

Perspective

Documenting ICE: Appraising Records of U.S Immigration Detention

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ABSTRACT

On July 14th, 2017, the National Archives and Records Administration (NARA) posted a notice in the Federal Register that U.S Immigration and Customs Enforcement (ICE) was seeking permission to destroy eleven types of records related to people detained by ICE. These include records of sexual abuse and assault, escapes, deaths, solitary confinement, and complaints made to a hotline by those in ICE custody. ICE requested timelines for the destruction of these records ranging from three to twenty years and in late August 2017, NARA granted preliminary approval of this request. This perspective essay seeks to shed light on the vast array of arguments asserting the value of these records to the people in ICE detention. Moreover, it attempts to weigh the evidence of ICE's recordkeeping practices, the preponderance of which points to ICE's inability and aversion to accurate, truthful and accessible documentation surrounding its operation. This exploration ultimately considers this historical moment as one in which archives can show their value as resources for government accountability, historical research and communities of migrants and refugees to argue that it is incumbent upon archivists to seize the opportunity.

Bruner, Mia Eloise. "Documenting ICE: Appraising Records of U.S. Immigration Detention," in "Information/Control: Control in the Age of Post-Truth," eds. Stacy E. Wood, James Lowry, and Andrew J Lau. Special issue, *Journal of Critical Library and Information Studies* 2, no.2 (2019). DOI: [10.24242/jclis.v2i2.73](https://doi.org/10.24242/jclis.v2i2.73).

ISSN: 2572-1364

INTRODUCTION

On July 14th, 2017, the National Archives and Records Administration (NARA) posted a notice in The Federal Register that Immigration Customs Enforcement (ICE) had been granted preliminary approval of timelines for the destruction of eleven types of records related to abuse and internal investigation in ICE custody.¹ The schedule proposed disposition timelines that ranged from three years for records of solitary confinement to twenty years for investigations into death and sexual assault in ICE custody. In a report detailing the appraisal of these records, NARA archivist Ashby Crowder justified his decision by claiming virtually all of these records possess “little or no research value” and fail to document “significant actions of Federal officials.”² In some cases, he also cited ICE’s annual reports as adequate replacements for records, explaining that the schedule provides enough time for outside parties to place Freedom of Information Act (FOIA) requests for any information not included in ICE’s annual reports.³

All federal agencies are required to propose schedules that suggest which records warrant preservation in the National Archives and which should be destroyed after their operational use.⁴ In these proposals, agencies suggest timelines that describe when records should be disposed of, which usually occurs after a specific event or period of time.⁵ After receiving proposed timelines, archivists at NARA assess the value of the records in question in accordance with NARA’s appraisal policy and determine whether

¹ “Request for Records Disposition Authority: Records of the Bureau of Immigration and Customs Enforcement (Records Schedule Number DAA-0567-2015-0013)” (National Archives and Records Administration, June 20, 2017), Electronic Records Archives, https://static1.squarespace.com/static/5722daf11d07c02f9c1739cc/t/599c58c859cc682fb9ff93b7/1503418568853/ICE_NARA-request_detainee-records.pdf.

² Ashby Crowder, “Appraisal: Records of Immigration and Customs Enforcement (DAA-0567-2015-0013)” National Archives and Records Administration, June 20, 2017, <http://altgov2.org/wp-content/uploads/DAA-0567-2015-0013-Appraisal.pdf>.

³ Crowder.

⁴ National Archives and Records Administration, “Records Management by Federal Agencies (44 U.S.C. Chapter 31),” National Archives - About the National Archives, August 15, 2016, <https://www.archives.gov/about/laws/fed-agencies.html>.

⁵ For a detailed history of record disposal policy in the U.S Federal Government, see James Bradsher, “An Administrative History of the Disposal of Federal Records, 1789-1949,” *Provenance: Journal of the Society of Georgia Archivists* 3, no. 2 (1985), <https://digitalcommons.kennesaw.edu/provenance/vol3/iss2/2>; Frank Wells, Garrard Winston, and Henry Beers, “Historical Development of the Records Disposal Policy of the Federal Government Prior to 1934,” *The American Archivist* 7, no. 3 (1944): 181–201.

the agency's proposed disposition is appropriate.⁶ The appraiser may ask the originating agency to revise their proposal before granting preliminary approval and publishing a notice in *The Federal Register*. The public is then given the opportunity to comment on the schedule which may result in NARA carrying out an additional revision of the schedule, conducting a closer review of the records, or withdrawing the proposal entirely.⁷ After the issues raised in public comments have been addressed, the record schedule is finalized and submitted for approval by the Archivist of the United States.⁸

NARA received a substantial number of comments from the public in response to ICE's proposed schedule. This included "three congressional letters with a total of 36 signatures (29 house members, 7 senators), a petition from the American Civil Liberties Union (ACLU) with 23,758 comments," 187 written comments and seven phone calls from individuals.⁹ In these comments, activists, archivists, journalists, lawyers, and scholars voiced concerns that the timelines in this schedule threaten the public's ability to hold ICE accountable for abuse in immigration detention and could create significant gaps in the nation's historical record.¹⁰ Victoria López, an attorney at the ACLU, called for public

⁶ National Archives and Records Administration, "Disposal of Records (44 U.S.C. Chapter 33)," National Archives - About the National Archives, August 15, 2016, <https://www.archives.gov/about/laws/disposal-of-records.html>.

⁷ National Archives and Records Administration, "Records Schedule Review Process," National Archives - Federal Records Management, March 29, 2019, <https://www.archives.gov/records-mgmt/policy/records-schedule-review-process.html>.

⁸ National Archives and Records Administration.

⁹ David Ferrerio, "National Archives Updates Progress on ICE Records Disposition," *The National Archives AOTUS Blog: The Blog of the Archivist of the United States* (blog), June 27, 2018, <https://aotus.blogs.archives.gov/2018/06/27/national-archives-updates-progress-on-ice-records-disposition/>, "National Archives Updates Progress on ICE Records Disposition."

¹⁰ Jorge Rivas, "ICE Seeks Permission to Destroy Records of Sexual Assaults and Deaths," *Splinter News* (blog), August 29, 2017, <https://splinternews.com/ice-seeks-permission-to-destroy-records-of-sexual-assau-1798541263>; Victoria Lopez, "ICE Plans to Start Destroying Records of Immigrant Abuse, Including Sexual Assault and Deaths in Custody," *American Civil Liberties Union* (blog), accessed April 28, 2019, <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-plans-start-destroying-records-immigrant>; James Grossman, "Letter from AHA Executive Director to David Ferrerio Regarding Destruction of ICE Records," July 25, 2018, <https://www.historians.org/news-and-advocacy/aha-advocacy/letter-from-aha-executive-director-regarding-destruction-of-ice-records>; Archivists Round Table of Metropolitan New York Board of Directors, "ART Statement on ICE Retention Schedules," Archivists Round Table of Metropolitan New York, October 17, 2017, https://www.nycarchivists.org/resources/Documents/Advocacy%20Actions/ICE_Letter.pdf; American Civil Liberties Union et al., "Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013)," September 14, 2017, <https://aila.org/File/DownloadEmbeddedFile/73196>; Raúl M. Grijalva and

support in demanding that NARA recognize these records as “necessary for the public to understand and fully evaluate the operation of a system that is notorious for inhumane and unconstitutional conditions affecting hundreds of thousands of people every year.”¹¹ The Archivists Roundtable of Metropolitan New York wrote an open letter to NARA criticizing the appraisal for its “failure to adhere to archival and records management best practice.”¹² Citing professional expertise as record managers and archivists, ART demanded that NARA “reconsider what could very well be a disastrous mistake for records management, for the historical record, and for government accountability and transparency.”¹³ James Grossman, the Executive Director of the American Historical Association also shared a letter sent directly to David Ferriero, the Archivist of the United States, imploring him to “deny any request for authorization to permit ICE or the Border Patrol to destroy records related to individuals in their custody.”¹⁴

The “unprecedented” number of comments submitted regarding this record schedule demonstrates the highly public and extremely problematic reputation of ICE’s recordkeeping practices.¹⁵ ICE has a well-documented history of taking active steps to hide violence and abuse in ICE custody from the public.¹⁶ On multiple occasions, ICE has

Judy Chu, “Letter to Kirstjen Nielsen, Thomas D. Homan, Michael E. Horowitz, and John V. Kelly,” December 18, 2017, https://grijalva.house.gov/uploads/2017_12_18_DHS_Nielsen_Sexual%20Assault%20in%20ICE%20facilities5.pdf.

¹¹ Lopez, “ICE Plans to Start Destroying Records.”

¹² Archivists Round Table of Metropolitan New York Board of Directors, “ART Statement on ICE Retention Schedules.”

¹³ Archivists Round Table of Metropolitan New York Board of Directors.

¹⁴ Grossman, “Letter from AHA Executive Director.”

¹⁵ Ferrerio, “National Archives Updates Progress on ICE Records Disposition.”

¹⁶ Nina Bernstein, “Officials Obscured Truth of Migrant Deaths in Jail,” *The New York Times*, January 9, 2010, sec. U.S., <https://www.nytimes.com/2010/01/10/us/10detain.html>; “Moving Toward More Effective Immigration Detention Management,” Pub. L. No. 111–47, § Subcommittee on Border, Maritime, and Global Counterterrorism of the House of Representatives Committee on Homeland Security (2009), <https://www.govinfo.gov/content/pkg/CHRG-111hrg57851/pdf/CHRG-111hrg57851.pdf>; Nikki Gramian, “Office of Government Information Services Compliance Review of Immigration and Customs Enforcement Freedom of Information Act Program: Strong Management, Innovative Use of Technology, and Suggested Improvements to Customer Service” (Washington, DC: National Archives and Records Administration and the Office of Government Information Services, October 18, 2016); Mary Small et al., “ICE Lies: Public Deception, Private Profit” (Washington, DC and Chicago, IL: Detention Watch Network and Heartland Alliance’s National Immigrant Justice Network, January 2018), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IceLies_DWN_NIJC_Feb2018.pdf; Office of Inspector General, “ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or

used false, incomplete, or inadequate records to perpetuate and obfuscate accountability for abuse in immigration detention.¹⁷ This includes falsifying medical logs, omitting ten deaths in custody from a list submitted to Congress, and stonewalling outside parties attempting to obtain records through FOIA requests.¹⁸ A recent example can be found in ICE's failures to document the separation of nearly 12,000 children from their parents which made it impossible to reunite families even after reunification was ordered by a federal judge.¹⁹

This paper will look closely at NARA's appraisal policy, the appraisal of ICE's detention records, and the public's response to ICE's proposal. Through this examination, it offers an initial attempt to discuss the disparity between the notion of research value and essential evidence employed by NARA's appraisal staff and the practical reality of

Systemic Improvements" Washington, DC: Department of Homeland Security, June 26, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

¹⁷ Carl Takei, Mary Small, and Jennifer Chan, "Fatal Neglect: How ICE Ignores Death in Detention" New York, Washington DC, Chicago: American Civil Liberties Union, Detention Watch Network, Heartland Alliance's National Immigrant Justice Center, February 2016, <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>; Clara Long and Grace Meng, "Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention" New York: Human Rights Watch, May 2017, <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>; Freedom for Immigrants (formerly Community Initiatives for Visiting Immigrants in Confinement [CIVIC]), "Sexual Assault in Immigration Detention," End Isolation, accessed May 5, 2019, <http://www.endisolation.org/sexual-assault-in-immigration-detention/>; Eunice Hyunhye Cho and Paromita Shah, "Shadow Prisons: Immigrant Detention in the South" Montgomery and Birmingham, AL, and Boston, MA: Southern Poverty Law Center, National Immigration Project of the National Lawyers Guild, National Day Laborer Organizing Network/Adelante Alabama Worker Center, November 21, 2016, <https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south>; Mark Noferi, "Immigration Detention: Behind the Record Numbers," The Center for Migration Studies of New York (CMS), February 13, 2014, <https://cmsny.org/immigration-detention-behind-the-record-numbers/>; US Immigration and Customs Enforcement, "ICE Identification of Previously Un-Tracked Detainee Deaths Highlight the Importance of Detention Reform," American Immigration Lawyers Association, August 17, 2009, <http://www.aila.org/File/DownloadEmbeddedFile/51394>.

¹⁸ Takei, Small, and Chan, "Fatal Neglect"; Bernstein, "Officials Obscured Truth of Migrant Deaths in Jail"; Gramian, "Office of Government Information Services Compliance Review."

¹⁹ Nick Miroff, Amy Goldstein, and Maria Sacchetti, "'Deleted' Families: What Went Wrong with Trump's Family-Separation Effort," *Washington Post*, July 28, 2018, https://www.washingtonpost.com/local/social-issues/deleted-families-what-went-wrong-with-trumps-family-separation-effort/2018/07/28/54bcdcc6-90cb-11e8-8322-b5482bf5e0f5_story.html.

how ICE detention records are created and used.²⁰ In doing so, this perspective essay aims to encourage further discussion of the ways in which archivists can support the needs of those who have survived abuse in ICE detention, and advocate for those who are experiencing it still.²¹

THEORETICAL FRAMEWORKS & ARCHIVAL APPRAISAL

To adequately understand how staff at NARA define the value records, it is critical to look at the theoretical basis for the appraisal policies in question. This is articulated in NARA's Appraisal Policy, which was developed in 2003 to "provide a consistent framework for appraisal decision making."²² Appraisers at NARA use three high-level categories to assess the presence of permanent value or value as "essential evidence":

1. Rights of American citizens;
2. Actions of Federal officials; and
3. The national experience.²³

Next, appraisers assess the informational value of the documents in question which can be determined by uniqueness, form, and "importance" in records.²⁴ In identifying records that fall into these categories, the policy stresses the value of considering organizational, political and social context during appraisal:

Records appraisal is not a rote exercise. It requires informed judgments, knowledge of and sensitivity to researchers' interests, recognition of resource considerations, and a willingness to acknowledge and understand comments and suggestions from diverse perspectives.²⁵

This appraisal policy is rooted in approaches developed by American archivists in the 1950s, most famously Theodore R. Schellenberg who broke from established archival practice by placing appraisal at the center of the archival process and developing criteria

²⁰ Crowder, "Appraisal: Records of Immigration and Customs Enforcement (DAA-0567-2015-0013)."

²¹ Crowder.

²² National Archives and Records Administration, "Strategic Directions: Appraisal Policy," National Archives - Federal Records Management, August 15, 2016, <https://www.archives.gov/records-mgmt/initiatives/appraisal.html>.

²³ National Archives and Records Administration.

²⁴ National Archives and Records Administration.

²⁵ National Archives and Records Administration.

based on the anticipated research needs of future scholars. Like the current appraisal policy used at the National Archives, Schellenberg's work stresses the challenge of objectively defining the "importance" of a given document: "the test of importance relates, as has been noted, to imponderable matters -- to matters that cannot be appraised with real certainty."²⁶ Because one can trace this sentiment from Schellenberg's work to NARA's current Appraisal Policy, it does not seem radical to assert that the definitions laid out in NARA's Appraisal Policy leave ample room for interpretation to the individual appraiser.²⁷

Since Schellenberg published his text *Modern Archives: Principles and Techniques* in 1956, there have been numerous developments in archival theory and practice that attempt to clarify the role of context in appraisal. The historical, political, and social contexts that influence appraisal became the foundation for a host of "societal-based" approaches developed in the 1980s and 1990s.²⁸ Through opening up traditional conceptions of archival practice, theories like macro-appraisal, documentation strategy, and postcustodial theory developed frameworks that could identify the value of records not only to the governments and institutions that produced them, but also their value as documentation of interactions between powerful institutions and agencies and the public.²⁹ A growing number of archivists and scholars focus on exploring the relationship between archives, power, and state violence.³⁰ For example, postcolonial archival theory

²⁶ Theodore R. Schellenberg, "The Appraisal of Modern Public Records," *Bulletin of the National Archives* 8 (October 1956), <https://www.archives.gov/research/alic/reference/archives-resources/appraisal-of-records.html>.

²⁷ Elizabeth Lockwood, "'Imponderable Matters': The Influence of New Trends in History on Appraisal at the National Archives," *The American Archivist* 53, no. 3 (1990): 394–405, <https://doi.org/10.17723/aarc.53.3.w66t31032j7528t4>.

²⁸ Terry Cook, "'We Are What We Keep; We Keep What We Are': Archival Appraisal Past, Present and Future," *Journal of the Society of Archivists* 32, no. 2 (2011): 173–89, <https://doi.org/10.1080/00379816.2011.619688>.

²⁹ Cook.

³⁰ Stacy Wood et al., "Mobilizing Records: Re-Framing Archival Description to Support Human Rights," *Archival Science* 14, no. 3 (2014): 397–419, <https://doi.org/10.1007/s10502-014-9233-1>; Livia Iacovino, "Shaping and Reshaping Cultural Identity and Memory: Maximising Human Rights through a Participatory Archive," *Archives and Manuscripts* 43, no. 1 (January 2, 2015): 29–41, <https://doi.org/10.1080/01576895.2014.961491>; Michelle Caswell, "Rethinking Inalienability: Trusting Nongovernmental Archives in Transitional Societies," *The American Archivist* 76, no. 1 (2013): 113–34, <https://doi.org/10.17723/aarc.76.1.p2260065lj714657>; Alexandra Barahona De Brito, Carmen González Enríquez, and Paloma Aguilar, *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford, UK: Oxford University Press, 2001); Randall C. Jimerson, "Embracing the Power of Archives," *The American Archivist* 69, no. 1 (2006): 19–32; Verne Harris, "Ethics and the Archive: An Incessant Movement of Recontextualisation," in *Controlling the Past: Documenting Society and Institutions. Essays in*

offers a framework from which to understand the role archives play within sociopolitical structures while also identifying and destabilizing the structural legacy of colonialism in archival principles.³¹ Similarly, discourses on identity politics, queer theory, and critical race theory offer frameworks for understanding the ways in which archives have acted as “key agents in...oppression, marginalization, silencing, alienation and trauma.”³² These discourses reimagine archives as “bastions not just of history but as evidence to support human rights, Aboriginal claims, government accountabilities, and broader societal heritage formation, as well as underpinning any hopes of addressing past abuses and crimes.”³³

While there is very little literature devoted to archival appraisal as it relates to immigration detention records in the United States, one can find ample discussion of the ways that appraisal practice reflects the material, political, and social contexts in which it is being enacted.³⁴ Within this conversation, a number of archivists have pointed to the need to reassess traditional principles relating to appraisal to better support the needs of

Honor of Helen Willa Samuel, ed. Terry Cook and Helen W. Samuels, 2011, 345–62; Anna Robinson-Sweet, “Truth and Reconciliation: Archivists as Reparations Activists,” *The American Archivist* 81, no. 1 (2018): 23–37, <https://doi.org/10.17723/0360-9081-81.1.23>; Tom A. Adami, “Future Perfect? Peacekeeping, Peacebuilding and Archives—the United Nations in Sudan,” *Journal of the Society of Archivists* 30, no. 1 (2009): 3–26; Richard J. Cox and David A. Wallace, eds., *Archives and the Public Good: Accountability and Records in Modern Society* (Westport, CT: Praeger, 2002); Anne J. Gilliland and Sue McKemmish, “The Role of Participatory Archives in Furthering Human Rights, Reconciliation and Recovery,” *Atlanti: Review for Modern Archival Theory and Practice* 24 (2014): 78–88.

³¹ Liam Buckley, “Objects of Love and Decay: Colonial Photographs in a Postcolonial Archive,” *Cultural Anthropology* 20, no. 2 (2005): 249–270; Stephanie Decker, “The Silence of the Archive: Post-Colonialism and the Practice of Historical Reconstruction from Archival Evidence” (March 11, 2012), https://mpira.ub.uni-muenchen.de/37280/1/MPRA_paper_37280.pdf; Cheryl McEwan, “Building a Postcolonial Archive? Gender, Collective Memory and Citizenship in Post-Apartheid South Africa,” *Journal of Southern African Studies* 29, no. 3 (2003): 739–57, <https://doi.org/10.1080/0305707032000095009>; Jeannette Bastian, “A Question of Custody: The Colonial Archives of the United States Virgin Islands,” *The American Archivist* 64, no. 1 (2001): 96–114.

³² Wood et al., “Mobilizing Records.”

³³ Cook, “We Are What We Keep.”

³⁴ Wood et al., “Mobilizing Records”; Iacovino, “Shaping and Reshaping Cultural Identity and Memory”; Caswell, “Rethinking Inalienability”; De Brito, Enríquez, and Aguilar, *The Politics of Memory*; Jimerson, “Embracing the Power of Archives”; Harris, “Ethics and the Archive”; Robinson-Sweet, “Truth and Reconciliation”; Cox and Wallace, *Archives and the Public Good*; Gilliland and McKemmish, “The Role of Participatory Archives .”

those who have been repeatedly erased in archival records.³⁵ Michelle Caswell urges archivists to consider moments of human rights crisis as opportunities for archivists to position themselves as trustworthy supporters of survivors.³⁶ Anna Robinson-Sweet has outlined a variety of ways archives can reassess their relationship to white supremacist violence and intentionally break with this tradition to act instead as a tool for reparations in the United States.³⁷ Jarrett M. Drake points out the ease with which New Orleans police officers conspired to manufacture records in an attempt to impair accountability of law enforcement. He implores archivists to reassess a major assumption embedded in the foundation of traditional archival practice: "...the unchallenged premise that organizations create records to depict the accuracy of a transaction and thus maintain no vested interest in producing inaccurate or untruthful records."³⁸ Together, this body of literature underscores the role of responsibility in archival practice and capacity of archivists to "ensure historical accountability, retain memory of the victims and survivors, [...] document the extremes of repression and chronicle the individuals power against the state."³⁹

APPRAISING RECORDS OF ICE DETENTION

In the past 25 years, the public has witnessed an unrelenting expansion of ICE's network of immigration detention centers in the United States. In 1994, there were approximately 6,800 people held in immigration custody; that number "steadily increased over the years, hovering between 28,000 and 34,000 for most of the past decade."⁴⁰ In 2017,

³⁵ Harris, "Ethics and the Archive"; Cook, "We Are What We Keep; We Keep What We Are"; Gilliland and McKemmish, "The Role of Participatory Archives"; Richard J. Cox, *No Innocent Deposits: Forming Archives by Rethinking Appraisal* (Lanham, MD: Scarecrow Press, 2003); Michelle Caswell, "Defining Human Rights Archives: Introduction to the Special Double Issue on Archives and Human Rights," *Archival Science* 14, no. 3 (2014): 207–13, <https://doi.org/10.1007/s10502-014-9226-0>; Patricia Garcia, "Documenting and Classifying Labor: The Effect of Legal Discourse on the Treatment of H-2A Workers," *Archival Science* 14, no. 3 (2014): 345–63, <https://doi.org/10.1007/s10502-014-9230-4>; Adami, "Future Perfect?"

³⁶ Caswell, "Rethinking Inalienability."

³⁷ Robinson-Sweet, "Truth and Reconciliation."

³⁸ Jarrett M. Drake, "Insurgent Citizens: The Manufacture of Police Records in Post-Katrina New Orleans and Its Implications for Human Rights," *Archival Science* 14, no. 3 (2014): 365–80, <https://doi.org/10.1007/s10502-014-9224-2>. Drake's question of how archivists should address the practice of manufacturing records in government agencies deserves extensive research and attention.

³⁹ Adami, "Future Perfect?"; Robinson-Sweet, "Truth and Reconciliation."

⁴⁰ Clara Long, "Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention" (New York, Chicago, Washington, DC: Human Rights Watch, National

immigration detention held a “daily average of 40,500 people”; there are plans in 2019 to detain 52,000 immigrants, “a record number representing nearly 30 percent expansion over the previous year.”⁴¹ Despite enormous growth in the number of people detained, the Trump administration requested less money for oversight in facilities which places greater importance on the records in question.⁴²

While NARA’s Appraisal Policy repeatedly emphasizes the importance of evidence and the Archives commitment to supporting government accountability, it is unclear how this sociopolitical context factored into this appraisal, if at all. It is even more difficult to understand what and how the appraiser knew about the legal use of ICE detention records. In his report, Crowder writes that the approved timelines are “adequate from the standpoint of legal rights and accountability” providing for “individuals and organizations who may wish to obtain the files...to request them from the Agency.”⁴³ But the responses NARA received from lawyers who currently use these records to defend survivors of abuse in ICE detention indicate that this statement is patently false.⁴⁴ Lawyers at the ACLU and Community Initiatives for Visiting Immigrants in Confinement (CIVIC) point out that in some cases the retention period for records is “shorter than the statute of limitations for some legal claims arising from harms suffered while detained.”⁴⁵

This is true of the records of the Detention Information Reporting Line (DRIL) which under this proposed schedule could be destroyed every five years.⁴⁶ In 2016, CIVIC used these records of abuses to file a federal complaint that “ICE has failed to enforce federal laws to protect public safety” and violates the constitutional rights of those in ICE custody.⁴⁷ CIVIC analyzed DRIL’s records and found that the Office of Inspector General received at least 1,016 reports of sexual abuse filed by people in detention between May

Immigration Justice Center, and the Detention Watch Network, June 20, 2018),
<https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration>.

⁴¹ Long.

⁴² Long.

⁴³ Crowder, “Appraisal: Records of Immigration and Customs Enforcement (DAA-0567-2015-0013).”

⁴⁴ American Civil Liberties Union et al., “Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013).”

⁴⁵ American Civil Liberties Union et al.

⁴⁶ Crowder, “Appraisal: Records of Immigration and Customs Enforcement (DAA-0567-2015-0013).”

⁴⁷ Rebecca Merton and Christina Fialho, “Letter to Thomas D. Homan, Claire Trickler-McNulty, John F. Kelly, and Veronica Venture Re: Sexual Abuse, Assault, and Harassment in U.S. Immigration Detention Facilities,” April 11, 2017,
https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9da297419202ab8be09c92/1520280217559/SexualAssault_Complaint.pdf.

2014 and July 2016, meaning that the OIG received on average more than one complaint of sexual abuse from people in detention per day during this time period. CIVIC found that the OIG investigated only 24 of those complaints, or 2.4% of the total.”⁴⁸ Because ICE’s records of sexual assault report only the small number of cases they investigate—not the number of complaints filed—CIVIC had to rely exclusively on the DRIL Records in their research.⁴⁹ Under ICE’s proposed schedule these would have been destroyed by 2017—the same year CIVIC filed their federal complaint.⁵⁰

Another alarming example of the failure of this appraisal to adequately account for the legal use of these documents is evident in the records of solitary confinement which—under ICE’s proposed schedule—would be destroyed every three years. Lawyers from many major immigrants’ rights organizations including the ACLU, CIVIC, and the Detention Watch Network again voiced their concerns that the proposed timelines threaten the ability of “victims of solitary confinement who may want to seek legal redress for violations of their rights” to hold ICE accountable:

Such a shortened timeframe for preserving records about solitary confinement may impede legal accountability in those cases. Additionally, the destruction of these records will eliminate a unique source of information about a governmental practice that has received widespread condemnation and is likely to change significantly in the coming decades.⁵¹

They also assert that the retention periods approved in this appraisal fail to take into account the reality that:

...notwithstanding the twenty-day statutory deadline—ICE and other DHS components sometimes take multiple years to provide final responses to Freedom of Information Act (FOIA) requests. Because these responses can result in administrative appeals, and at times litigation challenging the completeness of the agency’s search for documents, a destruction schedule shorter than five years

⁴⁸ Merton and Fiahlo. The complaint from CIVIC (now known as Freedom for Immigrants) details ten unique reports of sexual assault in custody that were closed without response or determined to be unfounded. One example describes “a medical exam of a young girl under 18 [that] showed indications of a sexually transmitted disease and vaginal scarring. Despite physical evidence, ICE declared the allegation of sexual abuse unfounded.” See page 8 of the complaint.

⁴⁹ Merton and Fiahlo.

⁵⁰ Merton and Fiahlo.

⁵¹ American Civil Liberties Union et al., “Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013).”

could also result in destruction of documents that are the subject of a pending FOIA request.⁵²

This possibility seems highly likely given ICE's historic treatment of FOIA requests. In 2012, the agency had a backlog that amounted to "almost 55% of DHS' overall backlog and almost 36% of the entire backlog Government wide."⁵³ Between 2009 and 2016, ICE's "failure to respond to a request in a timely manner was cited as a factor in about 57% of the 85 FOIA lawsuits filed against ICE."⁵⁴ As lawyers from agencies including the ACLU, CIVIC, and American Immigration Lawyers Association point out "setting a destruction schedule that is shorter than an applicable statute of limitations is inherently incompatible with NARA's goal of ensuring legal accountability."⁵⁵

NARA's Appraisal Policy repeatedly stresses the importance of appraisers applying "knowledge of and sensitivity to researchers' interests" when determining the disposition of records.⁵⁶ This, however, is called into question by Crowder's statement that almost every record in this schedule possesses "little or no research value."⁵⁷ Many of these records have served as the basis for research and literature offering proof of the mistreatment endured by people in detention, including sexual abuse, excessive use of solitary confinement, and death.⁵⁸ For example, Death Review Files were developed as a

⁵² American Civil Liberties Union et al., "Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013)."

⁵³ Gramian, "Office of Government Information Services Compliance Review."

⁵⁴ Gramian. The 2016 compliance report continues by discussing workflows used by ICE employees to close requests between 2009-2015. One example is a description of how ICE verifies requesters are still interested in pending FOIA requests: "ICE reported that it occasionally contacts requesters to ask whether the requester is still interested in the request and if the request can be closed...ICE reported when it asks if a requester is still interested via mail or email, it provides the requester with 10 days to respond before the request is administratively closed." It is difficult to discern how staff choose which requesters to contact and how often these inquiries were made which is compounded by the report's finding that ICE does not keep records of this correspondence.

⁵⁵ American Civil Liberties Union et al., "Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013)."

⁵⁶ National Archives and Records Administration, "Strategic Directions."

⁵⁷ Crowder, "Appraisal: Records of Immigration and Customs Enforcement (DAA-0567-2015-0013)."

⁵⁸ Cho and Shah, "Shadow Prisons"; Long, "Code Red: The Fatal Consequences"; Takei, Small, and Chan, "Fatal Neglect"; Project South and Penn State Law's Center for Immigrants' Rights Clinic, "Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers" Atlanta, GA and University Park, PA: Project South and Penn State Law Center for Immigrants' Rights Clinic, May 2017, https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf.

component of 2009 reforms that came after a three year long investigation conducted by the *New York Times* and the ACLU into the state of medical care and death in immigration detention.⁵⁹ This investigation revealed that “officials—some still in key positions—used their role as overseers to cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse.”⁶⁰ One of the most alarming findings was that some deaths in ICE detention had not been documented at all.⁶¹ In response to public pressure, ICE conducted an internal review and identified ten deaths between 2003 and 2009 which had been omitted from the official list of fatalities submitted to Congress.⁶² In 2008, the Performance Based National Detention Standards (PBNDS) were established to “improve safety, security, and conditions of confinement” for people held in detention.⁶³ Death Review Files were a component of these reforms.⁶⁴

⁵⁹ Bernstein, “Officials Obscured Truth of Migrant Deaths in Jail.”

⁶⁰ Bernstein, “Officials Say Detainee Fatalities Were Missed,” *The New York Times*, August 17, 2009, sec. U.S., <https://www.nytimes.com/2009/08/18/us/18immig.html>; Bernstein, “Officials Obscured Truth of Migrant Deaths in Jail.”

⁶¹ “Moving Toward More Effective Immigration Detention Management,” Pub. L. No. 111–47, § Subcommittee on Border, Maritime, and Global Counterterrorism of the House of Representatives Committee on Homeland Security.

⁶² US Immigration and Customs Enforcement, “ICE Identification of Previously Un-Tracked Detainee Deaths Highlight the Importance of Detention Reform.”

⁶³ US Immigration and Customs Enforcement, “2008 Operations Manual ICE Performance-Based National Detention Standards,” US Immigration and Customs Enforcement, July 12, 2017, <https://www.ice.gov/detention-standards/2008>. The Performance-Based National Detention Standards (PBNDS) were developed in 2008 to safeguard against abuses and neglect that had led to numerous deaths in custody and resulted in public outrage. They stipulated that “Notify immigration officials if a detainee spends two weeks or longer in solitary confinement. Check on suicidal inmates every 15 minutes, and evaluate their mental health every day. Inform detainees, in languages they can understand, how to obtain medical care. In disciplinary hearings, provide a staff member who can advocate in English on the detainee’s behalf.” However, the 2008 PBNDS standards were lacking in several regards. They made no mention of the need for translation services, for example. A current rule that detainees’ requests for medical care must be evaluated by a professional within 24 hours will be replaced by a requirement that the jails merely have procedures on providing medical care. These standards built on detention standards developed in 2000 when the agency was founded. Further research might explore changes and revisions to these policies from 2000 to now, such as the 2011 version and 2016 revisions to the standards.

⁶⁴ US Immigration and Customs Enforcement Office of Policy, “Directive 7-9.0: Notification and Reporting of Detainee Deaths,” October 1, 2009, https://www.ice.gov/doclib/dro/pdf/11003.1-hd-notification_reporting_detainee_deaths.pdf.

These records continue to be used today in research conducted by non-profit and community-based organizations working to protect and assert the rights of people detained by ICE. For example, the research presented in the ACLU's 2016 report, *Fatal Neglect: How ICE Ignores Deaths in Detention*, was sourced entirely from Death Review Files.⁶⁵ The National Immigrant Justice Center (NIJC) also used death review files for research published in a 72-page report called *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, which "examines the 15 Detainee Death Reviews ICE released from December 2015 through April 2017."⁶⁶

Code Red notes the significance of available Death Review Files to research pertaining to ICE detention: "In many cases Detainee Death Reviews are the only available window into the events leading to the deaths of individuals in ICE custody."⁶⁷ The unique value of Death Review Files to research is reiterated in a comment submitted to NARA by legal organizations, including CIVIC, NIJC, and the ACLU, which have relied on these records for research:

These files represent a significant accumulation of documentary material that both evaluates and documents whether ICE's actions leading up to each death were appropriate. This documentary material is compiled from many different sources that would not otherwise be stored in a single place, and it records important conclusions that are not retained elsewhere by the agency." These investigation files have received widespread attention from the media and are recognized as a uniquely important resource by human and civil rights defenders, immigrants' rights advocates, and journalists. They have also played an important role in wrongful death litigation against ICE and its contractors.⁶⁸

⁶⁵ Takei, Small, and Chan, "Fatal Neglect." This report illuminates inconsistency in ICE conducting death reviews at all: "The ACLU analyzed reviews of 24 deaths that occurred in ICE custody from January 2010 through May 2012. In response, ICE produced documents regarding 17 deaths, but did not provide investigations for seven individuals. Of these seven outstanding cases, four remained under investigation at the time of ICE's final document production, more than 400 days after these deaths occurred. In the remaining three deaths, ICE did not conduct its own detainee death review; in two cases, this was because the Office of Inspector General (OIG) in the Department of Homeland Security (DHS) conducted the investigation, and in one case... [it]is not clear if anyone conducted an investigation at all."

⁶⁶ Long, "Code Red: The Fatal Consequences." The report found that "eight of the 15 public death reviews show that inadequate medical care contributed or led to the person's death. The physicians conducting the analysis also found evidence of substandard medical practices in all but one of the remaining reviews.

⁶⁷ Long.

⁶⁸ American Civil Liberties Union et al., "Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013)."

In 2009, Congress made clear “its expectation that ICE’s system of detention inspections be meaningful, transparent and, where appropriate, create consequences sufficient to ensure compliance with required standards.”⁶⁹ Still, a 2018 report by the Department of Homeland Security titled “ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements” found that the agency has failed to comply with this request. The report states investigations of abuse in ICE detention are so flawed it “renders them inadequate to promote effective oversight.”⁷⁰ Because of the inadequacy of ICE’s reporting practices, researchers rely on direct analysis of case files documenting abusive conditions in ICE detention.⁷¹ This problematizes the Crowder’s assertion that the records appraised in this schedule have “little or no research value.” If the published research and public statements of researchers do not have bearing on what represents records of high research value, how is research value to be assessed here?

CONCLUSION

The goal of this perspective essay has been to consider the organizational, social, and political contexts of NARA’s appraisal of the request to destroy records of abuse and violence in ICE detention. In doing so, it attempts to support a broader discussion of the role and responsibility of the National Archives in addressing the needs of survivors of state violence. As stated in thousands of comments submitted to NARA by journalists, lawyers, researchers, historians, archivists, and government officials, the records in this schedule have “significant legal, research and historical value” to those surviving ICE detention, their families, outside members of the public and organizations from a variety of professional communities.⁷² Regardless of how NARA ultimately decides to revise this

⁶⁹ American Civil Liberties Union et al.

⁷⁰ Office of Inspector General, “Concerns about ICE Detainee Treatment and Care at Detention Facilities” (Washington, DC: Department of Homeland Security, December 11, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>; Office of Inspector General, “ICE’s Inspections and Monitoring of Detention Facilities”; US Immigration and Customs Enforcement, “ICE Identification of Previously Un-Tracked Detainee Deaths”; Gramian, “Office of Government Information Services Compliance Review”; Moving Toward More Effective Immigration Detention Management.

⁷¹ American Civil Liberties Union et al., “Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013)”; Long, “Code Red: The Fatal Consequences.”

⁷² American Civil Liberties Union et al., “Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013)”; Grossman, “Letter from AHA Executive Director to David Ferrerio Regarding Destruction of ICE

schedule, the primary issue in this appraisal is its failure to appropriately consider the legal implications of the destruction of these records, the concerns of the public and the needs of people in immigration detention.⁷³ At minimum, the feedback submitted offers an opportunity for NARA to, as recommended by the American Library Association, “increase the transparency of proposed records schedules and review its appraisal policy to give greater consideration to the potential value of records.”⁷⁴

Many of these comments offer recommendations for how NARA might revise this record schedule. CIVIC, the ACLU, NIJC, Detention Watch Network, Human Rights Watch, Just Detention International, National Immigrant Justice Center, Southern Poverty Law Center, and the Women’s Refugee Commission went as far as to urge NARA to consider the permanent retention of these request because the “designation of many of these documents as temporary and subject to destruction on such short timelines does not account for the needs of the public, impacted individuals and government officials to conduct necessary, and in some cases required, evaluation of ICE detention operations.”⁷⁵

NARA received similar calls from historians, archivists, and records managers across the country. James Grossman of the American Historical Association asserted these records warrant permanent retention based on their relationship to our specific historic moments:

Given their importance, the current matter regarding consideration by NARA of the proposed schedule of record destruction is of vital importance to historians and the American public. The American Historical Association urges you to deny any request for authorization to permit ICE or the Border Patrol to destroy records related to individuals in their custody. The potential historical significance

Records”; Archivists Round Table of Metropolitan New York Board of Directors, “ART Statement on ICE Retention Schedules”; Grijalva and Chu, “Letter to Kirstjen Nielsen, Thomas D. Homan, Michael E. Horowitz, and John V. Kelly”; American Civil Liberties Union, “Submit a Public Comment: Do NOT Allow ICE to Destroy Records of Sexual Abuse and Death of People in Custody,” ACLU: Take Action, September 15, 2017, <https://action.aclu.org/petition/ICE-Records>; Rivas, “ICE Seeks Permission to Destroy Records”; Long, “Code Red: The Fatal Consequences.”

⁷³ American Civil Liberties Union et al., “Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013)”; Grossman, “Letter from AHA Executive Director”; Lopez, “ICE Plans to Start Destroying Records.”

⁷⁴ Michelle Caswell, “Toward a Survivor-Centered Approach to Records Documenting Human Rights Abuse: Lessons from Community Archives,” *Archival Science* 14, no. 3-4 (2014): 1–16, <https://doi.org/10.1007/s10502-014-9220-6>.

⁷⁵ American Civil Liberties Union et al., “Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013).”

of the events recorded in these records makes it incumbent upon NARA to ensure their preservation for the long term. NARA should require that all records of investigations related to detainees should be retained regardless of the outcome of the case.⁷⁶

Similarly, in an open letter written by ART, a group of more than 400 archivists, librarians, and records managers in the New York metropolitan area, addressed the potential and practical concerns of the National Archives:

A pillar of records management, that “not everything can be saved,” fails to hold up. If the “Death and Sexual Abuse and Assault Files” are growing so exponentially, one might conclude that abuses of ICE detainees are serious problems requiring administrative remedy and retrospective deliberation. This would be a strong argument against destroying such records—there are potentially many lessons to be learned from the documents, and the agency should invite scrutiny. If the file is not actually growing so much (i.e., if deaths and sexual assaults in ICE custody just aren’t commonplace), then, again, the “can’t keep everything” argument is fraudulent.⁷⁷

Even if archivists at NARA fail to accommodate these requests, these comments offer an opportunity to develop policies that better address records documenting human rights abuse. This is particularly true in cases where the creating agency is known to manufacture and illegally destroy documentation of its action as is the case with ICE’s death review files. The volume of archivists and records managers outside the government who voiced their concern about this issue indicates there may be opportunities for collaboration between NARA and an archive outside the government who may be interested in preserving these materials. For example, NARA could consult the communities who have a direct connection to these records to better understand their needs. NARA staff could work with survivors and their families to find a partner institution to preserve these collections using its administrative and legal authority to ensure these records are transferred to the collection when they become inactive. This is just one example of many alternative approaches to handling records of ICE detention. NARA might also look to Michelle Caswell’s work which advocates for a survivor-centered approach in managing records of human rights abuse: “the most ethical course of action” is to center “archival efforts on survivors.”⁷⁸ In applying a survivor-centered approach,

⁷⁶ Grossman, “Letter from AHA Executive Director.”

⁷⁷ Archivists Round Table of Metropolitan New York Board of Directors, “ART Statement on ICE Retention Schedules.”

⁷⁸ Caswell, “Toward a Survivor-Centered Approach.”

NARA could actively seek out more information from those who submitted comments describing the “incredible importance” of these documents to “the families and communities whose loved ones died while in U.S. government custody.”⁷⁹ The problems made apparent by NARA’s 2017 appraisal of ICE’s detention records make clear the need for radical change to who and what is considered when defining the value of records. Further, special considerations must be made for archives to address the needs of migrant and refugee communities.⁸⁰ For example, traditional archival practice might recommend sampling in the case of death review files as opposed to accessioning files of each individual case.⁸¹ But as Anne Gilliland and Sue McKemmish point out in this case archives should eschew sampling in favor of comprehensive documentation, as these records serve to trace the particular personal histories of individual migrants or refugees: “...emigrants, migrant workers, refugees may pass through many points of documentation around the world as they move. So it is very important that all the traces that exist can be linked together to provide a bigger picture than a single archive might provide.”⁸²

In her 2017 article “A Matter of Life or Death: A Critical Examination of the Role of Records and Archives in Supporting the Agency of the Forcibly Displaced,” Anne Gilliland elaborates on the centrality of complete records to the needs of migrants and refugees. For those people who find themselves operating in the role of a non-citizen and the people who move through multiple jurisdictions there is often an explicit reliance on unorthodox employment of records for survival. Gilliland notes, “for the archival field to play a proactive role in supporting the survival, resettlement and recovery of the forcibly displaced, theoretical, organizational and practical reorientation is required. Such reorientation should be based in transnational and transinstitutional thinking and

⁷⁹ American Civil Liberties Union et al., “Letter to Margaret Hawkins Re: Comments to ICE Document Destruction Proposal (NARA-2017-054; Control Number DAA-0567-2015-0013).”

⁸⁰ Wood et al., “Mobilizing Records.” In “Mobilizing Records”, the authors discuss the necessity of changes “to institutional policies and standards in order to foster trust and transparency and identifies structural or system wide strategies for ameliorating past abuses.”

⁸¹ Paul Lewinson, “Archival Sampling,” *The American Archivist* 20, no. 4 (1957): 291–312; Terry Cook, *The Archival Appraisal of Records Containing Personal Information : A RAMP Study with Guidelines* (Paris, France: UNESCO General Information Programme and the United Nations Educational, Scientific and Cultural Organization, 1991), <https://trove.nla.gov.au/version/25537932>; Anne J. Gilliland, “Archival Appraisal: Practising on Shifting Sands,” in *Archives and Recordkeeping: Theory into Practice*, ed. Caroline Brown (London, UK: Facet Publishing, 2014), 31–61.

⁸² Gilliland and McKemmish, “The Role of Participatory Archives.”

proactive humanitarianism that engages at the level of affected individuals and their everyday lives.”⁸³

At present, there are multiple arguments for the value of archives. For some, archives are tools for governmental accountability and transparency, for others’ archives preserve an unmarred historical record to be used for future research, yet others believe archives can be activated as tools to build community power. Unfortunately, each of these approaches is failed by NARA’s appraisal in this case. This perspective essay sought to shed light on the vast array of arguments being made asserting the value of these records to the people in ICE detention. Moreover, it sought to weigh the evidence of ICE’s recordkeeping practices, the preponderance of which points to ICE’s inability and aversion to accurate, truthful and accessible documentation surrounding its operation. All indications point to this historical moment being one in which archives can show their value as resources for government accountability, historical research and communities of migrants and refugees; it is incumbent upon archivists to seize the opportunity.

⁸³ Anne J. Gilliland, “A Matter of Life or Death: A Critical Examination of the Role of Records and Archives in Supporting the Agency of the Forcibly Displaced,” *Journal of Critical Library and Information Studies* 1, no. 2 (2017), <https://doi.org/10.24242/jclis.v1i2.36>.

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