[ORAL ARGUMENT SCHEDULED FOR MARCH 17, 2016]

No. 15-5183

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Appellants,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PLAINTIFFS–APPELLANTS

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GLOSSARY

ACLU	American Civil Liberties Union
CIA	Central Intelligence Agency
Final Report	SSCI, *Committee Study of the CIA's Detention and Interrogation Program*, Dec. 3, 2014
FOIA	Freedom of Information Act
Initial Report	SSCI, *Committee Study of the CIA's Detention and Interrogation Program*, Dec. 3, 2012
SSCI	Senate Select Committee on Intelligence

SUMMARY OF THE ARGUMENT

Under this Circuit's precedent, when Congress authors a document and transmits it to an agency, it is presumptively an agency record subject to FOIA. This presumption is overcome only if an agency can prove that Congress *clearly* asserted control over the document. Given the undisputed record in this case, Defendants cannot meet their burden.

Defendants point to several purported indications of congressional control, but none of them have any relevance to the SSCI's intent for the Final Report. Defendants first contend that the SSCI's June 2009 letter, which established restrictions on the CIA's access to SSCI documents stored at an agency facility, shows congressional control over all final reports by the SSCI. But on its face, the letter applies only to documents at the CIA facility, and it is undisputed that the Final Report was not one of these documents. Defendants next argue that the SSCI's marking of the Final Report as "Top Secret" and meeting in closed session to discuss it indicate congressional control. However, these indicia of confidentiality merely reflect the SSCI's acknowledgment of *executive-branch* classification decisions, and do not reflect the SSCI's intent to control the Final Report.

Nor do any of the circumstances surrounding the transmission of the Final Report constitute a clear assertion of congressional control. Defendants contend

that Congress's intent to control the draft Initial Report in 2012 applies with equal force to the Final Report in 2014. Yet this argument is based on Defendants' improper conflation of the two documents as the "Full Report." That the SSCI asserted control over its draft Initial Report only underscores its failure to do so for the Final Report.

Defendants also contend that the SSCI's initiation of the executive-branch declassification process for the Executive Summary but not the Final Report is "significant." It is not. Both Defendants' argument and the district court's reasoning confuse "classification" with "congressional control," and the lack of a SSCI vote to ask the executive branch to declassify the Final Report is simply irrelevant.

Because Defendants have no basis to argue that Senator Feinstein's transmittal of the Final Report to them was improper, they instead contend that the transmittal should not "override" the full SSCI's intent to control the Final Report. But critically, Defendants have not satisfied their burden to show that the full SSCI ever intended to control the document. Furthermore, the Committee was on notice that the Full Report would be transmitted to the executive branch, and there is no evidence in the record that any SSCI member objected.

Finally, Defendants draw a false equivalency between Senator Feinstein's legitimate transmittal of the Final Report and Senator Burr's post-hoc clawback,

arguing that the first is somehow canceled out by the second. This is not so. Under the law of this Circuit, Senator Burr's post-hoc assertion of control is irrelevant to the agency record analysis.

ARGUMENT

DEFENDANTS FAIL TO MEET THEIR BURDEN TO SHOW A "CLEAR ASSERTION" OF CONGRESSIONAL CONTROL OVER THE FINAL REPORT.

A. Defendants bear the burden of proving that the SSCI clearly asserted control over the Final Report.

This Circuit's case law is clear: when a document—like the Final Report—is authored by Congress and transmitted by it to agencies, the document is presumptively an agency record subject to FOIA. *See* Pls.' Br. 20–21; *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); *see also Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 221 (D.C. Cir. 2013) (collecting cases).[1] Indeed, the parties agree

[1] Defendants do not dispute that they acquired the Final Report in the legitimate conduct of their official duties. *See* Defs.' Mot. Dismiss at 11–12, ECF No. 39; *see also* Pls.' Br. 19 (applying the Supreme Court test for agency control of a record and citing *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989)). As both parties note, this Court has refined its agency-control test for a congressionally authored document to focus on congressional, as opposed to agency, intent to control. *See Judicial Watch*, 726 F.3d at 221 (where Congress's

that such a document is excepted from FOIA only when agencies can prove that Congress has *clearly* asserted control over it. *See* Defs.' Br. 22–23.

Defendants bear the burden of proving clear congressional intent to control such a document even if—like the Final Report—it contains sensitive information, and even if it is the product of a congressional investigation.[2] For example, in *Paisley*, the FOIA requester sought documents related to her husband, a former CIA employee who died under mysterious circumstances. 712 F.2d at 689. The SSCI, through its investigation of the matter, had authored several of the documents the requestor sought. *Id.* at 694 n.32. The defendant agencies in *Paisley* argued that the SSCI had asserted control over these documents, pointing to four letters that, according to the agencies, indicated "the Committee's desire to prevent release without its approval of any documents generated by the Committee or by

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intent to control is clearly and affirmatively expressed, policy factors weigh in favor of deference to that intent). To the extent that Defendants argue that "special considerations" of separation of powers provide a separate justification for treating the Final Report as a congressional record, *see* Defs.' Br. 21–22, this argument should be rejected as unnecessary and contrary to precedent, because this Court's agency record test is already drawn to accommodate these considerations. *See Judicial Watch*, 726 F.3d at 221.

[2] Although Defendants recite the proper legal standard, *see*, *e.g.*, Defs.' Br. 22, they at times inaccurately suggest that it is the ACLU's burden to show that the entire SSCI affirmatively relinquished control over the Final Report. For example, Defendants argue that "the act of sharing information as part of congressional oversight does not equate to an intent to render congressional documents subject to the FOIA." *Id.* at 37–38 & n.9. But under well-established precedent, Plaintiffs need not show that the SSCI intended to make the Final Report subject to the FOIA. *See* Pls.' Br. 18, 20–21.

an intelligence agency in response to a Committee inquiry." *Id.* at 695. However, this Court held that because these and other congressional letters did not evince a "*specific*" and "*contemporaneous*" intent to control, Congress's intent was not "clear," and the documents were agency records subject to FOIA. *Id.* at 694–95 (emphases in original). Thus, if an agency legitimately possesses a congressionally authored document, only a clear assertion of congressional control can overcome the presumption of agency control.

Here, there is no question that the Final Report was legitimately transferred to Defendants and is legitimately in their possession. *See infra* section C.3 (Defendants do not—and cannot—contend that Senator Feinstein's transmittal of the Final Report was unauthorized). The question, then, is whether Defendants have satisfied their burden to show a clear and specific assertion of congressional control. As discussed below, the undisputed record contains no such assertion, and the Final Report is an agency record.

B. The circumstances surrounding the creation of the Final Report do not constitute a clear assertion of congressional control.

1. The SSCI's June 2009 letter does not relate to the Final Report.

Defendants argue that "case law confirms that the restrictions laid out in the Senate Committee's [June 2009] letter establish the congressional control necessary to make a record exempt from FOIA." Defs.' Br. 24. But none of the cases cited by Defendants address the critical question here: whether the June 2009

letter, which established restrictions on CIA access to SSCI documents stored at an agency facility, in fact encompasses the Final Report.[3] That question is answered by the plain text of the letter itself. *See* June 2009 Letter ¶¶ 6, 9, JA 93–94. As the ACLU has explained, because the June 2009 letter does not cover the Final Report, it has no relevance to the agency record analysis. *See* Pls.' Br. 24–27.

Defendants' arguments to the contrary are based on a fundamental misinterpretation of the letter, reflected in their selective quotations from it. *See* Defs.' Br. 27–28; Op. at 15–16, JA 155–56. Rather than quote the relevant portion of the letter—paragraph 6—in its entirety, Defendants omit and obscure key text from this paragraph. *See id.* The paragraph states:

> 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 purposes without the

[3] If anything, these cases stand for the proposition that courts carefully scrutinize the text of any purported assertion of congressional control. *See* Defs.' Br. 24–26. If the text fails to reflect a clear and specific intent to maintain control, it does not overcome the presumption that a document has become an agency record. *See United We Stand*, 359 F.3d at 601 (analogizing the interpretation of a congressional letter to statutory interpretation); *Paisley*, 712 F.2d at 694–95.

> 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, JA 93–94 (emphases added). Yet, eliding over and misconstruing the critical passages, Defendants contend that the SSCI's assertion of control extended to *any* "final . . . reports." Defs.' Br. 27. Read in its entirety and in context, however, paragraph 6 is clear that the SSCI sought to control only those documents that were either (i) stored on the SSCI's network drive at the CIA facility, or (ii) otherwise "kept at the Reading Room."

It is undisputed that the Final Report was neither stored on the network drive nor kept at the Reading Room. In the proceedings below, Defendants conceded the Final Report was never saved to the SSCI's network drive. *See* Defs.' Mot. Dismiss at 4–5, ECF No. 39; Higgins Decl. ¶¶ 12–14, JA 59–61. And they offered no evidence that the SSCI ever stored the Final Report at the Reading Room. Indeed, Defendants explained that the SSCI transferred portions of its draft out of the CIA facility to "complete the drafting process in its own workspaces." Defs.' Mot. Dismiss at 4–5.

Even if the Court were to conclude that the text of the June 2009 letter is ambiguous, this ambiguity must "redound to the benefit of" the ACLU. *Judicial Watch*, 726 F.3d at 220. And even if the Court were to conclude that the letter does somehow encompass the Final Report, the letter is not dispositive because the

evidence contemporaneous with the transmittal of the Final Report in December 2014 is far more probative of Congress's intent. *See Paisley*, 712 F.2d at 694; Pls.' Br. 30–31 & nn. 14–15. Although the "circumstances attending the document's generation" may be relevant to an agency record analysis, in this case, the circumstances surrounding the drafting of the SSCI's internal work product in 2009—inside a CIA facility—are in no way probative of the SSCI's intent for the Final Report in 2014, when it affirmatively encouraged multiple executive branch officials to disseminate the document broadly. *Goland v. CIA*, 607 F.2d 339, 347–48 & n.48 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979); *see also* Pls.' Br. 30–31.

2. The SSCI's efforts to preserve the confidentiality of the report reflect executive-branch classification decisions, not congressional control.

Because the June 2009 letter is irrelevant, it is not "buttressed" by the SSCI's procedures to "preserve confidentiality when discussing, voting on, and handling the report." Defs.' Br. 28. Even if the letter were relevant, the SSCI's efforts to preserve the confidentiality of its work product and the Final Report are not. These measures were the result of the executive branch's own classification decisions—not the SSCI's. Defendants point to the access restrictions on the face of the Final Report, but these merely reflect the SSCI's acknowledgement of executive branch classification; they do not evince independent congressional

control over the document. *See* Pls.' Br. 32–34. Likewise, the fact that Congress met in closed session to discuss the report—which, again, contained material classified by the executive branch—cannot constitute a clear assertion of congressional control. *See id.*; *see also* Op. at 20, JA 160 (recognizing that the ACLU "persuasively" argued that these indicia of confidentiality reflect the *CIA's* classification decisions—not Congress's intent for the document).

For similar reasons, *Goland* offers no support for Defendants' argument. *See* Defs.' Br. 29. In that case, Congress relied on its *own* powers to classify a transcript of its own hearing—and that document could be declassified only by Congress. *Goland*, 607 F.2d at 343, 346–48. As a result, this Court accepted that certain "indicia of a congressional purpose to ensure secrecy," such as the fact that the transcript was marked as "Secret," were evidence of a congressional intent to maintain control over the document. *Id.* at 348 n.48. But unlike the agencies in *Goland*, Defendants here made no showing that the SSCI relied on its own authority to designate the Final Report as classified. If the SSCI had done so, then *only the SSCI* would have the power to declassify the document for public release. But the CIA has argued precisely the opposite. *See* Higgins Decl. ¶ 15, ECF No. 17-2, JA 21 ("the Executive Branch does not consider SSCI's control over the document to extend to control over the classification of the information therein").

Thus, the SSCI's measures to preserve the confidentiality of the Final Report do not constitute a clear assertion of *congressional* control over the document.[4]

C. The circumstances surrounding the transmission of the Final Report do not constitute a clear assertion of congressional control.

1. That the SSCI imposed transmittal conditions in 2012 but not 2014 shows that Congress did not assert control over the Final Report.

Defendants contend that Congress's assertion of control over the Initial Report in 2012 applies with equal force to the Final Report in 2014. *See* Defs.' Br. 16–17 ("These limitations [applied by Congress in 2012] manifest an intent to continue congressional control of the [Final] Report."); *id.* at 30–31. But this argument fails on several grounds.

First, the Initial Report and Final Report are different documents, sent to the executive branch two years apart and for very different purposes. Senator Feinstein's December 2012 letter, transmitting the draft Initial Report, specifically stated that the SSCI sought "suggested edits or comments" from the executive branch. Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 14, 2012, JA 127. By contrast, Senator Feinstein's December 2014 letter specifically stated

[4] Accordingly, Defendants' characterization of the Final Report as a "sensitive, highly classified" document has no bearing on the agency record analysis. Defs.' Br. 1, 39. As Defendants know, *see id.* at 14–15, it is only after an agency processes a record and asserts withholdings under 5 U.S.C. § 552(b)(1), the FOIA exemption for properly classified information, that courts adjudicate whether any such assertion is in fact proper.

that she was transmitting the official, "full and final" report, which had been "formally filed" with the Senate, for executive branch use and dissemination as it "see[s] fit." Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 10, 2014, JA 133. Yet Defendants muddle these critical distinctions by referring to both documents as the "Full Report." *See* Defs.' Br. 30–31.

Second, and relatedly, Defendants' argument is belied by the CIA's own declarations, which describe in detail how the SSCI imposed access restrictions on the Initial Report in 2012 that it did not impose on the Final Report in 2014. *See* Higgins Decl. ¶¶ 10–11, 14, ECF No. 17-2, JA 18–19, 20; Higgins Decl. ¶¶ 15, 23, ECF No. 39-1, JA 61, 64–65; Ex. E to Higgins Decl., ECF No. 39-1, JA 98 (limiting dissemination of the Initial Report to specific individuals identified in advance to the Chairman). Indeed, the very fact that the SSCI declined to impose these restrictions in 2014 shows that the Committee *relinquished* control over the Final Report.

Third, insofar as Defendants are arguing that a "consistent course of dealing" with Congress reflects clear congressional control, the Court has rejected this argument. *United We Stand*, 359 F.3d at 602 (rejecting as "too general" the argument that Congress, based on its consistent course of dealing with an agency, "expected that communications between it and the agency would remain confidential").

2. That Congress did not seek to declassify the Final Report for public release is irrelevant.

Defendants assert that the SSCI's initiation of the declassification process for the Executive Summary but not the Final Report is "significant." Defs.' Br. 31–33.[5] But Defendants' argument is predicated entirely on the improper conflation of "classification" and "congressional control." For the same reasons that the lack of a Committee vote concerning declassification of the Final Report is irrelevant, *see* Pls.' Br. 35–36, the "'divergent treatment'" of the Executive Summary and Final Report is irrelevant as well. Defs.' Br. 31 (quoting Op. at 19, JA 159).

For the agency record analysis, the question is not whether Congress asked the executive branch to declassify the document for broad release to the public, but instead, whether Congress clearly asserted control over the document vis-à-vis the agencies. *See* Pls.' Br. 32. Yet Defendants fail to grapple with this basic proposition. *See* Defs.' Br. 32–33. Taken to their logical conclusion, Defendants' arguments and the district court's reasoning result in a novel "political declassification" requirement—such that any document authored by Congress, possessed by an agency, and containing information classified by the *executive branch* is a congressional record, unless and until Congress pursues executive-

[5] Defendants' reliance on *Holy Spirit* and *Paisley* for this proposition, *see* Defs.' Br. 32, is misplaced. Neither case suggests that Congress's initiation of the *executive branch* declassification process for one document has any relevance to Congress's intent to control a separate document.

branch declassification and public release. *See id.* at 32–35. As the ACLU has explained, to require Congress to initiate the executive-branch declassification process in order to relinquish control over a record would create an improper double-counting in FOIA, and would lead to absurd results. *See* Pls.' Br. 32, 35–36. Because Defendants' declassification argument is at odds with case law, common sense, and the purposes of FOIA, the fact that the SSCI voted to ask the executive branch to declassify one document and not another does not dictate the status of the Final Report. *See id.* at 35–36.

Defendants also err in arguing that because the December 2014 transmittal letter does not specifically authorize the agencies to disseminate the Final Report to the public, the agencies are not free to use the document as they see fit. Defs.' Br. 35–36. That argument reads into the letter's language an unmerited restriction that Defendants themselves create. Moreover, Defendant CIA takes the position that the SSCI does not control the classification of the information within the Final Report, *see* Higgins Decl. ¶ 15, ECF No. 17-2, JA 21, so the SSCI would be unable to direct Defendants to release the document publicly. Critically, nothing in the December 2014 transmittal letter limits the ability of the executive branch to undertake the declassification process, or even suggests that the SSCI would have the power to do so itself. *See* Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 10, 2014, JA 133. Finally, the mere fact that the SSCI retains the

ability to ask the executive branch to initiate a declassification process cannot constitute a clear assertion of control—particularly because the SSCI's ability to seek declassification is not unique to it. *See* Pls.' Br. 35; Exec. Order No. 13,526 § 3.5(a), 75 Fed. Reg. 707 (Dec. 29, 2009); 32 C.F.R. § 1908.01. Thus, as far as the SSCI is concerned, Defendants are free to use and dispose of the Final Report as they see fit—subject, of course, to any restrictions flowing from the executive branch's own classification decisions.

3. The transmittal of the Final Report was proper.

It is undisputed that the agencies acquired the Final Report in the "legitimate conduct of [their] official duties," *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989), and that transmittal of the Final Report to the agencies was authorized under the SSCI's own rules. In particular, Senate Intelligence Committee Rule 9.7 allows SSCI members and staff to disclose classified information to persons in the executive branch without prior approval, provided that several conditions are satisfied. One of these conditions is that "Committee members and staff who provide the information must be engaged in the routine performance of Committee legislative or oversight duties"—and Defendants notably do not suggest that Senator Feinstein was in violation of this rule when she

signed a transmittal letter as the SSCI Chairman and transferred the Final Report. Senate Intelligence Committee Rule 9.7, *available at* http://1.usa.gov/1H3Exz7.[6]

With no basis to argue that Senator Feinstein's transmittal of the Final Report was improper, Defendants instead contend that the transmittal should not "override" or "short-circuit" the full SSCI's intent to control the Final Report. Defs.' Br. 17, 34. But Defendants' argument wrongly assumes that they have satisfied their burden to show that the SSCI actually expressed a clear intent to control this document—and they have not. The full SSCI never asserted control over the Final Report, and as discussed below, Senator Burr's post-hoc attempt to claw back the document is irrelevant to this Court's analysis. Moreover, the record is clear that all SSCI members were on notice that the Final Report—a high-profile document that resulted from a years-long and critically important SSCI

[6] Defendants are wrong that, "[u]nder the ACLU's interpretation, the actions of a single staff member sharing information with an Executive Branch agency would be sufficient to relinquish control over a sensitive document on behalf of the entire Congress as long as the sharing was permitted by a committee rule." Defs.' Br. 38 n.9. First, this sharing would never be "sufficient" to relinquish control if Congress otherwise clearly asserts its intent to control a particular document. This is not an insurmountable hurdle: the SSCI well knows how to express its intent to control its documents, as evidenced in this case by its June 2009 letter, as well as the circumstances surrounding the transmittal of the Initial Report. *See, e.g.*, Ex. E to Higgins Decl., ECF No. 39-1, JA 98 (limiting dissemination of the Initial Report to specific individuals identified in advance to the Chairman). Second, Senate Intelligence Committee Rule 9.7 by its own terms limits staff members' authority to transmit sensitive documents to the executive branch without prior approval, *e.g.*, by requiring that the transmittal be in furtherance of routine legislative or oversight activities.

investigation and that was in the news throughout the relevant period—would be transmitted to Defendants. Senator Feinstein's April 2014 letter to the executive branch expressly stated that she would later transmit "the full, updated classified report to you and to appropriate Executive Branch agencies." Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Apr. 7, 2014, ECF No. 41-2, JA 130–31. Likewise, her December 9, 2014 filing of the Final Report with the Senate stated that it would be provided to the executive branch "for dissemination to all relevant agencies." Letter, Sen. Dianne Feinstein to Sen. Patrick Leahy, President Pro Tempore, United States Senate, Dec. 9, 2014, http://1.usa.gov/1STWp0L; *see also* Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Jan. 16, 2015, ECF No. 41-5, JA 138 (explaining that it was repeatedly made clear to the SSCI that the "final, updated classified version of the report was the official version of the Study and that it would be transmitted to appropriate Executive Branch agencies"). The record shows that the SSCI was on notice of the transmission. There is no evidence that any member objected to the transmittal of the Final Report in December 2014. *See* Pls.' Br. 5, 9. Accordingly, Senator Feinstein's transmittal could not have "short-circuit[ed]" anything.

4. Senator Burr's post-hoc attempt to assert control is irrelevant.

Defendants draw a false equivalency between Senator Burr's post-hoc letter and Senator Feinstein's December 2014 transmission of the Final Report to the

executive branch, arguing that Senator Feinstein's transmittal is somehow canceled out by Senator Burr's correspondence. *See* Defs.' Br. 33–34. This is wrong for at least two reasons.

First, as discussed above, Senator Feinstein's transmittal was in furtherance of the legitimate exercise of the SSCI's oversight function. For the purposes of the agency record analysis, the Final Report is thus presumptively an agency record, and what matters is whether Defendants have satisfied their burden of showing a clear assertion of congressional control over it. Ultimately, even if this Court were to view both Senators' actions as insufficiently probative of the entire SSCI's intent, Defendants cannot meet their burden on this record.

Second, regardless of how the Court weighs Senator Feinstein's December 2014 letter, Senator Burr's post-transmittal, post-hoc assertion of control cannot be credited in the agency record analysis. Time and again, this Court has refused to credit post-transmittal assertions of control—an approach that comports with evidentiary principles and common sense. *See* Pls.' Br. 38 (quoting *United We Stand*, 359 F.3d at 602, *Holy Spirit*, 636 F.2d at 842, and *Paisley*, 712 F.2d at 695). Accordingly, Senator Burr's letter, written after the Final Report was legitimately transmitted to Defendants, is entitled to no weight. *See id.* at 37–39.

5. The executive branch has the ability to use and dispose of the Final Report as it sees fit.

As a fallback argument, Defendants contend that Senator Feinstein's 2014 transmittal letter evinces "continued Senate Committee control" over the Final Report because, in Defendants' view, it limits what the executive branch can do with the document. Defs.' Br. 34. But the actual text of the December 2014 letter establishes precisely the opposite: it shows that Congress in fact relinquished control over the Final Report to Defendants. The transmittal letter encourages the use and dissemination of the Final Report "as broadly as appropriate"—a determination to be made by the executive branch as it "see[s] fit"—and does not function as any kind of limitation on Defendants. Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 10, 2014, JA 133; *see also* Pls.' Br. 28–31.[7]

CONCLUSION

For the reasons stated above and in the ACLU's opening brief, the district court's order dismissing the ACLU's claim for the Final Report should be reversed, and the case should be remanded for further proceedings.

[7] Defendants' attempt to analogize to *Goland* is again misplaced. *See* Defs.' Br. 35. In that case, the court held that the transcript was a congressional document *notwithstanding* the fact that the CIA retained a copy, because Congress's intent to control the document was clear. *See* 607 F.2d at 347. For the reasons explained above, Defendants cannot make the requisite showing here.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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Date: December 30, 2015

CERTIFICATE OF SERVICE

On December 30, 2015, I served upon the following counsel for Defendants–Appellees one copy of Plaintiffs–Appellants' REPLY BRIEF FOR PLAINTIFFS–APPELLANTS via this Court's electronic-filing system:

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