

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON, ET AL.,)	
)	
Plaintiffs,)	
)	CV No. 20-739
vs.)	Washington, D.C.
)	February 10, 2021
NATIONAL ARCHIVES)	2:00 p.m.
AND RECORDS ADMINISTRATION,)	
ET AL.,)	
Defendants.)	
)	

TRANSCRIPT OF ORAL ARGUMENT VIA ZOOM PROCEEDINGS
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

DEPUTY CLERK: Good afternoon, Your Honor. This is Civil Action 20-739, Citizens for Responsibility and Ethics in Washington, et al., versus the National Archives and Records Administration, et al.

Nikhel Sus for the plaintiffs.

Joseph DeMott for the defendants.

THE COURT: All right.

Counsel, good afternoon to everybody. I hope everybody is doing well, and that your families are safe and healthy and that you are as well.

So we're here this afternoon for a hearing on the cross-motions for summary judgment. I've reviewed the parties' papers and I have some questions about your arguments.

But actually, I want to start with Mr. DeMott and the government and do this a little bit in reverse order.

So, Mr. DeMott, before you get started, and then I'll give you the floor, I want to just confirm that the change in administration has not affected the Department's position or the agency's position as of today with respect to the positions that have been taken in the briefing?

MR. DeMOTT: Yes, Your Honor.

I've had no indication that the change in administration has affected anything with respect to this

1 case.

2 Obviously, the administration, you know, is taking
3 time to review lots of policies across lots of agencies, but
4 I have no indication that this particular decision is under
5 particular review.

6 THE COURT: Okay.

7 I mean, have -- let me put it slightly more
8 poignantly, which is that, since the change in
9 administration, has the Department of Justice inquired of
10 the agency whether the position it's taken in this case will
11 remain the position or it remains the position that -- of
12 the agency?

13 MR. DeMOTT: Yes, Your Honor.

14 I spoke with my contacts from the agency
15 yesterday, and they said that they had no information to
16 convey about a potential change in this policy.

17 They did note that under Section 11 of the
18 appraisal policy, there is a procedure for reassessing
19 previous appraisal determinations.

20 THE COURT: Right.

21 MR. DeMOTT: And so one example they gave was that
22 of alien files, or "A" files, which are referenced
23 throughout the Administrative Record, that's an example of a
24 file that was originally appraised for a 75-year long-term
25 retention. And then subsequently, the agency went back and

1 said, actually, we're going to preserve those files
2 permanently.

3 So they did note that there's a process for
4 revisiting such decisions but nothing to convey related to
5 the recent change in administration.

6 THE COURT: Okay.

7 And to the extent that they've noted the
8 reappraisal is as a possibility either now or in the future,
9 did they indicate whether that was something that was being
10 contemplated for these sets of records, either at present or
11 in the near term?

12 MR. DeMOTT: They gave no indication that it's
13 being considered for these particular sets of records.

14 They noted it more in the context of, you know,
15 the Significant Event Notification System, obviously, has a
16 75-year retention period and is relied on by the agency,
17 several places in the record.

18 And so they noted that if 60 years from now, for
19 example, people looked at those records and said, you know,
20 we think those should actually be preserved longer, there is
21 a process. And that could be applied, you know, to any
22 previously appraised records under the policy, but there was
23 nothing specific to these records.

24 THE COURT: Okay. Very good.

25 Hang on one minute. I want to -- maybe it's just

1 your connection: Your voice and your image aren't matching
2 up a little bit. So maybe it's just the view I've got here,
3 so let me just change it.

4 I'll just switch to speaker view.

5 All right. So why don't you go ahead and I'll
6 have some questions for you during your presentation.

7 MR. DeMOTT: Thank you, Your Honor.

8 The National Archives and Records Administration
9 appraises hundreds of record schedules each year containing
10 thousands of distinct categories of agency records.

11 Under the Federal Records Act, NARA must determine
12 whether each category of records warrants permanent
13 preservation, and, if not, must approve a reasonable
14 retention period.

15 Sections 7 and 8 of NARA's Appraisal Policy set a
16 very high standard for permanent preservation. NARA
17 permanently preserves records that are needed to protect
18 legal rights, despite the passage of time, and records that
19 are essential to understanding and documenting federal
20 actions, including those that document the basic
21 organizational structure of federal agencies, policies, and
22 procedures that pertain to an agency's core mission and key
23 agency decisions and actions.

24 NARA reasonably determined that most of the
25 records on the schedule at issue in this case, six of the

1 eight categories, and most of the contents of those six
2 categories, like the vast majority of all federal records,
3 do not meet these demanding criteria.

4 NARA further determined that the key information
5 that the six categories of records do contain is adequately
6 captured in other permanent or long-term temporary records.

7 NARA did recognize, however, that many
8 organizations and individuals have an interest in using
9 these records to vindicate legal rights and for purposes of
10 accountability and transparency. It, therefore, required
11 ICE to retain these records for periods ranging from 3 to 25
12 years for the six categories that plaintiffs are
13 challenging.

14 THE COURT: Mr. DeMott --

15 MR. DeMOTT: The agency's decisions are both
16 reasonable and reasonably explained and should be affirmed
17 under the highly deferential standard of APA review.

18 THE COURT: Mr. DeMott --

19 MR. DeMOTT: Starting off with the -- sorry.

20 THE COURT: Mr. DeMott -- that's all right.

21 I'm going to interrupt you.

22 Can you help me understand a bit -- I'm getting a
23 little bit of feedback, so I'm hearing my own voice.

24 Okay. By the way, I just ask everybody else to
25 mute their lines. Mr. DeMott, you obviously cannot.

1 But help me understand, just if you would, because
2 I've been trying to understand this framework here. And
3 starting with Section 6 and 7 of the archival policy here,
4 the Appraisal Policy, I guess it should be called.

5 Is it NARA's view that -- maybe there's a subtle
6 distinction here -- that all federal records fall within the
7 three categories that are outlined in Section 6 and 7, or is
8 it its position that Section 6 and 7 actually act as a bit
9 of a filtering mechanism, in that there are some federal
10 records that just fall outside those three categories that
11 are outlined in Section 6 and 7?

12 MR. DeMOTT: Your Honor, my understanding is that
13 NARA sees all federal records as falling into one or more of
14 the three categories outlined in Sections 6 and 7.

15 And, of course, Section 7 does provide additional
16 detail about how the vast majority of records documenting
17 the rights of citizens are not suitable for permanent
18 preservation, some are, that have enduring significance,
19 despite the passing of time, et cetera.

20 But to answer your question, yes, the three
21 categories, I think NARA views all federal records as, in
22 some way, falling into one or more of those three.

23 THE COURT: Okay, because if that's the agency's
24 position, then there are parts of the briefing that seem to
25 suggest that the agency concluded that certain record

1 categories didn't meet the -- didn't fall into one of the
2 three categories, you know.

3 So I'm just -- for example, on page 17 of your
4 brief, this is referring to a three-year retention period,
5 you write, "long-term retention of a weekly 'digest for
6 operational awareness' is plainly unnecessary to protect
7 legal rights and obligations, document significant actions
8 of Federal officials, or document the national experience."
9 And it's citing the two -- Appraisal Policy Sections 7
10 and 8.

11 Are you arguing that that category, for example,
12 and maybe there are a couple of others, that the category of
13 the three-year Detention Monitoring Reports, is it your
14 argument that the agency concluded it didn't fit into one of
15 the 7 -- Section 7 categories?

16 MR. DeMOTT: No, Your Honor.

17 The argument is not that these records do not
18 document the actions of federal officials.

19 I think certainly, many of the things that would
20 be in the digest for operational awareness, this is the
21 Detention Monitoring Reports, would document the actions of
22 federal officials.

23 And I apologize if my statement on page 17 of the
24 brief was unclear. What the agency found was that these
25 Detention Monitoring Reports don't document significant

1 activities that rise to the level of activities warranting
2 permanent preservation under either 7(b) or the more
3 specific appraisal objectives listed in Section 8.

4 So although they do document the actions of
5 federal officials, as 7(b) says, NARA seeks to retain only a
6 small portion of such records, those that contain very
7 significant documentation of key agency actions.

8 THE COURT: And so if that's the case, then --
9 and, again, I'm just trying to understand and piece together
10 the framework that's been put here.

11 If all federal records fall into one of these
12 three categories, does that, then, mean that all federal
13 records are potentially appraised against the Appendix 1
14 criteria?

15 Because if you read Section 9 -- Section 9 says,
16 "In determining which records support its appraisal
17 objectives" -- so appraisal objectives are in Section 9 --
18 "can thus warrant permanent retention, NARA uses the general
19 guidelines outlined in Appendix 1."

20 So if I understand this correctly, then, for any
21 records that were proposed for destruction, NARA is required
22 to or uses the Appendix 1 factors to determine if it meets
23 any of the permanent appraisal objectives.

24 Is that a fair way of reading the policy?

25 MR. DeMOTT: I think so, Your Honor.

1 I think that -- if I'm understanding you
2 correctly, I think the things that are listed in the
3 Appendix 1 are things that may be helpful in determining
4 whether or not a given category of records meets the
5 criteria set forth in Sections 7 and 8.

6 But as the policy makes clear, it's not a
7 checklist or some sort of roped mechanism, it's a holistic
8 determination.

9 So, for example, an appraiser might say, a given
10 set of records could contain significant research value;
11 however, it's largely duplicated by another set of records
12 that's already permanently preserved; and in that case, the
13 main reason for not slating these in addition for permanent
14 preservation would be that they're duplicated elsewhere.

15 A good example, I think, is the OPR and ERO
16 Detainee Death Review files referenced in the record.

17 THE COURT: Okay.

18 So that -- I mean, that's -- I appreciate that,
19 because I think that is sort of consistent with my
20 understanding -- at least how I understand it, I should say,
21 when I read all of this, which is that, when NARA is -- when
22 an agency comes to NARA and says, we'd like to destroy the
23 following records in five years or X -- you know, ten years,
24 NARA, then, has a statutory obligation to determine whether
25 those records should be permanently retained. And in

1 determining whether to permanently retain them or destroy
2 them after some period of time, it should consider the
3 various factors in Appendix 1.

4 And I agree with you that the Appendix clearly
5 says that no particular factor is dispositive and it all
6 needs to be answered.

7 So is that -- are we on the same page in terms of
8 the framework there?

9 MR. DeMOTT: I think so, Your Honor.

10 I apologize, you're breaking up just a little and
11 I'm seeing, like, yellow Internet-connection bars on your
12 screen. So I'm here at DOJ, and I apologize if it's on our
13 end; I'm not sure if the folks on your end can do anything.
14 But if you're hearing me okay, I think I caught everything
15 you said, and, I think, yes, we're on the same page.

16 I would just note that it's not just if an agency
17 decides to come to NARA and say, we'd like to not
18 permanently retain everything. Under the records disposal
19 act, the relevant portion of the Federal Records Act,
20 there's an obligation to have all federal records covered by
21 a schedule. So the default is not permanent preservation.
22 A very small percentage of all federal records will be
23 slated for permanent preservation, the archives. And
24 there's actually a statutory obligation to schedule records.

25 This was something that NARA addressed in the

1 record when commenters said, we think you should just deny
2 this request to schedule the records, as if the default were
3 permanent preservation. NARA has an obligation, actually,
4 to schedule the records and to make that determination.

5 THE COURT: Okay.

6 Again, I understand that -- I think I appreciated
7 that the exception is permanent retention, and the norm is
8 not permanent retention.

9 So let me, then, ask the following question about
10 research, and that's the primary issue that the plaintiffs
11 have raised.

12 In a case like this, research -- there's some
13 research value. And let me ask: Does the agency agree that
14 there is at least some research value in each category of
15 these records?

16 MR. DeMOTT: Certainly, for several of the
17 categories, that's indicated in the Administrative Record.

18 I know the agency says -- I believe it's on
19 page 17. And this is a broad summary that does apply to all
20 the categories. It recognizes the organizations and
21 individuals have an interest in using these records for
22 purposes of accountability and transparency.

23 I don't know if there's a semantic difference
24 between, you know, short-term research for the purpose of
25 accountability or transparency versus research 100 years

1 from now.

2 But I think to the extent we're considering
3 short-term research for accountability and transparency to
4 be research value, then, yes, the agency said that in the
5 record.

6 THE COURT: So if the agency has acknowledged that
7 there's some research value in each of these categories,
8 I guess the big question I have for you is: Where in the
9 record would you point to to show that the agency considered
10 the significance of the research value?

11 And here's what I mean: There is a statement that
12 the plaintiffs point out on page 17, where the response
13 is -- you know, when the National Archives appraises a
14 series of records as temporary rather than permanent, it
15 does not mean that the activities -- the records, documents
16 are unimportant or that the research -- or anticipated
17 research -- rather, it means that the anticipated research
18 use will be more contemporary, rather than many years in the
19 future.

20 And that's a comment that sort of matches up with
21 the question that the agency is supposed to ask in the
22 appraisal guidelines, which says, you know, determining
23 future research value is "the most difficult variable."

24 And then the guidance goes on to say,
25 nevertheless, it was important to consider this question;

1 that is, the value of future research in making appraisal
2 decisions. It is necessary to consider the kinds and extent
3 of current research use and to try to make inferences about
4 anticipated use both by the public and by the government.

5 So two questions; one is, would you agree that it
6 was incumbent upon the agency, once it acknowledged some
7 research value, to make a determination about future
8 research value?

9 MR. DeMOTT: Sorry, Your Honor, I wasn't sure if
10 you were going to do both questions.

11 If you'd like to answer that one, I'm happy to.

12 THE COURT: Yeah, let's start with that one and
13 then I'll ask the next question. Sorry.

14 Are you having trouble hearing me at all?

15 MR. DeMOTT: I am.

16 I think I'm responsible for the echo, and so I
17 have your volume turned down a little.

18 I'm doing okay. I'll let you know if --

19 THE COURT: Okay.

20 Yeah, sorry about that.

21 Your end of the feed is a little slow for me; in
22 other words, I'm hearing you loud and clear, but the video
23 is a little delayed and a little slow. So maybe that's
24 contributing to this.

25 COURT REPORTER: Judge, just so you know -- and

1 my -- it looks like my video is lagging a little bit, too.
2 But sometimes your voice drops for, like, a second at the
3 end of what you're saying. So maybe just try to keep your
4 voice up a little bit.

5 THE COURT: Okay.

6 COURT REPORTER: But otherwise, I mean, you're
7 coming through pretty good, and so is Mr. DeMott, for my
8 purposes.

9 THE COURT: Okay.

10 Well, I'll do a better job. Sometimes maybe I'm
11 looking down at my papers when I'm asking the question.

12 So let me just repeat that, which is that:
13 I mean, does the agency acknowledge that once it identifies
14 some research value, that it, then, needs to make an
15 assessment about future research value of those records?

16 MR. DeMOTT: The agency does not agree that it
17 needs to specifically address -- you know, make some sort of
18 projection with respect to each separate category of records
19 listed here. It certainly is one of the 15 or so factors in
20 Appendix 1 that the agency appraisers did consider.

21 But if you look at, for example, the sexual
22 assault files, the agency appraisal memorandum, as opposed
23 to the Appraisal Policy, the memorandum that's in the
24 Administrative Record makes clear that NARA settled on the
25 25-year retention period, because it's more than adequate to

1 protect legal rights, to satisfy the agency's business
2 needs, and then that it determined that period would be
3 adequate for research purposes.

4 But its primary reason was not because it doesn't
5 think some researcher 50 or 75 or 100 years in the future
6 might find some of this information interesting. I mean,
7 that's true for, I think, the vast majority of federal
8 records. If that were the standard, the National Archives
9 would contain many times the amount of material that it
10 does. Instead, NARA looked at the other types of records
11 that contain the key information about alleged sexual
12 assaults at detention facilities.

13 So, for example, key data about all sexual
14 assaults that are alleged is preserved in searchable form in
15 the Significant Event Notification System for 75 years.
16 If an ICE official is found to have committed misconduct in
17 relation to an alleged incident of sexual abuse or assault,
18 the record of the investigation will be permanent. And
19 there are additional records related to alleged sexual abuse
20 and assault from the DHS Office for Civil Rights and Civil
21 Liberties.

22 And so it's not that the agency's Appraisal Policy
23 requires for each of the thousands of records that the
24 agency is tasked with scheduling here to make this sort of
25 very difficult subjective judgment about what someone might

1 think many years in the future, it is something that's
2 considered.

3 But what the agency expressed in its appraisal
4 memorandum is its main reasons for its decision, which is,
5 in the case of the sexual assault files, that adequate
6 documentation of significant federal actions, again, that
7 very high standard, is already contained in other files.

8 THE COURT: So what do I make, then, of this
9 sentence, which says: It is necessary to consider the kinds
10 and extent of current research use and to try to make
11 inferences about any anticipated use, both by the public and
12 by the government?

13 I mean, "necessary" implies a requirement, it
14 seems to me, of some kind. And maybe you disagree with
15 that, but it does seem like a requirement.

16 And I don't see anywhere in the record where the
17 agency sort of considered the extent of current research
18 use -- current research use, and then tried to extrapolate
19 that into the future.

20 Now, let me ask you: Am I missing something in
21 the record where the agency, in fact, did that?

22 MR. DeMOTT: In the record, the agency certainly
23 acknowledges that there is significant contemporary
24 interest. And explains in the second consolidated reply
25 that contemporary research doesn't necessarily mean there

1 will be the same interest 20, 50, 80 years from now.

2 The agency -- I guess in response to that sentence
3 you read from the Appendix, it says, "it is necessary to
4 consider," I think that needs to be read within the context
5 of, this is one of 15 considerations in the Appendix that
6 are to be addressed, you know, holistically, and can be
7 referenced in an agency decision, to the extent those are
8 the dispositive factors in any given case.

9 But NARA certainly does not address all of these
10 potentially helpful considerations in every appraisal
11 decision. It would be incredibly burdensome, if the agency
12 were --

13 THE COURT: Counsel, I don't mean to suggest that
14 in every case, NARA needs to do the kind of future research
15 assessment necessarily. But this is certainly a case where
16 the research value has been highlighted in comments, public
17 comments, in a significant way.

18 I think the government would agree with that,
19 right, that at least these comments about research value
20 rise to the level of significant comment that required some
21 response by the agency?

22 MR. DeMOTT: Yes, Your Honor, the agency did
23 respond to comments about research value.

24 THE COURT: Yeah, no, no.

25 My question is slightly different, which is that,

1 the APA has a threshold, if I remember the standard, it's
2 "significant comment." You don't have to reply to every
3 comment, but certainly an agency has an obligation to
4 respond to significant comments.

5 And I think you would agree with me that the
6 concerns about research value would rise to the level of
7 significant comment here.

8 Would you agree with that?

9 MR. DeMOTT: I wouldn't agree that all of the
10 concerns about research value rise to that level.

11 I think the relevant language from the
12 D.C. Circuit's *Carlson* opinion is that the agency needs to
13 respond to comments that challenge one of the fundamental
14 premises underlining the agency decision.

15 And in this case, I think it's important to look
16 specifically at what the premises were for each of the six
17 categories of records. And for the first five, which is the
18 sexual assault files, the death review files, Detention
19 Monitoring Reports, Detainee Escape Reports, and DRIL,
20 phone, and email records, the -- one of the fundamental
21 premises was that the key information is already preserved
22 elsewhere.

23 And so to the extent that someone says, you know,
24 these Detainee Escape Reports could have significant
25 research value in the future, and NARA's response is, every

1 one of these detainee escapes is documented not only in
2 these reports that will be retained for seven years, but is
3 categorically a significant event and will, therefore, be
4 retained for 75 years in the Significant Event Notification
5 System, you know, it's not -- it's not challenging that
6 fundamental premise that this is duplicative and the other
7 information is going to be kept for 75 years, if someone
8 says, you know, I think these are valuable for research.

9 THE COURT: Let's hold on for one moment on the
10 issue of duplication of records. I do want to ask a
11 question about that.

12 But in terms of the research value and future
13 projection of the research value, I mean, it does seem to me
14 that -- let me just make a statement and then I'll ask you a
15 question.

16 I agree wholeheartedly with you, I do, that
17 research value is not a dispositive factor; in other words,
18 it's not a factor that it weighs in favor of permanency,
19 necessarily requires permanency, I agree with that. And
20 I think the guidelines are fairly clear that it's one of
21 many factors that the agency can turn to.

22 But I guess the question is as follows, which is
23 that: Given that it is a factor that the agency has to
24 consider and given it was something that was raised by
25 commenters, wasn't it incumbent upon the agency to provide a

1 fulsome explanation about its position on future research
2 value, more so than seems to be reflected in the record?

3 MR. DeMOTT: I don't think so, Your Honor.

4 I mean, the record contains two consolidated
5 replies to comments that address the main objections and do
6 discuss research value.

7 But, again, for the escape files and for the call
8 center intake records, the DRIL, phone and email records,
9 you know, the agency's reasoning was not that no one could
10 potentially rely on these records or be interested in these
11 records in the future. Rather, the agency's decision was
12 based on two fundamental premises. One, call center intake
13 records do not document significant actions of high-level
14 officials, they do not document changes in agency structure
15 or the sorts of key agency decisions that NARA preserves for
16 in the National Archives. And then, second, that there's
17 adequate documentation of these incidents in other long-term
18 records.

19 And so I just -- I don't think NARA has to respond
20 specifically or with anything like the level of granular
21 detail that plaintiffs are requesting when the comment says,
22 but these records might be used by a researcher many decades
23 from now, because NARA -- that's not challenging either of
24 the two fundamental premises on which NARA based its
25 decision.

1 And NARA did, again, respond to these concerns
2 about research value. But with respect to several of these
3 categories of records, it didn't base its decision on a
4 projection that no one would be interested in these records
5 in 50 years.

6 THE COURT: Referring to the question of
7 duplicative records, the agency, in several instances, has
8 made the argument that non-permanence is warranted, because
9 these records -- or, I should say, the information contained
10 in the records can be found elsewhere.

11 That said, I don't think any one of these
12 categories of documents is fully duplicated elsewhere; in
13 other words, there are some unique documents in each
14 category of documents. Even if reflected elsewhere, some of
15 the unique material will drop out, if destroyed.

16 The agency, does it have an obligation to make an
17 assessment of the value of the dropped-out material? And
18 the reason I ask is, you know, there is that footnote in
19 *Webster*, footnote 61, which sort of talks about summary. In
20 that case, it involved a question of the relative value of
21 summaries versus the original source of material. And in
22 that case, the FBI and NARA hadn't taken any -- hadn't
23 considered essentially the loss of information -- or the
24 failure to preserve information that otherwise wouldn't be
25 reflected in the summaries.

1 And I'm wondering whether the same concern
2 pertains here and to what extent the agency needed to
3 consider that; that is, the sort of loss of information from
4 the non-complete duplication of the record. That was a
5 long-winded way of asking the question, but I hope you were
6 able to follow that.

7 MR. DeMOTT: I'm sorry, Your Honor, you trailed
8 off a little at the end, and so I'm still having a little
9 trouble.

10 THE COURT: I said, it was a long-winded way of
11 asking a question, but hopefully you were able to follow it.

12 MR. DeMOTT: I think I was, Your Honor.

13 And I think the agency did consider the -- you
14 know, the additional information that would drop out when it
15 was clear what -- you know, what that information was. As
16 the record reflects, NARA appraisers had two or three
17 meetings with ICE officials, where they reviewed specific
18 examples of these documents.

19 And, for example, with the death review files,
20 they looked at an ERO file and OPR file for the same person
21 and looked at what the difference was. And what they said
22 was, the most significant information surrounding the
23 circumstances of the death is contained in the OPR file.
24 The entire OPR file, minus the exhibits, is duplicated in
25 the ERO file.

1 But the ERO file, also, in many cases -- and
2 obviously it depends on a case-by-case basis what exactly
3 ends up getting in the file, depending on what the facility
4 sent during the investigation or what sorts of records were
5 available in a particular case.

6 But often, the ERO file would contain an "A" file,
7 which is already permanently preserved elsewhere, and it
8 would contain significant incident reports, which are going
9 to be preserved for 75 years already through the SEN system.
10 And it would contain a lot of items that are unrelated to
11 the detainee's death.

12 Now, plaintiffs have pointed out that those items
13 would be of interest to researchers, and NARA took that into
14 account. That's why NARA said, we're going to preserve the
15 entire ERO death review file, even though it's, in many
16 respects, duplicative, we're going to require ICE to
17 preserve that for 20 years. And even if some of the
18 individual records in there would otherwise be disposed of
19 after five years.

20 So it never -- (audio disconnected) you know,
21 the -- I'm sorry, Your Honor?

22 THE COURT: That's okay, Counsel. You were
23 becoming garbled, I think, there. You were becoming garbled
24 there for a second.

25 MR. DeMOTT: I really apologize for the

1 connectivity issues, Your Honor. If they're on DOJ's end,
2 we apologize.

3 THE COURT: That's okay.

4 I don't know whether you can literally sit in
5 front of a laptop and be comfortable, because I wonder
6 whether there's a slowdown in your connection because you're
7 going through a conference-room system.

8 MR. DeMOTT: Yes, Your Honor.

9 I think, unfortunately, the issue may be the DOJ
10 firewall, which would, I think, affect me anywhere in this
11 building.

12 And I have a couple of young kids at home, and so
13 I don't generally feel comfortable doing these videos from
14 home.

15 THE COURT: That's why I'm at the office, too.

16 All right. Sorry about that. I interrupted you,
17 what you were saying.

18 THE COURT: Let me just -- can I just ask about
19 the SEN master file?

20 I mean, one of the challenges that I am having
21 here is, I don't have a sense of, to what extent the SEN
22 master file really contains duplicative information.
23 I mean, it sounds like it contains some information, fairly
24 high-level information about significant events. But even
25 with respect to significant events, it's not clear how much

1 detail that file contains about a particular event.

2 Do you have any further insight on that?

3 MR. DeMOTT: A bit, Your Honor.

4 I think a good example that may be helpful to
5 think about is the sexual assault files.

6 So the significant incident report that's required
7 to be created within 24 hours of any alleged incident of
8 sexual assault or sexual abuse is -- as the record says,
9 it's going to contain a summary of the allegations, the
10 incident, and it's going to contain biographical summaries
11 of those involved.

12 Now, I expect there's some variance between what a
13 significant incident report for one incident looks like
14 compared to another. These are created by a lot of
15 different people at different times across a large agency.

16 But the NARA appraisers determined that one view
17 would be adequate documentation for researchers many years
18 in the future. By contrast, you have these assault files
19 that are documenting the full investigation that was
20 conducted over 6 to 18 months. And, again, NARA recognized
21 that that's a significant interest, both for research and
22 for legal rights, and that's why it sat a very long 25-year
23 retention period.

24 But the dispositive question is not, again,
25 whether some researcher in 40 years might say, gosh, I'd

1 love to see the full file for some -- you know, of some
2 incident that happened 40 years ago. The question is
3 whether these files meet NARA's very demanding appraisal
4 standards for significant activities of the Federal
5 Government. And that's really the decision that's under
6 review here.

7 And under the deferential standard of APA review,
8 plaintiff just hasn't shown any sort of clear error that
9 would justify saying, these should actually be retained for
10 40 years, not 25 years, or that they do, in fact, meet the
11 criteria in Sections 7 and 8 and the other relevant
12 guidance.

13 THE COURT: I have one last question; and if
14 there's anything more you want to add, obviously, I'll give
15 you an opportunity to do that.

16 Going back to the issue of historical value, sort
17 of research value, you know, the plaintiffs make the point,
18 sort of focus on this Record Group 85. And they cite to the
19 Archives report, or I guess it's an index, I should say, of
20 Records Group 85. And that's a Record Group that contains
21 records from district level offices of the former INS.

22 And I just found this interesting that in that
23 index, in the preamble to the index, the agency sort of
24 acknowledges that these were once upon a time thought of as
25 records that would not be that important and actually sort

1 of acknowledges that that assessment of the records value
2 was incorrect and that many records were actually destroyed.

3 So how do I take that into account in evaluating
4 what the agency did here in terms of making a predictive
5 judgment about research value in the future?

6 MR. DeMOTT: Your Honor, my understanding is that
7 the full context of that quotation is actually referring to
8 inadvertent destruction of records that were in physical
9 form, where it was believed that the records were also in
10 physical form in another location and there was a sort of
11 administrative error that occurred that would be very
12 unlikely to occur today with our electronic record-keeping.

13 But I mean, that specific quote, and, more
14 generally, Record Group 85, no commenter raised this. If a
15 commenter had raised Record Group 85 and said that it was
16 somehow a relevant appraisal precedent, you know, I think
17 that view would have very clearly been rejected, because, as
18 explained in our briefs, Record Group 85 is all of the
19 records from the former INS that are still retained.

20 Now, plaintiffs in their brief point to some
21 specific examples documenting the day-to-day activities of
22 inspectors in a certain area of the country, a certain port
23 of entry in the 1840s or something.

24 NARA was not created until 1934, and, at that
25 point, they sort of went around sweeping up whatever

1 physical records they could find from the various federal
2 agencies all around the country.

3 I mean, that's just simply not a one-to-one
4 comparison or a relevant comparison to say, you have some
5 records that have been in 1934, already had sort of
6 artifactual significance as being 80 years old at that
7 point; therefore, you should, you know, preserve mundane
8 records today.

9 But, again, no one even raised this in the
10 notice-and-comment period, and so it's really not fair to
11 the agency for plaintiffs to raise it now and then to say
12 anything the agency says in response would be a post hac
13 rationalization.

14 This is, you know -- and it's cited particularly
15 in our reply brief -- this is why the D.C. Circuit has a
16 hard-and-fast rule that if an argument is not presented to
17 the agency and the agency doesn't have a chance to address
18 it, it can't be considered at this stage.

19 THE COURT: All right. Anything further, Counsel?
20 I'll obviously give you a chance at a rebuttal as well.

21 MR. DeMOTT: Sure, Your Honor.

22 I'm happy to talk about plaintiff's final
23 argument, which is about resource considerations or about
24 the guidance on periodic reports or anything else that's of
25 interest to you. But also, if you don't have questions off

1 those, then I'll defer to you.

2 THE COURT: I don't have any additional questions
3 on those at this time.

4 MR. DeMOTT: Okay. Thank you, Your Honor.

5 THE COURT: All right. Thank you, Counsel.

6 Could you all give me a second? I'm going to have
7 to go off-camera for one minute.

8 (Pause)

9 THE COURT: Sorry about that, everybody.
10 Okay. Let's turn, then, to plaintiffs' counsel.
11 Is it Mr. "Soos" or "Sus"? How do I pronounce
12 your last name?

13 MR. SUS: It's "Sus," Your Honor.

14 THE COURT: I'm sorry, could you say that again?

15 MR. SUS: "Sus."

16 THE COURT: Okay. "Sus."

17 Why don't you go ahead, Mr. Sus.

18 MR. SUS: Your Honor, rather than sort of
19 rehashing the briefs, I'd like to focus on a few of the key
20 issues that you brought up, starting first with the reading
21 of the Appraisal Policy.

22 So the government, at least in the briefing,
23 placed singular emphasis on Sections 7 and 8 as the relevant
24 provisions of the policy. As Your Honor pointed out, the
25 relevant provisions were actually 7, 8, and 9 in Appendix 1.

1 And I think it's helpful to just briefly walk through 7 and
2 8 to sort of explain how we get there.

3 Sections 7 and 8 collectively set forth the
4 high-level appraisal framework for NARA. They set forth the
5 framework by which NARA must relate its appraisal of
6 specific records to, and the overarching categories that
7 guide the appraiser's analysis.

8 But there is significant room -- there is
9 significant open-endedness, I should say, in the terminology
10 used in both of these sections, particularly in Section
11 7(b), where the policy refers to "significant documentation
12 of government activities that are essential to understanding
13 and evaluating federal actions and when it refers to key
14 agency actions and decisions."

15 And then when you turn to Section 8, the
16 references similarly to evidence of significant effects of
17 Federal Programs and the reference to major social issues
18 and significant business processes of the Federal
19 Government.

20 And see, neither of these two sections, while they
21 do set forth the high-level framework, plaintiffs do not
22 dispute that, they don't explain how NARA is to determine
23 what is a significant federal action or a key agency
24 decision or a major social issue.

25 That analysis, as set forth in Section 9, is

1 determined by Appendix 1. As Your Honor pointed out,
2 Section 9 states, "in determining which records support its
3 appraisal objectives and thus warrant permanent retention,
4 NARA uses the general guidelines outlined in Appendix 1."

5 And then if you flip to Appendix 1, the very first
6 sentence there reiterates the same point: In appraising
7 records, to decide whether records have archival value and
8 should be retained permanently, NARA will use the guidelines
9 found below." And, again, later in the same paragraph,
10 "NARA staff must address the following questions." Not
11 "may," but "must."

12 THE COURT: So, Mr. Sus, let's take this outside
13 the realm of this particular case, but is it your contention
14 that sort of in every records evaluation that NARA conducts,
15 it has to evaluate the research, future research value of a
16 set of records?

17 MR. SUS: Your Honor, our position is that
18 research value is always a relevant factor, as Your Honor
19 has already pointed out.

20 But, no, the level of detail required to address
21 that factor will vary depending on the rule-making record on
22 the notice-and-comment record.

23 And as Your Honor pointed out, the agency here,
24 NARA received an unprecedented number of public comments in
25 this case, over 23,000 public comments, the vast majority of

1 which explicitly related to research value and long-term
2 research interest in these records.

3 And not only that, but also to the second question
4 in Appendix 1, but the significance relating to the source
5 and context of the records, which looks at the significance
6 of the functions and activities performed by the originating
7 agency.

8 And what these factors require, particularly where
9 the public comments raise it as a central point of dispute,
10 is for NARA to look at the unique functions of the agency
11 itself. So NARA is not necessarily going to appraise
12 records of ICE in the same way that it would a completely
13 noncontroversial agency that hasn't generated widespread
14 concerns of human rights and civil rights abuses.

15 And, Your Honor, we would, you know, just point to
16 the Circuit's decision in *Webster*, where the D.C. Circuit,
17 you know, rejected many of the arguments that NARA -- that
18 Counsel just stated today. In finding that NARA's disposal
19 decisions are not committed to agency discretion by law and
20 are reviewable under the APA, the Court explicitly
21 recognized --

22 THE COURT: I don't think Counsel has suggested
23 they're unreviewable, but that there's some degree, if not a
24 substantial degree, of deference to the agency and its
25 expertise in making these determinations.

1 Let me ask a different question, which is: Does
2 the record reflect, in your view -- let me back up: Your
3 primary concern is -- or issue is that the agency didn't
4 adequately give consideration to the issue of the research
5 value of these records, correct?

6 MR. SUS: Correct.

7 THE COURT: Was the issue of research value raised
8 with respect to each category of these records, or was it
9 only raised with respect to a subset of them?

10 MR. SUS: I think -- well, the record reflects
11 that research value was raised certainly with greater detail
12 as to certain categories of records. And, in particular, I
13 would focus on the detention segregation reports. In terms
14 of long-term research value, that is certainly the category
15 that generated the most focused number of comments that --
16 each of which NARA largely disregarded, and so I would focus
17 on that category in particular.

18 But --

19 THE COURT: I mean, for example, if --

20 MR. SUS: I would say --

21 THE COURT: I'm sorry to interrupt.

22 But there were comments, for example, with respect
23 to, for example, the escape reports.

24 It's not clear to me that there were comments that
25 specifically said, look, with respect to the escape reports,

1 these actually have greater research value than you've
2 suggested to NARA and you need to take -- give greater
3 weight to the research value.

4 Was that a comment that was made with respect to
5 that record category, for example?

6 MR. SUS: Your Honor, with respect to that
7 category, that category of records has not really been the
8 focus of the briefing in this case.

9 And the only specific deficiency that we've
10 identified was the general deficiency in determining that
11 the SEN system records sufficiently duplicated those
12 records, and so that's sort of a generalized objection.

13 But no, with respect to that category of records,
14 we would not point to specific comments that NARA
15 disregarded as to research value, apart from the generalized
16 objection that we raise concerning the SEN system.

17 THE COURT: Because one of the things I've been
18 grappling with is, am I supposed to evaluate this case on a
19 category-by-category basis; in other words, is this really
20 six APA challenges, as opposed to just one APA challenge to
21 this policy announcement, because, you know, each category
22 of document is a little different and, arguably, involves
23 different factors and different weights that ought to be
24 given to these records.

25 MR. SUS: Well, Your Honor, as outlined in our

1 briefing, there were certain sort of overarching analytical
2 errors that NARA made that applied to each category of
3 records, and that -- including the failure to adequately
4 explain the factors that were disputed by the commenters and
5 that are made relevant both by the statute and the agency's
6 own Appraisal Policy. And those considerations apply to
7 every set of records, because NARA failed to provide that
8 explanation.

9 But there are --

10 THE COURT: I'm sorry to interrupt you.

11 But say, for instance -- let's sort of just use
12 the Detainee Escape Reports as an example. If none of the
13 commenters raised the research value of detainee escape
14 reports, you don't mean to say that NARA still had to
15 independently assess the research value of those records and
16 provide an explanation as to why the research value of those
17 records didn't warrant permanent retention?

18 MR. SUS: In the terms of the APA, it had to
19 render a reasonable explanation that took into account the
20 relevant comments. And so if there were not relevant
21 comments placing that category in dispute, that particular
22 objection wouldn't apply necessarily to that category of
23 records.

24 But I would say -- and I'm not sure if Your Honor
25 is going into this territory, but if the question is

1 whether, like, portions of the schedule could be severed and
2 whether it could be partially vacated, I'm not sure that
3 issue was briefed and we would submit that the government
4 really hasn't presented any argument for why that should be
5 the case.

6 I mean, our view is that the approval decision
7 stands as a cohesive product of NARA that can't necessarily
8 be severed or parsed, and that the appropriate remedy would
9 be to vacate the decision, rather than to sort of try to
10 figure out which part should stand and which part should
11 fall.

12 If on remand, you know, NARA addresses the
13 comments and there are no comments specifically raising
14 issues with respect to the research value as to the escape
15 reports, for example, then that may be fine under the APA.

16 But in terms of the Court's analysis of how it
17 handles the issue, anything other than fully vacating NARA's
18 approval decision we don't think would be appropriate.

19 THE COURT: Okay.

20 You know, the government's position here, at a
21 very high level, seems to be as follows: Look, we
22 acknowledged the research value of these records. And so we
23 acknowledged the research value of the records. And, in
24 fact, as a result of the research value, we did make some
25 adjustments. But, you know, research value is not a

1 dispositive factor; it's a factor; it's one of many factors.
2 And in balancing the various factors, we ultimately
3 concluded that notwithstanding the research value, that
4 there's some research value, we still think that other
5 factors dictate or weigh in favor of non-permanency.

6 So why isn't that right? I mean, why isn't that
7 essentially what the agency did here, which is to consider
8 other factors and say, yes, we acknowledge research, but
9 these other factors really are more substantial in our view.

10 MR. SUS: Well, Your Honor, if that is true, then
11 under the APA, NARA needed to put that analysis on paper,
12 and it didn't.

13 As Your Honor pointed out, nowhere in the
14 Administrative Record, is there any reasonable -- any
15 explanation period, let alone a reasonable explanation, for
16 why the particular factors that govern this sort of analysis
17 in its own Appraisal Policy support the agency's conclusion
18 as to research value, nor is there any analysis of the
19 comments, the substantial comments on this point.

20 And I would note, you know, Counsel keeps
21 referring to some research potentially being interested in
22 these records. I mean, that dramatically minimizes who is
23 submitting comments in this rule-making.

24 Again, there was over 23,000 comments, and --
25 including from 36 members of Congress, you know, 36 members

1 of a coordinate branch of government, telling NARA, you
2 know, in the terms of the Appraisal Policy, about,
3 "anticipated use by the government." And NARA never
4 responded to those concerns. It never addressed them in any
5 written decision, it never indirectly sort of referenced
6 them in responding to other concerns. They're just simply
7 not in the record.

8 What we have is basically --

9 THE COURT: But you don't -- I'm sorry.

10 But you don't dispute -- or let me ask you:
11 Do you dispute the notion that the agency ultimately has the
12 discretion to weigh how valuable the research value is?

13 Your real complaint here is that the agency just
14 didn't do it; that is, it didn't give adequate weight -- or
15 it didn't weigh the research value, and it didn't sort of
16 rationally explain how the research was being evaluated
17 relative to other factors.

18 MR. SUS: Yeah. Your Honor, that's correct,
19 that's a correct statement.

20 And going back to my earlier discussion of the
21 *Webster* decision, I understand the government is not
22 challenging the reviewability of NARA's decision here, but
23 the Circuit's reasoning on this point is relevant. It said,
24 "It is reasonable that NARA may have to spend more resources
25 developing and checking records plans for agencies whose

1 files are especially likely to contain significant
2 information pertaining to legal rights and topics of
3 particular interest to historical researchers."

4 So the fact that NARA has discretion in this area
5 does not relieve it of its burden to explain how it applied
6 its expertise and discretion and how it applied its
7 appraisal policies, particularly in a case with an agency
8 like ICE, which, as in *Webster*, where *Webster* was talking
9 about the FBI, ICE is an agency of considerable public
10 interest and that has drawn widespread scrutiny. And
11 so it's reasonable to expect, as the Circuit recognized,
12 that it may have to provide a more detailed explanation than
13 NARA might otherwise have to provide for other agency record
14 schedules.

15 THE COURT: Okay.

16 Let me move you to a different topic, if I could,
17 which is the topic of the duplication of information or
18 types of records and other sources.

19 Why don't I -- why shouldn't I simply sort of
20 defer to the agency on that front when it has evaluated
21 these different records and simply -- and said, look -- and
22 said that some portion of these records or some portion of
23 the information contained in these record categories will be
24 with reflected elsewhere. And having done that, shouldn't
25 we defer -- shouldn't I defer to the agency on that score?

1 MR. SUS: So, Your Honor, I'll raise two responses
2 to that. I'll say, first -- and I'll explain the first one
3 a little bit after the second one.

4 But the first response is that, under *Webster*,
5 that approach is just not appropriate.

6 The second point is that, if that position were
7 correct, then APA review in cases like this could be
8 rendered meaningless, because NARA could simply say, this
9 material is sufficiently duplicated elsewhere, and the Court
10 wouldn't be able to second-guess that judgment.

11 And so in -- and that is simply -- and going back
12 to the first point, *Webster* --

13 THE COURT: They have done more than just say it's
14 duplicated elsewhere. They at least have -- they've sort of
15 identified -- for example, in the death review files,
16 they've actually spelled out what's in the OPR file, they've
17 spelled out what's in the ERO file, sort of drawn a
18 comparison and ultimately said, look, the ERO -- excuse me,
19 the OPR file is really where the action is; and to the
20 extent that we need to be concerned about long-term
21 preservation, the OPR file is adequate.

22 MR. SUS: Well, Your Honor, I think I would
23 dispute that they drew the comparison.

24 I don't think they did draw the comparison. They
25 sort of -- and Counsel referenced the fact that NARA had an

1 on-site visit and the appraisal officer sort of determined,
2 as part of that, that the most significant contents were --
3 of the death review materials were in the OPR file.

4 But the reasoning for that is not on paper; again,
5 it's not in the decision. And as we flag in our briefing,
6 there are significant discrepancies that the agency -- that
7 NARA did not address, including the material in the ERO file
8 that is not in the OPR file, including the ERO corrective
9 action plan, which this is the plan that ERO, which is the
10 division of ICE that oversees detention and the detention
11 facilities across the country, this is their action plan
12 that they took in response to the extraordinary event of a
13 person dying in ERO's custody. This is a document of
14 significant long-term and near-term value.

15 Another item that's in the ERO file that's not in
16 the OPR file is the correspondence between ERO headquarters
17 and the regional facility where the individual died in ICE
18 custody.

19 And, again, this is significant material. And
20 it's really reflective, Your Honor, we think, of an overall
21 analytical error on NARA's part, which is a failure to
22 appreciate that these types of records, the sort of more
23 fulsome set of records that are in the sexual assault and
24 abuse files and that are in the ERO detainee files, death
25 review files, that facilitates, really, two distinct types

1 of analyses: One is, what happened in this case, what
2 happened to this person in ICE custody. And then the
3 distinct analysis is, how did ICE handle it? How did ICE
4 investigate this case? And what is the sort of raw
5 investigatory data that ICE had?

6 And that's not to say that, you know, under the
7 case law, under the APA, and under NARA's own appraisal
8 policies, that it could determine reasonably that the
9 material in the sort of raw investigative file, in the full
10 investigative file is sufficiently duplicated elsewhere.
11 But it needs to explain that.

12 And with respect to both --

13 THE COURT: What is -- I'm sorry.

14 But just to follow your thread there, I guess the
15 question -- I don't know the answer to and what your view is
16 on this -- is that -- and I asked government counsel this,
17 which is: With respect to the information that drops out,
18 in other words, you know, there's -- the government's made
19 the argument that the information that would be destroyed in
20 some of these categories is going to be preserved elsewhere.
21 But with respect to the information that drops out, what's
22 the ultimate assessment that the agency is required to make,
23 in your view?

24 MR. SUS: Well, Your Honor, at a minimum, it has
25 to acknowledge that information does drop out, and it has to

1 look at what drops out and assess the archival value, if
2 any, as to the dropped-out material.

3 And I can give you a very clear example with the
4 sexual assault and abuse files. Just looking at the
5 description of those files provided in the ICE schedule,
6 include police reports, summaries of medical exam results,
7 supporting memo and video, if any, materials pertaining to
8 this allegation --

9 THE COURT: Hang on.

10 Mr. Sus --

11 MR. SUS: Yes.

12 THE COURT: -- can I ask you to back up and
13 repeat. Again, I don't know if it's your end or my end, but
14 you became garbled, so I didn't hear the start of your --

15 MR. SUS: Sorry, Your Honor.

16 THE COURT: That's okay.

17 MR. SUS: So the detainee sexual assault files
18 include police reports, summaries of medical exam results,
19 supporting memos and video, if any, evidentiary materials
20 pertaining to the allegation, and investigation outcomes by
21 ICE's Office of Professional Responsibility.

22 Compare that to the description of the SEN system
23 reports, which is provided in the Administrative Record at
24 page 157. The SEN system reports are merely incident
25 reports that ICE generates upon receiving notice of alleged

1 sexual abuse or assault and consists only of biographical
2 information and event summaries.

3 So, Your Honor, I mean, this is not -- looking at
4 an incident report is not the same as looking at a full
5 investigatory file.

6 And to the extent that outside entities, members
7 of Congress, researchers, archivists, anyone who's looking
8 to assess how ICE handled sexual assault and abuse cases and
9 whether they followed appropriate protocols and whether they
10 investigated properly, significant incident reports are not
11 going to facilitate that type of analysis at all.

12 And we're not saying that that necessarily means
13 that NARA has to retain them. But we are saying that it's a
14 relevant factor that NARA entirely, you know, failed to
15 address, and that *Webster* -- the Circuit's decision in
16 *Webster* certainly supports the inference that the APA,
17 you know, regardless of what the Appraisal Policy says, the
18 APA requires NARA to address that.

19 THE COURT: So in your view, this would sort of go
20 to the third question in the guidelines, the appraisal
21 gleans, which is: Is the information unique?

22 MR. SUS: That's correct.

23 Or -- right. Particularly the language in that
24 section that says, "the most complete source of significant
25 information."

1 So with the sexual assault and abuse files, again,
2 that is indisputably, we would say, the most complete source
3 of significant information.

4 And none of the alternative data sources are
5 comparable. I already talked about the SEN system reports,
6 but also, you know, NARA pointed to the CRCL files.

7 But, again, Your Honor, just looking at page 157
8 of the Administrative Record, this is just -- this is just a
9 fraction of sexual assault and abuse cases, because the CRCL
10 only retains data on sexual assault allegations that are
11 filed with that component and that that component
12 investigates. And as the record reflects, CRCL is but one
13 of many avenues for the public to make complaints involving
14 DHS employees.

15 Separately, you know, ICE notes that -- or, sorry,
16 NARA notes that if an ICE official is found to have
17 committed misconduct, that that file remains permanent.
18 Again, there is a significant disconnect in the two data
19 sets, because outside stakeholders are interested not just
20 in the cases where ICE found the allegations merited, but
21 also where it didn't find the allegations warranted or where
22 it just didn't investigate at all.

23 So both of the -- all of the sort of alternative
24 data sets, the CRCL files, the SEN summaries, the cases
25 where ICE confirmed misconduct, none of those sufficiently

1 duplicate, by any means, the SEN -- the sexual assault and
2 abuse files, and NARA did not undertake any analysis of that
3 significant disconnect in research value.

4 THE COURT: Mr. Sus, I don't have any specific,
5 additional questions at this time. And I'll give you time
6 for a brief rebuttal, if you'd like. But also if there's
7 additional points you want to raise right now, that would be
8 fine, too.

9 MR. SUS: Yes, Your Honor.

10 Just briefly I would like to walk through just
11 some of the other highlights with respect to the items,
12 specific items on the schedule, on the ICE schedule.

13 With respect to the detention-monitoring reports,
14 the -- you know, these are subject to a three-year retention
15 period. In terms of the importance of the records, they're
16 reports by outside monitors, who monitor ICE's compliance
17 with detention standards, and thus, you know, document
18 significant issues that occur in ICE detention. And, again,
19 you know, ICE employed -- or NARA employed the same
20 reasoning to approve destruction of these records, as it did
21 for the sexual assault and abuse files, in that it claimed
22 the SEN system records would sufficiently duplicate them.

23 However, as at least one commenter raised to
24 Durham University professors, the Detention Monitoring
25 Reports capture significant data that ICE does not deem

1 significant enough to lodge in its SEN system, that academic
2 researchers have relied on extensively, including the two
3 professors who submitted the comment.

4 And, you know, these professors said in no
5 uncertain terms that this data, these records are necessary
6 for academic research, interrogating everyday life with
7 impartial spaces to progress.

8 And this was a highly relevant comment from
9 individuals who used these records as part of their
10 professional activities and have a deep knowledge and
11 insight of these issues, and yet NARA didn't even respond to
12 their comment.

13 And then moving to the DRIL records as well,
14 Your Honor, there's considerable minimization in the
15 briefing as to the importance of the DRIL intake system.

16 This is a critical intake mechanism for complaints
17 from detained individuals and other parties about serious
18 problems in ICE detention, including incidents of sexual
19 assault and physical assault, victims of human trafficking,
20 separation of minor children and other dependents and other
21 parental-related issues and other serious and unresolved
22 issues in detention.

23 And, again, sort of reflecting the similar
24 analysis with respect to the SEN records, NARA found that
25 significant events from the DRIL records would be captured

1 in other sources.

2 But the commenters flagged the unique research
3 value that the records have, that the DRIL records have as a
4 comprehensive data set; in other words, as a single data
5 set.

6 And the amici in their brief point to national
7 studies that analyze thousands of complaints received
8 through the DRIL system and that were able to draw
9 meaningful sort of trends and identified meaningful trends
10 in abuses in ICE detention and unresolved complaints in ICE
11 detention solely based on the DRIL records and that they
12 were able to do only because they had access to the records
13 as, again, a complete data set, rather than having to look
14 for different sort of sources of data that they could use to
15 compile and to analyze recurring issues in ICE detention.

16 At no point in the Administrative Record did NARA
17 address this point specifically. And the closest that --
18 and Counsel, in addressing it in the briefs in this case,
19 really is just raising a post hoc rationalization that NARA
20 never articulated as to why a comprehensive accumulation of
21 records can't be viewed as archivally significant when
22 viewed collectively as opposed to viewed separately.

23 And then finally, Your Honor, just on the detainee
24 segregation reports, I know I've already touched briefly on
25 this, but we thought that this particular item warrants

1 close scrutiny because of just the importance of the issues
2 that they document and the necessity of these reports, the
3 segregation reports to the issues that the commenters have
4 identified in ICE detention.

5 You know, looking at the Appraisal Policy,
6 Sections 7 and 8 of the Appraisal Policy, you know, the
7 segregation reports really do consist of unique and
8 significant documentation of government activities and key
9 agency decisions and actions.

10 And this is made clear by the ACLU's comment,
11 which, you know, outlined in detail this segregation
12 directive that ICE had issued in September of 2013 that
13 imposes these new strict limitations on segregation that are
14 designed to essentially make segregation an option of last
15 resort that ICE can only implement when other reasonable
16 alternatives have failed.

17 And, importantly, if you look to the description
18 of the segregation reports, they closely track the
19 requirements of the 2013 directive. The ICE schedule
20 describes the reports as including the reasons for
21 segregation placement, compliance with applicable detention
22 standards, alternative arrangements explored, and
23 assessments of the best course of action.

24 These are the types of reports that somebody
25 looking to analyze whether ICE's segregation reforms have

1 worked would need.

2 And there are no other records that, at least none
3 identified in the Administrative Record and certainly not
4 identified in NARA's decision documents in this case, that
5 would fulfill that function.

6 The only other record that the government points
7 to documenting segregation is the mere notation in an
8 individual's detention case file that the person detained
9 was placed in segregation.

10 But this mere notation does not, again, duplicate
11 the extensive and highly valuable information that appears
12 in the segregation reports, which, again, closely tracks the
13 requirements of the 2013 directive.

14 So when a researcher, you know, is looking at this
15 issue, say, ten years from now and they want to determine
16 whether this major 2013 segregation reform directive that
17 ICE implemented, whether it worked, it would not be able --
18 the researcher would not be able to answer that question
19 based on the individual detention case file.

20 First of all, they would have to know --

21 THE COURT: Mr. Sus, I'm going to --

22 MR. SUS: -- which detainee was placed in
23 segregation to know whose case file to ask for.

24 THE COURT: Mr. Sus, I'm going to interrupt you
25 and I'm going to sort of ask you to wrap up and so I can

1 turn back to government counsel --

2 MR. SUS: Okay.

3 THE COURT: -- and I'll give you a chance for
4 rebuttal as well.

5 MR. SUS: Sure.

6 THE COURT: All right.

7 Mr. DeMott, let me turn back to you and I'll hear
8 from you for rebuttal.

9 And in the course of your rebuttal, could you
10 address the issue of whether, in your view, why I ought to
11 be looking at this on a category-by-category basis or, as
12 Mr. Sus has suggested, the policy ought to sort of rise and
13 fall together.

14 MR. DeMOTT: Certainly, Your Honor.

15 I'm happy to start there so I don't forget to
16 address that point, if you'd like.

17 I think it's very clear and I was, frankly,
18 surprised to hear counsel suggest otherwise, that these are
19 a series of discrete decisions. That's how they're
20 explained and set forth within the Administrative Record and
21 that's how they were made.

22 And so if Your Honor were to determine that one of
23 the six categories was inadequately explained, it would be
24 quite appropriate to simply vacate with respect to that
25 category and remand for further explanation, if necessary.

1 And Judge Jackson actually has a recent decision.
2 The case is called *AFL-CIO v. National Labor Relations*
3 *Board*, the cite is 466 F.Supp.3d 68, where she explains at
4 some length that the APA authorizes courts to invalidate
5 just part of an agency decision. And really in her view and
6 in the government's view, the severability analysis isn't
7 even called for in this type of case, where it's so clear
8 that these are discrete decisions that NARA made.

9 And so it really wouldn't make any sense if the
10 problem were, say, inadequate response to a comment about
11 the segregation reports, to throw out all the other
12 appropriately reasoned and supported decisions.

13 THE COURT: Okay.

14 So I guess the bottom line is, in your view,
15 it would be appropriate to sort of take this category by
16 category?

17 MR. DeMOTT: Yes. Absolutely, Your Honor.

18 THE COURT: All right.

19 MR. DeMOTT: I did want to just briefly respond to
20 a few of the points that Counsel made. I think the vast
21 majority of them are addressed in the briefing, and, you
22 know, so we would largely rest on the brief.

23 But I just want to highlight, you know, time and
24 again, plaintiffs are trying to replace the high bar for
25 permanent preservation that NARA has established and adheres

1 to with a very speculative subjective inquiry into whether
2 the records might be useful for research down the road, and
3 that's simply not the standard by which NARA makes its
4 appraisal decisions. And plaintiffs just refuse to engage
5 with the high bar that's actually set forth in Sections 7
6 and 8 in particular.

7 And, you know, the vast majority of the
8 comments -- plaintiffs' counsel pointed out that there were
9 23,000 comments, the vast majority of them were duplicative,
10 they were just based off of the same, you know, form
11 provided by the ACLU.

12 But they weren't saying -- they weren't
13 challenging the premises of the actual decision, which are
14 in the Administrative Record, the appraisal memo in
15 particular but also both of the consolidated replies.

16 You know, with respect to the sexual abuse and
17 assault files, for example, appraisal memo --

18 THE COURT: Let me -- can I just interrupt you.

19 When you say -- just because I want to make
20 sure -- when you say the "appraisal memo," are you referring
21 to the September 12th, 2018, memo at A.R. 171, or is that a
22 different document you're referring to?

23 MR. DeMOTT: That's the document, Your Honor.

24 Sorry for not being clear on that.

25 THE COURT: No, that's okay. I just want to make

1 sure we're on the same page.

2 MR. DeMOTT: Yes, that is the appraisal memo.

3 So when you look at appraisal justification:

4 First, captured elsewhere in long-term temporary records
5 makes clear what those records are; second, captured
6 elsewhere in permanent records makes clear what those
7 records are.

8 And, again, this is APA review. Plaintiffs'
9 counsel is demanding a level of granularity and specificity,
10 both in articulating the reasoned basis for the decision and
11 in responding to every possible aspect of every comment that
12 the APA simply doesn't require.

13 I would note that Counsel is really ignoring the
14 long retention periods that NARA did establish for these
15 various sets of records and that those periods are
16 established based on the appraiser's subject area of
17 expertise and are entitled to deference.

18 For example, Counsel is pointing out that there
19 are several things that could be found in sexual assault
20 files -- again, each file is very different, so the lists
21 that you're seeing in these descriptions are the types of
22 things that one might find, and it's not like this is a
23 checklist of things that are all going to be in every sexual
24 assault investigation file.

25 But NARA didn't disregard the fact that they are

1 more complete than the significant incident reports, nor did
2 it ignore the fact that they could be used for transparency
3 and accountability. It says that on page 17 of the
4 Administrative Record, which is the second consolidated
5 reply. Again, it's summarizing its position, and it's
6 already given in detail in the appraisal memo its reasons
7 for its decision.

8 THE COURT: Can I just --

9 MR. DeMOTT: So it's quite clear --

10 THE COURT: I'm sorry to interrupt you.

11 But just so I make sure the timeline is straight
12 in my head.

13 So the appraisal memo -- well, the first notice in
14 the Federal Register appears in July of 2017. There are
15 comments that follow from that. The appraisal memo is,
16 then, written in September of 2018. But then there is a
17 consolidated reply in June of 2019.

18 So the appraisal memo was made -- was not public,
19 but the consol- -- the first consolidated reply was public.
20 There were additional comments, and then there's the second
21 consolidated reply in December of 2018.

22 Is that the correct timeline?

23 MR. DeMOTT: Your Honor, I apologize, I am not
24 sure whether the appraisal memo was made public.

25 My understanding was that it was made public on

1 the website, but I'm struggling to find that specifically in
2 my notes.

3 But the timeline is, I think, generally, as you
4 say; it's summarized on pages 6 to 9 of our opening
5 memorandum.

6 And what happened is, there were a few different
7 steps in the decision-making process. So there is an
8 original appraisal memo from, let's see, it's in the Joint
9 Appendix at pages 610 to 613.

10 So there was an appraisal memo of June 20, 2017.
11 And subsequently in response to the comments, the appraisal
12 memo was revised.

13 THE COURT: Okay.

14 MR. DeMOTT: Is that helpful, Your Honor?

15 THE COURT: It is, yes.

16 I'm just trying to -- there seems to be a lot of
17 various decision points here and I'm trying to get them all
18 straight in my head.

19 MR. DeMOTT: Yes.

20 We did our best to summarize it with all the dates
21 and references to the Administrative Record. It starts on
22 page 6 of our opening memorandum and continues for four or
23 five pages.

24 And I apologize that, at this moment, my
25 recollection of all the dates and order is probably not as

1 good as it was when I wrote this, so I'll direct you there
2 for the most kind of step-by-step statement of when
3 everything happened.

4 THE COURT: Okay.

5 All right. Mr. DeMott, do you have anything else
6 you would like to add?

7 MR. DeMOTT: Just in summary, Your Honor, I think
8 it's important to recognize that *Webster* did not create some
9 more stringent standard of APA review for cases involving
10 the Federal Records Act.

11 *Webster* was a case where the agency said it hadn't
12 taken anything into consideration except for its own
13 business needs and NARA had basically rubber stamped that
14 decision. And the Court said no, this is judicially
15 reviewable, there's substantial discretion to the archivist,
16 but the archivist does need to provide that brief
17 explanation required by the APA. And I think it's quite
18 clear from the briefing that what plaintiffs are demanding
19 is something much more specific and granular than the APA
20 requires.

21 The agency gave the main reasons for its decision,
22 it considered the relevant factors, it summarized and
23 responded to the most important comments, and its decision
24 should, therefore, be affirmed.

25 THE COURT: All right. Thank you very much for

1 your presentation; I appreciate it.

2 All right. Mr. Sus, we'll turn back to you and
3 give you a couple minutes for rebuttal.

4 MR. SUS: Sure.

5 And just three points, Your Honor.

6 First, the government's conception of NARA's
7 burden to respond to public comments, we just disagree with
8 them on the law on that.

9 The case law says that agencies have to respond to
10 comments that challenge a fundamental premise underlying the
11 agency's decision and those that raise substantial
12 countervailing statutory considerations.

13 To the extent the comments raised substantial
14 countervailing considerations on research value, NARA needed
15 to specifically address them. It could group them with
16 other comments and address them as a whole, we're not saying
17 it needed to respond to each comment individually, but to
18 the extent that comments raised unique and substantial
19 points that bore on the issue of research value, NARA needed
20 to address them.

21 The second point, Counsel referred to sort of the
22 reference -- NARA's reference below to transparency and
23 accountability as sort of a semantic difference between
24 referring to that and long-term historical and research
25 value, and we think it is more than a semantic difference.

1 Transparency and accountability is, especially
2 when viewed in context of where NARA made those statements,
3 is a much -- looking at more near-term interests rather than
4 the sort of long-term historical interests that the
5 plaintiffs have presented in this case and that the
6 commenters presented below, and it's not just a semantic
7 difference. And we think the fact that NARA only referred
8 to -- sort of referred to near-term transparency and
9 accountability interest is proof that the agency did not
10 consider the relevant priorities and at least did not
11 explain itself adequately.

12 And, finally, Your Honor, I just flag that
13 commenters did raise records that are stored in records
14 Group 85 below. The archival group reclaimed the records at
15 page 201 of the record, and also Professor Satsuki Ina, who
16 himself was detained in a World War II internment camp at
17 page 286 of the record, both specifically flagged records
18 that are stored in record group 85 and claimed that they
19 were historical parallels of the ICE records. They did not
20 identify records Group 85 by name, but presumably NARA is
21 aware of where its records are stored and it knows that the
22 records referenced are stored in Record Group 85.

23 And at a minimum, the comments were sufficient to
24 put NARA on notice that records of ICE's predecessor agency,
25 the INS, are in NARA's permanent archives, that they are

1 viewed as priceless by historians, as Your Honor pointed
2 out, and are subject to high reference use.

3 And we think that alone was sufficient to put the
4 agency on notice of the need to consider that as a relevant
5 past practice that bore on its appraisal determination.

6 THE COURT: Mr. Sus, thank you.

7 Mr. DeMott, thank you, both, for your
8 presentations. There's a lot here to chew on and get my
9 arms around and I know these issues are important to
10 everyone, so I will get down to the business of getting you
11 all a decision as soon as we can.

12 MR. SUS: Thank you, Your Honor.

13 MR. DeMOTT: Thank you, Your Honor.

14 THE COURT: Bu-bye.

15 (Proceedings concluded at 3:30 p.m.)

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C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Please note: This hearing occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of court reporting remotely.

Date: February 11, 2021 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR

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