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THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

November 17, 2014

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

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

Dear Ms. Hawkins:

The Constitution Project (TCP) respectfully submits this comment on the CIA's proposed schedule N1-263-14-1. It appears that the proposed schedule would authorize the CIA to destroy the emails of all but 22 of its personnel as early as the day those employees depart the agency. On November 3, 2014 a coalition of open government, civil liberties and human rights organizations filed comments on the CIA's proposal (the "November 3 Comments")<sup>1</sup> in which they raised a host of serious concerns. TCP shares those concerns and incorporates by reference here the 14 questions those groups posed;<sup>2</sup> questions that the National Archives and Records Administration (NARA) should answer before making any decision to move forward on the CIA's request.

TCP writes separately to emphasize an important constitutional dimension of the CIA's proposed schedule: its potential to frustrate government oversight. NARA must thoroughly satisfy itself that neither the proposed schedule, nor *any* records schedule approved for the CIA, could be used as a tool toward that end or could frustrate such oversight inadvertently.

TCP was established in 1997 to defend basic constitutional rights, structures, and values by building bipartisan consensus. We create coalitions of respected leaders of all political stripes and with diverse professional backgrounds who issue consensus recommendations for policy reforms on a variety of legal and constitutional issues. Much of our work focuses on preserving the separation of powers structure established by our Constitution and ensuring that all three branches of our government continue to check and balance each other.

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<sup>1</sup> The November 3 Comments were spearheaded by OpenTheGovernment.org and are available here: <http://www.openthegovernment.org/sites/default/files/OpenTheGovernment.org%20et%20al%20comments%20on%20N1-263-14-01.pdf>.

<sup>2</sup> *See id.* at 12-15.

## Congressional Oversight is a Pillar of our Constitutional Democracy

*[T]he proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust ... to expel them, and either expressly or virtually appoint their successors. –John Stuart Mill<sup>3</sup>*

The Constitution grants Congress – both implicitly and explicitly – significant authority to oversee executive branch agencies and activities.<sup>4</sup> As TCP explained in its 2006 Congressional Handbook, “[a]ll legislative oversight serves the purpose of informing Congress so that it may effectively develop legislation, monitor the implementation of public policy, and disclose to the public how its government is performing.”<sup>5</sup> Oversight is an essential vehicle for ensuring that the executive branch is complying with the law, administering government programs honestly, efficiently and effectively, and respecting individual rights and liberties in the process.<sup>6</sup>

The power to inquire into and investigate executive branch operations in particular vindicates Congress’ role in our system of checks and balances and separated powers. Such oversight also serves a transparency function. As President Woodrow Wilson explained in 1885 when describing the role of Congress:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. ... The informing functions of Congress should be preferred even to its legislative function.<sup>7</sup>

From Watergate, to revelations of the CIA’s role in attempts to assassinate foreign leaders, to more recent disclosures around our government’s controversial surveillance practices, we continue to be reminded that vigorous government oversight is uniquely important with respect to national security agencies that operate largely in secret.

## Effective Oversight Depends on Preservation of and Access to Information

It is perhaps axiomatic, but effective congressional oversight requires access to relevant executive branch information. The Supreme Court emphasized that point over 85 years ago in a case involving a Senate investigation of the Department of Justice:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere

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<sup>3</sup> J.S. Mill, *Considerations on Representative Government*, 42 (1875) (cited in Morton Rosenberg (Constitution Project Fellow), *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, The Constitution Project (2009) at 1, available at <http://www.constitutionproject.org/pdf/175.pdf> (Hereafter “TCP Congressional Handbook”).

<sup>4</sup> See CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser et al. (June 10, 2011) at 4-5 (Hereafter “Congressional Oversight Manual”); Congressional Handbook at 1.

<sup>5</sup> TCP Congressional Handbook at 1-2.

<sup>6</sup> See Congressional Oversight Manual at 1-2.

<sup>7</sup> *Id.* (citing W. Wilson, *Congressional Government*, 303 (1885)).

requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.<sup>8</sup>

A group of 47 inspectors general reiterated the point in an August 2014 letter to congressional oversight leaders. “[M]eaningful oversight depends on complete and timely access to all agency materials and data,”<sup>9</sup> they wrote. “Refusing, restricting, or delaying an Inspector General’s access to documents leads to incomplete, inaccurate, or significantly delayed findings or recommendations.”<sup>10</sup> That delay, in turn, “may prevent the agency from promptly correcting serious problems and deprive Congress of timely information regarding the agency’s performance.”<sup>11</sup>

E-mail can certainly be the source of such information, and, in some cases, the only source. But access to it is not possible if the information sought no longer exists. It should be noted that Senate Select Committee on Intelligence (SSCI) cites to e-mail correspondence on several occasions in its report on the Benghazi, Libya terrorist attacks<sup>12</sup> and that “internal e-mails” were among the documents it reviewed in producing its report on the CIA’s former detention and interrogation program.<sup>13</sup>

### NARA Should Approach the CIA’s Proposed Schedule Cautiously

NARA must assure itself that, notwithstanding *any* records schedule approved for the CIA, the agency will preserve emails that may become necessary to a congressional investigation. There are good reasons – both inherent to our constitutional scheme of separated powers and checks and balances, and specific to the CIA and its track record of resisting oversight – for NARA to approach the proposed schedule with a healthy degree of skepticism:

That [separated powers] scheme envisions and establishes a perpetual struggle for policy control between Congress and the Executive. The framers of the Constitution had a basic distrust of government as a result of their colonial, early state, and Articles of Confederation experiences. Indeed, the issue of honesty and integrity in government, and the prevention of public corruption, has been important since the formation of our government in the 18th century. This distrust motivated the structure of the Federal Government in the Constitution;

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<sup>8</sup> TCP Congressional Handbook at 7 (quoting *McGrain v. Daugherty*, 273 U.S. 135 (1927)).

<sup>9</sup> August 5, 2014 letter from Inspectors General to the Chairman and Ranking Member of the Senate Homeland Security and Government Affairs Committee and the Chairman and Ranking Member of the House Committee on Oversight and Government Reform, available at

<http://www.grassley.senate.gov/sites/default/files/issues/upload/IG%20Access%20Letter%20to%20Congress%2008-05-2014.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See U.S. Senate, Select Committee on Intelligence, “Review of the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012, Together with Additional Views,” January 15, 2014 at footnotes 65, 94, 95 and 118.

<sup>13</sup> See Senator Dianne Feinstein, Floor Statement on Intel Committee’s CIA Detention, Interrogation Report, March 11, 2014, available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report> (“Director Panetta proposed an alternative arrangement: to provide literally millions of pages of operational cables, *internal emails*, memos, and other documents pursuant to the committee’s document requests at a secure location in Northern Virginia. We agreed, but insisted on several conditions and protections to ensure the integrity of this congressional investigation.” (Emphasis added)).

that is, separating powers among three branches of government to avoid concentrations and abuses of power and facilitate “checks and balances” among the branches.<sup>14</sup>

With respect to the CIA in particular, there is ample historical evidence of the agency destroying documents and otherwise attempting to thwart oversight. The November 3 Comments provide several illustrative examples, including the destruction of interrogation videotapes that are widely understood to have recorded government agents torturing and abusing terrorism suspects. Most recently, the agency has pushed back against its congressional overseers during the course of SSCI’s investigation into the CIA’s former detention and interrogation program. In a March 2014 speech on the Senate floor, SSCI Chairman Senator Dianne Feinstein described repeated instances of CIA personnel electronically removing – without notice – SSCI access to documents after the CIA had provided them to the committee.<sup>15</sup> Even more troubling, in an apparent effort to shield from the committee documents that reportedly corroborate several of SSCI’s findings about the former detention interrogation program – findings that the agency is poised to dispute<sup>16</sup> – the CIA went so far as to wrongly access and search committee staff computers and to seek a criminal investigation into committee staff conduct without a factual basis for doing so.<sup>17</sup>

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“The threat of an overreaching, unrestrained executive is an ever-present, built-in reality of our separated but balanced plan of government.”<sup>18</sup> The CIA has a long history of bearing that threat out. “Vigilance through continuous and aggressive oversight is indispensable,” but the conditions for such oversight must be in place. Preservation of and access to information are key. The CIA cannot be allowed to adopt a records schedule that can be used as a tool to undermine those conditions.

We look forward to NARA’s responses to the questions posed by the signatories to the November 3 Comments. Like those organizations, TCP respectfully request the opportunity to submit further comments after NARA responds, and after the public release of the Executive Summary of SSCI’s report on the CIA’s former detention and interrogation program.

Thank you for your attention to this important matter. We look forward to a continuing dialogue with NARA on CIA Schedule N1-263-14-1.

Sincerely,

Virginia Sloan  
President

Scott Roehm  
Senior Counsel

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<sup>14</sup> TCP Congressional Handbook at 65.

<sup>15</sup> See Senator Dianne Feinstein, Floor Statement on Intel Committee’s CIA Detention, Interrogation Report, March 11, 2014, available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>.

<sup>16</sup> See *id.* (“The Internal Panetta Review summary now at the secure committee office in the Hart Building is an especially significant document as it corroborates critical information in the committee’s 6,300-page Study that the CIA’s official response either objects to, denies, minimizes, or ignores.”).

<sup>17</sup> See CIA Office of the Inspector General, Summary of Report Prepared at the Request of the Congressional Intelligence Committees, July 31, 2014, available at <http://images.politico.com/global/2014/07/31/cia-senateigrdisumm.pdf>.

<sup>18</sup> TCP Congressional Handbook at 63.