

In the Trenches

Archival Ethics, Law and the Case of the Destroyed CIA Tapes

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Abstract

Despite a lack of press attention, the U.S. National Archives and Records Administration (“NARA”) has a still-ongoing inquiry into whether the Central Intelligence Agency’s (“CIA”) destruction of videotapes depicting brutal interrogations of detainees was an unauthorized destruction of federal records. The relationship between NARA and the CIA illustrates how the role of archivists in government document destruction is fraught with legal and ethical complexities. Archivists must act as a promoter of efficient agency records management while simultaneously acting both as an arbiter of what records an agency should destroy and an enforcer when agencies destroy what they should not. The story of NARA and the destroyed CIA tapes provides an “in the trenches” view of negotiating these roles and balancing archival ethics, law, and government accountability.

Introduction

The archival community has embraced government accountability as a “core value” of archivists and ethical codes for archivists have long included prohibitions on document destruction designed to sanitize “the record” or conceal evidence (Society of American Archivists [“SAA”], 2013). For government archivists such values and standards are not simply aspirational or theoretical,



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but an integral part of their professional and legal obligations. In particular, the duties of the Archivist of the United States and NARA include the responsibility to authorize and empower federal agencies to destroy records. Exercising this authority requires NARA to negotiate a unique mix of competing, and sometimes conflicting, interests. While working cooperatively with federal agencies to improve the efficiency of agency record-keeping by encouraging agencies to dispose of unnecessary records, NARA archivists are simultaneously tasked with ensuring that agencies retain records that may be directly adverse to the interests of the agency and enforcing records retention responsibilities when agencies fail to comply.

This essay explores the relationship between NARA and government records destruction. It begins by discussing relevant archival “values” and ethical codes related to document destruction and government accountability and stressing the unique role of government archivists. It describes the methods federal agencies have used historically to evade record-keeping responsibilities and archival guidance, which have often relied upon manipulating archival concepts and terminology. The essay then examines the CIA’s 2005 destruction of videotapes depicting the detention and brutal interrogation of detainees as a practical illustration of both an agency apparently attempting to avoid record-keeping requirements and the difficult task of archivists in attempting to enforce them as a means towards government accountability. The article ends by suggesting that the most practical efforts to deal with conflicts are largely within the special expertise of archivists, but that current record-keeping reforms may unfortunately result in diminishing the role of archivists in ensuring accountability.

Archivists, Ethics, and Government Document Destruction

Archivists have a unique relationship with document destruction. Unlike many professionals who work in repositories of historical and cultural material, archivists’ destruction of material in their care is not only acceptable, but a crucial and indispensable responsibility. In the process euphemistically called “selection,” the role of the archivist is to separate the wheat from the chaff and determine which portions merit long-term preservation. The primary justification for this process is that with ever-present limitations of resources, archivists must reject the many to preserve the few (Cox, R.J., 2004, p. 8). In fact, the responsibility to select arguably rises to the same level as the duty to preserve. The 1955 “Archivist’s Code” created by the National Archives, for example, stated that an archivist “must be as diligent in disposing of records that have no significant or lasting value as in retaining those that do” (National Archives, 1955).

In performing the selection function, ethical considerations primarily focus

on not intentionally distorting or sanitizing the record. The SAA Code of Ethics, for example, provides that “Archivists may not willfully alter, manipulate, or destroy data or records to conceal facts or distort evidence” (2013). This ethical standard, therefore, simply prohibits the archivist from intentionally undertaking such destructive acts. In practice, however, the significantly more complex reality is that manipulation or destruction of “the record” most often occurs before documents arrive at the archives, while they are still in the hands of the institutions or individuals that created them. That is, archivists may never see the reams of documents consigned to the trash bin whether because their creators considered them insignificant, unimportant, or embarrassing or undesirable evidence of wrongdoing. It is here where the role of NARA archivists becomes more complicated than that of many of private sector peers.

First, NARA archivists have a central role in the management of *current* records of federal agencies. This includes promoting the importance of efficient records management and, most importantly, responsibility for the approval of records destruction undertaken by agencies. This role is akin to the responsibility of records managers in the private realm who develop records retention schedules for institutions that define how long categories of records will be maintained, but there is a crucial distinction. For records of private institutions, the default rule is that documents do not need to be preserved unless a specific legal requirement necessitates it. Such a legal requirement could arise from a law or regulation specific to the entity’s industry or from a general legal obligation to retain documents relevant to ongoing or foreseeable litigation. Absent such requirements, however, private documents can legally be destroyed at any time (Koesel & Turnbull, 2006, p. 5).

For government records, however, the default rule is precisely the opposite. No government records can be destroyed *unless* there is approval from the Archivist of the United States (44 U.S.C. § 3314). Obtaining this approval usually takes the form of an agency submitting a proposed “records schedule” enumerating categories of agency records that, in the agency’s view, do not have “sufficient administrative, legal, research, or other value to warrant their further preservation by the Government” after they are no longer needed by the agency in its “current business” (44 U.S.C. § 3303). NARA archivists review and appraise categories of records proposed for destruction, often examining samples, in order to advise the Archivist of the United States in making an *independent* determination about whether the records have “administrative, legal, research, or other value” before approving any records for destruction. The courts have stressed that such Archivist approval is the “exclusive mechanism for disposal of federal records” (*Armstrong v. Executive Office of the President*, 1993, p. 1278).

Second, the duty and loyalty of the NARA archivist is fundamentally different than that of a private records manager. In the private realm, the primary loyalty is to the interests of the institution or employer. Indeed, one of the primary purposes of a records management program in private institutions is to

assist with “litigation risk management.” In blunt terms, this means that an ideal records “retention” program will provide that as soon as records are no longer needed for the entity’s business purposes, and assuming a legal requirement does not require further retention, those records should be promptly destroyed. The theory is that if the documents no longer have value for the entity’s business, retaining them any longer than necessary creates a risk that unfavorable information in them might fall into the hands of unforeseen future plaintiffs in litigation. Moreover, even if such litigation arises, destroying records pursuant to a professional records retention schedule may further avoid negative consequences in the event the destroyed records are later found to be relevant. The records retention program itself can provide evidence that the entity destroyed the records in the normal course of business and not in bad faith specifically to avoid their disclosure in that litigation (Koesel & Turnbull, 2006, ch. 2).

There are undoubtedly legal and ethical limits to the loyalty of records managers to their employer. The Code of Professional Responsibility for ARMA International, the primary professional organization for records professionals, states that records managers have “responsibilities to society” that include affirming “the legal, ethical, and moral use of information.” ARMA’s Code also notes that due to “responsibilities to their employers or clients as well as to their profession” records managers should “[r]ecognize illegal or unethical” records and information management-related “actions and inform the client or employer of possible adverse consequences” (ARMA International, 2013). Assuming no illegality or unethical practices, however, the duty of the private records manager is to the institution.

In contrast, NARA archivists have a more clearly defined legal responsibility to a significantly larger pool of stakeholders in agency records. The “administrative, legal, research, or other value” that NARA archivists look for in records that agencies propose to destroy include the value that the records might have to historians, social scientists, and other researchers. Crucially, the stakeholders in agency records also include individuals whom agency actions may have negatively affected and who may have interests directly adverse to the agency. This is related to what the SAA has described as a “core value” of archivists: accountability. “By documenting institutional functions, activities, and decision-making,” the SAA’s Core Values Statement notes, “archivists provide an important means of ensuring accountability. In a republic such accountability and transparency constitute an essential hallmark of democracy. Public leaders must be held accountable both to the judgment of history and future generations as well as to citizens in the ongoing governance of society” (SAA, 2013).

The roles of the government archivist in assisting agencies in the management of their records while also ensuring that the agency retains records that could be used against it creates an inherent potential for conflict. The SAA “core values” acknowledge this possibility in general terms stating “Archivists are often subjected to competing claims and imperatives, and in certain situ-

ations particular values may pull in opposite directions.” More specifically, the SAA “core values” state, “Underlying all the professional activities of archivists is their responsibility to a variety of groups in society and to the public good. Most immediately, archivists serve the needs and interests of their employers and institutions. Yet the archival record is part of the cultural heritage of all members of society” (SAA, 2013).

In principle, the conflict between these two roles for NARA archivists should not be significant given that the law also independently requires government agencies to “preserve records containing adequate and proper documentation” of an agency’s activities in order 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” (44 U.S.C. § 3101). That is, in theory, the agency itself shares with NARA a duty to a larger pool of stakeholders. The legal requirement of an independent archival review of agency records proposed for destruction, however, acknowledges that agencies should not be left to exercise that authority alone.

A generous reading of the required role of NARA in government document destruction is that it is consistent with the maxim that “those closest to the making of history are often the least able to judge the significance of their actions” (H.R. Rep. No. 95-1487, 1978, p. 13). At a more practical level, however, government agencies, just like private institutions, vigorously defend themselves in administrative disputes, lawsuits, and other proceedings and have the same incentives towards self-protective behavior such as mitigating “litigation risk.” The Court of Appeals for the D.C. Circuit has acknowledged the reality that “agencies, left to themselves, have a built-in incentive to dispose of records relating to ‘mistakes’” (*American Friends Service Committee v. Webster*, 1983, p. 41).

Evading Archives and Accountability

The default rule that agency records must be retained absent permission from the Archivist of the United States as well as the fact that preserving certain records may not be in the agency’s self-interest has led to attempts to evade record-keeping requirements. Such evasions, or attempted evasions, come in a few distressingly repetitive forms.

Agencies may improperly destroy records, for example, in purported compliance with already approved records schedules. Such a misapplication can result from legitimate confusion or outright bad faith. In the late 1990s, for example, NARA initiated an inquiry into the CIA’s destruction of records related to CIA covert operations in Iran in 1953. The CIA claimed that the records were destroyed pursuant to an approved records schedule. NARA found, however, that there were no relevant schedules in effect during the destruction, which occurred between 1959 and 1963, and therefore “the destruction of records

related to Iran was unauthorized” (NARA, 2000, p. 29). There have also been situations in which destruction has occurred pursuant to an approved records schedule whose meaning both the agency and NARA agreed was proper, but which a court later finds does not comply with the federal records laws. In *American Friends Service Committee v. Webster*, for example, the D.C. Circuit found that a NARA-approved schedule allowing destruction of FBI field files failed to adequately consider the historical value of those records (1983, p. 29).

Agencies have also avoided record preservation requirements by keeping documents outside of record keeping systems that might require their retention. Beginning in the 1940s and continuing for decades thereafter, for example, the Federal Bureau of Investigation utilized “Do Not File” procedures in which FBI officials kept sensitive documents out of the FBI’s filing system allowing their existence to be denied in response to queries and allowing the FBI to destroy them at their discretion (Theoharis, 1982, pp. 21–22).

A related strategy is denying that certain government documents are “records” and treating them as “nonrecord material” not subject to the federal records laws. “Nonrecord material” is a legitimate concept that includes documentary material that does not satisfy the definition of “record.” The law, however, defines “record” broadly to include all “documentary materials” made or received by an agency in the “transaction of public business” that is “preserved or appropriate for preservation” as evidence of the policies, decisions or operations of the U.S. government or because of the “informational value of data” in the documents (44 U.S.C. § 3301). Given this, “nonrecord material” ought to be a limited category of non-substantive material, yet the fact that “nonrecord material” is not subject to the same record-keeping requirements unquestionably invites mischief. A NARA Task Force found, for example, that the “basic problem” of “nonrecord” was “not the concept but the application of the term.” The Task Force noted that following the passage of the Freedom of Information Act, for example, agencies began attempting “to exclude certain types of information from disclosure by labeling the materials containing such information as nonrecord” (Task Force on NARA Responsibilities, 1988, p. 6).

Thus, NARA archivists must work cooperatively with agencies while also taking into consideration that agencies may have conflicting interests in the preservation or destruction of certain agency records unknown to the archivists. Put simply, government archivists must be watchdogs, being careful not to become either lapdogs or scapegoats.

NARA and the Destroyed CIA Interrogation Tapes

The CIA’s destruction of interrogation tapes and the relationship between NARA and the CIA that preceded it provide an “in the trenches” illustration of the difficult task of government archivists in both empowering agency doc-

ument destruction for proper records management while also attempting to ensure government accountability.

A central problem for NARA's relationship with the CIA is that the agency has often resisted allowing NARA archivists, even those with appropriate security clearances, from viewing the CIA records whose value the archivists are obligated to appraise. In 1988, for example, the CIA sought NARA approval for a records schedule for the CIA's Directorate of Operations (now the National Clandestine Service), which is responsible for the most secret CIA operations, including the program begun more than 20 years later that resulted in the creation of the interrogation tapes. The process of approving this CIA records schedule resulted in tension and conflict. NARA described in an August 1988 letter the "essential problem" that the CIA "requires that records be kept in a highly compartmentalized, secret manner in order to protect intelligence *sources and methods*" while NARA "requires that a number of its archivists and managers *need to know* sufficient detail about those records to authorize their disposition" (Rossman, 1988, p. 1). More specifically, NARA complained in a December 1988 letter that the CIA had permitted NARA archivists only to see "abstracts" of files the CIA proposed to destroy. "That," NARA stated, "is insufficient." NARA warned that if more access was not granted, NARA could not approve CIA's proposed destruction of documents and that NARA would "have no alternative but to make all of the records in these important series permanent" (Rossman, 1988, December, pp. 1–2).

The records schedule that NARA finally approved in 1989, in fact, provided that the most sensitive and important records of the CIA's Directorate of Operations—the "operational activity files"—were permanent records that could not be destroyed with the limited exception of "duplicate and other non-record material" (CIA Directorate of Operations, 1989, Item No. 3). As mentioned above, nonrecord material, which was intended to be a limited category, is not technically subject to the federal records laws, yet the CIA wanted "duplicate and non-record material" expressly identified as disposable in the approved schedule for its operational files (Miller, 1989, p. 2).

Thereafter, beginning in the late 1990s, NARA undertook a broad evaluation of the CIA's record-keeping procedures and operations, which culminated in an extensive NARA report issued in 2000. This evaluation found, among other things, that the CIA was inappropriately classifying all documents at CIA "field sites" as nonrecord material. NARA protested that this was contrary to the CIA's own written guidance and recommended that the CIA ensure that CIA "personnel at field offices are aware of the record status of the files they accumulate" (NARA, 2000, pp. 50–51).

A follow-up to NARA's 2000 evaluation involved a review of the CIA's treatment of its "operational files," which finally provided NARA archivists with a meaningful opportunity to examine such files. NARA's review concluded that, although the records schedule approved in 1989 only allowed the disposal

of “duplicate and non-record material,” the CIA’s application of those standards had been resulting in the “destruction of some files and documents that warrant permanent preservation.” NARA found that “policy, management, development, and planning documents, as well as other significant documentation of a substantive nature” were “being destroyed, even though the schedule only authorizes the disposal of duplicate and non-record material.” NARA further concluded that the files contained “virtually no documentation that is non-record.” As a result NARA demanded that the CIA revise its records schedule relating to operational files to reflect that all of the material in operation files should be maintained permanently (Kurtz, 2001, pp. 1–2).

It was just a year later, in April 2002, that the CIA began videotaping its detention and interrogation of two terrorism suspects. Early on, the CIA apparently intended to treat the videotapes as records. An April 27, 2002 email from CIA headquarters, for example, directed that the videotapes “should all be catalogued and made into official record copies” (“AZ interrogations,” 2002). In August 2002, however, following approvals from the Department of Justice to utilize “enhanced interrogation techniques” including waterboarding, “security” concerns suddenly arose and the CIA began to reconsider the advisability of retaining the tapes. In a September 2002 meeting, senior CIA officials at headquarters concluded that the law did not require the retention of the tapes (“Disposition of videotapes,” 2002). By the beginning of 2003, the CIA’s most senior attorneys stated that they “had no objection to the destruction of the videotapes” (“CIA interrogation of Abu Zubaydah,” p. 7; Rodriguez, 2012, p. 187).

According to the CIA’s own statements in a subsequent court filing, the interrogation videotapes were in the CIA’s operational files (CIA, 2008, p. 1). These were the same category of operational files whose full content NARA had concluded in 2001 should be preserved permanently and intact. In fact, in April 2003, as the CIA continued to actively consider destroying the videotapes, NARA, completely unaware of the existence of the tapes, followed up on the issue of the retention of the CIA operational files and reiterated that the CIA must agree that “all parts of all” operational files “warrant preservation.” NARA stated that this determination was “made at the highest levels of NARA and is not open to negotiation” (Kurtz, 2003). The CIA, however, continued to delay agreeing to a revised schedule for its operational activities files, a fact which becomes more meaningful when combined with a later public statement by a CIA press officer that the “bottom line is that these videotapes were not federal records as defined by the Federal Records Act” (Isikoff, 2007). That is, the videotapes were arguably a perfect example of what NARA had uncovered in its earlier review: important, substantive material placed in CIA operational files that the CIA was classifying as non-record material appropriate for destruction.

Meanwhile, CIA lawyers continued to advise CIA officials that there was no legal requirement to retain the videotapes (Rodriguez, 2012, pp. 191–192). In August 2005, NARA, still unaware of the existence of the tapes, again fol-

lowed up with the CIA about the operational files schedule with no success (Langbart, 2005). Just a few months later, in November 2005, the CIA destroyed the videotapes (Mazzetti, 2007). A few months after that, in March 2006, after 5 years of demands from NARA, the CIA finally submitted a revised schedule for operational files, which stated that “all documentation relating to operational activities created or received and filed or appropriate for filing in any operational activity file” would thereafter be permanent records (CIA, 2006).

Following the disclosure of the destruction of the tapes in late 2007, NARA began its inquiry. In a December 2007 letter, NARA stated that based on “recent reports in the media” the CIA had destroyed interrogation videotapes and noted “[a]s 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” and that NARA was “unaware of any CIA disposition authority that covers these records” (Wester, 2007, p. 1). While, as mentioned above, a CIA public affairs officer asserted that the videotapes were not “records,” the CIA formally wrote NARA simply stating that “in light of” the criminal investigation that had begun into the destruction of the tapes, the CIA “was unable to respond” to NARA’s inquiry (Lambert, 2008, p. 1).

In November 2010, after the Department of Justice announced that it would not bring criminal charges for the destruction of the tapes, NARA resumed its inquiry and wrote to the CIA stating that NARA “must still receive a report of CIA’s own investigation” in order to determine whether “an unauthorized destruction” of federal records had occurred (Wester, 2010, p. 1). In December 2010, the CIA responded by stating that the Department of Justice “has not yet released its report on the investigation into this matter” and that once the CIA received a “copy of this report” and “had time to analyze the findings” the CIA would “respond” to NARA’s inquiry (Lambert, 2010, p. 1). This was the last correspondence from the CIA to NARA on the issue of the destroyed tapes.

Refining the Role of the Archivist in Government Document Destruction

The CIA’s destruction of the interrogation tapes thus provides an illustration of archivists grappling with working cooperatively with an agency while asserting its professional judgment in relation to value of records as well as seeking to ensure accountability for potentially unauthorized destruction. NARA’s efforts occurred largely behind the scenes and attracted little press attention. In retrospect, NARA’s praiseworthy efforts to enforce the preservation of all documentation in CIA operational files were more important at the time than NARA even knew, although questions about whether NARA did enough or whether it should be empowered to do more in the future remain. NARA’s still ongoing inquiry likely provides the last possibility for meaningful account-

ability for the destruction of the tapes, although one could question whether NARA has been diligent enough in pressing the CIA for a substantive response. NARA and the CIA tape destruction provides several possible lessons about the difficult legal and ethical issues related to government archivists and document destruction.

First, government archivists should take into consideration in their work the CIA tapes destruction and the long history of attempts at evasion of record-keeping responsibilities, especially those archivists working with agencies part of that history. Archivists should perhaps approach appraisal of records of such agencies and approval of records destruction schedules with greater skepticism. Archivists should perhaps give even greater consideration to whether they have truly had sufficient access to agency records in order to properly appraise their value and ensure that records schedules are sufficiently unambiguous to avoid manipulation or misuse. After pursuing the CIA for five years, for example, to treat all documentation in CIA operational files as permanent records, the resulting records schedule still includes some soft and ambiguous language. The new records schedule, for example, states that it applies to documentation “filed or appropriate for filing” in an operational file. This essentially replicates the same ambiguity in the legal definition of “record,” namely documentation “appropriate for preservation,” which agencies have used to expand the number of documents that are excluded from the legal preservation requirements for records (Cox, 2011, pp. 161–162).

More broadly, the CIA’s tape destruction argues for revisiting the more basic issue of the meaning of “record” and the misuse of “nonrecord.” The long and complicated history of who has the legal authority to decide conclusively whether a document is a “record” is beyond the scope of this essay. In short, though, at one point the law gave binding authority to the Archivist of the United States, but following subsequent amendments and assertions of agency power, NARA currently views that authority as resting with federal agencies, not NARA (Shrag, 1994, pp. 113–126). There is also, however, currently a bill before the U.S. House of Representatives that would amend the law to state that “The Archivist’s determination whether recorded information ... is a record ... shall be binding on all Federal Agencies” (Presidential and Federal Records Act Amendments of 2013, sec. 5). Even in the absence of this law there are potentially grounds for NARA to argue for greater authority in such determinations to further ensure accountability.

There are also some indications, however, that NARA involvement in agency document destruction may become yet more attenuated. In 2012, NARA and the Office of Management and Budget issued a new records management directive. While the new directive contains strengthened requirements related to electronic records management and requires greater involvement of senior agency officials in order to stress the importance of records management, the directive also appears to contemplate ceding greater discretion and control over

records management to the agencies. In particular, the 2012 directive states that it aims to “improve” the current process for records schedules by stating that “[c]onsistent with current Federal records management statutes, or with changes to existing statutes (if required)” NARA will “develop criteria that agencies can apply to the scheduling, appraisal, and overall management of temporary records that can be effectively monitored with appropriate NARA oversight” (Zients and Ferriero, 2012, p. 7).

What form “appropriate NARA oversight” over expanded agency control over government document destruction may take is unclear and NARA staffing and resource constraints may make such changes necessary or inevitable. Any limitation of the role of NARA in the process, however, risks significant consequences. The legal, ethical, and sometimes political challenges the government archivist must face in enabling and policing government document destruction are, in the end, a reflection of the gravity and importance of the archivist’s indispensable role.

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