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29 April 2016

The Honorable Dianne Feinstein
The Honorable Patrick Leahy
United States Senate
Washington, DC 20510

Dear Senator Feinstein and Senator Leahy:

I write in response to your letter dated April 13, 2016, concerning the Report of the Senate Select Committee on Intelligence (SSCI) on the CIA's Detention and Interrogation Program. You have asked me to "affirm" that this Senate Report is a federal record in accordance with the authority in the Federal Records Act (FRA) that now allows me to make a binding "determination whether recorded information . . . is a record" as defined in the FRA. 44 U.S.C. § 3301. I greatly appreciate your concern about the importance of the FRA and its proper application by the National Archives and Records Administration (NARA). I also understand the importance that you place on the Senate Report.

As you know, my staff has had regular communication for the past year with Senator Feinstein's staff about this issue. They have explained that, based on conversations with the U.S. Department of Justice (DOJ), NARA has refrained from interceding in this matter because the issue is the subject of ongoing litigation. As is routine with respect to any issue that is being litigated, we have coordinated with litigation counsel at DOJ handling the pending court case.

My staff also noted in their communications with Senator Feinstein's staff that, as a general matter, the determination of record status under the FRA and the Freedom of Information Act (FOIA), while not identical, is similar. Both statutes afford the possibility that an agency could accept physical receipt of a document but maintain it in such a

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manner so that the agency does not acquire legal custody for purposes of either the FRA or the FOIA.

It is also important to clarify that the authority established under 44 U.S.C. § 3301(b) is for the Archivist to make a "determination" based on an independent analysis of the information in question. Accordingly, it would not be appropriate for me to have a pre-disposed viewpoint in any particular case as to whether recorded information is or is not a federal record.

Again, I greatly appreciate your interest in the work that NARA does pursuant to the Federal Records Act.

Sincerely,

A handwritten signature in black ink, appearing to read "D. S. Ferriero", with a stylized flourish at the end.

DAVID S. FERRIERO
Archivist of the United States

cc: The Honorable Loretta Lynch, U.S. Attorney General