

United States Senate
WASHINGTON, DC 20510

April 13, 2016

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, D.C. 20408

Dear Archivist Ferriero:

We write to ask the National Archives and Records Administration (NARA) to affirm that an official Senate report approved by the Senate Select Committee on Intelligence and formally transmitted to the executive branch is a federal record and must be preserved.

Specifically, we believe the National Archives should affirm that the Committee's Report on the CIA's Detention and Interrogation Program (hereinafter "the Senate Report") must be considered a "federal record" for purposes of the Federal Records Act and its associated regulations, because the Senate Report was (1) "received by a Federal agency under Federal law or in connection with the transaction of public business," and (2) "preserved or appropriate for preservation" by the receiving agency.¹

The Senate Intelligence Committee's investigation into the CIA's now defunct Detention and Interrogation Program was initiated by a 14-1 vote, on March 5, 2009. After the investigation was completed, on December 13, 2012, the Committee approved the report by a bipartisan vote of 9-6. On April 3, 2014, the Committee agreed by a bipartisan vote of 11-3 to seek declassification of the executive summary, which was publicly released on December 9, 2014. On that same day, the Committee formally filed the full, classified version of the Senate Report (S. Rept. 113-288) and the next day the full report was transmitted to the Office of the Director of National Intelligence, the Central Intelligence Agency, the Department of Justice, the Department of Defense, the State Department, the Federal Bureau of Investigation, and the Office of the CIA Inspector General.

¹ 44 U.S.C. § 3301(a).

We were disappointed to learn that, based on guidance from the Department of Justice, the National Archives has refused to affirm that the Senate Report officially transmitted to these agencies is a federal record because of ongoing Freedom of Information Act (FOIA) litigation.

We believe that Congress has made it clear that the National Archives has a responsibility—as the nation’s record keeper—to advise other parts of the United States government of their legal duty to preserve documents like the Senate Report under the Federal Records Act, the Presidential Records Act, and other statutes.

As you know, the Presidential and Federal Records Act Amendments of 2014 gives you legal authority to determine what is a federal record. Specifically, 44 U.S.C. § 3301(b) clarifies that “[t]he Archivist’s determination whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record as defined in subsection (a) shall be binding on all Federal agencies.” The Federal Records Act also clearly defines what does and does not constitute a federal record. As amended in 2014, 44 U.S.C. § 3301(a)(1)(A) defines a federal record as: (1) “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business” and (2) “preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.”² (emphasis added).

The Senate Report clearly satisfies both prongs of this test. First, the federal agencies “received” the report, because it was accepted by personnel at each agency where it was transmitted and the agencies have acknowledged doing so (what they did after they received it is another matter). That receipt took place “under Federal law or in connection with the transaction of public business,” as the Senate Report’s transmittal to the executive branch was pursuant to formal Committee action connected with the Committee’s constitutionally-based oversight and investigatory powers. Second, the report has either been preserved or is appropriate for preservation, as those terms are defined under 36 C.F.R. § 1222.10, because it contains uniquely valuable information regarding the CIA’s detention and interrogation program under the Bush Administration, which was compiled by the Committee following a five-year review of more than 6.3 million pages of classified and unclassified CIA records.

² 44 U.S.C. § 3301(a).

The Senate Report is a federal record – and one that the executive branch has much to learn from. However, no part of the executive branch has ruled out destroying or sending back the full report to Congress after the conclusion of the current FOIA litigation. Therefore, NARA should act to ensure that agencies do not dispose of or return the report to Congress as soon as the FOIA lawsuit ends without an independent determination of its record status by the Archivist.

In sum, we urge you to put the public interest first and affirm that the Senate Report is a federal record and must be preserved.

Thank you for your attention to this important issue. We look forward to hearing back from you as soon as possible, but no later than April 30, 2016.

Sincerely,


Dianne Feinstein


Patrick Leahy