedule].

137. Krauskopf Memo, *supra* note 136, at 3 (emphasis added). In 2008, NARA and the CIA entered into a Memorandum of Understanding establishing procedures for the treatment of CIA records in NARA custody, which is available at <http://www.archives.gov/declassification/mou-nara-cia-2008.pdf>.

138. According to CIA representations in court filings the tapes themselves were held in CIA “operational files.” CIA’s Memorandum of Law in Opposition to Plaintiff’s Motion for Contempt and Sanctions, *ACLU v. Dep’t of Justice* (S.D.N.Y., Jan. 10, 2008) (No. 04-4151), at 1 [hereinafter CIA Opposition to Contempt Motion]; *see also infra* notes 177-78 and accompanying text.

139. The “Confidential” version of the DO records schedule was recently declassified. *See* CIA Directorate of Operations, Request for Records Disposition Authority, N1-263-87-2, Aug. 16, 1989, *available at* <http://www.dcofiles.com/872.pdf> [hereinafter DO Records Schedule].

140. *See* Memorandum from Mike Miller, NARA Records Appraisal and Disposition Division, Review of DO Records, N1-263-87-2, July 1, 1988 (describing limited review of CIA records schedules and a sample of operational records), *available at* <http://www.dcofiles.com/71.pdf>. The 2000 NARA Evaluation later noted that the “full criteria” for screening records “were briefly reviewed by NARA” and that they “appear[ed] adequate” but that “NARA should be afforded an opportunity to review these criteria in detail so it can determine whether or not they warrant revision.” NARA EVALUATION, *supra* note 14, at 23.

be retained permanently.<sup>141</sup> The “essential problem,” NARA noted, is that the CIA “requires that records be kept in a highly compartmentalized, secret manner in order to protect intelligence *sources and methods*,” but, at the same time, NARA “requires that a number of its archivists . . . *need to know* sufficient detail about [CIA] records to authorize their disposition.”<sup>142</sup>

The DO records schedule resulting from this dispute that was approved by the Archivist in 1989 is crucial to the CIA's treatment of the interrogation tapes. In particular, the DO schedule provided that documents within the CIA's “operational activity files” should be considered permanent records except for “duplicate and other non-record material” in the files, which was to be destroyed “when no longer needed.”<sup>143</sup>

NARA evaluations raised serious concerns about the CIA's application of these standards. First, in its 2000 report on CIA records management, NARA noted that at DO field sites the CIA was taking the “position that field files are non-record,” which NARA noted was “contrary to the agency's own internal guidance” which limited nonrecord material only to material falling within the three statutorily defined categories.<sup>144</sup> NARA recommended that the CIA “[e]nsure that DO personnel at field offices are aware of the record status of the files they accumulate.”<sup>145</sup>

Second, following the 2000 evaluation, NARA conducted a more specific and thorough review of the CIA's “operational activity files” that was completed in early 2001. This review determined that “*all* documentation from *all* [operational activity] files warrants preservation and eventual transfer to the National Archives.”<sup>146</sup> The review concluded

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141. See Letter from Kenneth F. Rossman, Director, Records Appraisal and Disposition Division, NARA to redacted recipient, CIA, at 1-2 (Dec. 6, 1988) (stating that if the CIA “cannot permit the examination of the records it recommends for disposal” NARA has “no alternative but to make all of the records in these important series permanent”), *available at* <http://www.dcofiles.com/6.pdf>.

142. Letter from Kenneth F. Rossman, Director, Records Appraisal and Disposition Division, NARA to a redacted recipient, CIA (Aug. 1, 1988) (emphasis in original), *available at* <http://www.dcofiles.com/81.pdf>.

143. DO Records Schedule, *supra* note 139, at Item No. 3; *see also* NARA EVALUATION, *supra* note 14, at 23-24 (describing screening of DO records). NARA noted that the CIA was specifically “interested in having [duplicate and non-record] material clearly identified as disposable in its schedule” despite the fact that “technically the agency has the authority to dispose of this material anyway” as a result of the federal records laws. Memorandum from Michael L. Miller, Records Appraisal and Disposition Division, NARA, Job No. N1-263-87-2, at 2 (Aug. 22, 1989), *available at* <http://www.dcofiles.com/22.pdf>.

144. NARA EVALUATION, *supra* note 14, at 39.

145. *Id.*

146. Letter from Michael J. Kurtz, Assistant Archivist for Records Services, NARA, to Edmund Cohen, Director, Office of Information Management, CIA, at 1 (Feb. 8, 2001), *available at* <http://www.dcofiles.com/governmentattic/8.pdf> [hereinafter Kurtz Letter]. This appears to be a follow-up from the earlier NARA evaluation. NARA EVALUATION, *supra* note 14, at 23-24.

that the CIA's screening of the material in the operational files based on the "duplicate" and "nonrecord" language in the DO records schedule was

result[ing] in the destruction of some files and documents that warrant permanent preservation. We found instances where policy, management, development, and planning documents, as well as other significant documentation of a substantive nature, are being destroyed, even though the schedule only authorizes the disposal of duplicate and non-record material. *We also concluded that the files contain virtually no documentation that is non-record.*<sup>147</sup>

Although NARA acknowledged that the files did "include some records that related to administrative matters as well as duplicates of intelligence reports found elsewhere," it found that "allowing the files to be screened for this material can lead to the disposal of records that should be retained, and, in fact, has had this result."<sup>148</sup> NARA concluded by stating that the CIA's operational activity files "document some of the most important and sensitive activities of the U.S. Government and must be preserved intact."<sup>149</sup>

Such guidance, therefore, had been specifically highlighted to the CIA the year before it considered the record status of the interrogation tapes. As a result of the NARA reviews, the CIA at some point began amending its records schedule governing operational activity files. In August 2005, three months before the tapes were destroyed, NARA sent the CIA an email following up on the issue, stating "We would appreciate it if the CIA let us know what questions are still outstanding regarding the schedule for operational activity files."<sup>150</sup> In March 2006, four months after the tapes were destroyed, the CIA finally submitted the amendment to its records schedule governing operational activity files designating "*all documentation* relating to operational activities created or received and filed or appropriate for filing in any operational activity file" as permanent.<sup>151</sup>

### III. THE LEGAL STATUS OF THE CIA TAPES

The legal status of the tapes under the federal records laws became an issue immediately, albeit briefly, after the public disclosure of their

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147. Kurtz Letter, *supra* note 146, 1 (emphasis added).

148. *Id.* NARA also concluded that "destroying duplicates and administrative documents results in a loss of context that adversely affects the research value of the permanent material." *Id.* at 1-2.

149. *Id.* at 2.

150. Email from David A. Langbart, Life Cycle Management Division, NARA, to Christopher J. Olsen, Chief, Records Classification and Management Group, CIA (Aug. 5, 2005), available at <http://www.dcofiles.com/governmentattic/5.pdf>.

151. The revised CIA records schedule for operational activity files is available at <http://www.dcofiles.com/61.pdf> (emphasis added).

destruction in December 2007. Just days later, on December 10, NARA sent the CIA a letter, which expressly assumed that the tapes were records, requesting a written explanation for their destruction, stating:

According to recent reports in the media, the Central Intelligence Agency destroyed video tapes of the interrogations of two al-Qaeda terrorism suspects. As you are aware, no Federal records may be destroyed except under the authorization of a records disposition schedule approved by the Archivist of the United States. We are unaware of any CIA disposition authority that covers *these records*.<sup>152</sup>

The following day, Congressman Henry Waxman separately wrote to the Archivist asking for an opinion as to whether “the CIA’s actions violated the Federal Records Act.”<sup>153</sup>

The CIA publicly responded in the press to the issue raised by NARA’s letter through CIA spokesman Mark Mansfield, who asserted “[t]he bottom line is that these videotapes were not federal records as defined by the Federal Records Act.”<sup>154</sup> Before the CIA formally responded to NARA in writing, however, the DOJ initiated first a preliminary inquiry and then a criminal investigation into the destruction of the tapes.<sup>155</sup> The criminal investigation resulted in the CIA declining to provide a written response to NARA’s “request.”<sup>156</sup> From the perspective of NARA and the federal

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152. 2007 Wester Letter, *supra* note 8, at 1 (emphasis added). The letter asked the CIA to investigate the matter and report back to NARA within 30 days. *Id.*

153. Letter from Rep. Henry A. Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, to Allen Weinstein, Archivist of the United States (Dec. 11, 2007), *available at* [http://www.fas.org/irp/congress/2007\\_cr/waxman121107.pdf](http://www.fas.org/irp/congress/2007_cr/waxman121107.pdf). News articles and commentators also took up the issue briefly. *See* Isikoff, *supra* note 9; Steven Aftergood, *Did CIA Violate Federal Records Act*, *SECURITY NEWS*, Dec. 12, 2007, [http://www.fas.org/blog/security/2007/12/did\\_cia\\_violate\\_the\\_federal\\_re.html](http://www.fas.org/blog/security/2007/12/did_cia_violate_the_federal_re.html); bmaz, *The “Other” Provision of the Records Act*, *EMPTYWHEEL*, Dec. 25, 2007, <http://emptywheel.firedoglake.com/2007/12/25/the-other-provision-of-the-records-act/>.

154. Isikoff, *supra* note 9. The CIA supported this position by referring to D/CIA Hayden’s statement that the agency had determined that the tapes were no longer of intelligence value and “not relevant to any internal, legislative or judicial inquiries.” *Id.*

155. *See* Press Release, U.S. Dep’t of Justice, Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation into the Destruction of Videotapes by CIA Personnel (Jan. 2, 2008), *available at* [http://www.justice.gov/opa/pr/2008/January/08\\_opa\\_001.html](http://www.justice.gov/opa/pr/2008/January/08_opa_001.html).

156. Letter from Joseph W. Lambert, Director, Information Management Services, CIA to Paul M. Wester, Jr., Director, Modern Records Programs, NARA (Jan. 10, 2008) (stating that “in light of” the criminal investigation, the CIA is “unable to respond to your request at this time”), *available at* <http://www.dcofiles.com/10.pdf>. NARA responded to the CIA that it “understood that your detailed response may have to wait until other investigations are completed” but that the “case will remain open until we have received the report.” Letter from Paul M. Wester, Jr., Director, Modern Records Programs, NARA, to Joseph Lambert,

records laws, the matter remained dormant for almost three years until November 2010, when the DOJ announced that it would not pursue criminal charges for the destruction of the tapes and NARA resumed its own inquiry.<sup>157</sup> In a November 2010 letter to the CIA, NARA stated that it “must still receive a report of CIA’s own investigation” to determine whether an “unauthorized destruction” of federal records has occurred.<sup>158</sup>

The CIA’s position on the record status of the tapes was clearly not formulated *post hoc* in response to NARA’s inquiry, but rather the issue was central to the CIA’s early analysis. In particular, as described in the timeline above, the CIA determined as early as September 2002 that the “continued retention of these tapes” was “not required by law.”<sup>159</sup> By October 25, 2002, the CIA announced the plan to destroy the existing tapes and to recycle one tape daily going forward.<sup>160</sup> And by mid-January 2003, not only had the CIA’s position that the tapes were not records solidified, but the CIA was also “informing and reminding CIA officers of the question, what actions make the video tapes an official record,” presumably to avoid actions that might indisputably convert them into records.<sup>161</sup>

The legal arguments underlying the CIA’s assertion that the tapes did not constitute records, and therefore that the destruction of the tapes was “in line with” the federal records laws,<sup>162</sup> could take several possible forms.<sup>163</sup> First, the CIA could argue that the tapes did not fall within the statutory definition of “record” on the basis that the tapes were neither “preserved” nor “appropriate for preservation” for their evidential or informational value. Second, the CIA could argue that the tapes, although technically satisfying the definition of record, nevertheless fall within the statutory exception for “extra copies of documents preserved only for convenience of

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Director, Information Management Services, CIA (Jan. 16, 2008), *available at* <http://www.dcofiles.com/16.pdf>. NARA also responded to Rep. Waxman delaying NARA’s assessment of whether the CIA’s actions violated the federal records laws until after “the CIA has responded to NARA’s query.” Letter from Allen Weinstein, Archivist of the United States, to Representative Henry A. Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives (Dec. 18, 2007), *available at* <http://www.dcofiles.com/18.pdf>.

157. 2010 Wester Letter, *supra* note 16.

158. *Id.*

159. October 25, 2002 Cable, *supra* note 38.

160. *Id.*

161. Jan. 12, 2003 Memo, *supra* note 50. The CIA returned to the question again in 2004. *See* April 12, 2004 Email, *supra* note 57.

162. D/CIA 2007 Statement, *supra* note 1.

163. While the CIA’s own internal legal analysis is not available, such arguments appear necessary not only to avoid the general statutory provisions of the federal records laws, but also more specifically the CIA’s records schedule for the Directorate of Operations that mandated permanent preservation of “operational activity files” except for “nonrecords” and “duplicates.” *See* DO Records Schedule, *supra* note 139, at Item 3; *see also supra* notes 143 to 151 and accompanying text.

reference.” Third, the CIA could argue that the tapes were “working papers” or drafts used to prepare the “final” interrogation reports and that because the tapes did not contain unique, substantive information not in the “final” written reports, preservation was unnecessary.

#### A. *The Tapes as Records*

The statutory definition of “records” includes several elements.<sup>164</sup> First, records are “documentary material,” which is defined broadly to include “all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics.”<sup>165</sup> As recognized by guidance from both the National Archives and the CIA, this definition can undoubtedly encompass audio-visual material including videotapes.<sup>166</sup> The second element, that a record is “made or received by an agency” under “Federal law or in connection with the transaction of public business,”<sup>167</sup> would also appear to be satisfied on the basis that the CIA “made” the tapes while conducting public business.<sup>168</sup>

The final element of the “record” definition is the crux. To constitute a record, documentary material must be “preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.”<sup>169</sup>

Determining whether the interrogation tapes were “preserved” is more complex than noting that they were eventually destroyed. The issue instead is whether the destroyed tapes became records on the basis that they were *initially* “preserved” as evidence of the activities of the CIA or for the information they contained. Under NARA regulations, for example, the term “preserved” is defined as “the filing, storing, or any other method of systematically maintaining documentary materials . . . by the agency.”<sup>170</sup>

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164. 44 U.S.C. §3301 (2006); *see also* *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993) (defining test for determining record status).

165. 44 U.S.C. §3301 (2006).

166. *See* 36 C.F.R. §1222.10(b)(2) (2010) (defining “regardless of physical form or characteristics” to mean “that the medium may be paper, film, disk, or other physical type or form”). The 2000 NARA report noted that a CIA regulation “made it clear that records include all media, not merely paper.” NARA EVALUATION, *supra* note 14, at 40.

167. 44 U.S.C. §3301 (2006).

168. NARA regulations define “made” as “creating and recording information by agency personnel in the course of their official duties.” 36 C.F.R. §1222.10(b)(3) (2010).

169. 44 U.S.C. §3301 (2006).

170. 36 C.F.R. §1222.10(b)(5) (2010). The regulatory definition further notes that “preserved” covers “materials not only actually filed or otherwise systematically maintained but also those temporarily removed from existing filing systems.” *Id.*

Despite the later assertion that the tapes were not records, the CIA's early treatment of them provides a strong argument that the tapes were initially preserved and stored as records. As early as April 17, 2002, just over two weeks after Abu Zubaydah's arrest, a CIA cable directed that the tapes of Abu Zubaydah "should not [repeat] not be taped over" and that "[e]ach of the tapes should be collected, logged and labeled, and sent to headquarters."<sup>171</sup> An April 27, 2002, email between CIA officers that copied CIA attorneys expressly stated that the tapes of the interrogations "should all be catalogued and made into *official record copies*."<sup>172</sup> A May 5, 2002, cable repeated the instruction "Please preserve all videos" and arguably further indicated the intent to preserve them for their evidential and informational value, noting that "they offer evidence of AZ's condition/treatment while in [redacted] care that may be of value in the future (apart from actionable intelligence)."<sup>173</sup>

In early 2003, the issue of whether the tapes were "preserved" or "filed" was further implicated by the CIA's OIG's "special review" which included a review of the video tapes.<sup>174</sup> A February 7, 2003, email entitled "Request of tape copies," for example, discussed "how to best accommodate a request for review of video tapes," which appears to have been referring to a request by the OIG.<sup>175</sup> The significance of such a request for purposes of the federal records laws is that if copies of the tapes had been provided to, and placed in the files of, the CIA OIG, such "filing" may have also converted the copies into "records" of the OIG.<sup>176</sup> As the CIA OIG would later confirm, however, it subsequently reviewed the videotapes on-site at the facility overseas and "never had the videotapes or copies of the videotapes in their files."<sup>177</sup>

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171. See April 17, 2002 Cable, *supra* note 30.

172. See April 27, 2002 Email, *supra* note 32 (emphasis added).

173. See May 6, 2002 Cable, *supra* note 33.

174. See generally Rea Declaration, *supra* note 52.

175. A government index describing the Feb. 7, 2003, email entitled "Request of Tape Copies" discussing "how best to accommodate a request for review of video tapes, without complicating security issues" is available at <http://www.dcofiles.com/aclu/72.pdf>. An additional government index describing a Feb. 7, 2003, email entitled "Tapes," which may be referring to the same email or a related email and which concerned the "IGs anticipated tape review" is available at <http://www.dcofiles.com/aclu/71.pdf>.

176. This could be true even if the CIA considered the original tapes to be "nonrecord." See 36 C.F.R. §1222.12(d) (2010) (stating that "[m]ultiple copies of the same document and documents containing duplicative information . . . may each have record status depending upon how they are used to transact agency business").

177. Rea Declaration, *supra* note 52, at ¶4. The fact that the CIA OIG did not receive copies of the tapes subsequently had significant effects in the ACLU FOIA case when the Court in early 2005, unaware of the existence of the tapes and based on a CIA motion to narrow an earlier, broader order, limited the relevant portion of the CIA's obligation to search and review "agency records" to "relevant documents that have already been identified and produced to, or otherwise collected by, the CIA's Office of Inspector General." Order Granting CIA's Motion for Partial Relief, *ACLU v. Dep't of Def.* (S.D.N.Y. Apr. 18, 2005)

## 2011] THE CIA'S DESTRUCTION OF ITS INTERROGATION TAPES 161

A final indication that the tapes were “preserved” as records arose in early 2008 following the public disclosure of the destruction. In response to a motion for contempt in the ACLU FOIA case, the CIA specifically represented in a court filing that the “videotapes were held in operational files,” which potentially constitutes additional evidence that the tapes had been “filed” or “stored” within agency files and were therefore “preserved.”<sup>178</sup>

Even if the tapes were not “preserved,” however, they would nevertheless have satisfied the definition of record if they were “appropriate for preservation” as evidence of the activities of the government or for their informational value.<sup>179</sup> The meaning of “appropriate for preservation,” and who has the authority to apply it, has been controversial.<sup>180</sup> Since 1990, NARA regulations have ceded discretion in applying the term to federal agencies by defining “appropriate for preservation” as:

documentary materials made or received which, *in the judgment of the agency*, should be filed, stored, or otherwise systematically maintained by an agency because of the evidence of agency activities or information they contain, even if the materials are not covered by its current filing or maintenance procedures.<sup>181</sup>

Subsequent court decisions that have addressed this issue, however, have held that the discretion of agencies to determine which documents are “appropriate for preservation” is subject to judicial review and is limited by

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(No. 04-4151). Based on this order, the government subsequently argued that the ACLU FOIA case was not an impediment to the destruction of the tapes. CIA Opposition to Contempt Motion, *supra* note 138, at 1.

178. CIA Opposition to Contempt Motion, *supra* note 138, at 1. The government argued, therefore, that the tapes fell within a FOIA exemption for CIA operational files. *Id.*

179. 44 U.S.C. §3301 (2006).

180. See Schrag, *supra* note 99, at 113-126 (providing a detailed history of the waxing and waning of Archivist authority over determining record status). In 1981, as a result of a dispute over who should determine the “record value” of notes of telephone conversations of former Secretary of State Henry Kissinger, the DOJ OLC issued an opinion that found that “[a]gencies retain a measure of discretion in deciding whether materials are ‘appropriate for preservation’” and that while the law requires agencies to comply with record disposal regulations, the Archivist “is not authorized to promulgate standards or guidelines that have a binding effect on the agency’s determination as to whether a document constitutes a ‘record.’” Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Allie B. Latimer, General Counsel, General Services Administration (Jan. 13, 1981), at 5-6, available at <http://www.dcofiles.com/13.pdf>; see also NARA TASK FORCE REPORT, *supra* note 92, at ¶4.5; Schrag, *supra* note 99, at 118-119.

181. 36 C.F.R. §1222.10(b)(6) (2010) (emphasis added). NARA’s original proposed regulations defined “appropriate for preservation” more forcefully, but ambiguously, as “documentary materials made or received that *should be* filed, stored, or otherwise systematically maintained by an agency because of the evidence of agency activities or information they contain.” 55 Fed. Reg. 740, 741 (proposed Jan. 9, 1990) (emphasis added).

the intent of Congress in formulating the federal records laws. In *Armstrong v. Executive Office of President*, for example, the plaintiffs, who were journalists and private researchers, sued the Executive Office of the President, the National Security Council, and the Archivist to prevent the proposed destruction of government emails.<sup>182</sup> The government argued, based on the fact that paper printouts of the emails had been preserved as records, that the electronic originals were not “appropriate for preservation.”<sup>183</sup> The Court of Appeals for the D.C. Circuit rejected the government’s argument that “agency heads have sweeping discretion to decide which documents are ‘appropriate for preservation’” and held that the federal records laws “surely cannot be read to allow the agency by fiat to declare ‘inappropriate for preservation’ an entire set of substantive e-mail documents.”<sup>184</sup> The court determined that despite the government’s arguments that the emails were “nonrecords” that were “not appropriate for preservation,” they could not be destroyed except in accordance with the federal records laws.<sup>185</sup>

Again, the initial decisions of the CIA in early 2002 to mandate retention of the tapes and to convert them into “official record copies” would appear to indicate a determination that even if the tapes were not ultimately preserved, they were, at least initially, “appropriate for preservation” in “the judgment of the agency.”<sup>186</sup>

#### *B. The Tapes as Nonrecord Copies or “Working Papers”*

The CIA’s position that the tapes did not constitute records more likely reflects a determination that the written intelligence reports the CIA produced from, and about, the interrogations rendered the videotapes duplicative. This argument could take two forms. First, even if the tapes were initially preserved, or appropriate for preservation, as records they could have arguably been “stripped of that status” by falling within the statutory exception for “extra copies of documents preserved only for convenience of reference” thus making them nonrecords.<sup>187</sup>

Second, the CIA might have treated the interrogation tapes as “working files” or drafts of the “final” intelligence reports. In a briefing to Senator Pat Roberts in February 2003, for example, while disclosing its intent to destroy the tapes, the CIA noted that the tapes “were created in any case as but an aide to the interrogations.”<sup>188</sup> The possible treatment of the tapes as

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182. *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

183. *Id.* at 1283.

184. *Id.*

185. *Id.*

186. 36 C.F.R. §1222.10(b)(6) (2010).

187. *Armstrong*, 1 F.3d at 1283 (quoting 44 U.S.C. §3301).

188. A redacted copy of a Memorandum For Record describing the February 2003

working files is further enhanced by the fact that NARA, in its 2000 review of CIA records management, expressly encouraged the CIA to analyze the status of its files located at DO field sites, which it had been classifying as “nonrecord,” as working files.<sup>189</sup> Under NARA regulations, working files can be discarded if they were not circulated and contain no “unique” information” not in the final version “that adds to a proper understanding of the agency’s” actions.<sup>190</sup>

These two possible explanations – the tapes as nonrecord copies or working files that could be discarded – thus converge on a single issue that has been central to the CIA’s argument from the beginning: the extent to which the interrogation reports duplicated the tapes. In its 2003 briefing of Senator Roberts, for example, the CIA described the OIG’s “comparison of the tapes with the cables describing the same interrogations” in late 2002 and told Senator Roberts that “the match was perfect.”<sup>191</sup> Further, D/CIA Hayden’s 2007 statement disclosing the destruction, when read in light of the subsequent assertion that the tapes did not constitute records, appears almost singularly designed to make the argument that the tapes were the equivalent of extra copies or working papers. In particular, Hayden stated that although “[a]t one point, it was thought” that the tapes could verify that “other methods of documenting” the interrogations were – quoting without attribution the federal records laws – “accurate and complete”<sup>192</sup> the CIA “soon determined that its documentary reporting was full and exacting, removing any need for tapes.”<sup>193</sup>

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briefing of Senator Pat Roberts, dated Nov. 30, 2004, is available at <http://www.dcofiles.com/judicialwatch/4.pdf> [hereinafter Sen. Roberts Briefing].

189. NARA EVALUATION, *supra* note 14, at 41-42. CIA “working files” were, at the time of the 2000 NARA evaluation, governed by an agency-wide records schedule. CIA General Records Schedule, *supra* note 136, at Item 18(a). NARA recommended revisions to the schedule while also recommending that the CIA treat files at DO field sites as working files. NARA EVALUATION, *supra* note 14, at 26-28. The CIA subsequently created a new records schedule for working files, which the CIA signed in September 2002, the same month it determined that the law did not require the retention of the interrogation tapes. CIA, Request for Records Disposition Authority, N1-263-03-2, *available at* <http://www.dcofiles.com/902.pdf>. The schedule, which the Archivist approved in April 2003, assesses working files based on whether they are “accumulated at the Deputy Director level and above,” whether they “were coordinated outside the unit of origin,” and whether they contain “substantive” information and instructs that “substantive documents” be placed in the “appropriate official file,” but that others are to be screened annually and destroyed. *Id.*

190. 36 C.F.R. §1222.12(c)(2) (2010).

191. Sen. Roberts Briefing, *supra* note 188, at 2.

192. *See* 44 U.S.C. §2902 (stating that among the goals of the federal records management laws is the “[a]ccurate and complete documentation of the policies and transactions of the Federal Government”).

193. D/CIA 2007 Statement, *supra* note 1. He further stated that “the interrogation sessions had already been *exhaustively detailed* in written channels.” *Id.* (emphasis added)

The standard to be applied in determining whether a record is an “extra copy” was directly addressed in *Armstrong v. Executive Office of the President*. As mentioned above, the *Armstrong* court considered whether treating hardcopy paper printouts of email messages as records would render the original electronic versions nonrecord copies “subject to unobstructed destruction.”<sup>194</sup> The court framed the issue in this manner: “[T]he mere existence of the paper printouts does not affect the record status of the electronic materials unless the paper versions include all significant material contained in the electronic records. Otherwise the two documents cannot accurately be termed ‘copies’ – identical twins – but are, at most, ‘kissing cousins.’”<sup>195</sup>

In making this determination, the court applied a strict standard for “copies,” quoting *Webster’s Dictionary* definition as “full reproduction[s] or transcription[s]; imitation[s] of a prototype: . . . duplicate[s].”<sup>196</sup> Although the paper printouts were identical to the view of the original email on a computer screen, the court noted certain information contained within the electronic version would not always be available in the paper printout.<sup>197</sup> On this basis, the court found that “there is no way we can conclude that the original electronic records are mere ‘extra copies’ of the paper print-outs” and that finding otherwise would be “flatly inconsistent with Congress’s evident concern with preserving a *complete* record of government activity for historical and other uses.”<sup>198</sup>

Beyond the basic fact that CIA intelligence reports of the interrogations obviously are not actual “copies” of the videotapes, the available public information appears in several respects to undermine the assertion that the tapes were duplicative of the intelligence reports and cables derived from the interrogations. The CIA has acknowledged, for example, that it is “not

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194. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1284 (D.C. Cir. 1993).

195. *Id.* at 1283.

196. *Id.* at 1284 (citing WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 404 (2d ed. 1979)). Such a reading might also be justified on the basis that in 1943, when the statutory language was added, “copies” may have referred to carbon copies. See GARY M. PETERSON & TRUDY HUSKAMP PETERSON, ARCHIVES & MANUSCRIPTS: LAW 14 (1985) (noting that the copies for “‘convenience of reference’ clause was probably conceived as a cover for the extra carbon copies that many offices create and give to the drafters of documents”).

197. This included the fact that senders and recipients might be identified in a printout of an email by User IDs or nicknames (rather than full names) or by the name of a distribution list (rather than by the names of all of the individuals comprising that list). *Armstrong*, 1 F.3d at 1284.

198. *Id.* at 1285 (emphasis in original). Following up on its “twin” versus “cousin” metaphor, the Court found that since “the two versions of the documents may frequently be only cousins – perhaps distant ones at that – the electronic documents retain their status as federal records” and held that all federal records laws governing the “preservation of records still apply.” *Id.* at 1283.

aware of any transcripts of the destroyed videotapes.”<sup>199</sup> Even presuming that the content of the interrogations depicted in the videotapes was accurately reported in the interrogation reports, based on the CIA’s “profound interest in obtaining accurate information” and “in reporting that information accurately” for intelligence purposes,<sup>200</sup> the lack of transcripts suggests that the reports did not duplicate *all* of the information on the tapes. Indeed, it would be reasonable that the CIA would not include information in intelligence reports that was not relevant or useful to its intelligence operations.<sup>201</sup> Information contained in the tapes that had no intelligence value, however, may well have had “administrative, legal, research, or other value” which the federal records laws are specifically designed to preserve.<sup>202</sup>

Moreover, descriptions of the CIA OIG’s review in late 2002, on which the CIA’s argument that the tapes were duplicative appears to be based, indicates that the attorney reviewing the tapes appeared to focus on whether the interrogation *techniques* depicted in the tapes were adequately described in the cables and intelligence reports.<sup>203</sup> Whether the review included an exhaustive comparison of the *content* of the interrogations (as well as non-

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199. Letter from Lev L. Dassin, Acting United States Attorney, S.D.N.Y., U.S. Department of Justice, to Hon. Alvin K. Hellerstein, U.S. District Judge, S.D.N.Y., at 2 (Mar. 6, 2009), <http://www.aclu.org/torturefoia/legaldocuments/Letter030609.pdf>.

200. *U.S. v. Moussaoui*, 382 F.3d 453, 478 (4th Cir. 2004) (stating that the “profound interest in obtaining accurate information” from witnesses “and in reporting that information accurately to those who can use it to prevent acts of terrorism” provided government reports with “sufficient indicia of reliability” to allow them to be used as substitutes for live testimony). That this should be true makes the fact, noted by the CIA OIG, that, despite having the videotapes available to ensure the accuracy of the interrogation reports, the interrogation teams stated that they “rarely, if ever, were used” to “assist in the preparation of the debriefing reports” both surprising and troubling. CIA OIG REPORT, *supra* note 24, at ¶77.

201. CIA officers in the field, for example, advised headquarters in April 2002 that “if the primary purpose [of the videotapes] is to ensure capture of vital intelligence, the interrogation team is maintaining a careful log of all activities as well as keeping careful track of the intelligence obtained” and that the “mound of video tapes” contained “many hours of little if any information being obtained from subject” and that the field’s “preference [was] to be more selective and retain only those interrogations where actionable intelligence [was] gathered.” April 18, 2002 Cable, *supra* note 31.

202. 44 U.S.C. §3303 (2006). In *American Friends Service Committee v. Webster*, 720 F.2d 29 (D.C. Cir. 1983), the D.C. Circuit addressed a strikingly similar situation involving FBI field files. The FBI, with approval from NARA, was retaining only “summaries of field office files” and destroying “the original documents upon which the summaries are based.” *Id.* at 65. The Court stated that it did “not disagree with the government’s general point that the FBI may satisfactorily summarize much investigative data,” but that “the summaries need to account in some reasonable fashion for historical research interests and the rights of affected individuals – not just the FBI’s immediate, operational needs.” *Id.*

203. See CIA Abu Zubaydah Report, *supra* note 17, at 7 (stating that the purpose of OGC review was “to confirm that the cable traffic accurately described the interrogation methods employed”).

interrogation portions of the tapes) is more questionable.<sup>204</sup> A heavily redacted interview concerning the attorney's review appears to indicate, in contrast, that the attorney was "listening to the audio for the *tenor* of the session."<sup>205</sup>

The unique value of the tapes is further evidenced by the fact that the CIA OIG's review of the tapes came to different conclusions than the CIA OGC even about the interrogation techniques depicted on the tapes. Whereas the OGC found that the techniques on the tapes complied with DOJ guidance, the OIG concluded that the waterboarding technique on the tape "was different from the technique as described in the DOJ opinion."<sup>206</sup> The OIG stated that "the difference was in the manner in which the detainee's breathing was obstructed" noting that

in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator [redacted] continuously applied large volumes of water to a cloth that covered the detainee's mouth and nose.<sup>207</sup>

These are precisely the type of details that a video could confirm, but which a written record indicating only that a technique was applied for a specific duration may not. The continuing importance of the tapes to provide an accurate record, and the inadequacy of the written cables in doing so, was highlighted by the DOJ's Office of Professional Responsibility which noted in 2009 that "[b]ecause CIA video tapes of its actual use of the waterboard were destroyed by the CIA, a definitive assessment of how that technique was applied may be impossible."<sup>208</sup>

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204. Any such review would have been complicated by uncertainty about whether questions and answers depicted in the tapes were audible and accurately translated in the corresponding intelligence report. The extent to which portions of the interrogations were conducted in English or the OGC attorney reviewing the tapes understood Arabic is unclear from public sources.

205. A copy of an interview report dated June 18, 2003, by the OIG of a CIA attorney regarding the review of the videotapes and a government index description is available at <http://www.dcofiles.com/aclu/18.pdf> (emphasis added). The interview concludes with the OIG asking whether the "conclusion that the tapes 'confirm' the cable traffic was overstated" and the attorney replying "that the tapes 'tend to confirm what is in the cables' and 'do nothing to discredit any of the cables.'" *Id.* at ¶14.

206. CIA OIG REPORT, *supra* note 24, at ¶79.

207. *Id.* The OIG noted that "[o]ne of the psychologists/interrogators . . . explained that the Agency's technique is different because it is 'for real' and is more poignant and convincing." *Id.*

208. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 247 n.205 (2009).

In addition, certain intangible elements of an interrogation are perhaps impossible to describe exhaustively in a written record. The updated Army Field Manual on interrogation states, for example, that “video recording is possibly the most accurate method of recording a questioning session since it records *not only the voices but also can be examined for details of body language and source and collector interaction.*”<sup>209</sup>

Finally, the very concern that appeared to provide the final impetus to destroy the tapes was that a video of “enhanced interrogation techniques” would have a quality lacking in a written account. According to an internal CIA email, for example, CIA officers indicated that “the heat from destroying [the tapes] is nothing compared to what it would be if the tapes ever got into the public domain” and that “out of context, they would make us look terrible; it would be ‘devastating’ to us.”<sup>210</sup> Another CIA official was similarly quoted in the press stating “People know what happened, but to see it in living color would have far greater power.”<sup>211</sup>

A final argument that the CIA might assert is that even if the intelligence reports and cables did not exhaustively reflect all of the content of the videotapes, the partial information contained in the reports nevertheless was sufficient to satisfy the CIA’s statutory obligation to make and preserve “adequate and proper documentation,” thereby making the preservation of the tapes unnecessary.<sup>212</sup> The D.C. Circuit, however, in *Armstrong v. Executive Office of the President*, found this same argument “unconvincing” on the basis that it relies only upon the statutory provision that describes an agency’s basic duty “to create and then retain a baseline inventory of ‘essential’ records.”<sup>213</sup> The argument ignores other parts of the federal records laws that “prescribe more particularized duties for agency heads that reach beyond their general obligation to ‘adequately document’ core agency functions” such as the “mandate that *all* records . . . whether or not related to ‘adequate documentation’” be preserved and that they can only be destroyed “in accordance with explicit statutory directives.”<sup>214</sup> Or,

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209. DEP’T OF THE ARMY, FM2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 9-11 (2006) (emphasis added). Currently, this Army Field Manual governs any interrogations conducted by the CIA. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). A revision of the DoD Directive on Interrogations notes the further value of videotaped interrogations for “the training of new interrogators, the periodic assessment of interrogator performance, reviewing interrogation reports for completeness, re-assessing the veracity of sources during questioning, monitoring compliance with policy and procedures, documenting the interrogation environment.” DEP’T OF DEFENSE, DIRECTIVE NO. 3115.09, 5 (Oct. 9, 2008).

210. Email from redacted individual to Dusty Foggo (Nov. 10, 2005), available at <http://www.dcofiles.com/aclu/10.pdf>.

211. Mazzetti, *supra* note 29.

212. 44 U.S.C. §3101 (2006).

213. *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1286 (D.C. Cir. 1993).

214. *Id.* at 1286-1287. The Tenth Circuit has similarly rejected the argument that the

put another way, the question of whether the CIA was obligated to videotape the interrogations in the first place<sup>215</sup> is separate from the question of whether, the videotapes having been made, the CIA was allowed to destroy them.<sup>216</sup>

Moreover, one could argue that, despite the fact that there was not, at the time, an express statutory obligation to videotape interrogations,<sup>217</sup> the extraordinary nature of the Abu Zubaydah interrogations may have required videotaping even to satisfy the basic standard of “adequate and proper documentation.”<sup>218</sup> The unique circumstances of these interrogations were evidenced by the active involvement of multiple federal agencies and the White House in the interrogation plan, the government’s expressed view of the importance of Abu Zubaydah in providing information necessary to protect the United States from terrorist attacks,<sup>219</sup> and the request for a

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“adequate and proper documentation” language from 44 U.S.C. §3101 implies any “limit on an agency’s preservation responsibilities” and held that “[w]hen chapter 33 [of Title 44], entitled “Disposal of Records,” imposes duties with respect to records, it undoubtedly refers to *all* records defined by [44 U.S.C.] §3301 . . . not just the subset described in §3101.” *Rohrbough v. Harris*, 549 F.3d 1313, 1319 (10th Cir. 2008) (emphasis in original).

215. The CIA’s position appears to be that they did not. *See, e.g.*, D/CIA 2007 Statement, *supra* note 1 (stating that the CIA “on its own” began taping).

216. Agencies may often create many more records than are necessary to fulfill the basic duty of “adequate and proper documentation;” they cannot, however, destroy the “extra” records unless they are nonrecord, such as “copies maintained for convenience,” or unless a records disposal schedule *properly* approved by the Archivist allows it. *See Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29 (D.C. Cir. 1983) (holding that agency and NARA recordkeeping activities are subject to judicial review and finding that destruction of agency records, approved by the Archivist, did not comply with federal records laws).

217. Federal law now requires the videotaping of at least certain intelligence interrogations. *See National Defense Authorization Act for Fiscal Year 2010*, Pub. L. No. 111-84, §1080, 123 Stat. 2190, 2479 (2009) (requiring “videotaping or otherwise electronically recording strategic intelligence interrogations” of person under the control of DoD).

218. Indeed, query whether the later recordkeeping requirement for the use of “enhanced interrogation techniques” that mandated only a written record “setting forth the nature and duration of each such technique employed” was sufficient to document, adequately and properly, the 183 applications of the waterboard on Khalid Sheik Mohammed. CIA OIG REPORT, *supra* note 24, at App. E, ¶5. *Cf. Al-Adahi v. Obama*, 672 F. Supp. 2d 114, 118 (D.D.C. 2009) (finding the government in contempt for violating a court order to videotape a detainee’s habeas testimony stating that “a picture is truly worth 1,000 words, and the full import of Petitioner’s testimony cannot be gained from the cold, dry transcript alone”).

219. *See Remarks on the War on Terror*, 42 WEEKLY COMP. PRES. DOC. 1569, 1571 (Sep. 6, 2006) (stating that Abu Zubaydah “provided information that helped stop a terrorist attack being planned inside the United States”). In Abu Zubaydah’s habeas case, however, the government recently stated that it was “not contend[ing] in this proceeding that at that the time of his capture, [Abu Zubaydah] had knowledge of any specific impending terrorist operations other than his own thwarted plans.” Respondent’s Memorandum of Points and Authorities in Opposition to Petitioner’s Motion for Discovery and Petitioner’s Motion for Sanctions, *Husayn v. Gates* (D.D.C. Oct. 27, 2009) (No. 08-1360), at 35, *available at* <http://www.truth-out.org/files/memorandum.pdf> [hereinafter *Opposition to Sanctions in Abu*

specific opinion from the DOJ OLC. Such an argument is strengthened by the requirement that “adequate and proper documentation” be “designed to furnish the information necessary to protect the legal rights . . . of the Government,” which risked being accused of violating treaty obligations, and the legal rights of those “persons directly affected by the agency activities,”<sup>220</sup> which included not only the detainees being subjected to simulated drowning, but also government interrogators, who risked being charged with committing torture. The surviving written record may be, in the end, inadequate to accomplish any of these goals, which raises a final issue about the tapes and their potential role as evidence.

### C. *The Tapes as Relevant Evidence*

The possible relevance of the tapes to specific legal proceedings or investigations, which may have triggered alternative legal obligations to preserve them, is beyond the scope of this article. Yet such considerations are not irrelevant to the federal records laws. First, as mentioned above, the law requires agencies to create records designed to protect the legal rights of both the government and individuals affected by agency activities.<sup>221</sup> Second, the evidential and informational value of government documents properly forms part of the determination about whether they are “appropriate for preservation” and therefore whether they satisfy the statutory definition of “record.”<sup>222</sup> Third, once documents are determined to be records, the law requires both agencies and the Archivist to assess their “legal” value in considering their appropriate disposition.<sup>223</sup>

The relevance of CIA records to legal proceedings is also specifically incorporated into a CIA records schedule covering “Records relating to actual or impending litigation or to matters under investigation by the Department of Justice or Congress.”<sup>224</sup> The schedule instructs that such records should be retained or destroyed “in accordance with approved Agency disposition instructions for the records, *or when litigation or investigation requirement has ended, whichever is later.*”<sup>225</sup> The provision was intended to be a standing “litigation hold” instruction by the CIA General Counsel “to assure that any records involved in litigation or

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Zubaydah’s Habeas Case].

220. 44 U.S.C. §3101 (2006).

221. *Id.*

222. 44 U.S.C. §3301 (2006).

223. 44 U.S.C. §§3303, 3303a(a) (2006).

224. CIA General Records Schedule, *supra* note 136, at Item 5(d) (emphasis added).

225. *Id.*

investigations are retained until that requirement ends, their regular disposition instructions notwithstanding.”<sup>226</sup>

The CIA’s assertion that the tapes were not records, despite their potential relevance as evidence, would arguably avoid such requirements, however. This would then leave only *ad hoc* legal obligations arising either from specific preservation orders or the general duty to preserve relevant evidence. D/CIA Hayden’s 2007 statement disclosing the destruction of the tapes asserted that the CIA had determined that the tapes were “not relevant to any internal, legislative, or judicial *inquiries* – including the trial of Zacharias Moussaoui.”<sup>227</sup> Even if this assertion is true, however, it does not accurately describe the standard for the duty to preserve relevant evidence, which is triggered not only by pending, but reasonably foreseeable, litigation.<sup>228</sup>

A thorough analysis of the latticework of legal positions the CIA has thus far asserted to argue that the tapes were not relevant to a number of proceedings,<sup>229</sup> including Abu Zubaydah’s subsequent habeas case,<sup>230</sup>

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226. See Krauskopf Memo, *supra* note 136, at 2.

227. D/CIA 2007 Statement, *supra* note 1 (emphasis added).

228. See, e.g., *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (defining spoliation as the destruction of evidence “in pending or reasonably foreseeable litigation”); see also generally MARGARET M. KOESEL & TRACEY L. TURNBULL, *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* (2d ed. 2006). Whether the relevance of the tapes to pending or foreseeable litigation at the time of their destruction was adequately considered is further called into question by the fact that, according to press reports, the CIA attorney who was consulted about “whether there was any legal requirement to keep the tapes” and reportedly advised that there was not, was Robert Eatinger. While Eatinger had formerly been the Chief of the CIA’s Litigation Division, at the time he would have provided this advice he was assigned to the CIA’s Counterterrorism Center and, by his own account, had not had “any role in any CIA litigation” since April 2004. Decl. of Robert J. Eatinger, *Horn v. Huddle* (D.D.C. Oct. 23, 2009) (No. 94-1756), at ¶19.

229. In the Moussaoui case, for example, the government disclosed in December 2007 that “recordings did exist for enemy combatant Abu Zubaydah” but argued that “[t]he district court ruled on January 31, 2003 [] that Zubaydah lacked material evidence, so he was no longer at issue when the district court raised the issue of recordings [of interrogations].” Appellee’s Response in Opposition to Appellant’s Motion for a Limited Remand Based on the Government’s Disclosure of Incorrect Declarations, Testimony, and Representations, *U.S. v. Moussaoui* (4th Cir. Dec. 6, 2007) (No. 06-4494), at 16 n.9. According to CIA spokesman Mark Mansfield “the tapes were not destroyed while the 9/11 Commission was active so that they would be available if ever requested for its report.” *CIA Director: Agency Taped Terror Interrogations, Destroyed Tapes Over Leak Fears*, ASSOCIATED PRESS, Dec. 7, 2007. The CIA determined, however, that the tapes were simply never responsive to the 9/11 Commission’s inexplicably narrow document requests, which asked only for cables and “other reports of intelligence information obtained from interrogations” of Abu Zubaydah. Memorandum from Philip Zelikow to Tom Kean and Lee Hamilton, *Interrogations and Recordings: Relevant 9/11 Commission Requests and CIA Responses*, at 2 (Dec. 13, 2007); but see John Radsan, *When the Smoke Clears at CIA*, 2 BERKELEY J. INT’L L. PUBLICIST 1, 8 (Summer 2009) (stating that the author, a former CIA attorney, “knew someone in the [CIA] Office of General Counsel who said – to no avail – that the Agency should turn over its

2011] THE CIA'S DESTRUCTION OF ITS INTERROGATION TAPES 171

remains to be written. If anything, the cumulative effect of such arguments, however, is to illustrate the importance of the federal records laws in providing a baseline, institutional obligation to ensure the careful and proper disposition of all government records according to schedules approved by an outside, impartial authority – the Archivist.

The publicly available facts about the decision to destroy the tapes, in contrast, mirror assessments made by corporate officers about whether to destroy incriminating documents when advised by counsel that they have a strong argument that a preservation obligation has not been triggered. A leading treatise on the destruction of evidence (written, coincidentally, by a member of the 9/11 Commission) notes, for example, that “when the evidence itself is devastating and there is a strong argument that destruction is legal” then the risks of destruction, including possible adverse inferences for spoliation in subsequent litigation, may be “worthwhile.”<sup>231</sup>

The federal records laws, properly applied, however, ought to make such assessments moot for government records. Given the considerably broader pool of stakeholders in the preservation of government documents, the federal records laws in principle are designed to take decisions about the “risks” of destruction away from interested hands and place them into more objective ones. As then Director of Archival Management Theodore Schellenberg, an early leader in the field, noted: “An archivist is not an interested party with respect to the preservation of evidence, whether favorable or unfavorable to an agency’s administration. He will not judge of its partiality; he is interested only in preserving all the important evidence.”<sup>232</sup>

#### IV. BALANCING ARCHIVAL BOXES AND BURN BAGS

Following the DOJ announcement that it would not pursue criminal charges for the destruction of the tapes, NARA moved quickly to resume its inquiry into whether an “unauthorized destruction” of federal records had occurred.<sup>233</sup> As of this writing, however, the CIA’s public statements suggest that it does not intend to respond anytime soon.<sup>234</sup> Calls for

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interrogation videotapes to the 9/11 Commission”). For CIA arguments in the ACLU FOIA case, see *supra* notes 177-178 and accompanying text.

230. See Opposition to Sanctions in Abu Zubaydah’s Habeas Case, *supra* note 219, at 63 (arguing that “the interrogation tapes are irrelevant to this case”).

231. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE §9.2 (2010).

232. THEODORE R. SCHELLENBERG, MODERN ARCHIVES: PRINCIPLES AND TECHNIQUES 29 (1956).

233. 2010 Wester Letter, *supra* note 16.

234. See Isikoff, *supra* note 16 (quoting CIA spokeswoman Marie Harf stating that the CIA would not comment on the NARA inquiry because the DOJ “has not fully completed its investigation into the former detention program”).

Congress to reopen its inquiries into the destruction of the tapes have thus far gone unheeded as well.<sup>235</sup> Congress, NARA, and the CIA must consider carefully the implications and consequences of the CIA's legal positions for the ongoing and future preservation of the records of its intelligence operations. Outlined briefly below are a few issues that such inquiries should address and some provisional thoughts on their resolution.

As an initial matter, even for documents that are accepted as "records," there can be a legitimate tension between the goal of preserving records and the goal of preserving the security of intelligence operations abroad. The proliferation of extra copies and multiple files, which can aid in ensuring "accurate and complete" documentation, can be the enemy of information security policies that seek to keep the amount of classified material to an absolute minimum.<sup>236</sup> NARA acknowledged this tension at CIA field sites which, NARA noted, received guidance from CIA headquarters not only about recordkeeping obligations, but also about requirements "stem[ming] primarily from security concerns" that are "geared to ensuring that record holdings are kept to a minimum and can be destroyed quickly in an emergency."<sup>237</sup>

The central issue is whether these interests are being properly balanced. Any classified document, by definition, poses a "security risk."<sup>238</sup> That justification alone obviously does not remove the possibility of less appropriate motives for destruction.<sup>239</sup> Further, security risks presented by

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235. See, e.g., Editorial, *The CIA Tapes: Case Not Closed*, WASH. POST., Nov. 12, 2010 (stating that "Congress should step in to address myriad unanswered questions" about the destruction of the interrogation tapes).

236. See, e.g., DOD INFORMATION SECURITY PROGRAM, *supra* note 104, at §6-101 (mandating that "working papers containing classified information" shall be "[d]estroyed when no longer needed").

237. NARA EVALUATION, *supra* note 14, at 39. Legal guidance to an FBI field office in Islamabad, Pakistan provides a comparable example of the two goals juxtaposed. On the one hand, the FBI General Counsel advised the field office that "[i]n accordance with existing law and regulation" all offices must "retain and preserve documents, materials, records and other information related to the FBI's knowledge, activities, and efforts regarding terrorism and counterterrorism before, on, and after September 11, 2001." Memorandum from FBI, Office of the General Counsel to All Divisions (Jan. 22, 2002), *available at* <http://www.dcofiles.com/governmentattic/22.pdf>. On the other hand, the field office responded that it was "located in a high threat area. The U.S. Embassy is now operating under a 'zero burn' policy. Hard copies of some documents are maintained in the office space, however, if an emergency evacuation is necessary, all files will be destroyed in compliance with U.S. State Department policy. Therefore in all investigations . . . this office will not retain interview notes, evidence, or other documentation related to any case." Memorandum from Legal Attaché, Islamabad to FBI, Office of the General Counsel (Feb. 13, 2002), <http://www.dcofiles.com/governmentattic/13.pdf> [hereinafter FBI Legal Attaché Memo].

238. See Exec. Order No. 13,526, *Classified National Security Information*, 75 Fed. Reg. 707,708 (Dec. 29, 2009) (describing classified information as information the disclosure of which would be "reasonably expected" to cause damage to national security).

239. See, e.g., *Kronisch v. U.S.*, 150 F.3d 112, 124 (2d Cir. 1998) (questioning the CIA's assertion that documents were "destroyed to preserve the confidential identities" of

classified records abroad can be minimized by well established information security procedures, such as moving sensitive materials to more secure locations.<sup>240</sup> This was, in fact, the initial guidance provided by the CIA to the field in April 2002, instructing that the tapes “should be collected, logged and labeled, and *sent to headquarters*.”<sup>241</sup> Instead, the CIA’s contrary actions of stockpiling the tapes first at a field location and then, according to press accounts, at a foreign CIA station for three years, arguably may have placed them at greater risk of loss or capture than if they had been quickly transported back to the United States for safekeeping as initially planned.

Outlined below are suggested modifications to the law, intelligence community policies, and enforcement to address these concerns.

First, Congress should consider legislation to clarify the extent to which it intends that the CIA has, or should have, any exemption from the requirements of federal records laws. At the very least, such exemptions, if any, should be transparent and clearly stated in the U.S. Code.<sup>242</sup> Even a belated examination by Congress of the CIA’s destruction of the interrogation tapes would provide a unique and concrete opportunity to assess the necessity for such exemptions. Congress could consider, for example, whether the CIA properly determined that the preservation of the tapes constituted an unacceptable security risk that federal records laws failed to recognize or properly ameliorate.<sup>243</sup> Congress may well determine,

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participants in a program and that the CIA’s justification may have also included “a fear that the documents would become the subject of litigation”). Standard operating procedures that governed certain interrogations in Guantánamo instructed interrogators that once summaries of interrogations were created “handwritten interrogator notes may be destroyed” on the express basis that the interrogation “mission has legal and political issues that may lead to interrogators being called to testify” and that “keeping the number of documents with interrogation information to a minimum can minimize certain legal issues.” Aff. of William C. Kuebler, Lieutenant Commander, U.S. Navy, June 8, 2008, at ¶6, *available at* <http://www.scotusblog.com/wp-content/uploads/2008/06/kuebler-affidavit-6-8-08.pdf>.

240. See DOD INFORMATION SECURITY PROGRAM, *supra* note 104, at §6-303 (mandating emergency planning “for the protection, removal, or destruction of classified material in case of . . . terrorist activities, or enemy action, to minimize the risk of its compromise” and stating that such plans should consider the “[s]torage of less frequently used classified material at more secure locations”); see also STATE DEP’T, FOREIGN AFFAIRS HANDBOOK, 5 FAH-4, at H-315.2-2 (stating that records could be destroyed at foreign posts in an “extreme emergency” but noting that it is preferable to “safe haven” records to another location), *available at* <http://www.state.gov/documents/organization/89250.pdf>.

241. April 17, 2002 Cable, *supra* note 30 (emphasis added); cf. FBI Legal Attaché Memo, *supra* note 237 (stating that the FBI Legal Attaché in Islamabad “will not retain interview notes, evidence, or other documentation related to any case” but that “[a]ll of these items have been or will routinely be forwarded to the appropriate office”) (emphasis added).

242. See *supra* Part II.C.

243. In doing so, Congress would have to consider the fact that the same risks might argue for a similar exemption from the obligation to preserve records requested, for example, in Congressional investigations.

in contrast, that federal records laws adequately balance such concerns by providing all agencies with an emergency exception that allows the destruction of records located outside the United States “when hostile action by a foreign power appears imminent” and that a statutory exemption for the CIA, if it exists, is unnecessary.<sup>244</sup>

Second, Congress should revisit the definition of records, the related concept of nonrecords, and the proper discretion agencies should have in applying such terms. Congress could control misuse of the “nonrecord” category, for example, by expanding the statutory definition of “record” to encompass more, if not all, agency documents. This would not force agencies to preserve “every scrap of paper.”<sup>245</sup> Instead, descriptions of categories of what are now termed “nonrecords” could simply be added to either agency records schedules or general records schedules produced by the Archivist. The practical effect for most agencies would be negligible, but the change would provide transparency about the variety and types of documents agencies are destroying as nonrecords and prevent documents of significant value from being destroyed as nonrecords without notice to, and input from, the Archivist.

Third, the destruction of the CIA tapes should provide the impetus for policy, education, and training reforms across the intelligence community relating to federal records responsibilities. The position of Director of National Intelligence (DNI) appears ideally suited to provide a policy that is consistent within the intelligence community and avoid piecemeal measures. Moreover, the burden of this action is diminished by the fact that the DoD has already introduced relevant reforms that the DNI could simply replicate across the broader intelligence community, including the CIA.

In particular, the DoD examined the policies relating to videotaping interrogations throughout its components.<sup>246</sup> The DoD subsequently revised its directive on “Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning,” to include a section on “Recordings of Intelligence Interrogations” which expressly discusses video recording of

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244. 44 U.S.C. §3311 (2006). This law also provides for accountability for such destruction by requiring an after-the-fact report to the Archivist of the United States. *Id.*; Some have speculated about whether the CIA might have been relying upon this provision in destroying the tapes. See Isikoff, *supra* note 9; *The “Other” Provision of the Records Act*, *supra* note 153. This appears highly unlikely on the basis that it would be inconsistent with the CIA’s public statement that the tapes were not records. Any attempted reliance would also be suspect on the basis that the danger to the tapes, which were reportedly held in a safe on the grounds of the U.S. embassy in Thailand, would not appear to be sufficiently imminent. A FOIA request by the author to NARA for a copy of any such report filed by the CIA in relation to the tapes yielded no responsive documents, available at <http://www.dcofiles.com/narafoia.pdf>.

245. See *supra* note 92 and accompanying text.

246. See Al Pessin, *Pentagon Reviews Policy of Videotaping Interrogations*, VOICE OF AMERICA, Mar. 13, 2008.

interrogations.<sup>247</sup> The Directive states clearly that “[o]nce the purposes for which a recording was made have been accomplished, the recording shall be disposed of only in accordance with a disposition schedule developed by the [Secretary of Defense] and approved by the Archivist of the United States.”<sup>248</sup>

Such reforms within the DoD arose, in part, from interrogation tapes depicting detainee Ali Saleh Kahlah al-Marri that were destroyed by the Defense Intelligence Agency (DIA) in 2004 and 2005.<sup>249</sup> In contrast to the CIA’s unequivocal defense of the legality of the destruction of the Abu Zubaydah tapes, the DIA General Counsel and Inspector General conducted a joint investigation into the destruction of the DIA tapes that both highlighted the unique problems of intelligence community records and the resolution of such issues.<sup>250</sup> The investigation found, for example, that the interrogation team “regarded the recordings as working materials similar to handwritten notes, destruction of which *they believed was required* when no longer needed for intelligence purposes.”<sup>251</sup> The DIA investigation concluded, however, that the recordings “did not fit the definition of working papers” under NARA regulations and recommended both “submitting a report of records destruction to NARA” and “reviewing DIA and DoD regulations to clarify the definition of working materials.”<sup>252</sup>

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247. See generally Dep’t of Defense, Directive No. 3115.09 (Oct. 9, 2008). The Directive addresses the concerns of the CIA regarding the identity of interrogators by requiring that “[b]efore a video recording is disclosed or released to any person or entity outside the Department of Defense or the U.S. Intelligence Community, the identities” of the interrogators “shall be concealed.” *Id.* at §10(e).

248. *Id.* at §10(c).

249. See Defense Intelligence Agency Memorandum, Congressional Notification – DIA Interrogation Recordings of Ali Saleh Kahlah Al-Marri (Feb. 1, 2008), available at <http://www.dcofiles.com/eff/1.pdf>; Defense Intelligence Agency Memorandum to Assistant to the Secretary of Defense (Intelligence Oversight), Quarterly Intelligence Oversight Report for the Period Ending 31 March 2008 (Apr. 24, 2008), available at <http://www.dcofiles.com/eff/24.pdf>.

250. Although the classified report has not been publicly released, a government summary of the DIA investigation report was produced in the criminal case, *United States v. Ali Saleh Kahlah al-Marri*, and it is available at <http://www.dcofiles.com/4.pdf> [hereinafter DIA Investigation Summary].

251. *Id.* While the DIA investigation summary noted that “[t]his belief was consistent with then DIA and DoD issuances concerning information security,” it is unclear whether the DIA report acknowledged that DoD issuances also included express guidance regarding compliance with the Federal Records Act. See DOD INFORMATION SECURITY PROGRAM, *supra* note 104, at §C6.7.1.1 (stating that classified documents “that are no longer required for operational purposes shall be disposed of in accordance with the provisions of the Federal Records Act” and “appropriate implementing directives and records schedules”).

252. The DIA investigation summary indicated that DIA “later learned that NARA classifies the recordings as unclassified records and the recordings should have been retained at least until a records schedule for the recordings was developed and approved by NARA.” DIA Investigation Summary, *supra* note 250.

Finally, Congress should consider the adequacy of current enforcement mechanisms and consider providing NARA with additional authority to ensure robust oversight over agency records management. Congress should specifically revisit, for example, provisions limiting NARA's authority to inspect "restricted" agency records and policies without the permission of the head of the agency.<sup>253</sup> Allowing agencies to restrict access even to properly cleared NARA staff, whose statutory duties should provide a requisite "need to know," impairs compliance by NARA and the relevant federal agency with the requirements of the federal records laws.<sup>254</sup> While currently lacking the personnel and the funding to undertake a more active role in enforcement, NARA has the requisite expertise and should have the requisite objectivity.

As a last resort, private enforcement remains an option recognized by the courts, and it is one that Congress should not disturb.<sup>255</sup> If DOJ and NARA do not act, the courts have recognized a limited right of action by individuals to force DOJ and NARA to fulfill their statutory responsibilities.<sup>256</sup> The courts have noted the need for some form of judicial review, in part because of the inherent conflicts that can arise. In *American Friends*, for example, which involved the destruction of FBI field office documents with the approval of NARA, the court noted that the "allegedly illegal destruction is attributed to the very agencies in charge of filing suit to protect records," namely NARA and the FBI (as part of the DOJ).<sup>257</sup> The court concluded that in such a situation "it is highly unlikely that Congress intended the exclusive remedy to be a Justice Department suit to recover the records (and to have the remedy triggered by FBI or [Archivist] notification of improper records removal)."<sup>258</sup>

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253. See 44 U.S.C. §2906(a)(2) (stating that "[r]ecords, the use of which is restricted . . . for reasons of national security . . . shall be inspected" by the Archivist "subject to the approval of the head of the agency concerned or of the President"); see also *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 77 (D.C. Cir. 1983) (holding that the District Court did not have the power to order a NARA review of restricted FBI records "because neither the FBI Director nor the President has approved inspection by the Archives").

254. This issue was a point of contention between NARA and the CIA in the initial approval of the CIA schedule for the Directorate of Operations. See, e.g., Letter from Kenneth F. Rossman, Director, Records Appraisal and Disposition Division, NARA, to CIA (recipient identity redacted) (Apr. 26, 1988) (noting that the CIA would not permit NARA archivists to examine relevant CIA files and stating that NARA's "position remains that the NARA appraisal process constitutes a valid 'need to know'"), available at <http://www.dcofiles.com/26.pdf>.

255. See Schrag, *supra* note 99, at 140 n.252 (stating that "several officials of the Archives" had told the author "off the record, that one court order usually had more effect in getting an agency to adopt good records preservation practices than decades of regulating and cajoling by National Archives personnel").

256. *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 41 (D.C. Cir. 1983).

257. *Id.*

258. *Id.*

Similar concerns exist with respect to the CIA tapes, given that the DOJ, as the government's litigation counsel, has obligations to both advise and supervise its client in the preservation of relevant evidence.<sup>259</sup> A joint letter from Senator Patrick Leahy and Senator Arlen Specter, for example, to then Attorney General Mukasey regarding the destruction of the CIA tapes demanded "a complete account of the Justice Department's *own knowledge of and involvement with these matters.*"<sup>260</sup>

#### CONCLUSION

The end of the DOJ's criminal investigation should not be the end, but the beginning of the inquiry into the CIA's destruction of the Abu Zubaydah tapes. The unquestioned importance of the tapes and the CIA's troubling treatment of them as nonrecords raise a red flag that Congress and NARA cannot and should not ignore. The issue of records preservation policies is too often overlooked. A NARA task force in 1988 recommended various legislative changes and noted that amendments to the federal records laws "will have a better chance for passage as a correction to a perceived problem" such as following the document preservation issues raised "in the [then] recent Iran-Contra hearings."<sup>261</sup> The destroyed CIA tapes provide just such an opportunity, and it should not be squandered. Moreover, the issue is one that properly should have bipartisan appeal, since the preservation of records is crucial not only to the rights of detainees, but to intelligence personnel and to future intelligence operations. The debate should be framed in a manner that acknowledges that this issue is not primarily about investigating a past event, but rather about finding the proper procedures for preserving an appropriate history of intelligence activities.

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259. See, e.g., *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431-434 (S.D.N.Y. 2004) (describing the duties of counsel to supervise a client's preservation of evidence).

260. Leahy/Specter Letter, *supra* note 2 (emphasis added). There are many connections linking some DOJ officials to the CIA tapes. For example, Attorney General Mukasey selected Kenneth L. Wainstein to conduct the preliminary inquiry into the destruction of the tapes. In June 2005, just months before the tapes were destroyed, Wainstein had been one of the attorneys on a DOJ brief filed in a Guantánamo habeas case that opposed a detainee's motion for an order requiring the preservation of evidence relevant to his case. DOJ represented that "respondents *are* well aware of their obligation not to destroy evidence that may be relevant in pending litigation" Respondents' Opposition to Petitioners' Motion for Preservation Order, *Abdullah v. Bush*, (D.D.C. Jun. 7, 2005) (No. 05-23) (emphasis in original). This was the same case in which the court, after issuing a 2005 preservation order, then found that the detainee had "made a sufficient showing" that the destruction of the CIA videotapes violated the order. *Abdullah v. Bush*, 534 F. Supp. 2d 22, 23 (D.D.C. 2008).

261. NARA TASK FORCE, *supra* note 92, at 22.