

April 28, 2016

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

Dear Archivist Ferriero:

We, the undersigned open government, human rights, civil liberties and media organizations, write to request that you: (1) ensure the preservation of the Senate Select Committee on Intelligence's full, 6,700 page study on the CIA's former detention and interrogation program ("study" or "Senate study"), and (2) meet with civil society groups to discuss NARA's approach to both the study, and the preservation of CIA records more generally.

We were disturbed to read that, according to Senators Dianne Feinstein and Patrick Leahy, "personnel at the National Archives and Records Administration have stated that, based on guidance from the Department of Justice, they will not respond to questions about whether the study is a federal record under the Federal Records Act" because of a pending Freedom of Information Act (FOIA) case."¹

We recognize that the Department of Justice determines which agency denials of FOIA requests it will defend in court, and what litigation strategy to pursue in those cases.² But the Justice Department does not have any authority to forbid other agencies from reading or preserving the study, nor does it have the authority to prevent NARA from carrying out its statutory responsibilities under the Federal Records Act. Whether or not the full report is publicly released, it must be preserved.

In the Presidential and Federal Records Act Amendments of 2014, Congress specifically gave the Archivist, not the Attorney General or any other official in the Department of Justice, the final authority to determine what constitutes a Federal Record. The relevant provision states that "[t]he Archivist's determination whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record...shall be binding on all Federal agencies."³

Further, the Federal Records Act's definition of a "record" clearly applies to the full Senate study. 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."

There is no dispute that the full study, an official Senate report (S. Rept. 113-288) approved by

¹ Senator Dianne Feinstein and Senator Patrick Leahy, Letter to Attorney General Loretta Lynch and FBI Director James Comey, November 5, 2015, available at https://fas.org/irp/congress/2015_cr/ssci-lynch.pdf.

² See Attorney General Eric Holder, Memorandum for Heads of Executive Departments and Agencies Re: The Freedom of Information Act, March 19, 2009, available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

³ 44 U.S.C. § 3301(b) (as amended).

the Senate Select Committee on Intelligence, was transmitted by then-Chairman Dianne Feinstein to the President, the Director of National Intelligence, the Director of the CIA, the Attorney General, the Secretary of Defense, the Secretary of State, the Director of the FBI, and the CIA Inspector General on December 10, 2014.⁴ Senator Feinstein stated in the accompanying letter that the report should be made available within the Executive Branch “for use as broadly as appropriate to help make sure that this experience is never repeated.”⁵

There is also no reasonable dispute that the full study contains historically important evidence of the U.S. government’s actions and decisions, and is appropriate for preservation. As Senator Feinstein wrote in her Foreword to the published Executive Summary, “[t]he Study describes the history of the CIA’s Detention and Interrogation Program from its inception to its termination, including a review of each of the 119 known individuals who were held in CIA custody.”⁶ This includes six detainees who are being tried on capital charges in Guantanamo, and a deceased detainee whose false statements after torture were used to justify the 2003 Iraq War.

NARA’s guidance to agencies, including most of the agencies that received copies of the Senate study, confirms that congressional reports transmitted to the Executive Branch—and correspondence between Agency heads and oversight committee chairs—are federal records and are suitable for permanent preservation.⁷

The Archivist has not only the authority, but also the obligation to ensure that these federal records are preserved. The Federal Records Act’s implementing regulations state that the Archivist of the United States is “responsible for preventing the alienation or unauthorized destruction of records,”⁸ and that

[u]pon receiving any credible information that records are at risk of actual, impending, or threatened damage, alienation, or unauthorized destruction, NARA will contact the agency...If the

⁴ Senator Dianne Feinstein, Letter to President Obama, December 10, 2014, available at http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=be9d4494-383c-44c2-97ba-085033357ab6.

⁵ *Id.*

⁶ Senate Select Committee on Intelligence, *Committee Study of the CIA’s Detention and Interrogation Program*, Foreword, available at <http://www.intelligence.senate.gov/sites/default/files/press/foreword.pdf>.

⁷ See, e.g. National Archives and Records Administration, *Disposition of Federal Records: A Records Management Handbook* (2000), Appendix C, available at <https://www.archives.gov/records-mgmt/publications/disposition-of-federal-records/appendix-c.html> (stating that agency leadership’s correspondence with “Members of Congress and congressional committees” are generally designated as permanent); Department of Justice, Records Schedule N1-060-91-004, available at https://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-91-004_sf115.pdf (Department of Justice correspondence with Committee Chairs, Subcommittee Chairs, and ranking members, including all attachments, designated as permanent); Department of Justice, Records Schedule N1-065-07-7, available at https://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0065/n1-065-07-007_sf115.pdf (FBI records related to “liaison with members of Congress” and “response to oversight activities” designated as permanent); Office of the Director of National Intelligence, Records Schedule N1-576-11-2, available at http://www.archives.gov/records-mgmt/rcs/schedules/independent-agencies/rg-0576/n1-576-11-002_sf115.pdf (all correspondence sent from and received by the Director of National Intelligence designated as permanent); Department of Defense, Records Schedule NC1-330-79-01, available at https://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-defense/office-of-the-secretary-of-defense/rg-0330/nc1-330-79-01_sf115.pdf (correspondence between Congress and the Secretary of Defense on substantial policy issues, including “important investigations,” designated as permanent).

⁸ 36 C.F.R. § 1228.100.

threat has not yet resulted in damage, removal, or destruction, NARA will contact the agency by phone promptly and follow up in writing within five business days.⁹

In January 2015, the current Chairman of the Senate Select Committee on Intelligence, Richard Burr, wrote to the President to ask him to return copies of the full study, which Burr wrote “should not be entered into any Executive Branch system of records.”¹⁰ The Executive Branch has said that it will not return the full Senate study while the FOIA litigation is pending, but has left open the possibility that it would do so immediately after the conclusion of the case. There is thus a credible threat of the report’s alienation—a threat that will only be heightened if the government prevails in the FOIA suit.

The Senate study began as an examination of the CIA’s destruction of crucial video records of the torture program, which occurred without NARA’s knowledge or authorization. It would be sadly ironic if NARA knowingly allowed the Executive Branch to return the most comprehensive history of the CIA torture program.

To prevent this, we ask you to exercise your authority to make a formal determination that the Senate report is a Federal Record under 44 U.S.C. § 3301. No court orders prevent you from doing so, and no party to the Freedom of Information Act lawsuit has requested such an order from the court.¹¹ The Justice Department’s litigation tactics should not override the Archivist’s responsibility to ensure the preservation of historical records—and in any case, a determination by the Archivist that the Senate study is a federal record is unlikely to affect the outcome of the FOIA litigation.

If the NARA nonetheless determines that it must follow the Department of Justice’s instructions—despite the Archivist’s statutory obligations—we request a meeting to discuss alternative means of ensuring that the full Senate study is not returned should the FOIA litigation be resolved in the government’s favor.¹² In any case, we would like to meet to discuss records

⁹ 36 C.F.R. § 1230.16.

¹⁰ News reports alleged that Burr wrote his letter at the request of executive branch officials, and Steven Aftergood, director of the Project on Government Secrecy at the Federation of American Scientists, said that Burr’s request “seems like a calculated effort to carve out an exclusion from FOIA. There is no other reason to even mention executive branch filing systems.” Jason Leopold, *GOP Senator Wants to Make Sure Full Torture Report Never Sees Light of Day*, Vice News, January 21, 2015, available at <https://news.vice.com/article/gop-senator-wants-to-make-sure-the-full-cia-torture-report-never-sees-the-light-of-day>. Aftergood similarly stated regarding the Department of Justice’s instructions to executive agencies not to read the report that “[i]t seems to be an attempt to circumvent the law, the Freedom of Information Act, and to defeat the work of the Senate Intelligence Committee by rendering it inaccessible to the government itself.” David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, December 9, 2015, available at <http://www.npr.org/2015/12/09/459026249/cia-torture-report-may-remain-secret>.

¹¹ The Department of Justice has represented to the U.S. District Court for the District of Columbia in the FOIA case that “it will preserve the status quo regarding the Full Report absent either leave of court or resolution of this litigation in the government’s favor,” but this was in response to a motion by the ACLU for an order barring the government from returning the full report to Congress. See Defendant’s Response to Plaintiffs’ Emergency Motion for an Order Protecting This Court’s Jurisdiction, *ACLU v. CIA* (D.D.C. no. 13-cv-1870, February 6, 2015), available at <https://www.aclu.org/legal-document/aclu-v-cia-defendants-response-plaintiffs-emergency-motion-and-order-protecting>.

¹² For example, NARA could inform all executive branch agencies that received a copy of the full Senate torture report that they must preserve it after the conclusion of the FOIA case until the Archivist makes a formal determination of its record status.

preservation issues at the CIA more generally, including the preservation of the RDINet server and the documents on it, preservation of the “Panetta Review” documents,¹³ and the status of NARA’s inquiries to the CIA regarding the previous destruction of the torture videos.

Thank you very much for your consideration.

Sincerely,

Advocacy for Principled Action in Government
Allard K. Lowenstein International Human Rights Clinic
Appeal for Justice
Association of American Publishers
Bill of Rights Defense Committee/Defending Dissent Foundation
Center for Constitutional Rights
Center for Media and Democracy
Center for Victims of Torture
Citizens for Responsibility and Ethics in Washington (CREW)
Coalition for an Ethical Psychology
The Constitution Project
Demand Progress
Duke Human Rights Center at the Franklin Humanities Institute
Essential Information
Federation of American Scientists, Project on Government Secrecy
Fellowship of Reconciliation
Government Accountability Project
Human Rights Watch
Human Rights First
National Religious Campaign Against Torture
National Security Archive
NC Stop Torture Now
No More Guantánamos
OpenTheGovernment.org
PEN America
Physicians for Human Rights
Psychologists for Social Responsibility
Society of Professional Journalists
Sunlight Foundation
Win Without War
Witness Against Torture

¹³ The “Panetta Review” is the term generally used to describe documents generated by a classified internal review of the CIA’s detention and interrogation program, the subject of an intense debate between the CIA and its Congressional overseers. See Senator Dianne Feinstein, Statement on Intelligence 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>; Zachary Roth, *Mark Udall Offers Scathing Condemnation of Obama’s CIA*, MSNBC, December 10, 2014, available at <http://www.msnbc.com/msnbc/mark-udall-offers-scathing-condemnation-obamas-cia>.