

## Torture Report Accessibility

THE TRUMP ADMINISTRATION has begun to return copies of the Senate Intelligence Committee's report on the CIA's post-9/11 torture program. The move is a significant setback to efforts to shine a light on one of the darkest chapters in recent American history.

Why does it matter? Because even though the American people have seen a declassified version of the report, the committee also sent members of the administration the full, 6,700-page classified report presumably so that the people with the appropriate security clearance could learn from [the important information on the institutional and operational failures](#) documented therein.

Now they're giving the report back. And that means they'll never learn the lessons it contains. If they don't have the report they can't read it.

In early 2015 Senator Richard Burr (R-NC) asked the Executive Branch to return copies of the report when he became Chairman of the Intelligence Committee, but the Obama Administration refused the request. And in December 2016 the Obama Administration decided to archive a copy of the report. That copy, however, will not become available for public viewing for at least 12 years.

As the CIA and other Executive Branch agencies return their copies of the torture report to Congress, there is a question as to whether they will be able to access the copy of the report preserved in Obama's presidential records.

### **The short answer is no.**

Any Executive Branch agency that has returned its copy of the torture report to Congress would need President Trump or a subsequent president to

request President Obama's preserved copy of the report to access it. Additionally, the incumbent president would only be able to obtain the Obama copy if they could show that the report was "needed for the conduct of current business of the incumbent President's office and that [it] is not otherwise available." There is no way for an agency to independently obtain Obama's preserved copy of the torture report.

According to the [Presidential Records Act](#), a currently sitting president can request access to restricted documents in a former president's records under certain circumstances. This is controlled specifically by 44 U.S.C. §2205.2.B which states, "Presidential records shall be made available... to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available." So, President Trump or a successor can only gain access to the Obama copy if they can show that it is relevant to their current work.

Although the text of §2205 specifies only that the incumbent president may access the restricted records—thus leaving it legally unclear as to how liberally the president can share the restricted material—the Archivist of the United States explained in a [statement](#) to Congress in 2001 that, "[t]he incumbent President may also obtain access to the records of a predecessor on behalf of his staff, such as the NSC, or any other agency."

Finally, affected parties can attempt to block any §2205 exception by arguing, "rights, defenses, or privileges" at common law, but in this case it is doubtful that any party could successfully bring such a claim against a sitting president. First, it is unclear

here what claim might exist and, even if one were brought, everyone who is implicated in the report—the CIA, the Department of Defense, and White House staff—compose parts of the Executive Branch over which the president is chief. In this case, the report would be used by the president for executive purposes and the material would remain confidential.

Furthermore, the fact that multiple copies of the report were previously given to the Executive Branch, and held by it, would presumably negate any claim of confidentiality from any party as the executive is already privy to the information.

Below are the current whereabouts of the Senate Intelligence Committee’s torture report, as of June 3, 2017, based on reporting from the [New York Times](#) and [CNN](#):

#	Recipient	Status
1	Senate Intelligence Committee	Original, in Congress
2	CIA	Returned to Congress
3	CIA Inspector General	Returned to Congress
4	FBI	Returned to Congress
5	Office of Director of National Intelligence	Returned to Congress
6	Department of State	Returned to Congress
7	Department of Justice	Held by the Federal District Court for DC
8	Department of Defense	Held by the DOD under <u>Court Order</u>
9	Obama Presidential Record	Held by Nat'l Archives and Records Adm.