No. _____

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Petitioners,

—v.—

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
4301 Connecticut Avenue, NW
Suite 434
Washington, DC 20008

Hina Shamsi
Counsel of Record
Ashley Gorski
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
hshamsi@aclu.org

QUESTION PRESENTED

In 2014, the Senate Select Committee on Intelligence transmitted its landmark investigative report concerning the Central Intelligence Agency's former program of detention, torture, and abuse of detainees to several executive branch agencies, with instructions that it be used "as broadly as appropriate to help make sure that this experience is never repeated." When Petitioners sought non-exempt portions of the report under the Freedom of Information Act ("FOIA"), Respondents argued that the court lacked subject-matter jurisdiction because the report remained a congressional document and was not an "agency record" subject to the statute. The court of appeals agreed and dismissed the case.

The question presented is whether the report became an "agency record," subject to FOIA, when the Senate Committee transmitted it to several executive agencies with instructions for its wide dissemination and use.

PARTIES TO THE PROCEEDING

The Petitioners in this case are the American Civil Liberties Union and the American Civil Liberties Union Foundation.

The Respondents are the Central Intelligence Agency, the Department of Defense, the Department of Justice, and the Department of State.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners confirm that they do not have parent companies, nor do any publicly held companies own 10% or more of their stock.

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Petitioners American Civil Liberties Union and American Civil Liberties Union Foundation respectfully submit this petition for a writ of certiorari.

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The opinion of the court of appeals is reported at 823 F.3d 655 and reprinted in the Appendix at 1a–25a. The opinion of the district court is reported at 105 F. Supp. 3d 35 and reprinted in the Appendix at 28a–59a.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2016. A timely petition for panel rehearing or rehearing en banc was denied on July 13, 2016. On September 30, 2016, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to November 10, 2016. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the Appendix.

INTRODUCTION

This case concerns the public's right to access, under the Freedom of Information Act, an exceptionally important document in Respondents' possession: a 6,963-page report on the Central Intelligence Agency's ("CIA") former program of detention, torture, and other abuse of detainees. This report (the "Final Report") was authored by the

Senate Select Committee on Intelligence ("SSCI"), which conducted a comprehensive investigation into the CIA's torture program.

FOIA requires federal executive agencies to promptly produce "agency records" upon request, subject to certain exemptions. *See* 5 U.S.C. §§ 551(1), 552(a)(3)(A), (a)(4)(B). The statute does not apply to congressional or judicial records. The court below erroneously held that the Final Report, which the Respondent executive agencies received in the course of their official duties, is not an "agency record" subject to FOIA.

This case thus presents a recurring question of national importance: when does a document created by Congress and transferred to agencies become an agency record under the statute? Although FOIA does not define "agency records," this Court has explained that documents possessed by agencies are subject to the statute if (1) the agency created or obtained the requested record, and (2) the agency is in control of the record at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989). The Court has further explained that an agency is "in control" of any record that comes into the agency's possession in the legitimate conduct of its official duties. *Id.* Applying this definition of agency control, it is undisputed that the Respondent agencies control the Final Report and that it is an agency record.

Despite this Court's clear guidance about the meaning of agency control, the D.C. Circuit applies a four-factor test to determine whether an agency controls a document in its possession. When evaluating a document authored by Congress, the

D.C. Circuit's test ultimately focuses on whether Congress manifested a clear intent to control the document. In this case, applying its own test, the D.C. Circuit held that the Final Report was not an agency record and could not be sought under FOIA. However, even by the terms of the D.C. Circuit test, it is plain that the Final Report is an agency record, and the lower court erred in concluding otherwise.

This Court should grant certiorari to clarify the meaning of "agency records," and to correct the D.C. Circuit's error in holding that the Final Report is not an agency record subject to FOIA.

STATEMENT OF THE CASE

A. The SSCI's *Committee Study of the CIA's Detention and Interrogation Program*

On March 5, 2009, the SSCI voted 14-to-1 to initiate a comprehensive review of the CIA's detention and interrogation program. It did so after learning from a *New York Times* article that the CIA had destroyed videotapes of certain abusive interrogations, despite the objections of then-President Bush's White House Counsel and the then-Director of National Intelligence. *See* Press Release, Sen. Dianne Feinstein, Statement on Intel Committee's CIA Detention, Interrogation Report (Mar. 11, 2014), http://1.usa.gov/1GdfNhk.

The SSCI's investigation took more than three years and involved the review of approximately six million pages of CIA documents. *See* SSCI, Executive Summary, *Committee Study of the CIA's Detention and Interrogation Program*, Dec. 3, 2014, http://1.usa.gov/1wy9dw9 (together with the SSCI's

Findings and Conclusions, the "Executive Summary").

In March 2009, the SSCI and the CIA engaged in extensive discussions to identify appropriate procedures for the SSCI's review of CIA documents at an agency facility. These procedures—which were developed in relevant part to ensure that work product generated or stored at the CIA facility by congressional staff during the investigation remained under congressional control—were memorialized in a June 2009 letter from the SSCI to the then-Director of the CIA, Leon Panetta. *See* App. 95a ("June 2009 Letter").[1]

The SSCI approved an initial version of its investigative report, *Committee Study of the CIA's Detention and Interrogation Program* ("Initial Report"), on December 13, 2012. After adopting the Initial Report, the Committee sent it to executive branch agencies for "suggested edits or comments." App. 102a. The SSCI also limited dissemination of the Initial Report within the executive branch. *See* Email from David Grannis, SSCI Staff Dir., to [redacted] and Mark David Agrast, Dir. of Office of Cong. Affairs (Dec. 13, 2012), attached as Ex. E to the Declaration of Neal Higgins, Dir. of Office of Cong. Affairs, CIA (Jan. 21, 2015), *ACLU v. CIA*, No. 13-cv-1870 (D.D.C.), ECF No. 39-1 ("Higgins Decl.").

After receiving feedback from the CIA, and considering the views of minority members of the Committee, the SSCI revised the Initial Report and created an updated version ("Updated Report"). *See*

[1] The operative language from the June 2009 Letter is discussed more fully at pp. 15–19, *supra*.

160 Cong. Rec. S6405–10 (daily ed. Dec. 9, 2014), http://bit.ly/2eYqpuZ. On April 3, 2014, by a bipartisan vote of 11-to-3, the SSCI voted to send the executive summary of the Updated Report to President Obama for declassification and public release. A member of the SSCI described the report as "profoundly disturb[ing]" and observed that "much of what CIA officials have said about the effectiveness of coercive interrogations was simply untrue." Press Release, Sen. Ron Wyden, Wyden Statement on the Senate Intelligence Committee's Vote to Declassify its Interrogation Report (Apr. 3, 2014), http://1.usa.gov/1lEpBeH.

On April 7, 2014, then-Chairman of the SSCI, Senator Dianne Feinstein, transmitted the executive summary of the Updated Report to the executive branch. Her accompanying letter to the President stated that she would separately transmit copies of the full Updated Report to the executive branch, and that she "encourage[d] and approve[d] the dissemination of the updated report to all relevant Executive Branch agencies." App. 105a. The Director of National Intelligence, Director of the CIA, Attorney General, Secretary of Defense, and Secretary of State were copied on the transmittal letter. *See* App. 106a.

That April 7, 2014 transmittal letter contained no restrictions on the dissemination of the Updated Report either within or outside of the executive branch. *See* App. 104a–106a. The CIA received the Updated Report in the summer of 2014. *See* Higgins Decl. ¶ 21. Between April 2014 and December 2014, the SSCI made further revisions to its study, resulting in the Final Report.

The SSCI publicly released the Executive Summary of the Final Report, along with minority views and the additional views of SSCI members, on December 9, 2014. The detailed description of the CIA's abusive interrogation techniques, and the manner in which the agency deceived both Congress and the American public about those practices, generated extensive worldwide attention. *See, e.g.*, Greg Miller, Adam Goldman, & Julie Tate, *Senate Report on CIA Program Details Brutality, Dishonesty*, Wash. Post, Dec. 9, 2014, http://wapo.st/1uhd3ty (describing the SSCI's "exhaustive" description of "levels of brutality, dishonesty and seemingly arbitrary violence that at times brought even agency employees to moments of anguish," and its cataloguing of "dozens of cases" of CIA deceptions); Editorial Board, *The Senate Report on the C.I.A.'s Torture and Lies*, N.Y. Times, Dec. 9, 2014, http://nyti.ms/1uhxqpy ("even after being sanitized by the Central Intelligence Agency itself, [the Executive Summary] is a portrait of depravity that is hard to comprehend and even harder to stomach").

In a foreword to the Executive Summary, Senator Feinstein briefly described the Final Report:

> The full Committee Study also provides substantially more detail than what is included in the Executive Summary on the CIA's justification and defense of its interrogation program on the basis that it was necessary and critical to the disruption of specific terrorist plots and the capture of specific terrorists. While the Executive Summary provides sufficient detail to demonstrate the

> inaccuracies of each of these claims, the information in the full Committee Study is far more extensive.

Foreword, Executive Summary at 3. Among the matters more expansively detailed in the Final Report are the CIA's efforts to evade oversight for abusive conduct by making misrepresentations to Congress, to other executive branch agencies including the Department of Justice, to the courts, to the media, and to the American public. *See, e.g.*, Executive Summary at 172–73 n.1050, 177 n.1058.

Senator Feinstein emphasized in her foreword to the Executive Summary that the SSCI's full report "is now final and represents the official views of the Committee. This and future Administrations should use this Study to guide future programs, correct past mistakes, increase oversight of CIA representations to policymakers, and ensure coercive interrogation practices are not used by our government again." Foreword, Executive Summary at 5. Senator Feinstein also explained that she "chose not to seek declassification of the full Committee Study at this time," as it would have "significantly delayed the release of the Executive Summary." *Id.* at 3.[2]

On December 9, 2014, the SSCI formally filed the Final Report with the Senate. Senator Feinstein's cover letter to the Senate stated that "[t]he entire classified report will be provided to the Executive Branch for dissemination to all relevant agencies.

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[2] *See also* 160 Cong. Rec. S6405–06 (daily ed. Dec. 9, 2014), http://bit.ly/2eYqpuZ (during a speech on the Senate floor, Senator Feinstein described the SSCI's "lengthy negotiation" with the executive branch over redactions in the report).

The full report should be used by the Central Intelligence Agency and other components of the Executive Branch to help make sure that the system of detention and interrogation described in this report is never repeated." Letter from Sen. Dianne Feinstein to Sen. Patrick Leahy, President Pro Tempore, U.S. Senate (Dec. 9, 2014), http://1.usa.gov/1STWp0L.

The following day, the SSCI sent the Final Report to President Obama. Senator Feinstein's transmittal letter stated that "the full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated. To help achieve that result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit." App. 108a. Copies of the letter and the Final Report were sent to each of the Respondents in December 2014.

The December 10 transmittal letter contained no restrictions on the dissemination of the Final Report either within or outside of the executive branch. *See* App. 107a–108a.

B. Procedural History

In February 2013, Petitioners filed a FOIA request with the CIA seeking production of the Initial Report. Petitioners initiated this FOIA action in November 2013 following the CIA's denial of their request, asserting jurisdiction under 5 U.S.C. § 552, 5 U.S.C. § 701–706, and 28 U.S.C. § 1331. After the

SSCI completed the Updated Report, Petitioners filed FOIA requests with the CIA and Departments of Defense, Justice, and State for the updated version of the report. With the government's consent, Petitioners filed a second amended complaint against these agencies to enforce the new FOIA request. The parties subsequently agreed, and the district court ordered, that Petitioners' FOIA request and second amended complaint for the Updated Report refer to the Final Report.

In January 2015, Respondents moved to dismiss Petitioners' claim for the Final Report for lack of subject-matter jurisdiction, contending that the Final Report is a congressional record not subject to FOIA.

On May 21, 2015, the district court granted Respondents' motion to dismiss, finding that, "[a]lthough this case is no slam dunk for the Government," the Final Report is a congressional record and therefore not subject to FOIA. App. 44a. In its analysis of the agency-record question, the court considered whether there were "sufficient indicia of congressional intent to control" the Final Report. *Id.* (internal quotation marks omitted). Construing the June 2009 Letter as evidence of the SSCI's intent to control the Final Report, the court reasoned that, against this "backdrop," the subsequent evidence related to the transmittal of the report did not show that the SSCI intended to relinquish control over the document. *Id.* at 49a–51a. Petitioners timely appealed.

On appeal, the D.C. Circuit affirmed the district court's judgment. App. 25a. It held that the June 2009 Letter from the SSCI to the CIA

constituted a clear assertion of congressional control over the Final Report. The court also concluded that the SSCI's transmission of Final Report to multiple executive branch agencies in December 2014, and the instructions accompanying that transmission, did not override the 2009 letter. App. 22a–24a.

Petitioners filed a timely petition for panel rehearing or rehearing en banc, which was denied on July 13, 2016. App. 62a–64a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE MEANING OF "AGENCY RECORDS" AND THE SCOPE OF FOIA.

Over the past two decades, the D.C. Circuit has repeatedly distorted this Court's test for whether a document is an "agency record" under FOIA, rendering the scope of the statute uncertain. This Court should grant review to clarify a question of national importance: when does a document created by Congress, and then transferred to agencies that are subject to FOIA, become an "agency record" under the statute?

The question is a critical and recurring one, as FOIA requesters routinely seek, from covered agencies, documents that were created by entities not subject to FOIA, such as Congress.[3] *See, e.g.*, *Cause*

[3] For the purposes of FOIA, an agency "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1).

of Action v. Nat'l Archives & Records Admin., 753 F.3d 210 (D.C. Cir. 2014); *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208 (D.C. Cir. 2013); *Elec. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 988 F. Supp. 2d 1 (D.D.C. 2013). Moreover, as this Court has emphasized, one of FOIA's core purposes is to "giv[e] the public access to all nonexempted information received by an agency as it carries out its mandate." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 147 (1989). Because the test employed by the D.C. Circuit unduly circumscribes the reach of the statute, this Court's review and clarification is warranted.

Although FOIA does not define the term "agency records," *see* 5 U.S.C. §§ 551–552, the Court has supplied a clear definition. In *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), the Court held that a record is an agency record for FOIA purposes if (1) the agency created or obtained the requested record, and (2) the agency is "in control" of the record at the time of the FOIA request. *Id.* at 144–45. The Court explained that an agency is "in control" of a document when "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 145.

In contrast, the D.C. Circuit typically relies on a four-factor test for agency control—a test that this Court was presented with but declined to adopt in *Tax Analysts*. *See Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *affirmed on other grounds*, 492 U.S. 136 (1989). Rather than simply assess whether the agency obtained the document in the conduct of its official duties, the D.C. Circuit considers:

> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.

Id. (quoting *Lindsey v. Bureau of Prisons*, 736 F.2d 1462, 1465 (11th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984)); *see also, e.g.*, *Burka v. U.S. Dep't of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996).

In recent years, the D.C. Circuit has refined its four-factor test when evaluating documents created by Congress. In this context, the court has deemed two of the factors "dispositive": the intent of the document's creator to retain or relinquish control over the records, and the ability of the agency to use and dispose of the record as it sees fit. *See Judicial Watch*, 726 F.3d at 221. In practice, this two-factor test ultimately focuses on congressional intent. When Congress clearly expresses its intent to control the requested document, the agency cannot use or dispose of the document as it sees fit. *See, e.g.*, *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597, 600 (D.C. Cir. 2004); *Paisley v. CIA*, 712 F.2d 686, 693–95 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984); *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842 (D.C. Cir. 1980), *vacated in part on other grounds*, 455 U.S. 997 (1982).

Critically, however, each permutation of the D.C. Circuit's agency-control test is in tension with the simple definition of agency control articulated by this Court in *Tax Analysts*. Moreover, the circuit court's heavy emphasis on whether an entity intends to control a document is at odds with this Court's statement that the agency-record inquiry should not "turn on the intent of the creator of a document relied upon by an agency. Such a *mens rea* requirement is nowhere to be found in the Act." *Tax Analysts*, 492 U.S. at 147; *see also Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 293–94 (D.C. Cir. 2006) (Henderson, J., concurring) (rejecting the majority's test for agency control because "the Supreme Court determined that the author's intent is irrelevant to whether a document is an 'agency record'").

This case is an appropriate vehicle to clarify the definition of agency control and the meaning of "agency records," as it is undisputed that this Court's control test is satisfied here: Respondents obtained the Final Report in the legitimate conduct of their official duties.

II. THE D.C. CIRCUIT ERRED IN HOLDING THAT THE FINAL REPORT IS NOT SUBJECT TO FOIA.

Even if the D.C. Circuit's agency-control test applies, Congress did not clearly assert control over the Final Report, and, accordingly, it is an agency record subject to FOIA. For the reasons stated below, the lower court's opinion to the contrary was in error.

A. The SSCI's June 2009 Letter Does Not Relate To The Final Report.

The D.C. Circuit incorrectly held that the June 2009 Letter from Senators Feinstein and Bond to then-CIA Director Panetta constituted the SSCI's "clearly expressed intent to control" the Final Report in 2014. App. 17a–21a. In so holding, the court failed to credit adequately the historical context of this SSCI–CIA agreement and the plain language of the letter. Because the June 2009 Letter does not cover the Final Report, it has no relevance to the agency record analysis.

The historical context of the June 2009 Letter bears emphasis. It was the result of, and memorialized, extensive discussions about the appropriate procedures for the SSCI's review of CIA documents. *See* App. 95a. Although the SSCI wanted to review these documents in its own offices, the CIA insisted that the SSCI's review should take place at a CIA facility. Higgins Decl. ¶ 10. As the result of an "inter-branch accommodation," the CIA established a "Reading Room" on CIA premises where SSCI personnel could review agency materials. *Id.* ¶ 12. Within this Reading Room, the CIA also created a "segregated network share drive," which was supposed to allow SSCI personnel to confidentially store their electronic notes, drafts, and other work product. *Id.* ¶ 11; *see also* App. 97a.

The June 2009 Letter set forth the terms by which the SSCI could access CIA materials, and it established restrictions on CIA access to SSCI documents stored at the agency facility. *See* App. 95a–100a. Most relevant here, paragraph 6 of that letter limited CIA control over two categories of

SSCI documents: those generated on the segregated network drive, and any other documents stored in the Reading Room. Paragraph 6 provided that "these records" were congressional, and not agency, records. App. 97a–98a.

The D.C. Circuit erroneously held that the SSCI's assertion of control extended to *any* "final . . . reports" by the SSCI on the CIA's torture program, regardless of whether they were ever stored in the Reading Room. App. 19a. However, read in its entirety and in context, paragraph 6 is clear that the SSCI sought to control only the "final recommendations, reports, or other materials" that it created or stored *in the Reading Room*:

> Any documents generated on the network drive referenced in paragraph 5, as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee and *will be kept at the Reading Room* solely for secure safekeeping and ease of reference. *These documents* remain congressional records in their entirety and disposition and control over *these records*, even after the completion of the Committee's review, lies exclusively with the Committee. As such, *these records* are not CIA records under the Freedom of Information Act or any other law. The CIA may not integrate *these records* into its records filing systems, and may not disseminate

> or copy them, or use them for any purpose without the prior written authorization of the Committee. The CIA will return *the records* to the Committee immediately upon request *in a manner consistent with paragraph 9*. . . .

June 2009 Letter ¶ 6, App. 97a–98a (emphasis added); *see also* Brief of Sen. John D. Rockefeller IV as Amicus Curiae Supporting Appellants at 6–8, 11–12, *ACLU v. CIA*, No. 15-5183 (D.C. Cir.), Doc. No. 1585072 ("Sen. Rockefeller Br.") (explaining that paragraph 6 "only covered materials that were kept at the SSCI's reading room, a CIA-controlled space, during the ongoing investigation").

Properly understood, "*[t]hese* documents," "*[t]hese* records," and "*the* records" refer to SSCI documents that were either (i) generated on the network drive or (ii) otherwise "kept at the Reading Room." App. 97a–98a. *These* are the documents that "remain congressional records in their entirety." *Id.* This interpretation is further supported by the fact that, upon the SSCI's request, the CIA was required to return "the records" "in a manner consistent with paragraph 9"—a paragraph that applies only to materials *in the Reading Room*. App. 98a–99a. Ultimately, paragraph 6, like several other provisions in the June 2009 Letter, was designed to protect the SSCI's internal work product, which it

was forced to store on the computer system of the agency it was investigating.[4]

The court below also erred in reasoning that "[i]t does not matter that the Full Report was neither stored on the CIA's segregated network drive nor kept in the CIA's Reading Room," in part because "it was understood by the Committee and the CIA that much of the final drafting of the reports would be completed at the United States Capitol in the Senate Committee's own workspace." App. 19a. The record is actually not clear as to whether this was contemplated in June 2009—but, in any event, even if the SSCI and CIA had "understood" that the final drafting would take place at the U.S. Capitol, that understanding is entirely consistent with Petitioners' interpretation of the scope of the letter.

Notably, in their motion to dismiss in the district court, Respondents made less of the June 2009 Letter than the district court (and eventually the D.C. Circuit) did. Respondents conceded that the letter applied to documents created by SSCI personnel on the "segregated shared drive," and they conceded that the Final Report was *not* one of these documents. *See* Defs.' Mot. Dismiss at 4–5; Higgins Decl. ¶¶ 12–14. Moreover, they did not claim that the SSCI ever stored the Final Report at the Reading Room. *See* Defs.' Mot. Dismiss at 4–5. It was only in Respondents' reply memorandum that they argued, for the first time, that the June 2009 Letter "covers"

[4] *See, e.g.*, *id.* ¶ 7, App. 98a ("CIA will provide the Committee with lockable cabinets and safes, as required, in the Reading Room.").

the Final Report, *see* Defs.' Reply at 5, ECF No. 49—a contention belied by their own concessions.

Regardless of Respondents' shifting characterizations of the June 2009 Letter, the text of the letter speaks for itself: because the Final Report was not one of "[t]hese documents" covered by paragraph 6, the letter is simply not relevant to the question of whether Congress intended the Final Report to remain a congressional record, and the D.C. Circuit's holding to the contrary was in error. Petitioners' reading is confirmed by the historical context, in which the SSCI was seeking to shield its work product—stored on the premises of the very agency it was overseeing—from agency personnel. Finally, even if the letter is ambiguous as to whether it relates to the Final Report, that ambiguity must redound to Petitioners' benefit. *Tax Analysts*, 492 U.S. at 142 n.3 ("[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records'"); *Judicial Watch*, 726 F.3d at 220 (in light of the agency's burden, any uncertainty in the agency-record inquiry must redound to the benefit of the FOIA requester).

B. The December 2014 Transmittal Letter Reflects The SSCI's Intent To Relinquish Control Over The Final Report.

Even if the June 2009 Letter reflected the SSCI's clear intent to control the Final Report, the December 2014 transmittal letter establishes that the SSCI relinquished control over the Final Report to Respondents. The D.C. Circuit erred in discounting the importance of this contemporaneous evidence. *See* App. 22a–24a.

The December 10, 2014 transmittal letter is explicit:

> [T]he full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated. To help achieve this result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, *as you see fit*.

App. 108a (emphasis added). By encouraging the use and dissemination of the Final Report "broadly" within the executive branch, and by leaving to the executive branch the decision as to how broadly the report should be distributed, and how extensively it should be used, the SSCI explicitly relinquished its control over the document. *Id.*; *see also* Sen. Rockefeller Br. at 10–11 ("*Amicus* and his colleagues never believed that more was required in order to indicate their intent to relinquish control"); Letter from Sen. Dianne Feinstein to Sen. Patrick Leahy, President Pro Tempore, U.S. Senate (Dec. 9, 2014), http://1.usa.gov/1STWp0L (urging that the report "should be used" by the CIA and other agencies "to help make sure that the system of detention and interrogation described in this report is never repeated").

The D.C. Circuit improperly minimized the significance of this contemporaneous evidence. First, although the transmittal letter gave absolute

discretion to the executive branch to use the Final Report as it saw fit, the Court wrongly concluded that the letter gave the executive branch only "*some* discretion." App. 23a (emphasis added). There is no such qualification in the text of the letter.

Second, the lower court erred in reasoning that the letter did not "override" the SSCI's "clear intent to maintain control of the [Final] Report expressed in the June 2009 Letter." App. 24a. As an initial matter, for the reasons discussed above, the June 2009 Letter does not apply to the Final Report. But even if the June 2009 Letter were relevant to the agency record analysis, the December 2014 transmittal letter is far more probative of Congress's intent in 2014—and makes plain that the SSCI relinquished control over the Final Report.

Indeed, the D.C. Circuit's own case law places particular emphasis on Congress's intent at the time of transmittal—an emphasis that comports with basic evidentiary principles and common sense. *See Paisley*, 712 F.2d at 694–95 (holding that the SSCI lacked the requisite "specific intent" to control documents where, among other things, the government failed to point to "contemporaneous" evidence of the SSCI's intent to limit their use); *Holy Spirit*, 636 F.2d at 842 (letter from Clerk of House of Representative written after transfer of records did not evince congressional control). Here, the concerns that the SSCI had in 2009 about protecting its work product from CIA employees, when it was conducting its investigation in a CIA facility, are far different from its intent in 2014, when the Final Report was completed and transmitted 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, with affirmative encouragement to disseminate it "broadly" within the executive branch. App. 108a.

Contrary to the circuit court's supposition, Petitioners' argument is in no way premised on the assumption that Congress *must* give "contemporaneous instructions" to retain control over documents it transmits to an agency. *See* App. 21a. Rather, Petitioners contend that the SSCI *never* clearly expressed its intent to control the Final Report. To the extent that the June 2009 Letter is ambiguous, this Court's precedent requires that ambiguity to be resolved in Petitioners' favor, *see Tax Analysts*, 492 U.S. at 142 n.3, and thus the letter cannot constitute a clear assertion of congressional control. Finally, even if the June 2009 Letter clearly applied to the Final Report, the evidence contemporaneous with the transmittal of the document—namely, the December 2014 transmittal letter—vitiates any assertion of control five years earlier. *See, e.g.*, *Holy Spirit*, 636 F.2d at 843 (holding that even if documents at issue were congressional documents, they "lost their exemption as congressional records when Congress failed to retain control over them").

III. THE FINAL REPORT IS A DOCUMENT OF EXCEPTIONAL NATIONAL IMPORTANCE.

Given the importance of the Final Report to the American public, this Court's review is warranted. The Final Report is a uniquely important

record. Spanning more than 6,900 pages, it is the definitive account of the CIA's involvement in one of the darkest chapters in our nation's history. The Final Report describes widespread and horrific human rights abuses by the CIA. It also details the agency's evasions and misrepresentations to Congress, the White House, the courts, the media, and the American public. Release of the report would bring the light of public scrutiny to bear on these abuses, which is precisely the outcome that Congress intended in enacting FOIA. Especially because the Final Report is a record of such national importance, this Court should make the final determination regarding whether it is subject to FOIA, and therefore may be released to the American public.[5]

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[5] Absent review by this Court, there is a risk that the Final Report may never see the light of day. A week before Respondents filed their motion to dismiss the Petitioners' complaint, Senator Richard Burr, who had become Chairman of the SSCI, wrote to the President, requesting the transfer back to the SSCI of all copies of the Final Report in the possession of the executive branch. *See* Letter from Sen. Richard Burr to the Hon. Barack Obama (Jan. 14, 2015), *ACLU v. CIA*, No. 13-cv-1870 (D.D.C.), ECF No. 41-4. Several members of the SSCI and other Senators criticized Senator Burr's demand. Senator Feinstein, Vice Chairman of the SSCI, wrote to the President, stating that she did not support Senator Burr's request and disputing assertions made in his letter. *See* Letter from Sen. Dianne Feinstein to the Hon. Barack Obama (Jan. 16, 2015), *ACLU v. CIA*, No. 13-cv-1870 (D.D.C.), ECF No. 41-5.

On January 27, 2015, Petitioners filed an emergency motion to protect the district court's jurisdiction over the Final Report. Petitioners withdrew the motion after Respondents committed to retaining the report pending final adjudication of the parties' agency-control dispute. *See* Pls.' Notice of Withdrawal of Pls.' Emergency Mot. (Feb. 9, 2015), *ACLU v. CIA*, No. 13-cv-1870 (D.D.C.), ECF No. 43.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Hina Shamsi
Counsel of Record
Ashley M. Gorski
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
hshamsi@aclu.org

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
4301 Connecticut Avenue, NW–Suite 434
Washington, DC 20008

Dated: November 10, 2016

As reported by the *New York Times*, if all copies of the Final Report are returned to the Senate, "the documents could remain locked in a Senate vault for good." Mark Mazzetti & Matt Apuzzo, *Classified Report on the C.I.A.'s Secret Prisons Is Caught in Limbo*, N.Y. Times, Nov. 9, 2015, http://nyti.ms/1MUOgtY. "Mr. Burr's demand, which means that even officials with top security clearances might never read [the Final Report], has reminded some officials of the final scene of 'Raiders of the Lost Ark,' when the Ark of the Covenant is put into a wooden crate alongside thousands of others in a government warehouse of secrets." *Id.*

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 17, 2016 Decided May 13, 2016

No. 15-5183

AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

APPELLANTS

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.,

APPELLEES

Appeal from the United States District Court for the District of Columbia
(No. 1:13-cv-01870)

Hina Shamsi argued the cause for appellants. With her on the briefs was *Arthur B. Spitzer*.

Susanne Peticolas was on the brief for *amicus curiae* Senator John D. Rockefeller IV in support of appellants.

Thomas G. Pulham, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Douglas N. Letter* and *Matthew M. Collette*, Attorneys.

Before: TATEL and SRINIVASAN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: The Freedom of Information Act ("FOIA" or "Act"), subject to certain statutory exemptions, requires federal agencies to make agency records available to the public upon reasonable request. 5 U.S.C. § 552(a)(3)(A); *see id.* § 552(b)(1)-(9). Congress is not an "agency" under FOIA and, therefore, congressional documents are not subject to FOIA's disclosure requirements. *See id.* §§ 551(1)(A), 552(f). When Congress creates a document and then shares it with a federal agency, the document does not become an "agency record" subject to disclosure under FOIA if "Congress [has] manifested a clear intent to control the document." *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 221 (D.C. Cir. 2013) (quoting *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004)).

The dispute in this case concerns an attempt by the American Civil Liberties Union and American Civil Liberties Union Foundation (jointly, "Appellants") to invoke FOIA to obtain a copy of a report authored by the Senate Select Committee on Intelligence ("Committee"). In 2009, as a part of its oversight of the intelligence community, the Senate Committee announced that it would conduct a comprehensive review of the program of detention and interrogation formerly run by the Central Intelligence Agency ("CIA"). Before the review commenced, the Senate Committee and officials at

the CIA negotiated arrangements to deal with access to classified materials by Senators and their staff, and agreed on rules regarding the Committee's control over its work product.

These arrangements and rules were memorialized in a June 2, 2009, letter ("June 2009 Letter") sent by the Chairman and Vice Chairman of the Senate Committee to the CIA Director, which provided, *inter alia*, that

> Any . . . notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee . . . . These documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee. As such, these records are not CIA records under the Freedom of Information Act or any other law.

In 2014, after completing its review and receiving comments and proposed edits from the Executive Branch, the Committee produced a *Committee Study of the CIA's Detention and Interrogation Program*. The end product included a 6,000-plus page investigative report ("Full Report") and a 500-plus page Executive Summary. The Committee transmitted copies of the final Full Report and Executive Summary to the President, as well as to officials at the CIA, Department of Defense, Department of Justice, and Department of State (collectively, "Appellees"). The Executive

Summary, but not the Full Report, was publicly released by the Committee. The Committee made it clear that it alone would decide if and when to publicly release the Full Report. Appellants filed FOIA requests with Appellees seeking disclosure of the Full Report. These requests were denied on the ground that the Full Report is a congressionally generated and controlled document that is not subject to disclosure under FOIA. Appellants filed suit in the District Court to compel disclosure, but their action was dismissed by the court for lack of jurisdiction. Appellants now appeal the decision of the District Court. We affirm.

Appellants' principal claim is that the Senate Committee relinquished control over the Full Report when it sent the document to the President and officials at the Appellees' agencies in December 2014. According to Appellants, when an agency has been given possession of a document created by Congress, the document is presumptively an agency record unless Congress has clearly expressed its intent to control the document. In Appellants' view, Appellees cannot establish a clear assertion of congressional control with respect to the Full Report because it was disseminated to Appellees without any restrictions. We disagree. The June 2009 Letter manifests a clear intent by the Senate Committee to maintain continuous control over its work product, which includes the Full Report. Therefore, the Full Report always has been a congressional document subject to the control of the Senate Committee. The mere transmission of the Full Report to agency officials for their consideration and use within the Executive Branch did not vitiate the command of the June 2009 Letter

or constitute congressional relinquishment of control over the document.

I. BACKGROUND

A. The Senate Committee's Oversight Review and Production of the Full Report

In March 2009, the Senate Select Committee on Intelligence announced that it would conduct an oversight review of the CIA's highly controversial, but then-defunct, detention and interrogation program. The review contemplated by the Committee could not be completed unless Senators and their staff had access to millions of pages of CIA documents containing highly sensitive and classified information. Because of the concerns regarding classified materials, the members of the Committee and officials at the CIA negotiated special arrangements to allow the Senate Committee to undertake a comprehensive review while respecting the President's constitutional authorities over classified information. These arrangements were memorialized in the aforementioned June 2, 2009, letter from the Senate Committee Chairman and Vice Chairman to the CIA Director, setting forth "procedures and understandings" governing the Senate Committee's review.

The letter indicated that the Senate Committee would conduct its review of CIA records in a secure electronic reading room at a CIA facility. The CIA agreed to create a segregated network drive at the CIA facility where Senate personnel could prepare and store their work

product. And, at the insistence of the Senate Committee, the letter also included clear terms regarding control of the Senate Committee's work product. On this point, the letter stated:

> Any documents generated on the network drive referenced in paragraph 5, as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee and will be kept at the Reading Room solely for secure safekeeping and ease of reference. These documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee. As such, these records are not CIA records under the Freedom of Information Act or any other law. . . . If the CIA receives any request or demand for access to these records from outside the CIA under the Freedom of Information Act or any other authority, the CIA will immediately notify the Committee and will respond to the request or demand based upon the understanding that these are congressional, not CIA, records.

Letter from Dianne Feinstein, Chairman, Senate Select Comm. on Intelligence, and Christopher S.

Bond, Vice Chairman, Senate Select Comm. on Intelligence, to Leon Panetta, Director, CIA (June 2, 2009) ("June 2009 Letter"), at ¶ 6, Joint Appendix ("J.A.") 93-94. Pursuant to the terms of the June 2009 Letter, the Senate Committee drafted initial versions of its report on the CIA's segregated network drive. As the drafting process progressed, however, the Senate Committee worked with the CIA to transfer portions of the report from the segregated network drive to the Senate Committee's secure facilities at the United States Capitol. This arrangement allowed the Senate Committee to complete the drafting process in its own workspace.

On December 13, 2012, the Senate Committee approved the initial draft of the *Committee Study of the CIA's Detention and Interrogation Program*. This version of the Committee's work included drafts of the 6,000-plus page Full Report and the 500-plus page Executive Summary. The Senate Committee sent the drafts to an approved list of individuals in the Executive Branch for the limited purpose of eliciting their comments and proposed edits.

On April 3, 2014, after revising the drafts in response to the feedback received from the Executive Branch, the Senate Committee voted to approve updated versions of the Full Report and the Executive Summary. The Committee then voted to send only the updated Executive Summary to the President for declassification review. Over the next several months, the Senate Committee and the Executive Branch engaged in further discussions regarding the processing of the Executive Summary.

The Senate Committee also continued to edit both the Executive Summary and the Full Report. On December 9, 2014, after the Director of National Intelligence declassified a minimally redacted version of the Executive Summary, the Senate Committee publicly released that document. The Chairman's Foreword to the Executive Summary noted that the Full Report was final, but that the Senate Committee was not publicly releasing the Full Report.

In the days following the public release of the Executive Summary, the Senate Committee sent copies of the Full Report to the President, as well as to specified officials at the CIA, Department of Defense, Department of Justice, and Department of State, *i.e.*, the Appellees in this case. The Senate Committee's transmission of the Full Report to the President included a letter from Senate Committee Chairman Dianne Feinstein. The letter, dated December 10, 2014, stated that

> the full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated. To help achieve that result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit.

Letter from Dianne Feinstein, Chairman, Senate Select Comm. on Intelligence, to President Barack

Obama (Dec. 10, 2014) ("December 2014 Letter"), J.A. 133.

In January 2015, the Chairmanship of the Senate Committee passed from Senator Feinstein to Senator Richard Burr. On January 14, 2015, Senator Burr sent a letter to the President saying that he considered the Full Report to be "a highly classified and committee sensitive document," and he requested that "all copies of the full and final report in the possession of the Executive Branch be returned immediately to the Committee." Letter from Richard Burr, Chairman, Senate Select Comm. on Intelligence, to President Barack Obama (Jan. 14, 2015), J.A. 136. Senator Feinstein, who was then Vice Chairman of the Committee, disagreed with Senator Burr, and she "ask[ed] that [the President] retain the full 6,963-page classified report within appropriate Executive branch systems of record, with access to appropriately cleared individuals with a need to know." Letter from Dianne Feinstein, Vice Chairman, Senate Select Comm. on Intelligence, to President Barack Obama (Jan. 16, 2015), J.A. 139. We are unaware of any further correspondence on the matter.

B. Appellants' FOIA Requests and Initiation of this Lawsuit

In February 2013, Appellants filed a FOIA request with the CIA seeking "disclosure of the recently adopted [Senate Committee] report . . . relating to the CIA's post-9/11 program of rendition, detention, and interrogation." The CIA promptly denied the request, characterizing the then-initial draft version of the Full Report as a "Congressionally generated and controlled

document that is not subject to the FOIA's access provisions."

Appellants filed suit against the CIA in November 2013, seeking to compel disclosure of the Full Report. Several months later, Appellants submitted new FOIA requests to the other Appellee agencies, seeking the Full Report as it existed when the Committee voted to send the Executive Summary to the President for declassification review. Appellants then filed an amended complaint with the District Court based on these new requests and added the other agencies as defendants in the lawsuit. The parties and the District Court then agreed that Appellants' amended complaint referred to the Full Report that was transmitted to Appellees after the Executive Summary was released.

In January 2015, Appellees moved to dismiss Appellants' suit under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, contending that the Full Report is a congressional record beyond the reach of FOIA. Appellants opposed the motion, arguing that the Full Report became an "agency record" subject to disclosure when it was transmitted from the Senate Committee to Appellees in December 2014. The District Court granted Appellees' motion to dismiss, and Appellants now appeal.

II. ANALYSIS

We review *de novo* the District Court's grant of Appellees' motion to dismiss for lack of subject matter jurisdiction. *See Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 360 (D.C. Cir. 2005). For the

reasons explained below, we affirm the eminently well-reasoned judgment of the District Court.

A. The Legal Framework

As noted above, subject to certain statutory exemptions, FOIA requires federal agencies to make agency records available to the public upon reasonable request. 5 U.S.C. § 552(a)(3)(A); *see id.* § 552(b)(1)-(9). The Act grants federal district courts jurisdiction "to order the production of any *agency records* improperly withheld from the complainant." *Id.* § 552(a)(4)(B) (emphasis added). FOIA limits access to " agency records," but the statute does not define the term. *Forsham v. Harris*, 445 U.S. 169, 178 (1980); *Judicial Watch*, 726 F.3d at 215-16. Nevertheless, because it is undisputed that Congress is not an agency, it is also undisputed that "congressional documents are not subject to FOIA's disclosure requirements." *United We Stand*, 359 F.3d at 597 (citing 5 U.S.C. §§ 551(1), 552(f)).

The issue in this case is whether the Senate Committee's Full Report became an "agency record" subject to disclosure under FOIA when it was transmitted from Congress to the Executive Branch. In other words, did the Full Report achieve the status of an "agency record" once it was in the possession of Appellees, *i.e.*, federal agencies, who are subject to FOIA?

It is clear that "not all documents in the possession of a FOIA-covered agency are 'agency records' for the purpose of that Act." *Judicial Watch*, 726 F.3d at 216. In *United States Department of Justice v. Tax Analysts*, the Supreme Court

instructed that the term "agency records" extends only to those documents that an agency both (1) "create[s] or obtain[s]," *and* (2) "control[s] . . . at the time the FOIA request is made." *Tax Analysts*, 492 U.S. 136, 144-45 (1989) (citation omitted). Thus, not all records that an agency possesses are "agency records" under FOIA. *See, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157-58 (1980) (summaries of Henry Kissinger's telephone conversations as National Security Advisor that he brought from the White House to the State Department); *Goland v. CIA*, 607 F.2d 339, 344-48 (D.C. Cir. 1978) (congressional hearing transcript in the possession of the CIA), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979) (per curiam). In this case, there is no dispute that Appellees lawfully obtained copies of the Full Report, thus satisfying the first prong of *Tax Analysts*. The critical question before the court is whether the Senate Committee continued to "control" the Full Report once copies were transmitted to the Executive Branch.

Normally, we look to four factors to determine whether an agency has sufficient control over a document to make it an "agency record":

> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.

Judicial Watch, 726 F.3d at 218 (alterations in original) (quoting *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1068-69 (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 (1989)). However, this "test does not apply to documents that an agency has either obtained from, or prepared in response to a request from, a governmental entity not covered by FOIA: the United States Congress." *Id.* at 221. This is because "special policy considerations . . . counsel in favor of according due deference to Congress' affirmatively expressed intent to control its own documents." *Id.* (ellipsis in original) (quoting *Paisley v. CIA*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (per curiam)). Thus, when an agency possesses a document that it has obtained from Congress, the answer to the question whether the document is an "agency record" subject to disclosure under FOIA "'turns on whether Congress manifested a clear intent to control the document.' This focus renders the first two factors of the standard test effectively dispositive." *Id.* (quoting *United We Stand*, 359 F.3d at 596).

These principles arise from a series of decisions issued by this court, beginning with *Goland v. CIA*. In that case, a FOIA requester sought disclosure of a congressional hearing transcript that had been released by a congressional committee to the CIA. *Goland*, 607 F.2d at 342-43. The court concluded that the transcript, which "bore the typewritten marking 'Secret' on its interior cover page," was retained by the CIA "for internal reference purposes only." *Id.* at 347. The court explained that "Congress exercises oversight authority over the various federal

agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in according with Congress' originating intent." *Id.* at 346. Subjecting the transcript to disclosure under FOIA, we said, would force Congress "either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role." *Id.* In light of the "circumstances attending the document's generation and the conditions attached to its possession," the court held that the CIA was "not free to dispose of the Transcript as it wills, but holds the document, as it were, as a 'trustee' for Congress." *Id.* at 347. Because "on all the facts of the case Congress' intent to retain control of the document [wa]s clear," we ruled that the transcript was "not an 'agency record' but a congressional document to which FOIA does not apply." *Id.* at 348.

The *Goland* analysis was followed in later cases, some of which found that the contested documents were subject to disclosure under FOIA "because Congress had not clearly expressed an intent to retain control over them." *Judicial Watch*, 726 F.3d at 221. For example, in *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, a FOIA requester sought documents that had come into the possession of the CIA containing "correspondence and memoranda originated by one of four congressional committees that investigated various aspects of Korean-American relations between 1976 and 1978." *Holy Spirit*, 636 F.2d 838, 839-840 (D.C. Cir. 1980), *vacated in part on other grounds*, 455 U.S. 997 (1982). Because the documents were released to the CIA by Congress without "some clear assertion of congressional

control. . . . either in the circumstances of the documents' creation or in the conditions under which they were sent to the CIA," the court determined that they were agency records under FOIA. *Id.* at 842. The court contrasted the treatment of the requested records with the treatment of "three sealed cartons of additional congressional documents" transferred to the CIA at around the same time that were "accompanied by a memorandum from the House Committee on International Relations indicating that the Committee retained jurisdiction over the documents, that the documents contained classified information, and that access to the files was limited to those with authorization from the Clerk of the House." *Id.*

The decision in *Paisley v. CIA* is also illuminating. In that case, a FOIA requester sought disclosure of letters transmitted from the Senate Committee to the FBI and CIA relating to the shooting death of a former CIA official. *Paisley*, 712 F.2d at 689-90, 694. In concluding that the letters were agency records, the court noted that "[w]hen Congress created the five documents in this case, it affixed no external indicia of control or confidentiality on the faces of the documents." *Id.* at 694. We contrasted the letters with "at least seven *other* of [the Senate Committee's] documents . . . which were later requested by appellant, but which were properly held by the District Court to be exempt congressional documents in light of their classification markings." *Id.* The court stressed that the disputed letters were subject to disclosure under FOIA because they were not "sent to the FBI and the CIA in such a way as to manifest any

intent by Congress to retain control." *Id.* In other words, "nothing in either the circumstances of the documents' creation or the conditions attending their transfer provide[d] the requisite express indication of a congressional intent to maintain exclusive control over these particular records." *Id.* at 695.

It is important to note that the decisions in *Goland*, *Holy Spirit*, and *Paisley* make it clear that Congress may manifest an intent to retain control over documents *either* when the documents are created *or* when the documents are transmitted to an agency. Obviously, then, if Congress initiates the creation of documents with a clear statement that the "*documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee*," June 2009 Letter, at ¶ 6, J.A. 93, and adds that "*these records are not CIA records under the Freedom of Information Act or any other law*," *id.*, then congressional intent to maintain exclusive control of the documents is clear. In this situation, congressional intent can only be overcome if the record reveals that Congress subsequently acted to vitiate the intent to maintain exclusive control over the documents that was manifested at the time of the documents' creation.

In sum, if " Congress has manifested its own intent to retain control, then the agency—by definition—cannot lawfully 'control' the documents." *Paisley*, 712 F.2d at 693. Conversely, if Congress intends to relinquish its control over documents, then the agency may use them as the agency sees

fit. *See id.*; *see also United We Stand*, 359 F.3d at 600 ("Congress's intent to control and the agency's ability to control 'fit together in standing for the general proposition that the agency to whom the FOIA request is directed must have exclusive control of the disputed documents' . . . ." (quoting *Paisley*, 712 F.2d at 693)). In this case, we must decide whether Congress somehow vitiated its clear intent to control the Full Report when it transmitted the document to Appellees.

Before turning to an application of the law to the facts of this case, we must make it clear that we can give no weight to the letter sent by now-Senate Committee Chairman Richard Burr to the President in January 2015. The letter was sent after Appellants had submitted their FOIA request and after they had filed suit in the District Court. Therefore, the letter is a "post-hoc objection[] to disclosure," and, as such, it "cannot manifest the clear assertion of congressional control that our case law requires." *United We Stand*, 359 F.3d at 602; *see also Holy Spirit*, 636 F.2d at 842 (refusing to consider as evidence of congressional intent a letter "written as a result of [appellant's] FOIA request and this litigation—long after the actual transfer [of the documents] to the CIA").

B. Application of the Law to the Facts of this Case

As we have made clear, the critical evidence in this case is the June 2009 Letter from the Senate Committee Chairman and Vice Chairman to the Director of the CIA. The Letter, in straightforward terms, makes it plain that the Senate Committee intended to control any and all of its work product,

including the Full Report, emanating from its oversight investigation of the CIA. The Letter's command is unequivocal, and it contains no temporal limitations:

> Any documents generated on the network drive referenced in paragraph 5, *as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members*, are the property of the Committee and will be kept at the Reading Room solely for secure safekeeping and ease of reference. *These documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee.* As such, these records are not CIA records under the Freedom of Information Act or any other law. . . . If the CIA receives any request or demand for access to these records from outside the CIA under the Freedom of Information Act or any other authority, the CIA will immediately notify the Committee and will respond to the request or demand based upon the understanding that these are congressional, not CIA, records.

June 2009 Letter, at ¶ 6, J.A. 93-94 (emphases added).

Appellants maintain that the June 2009 Letter demonstrates the Senate Committee's intent to control only those documents that were either (1) stored on the CIA's segregated network drive or (2) otherwise kept at the CIA's Reading Room. Br. for Appellants at 26. Therefore, according to Appellants, the Full Report was not covered by the Committee's expressed intention to control its work product. We reject this argument because it cannot be squared with the plain language of the Letter.

The Letter, by its explicit terms, applies to all "documents generated on the network drive" *and* to "any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members." The Full Report is a "final . . . report." Therefore, the language of the Letter unambiguously includes the Full Report. It does not matter that the Full Report was neither stored on the CIA's segregated network drive nor kept in the CIA's Reading Room. Indeed, it was understood by the Committee and the CIA that much of the final drafting of the reports would be completed at the United States Capitol in the Senate Committee's own workspace. The Full Report and the other specified documents were to "remain congressional records in their entirety . . . even after the completion of the Committee's review." The Letter's expansive language is clear on this point.

At oral argument, counsel for Appellants cited *United We Stand* for the proposition that "this court's case law is skeptical about pre-existing agreements" that foreclose agencies from disclosing documents that are in their possession. Oral Arg.

Recording at 11:02-11:11. This argument stretches the holding of *United We Stand* well beyond what the court said in that case. We simply rejected the agency's effort to rely on its "consistent course of dealing" with Congress to prove that future communications were necessarily confidential. *United We Stand*, 359 F.3d at 602; *see also Paisley*, 712 F.2d at 695 (letters indicating Senate Committee's "desire to prevent release without its approval of any documents generated by the Committee or an intelligence agency in response to a Committee inquiry [were] . . . . too general and sweeping to provide sufficient proof, when standing alone . . . . [of] the requisite express indication of a congressional intent to maintain exclusive control over the[] particular records [at issue]"). In this case, however, unlike in *United We Stand*, the June 2009 Letter did not relate to the Senate Committee's previous course of dealing with the CIA. Rather, the Letter related specifically to the work product emanating from the Senate Committee's review of the CIA's former detention and interrogation program. The Full Report was indisputably part of this work product. The June 2009 Letter is thus akin to the typewritten marking "Secret" on the interior cover page of the document at issue in *Goland*. The Committee effectively stamped its control over the Full Report when it wrote the terms of the Letter.

The June 2009 Letter also stands in sharp contrast to the evidence in *Paisley*. It surely cannot be said here that the June 2009 Letter was "too general and sweeping" to manifest the Committee's clear intent to control the work product emanating from the Senate Committee inquiry. *See also*

Judicial Watch, 726 F.3d at 223 & n.20 (relying on a pre- existing agreement, likewise concluding that such agreement was not too "general"). The Senate Committee could hardly have been more clear or precise in claiming control over all of the work produced during its investigation of the CIA's former detention and interrogation program.

In an effort to avoid the clear terms of the June 2009 Letter, Appellants argue that the circumstances surrounding the transmittal of the Full Report to Appellees demonstrate that the Senate Committee intended to relinquish its control over the Full Report. We disagree because the Committee's limited transmittal of the Full Report – *especially in contrast with its public release of the Executive Summary* – in no way vitiated its existing, clearly expressed intent to control the Full Report.

Appellants' argument seems to be premised on an assumption that, when Congress transmits documents to an agency, it must give contemporaneous instructions preserving any previous expressions of intent to control the documents in order to retain control over the documents. This is not the law. Indeed, we rejected this proposition in *Holy Spirit*, even as we held that the relevant documents constituted agency records. *See Holy Spirit*, 636 F.2d at 842 (emphasizing that "we do not adopt appellant's position—that Congress must give contemporaneous instructions when forwarding congressional records to an agency. Nor do we direct Congress to act in a particular way in order to preserve its FOIA exemption for transferred documents"). And in

Judicial Watch, the court relied heavily on a Memorandum of Understanding executed " well before the creation and transfer of the documents at issue" in that case. *See Judicial Watch*, 726 F.3d at 223 n.20. The court in *Judicial Watch* did not require the Office of the President – the FOIA exempt governmental entity in that case – to show contemporaneous evidence confirming its previous expressions of intent to control the disputed documents.

Appellants acknowledge that when the Senate Committee approved an initial version of the Full Report in December 2012 and sent the draft to the Executive Branch, the Senate Committee did so with specific limitations on its use. The Committee's transmission made it clear that the draft of the Full Report was being sent to specific individuals in the Executive Branch for comments and possible edits, and that the Senate Committee retained the discretion to accept or reject any proposed changes offered by the Executive Branch. The Senate Committee's transmission also emphasized that the Committee alone would "consider how to handle any public release of the report, in full or otherwise." Letter from Dianne Feinstein, Chairman, Senate Select Comm. on Intelligence, to President Barack Obama (Dec. 14, 2012), J.A. 127. These actions undeniably reinforced what had already been made clear in the June 2009 Letter, *i.e.*, that the Committee intended to retain control over the Full Report.

Appellants contend, however, that when the Senate Committee transmitted the final version of the Full Report to the Executive Branch in

December 2014, the Committee did so without any similar limitations attached. This, according to Appellants, gives proof of Congress' intent to abdicate control over the Full Report. In further support of this position, Appellants seize on the following language of the December 2014 Letter, which accompanied the Senate Committee's transmission of the final version of the Full Report to the President:

> "[T]he full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated. To help achieve that result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit."

December 2014 Letter, J.A. 133.

Focusing on the letter's use of the terms "broadly" and "as you see fit," Appellants claim that the Senate Committee relinquished any control it may have had over the Full Report. Br. for Appellants at 28-29. When the December 2014 Letter is read in context, however – particularly against the backdrop of the June 2009 Letter – it does not vitiate Congress' existing, clearly expressed intent to maintain control of the Full Report. The December 2014 Letter undoubtedly gives the Executive Branch some discretion to use the Full Report for internal purposes, much like the

transcript at issue in *Goland*. *See Goland*, 607 F.2d at 347 (transcript was a congressional document even though "[t]he CIA retain[ed] a copy . . . for internal reference purposes"). However, the December 2014 Letter does not override the Senate Committee's clear intent to maintain control of the Full Report expressed in the June 2009 Letter.

When Senator Feinstein transmitted the draft of the Full Report to the Executive Branch on December 14, 2012, her transmittal letter made it clear that the Committee would determine if and when to publicly disseminate the Full Report. Nothing changed as the final edits and corrections were made to the Full Report. The limited transmittal of the Full Report to Appellees in 2014 certainly did not vitiate the command of the June 2009 Letter or otherwise authorize public dissemination.

Finally, Appellants claim that the Chairman's Foreword to the Executive Summary, which encouraged "[t]his and future Administrations [to] use this Study to guide future programs, correct past mistakes, [and] increase oversight of CIA representations to policymakers," is evidence of the Committee's intent to relinquish control of the Full Report. Br. for Appellants at 29. This argument, which relies on a glaring *non sequitur*, obviously cannot carry the day.

On the record before us, the Senate Committee's intent to retain control of the Full Report is clear. The Full Report therefore remains a congressional document that is not subject to disclosure under FOIA.

III. CONCLUSION

For the foregoing reasons, the judgment of the District Court is affirmed.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5183 **September Term, 2015**
FILED ON: MAY 13, 2016

AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
APPELLANTS

V.

CENTRAL INTELLIGENCE AGENCY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-01870)

Before: TATEL and SRINIVASAN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: May 13, 2016

Opinion for the court filed by Senior Circuit Judge Edwards.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*, **Plaintiffs,** **v.** **CENTRAL INTELLIGENCE AGENCY, *et al.*,** **Defendants.**	**Civil Action No. 13-1870 (JEB)**

MEMORANDUM OPINION

A lightning rod for controversy, the Central Intelligence Agency's former detention and interrogation program has spawned a welter of cases under the Freedom of Information Act demanding access to the inside story. In this particular suit, the American Civil Liberties Union and the American Civil Liberties Union Foundation seek to compel disclosure of two records relating to the program: the 6,963-page "Final Full Report" drafted by the Senate Select Committee on Intelligence after a comprehensive investigation, and a separate internal CIA study commissioned by former Director Leon Panetta. Contending that the Final Full Report is a congressional record exempt from the strictures of

FOIA, the four defendant agencies move to dismiss that count of the Complaint. The CIA – the only agency asked to produce the Panetta Review – separately seeks summary judgment on that withholding, invoking FOIA Exemptions 1, 3, and 5. Concurring in full with the Government, the Court will enter judgment in its favor.

I. Background

Given the circumstances surrounding the genesis of the disputed records, an overview of these events and the origins of the FOIA requests here may prove useful to the reader. In its explication, the Court first addresses the SSCI Report and the FOIA request pertaining to it, then turns to the Panetta Review and its corresponding request.

A. The SSCI Report

1. *Initiation of Investigation*

In March 2009, the Senate Select Committee on Intelligence announced plans to comprehensively review the CIA's former detention and interrogation program. See Def. Mot. for Summary Judgment, Att. 1 (Declaration of Martha M. Lutz, Chief of the Litigation Support Unit, CIA), ¶ 11. To fulfill that ambition, Committee personnel required "unprecedented direct access to millions of pages of unredacted CIA documents." Id. Wary of freewheeling disclosure of such sensitive information, the CIA negotiated with SSCI to devise accommodations that " respected both the President's constitutional authorities over classified information and . . . Congress's constitutional authority to conduct oversight of the Executive Branch." Def. Mot. to Dismiss, Att. 1 (Declaration of

Neal Higgins, Director of the Office of Congressional Affairs, CIA), ¶ 11.

Those efforts were realized in a June 2, 2009, letter from the SSCI Chairman and Vice Chairman to the CIA Director, in which the Committee agreed that its review of Agency records would take place in a secure electronic reading room at a CIA facility. See id., ¶¶ 10-11; see also id., Exh. D (June 2, 2009, Letter from SSCI to the CIA), ¶ 2. The Agency would, in turn, create a segregated network drive there where SSCI members and staffers could "prepare and store their work product . . . in a secure environment." Higgins Decl., ¶ 11; see also June 2, 2009, SSCI Letter, ¶¶ 5-6.

One key provision of the 2009 letter, and "a condition upon which SSCI insisted," concerned the status of such work product. See Higgins Decl., ¶ 12. More specifically, the letter instructed:

> Any documents generated on the network drive referenced in paragraph 5, as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee and will be kept at the Reading Room solely for secure safekeeping and ease of reference. These documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee. As such, these records are

> not CIA records under the Freedom of Information Act or any other law. . . . If the CIA receives any request or demand for access to these records from outside the CIA under the Freedom of Information Act or any other authority, the CIA will immediately notify the Committee and will respond to the request or demand based upon the understanding that these are congressional, not CIA, records.

June 2, 2009, SSCI Letter, ¶ 6 (emphasis added). The governing terms so defined, SSCI began its Brobdingnagian task.

2. *Approval and Transmission of Early Drafts*

More than three years later, on December 13, 2012, SSCI held a closed session in which it approved an initial version of its full investigative report, as well as a stand-alone "Executive Summary." See Higgins Decl., ¶ 15. It then transmitted both drafts to the Executive Branch for review, soliciting "suggested edits or comments" but limiting dissemination to specific individuals identified in advance to the Chairman. See ECF No. 41-1 (December 14, 2012, Letter from Senator Dianne Feinstein to President Barack Obama).

On April 3, 2014, after revising both documents in response to the CIA's feedback, the Committee met again in closed session to determine their proper disposition. See Higgins Decl., ¶ 17. It ultimately voted to approve both documents, but to designate at that time only the Executive Summary

for declassification and eventual public release. See SSCI, Committee Study of the CIA's Detention and Interrogation Program: Executive Summary at 8 (Dec. 3, 2014) [hereinafter "Executive Summary"], available at http://www.intelligence.senate.gov/study 2014/executive-summary.pdf; Higgins Decl., Exh. F. (April 3, 2014, Senator Feinstein Press Release) ("The full 6,200-page full report has been updated and will be held for declassification at a later time."). Both documents were transmitted to the Executive Branch in the summer of 2014. See Higgins Decl., ¶ 21.

Over the next several months, SSCI and the CIA engaged in further discussions regarding the processing of the Executive Summary, and the Committee continued to edit that document – and the Full Report – in light of those conversations. See Higgins Decl., ¶ 19. After much negotiation, the Director of National Intelligence declassified a minimally redacted final version of the Executive Summary, which SSCI then publicly released on December 9, 2014. See id., ¶ 20.

In her foreword to the Summary, Chairman Feinstein described the Full Report, clarifying that it is "now final and represents the official views of the Committee." See Executive Summary, Chairman's Foreword at 5 (Dec. 3, 2014) [hereinafter "Chairman's Foreword"], available at http://www. intelligence.senate.gov/study2014/ foreword.pdf. She further expressed her desire that "[t]his and future Administrations should use this Study to guide future programs, correct past mistakes, increase oversight of CIA representations to policymakers, and ensure coercive interrogation practices are not

used by our government again." Id. at 5. In keeping with the Committee's earlier decision, however, the Final Full Report was neither sent for declassification nor publicly released. See id. at 3 ("I chose not to seek declassification of the full Committee Study at this time.").

3. *Transmission of Final Full Report*

Instead, during the several days immediately following the public release of the Executive Summary, SSCI sent a copy of the Final Full Report to President Obama and each Defendant agency. See Higgins Decl., ¶ 21; Def. Mot. to Dismiss, Att. 2 (Declaration of Julia Frifield, Department of State), ¶ 7; id., Att. 3 (Declaration of Mark Herrington, Department of Defense), ¶ 5; id., Att. 4 (Declaration of Peter Kadzik, Department of Justice), ¶ 5. Chairman Feinstein's transmittal letter – addressed to the President – stated as follows:

> As you said publicly on August 1, 2014, the CIA's coercive interrogation techniques were techniques that "any fair-minded person would believe were torture," and "we have to, as a country, take responsibility for that so that, hopefully, we don't do it again in the future."
>
> I strongly share your goal to ensure that such a program will not be contemplated by the United States ever again and look forward to working with you to strengthen our resolve against torture. Therefore, the full report should be made available within the CIA and

> other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated. To help achieve that result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit.

Def. Mot. to Dismiss, Exh. 3 (December 10, 2014, Letter from Senator Dianne Feinstein to President Barack Obama) at 1.

The decision to share the Final Full Report within the Executive Branch has since drawn official Senate criticism, in large part due to a shift in Committee leadership that occurred after the 2014 elections gave the Republicans a Senate majority. Shortly after his installation as the new Chairman, Senator Richard Burr sent a letter to the President indicating that he had not been aware of the Report's transmission at the time it occurred. See Def. Mot. to Dismiss, Exh. 4 (January 14, 2015, Letter from Senator Richard Burr to President Barack Obama). He further advised that he considered the Report to be "a highly classified and committee sensitive document" and therefore requested that "all copies of the full and final report in the possession of the Executive Branch be returned immediately to the Committee." Id. The Chairman added: "If an Executive Branch agency would like to review the full and final report, please have them contact the Committee and we will attempt to arrive at a satisfactory accommodation for

such a request." Id.

In response, now-SSCI Vice Chairman Feinstein wrote the President saying that she " do[es] not support" the request that all copies of the Full Report be returned to the Committee. See Def. Mot. to Dismiss, Exh. 5 (January 16, 2015, Letter from Senator Dianne Feinstein to President Barack Obama) at 1. She further reiterated the sentiment of her December 10, 2014, letter and asked that the Final Report be retained "within appropriate Executive branch systems of record, with access to appropriately cleared individuals with a need to know." Id. at 1-2. No action has yet been taken in response to Senator Burr's letter, as Defendants have agreed to retain their respective copies of the Report pending the Court's adjudication of the dispute at hand. See ECF No. 42 (Defendants' Response to Plaintiffs' Emergency Motion for an Order Protecting Jurisdiction).

4. *FOIA Request and Initiation of Suit*

In the midst of all this back-and-forth, the ACLU and the ACLU Foundation (jointly, " ACLU" or "Plaintiff") sent a FOIA request to the CIA, seeking "disclosure of the recently adopted [SSCI] report . . . relating to the CIA's post-9/11 program of rendition, detention, and interrogation." Def. Original Mot. to Dismiss, Att. 2 (Affidavit of Neal Higgins), Exh. A (February 13, 2013, FOIA Request). The CIA promptly denied the request, characterizing the Report as a "[c]ongressionally generated and controlled document" exempt from FOIA. See Higgins Aff., Exh. B (February 22, 2013, Letter from Michele Meeks, CIA Information and Privacy Coordinator). Unconvinced, the ACLU filed

suit against the CIA to compel disclosure on November 26, 2013. Plaintiff also initially sought access to the CIA's official response to the SSCI Report. See Compl., ¶ 22. In light of its subsequent public release on December 9, 2014, the ACLU has since withdrawn that portion of its request. See Pl. Cross-Mot. & Opp. at 7 n.4.

By way of an additional FOIA request, amendments to its Complaint, and various status conferences, Plaintiff has since named three additional agencies as defendants – the Department of Defense, the Department of Justice, and the Department of State – and made clear that it seeks the final version of the Full SSCI Report. See id. at 7. Each of the agencies has now moved to dismiss the ACLU's claim under Federal Rule of Civil Procedure 12(b)(1) for lack of subject- matter jurisdiction. They argue that the Report remains a congressional record notwithstanding its transmittal to the Executive Branch and thus falls outside the scope of FOIA. Plaintiff opposes, maintaining that the Report should be considered an agency record.

B. The Panetta Review

The ACLU's case, however, sweeps wider still. It also seeks an entirely separate set of documents created by the CIA during the early stages of SSCI's investigation, which the media has now dubbed the "Panetta Review."

1. *Creation of Review*

In 2009, mindful of the magnitude and sensitivity of the records being disclosed to SSCI for its investigation, the CIA formed a "Special Review Team" to review the documents SSCI was accessing

and to "prepar[e] summaries of certain key information." Lutz Decl., ¶ 14. As this Court has already detailed in a very recent Opinion, Leopold v. CIA, No. 14-48, 2015 WL 1445106 (D.D.C. Mar. 31, 2015), then-Director of the CIA Leon Panetta and other senior CIA officials wished to remain apprised of "the most noteworthy information contained in the millions of pages of documents being made available to the SSCI" so as to "inform other policy decisions related to the Committee's study." Lutz Decl., ¶¶ 8, 13.

The SRT carried out its assigned task for approximately a year, producing a series of more than 40 draft documents that are now generally referred to as the Panetta Review. See Leopold, 2015 WL 1445106, at *2. Team leaders would assign research topics to team members, who in turn would conduct searches for documents "related to their assigned topic" and review the results to "determine[] whether certain contents of those documents might be relevant to informing senior CIA leaders in connection with the SSCI's study." Lutz Decl., ¶ 15. If a team member found information that she "believed was significant" about her topic, she would describe the information in her review. See id.

In 2010, however, the project was abandoned. The Agency determined that its " continued work on the Review[] could potentially complicate a separate criminal investigation by the Department of Justice into the detention and interrogation program." Id., ¶ 18. As a result, the project was never finished. Id., ¶ 19. Indeed, when cast aside, the reviews "covered less than half of the millions of pages of documents that the CIA ultimately made available to the SSCI"

and remained in draft form. Id. According to the Agency, had the project not been forsaken, the drafts "would likely have been reviewed and edited by a number of senior CIA officials . . . before being presented to the Director as finished products." Id.

2. *FOIA Request and Procedural History*

Fast-forward several years. On December 17, 2013, then-Senator Mark Udall publicly referenced an "internal study" that the CIA had allegedly drafted about its former detention and interrogation program. Its antennae finely tuned for such statements, Plaintiff quickly submitted a FOIA request seeking:

> [A] report commissioned by former Central Intelligence Agency ("CIA") Director Leon Panetta on the Agency's detention and interrogation programs (the "Panetta Report"), which was referred to by Senator Mark Udall on December 17, 2013, during the confirmation hearing for CIA General Counsel nominee Caroline Diane Krass.

Lutz Decl., Exh. A (December 19, 2013, FOIA Request). The CIA responded within the week, indicating that it would accept and process the request, but that it would unlikely be able to respond within 20 working days. See Lutz Decl, Exh. B (December 24, 2013, Letter from Michele Meeks, CIA Information and Privacy Coordinator). On January 27, 2014, still awaiting a substantive response to its request, Plaintiff amended its Complaint in this case to include a claim against the

CIA for disclosure of the Panetta Review. See Lutz Decl., ¶ 7; Am. Compl. at 8-9.

The Agency has now moved for summary judgment on the ground that it properly withheld the Review, relying on FOIA Exemptions 1, 3, and 5. Plaintiff cross-moves, arguing the contrary.

II. Legal Standard

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(1), a court must dismiss a claim for relief when the complaint "lack[s] . . . subject-matter jurisdiction." To survive a motion to dismiss under Rule 12(b)(1), a plaintiff bears the burden of proving that the Court has subject-matter jurisdiction to hear its claims. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); U.S. Ecology, Inc. v. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). A court has an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). "For this reason 'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (alterations in original) (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987)). Additionally, unlike with a motion to dismiss under Rule 12(b)(6), the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens Pharms. v.

FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005); see also Venetian Casino Resort, LLC v. EEOC, 409 F.3d 359, 366 (D.C. Cir. 2005) ("[G]iven the present posture of this case – a dismissal under Rule 12(b)(1) on ripeness grounds – the court may consider materials outside the pleadings."); Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992).

B. Summary Judgment

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006). A fact is "material" if it is capable of affecting the substantive outcome of the litigation. See Liberty Lobby, 477 U.S. at 248; Holcomb, 433 F.3d at 895. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Scott v. Harris, 550 U.S. 372, 380 (2007); Liberty Lobby, 477 U.S. at 248; Holcomb, 433 F.3d at 895. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion" by "citing to particular parts of materials in the record" or " showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

FOIA cases typically and appropriately are decided on motions for summary judgment. See

Brayton v. Office of U.S. Trade Rep., 641 F.3d 521, 527 (D.C. Cir. 2011). In a FOIA case, the Court may grant summary judgment based solely on information provided in an agency's affidavits or declarations when they "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (citation omitted).

III. Analysis

As previously articulated, Plaintiff in this case seeks two discrete documents: the Full SSCI Report and the Panetta Review. The Court will treat each in turn, ultimately concluding that neither is subject to release under FOIA.

A. The SSCI Report

FOIA mandates that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . , shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). A plaintiff thus states a claim under that Act where it properly alleges that "'an agency has (1) improperly (2) withheld (3) agency records.'" United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989) (quoting Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980)) (internal quotation marks omitted); 5 U.S.C. § 552(a)(4)(B) (granting federal district courts jurisdiction "to order the production of any agency

records improperly withheld from the complainant") (emphasis added).

For purposes of FOIA, the definition of an "agency" specifically excludes Congress, legislative agencies, and other entities within the legislative branch. See 5 U.S.C. §§ 551(1), 552(f); see also United We Stand America, Inc. v. Internal Revenue Serv., 359 F.3d 595, 597 (D.C. Cir. 2004) ("The Freedom of Information Act does not cover congressional documents."). Neither party, accordingly, disputes that at the time SSCI drafted the Full Report, it constituted a congressional document exempt from FOIA. The bone of contention, instead, is whether the Report, once transmitted to Defendants, became an "agency record" subject to FOIA.

1. *Legal Framework*

As a starting point, "not all documents in the possession of a FOIA-covered agency are 'agency records' for the purpose of that Act." Judicial Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 216 (D.C. Cir. 2013); see also, e.g., Kissinger, 445 U.S. at 157 ("mere physical location of papers and materials" does not confer "agency-record" status). As the Supreme Court instructed in Tax Analysts, the term "agency records" extends only to those documents that an agency both (1) "create[s] or obtain[s]," and (2) "control[s] . . . at the time the FOIA request [was] made." 492 U.S. at 144-45. Turning briefly to Tax Analysts' first prong, Defendant agencies do not dispute that the Full SSCI Report was delivered to them in December 2014 – *i.e.*, that they obtained it. See Def. Mot. to Dismiss at 11-12. Instead, the parties clash over whether the SSCI Report is under

agency "control."

In the typical case, this Circuit looks to four factors to determine "whether an agency has sufficient control over a document to make it an agency record." Judicial Watch, 726 F.3d at 218 (internal quotation marks omitted). They are:

> [1] the intent of the document's creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.

Id.; accord United We Stand, 359 F.3d at 599; Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996).

Because the present case concerns documents obtained by the agencies from Congress, however, the usual four-part test does not apply. See Judicial Watch, 726 F.3d at 221; United We Stand, 359 F.3d at 599. Rather, in such cases, "'special policy considerations . . . counsel in favor of according due deference to Congress' affirmatively expressed intent to control its own documents.'" Judicial Watch, 726 F.3d at 221 (quoting Paisley v. CIA, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983)). As this Circuit has repeatedly emphasized, "Congress exercises over-sight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress'

originating intent." United We Stand, 359 F.3d at 599 (quoting Goland v. CIA, 607 F.2d 339, 346 (D.C. Cir. 1978)). Failure to heed congressional intent "would force Congress 'either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role.'" Id. (quoting Goland, 607 F.2d at 346). In suits involving congressional documents, consequently, "the first two factors of the standard test" are " effectively dispositive." Judicial Watch, 726 F.3d at 221.

Yet basic analysis reveals that even this formulation is needlessly cumbersome. In truth, the first two factors represent two sides of the same coin: that is, if "Congress has manifested its own intent to retain control, then the agency – by definition – cannot lawfully 'control' the documents." Paisley, 712 F.2d at 693. Conversely, if Congress intends to relinquish its control over the document, then the agency may use it as it sees fit. See id.; see also United We Stand, 359 F.3d at 600 ("Congress's intent to control and the agency's ability to control 'fit together in standing for the general proposition that the agency to whom the FOIA request is directed must have exclusive control of the disputed documents.'") (quoting Paisley, 712 F.2d at 693). The Court's inquiry, therefore, is a streamlined one: do there exist "sufficient indicia of congressional intent to control," id., the Full SSCI Report?

2. *Control of SSCI Report*

Although this case is no slam dunk for the Government, the Court answers that question in the affirmative. In so doing, it focuses on three pieces of evidence: SSCI's June 2009 letter to the CIA, Senator Feinstein's December 2014 letter

transmitting the Final Report, and SSCI's treatment of the Executive Summary.

a. SSCI's 2009 Letter

The Court begins with "the circumstances surrounding the . . . creation" of the Report. United We Stand, 359 F.3d at 600. In its June 2009 letter to the CIA, SSCI expressly stated its intent that the documents it generated during its investigation "remain congressional records in their entirety and disposition," such that "control over these records, even after the completion of the Committee's review," would "lie[] exclusively with the Committee." June 2, 2009, SSCI Letter, ¶ 6. Making its wishes even more explicit, it continued, "As such, these records are not CIA records under the Freedom of Information Act, or any other law." Id.

Such admonitions related to the creation of documents resemble those previously relied on by the D.C. Circuit to sustain an agency withholding. In United We Stand, the Joint Committee on Taxation sent a letter to the Internal Revenue Service requesting specified categories of documents and information. The letter concluded: "This document is a Congressional record and is entrusted to the Internal Revenue Service for your use only." Id. at 600-01. In response, the IRS prepared and sent to the Joint Committee a seventeen-page letter with three attachments. See id. at 597. Some three years later, United We Stand America brought suit under FOIA seeking that response in its entirety. Although the Circuit ultimately deemed some portions subject to disclosure, it held the remaining portions to be congressional records not subject to FOIA. Specifically, it found that the Joint Committee's

originating letter reflected "sufficient . . . intent to control" not only its original request but also those portions of the IRS's subsequent response "that would reveal that request." Id. at 600 (emphasizing the confidentiality directive contained in the Joint Committee's letter). Here, too, Congress's previously expressed intent to retain control over the Report militates heavily in Defendants' favor.

Plaintiff rejoins that the June 2009 letter bears no relevance to the Full Report, as it " applied only to documents residing on the SSCI's network drive at the CIA's secure facility." See Pl. Cross-Mot. & Opp. at 18-19. According to the ACLU, the letter's restrictions "understandably reflected the underlying purpose and spirit of the SSCI-CIA agreement at that time" – *i.e.*, "to protect the SSCI's work product, which was stored on the computer system of the agency it was overseeing." Id. at 19. As Defendants concede, the Final Full Report never resided on that system; although the Committee used the segregated shared drive to draft early versions of its Report, those drafts were ultimately transferred to secure facilities at the U.S. Capitol complex so that SSCI could complete the final drafting process in its own workspaces. See Higgins Decl., ¶ 13.

By its express terms, however, the SSCI-CIA agreement is not so limited. It applies both to "documents generated on the network drive" and to "any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or members." June 2, 2009, SSCI Letter, ¶ 6. That language encompasses the Final Full Report, which by its own title is plainly a "final . . . report[] or other material[]

generated by Committee staff or members." This literal construction is also the more sensible one. While the ACLU is undoubtedly correct that SSCI had FOIA-related concerns arising from its usage of the CIA's network drive, the Committee was presumably also concerned about maintaining control over any public disclosure of its work product – regardless of which computer systems ultimately housed them. The letter's expansive language is consistent with such intent.

One final point bears mention. Defendants' own characterizations of the scope of the letter vary somewhat in their submissions. Compare, e.g., Higgins Decl., ¶ 12 ("One key principle necessary to this inter-branch accommodation . . . was that the materials created by SSCI personnel on [the] segregated shared drive would not become 'agency records' even if those documents were stored on a CIA computer system or at a CIA facility.") (emphasis added), with Def. Reply at 5 (explaining that the language of the June 2009 letter "covers the Full Report" as a "final . . . report[] or other material[] generated by Committee staff or members," even though it did not reside on the network drive). Although these divergent representations are slightly disconcerting, they are ultimately of little consequence. The United We Stand inquiry focuses on "Congress' intent to control (and not on the agency's)." 359 F.3d at 600 (internal quotation marks omitted; emphasis added). The agencies' inconsistency in paraphrasing SSCI's June 2009 letter thus cannot undermine the plain import of the language therein.

b. Senator Feinstein's December 10, 2014, Letter

Undeterred, the ACLU characterizes the 2009 agreement as "irrelevant, indirect evidence of past intent." Pl. Cross-Mot. & Opp. at 18. It insists that any evidence of congressional control "must be contemporaneous with the transmission of the document." Id. at 16. And, according to Plaintiff, "[t]he contemporaneous record is clear that the SSCI relinquished control over the Final Full Report when it sent the report to Defendants . . . in December 2014." Id. at 17.

As its *pièce de résistance*, the ACLU seizes on the December 10, 2014, transmittal letter from Senator Feinstein, claiming it represents "direct evidence of the SSCI's intentions for the Final Full Report." Id. That letter, to recap, states:

> [T]he full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated. To help achieve this result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit.

December 10, 2014, Feinstein Letter. " By encouraging the use and dissemination of the Final Full Report among the executive branch, and by leaving to the executive branch the decision as to

how 'broadly' the report should be used within the agencies," claims Plaintiff, "SSCI relinquished its control over the document." Pl. Cross-Mot. & Opp. at 17-18.

As a threshold matter, the ACLU's attempt to unduly narrow the universe of relevant evidence ignores on-point precedent. The D.C. Circuit specifically rejected an analogous argument in Holy Spirit Association for the Unification of World Christianity v. CIA, 636 F.2d 838 (D.C. Cir. 1980), which likewise dealt with congressional documents in the possession of an agency. Although ultimately holding that the relevant documents constituted agency records, the court there explicitly declared that it was "not adopt[ing] appellant's position that Congress must give contemporaneous instructions when forwarding congressional records to an agency." Id. at 842 (emphasis added). Similarly, in Judicial Watch – which applied the United We Stand inquiry to documents created at the behest of the Office of the President – the court relied heavily on a Memorandum of Understanding executed "well before the creation and transfer of the documents at issue" in that case. See 726 F.3d at 223 & n.20. The Court, therefore, need not confine its consideration to the moment of transmission. On the contrary, SSCI's 2009 letter sets the appropriate backdrop against which Senator Feinstein's 2014 letter can be properly understood.

So teed up, her letter does not evince congressional intent to surrender substantial control over the Full SSCI Report. While it does bestow a certain amount of discretion upon the agencies to determine how broadly to circulate the Report, such

discretion is not boundless. Most significantly, the dissemination authorized by the letter is limited to the Executive Branch alone. It plainly does not purport to authorize the agencies to dispose of the Report as they wish – *e.g.*, to the public at large.

This distinction is critical. Congress "has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules." Goland, 607 F.2d at 346. Yet Congress also "exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress' originating intent." Id.; see also Paisley, 712 F.2d at 694 n.30 (emphasizing Congress's "vital function as overseer of the Executive Branch"). As a result, it frequently transmits documents to the Executive Branch with the understanding that relevant agencies should make appropriate internal use of the information. See Goland, 607 F.2d at 346. Such tender should not be readily interpreted to suggest more wholesale abdication of control. See id. at 347-48 (holding that CIA's possession of congressional hearing transcript "for internal reference purposes" did not convert document to an agency record). Especially here, where SSCI's 2009 letter affirmatively manifests its intent to retain control of its work product, the Court declines to assume the contrary "absent a more convincing showing of self-abnegating congressional intent." Id. at 346.

c. SSCI's Handling of Executive Summary

This conclusion is further reinforced by SSCI's

divergent treatment of the Executive Summary. On April 3, 2014, when the Committee met to determine the proper disposition of the Executive Summary and Full Report, it voted to approve the updated versions of both, but to send only the former to the President for declassification and eventual public release. See Executive Summary at 9; see also, e.g., April 3, 2014, Feinstein Press Release ("The full 6,200-page full report has been updated and will be held for declassification at a later time."). After the Executive Summary underwent further editing, a minimally redacted version was declassified by the Director of National Intelligence and publicly released by SSCI on December 9, 2014. See Higgins Decl., ¶¶ 19-20. In the foreword to the publicly released summary, Chairman Feinstein explained, "I chose not to seek declassification of the full Committee Study at this time. I believe that the Executive Summary includes enough information to adequately describe the CIA's Detention and Interrogation Program. . . . Decisions will be made later on the declassification and release of the full 6,700 page Study." Chairman's Foreword at 3. SSCI's deliberate decision not to publicly release the Full Report, combined with its assertion that it would consider that course of action in the future, serve to further undermine Plaintiff's theory that Congress intended to relinquish control over the document only days later.

d. Remaining Arguments

Given the Court's decision, it need not wrestle with two other arguments Defendants raise – namely, that SSCI's closed sessions and marking of the Full Report "TOP SECRET," as well as now-

Chairman Burr's January 14, 2015, letter seeking return of all copies of the Report, signify abiding congressional control over the document. See Def. Mot. to Dismiss at 16-17, 21. These arguments would not likely gain much traction. See Pl. Cross-Mot. & Opp. at 20 (persuasively arguing on first point that such indicia of confidentiality merely reflect SSCI's acknowledgement of "the CIA's classification decisions . . . with respect to [A]gency documents that form the basis of the Final Full Report" and thus fail to reflect Congress's intent); Holy Spirit, 636 F.2d at 842 (letter from House of Representatives written after transfer of records did not establish congressional control); United We Stand, 359 F.3d at 602 (Congress's "post-hoc objections to disclosure cannot manifest the clear assertion of congressional control that our case law requires."). The Court need not, however, definitively resolve these final points. Even excluding them from the Government's side of the ledger, it has made the requisite showing of congressional intent to retain control.

* * * *

At the end of the day, the ACLU asks the Court to interject itself into a high-profile conversation that has been carried out in a thoughtful and careful way by the other two branches of government. As this is no trivial invitation, it should not be blithely accepted. Absent more convincing evidence that the SSCI Report has "passed from the control of Congress and become property subject to the free disposition of the agenc[ies] with which the document resides," Goland, 607 F.2d at 347, the Court must hold that it remains exempt from disclosure under FOIA. To be sure,

Plaintiff – and the public – may well ultimately gain access to the document it seeks. But it is not for the Court to expedite that process.

B. Panetta Review

The Court now directs its attention to the ACLU's request for the Panetta Review – *i.e.*, the series of "more than forty draft documents" created by the SRT. The CIA maintains that such documents are entirely exempt from disclosure under FOIA Exemption 5's deliberative- process privilege or, in the alternative, that portions of the Review are protected by Exemption 1 (which covers materials classified by Executive Order) and Exemption 3 (which covers materials specifically exempted from disclosure by statute).

1. *Prior Decision*

In the immortal words of Yogi Berra, "It's *déjà vu* all over again." The Court's recent decision in Leopold v. Central Intelligence Agency, No. 14-48, 2015 WL 1445106, at *1 (D.D.C. Mar. 31, 2015), issued while this Motion was pending, addressed precisely this withholding. The plaintiff in that case – journalist Jason Leopold – likewise demanded release of the Panetta Review, and the CIA, in turn, refused, citing Exemptions 1, 3, and 5. See id. at 3-4. Concluding that "Exemption 5 acts as a complete shield" over the contested documents – and that it therefore need not address the other exemptions – the Court granted summary judgment to the Agency. See id. at 6.

In so holding, the Court first outlined the parameters of Exemption 5, which protects from disclosure "documents that would ordinarily be

unavailable to an opposing party through discovery," including those that fall within the deliberative-process privilege. See United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184-85 (D.C. Cir. 1987). To come under that umbrella, documents must be both " 'predecisional'" and "'deliberative.'" Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

Drawing on relevant precedent, the Court found that the Panetta Review met both criteria. The "predecisional" component, it explained, is satisfied where material is "prepared . . . to assist an agency decisionmaker in arriving at his decision," rather than "to support a decision already made." Petroleum Info. Corp. v. Dep't of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992). An agency need not, however, "identify a specific decision to which withheld materials contributed," as the exemption is "aimed at protecting [an agency's] decisional process." Leopold, 2015 WL 1445106, at *9 (internal quotation marks omitted). Observing that the Panetta Review was generated by lower-level employees "to aid senior agency officials' deliberations about how to respond" to SSCI's ongoing investigation into the CIA's former detention and interrogation program, as well as "how to deal with other policy issues that might arise therefrom," the Court found that the CIA had sufficiently defined a forward-looking " decisionmaking process" to which the documents were designed to contribute. Leopold, 2015 WL 1445106, at *4, *9, *11.

It then turned to the "deliberative" prong, which asks whether material "reflects the give- and-

take of the consultative process." Coastal States Gas Corp. v. U.S. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Although Leopold argued that the draft reviews contained " purely factual material" – which ordinarily cannot be withheld under Exemption 5 – the Court explained that such material can be exempt where "it reflects an exercise of discretion and judgment calls" and "where its exposure would enable the public to probe an agency's deliberative processes." Leopold, 2015 WL 1445106, at *6 (internal quotation marks omitted). "[T]he legitimacy of withholding," accordingly, "does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency's deliberative process." Ancient Coin Collectors Guild v. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011).

The Review, found the Court, was compiled in just such fashion. "[I]ntended to facilitate or assist development of the agency's final position on the relevant issue[s]," the drafts were neither "comprehensive, matter-of-fact summaries" nor "rote recitations of facts." Leopold, 2015 WL 1445106, at *8 (internal quotation marks omitted). On the contrary, "the authors strove to write briefing materials that would aid senior officials' decisionmaking," "ma[king] judgments about the salience of particular facts in light of the larger policy issues that senior CIA leaders might face in connection with the SSCI's study" and "organiz[ing] that information in a way that would be most useful to senior CIA officials." Id. (internal quotation marks omitted). In light of the significant discretion exercised by the authors, the Court concluded that

requiring disclosure of the draft reviews would "cause the sort of harm that the deliberative-process privilege was designed to prevent – *i.e.*, inhibiting frank and open communications among agency personnel." Id. at *9. The Panetta Review, consequently, merited protection under the deliberative-process privilege.

The arguments raised by the ACLU in the present suit echo those already rejected by the Court in Leopold. Its attack on the "predecisional" prong, for instance, centers on the claim that the CIA failed to sufficiently identify a decisionmaking process to which the Panetta Review was designed to contribute. See Pl. Cross-Mot. & Opp. at 29-31. Likewise, in claiming that the documents are not "deliberative," it principally argues that the drafts "consist largely or entirely of factual summaries" and are thus subject to disclosure. See id. at 31-37. Plaintiff's rehashing of Leopold's arguments – although at times more developed – is no more persuasive. The Court sees no reason to disturb its prior conclusion: the Panetta Review is properly characterized as both predecisional and deliberative.

2. *Novel Arguments*

The Court will, however, briefly address two ancillary points raised by the ACLU, neither of which the prior Opinion had occasion to consider. First, Plaintiff highlights certain statements made by former Senator Mark Udall, who claims to have read portions of the Review. According to him – notwithstanding the manner in which various CIA officials have characterized it – "the Panetta review is much more than a 'summary' and 'incomplete drafts.'" Pl. Cross-Mot. & Opp., Att. 1 (Declaration of

Ashley Gorski), Exh. A (Senator Mark Udall's December 10, 2014, Floor Speech) at 3. In point of fact, it is "a smoking gun" that "acknowledges significant problems and errors made in the CIA's detention and interrogation program." Id. In particular, says the Senator, the Report concludes that "the CIA repeatedly provided inaccurate information to the Congress, the President, and the public on the efficacy of its coercive techniques." Id. He asserts that "the CIA is lying" about the Report's contents in order to "minimize its significance." Id.

These statements are deeply troubling, to say the least. That a United States Senator believes the CIA is dissembling as to the true nature of the Panetta Review is a heady accusation. The Court notes, however, that Senator Udall's statements on the Senate floor were not a point- by-point rebuttal intended to discredit the declaration submitted by the CIA in this case (or the similar one proffered in Leopold). Instead, his speech was intended to respond more broadly to statements made outside the litigation context by CIA Director John Brennan and other Agency officials, and his allegations must be viewed in that light.

More fundamentally, however, the ACLU's reliance on his statements is noticeably half- hearted. Although its briefing is long on his allegations, it is decidedly short as to the conclusion to be drawn from them. Such reticence is unsurprising. If Senator Udall's statements are correct, they serve to confirm, rather than undermine, the Panetta Review's privileged status. That is, insofar as he asserts that the draft reviews contain analyses and conclusions rather than primarily facts, their deliberative nature

is only bolstered. See Playboy Enterprises, Inc. v. Dep't of Justice, 677 F.2d 931, 937 (D.C. Cir. 1982) ("The report may contain conclusions, recommendations, or opinions . . . . These parts of the report are not subject to disclosure."). His statements thus do little to advance Plaintiff's case.

The ACLU next argues that even if the Panetta Review falls within the ambit of the deliberative-process privilege, the "official-acknowledgment" doctrine precludes the CIA from withholding the documents in their entirety. As Plaintiff notes, "[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007) (internal quotation marks omitted). According to the ACLU, "[I]t is a near certainty that the Panetta report contains information that has been revealed publicly." Pl. Cross-Mot. & Opp. at 39. More specifically, " [a]t least some of the information contained within the Panetta Report documents has almost certainly been officially acknowledged by the CIA in its June 2013 response to the Initial SSCI Report – among other public disclosures – as well as by the SSCI in its publicly released Executive Summary." Id.

Although it may well be that some of the facts contained within the Panetta Review have been otherwise disclosed, the Court does not believe that the official-acknowledgement doctrine has resonance in this case. As courts in this Circuit have recognized, "Even if the information sought is exactly the same as the information which was acknowledged, . . . 'the very fact that a known datum appears in a certain

context or with a certain frequency may itself be information that the government is entitled to withhold.'" Pub. Citizen v. Dep't of State, 787 F. Supp. 12, 14 (D.D.C. 1992) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)). Such is the case here. As the Court's prior Opinion emphasized, the Panetta Review's protection under the deliberative-process privilege derives from the "judgments" its authors needed to make "about the salience of particular facts in light of the larger policy issues that senior CIA leaders might face in connection with the SSCI's study." Leopold, 2015 WL 1445106, at *8. Divulging which facts were culled for inclusion, or even the topics that agency officials selected for the Review, would risk "expos[ure] [of] their internal thought processes." Id. This logic retains its force even if the underlying facts have been otherwise shared with the public, for it is their inclusion in the Review that warrants protection as deliberative. Application of the official-acknowledgement doctrine under the circumstances here thus cannot defeat the CIA's proper invocation of the privilege.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss and the CIA's Motion for Summary Judgment. A contemporaneous Order so stating shall issue this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: May 20, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*, **Plaintiffs,** **v.** **CENTRAL INTELLIGENCE AGENCY, *et al.*,** **Defendants.**	**Civil Action No. 13-1870 (JEB)**

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendants' Motion to Dismiss is GRANTED;
2. The CIA's Motion for Summary Judgment is GRANTED;
3. Plaintiffs' Cross-Motion for Summary Judgment is DENIED; and
4. Judgment is ENTERED in favor of Defendants.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: May 20, 2015

UNITED STATES COURTS OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5183 **September Term, 2015**
1:13-cv-01870-JEB
Filed On: July 13, 2016

American Civil Liberties Union
and American Civil Liberties
Union Foundation,

Appellants

v.

Central Intelligence Agency,
et al.,

Appellees

BEFORE: Tatel and Srinivasan, Circuit Judges; Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellants' corrected petition for panel rehearing filed on June 27, 2016, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

UNITED STATES COURTS OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5183 **September Term, 2015**
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American Civil Liberties Union
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Appellants

v.

Central Intelligence Agency,
et al.,

Appellees

BEFORE: Garland,* Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard,* and Wilkins, Circuit Judges; Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellants' corrected petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken R. Meadows
Deputy Clerk

* Chief Judge Garland and Circuit Judge Pillard did not participate in this matter.

5 U.S.C. § 551

§ 551. Definitions

For the purpose of this subchapter [5 USCS §§ 551 et seq.]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title [5 USCS § 552]--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49 [49 USCS §§ 47151 et seq.]; or sections 1884, 1891-1902, and former section

1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an

agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity,

privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter [5 USCS §§ 551 etc.].

5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case

of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register

when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)

(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall make the index referred to in

subparagraph (E) available by computer telecommunications by December 31, 1999. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records

promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)) [50 USCS § 3003]) shall not make any record available under this paragraph to--

(i) any government entity, other

than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4) (A) (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose

purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working

for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a

request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)

(I) Except as provided in subclause

(II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II) (aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely

written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part

thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed]

(E)

(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief

through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)

(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall

submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member

shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of--

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination--

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days

(excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame

for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related

matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term

"exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this sub-paragraph.

(D)

(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this sub-paragraph may provide a person making a request that does not

qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records-

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration

of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this

paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each

request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8) (A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)

(I) consider whether partial disclosure of information is possible whenever the

agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

UNITED STATES SENATE
SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, D.C. 20510-0504

June 2, 2009

The Honorable Leon Panetta
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Director Panetta:

In a letter dated March 26, 2009, the Senate Select Committee on Intelligence (the Committee) informed the Central Intelligence Agency (CIA) of its intention to conduct a thorough review of the CIA's detention and interrogation program. The letter included terms of reference approved by the Committee, as well as a document request.

To conduct our work in a comprehensive and timely matter, the Committee requires access to unredacted materials that will include the names of non-supervisory CIA officers, liaison partners, black-site locations, or contain cryptonyms or pseudonyms. We appreciate the CIA's concern over the sensitivity of this information. Our staff has had numerous discussions with Agency officials to identity appropriate procedures by which we can obtain the information needed for the study in a way that meets your security requirements. We agree that the

Committee, including its staff, will conduct the study of CIA's detention and interrogation program under the following procedures and understandings:

1. Pursuant to discussions between the Committee and CIA about anticipated staffing requirements, the CIA will provide all Members of the Committee and up to 15 Committee staff (in addition to our staff directors, deputy staff directors, and counsel) with access to unredacted responsive information. In addition, additional cleared staff may be given access to small portions of the unredacted information for the purpose of reviewing specific documents or conducting reviews of individual detainees. These Committee staff have or will have signed standard Sensitive Compartmented Information non-disclosure agreements for classified information in the [redacted] compartment.

2. CIA will make unredacted responsive operational files, as that term is defined in Section 701(b) of the National Security Act of 1947 (50 U.S.C. 431(b)), available at a secure Agency electronic Reading Room facility (Reading Room) which will permit Committee staff electronic search, sort, filing, and print capability.

3. If responsive documents other than those contained in operational files identify the names of non-supervisory CIA officers, liaison partners, or black-site location, or contain cryptonyms or pseudonyms, CIA will provide unredacted copies of those documents at the Reading Room.

4. Responsive documents other than those contained in operational files that do not identity the names of non-supervisory CIA officers, liaison partners, or black-site locations, or contain cryptonyms or pseudonyms will be made available to the Committee in the Committee's Sensitive Compartmented Information Facility (SCIF), unless other arrangements are made.

5. CIA will provide a stand-alone computer system in the Reading Room with a network drive for Committee staff and Members. This network drive will be segregated from CIA networks to allow access only to Committee staff and Members. The only CIA employees or contractors with access to this computer system will be CIA information technology personnel who will not be permitted to copy or otherwise share information from the system with other personnel, except as otherwise authorized by the Committee.

6. Any documents generated on the network drive referenced in paragraph 5, as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee and will be kept at the Reading Room solely for secure safekeeping and ease of reference. These documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee. As such, these records are not CIA

records under the Freedom of Information Act or any other law. The CIA may not integrate these records into its records filing systems, and may not disseminate or copy them, or use them for any purpose without the prior written authorization of the Committee. The CIA will return the records to the Committee immediately upon request in a manner consistent with paragraph 9. If the CIA receives any request or demand for access to these records from outside the CIA under the Freedom of Information Act or any other authority, the CIA will immediately notify the Committee and will respond to the request or demand based upon the understanding that these are congressional, not CIA, records.

7. CIA will prove the Committee with lockable cabinets and safes, as required, in the Reading Room.

8. If Committee staff identifies CIA-generated documents or materials made available in the Reading Room that staff would like to have available in the Committee SCIF, the Committee will request redacted versions of those documents or materials in writing. Committee staff will not remove such CIA-generated documents or materials from the electronic Reading Room facility without the agreement of CIA.

9. To the extent Committee staff seeks to remove from the Reading Room any notes, documents, draft and final recommendations, reports or other materials generated by Committee Members or staff, Committee staff will ensure

that those notes, documents, draft and final recommendations, reports or other materials do not identity the names of non-supervisory CIA officers, liaison partners, or black-site locations, or contain cryptonyms or pseudonyms. If those documents contain such information, Committee staff will request that CIA conduct a classification review to redact the above-referenced categories of information from the materials or replace such information with alternative code names as determined jointly the by Committee and the CIA.

Any document or other material removed from the reading room pursuant to paragraphs 8, 9, or 10 will be stored in the Committee SCIF or transferred and stored on Committee TS//SCI systems, under Committee security procedures.

10. Any notes, documents, drafts and final recommendations, reports or other materials prepared by Committee Members or Staff based on information accessed in the Reading Room will be prepared and stored on TS//SCI systems. Such materials will carry the highest classification of any of the underlying source materials. If the Committee seeks to produce a document that carries a different classification than the underlying source material, the Committee will submit that document to CIA, or if appropriate to the DNI, for classification review and, if necessary, redaction.

11. The Reading Room will be available from 0700 to 1900 hours, official government business days, Monday through Friday. If Committee staff requires additional time or weekend work

is required, Committee staff will make arrangements with CIA personnel with as much advance notice as possible.

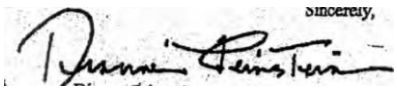
12. The Committee will memorialize any requests for documents or information in writing and CIA will respond to those requests in writing.

13. All Committee staff granted access to the Reading Room shall receive and acknowledge receipt of a CIA security briefing prior to reviewing CIA documents at the Reading Room.

We anticipate that agreement to these conditions will address your concerns about Committee access to unredacted materials responsive to the Committee's document request. We look forward to immediate staff access to those materials.

In addition, we expect that the discussions and agreements over access to the study information are a matter restricted to Congress and the Executive branch. As such, neither this letter nor derivative documents may be proved or presented to CIA's liaison partners.

Sincerely,



Dianne Feinstein
Chairman

Christopher S. Bond
Vice Chairman

SSCI# 2012- 4511

UNITED STATES SENATE
SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

December 14, 2012

The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

I am pleased to inform you that the Senate Select Committee on Intelligence has completed its study of the CIA's former detention and interrogation program, and has produced a 6,000 page report, complete with an executive summary, findings, and conclusions. Yesterday, the Committee approved the report by a vote of 9-6. I will be providing a copy of the report for your review as it involves the implementation of a program conducted under the authority of the President.

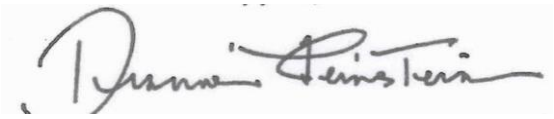
This review is by far the most comprehensive intelligence oversight activity ever conducted by this Committee. We have built a factual record, based on more than six million pages of Intelligence Community records. Facts detailed in the report are

footnoted extensively to CIA and other Intelligence Community documents. Editorial comments are kept to a minimum, clearly marked, and included to provide context. We have taken great care to report the facts as we have found them.

I am also sending copies of the report to appropriate Executive Branch agencies. I ask that the White House coordinate any response from these agencies, and present any suggested edits or comments to the Committee by February 15, 2012. After consideration of these views, I intend to present this report with any accepted changes again to the Committee to consider how to handle any public release of the report, in full or otherwise.

The report contradicts information previously disclosed about the CIA detention and interrogation program, and it raises a number of issues relating to how the CIA interacts with the White House, other parts of the Executive Branch, and Congress. Recognizing the many important issues before you, I urge you to review or get briefed on the report as soon as possible. I will be pleased to make myself, and staff, available to discuss the report at your convenience.

Sincerely Yours,



Dianne Feinstein
Chairman

cc: Mr. Michael Morell, Acting Director, Central Intelligence Agency
The Honorable James Clapper, Director of National Intelligence
The Honorable Eric Holder, Attorney General
The Honorable Leon Panetta, Secretary of Defense
The Honorable Hillary Clinton, Secretary of State

UNITED STATES SENATE
SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

April 7, 2014

The Honorable Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President,

I am pleased to inform you that the Senate Select Committee on Intelligence has voted to send for declassification the Findings and Conclusions and Executive Summary of an updated version of the Committee's Study of the CIA's Detention and Interrogation Program. Both are enclosed. I request that you declassify these documents, and that you do so quickly and with minimal redactions. If Committee members write additional or minority views that they wish to have declassified and released as well, I will transmit those separately.

As this report covers a covert action program under the authority of the President and National Security Council, I respectfully request that the White House take the lead in the declassification process. I very much appreciate your past statements

– and those of your Administration – in support of declassification of the Executive Summary and Findings and Conclusions with only redactions as necessary for remaining national security concerns. I also strongly share your Administration's goal to "ensure that such a program will not be contemplated by a future administration," as your White House Counsel wrote in a February 10, 2014, letter.

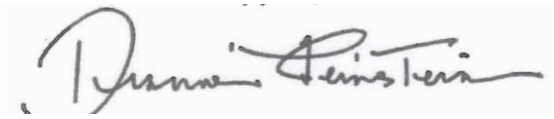
In addition to the Findings and Conclusions and Executive Summary, I will transmit separately copies of the full, updated classified report to you and to appropriate Executive Branch agencies. This report is divided into three volumes, exceeds 6,600 pages, and includes over 37,000 footnotes, and updates the version of the report I provided in December 2012. This full report should be considered as the final and official report from the Committee. I encourage and approve the dissemination of the updated report to all relevant Executive Branch agencies, especially those who were provided with access to the previous version. This is the most comprehensive accounting of the CIA's Detention and Interrogation Program, and I believe it should be viewed within the U.S. Government as the authoritative report on the CIA's actions.

As I stated in my letter to you on December 14, 2012, the Committee's report contradicts information previously disclosed about the CIA Detention and Interrogation Program, and it raises a number of issues relating to how the CIA interacts with the White House, other parts of the Executive Branch, and Congress. I ask that your Administration declassify the Findings and

Conclusions and Executive Summary of this updated report as soon as possible. I also look forward to working with you and your Administration in discussing recommendations that should be drawn from this report.

Thank you very much for your continued attention to this issue.

Sincerely Yours,



Dianne Feinstein
Chairman

Enclosures: as stated

cc: The Honorable James Clapper. Director of National Intelligence
The Honorable John Brennan, Director, Central Intelligence Agency
The Honorable Eric Holder, Attorney General
The Honorable Chuck Hagel, Secretary of Defense
The Honorable John F. Kerry, Secretary of State

SSCI: # 2014-3514

UNITED STATES SENATE
SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

December 10, 2014

The Honorable Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President,

Yesterday the Senate Select Committee on Intelligence formally filed the full version of its Study of the Central Intelligence Agency's Detention and Interrogation Program with the Senate and publicly released the declassified Executive Summary and Findings and Conclusions, as well as the declassified additional and minority views.

The full and final report is enclosed with this letter. It is divided into three volumes, exceeds 6,700 pages, and includes over 37,700 footnotes.

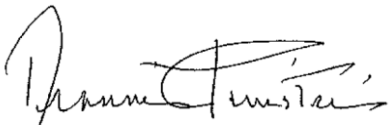
As you said publicly on August 1, 2014, the CIA's coercive interrogation techniques were techniques that "any fair-minded person would believe were torture," and "we have to, as a country,

take responsibility for that so that, hopefully, we don't do it again in the future."

I strongly share your goal to ensure that such a program will not be contemplated by the United States ever again and look forward to working with you to strengthen our resolve against torture. Therefore, the full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated. To help achieve that result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit.

Thank you very much for your continued attention to this issue.

Sincerely Yours,



Dianne Feinstein
Chairman

cc: The Honorable James Clapper, Director of National Intelligence
The Honorable John Brennan, Director, Central Intelligence Agency
The Honorable Eric Holder, Attorney General
The Honorable Chuck Hagel, Secretary of Defense
The Honorable John F. Kerry, Secretary of State
The Honorable James B. Comey, Director, Federal Bureau of Investigation
The Honorable David Buckley, CIA Inspector General