

September 30, 2020

VIA ELECTRONIC AND CERTIFIED MAIL

Records Appraisal and Agency Assistance
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001
Request.Schedule@nara.gov

**Re: Comments to CBP Document Destruction Proposal (NARA-20-0017-0014;
Control Number DAA-0568-2018-0001)**

Dear National Archives and Records Administration,

The undersigned organizations submit the following comments to the National Archives and Records Administration (NARA) in response to the records schedule regarding Department of Homeland Security (DHS), Customs and Border Protection (CBP) (Control Number DAA-0568-2018-0001), 85 FR 47248 (Proposed CBP Schedule).

CBP seeks NARA's approval to destroy after four years "records developed to track and monitor complaints that are or will be investigated by DHS Civil Rights and Civil Liberties (CRCL) regarding alleged violations of civil rights and civil liberties" and associated "Requests for Information." CBP further proposed 25-year retention periods for "records pertaining to administrative and criminal investigations on [CBP] employees, contractors, and those in CBP custody," as well as records and reports pertaining to Prison Rape Elimination Act (PREA) allegations. A July 9, 2020 NARA appraisal memorandum accompanying the Proposed CBP Schedule recommends approving it in full (Appraisal Memorandum).

We are deeply concerned by CBP's proposal, and we urge NARA to revise the records schedule and permanently retain the records at issue.

I. CBP's Origins, Structure, and Culture of Impunity

CBP was established as a component of DHS in 2003, as part of a major restructuring of U.S. immigration agencies in the wake of September 11, 2001.¹ "Before CBP, security, compliance and facilitation of international travel and trade were conducted by multiple organizations."²

¹ Chad C. Haddal, *Border Security: Key Agencies and Their Missions*, Congressional Research Service, (Jan. 26, 2010), <https://fas.org/sgp/crs/homesec/RS21899.pdf>.

² U.S. Customs and Border Protection, *CBP through the Years*, <https://www.cbp.gov/about/history> (July 30, 2019).

Among CBP's components is U.S. Border Patrol, which is charged with policing U.S. borders between ports of entry.³ Today, CBP employs 19,648 Border Patrol agents and 24,511 CBP officers tasked with enforcement at ports of entry.⁴ Since the agency's inception in 2003, CBP's budget has increased from \$5.9 billion to nearly \$17 billion.⁵ It is now the nation's largest federal law enforcement agency in the United States.⁶

Despite its relatively recent creation, CBP has already amassed a disturbing record of abuse and misconduct, as well as a deep-rooted culture of impunity.⁷ Compounding the problem, accountability mechanisms have utterly failed to keep pace with CBP's rapid expansion and massive workforce.

Indeed, a volume of evidence shows that CBP's devised accountability mechanisms have not, in fact, held it accountable for abuse and misconduct.⁸ The accountability mechanisms are also shrouded in secrecy. Though a Cato Institute study found strong evidence of CBP's misconduct and disciplinary infractions between 2006 to 2016, it was "virtually impossible to assess the extent of corruption or misconduct in U.S. Customs and Border Protection . . . because most publicly available information [was] incomplete or inconsistent."⁹

³ U.S. Customs and Border Protection, *Executive Assistant Commissioners' Offices*, <https://www.cbp.gov/about/leadership-organization/executive-assistant-commissioners-offices> (Sept. 4, 2020).

⁴ U.S. Customs and Border Protection, *Snapshot: A Summary of CBP Facts and Figures* (June 2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Jun/CBP-Snapshot-20200611-web.pdf>.

⁵ American Immigration Council, *The Cost of Immigration Enforcement and Border Security* (May 17, 2019), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security>.

⁶ Shaw Drake & Andrea Flores, ACLU, *Border Patrol Violently Assaults Civil Rights and Liberties*, (June 24, 2020), <https://www.aclu.org/news/immigrants-rights/border-patrol-violently-assaults-civil-rights-and-liberties/>.

⁷ *Id.*

⁸ Guillermo Cantor, Ph.D. & Walter Ewing, Ph.D., Am. Immigr. Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, (August 2, 2017), <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered>; see also Daniel E. Martinez, Ph.D., Guillermo Cantor, Ph.D. and Walter Ewing, Ph.D., *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, Am. Immigr. Council, May 4, 2014, available at <https://www.americanimmigrationcouncil.org/research/no-action-taken-lack-cbp-accountability-responding-complaints-abuse> (of 809 complaints of alleged abuse lodged against Border Patrol agents between January 2009 and January 2012 - including cases involving physical, sexual, and verbal abuse - 97 percent resulted in "No Action Taken"); Dana Liebelson, *A CBP Officer Shot A 21-Year-Old American In The Head. 6 Months Later, CBP Won't Say Why*, HuffPost, (Aug. 19, 2019), https://www.huffpost.com/entry/cbp-shooting-unarmed-vehicles_n_5d24cd0ae4b0583e4828365f.

⁹ Alex Nowrasteh, CATO Institute *Border Patrol Termination Rates: Discipline and Performance Problems Signal Need for Reform*, (November 2, 2017), <https://www.cato.org/publications/policy-analysis/border-patrol-termination-rates-discipline-performance-problems-signal>.

Data obtained by the American Immigration Council in 2017 revealed that the agency took “no action” in 95.9 percent of complaints made against agents including verbal abuse, theft of property, and physical assault, over a three year-period.¹⁰

The lack of accountability for agency abuses is largely due to CBP’s failed disciplinary system. Despite a set of recommendations issued by an independent advisory panel in 2016, CBP has still not taken adequate steps to fix the system. For example, the panel recommended CBP hire 350 internal affairs investigators, but the agency has not done so. It also recommended the appointment of a discipline czar to coordinate internal accountability across the agency. Over three years later, the agency has yet to create that position.¹¹

In addition to CBP’s failed disciplinary and internal accountability mechanisms necessitating robust retention of all agency records, the frequent lack of public findings or recommendations issued by CRCL in response to complaints further supports the need to retain internal CBP records related to all oversight inquiries. In 2016, the DHS inspector general acknowledged the need to investigate whether CRCL was effectively responding to complaints, but that audit never happened.¹² In 2019 alone the ACLU of Texas and the ACLU of San Diego and Imperial Counties filed at least 11 separate complaints with CBP’s joint intake system regarding CBP’s abuses at the Southwest border.¹³ Those complaints contained numerous individual examples of

¹⁰ Guillermo Cantor, Ph.D. & Walter Ewing, Ph.D., *supra* 8.

¹¹ A.C. Thompson, *Years Ago, the Border Patrol’s Discipline System Was Denounced as ‘Broken.’ It’s Still Not Fixed*, Propublica, (June 20, 2019), <https://www.propublica.org/article/border-patrol-discipline-system-was-denounced-as-broken-still-not-fixed>.

¹² Department of Homeland Security, Office of Inspector General, *Fiscal Year 2016 Annual Performance Plan*, 29, https://www.oig.dhs.gov/sites/default/files/assets/SAR/2016/OIG_APP_FY16.pdf; Myram Saleh & Spencer Woodman, *A Homeland Security Whistleblower Goes Public about ICE Abuse of Solitary Confinement*, The Intercept (May 20, 2019), <https://theintercept.com/2019/05/21/ice-solitary-confinement-whistleblower/> (Erica Paulson confirmed no audit done).

¹³ Four complaint series on mistreatment of detained people in CBP custody in Southern California, including the treatment of pregnant women, sick children, family separation, and verbal abuse, ACLU (Jan. – March 2020), <https://www.aclusandiego.org/administrative-complaint-series-reflects-horrors-of-cbp-detention/>; Complaint Re: CBP’s unlawful turn back of Mexican asylum seekers at ports of entry, ACLU (Nov. 2019), https://www.aclutx.org/sites/default/files/aclu_oig_complaint_metering.pdf; Complaint Re: Pregnant women returned to Mexico under the “Migrant Protection Protocols,” ACLU (Sept. 2019), https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf; Complaint Re: U.S. Customs & Border Protection’s Routine Failure to Provide Necessary Medical Care and Treatment to Individuals in Substance Withdrawal at Ports of Entry, ACLU and Physicians for Human Rights (Sept. 2019), https://www.aclutx.org/sites/default/files/poe_med_care_ltr_-_aclu_and_phr.pdf; Complaint Re: U.S. Customs and Border Protection (CBP) Illegally Denying Entry of United States Citizens as Mexican Authorities Threatened Them with Arrest, ACLU (Aug. 2019), https://www.aclutx.org/sites/default/files/aclu_border_rights_center_eagle_pass_complaint.pdf; Complaint Re: Abusive Conditions in Border Patrol Detention Facilities in the Rio Grande Border Patrol Sector, ACLU (May 2019), https://www.aclutx.org/sites/default/files/aclu_-_rgv_border_patrol_conditions_oig_complaint_05_17_2019.pdf; Complaint Re: Abusive Conditions in Makeshift Border Patrol Holding Facilities at Paso del Norte Port of Entry in El Paso, Texas, ACLU (March 2019), https://www.aclutx.org/sites/default/files/pdn_border_patrol_abuse_oig_complaint.pdf;

abuse by CPB and were built on hundreds of interviews. Only one resulted in a confirmed DHS Office of Inspector General (OIG) investigation, while others received form letter responses from CRCL ensuring inquiry into the allegations but no further communication about the status of the complaint. Though the complainant and the public may not receive even basic information about investigations as they are occurring, documentation collected by CBP in response to such complaints could eventually prove vital in a retrospective examination into a particularly abusive period in the agency's history.

As explained in further detail below, the widely documented failures of DHS oversight mechanisms and internal agency accountability measures weigh heavily in favor of permanently retaining records of CBP misconduct and abuse.

II. Legal Framework

Under the Federal Records Act (FRA), NARA can approve the destruction of records only if it determines they lack “sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government.”¹⁴ Once NARA approves an agency's proposed records schedule, disposal of the scheduled records “shall be mandatory.”¹⁵ “If the Archivist errs in authorizing disposal, therefore, valuable federal records could be lost forever.”¹⁶

Guiding NARA's determination is its Appraisal Policy, which “sets out the strategic framework, objectives, and guidelines that [NARA] uses to determine whether Federal records have archival value.”¹⁷ Under this policy, “NARA will identify for permanent retention records that,” among other things, (1) “[r]etain their importance for documenting legal status, rights and obligations of individuals, groups, organizations, and governmental bodies despite the passage of time”; (2) “[p]rovide evidence of Federal deliberations, decisions, and actions relating to major social . . . issues”; (3) “[p]rovide evidence of the significant effects of Federal programs and actions on individuals” and “communities”; or (4) “[c]ontribute substantially to knowledge and understanding of the people and communities of our nation.”¹⁸

The Appraisal Policy further directs NARA to evaluate records' “future research potential” by “consider[ing] the kinds and extent of current research use” and by “try[ing] to make inferences about anticipated use both by the public and by the Government.”¹⁹ This analysis necessarily requires “knowledge of and sensitivity to researchers' interests,” and a “willingness to acknowledge and understand comments and suggestions from diverse perspectives.”²⁰ Other

Complaint Re: U.S. Customs and Border Protection (CBP) Illegally Denies Family Access to Ports of Entry to Lawfully Seek Asylum, Leading to Kidnapping, and Mistreatment in Mexico, ACLU (March 2019), https://www.aclutx.org/sites/default/files/field_documents/oig_complaint_doe_family_.pdf.

¹⁴ 44 U.S.C. § 3303a(a).

¹⁵ 44 U.S.C. § 3303a(b).

¹⁶ *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999).

¹⁷ NARA Directive 1441, Appraisal Policy of the National Archives and Records Administration, § 1, Sept. 20, 2007, <https://www.archives.gov/records-mgmt/scheduling/appraisal> (“Appraisal Policy”).

¹⁸ *Id.* § 8.

¹⁹ *Id.*, App. 1.

²⁰ *Id.* § 1.

“important considerations” include the “significance of the functions and activities performed by the originating agency . . . and the business context within which the records are created,” as well as the records’ “uniqueness”—*i.e.*, whether they are “the only or are the most complete source for significant information.”²¹

Echoing these principles, the D.C. Circuit Court of Appeals has long held that NARA’s appraisal decisions must “account in some reasonable fashion for historical research interests,” and “not just the [agency’s] immediate, operational needs.”²² This is reinforced by the FRA’s legislative history, which shows that “Congress intended, expected, and positively desired private researchers and private parties whose rights may have been affected by government actions to have access to the documentary history of the federal government.”²³ NARA thus cannot assume that “summaries” of records slated for destruction “are always sufficient to maintain all information,” because “[i]n certain cases that invoke substantial public or historical interest, it will be valuable for researchers to examine primary source material instead of relying on secondary source summaries,” and in other “cases, summaries cannot be trusted to address all important research issues that may arise, especially when the summaries are prepared with the [agency’s] objectives in mind.”²⁴

In short, NARA’s appraisal decisions cannot be made in a vacuum, but must instead consider various contextual factors such as contemporary use of the records by legislators and private parties (including advocates, researchers, and academics), the use of comparable records stored in NARA’s permanent archives by historians and others, the functions and activities of the originating agency, the extent to which those actions relate to major social issues and events, and the public interest the agency’s actions have generated.

III. NARA Should Reject the Proposed CBP Records Schedule

The Proposed CBP Schedule includes three items for temporary disposition: Civil Rights and Civil Liberties Case Files (CRCL Case Files), Misconduct Files, and Prison Rape Elimination Act Allegation Tracking Records. For each item, NARA has either insufficiently described the records at issue (thus precluding meaningful public comment), insufficiently explained its reasoning for approving temporary retention, overlooked important appraisal considerations, or made each of these errors. Because the records slated for destruction have high long-term value for legal, research, historical, and accountability purposes, NARA should decline to approve the schedule as proposed and permanently retain the records at issue. At a minimum, NARA should provide additional detail on the scheduled records and conduct another round of public comment before making a final approval decision.

²¹ *Id.* App. 1.

²² *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 65 (D.C. Cir. 1983); *see also id.* at 66 n.61 (NARA did “not provide a suitable . . . reasoned justification” for approving agency disposal schedules where it “reflect[ed] an insensitivity to research needs,” and overlooked that “certain records may be of particular interest to historians, researchers, or other private parties”).

²³ *Id.* at 57.

²⁴ *Id.* at 66 n.61.

In addition to the reasons set forth below, the subject records are likely to reflect CBP interactions with other government agencies, and therefore may include law enforcement, intelligence and diplomatic information from outside of CBP.

It is unclear whether the proposed schedule pertains to classified records or information. If so, the presence of classified material would argue in favor of a longer retention schedule, considering the slow pace of declassification.

A. CBP's CRCL Case Files

The proposed schedule states CRCL Case Files are “developed to track and monitor complaints that are or will be investigated by DHS Civil Rights and Civil Liberties regarding alleged violations of civil rights and civil liberties, and to track and monitor Requests for Information associated with complaints.”²⁵ The schedule would require destruction of these records four years after the case is closed.

NARA's description of these records is insufficient to permit meaningful public comment. The proposed schedule provides only a terse, two-sentence description. And NARA's Appraisal Memorandum states only that the records at issue are “records tracking complaints involving CBP that are being investigated by [CRCL],” including “tracking of requests for information that arise during investigation of complaints,” which are “maintained by [the Office of Professional Responsibility's] Joint Intake Center.”

NARA's “appraisal justification” includes no substantive discussion of the appraisal considerations outlined above. It instead dismisses the records' historical value and future research potential in a conclusory manner, proclaiming without analysis that the records do not have “value beyond their functional use for tracking complaints and ensuring fulfillment of obligations to furnish information for CRCL regarding complaints” and “contain insufficient historical value to warrant preservation in the National Archives once the business needs of the agency have been met.”

The Appraisal Memorandum also appears to conclude that CBP's retention of the files would be duplicative of CRCL's own case files, but insufficiently explains the basis for that conclusion. Specifically, the appraisal justification implies that because CRCL is conducting the investigation and the CBP records are merely tracking the complaints and CRCL requests for information, maintaining CRCL records related to the same investigation for a longer period of time (though, not permanently) should suffice. But since the records at issue are developed in response to future or ongoing investigations by CRCL, it is presumably not the case that records maintained by CRCL are assured to be fully duplicative of the CBP documents slated to be destroyed. There is no guarantee that CBP turned over all documents to CRCL related to their investigations, leaving open that possibility that important additional details are only contained in CBP records. At a minimum, NARA should provide a more detailed explanation of its conclusion that retention of the CBP records would be duplicative of CRCL's own case files.²⁶

²⁵ Records Schedule DAA-0568-2018-0001-0001.

²⁶ See *Webster*, 720 F.2d at 65-66 & n.61.

In addition, NARA's appraisal of the CBP records' research value was based partly on CRCL's own record-retention decisions, including CRCL's decisions whether to retain investigative files documenting "policy, procedural, or operational change[s]." This assumption is flawed.

CRCL has historically failed to establish a consistent and effective oversight role over immigration enforcement agencies at DHS. CRCL staff have repeatedly raised alarm at the office's inability or unwillingness to investigate cases of abuse. In 2019, a former CRCL staff attorney and adviser, Ellen Gallagher, said: "It seems to mislead the public, to invite complaints involving specific information about the individual or the family and the alleged violation, if Civil Rights and Civil Liberties had no intention of specifically investigating or resolving those individual complaints."²⁷ More recently, CRCL staffers publicly expressed concerns that they were being wholly sidelined by CBP.²⁸

Documentation of CBP abuses relies largely on complaints initiated by victims and civil society. CBP does not have a unified system through which the agency receives its complaints. Instead, individuals must attempt to access a confusing and convoluted process for submitting, managing, and tracking complaints. Complaints regarding criminal and non-criminal misconduct by CBP employees or contractors can be submitted directly to the DHS-OIG, to the Joint Intake Center (JIC), to CBP's Office of Professional Responsibility (OPR), and/or to CRCL.²⁹ Reports show that CBP fails to timely respond to the oversight agency's requests for additional information about specific complaints.³⁰ CBP also has found complaints unsubstantiated based on records where CBP record-keeping was clearly inadequate.³¹

CBP records shedding light on how CRCL-led investigations are conducted should be retained permanently, because they will have high long-term value to legislators, advocates, researchers, historians, and others. The records will provide critical insight to anyone seeking to evaluate internal CBP accountability; investigative details regarding the types of civil rights and civil liberties complaints that plagued the young agency; and internal CBP action or inaction

²⁷ Susan Ferriss, Alison Kodjak et al., *Homeland Security's Civil Rights Unit Lack Power to Protect Migrant Kids*, National Public Radio (Aug. 2, 2019), <https://www.npr.org/sections/health-shots/2019/08/02/746982152/homeland-securitys-civil-rights-unit-lacks-power-to-protect-migrant-kids>.

²⁸ Julia Ainsley & Laura Strickler, *DHS Staffers Say Trump Appointees Wolf, Cuccinelli Ignoring Input on Protests, Immigration Policy*, NBC News (Aug. 7, 2020), <https://www.nbcnews.com/politics/immigration/dhs-staffers-say-trump-appointees-wolf-cuccinelli-ignoring-input-protests-n1236040>.

²⁹ U.S. Customs and Border Protection, Office of Professional Responsibility – Professional Responsibility, <https://www.cbp.gov/about/leadership-organization/professional-responsibility> (July 13, 2017).

³⁰ ACLU of San Diego and Imperial Counties, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs & Border Patrol 35* (May 2018), <https://www.aclusandiego.org/civil-rights-civil-liberties/>.

³¹ *Intake Without Oversight: Firsthand Experiences with the Customs and Border Protection Complaints Process*, Kino Border Initiative (July 2017), https://www.kinoborderinitiative.org/wp-content/uploads/2017/11/IntakeWithoutOversight_v06.pdf.

regarding these complaints. At the very least, NARA should provide a more detailed description of the CBP records to enable meaningful public comment.

B. Records of CBP Misconduct

The proposed CBP schedule describes “Misconduct Files” as “records pertaining to administrative and criminal investigations conducted on U.S. Customs and Border Protection employees, contractors, and those in CBP custody.” DAA-0568-2018-0001-0002. They involve all investigations of misconduct by CBP employees and contractors that are referred to and investigated by OPR, including “cases of alleged corruption, mismanagement, off-duty misconduct, and misuse of government-issued weapons.” The records involve investigations of the most high-level agency officials - members of the Senior Executive Service (SES) and GS-15 employees - by the Special Investigations Unit (SIU) and include documents such as “the closing report on an investigation, sworn witness statements and transcripts of interviews.” CBP proposes destroying these files 25 years after “close of [the] case or receipt of notification as applicable.”

NARA’s Appraisal Memorandum dismisses these records as lacking long-term historical value because the “vast majority of investigations are administrative,” and “significant cases” or those “receiving national media attention or congressional committee interest” are separately investigated by the DHS-OIG. Dismissing the files as merely “administrative” and using the DHS-OIG’s investigative decisions as a litmus test for gauging the significance of CBP misconduct investigations demonstrates a fundamental misunderstanding of the immigration oversight system.

CBP abuses along the United States-Mexico border are commonplace: over ten percent of undocumented migrants experience physical abuse while in CBP custody.³² With officials apprehending over 400,000 people each year, that amounts to tens of thousands of individuals subject to physical abuse *annually*.³³ In addition to a high number of incidents involving physical force, officials routinely deny detained children medical care,³⁴ lose, destroy or steal detainees’

³² Jeremy Slack, Daniel E. Martinez et al., *The Geography of Border Militarization, Violence, Death, and Health in Mexico and the United States*, in *The Shadow of the Wall* 106 (Univ. of Arizona Press ed., 2018).

³³ *Id.*

³⁴ *Supra* 30; see Letter Complaint from Am. Immigr. Council, et al. to Officer Cameron Quinn Office for Civil Rights and Civil Liberties Department of Homeland Security, et al. (Sept. 4, 2019), <https://www.americanimmigrationcouncil.org/advocacy/medical-negligence-customs-and-border-protection-facilities?emci=f4923f95-42cf-e911-bcd0-281878391efb&emdi=ea000000-0000-0000-0000-000000000001&ceid> (highlighting a systematic failure to provide adequate medical care to children in Customs and Border Protection (CBP) custody—in violation of CBP’s own internal guidance and extensive medical guidelines).

personal property,³⁵ and withhold food.³⁶ Agents also participate in pervasive verbal abuse of those in custody.³⁷

A FOIA release of 2,178 complaints filed against CBP alleged a wide range of abuses: an agent ran over an individual with an all-terrain vehicle; an agent placed a Taser in a U.S. citizen's mouth;³⁸ an agent struck a person on the back of the head with a shotgun; an agent beat, kicked, and made an person eat dirt while he was apprehended; an agent failed to provide food, milk, diapers, and medical care to detained mothers, children, and unaccompanied children; an agent made a young girl take her pants off then looked down her underwear; two agents raped a person; and an agent solicited sexual favors from people in exchange for entry into the U.S.³⁹ That an investigation of this type of abuse might be labeled "administrative" or that the DHS-OIG chooses not to investigate in no way supports a conclusion that such records lack long-term research or historical value.

In addition, CBP has proven itself to be an untrustworthy arbiter of misconduct investigations, reinforcing the need for external scrutiny. A report on the CBP complaint and discipline system released in November 2015 by an independent consulting agency expressed concern about the quality of investigations into employee misconduct. The report noted lengthy case processing delays even for less serious complaints, concerns about rote questioning, and failure to follow up with answers from an interviewee.⁴⁰

In addition to flawed investigations, CBP has failed to take action against officers or agents for even serious complaints of abuse. Information released by CBP to the American Immigration Council ("Council") through a FOIA request showed that 96 percent of outcomes of complaints filed against Border Patrol agents between January 2012 and October 2015 in which a formal decision was made, resulted in no action against the agent.⁴¹ The official designation "No Action

³⁵ According to data collected between August 2015 and August 2016 from the Binational Defense and Advocacy Program (PDIB), among 1,162 repatriated individuals, 731 (66.5 percent) reported that the authorities retained their belongings. See Walter Ewing & Guillermo Cantor, Am. Immigr. Council, *Deported with No Possession: The Mishandling of Migrants' Personal Belongings by CBP and ICE* (Dec. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/deported_with_no_possessions.pdf.

³⁶ *Supra* 30.

³⁷ Complaint Re: U.S. Border Patrol's Verbal Abuse of Detained Individuals, ACLU (July 7, 2020), <https://www.aclusandiego.org/wp-content/uploads/2020/07/2020-07-07-OIG-Complaint-4-FINAL-1.pdf>.

³⁸ Guillermo Cantor, Ph.D. & Walter Ewing, Ph.D., *supra* 8; see also Joseph Tanfani, Brian Bennett & Matt Hansen, *How Tasers became instruments of excessive force for CBP*, L.A. Times (Oct. 30, 2015), www.latimes.com/nation/la-na-taser-border-20151030-story.html.

³⁹ See Guillermo Cantor, Ph.D. & Walter Ewing, Ph.D., *supra* 8, at 9.

⁴⁰ See Pivotal Practices Consulting LLC, U.S. Customs and Border Prot. Compl. and Discipline Systems Review: Pub. Rep. of Findings and Recommendations at 34-38 (Nov. 23, 2015), <https://www.cbp.gov/sites/default/files/assets/documents/2016-Mar/cbp-complaint-discipline-system-review.pdf>.

⁴¹ Guillermo Cantor, Ph.D. & Walter Ewing, Ph.D., *supra* 8, at 15. Of 2,178 formal complaints, 1,255 formal decisions were made. 'No Action' represented nearly 96 percent of all outcomes. See also Daniel E. Martinez, Ph.D., Guillermo Cantor, Ph.D. and Walter Ewing, Ph.D., *supra* 8 (97 percent of complaints between January 2009 and January 2012 resulted in "No Action Taken").

Taken” was given in hundreds of complaints of appalling misconduct and abuse, including acts such as severe physical abuse, threats of death and rape, neglect of detainees in need of medical attention, sexual abuse, and coercion into signing English-language paperwork.⁴²

Patterns of abuse within the agency are longstanding and widespread. CBP’s failure to provide adequate access to complaint procedures, to investigate alleged misconduct, and to consistently and satisfactorily discipline officials has fostered a culture of unchecked impunity. A summary of agency activities derived from these investigative records in an annual report will not suffice. The long-term research value of the CBP Misconduct Files cannot be overstated. They provide the only firsthand detailed documentation of the agency’s action and, in many cases, failure to fully investigate a range of abusive behavior. The records should be retained permanently.

C. Prison Rape Elimination Act Allegation Tracking Records and Reports

The Prison Rape Elimination Act (PREA) allegation tracking records scheduled for destruction include “sexual abuse incident review reports and incident-based sexual abuse data available to the Prevention of Sexual Assault (PSA) Coordinator (or subsequent position), including the number of reported allegations determined to be substantiated, unsubstantiated, or unfounded, or for which investigation is ongoing.” For the “substantiated” incidents, additional details are included in the records, including date, time, location and nature of the incident; the demographic background of the victim and perpetrator, including citizenship, age and gender; the reporting timeline for the incident; injuries sustained by the victim; actions taken by the agency and any sanctions imposed. DAA-0568-2018-0001-0003.

In its appraisal justification for these records, NARA states simply that similar records have been approved as temporary by U.S. Immigration and Customs Enforcement (ICE) and the records are captured in the PREA Annual Report. But, as with the CRCL Case Files discussed above, NARA has not sufficiently described these records to enable meaningful public comment. It is not clear, for example, whether all the information captured in the tracking data is also captured in the CBP PREA Annual Reports. NARA should clearly state if the tracking records are fully duplicated in the annual report or if unique details in the tracking records that would provide important context to the PREA investigations would be destroyed under the records schedule. Absent such clarification and further public comment, these records should be retained.

D. Long-Term Research and Historical Needs Require Permanent Retention

In addition to the interests outlined above, historians in particular have a compelling interest in NARA permanently retaining the CBP records, especially those historians seeking to study CBP’s origins and culture. Because the records at issue cover the agency’s nascent period—from its creation in 2003 as part of a major restructuring of U.S. immigration agencies, through its years on the forefront in implementing U.S. immigration policy—their long-term historical value

⁴² *Id.* at 8-10.

is particularly high. And given recent calls for further restructuring of U.S. immigration agencies, the need for permanent retention is all the more pressing.⁴³

NARA's appraisal of the records is inadequate for two major reasons.

First, the records appraisal does not, as is required by the NARA appraisal policy previously discussed, take account of the records' uniqueness and comprehensiveness.

Many CRCL investigations of complaints do not lead to policy changes since CRCL lacks significant enforcement power,⁴⁴ and DHS-OIG does not adequately investigate most significant officer misconduct.⁴⁵ If only files that result in policy change and significant DHS-OIG inquiries are retained permanently at the National Archives, historians will not have access to historically significant material relating to discrimination and mistreatment (including surveillance, harassment, and coercion; physical, sexual, and verbal abuse; withholding of food and medical care; and stealing and destruction of property) by CBP officers that led to CRCL or internal investigation but went no further.⁴⁶

⁴³ Anthony Romero, *Dismantle the Department of Homeland Security. Its Tactics are Fearsome*. ACLU (Aug. 11, 2020), <https://www.aclu.org/news/immigrants-rights/dismantle-the-department-of-homeland-security-its-tactics-are-fearsome/>; David Rittgers, *Abolish the Department of Homeland Security*, Cato Institute Policy Analysis No. 6856 (Sept. 11, 2011), <https://www.cato.org/sites/cato.org/files/pubs/pdf/PA683.pdf>; Matt Mayer, *Why We Should Eliminate the Department of Homeland Security*, Reason (June 23, 2015), <https://reason.com/2015/06/23/president-bush-was-right-before-he-was-w/>.

⁴⁴ CRCL complaints did not lead to demonstrable change in the treatment of children by CBP or implementation of the Remain in Mexico policy: *Neglect & Abuse of Unaccompanied Children U.S. Customs and Border Protection*, ACLU of San Diego and Imperial Counties (May 2018), <https://www.aclusandiego.org/civil-rights-civil-liberties/>; *Rape, Kidnapping, Assault and Other Attacks on Asylum Seekers and Migrants Returned to Mexico Under the "Migrant Protection Protocols; Returns of Other Vulnerable Individuals*, Human Rights First (Aug. 26, 2019), <https://www.humanrightsfirst.org/sites/default/files/OIG-CRCL-Complaint-MPP.pdf>.

⁴⁵ Melissa de Bosque, *A Group of Agents Rose through the Ranks to Lead the Border Patrol. They're Leaving it in Crisis*, ProPublica (Feb. 10, 2020), <https://www.propublica.org/article/a-group-of-agents-rose-through-the-ranks-to-lead-the-border-patrol-theyre-leaving-it-in-crisis>; Robert Moore, *Border Patrol Officials Dodged Congress' Questions About Migrant Children's Deaths*, ProPublica (Jan. 14, 2020), <https://www.propublica.org/article/border-patrol-officials-dodged-congress-questions-about-migrant-childrens-deaths>; Alex Nowraseth, *Discipline and Performance Problems Signal Need for Reform*, Cato Institute Policy Analysis No. 825 (Nov. 2, 2017), <https://www.cato.org/publications/policy-analysis/border-patrol-termination-rates-discipline-performance-problems-signal>.

⁴⁶ Tianna Spears, *I was a U.S. Diplomat. Customs and Border Protection Only Cared That I was Black,* Politico (Aug. 30, 2020), <https://www.politico.com/news/magazine/2020/08/30/black-us-diplomat-customs-border-protection-cbp-detained-harassed-325676>; *Over 30,000 Pages of Records Show Abuse of Minors in CBP Custody*, NBC (October 28, 2019), <https://www.nbcсандiego.com/news/local/cbp-aclu-immigration-abuse-lawyer/2059303/>; Steve Dorsey, *Complaints About Border Employee Conduct, Discrimination Increased as Trump Took Office*, CBS News (April 23, 2018), <https://www.cbsnews.com/news/complaints-about-border-employee-conduct-discrimination-increased-as-trump-took-office/>; Guillermo Cantor, Ph.D. & Walter Ewing, Ph.D., *supra* 8; Jesuit Conference of Canada and the United States & Kino Border Initiative, *Intake Without Oversight: Firsthand Experiences*

Many historians of immigration are interested in understanding the qualitative experiences of individual immigrants in their interactions with CBP agents or while in CBP custody. All primary source material related to CRCL complaints needs to be preserved because, as the aforementioned Ellen Gallagher observed, “the approach within CRCL was essentially not to address the specifics of individual cases.”⁴⁷ The records schedule notes that the misconduct records slated for destruction include “sworn witness statements and transcripts of interviews” and that the Prison Rape Elimination Act records slated for destruction include “sexual abuse incident review reports.” The rich material in these files will not be captured in statistics in PREA and OPR annual reports. The latter, especially, are functional updates geared towards “highlighting examples of the breadth and depth of work OPR does” rather than the numerous complaints that lead to no action taken.

Further, historians must be able to examine complaints and their full handling by the agency in order to adequately draw conclusions about the agency’s oversight functions. The admitted reality that DHS-OIG only takes up a fraction of complaints weighs heavily in favor of permanent retention. A historical examination of all misconduct files compared to those taken up for investigation by the Inspector General would be a highly informative approach to review CBP accountability across its short lifespan under DHS. Full archival retention of such records is vital to any deep retrospective examination of the effectiveness of agency accountability mechanisms. Archival retention is critical as well because historians do not customarily use FOIA to gain access to documents held by agencies and because historians do research into agency activities decades after they occur.

Second, NARA’s analysis also fails to properly evaluate the CBP records’ “future research potential” by “consider[ing] the kinds and extent of current research use” of both the CBP records themselves and historical predecessors of the CBP records from the pre-DHS era.⁴⁸ Indeed the appraisal of the CBP records does not take into account, as required by NARA’s appraisal policy, their relationship to records already appraised as permanent and subject to high reference use at the National Archives.

Contemporary research has focused on behavior of CBP personnel, including abuse of power and a culture of impunity.⁴⁹ This research interest chronologically extends the growing body of scholarship on the behavior of Border Patrol and immigration agents from the pre-DHS era. This pre-DHS era scholarship on misconduct (including on topics covered in the CBP records at issue, such as alleged “corruption,” “misuse of government-issued weapons,” and “sexual assault and abuse of detained immigrants”) does not, for the most part, rely on U.S. Customs Service Misconduct Files that were previously approved as temporary, as the Appraisal Memorandum

with the Customs and Border Protection Complaints Process, (July 2017),

https://www.kinoborderinitiative.org/wp-content/uploads/2017/11/IntakeWithoutOversight_v06.pdf.

⁴⁷ Maryem Saleh and Spencer Woodman, *A Homeland Security Whistleblower Goes Public*, *The Intercept* (May 21, 2019), <https://theintercept.com/2019/05/21/ice-solitary-confinement-whistleblower/>.

⁴⁸ Appraisal Policy, App. 1.

⁴⁹ Jeremy Slack, *The Shadow of the Wall: Violence and Migration at the US Mexico Border* (Daniel Martinez & Scott Whiteford eds., Tucson: University of Arizona Press, 2018).

notes. This pre-DHS era scholarship instead relies upon files of the Immigration and Naturalization Service (INS) stored in NARA's permanent collections.

For example, Kelly Lytle Hernandez, author of *Migra!: A History of the U.S. Border Patrol* (University of California Press, 2010), made ample use of INS internal investigation and complaint files for the period 1924-1956 in order to understand the changing use of discriminatory violence by the Border Patrol.⁵⁰ Over the past decade scholars have continued to use these INS files to analyze how the Border Patrol handled inspections, investigations, operations, voluntary departures, and deportation.⁵¹ Other historians have relied on INS case files available at the National Archives to examine misuse of force, sexual misconduct, and participation in smuggling by border and immigration agents.⁵² It is only within the past five years that INS files spanning the period from the late 1950s through the early 1970s have been screened for research at the National Archives; newly available files cover such topics as agent "graft and bribery," "internal investigations" and complaints of misconduct at Border Patrol stations.⁵³ These records are of interest to recent and current graduate students investigating INS and border patrol handling of asylum seekers, child migrants, and detention conditions during the third quarter of the twentieth century.⁵⁴

This scholarship shows that historians and researchers are making use of permanently archived historical predecessors of the records at issue here. NARA should consider this use in assessing the future research potential of the CBP internal investigations files. If these records are not designated permanent, it will be impossible to pursue scholarship on precisely those topics

⁵⁰ See especially chapter 2 ("sanctuary of violence") and chapter 6 ("corridors of migration control").

⁵¹ Natalia Molina, *Mexicans Suspended in a State of Deportability: Medical Racialization and Immigration Policy in the 1940s* in *How Race is Made in America: Immigration, Citizenship, and the Historical Power of Racial Scripts* (University of California Press, 2013); *Deportation in the Americas: Histories of Exclusion and Resistance*, (Kenyon Zimmer & Cristina Salinas eds., Texas A&M Press, 2018); Adam Goodman, *The Deportation Machine: America's Long History of Expelling Immigrants* (Princeton University Press, 2020).

⁵² Alexandra Minna Stern, *Nationalism on the Line: Masculinity, Race, and the Creation of the U.S. Border Patrol, 1910-1940*, *Continental Crossroads: Remapping U.S.-Mexico Borderlands History*, (Samuel Truett & Elliott Young eds., Duke University Press, 2004); Lauren D. Catterson. *The Case of the Waylaid Immigrant Inspector: Authority, Respectability, and Sexual Misconduct, 1921 34-61*, *Journal of American Ethnic History* 38.1 (2018).

⁵³ These files are part of this records designation: https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/departments-of-justice/rg-0085/n1-085-01-001_sf115.pdf

These INS Central Office files are indexed in box lists available in the finding aid room at the National Archives in Washington, DC. Files include CO CO287.2, "Immigration officers and employees—bribery and graft reports; CO287.3 "Internal Investigations"; CO750.45, "Complaints—El Paso, TX,," CO700.59, "Complaints—Yuma, AZ," etc.; CO791, "Inspectors—Immoral Activity," CO808 "Investigations of Personnel." There additionally are files on personnel matters broken down by region as well as files on "separation, suspension, reduction in rank or salary" of personnel (CO 926).

⁵⁴ Ph.D. dissertation research by Yael Schacher (Harvard), Ivon Padilla-Rodriguez (Columbia) & Smita Ghosh (University of Pennsylvania). See also, Jenna M. Loyd and Alison Mountz, *Boats, Borders, and Bases: Race, the Cold War and the Rise of Migration Detention in the United States* (University of California Press, 2018).

gaining increasing attention by historians of immigration: the interaction of immigrants with officials and the ways local agent activity shape immigration policy and law.⁵⁵ Destroying the CBP records with thus violate NARA's appraisal policy directing the retention of records documenting "significant policy formulation" and the "effects of Federal actions on individuals." If the records are not retained, it will also be impossible for historians of border enforcement to advance their research into the DHS era.⁵⁶ These records constitute the primary source of information regarding the issue of CBP misconduct. Without them, an entire chapter of CBP history would be erased from the public record. The records should be retained permanently.

We urge the National Archives and Records Administration to reject the proposed records schedule and permanently retain all documents relevant to CBP's internal accountability. The destruction of the relevant documents on this timeline does not account for deep failures of accountability mechanisms at CBP, a history of impunity for even the most egregious abuses at the agency, or the need to review a young agency's records. As described above, many of the records in this schedule have significant legal, research, and historical value. They cut to the core concern plaguing the nation's largest law enforcement agency – impunity for abuse. Based on these considerations, the records warrant continued preservation.

Thank you for your attention to our comments.

Respectfully submitted,

[ORG LIST IN ALPHABETICAL ORDER]

⁵⁵ Ethan Blue, *Building the American Deportation Regime: Governmental Labor and the Infrastructure of Forced Removal in the Early Twentieth Century*, *Journal of American Ethnic History* 38 no. 2, 36-64 (2019); S. Deborah Kang, *The INS on the Line: Making Immigration Law on the US-Mexico Border, 1917-1954* (Oxford University Press, 2017); Ashley Johnson Bavery, *Bootlegged Immigrants: Politics and Policy on America's Northern Border* (University of Pennsylvania Press, 2020); scholarship by Cybelle Fox.

⁵⁶ Joseph Nevins, *Operation Gatekeeper: The Rise of the "Illegal Alien" and the Making of the U.S.-Mexico Boundary* (Routledge, 2002); Timothy Dunn, *Blockading the Border and Human Rights: The El Paso Operation that Remade Immigration Enforcement* (University of Texas Press, 2009).