

## The CIA torture report belongs to the public

The American public's ability to read the Senate Intelligence Committee's full, scathing report on the Central Intelligence Agency's torture program is in danger because David Ferriero, the archivist of the United States, will not call the report what it is, a federal record. He is refusing to use his clear statutory authority to label the report a federal record, which would be subject to Freedom of Information Act (FOIA) disclosure requirements, because the Justice Department has told the National Archives and Records Administration (NARA) not to. The DOJ has a long history of breaking the law to avoid releasing information in response to FOIA requests. The NARA does not have such a legacy and should not allow itself to be bullied by the DOJ.

The DOJ instructed the NARA not to make any determination on the torture report's status as a federal record, ostensibly because it would jeopardize the government's position in a FOIA lawsuit seeking the report's release. The DOJ, however, has no right to tell the NARA not to weigh in on the record's status, and the Presidential and Federal Records Act Amendments of 2014 gives the archivist of the United States the binding legal authority to make precisely that determination.

Democratic Sens. Patrick Leahy of Vermont and Dianne Feinstein of California revealed the DOJ's insistence that the archivist of the United States not faithfully fulfill his duty in a Nov. 5, 2015, letter to Attorney General Loretta Lynch. They protested the DOJ's refusal to allow its officials as well as those of the Defense Department, the CIA and the State Department to read the report. Leahy and Feinstein's letter notes that "personnel at the National Archives and Records Administration have stated that, based on guidance from the Department of Justice, they will not respond to questions about whether the study constitutes a federal record under the Federal Records Act because the FOIA case is pending." Rather than try to win the FOIA case on a technicality and step on the NARA's statutory toes, the DOJ should allow the FOIA review process to determine on the case's merits whether the document may be released.

Not even officials with security clearances may read the document while its status as a congressional or federal record is debated. The New York Times reported in November 2015 that in December of the previous year, a Senate staffer delivered envelopes containing the 6,700-page top secret report to the DOJ, the State Department, the Federal Bureau of Investigation and the Pentagon. Yet a year later, none of the envelopes had been opened, and none of the country's top officials had read the report's complete findings. This is because the DOJ, the Times wrote, "prohibited officials from the government agencies that possess it from even opening the report, effectively keeping the people in charge of America's counterterrorism future from reading about its past." The DOJ contends that if any agency officials read the report, it could alter the outcome of the FOIA lawsuit.

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The Federal Records Act clearly defines what does and does not constitute a federal record. It notes that all records "made or received by an agency of the United States government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government" are federal records. Steven Aftergood of the Federation of American Scientists notes that "all of the evidentiary material on which the report is based originated in the executive branch anyway."

There is a sad irony in the possibility of the Senate report remaining locked away in congressional vaults, never to be read. Feinstein initiated the report after learning that Jose Rodriguez, the former CIA official in charge of the agency's defunct torture program, authorized the destruction of 92 video recordings of suspected Al-Qaeda leader Zain Abidin Mohammed Husain Abu Zubaydah being waterboarded 83 times in one month at a black site prison in 2005.

Rodriguez justified the destruction by writing that "the heat from destroying [the torture videos] is nothing compared to what it would be if the tapes ever got into the public domain." The Senate's torture report was an attempt to right his grievous wrong and preserve the lessons from the sordid program for posterity. But now agency politics may bury all the good and necessary work that the Senate Intelligence Committee did to present a history of our nation's use of torture, its efficacy and its consequences.

Unfortunately, in this instance it looks as though the NARA is content to abdicate its responsibility to preserve and maintain federal records and its statutory independence for the sake of placating the DOJ and allow the report to slip into obscurity — a fate that would delight Rodriguez and other orchestrators of the torture program.

The report should not. The archivist of the United States should place public interest and the NARA's mission, according to its website, to "drive openness, cultivate public participation and strengthen our nation's democracy through public access to high-value government records" above the DOJ's maneuvering and definitively state the obvious: The Senate report on the CIA's torture program is a federal record subject to FOIA review.

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The views expressed in this article are the author's own and do not necessarily reflect Al Jazeera America's editorial policy.