

January 12, 2024

Records Appraisal and Agency Assistance
National Archives and Records Administration
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SUBMITTED VIA INTERNET AT REGULATIONS.GOV

**Re: Comments to CBP Document Destruction Proposal (NARA
DAA-9568-2022-0003)**

Dear National Archives and Records Administration,

The undersigned 171 scholars and 72 organizations submit the following comments to the National Archives and Records Administration (“NARA”) in response to the proposal to dispose of records in accordance with the records schedule regarding the Department of Homeland Security (DHS), Customs and Border Protection (“CBP”) (Control Number DAA-9568-2022-0003) (“Proposed CBP Schedule”); *see* 88 Fed. Reg. 83163.

CBP seeks NARA’s approval to destroy custodial medical case files, which include records of medical treatment and/or examination of immigrants in CBP custody, after twenty years.¹ An October 20, 2023 NARA appraisal memorandum accompanying the Proposed CBP Schedule recommends approval in full (“Appraisal Memorandum”).²

We are deeply concerned by CBP’s proposal and urge NARA to revise the records schedule and permanently retain the records at issue. The records at issue have high long-term archival value for historical and social science research, accountability purposes, and legal proceedings, and should be designated on records disposition schedules as “permanent.” Under the criteria set forth by NARA’s Appraisal Policy, these records retain importance as they “document[] legal status, rights and obligations of individuals . . . and governmental bodies despite the passage of time;” “provide evidence of the significant effects of Federal programs

¹ Office of the Chief Records Officer for the U.S. Government, NARA, Request for Disposition Authority, DAA-0568-2022-0003 (Oct. 23, 2023), <https://www.regulations.gov/document/NARA-23-0013-0001> [hereinafter “Request for Disposition Authority”].

² Memorandum from Ashby Crowder, NARA Appraiser, DAA-0568-2022-0003 (Oct. 20, 2023), <https://www.regulations.gov/document/NARA-23-0013-0001> [hereinafter “Appraisal Memorandum”].

and actions on individuals [and] communities;” and “contribute substantially to knowledge and understanding of the people and communities of our nation.”³

I. Background

A. Current Proposal for Records Destruction

The proposed schedule seeks to dispose of “medical case files of persons in the custody of U.S. Customs and Border Protection.”⁴ These case files are “created for those persons who are provided medical services while in the agency’s custody,” and include digital files, created after June 2021, managed by the Office of the Chief Medical Officer, as well as other records maintained “at the field facilities where the records were created.”⁵ Where CBP transfers a detained immigrant to another entity, such as Immigration and Customs Enforcement (ICE) or the Office of Refugee Resettlement (“ORR”), CBP creates a clinical summary form, CBP 2501, and transfers it to the receiving agency, but continues to maintain the custodial medical file itself.⁶

When a person receives in-house medical care while in CBP custody at facilities that offer medical services, CBP creates an electronic medical record.⁷ According to CBP policy, agents and officers are required to observe and identify potential medical health issues during initial encounters with migrants in custody.⁸ Any individual who is identified as having medical issues will receive a health interview or medical assessment.⁹ Agents and officers must ensure a health interview is conducted on all individuals in custody under the age of 18; and juveniles aged 12 and under, as well as any individual with a reported medical concern, are required to receive a medical assessment.¹⁰

The disposition schedule covers documents collected during this process. The items described cover information about medical history, physical condition, vaccinations, mental health, first-aid, and other medical treatment received by migrants in CBP custody, which include medical assessments, notes of patient encounters, medical summaries, patient refusal of treatment, recorded observations, health interviews, and questionnaires.¹¹ The information contained within these categories may include allergies, special needs, and medications; vital signs; medical history; mental health evaluation and results; recorded health observations of medical providers; physical

³ NARA, *Appraisal Policy of the National Archives* § 7 (2007), <https://www.archives.gov/records-mgmt/scheduling/appraisal>.

⁴ NARA, Appraisal Memorandum.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ U.S. Dep’t of Homeland Sec., Office of the Inspector General (DHS-OIG), *CBP Needs to Strengthen Its Oversight and Policy to Better Care for Migrants Needing Medical Attention 2* (2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-07/OIG-21-48-Jul21.pdf>.

⁹ DHS-OIG, *CBP Needs to Strengthen Its Oversight and Policy to Better Care for Migrants Needing Medical Attention* at 2.

¹⁰ *Id.* at 2.

¹¹ NARA, Request for Disposition Authority at 4.

examinations; review of systems; admission/disposition; subjective notes; medical examiner's notes; additional observations notes; plan of care; objective diagnosis; details on administered medication; and disposition such as whether the migrant is medically cleared for travel, transfer, release or referred to local medical treatment facility.¹²

The records sought to be destroyed within the time proposed by CBP are of great significance both from a historical and legal perspective. The records at issue can provide useful historical research information about migrants' health and their treatment in CBP custody. Further, the records may prove crucial to legal claims against CBP that may come to fruition after the scheduled date of the documents' destruction, including for people who have disabilities or who were minors when abuse or neglect in CBP's custody occurred.

B. Standard for NARA Preservation

Under the Federal Records Act ("FRA"), NARA can approve the destruction of records only if it determines that they lack "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government." 44 U.S.C. § 3303a(a). Once NARA approves an agency's proposed records schedule, disposal of the scheduled records "shall be mandatory." 44 U.S.C. § 3303a(b). "If the Archivist errs in authorizing disposal, therefore, valuable federal records could be lost forever."¹³

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."¹⁴ Under this policy, NARA will identify for permanent retention records that retain their importance for documenting legal status, rights and obligations of individuals, groups, organizations, and governmental bodies despite the passage of time; provide evidence of significant policy formulation and business processes of the federal government; provide evidence of Federal deliberations, decisions, and actions relating to major social . . . issues; provide evidence of the significant effects of Federal programs and actions on individuals and communities; or contribute substantially to knowledge and understanding of the people and communities of our nation.¹⁵

The Appraisal Policy further directs NARA to evaluate records' future research potential acknowledging that what may have low research value today may become of great research use in the future.¹⁶ Other important considerations include the significance of the records, the significance of the source and context of the records, and the timeframe of the records.¹⁷ NARA

¹² *Id.* at 4.

¹³ *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999).

¹⁴ NARA, *Appraisal Policy of the National Archives* § 7.

¹⁵ *Id.* § 8.

¹⁶ *Id.* App. 1

¹⁷ *Id.* App. 1.

must also balance these interests with the costs for long-term maintenance of the records and the volume of the records to be retained.¹⁸

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.”¹⁹ 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.”²⁰

In short, NARA’s appraisal decisions cannot be made in a vacuum, but must instead consider various contextual factors such as the 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.

C. CBP Background

CBP is the lead federal agency charged with ensuring the detection and interdiction of persons unlawfully entering the United States.²¹ With a workforce of over 60,000 employees and over 19,000 border patrol agents,²² CBP is the nation’s largest federal law enforcement agency.²³ The agency’s budget for fiscal year 2023 was for \$17.5 billion.²⁴ Notably, the 2023 budget included \$129.5 million allocated for medical services at the border.²⁵

Despite its stated mission of securing America’s borders, CBP has assumed law enforcement duties beyond the borders in recent years. Agency documents obtained through the Freedom of Information Act showed that CBP officers took part in law enforcement activities

¹⁸ *Id.*

¹⁹ *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”).

²⁰ *Am. Friends Serv. Comm.* 720 F.2d at 57.

²¹ U.S. Gov’t Accountability Office (GAO), *Southwest Border: CBP Needs to Increase Oversight of Funds, Medical Care, and Reporting of Deaths* 1 (2020), <https://www.gao.gov/assets/d20536.pdf>.

²² CBP, *On a Typical Day in Fiscal Year 2022, CBP...* (Jul. 21, 2023), <https://www.cbp.gov/newsroom/stats/typical-day-fy2022>.

²³ CBP, *CBP Enforcement Statistics* (Dec. 22, 2023), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

²⁴ DHS, *U.S. Customs and Border Protection Budget Overview, Fiscal Year 2023 Congressional Justification* at 9, https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection_Remediated.pdf.

²⁵ DHS, *U.S. Customs and Border Protection Budget Overview, Fiscal Year 2023 Congressional Justification* at 11.

during the protests demanding racial justice after the murder of George Floyd in the summer of 2020.²⁶ Media reports indicated that CBP personnel utilized unmarked vehicles to detain protesters.²⁷

CBP's large budget, extensive workforce, and growing mission have not ensured the safety of individuals in the agency's custody. A report by the Office of the Inspector General of the U.S. Department of Homeland Security noted that during a period from November 2019 to April 2020, CBP reported 28 deaths at the U.S.-Mexico border; five of them were reported as "in CBP custody and in their care."²⁸ On May 17, 2023, Anadith Reyes Alvarez, an eight-year old girl, died in CBP custody after reports showed the child was not treated by a doctor despite flu symptoms, a fever that reached 104.9 degrees, and a history of sickle cell disease and heart problems.²⁹ On August 27, 2023, a 29-year old woman also died in CBP custody after experiencing medical issues.³⁰

The deaths of individuals in CBP detention have garnered the attention of Congress. Senator Richard Durbin, Chair of the Senate Judiciary Committee, wrote a letter to CBP requesting "current guidance governing medical care of migrants in CBP custody, including existing guidelines for seeking medical care outside of a CBP facility," as well as information regarding CBP's electronic medical record system, which serves as the portal for records slated for destruction by the agency.³¹

Government oversight agencies and non-governmental organizations have criticized the adequacy of CBP's medical care of individuals in the agency's custody. A July 20, 2021 report by the DHS's Office of Inspector General ("OIG") concluded that CBP needs better oversight and policy to adequately safeguard migrants experiencing medical emergencies along the southwest border.³² The OIG noted that agents and officers were not adequately trained to

²⁶ American Immigration Council, *Beyond the Border: U.S. Customs and Border Patrol (CBP) Presence at Racial Justice Protests in Summer of 2020* (Sept. 20, 2023), <https://www.americanimmigrationcouncil.org/foia/cbp-presence-racial-justice-protests-summer-2020>.

²⁷ Katie Shepherd and Mark Berman, "It Was Like Being Preyed Upon:" Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them, WASH. POST, Jul. 17, 2020, <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/>.

²⁸ DHS-OIG, *CBP Needs to Strengthen Its Oversight and Policy to Better Care for Migrants Needing Medical Attention*, at 1.

²⁹ Nick Miroff, *Inquiry After Girl's Death Reports Unsafe Medical Care in U.S. Border Facilities*, WASH. POST, Jun. 22, 2023, <https://www.washingtonpost.com/immigration/2023/06/22/medical-care-unsafe-border-facilities-migrants/>.

³⁰ CBP, *CBP Statement on Death in Custody at Harlingen Station*, Sept. 1, 2023, <https://www.aila.org/aila-files/4FAF6996-FDAC-4A4E-B24B-152F949689D1/21032932x.pdf>.

³¹ Letter from Sen. Richard J. Durbin, Chair, Senate Judiciary Cmte., to Troy Miller, Sr. Off. Performing Duties of Commiss., CBP (Dec. 14, 2023), <https://www.judiciary.senate.gov/imo/media/doc/SJC%20Durbin%20letter%20to%20CBP%20.pdf>.

³² DHS-OIG, *CBP Needs to Strengthen Its Oversight and Policy to Better Care for Migrants Needing Medical Attention*, Highlights.

identify the need for medical attention,³³ which resulted in CBP officers' failure to provide medical screenings to some medically vulnerable individuals.³⁴ In June 2020, the Government Accountability Office ("GAO") found that CBP spent funds appropriated by Congress for migrants' medical care on items not related to such purpose, including the upgrading of computer networks used for enforcement activities and vehicles used in enforcement missions.³⁵ The report also found that CBP has not consistently implemented enhanced medical care policies and procedures, including the agency's failure to heed a recommendation by the Centers for Disease Control and Prevention to offer influenza vaccines to individuals in custody.³⁶ On April 25, 2023, 66 organizations and 114 medical professionals wrote to CBP's Acting Commissioner, Troy Miller, to complain about CBP's lack of medical care for pregnant women. The letter cites instances when CBP failed to protect the physical and mental health of pregnant women in its custody.³⁷

The documents sought to be disposed of by CBP provide critical documentation of these incidents and are crucial to the study of how an agency tasked in part with ensuring the safety of migrants has provided care for or neglected people in its custody.

II. NARA Should Reject CBP's Proposed Schedule

The Proposed CBP Schedule provides for the destruction of custodial medical case files for people held in CBP custody after twenty years. 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.

A. CBP Medical Case Files Have Significant Historical Value

NARA's Appraisal Memorandum justifies the destruction of CBP medical records after 20 years, stating that the records do not meet the appraisal criteria for permanent preservation. NARA's appraisal justification, however, includes no substantive discussion of the appraisal considerations outlined above. The appraisal justification merely concludes, without analysis, that the records "do not have sufficient administrative, research, or legal use that would make them appropriate for permanent retention in the National Archives once the business needs of the agency have been fulfilled."³⁸

³³ *Id.* at 7

³⁴ *Id.* at 5.

³⁵ U.S. Gov't Accountability Office (GAO), *Southwest Border: CBP Needs to Increase Oversight of Funds, Medical Care, and Reporting of Deaths* at 14.

³⁶ *Id.* at 30.

³⁷ Letter from 66 Organizations and 114 Medical Professionals to Acting Cmmr. Troy Miller, CBP (Apr. 25, 2023), <https://wp.api.aclu.org/wp-content/uploads/2023/04/2023-04-25-Sign-on-Letter-to-CBP-Acting-Comm-Miller.pdf>.

³⁸ NARA, Appraisal Memorandum.

This conclusion is flawed. NARA’s Appraisal Policy directs the agency 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.”³⁹ This analysis necessarily requires “knowledge of and sensitivity to researchers’ interests,” and a “willingness to acknowledge and understand comments and suggestions from diverse perspectives.”⁴⁰

NARA’s appraisal of these records fails to account for the records’ unique and comprehensive nature, as well as the future research potential of these records. Historians have frequently turned to the National Archives for primary sources regarding the treatment of migrants at the U.S.-Mexico border, and their treatment in immigration detention spaces.⁴¹ The study of migration to the United States along the U.S.-Mexico border,⁴² CBP’s administrative origins and culture,⁴³ the use of health-based criteria as a basis for entry or exclusion,⁴⁴ access to

³⁹ NARA, *Appraisal Policy of the National Archives*, App. 1

⁴⁰ *Id.* § 1.

⁴¹ See, e.g. Joseph Nevins, *OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY* (2010); Mae M. Ngai, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); Kristina Shull, *DETENTION EMPIRE: REAGAN’S WAR ON IMMIGRANTS AND THE SEEDS OF RESISTANCE* (2022); Elliott Young, *FOREVER PRISONERS: HOW THE UNITED STATES MADE THE WORLD’S LARGEST IMMIGRANT DETENTION SYSTEM* (2021); Jessica Ordaz, *THE SHADOW OF EL CENTRO: A HISTORY OF MIGRANT INCARCERATION AND SOLIDARITY* (2021); Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 *WESTERN HISTORICAL QUARTERLY* 421 (2006); Celeste Menchaca, “*The Freedom of Jail*”: Women, Detention, and the Expansion of Immigration Governance along the US–Mexico Border, 1903–1917, 39 *J. AM. ETHNIC HIST.* 27 (2020), Brianna Nofil, *Policing, Profits, and the Rise of Immigration Detention in New York’s “Chinese Jails,”* 39 *L. AND HIST. REV.* 649 (2021); Ivón Padilla-Rodríguez, “*Los Hijos Son La Riqueza Del Pobre:*” Mexican Child Migration and the Making of Domestic (Im)migrant Exclusion, 1937-1960, 42 *J. AM. ETHNIC HIST.* 43 (2020).

⁴² See, e.g. Daniel E. Martinez, et al., “*The Migrant Border Crossing Study: A Methodological Overview of Research along the Sonora–Arizona Border,*” 71 *POPULATION STUD.* 249 (2017); Jeremy Slack, et al. *The Geography of Border Militarization: Violence, Death and Health in Mexico and the United States*, 15 *J. LATIN AM. GEOGRAPHY* 7 (2016).

⁴³ See, e.g. Dara Kay Cohen, et al. *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 *STAN. L. REV.* 673 (2006); David Cortez, *Latinxs in La Migra: Why They Join and Why It Matters*, 73 *POLITICAL RESEARCH QUARTERLY* 688 (2021); Todd Miller, *BORDER PATROL NATION: DISPATCHES FROM THE FRONT LINES OF HOMELAND SECURITY* (2014).

⁴⁴ See, e.g. Ayelet Shachar and Aaqib Mahmood, *The Body as the Border: A New Era*, 46 *HIST. SOC. RESEARCH/HISTORISCHE SOZIALFORSCHUNG* 124 (2021); Stephen H. Waterman, et al., *A New Paradigm for Quarantine and Public Health Activities at Land Borders: Opportunities and Challenges*, 124 *PUB. HEALTH REP.* 203 (2009); Amy Reed-Sandoval, *Policy and Politics: Crossing U.S. Borders While Pregnant: An Increasingly Complex Reality*, 48 *HASTINGS CTR. RPT.* 5 (2018); Jennifer F. Myers, et al., *Identification and Monitoring of International Travelers During the Initial Phase of an Outbreak of COVID-19 — California, February 3–March 17, 2020*, 69 *MORBIDITY AND MORTALITY WEEKLY RPT.* 599 (2020); Clive M. Brown, et al., *Airport Exit and Entry Screening for Ebola — August–November 10, 2014*, 63 *MORBIDITY AND MORTALITY WEEKLY RPT.* 1163 (2014).

medical care by migrants at the border,⁴⁵ and medical care and neglect in detention settings,⁴⁶ are all topics of significant academic interest. Contemporary medical analyses of health care in detention similarly rely on disclosures of medical records taken in CBP custody.⁴⁷

The undersigned historians and scholars emphasize the importance of the government's retention of CBP medical records, particularly as they concern documents regarding migrants during the agency's nascent period. CBP was created in 2003 as part of a major restructuring of U.S. immigration agencies, and remains at the forefront in implementing U.S. immigration policy, including recent policies of family separation,⁴⁸ deterrence of migrants by Border Patrol agents on horseback,⁴⁹ and border enforcement practices and policies during the COVID-19 pandemic.⁵⁰ CBP's Office of Chief Medical Officer was only created in 2020; the documents slated for destruction will shape the public's long-term understanding of controversies at issue regarding medical care in CBP detention.⁵¹

Important historical scholarship has relied on medical records from bureaucratic agencies that handled medical care for migrants, including the United States Public Health Service, formerly known as the Marine Hospital Service (1798-1902) and the U.S. Public Health and

⁴⁵ See, e.g. Kate Huddleston, *Border Checkpoints and Substantive Due Process: Abortion Rights in the Border Zone*, 125 YALE L. J. 1744 (2016); *Public Health Surveillance Using Emergency Medical Service Logs — U.S.—Mexico Land Border, El Paso, Texas, 2009*, 59 MORBIDITY AND MORTALITY WEEKLY RPT. 649 (2010); *Public Health Interventions Involving Travelers with Tuberculosis — U.S. Ports of Entry, 2007–2012*, 61 MORBIDITY AND MORTALITY WEEKLY RPT. 570 (2012).

⁴⁶ See, e.g. Owen Dyer, *U.S. Government Treatment of Migrant Children Held in Detention Condemned by Eyewitnesses*, 365 BRITISH MED. J. (2019); Jessica Leung, et al. *Mumps in Detention Facilities That House Detained Migrants — United States, September 2018–August 2019*, 68 MORBIDITY AND MORTALITY WEEKLY RPT., 749 (2019); Katherine Peeler, et al., *Sleep Deprivation of Detained Children: Another Reason to End Child Detention*, 22 HEALTH AND HUM. RTS. 317 (2020); Sara Tomczyk, et al., *Multistate Outbreak of Respiratory Infections Among Unaccompanied Children, June 2014–July 2014*, 63 CLINICAL INFECTIOUS DISEASES 48 (2016); Parveen Parmar et al., *Mapping Factors Associated with Deaths in Immigration Detention in the United States, 2011-2018: A Thematic Analysis*, 2 LANCET REGIONAL HEALTH – AMERICAS (2021), [https://www.thelancet.com/journals/lanam/article/PIIS2667-193X\(21\)00032-6/fulltext](https://www.thelancet.com/journals/lanam/article/PIIS2667-193X(21)00032-6/fulltext); Molly Grassini, et al., *Characteristics of Deaths Among Individuals in US Immigration and Customs Enforcement Detention Facilities, 2011-2018*, 4 JAMA NETWORK OPEN (Jul. 1, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2781682>.

⁴⁷ See, e.g. Joseph Nwadiuko et al., *Pediatric Hospitalizations from Immigration Detention in Texas, 2015-2018*. J PEDIATRICS (May 2022), <https://pubmed.ncbi.nlm.nih.gov/34971657/>.

⁴⁸ Ted Hesson, *Close to 1,000 Migrant Children Separated by Trump Yet to Be Reunited with Parents*, REUTERS, Feb. 2, 2023, <https://www.reuters.com/world/us/close-1000-migrant-children-separated-by-trump-yet-be-reunited-with-parents-2023-02-02/>.

⁴⁹ Eileen Sullivan and Zolan Kanno-Yougs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES, Sept. 21, 2021, <https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html>.

⁵⁰ Ben Fox, *U.S. Extends Heightened Border Enforcement During Coronavirus*, AP NEWS, May 19, 2020, <https://apnews.com/article/12f1a6a2bb555b1f1389473c86575cec>; U.S. CBP, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (last visited Jan. 6, 2024).

⁵¹ See, e.g. Nick Miroff, *CBP Reassigns Chief Medical Officer After Child's Death in Border Custody*, WASH. POST, Jun. 15, 2023, <https://www.washingtonpost.com/nation/2023/06/15/border-patrol-medical-care-child-death/>.

Marine Hospital Service (1902-12).⁵² John McKeirnan González's *Fevered Measures: Public Health and Race at the Texas-Mexico Border, 1848-1942*, Alexandra Minna Stern's *Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America*, and Natalia Molina's *Fit to Be Citizens* are just three examples of historical immigration scholarship that rely heavily upon medical records produced by government agencies.⁵³ The history of eugenics in the United States, particularly as it was practiced on immigrants at Ellis Island, Angel Island and along the U.S.-Mexico border, not to mention overseas sites such as Guantanamo and the Tricornia immigrant detention center in Cuba under U.S. occupation, has relied on U.S. government public health and medical records.⁵⁴ Without such documentation, future historians will be unable to account for the ways in which medicine and public health has been used as an essential tool of immigration policy. One only has to look at the use of a public health measure like Title 42 in recent years to expel millions of immigrants during the COVID-19 pandemic to understand the important relationship between public health, medicine, and immigration policy.

In addition, the appraisal of the CBP records does not take into account, as required by NARA's policy, their relationship to records already appraised as permanent reference use at the National Archives. Pre-DHS scholarship regarding entry and medical care in detention also relies upon files of the Immigration and Naturalization Service ("INS"), and its agency predecessor, the Department of Labor, which are stored in NARA's permanent collections. Indeed, the National Archives maintains files addressing topics ranging from "Quarantine and Immigration" in Customs Service records from 1789 to 1913;⁵⁵ records of medical inspectors on the medical condition of immigrants entering the port of Philadelphia between 1896-1904;⁵⁶ daily medical reports related to Immigration Station detainees between 1941-1944;⁵⁷ medical records including

⁵² "Records of the Public Health Service [PHS], 1912-1968", RG 90, NARA, <https://www.archives.gov/research/guide-fed-records/groups/090.html>.

⁵³ John McKeirnan González, *FEVERED MEASURES: PUBLIC HEALTH AND RACE AT THE TEXAS-MEXICO BORDER, 1848-1942* (2012), Natalia Molina, *FIT TO BE CITIZENS? PUBLIC HEALTH AND RACE IN LOS ANGELES, 1879-1939* (2006); Alexandra Minna Stern, *EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA* (2005).

⁵⁴ See, e.g. Douglas Baynton, *DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS* (2016); Amy Fairchild, *SCIENCE AT THE BORDERS: IMMIGRANT MEDICAL INSPECTION AND THE SHAPING OF THE MODERN INDUSTRIAL LABOR FORCE* (2003); Alan Kraut, *SILENT TRAVELERS: GERMS, GENES, AND THE "IMMIGRANT MENACE"* (2003); Tala Khanmalek, "*Wild Tongues Can't Be Tamed*": Rumor, Racialized Sexuality, and the 1917 Bath Riots in the US-Mexico Borderlands, 19 *LAT STUD.* 334 (2021); A. Naomi Paik, *Carceral Quarantine at Guantanamo: Legacies of U.S. Imprisonment of Haitian Refugees*, 115 *RADICAL HISTORY REV.* 142 (2013); Nayan Shah, *QUARANTINE: EMPIRE OF MEDICAL INVESTIGATION ON ANGEL ISLAND, CALIFORNIA: LOCAL AND GLOBAL HISTORIES* (2016).

⁵⁵ "Letters Received Concerning Quarantine and Immigration, 1883-1912," RG 36, NARA, <https://catalog.archives.gov/id/6047751>.

⁵⁶ "Reports of Medical Inspectors in Philadelphia, 1896-1904," RG 85, NARA, <https://catalog.archives.gov/id/5719305>.

⁵⁷ "Daily Reports Relating to Detainees and Internees, December 1941-December 1944," RG 494, NARA, <https://catalog.archives.gov/id/1088860>.

outpatient sick call cards, clinical records, summaries of medical records, and X-ray radiographs from INS's enemy alien internment facilities in Texas⁵⁸ and North Dakota.⁵⁹

NARA should consider these factors in assessing the future research potential of the CBP medical files. If these records are not designated permanent, it will be impossible to pursue scholarship on precisely those topics gaining increasing attention by historians of immigration: the interactions between immigrants and officials, and the ways local agent activity shape immigration policy and law.

Destroying CBP medical records would 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. The records should be retained permanently.

B. Legal Significance of Documents

NARA's conclusion that CBP medical records lack sufficient administrative or legal use that would make them "appropriate for permanent retention" is similarly flawed.⁶⁰ The CBP medical records set for destruction are primary evidence of medical care received by individuals in CBP custody. These records are essential to government accountability efforts regarding systemic medical neglect in CBP custody, as well as legal claims of individuals who have suffered medical abuse and neglect.

CBP's failure to provide adequate medical care to people in its custody is systematic and widespread. Advocates and government oversight agencies have long raised repeated concerns regarding serious medical neglect of people in CBP custody. These examples include the denial of care to people with a ruptured appendix, broken bones, a damaged testicle due to injury by a Border Patrol officer, severe fever, and infant diarrhea.⁶¹ An ACLU investigation of government

⁵⁸ "Medical Records of the Immigration and Naturalization Service Enemy Alien Internment Facility at Crystal City, Texas, 1942-1945," RG 85, NARA, <https://catalog.archives.gov/id/5757310>; "Clinical Records of the Immigration and Naturalization Service Enemy Alien Internment Facility at Seagoville, Texas, 1942-1945," RG 85, NARA, <https://catalog.archives.gov/id/5819394>.

⁵⁹ "X-Ray Radiographs of Alien Enemy Patients Interned at the Immigration and Naturalization Service Facility at Fort Lincoln, North Dakota, 1941-1946," RG 85, NARA, <https://catalog.archives.gov/id/5805367>.

⁶⁰ See NARA, Appraisal Memorandum.

⁶¹ Keegan Hamilton, *Kids Allege Medical Neglect, Frigid Cells, and Rotten Burritos in Border Detention*, VICE.COM, May 2, 2022, <https://www.vice.com/en/article/93b4vv/border-patrol-abuse-migrant-children>; Human Rights Watch, "THEY TREAT YOU LIKE YOU ARE WORTHLESS": INTERNAL DHS REPORTS OF ABUSES BY U.S. BORDER OFFICIALS (2021), <https://www.hrw.org/report/2021/10/21/theytreat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>; Letter from American Immigration Council et al., to Cameron Quinn, DHS CRCL, et al. (Sept. 4, 2019), <https://www.aila.org/library/deprivation-medical-care-to-children-cbp-custody>; Denise Nathan, *A 5-Year-Old Girl in Immigration Detention Nearly Died of an Untreated Ruptured Appendix*, THE INTERCEPT, Sept. 2, 2018, <https://theintercept.com/2018/09/02/border-patrol-immigrant-detention-medical->

records illustrated multiple cases of denial of medical care to children in CBP custody, including denial of medical care to a pregnant minor, which preceded a stillbirth; leaving a 4-pound premature baby and her minor mother in an overcrowded and dirty cell full of sick people, against medical advice; and withholding of prescription medication for a child who was detained after undergoing spinal surgery following a car accident.⁶² The DHS Office of Inspector General recently reported that five people, including children, died in CBP custody after having a medical emergency in FY 2021.⁶³

Recent whistleblower disclosures by a CBP Contract Officer Representative further underscore systemic issues with medical care known by the agency, including significant understaffing and the provision of medical services by personnel without appropriate medical licenses, or with expired licenses.⁶⁴ CBP's own investigation concluded that such failures in medical care and agency oversight led to the preventable death of Anadith Reyes Alvarez, a medically vulnerable eight-year-old girl.⁶⁵ These whistleblower disclosures have led Congress to request additional information from CBP regarding the provision of medical care to people in its custody, as well as information regarding the agency's use of its Electronic Medical Record (EMR) software platform in light of the whistleblower allegations.⁶⁶

Preservation of CBP medical records is also necessary to potential litigation efforts on behalf of individuals who have suffered medical abuse or neglect while in the agency's custody. The medical records slated for destruction are critical to confirm or contest the most basic facts relevant to a legal claim, including medications given, time frames for care received or not received, and necessary medical information for the detainee. This information is even more significant in cases of wrongful death, where the deceased individuals are unable to provide testimony.

NARA's conclusion that the retention period of 20 years is "adequate from the standpoint of legal rights and accountability" is flawed.⁶⁷ This retention period does not provide "a sufficient

neglecttexas/; Human Rights Watch, IN THE FREEZER: ABUSIVE CONDITIONS FOR WOMEN AND CHILDREN IN U.S. IMMIGRATION HOLDING CELLS (2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

⁶² ACLU Border Rights, ACLU Border Litigation Project, and University of Chicago Law School Int'l Human Rights Clinic, NEGLECT AND ABUSE OF UNACCOMPANIED CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION (2018), https://www.dropbox.com/s/lplnnufjwci0xn/CBP%20Report%20ACLU_IHRC%205.23%20FINAL.pdf?dl=0.

⁶³ DHS Office of Inspector General, ICE AND CBP DEATHS IN CUSTODY DURING FY 2021, OIG-23-12 3 (2023), <https://www.oig.dhs.gov/sites/default/files/assets/2023-02/OIG-23-12-Feb23.pdf>.

⁶⁴ See Gov't Accountability Project, *Protected Whistleblower Disclosures Regarding the Performance and Oversight Failures of the Medical Services Contract of U.S. Customs and Border Protection with Loyal Source Government Services* (Nov. 30, 2023).

⁶⁵ U.S. CBP, *June 1, 2023 Update: Death in Custody of 8-Year-Old in Harlingen, Texas*, Jun. 1, 2023, <https://www.cbp.gov/newsroom/speeches-and-statements/june-1-2023-update-death-custody-8-year-old-harlingen-texas>.

⁶⁶ Letter from Sen. Richard J. Durbin, Chair, Senate Judiciary Cmte., to Troy Miller, Sr. Off. Performing Duties of Commiss., CBP (Dec. 14, 2023).

⁶⁷ NARA, Appraisal Memorandum.

amount of time to support investigation and litigation needs”⁶⁸ of the most vulnerable people who suffered abuse and neglect in CBP custody. Protection of the vulnerable, equity and due process concerns underlie rules that toll statutes of limitations in cases where the plaintiffs have a disability, were minors at the time of the neglect or abuse,⁶⁹ or if the reason for a later filing is due to fraud.⁷⁰

III. Conclusion

We urge NARA to reject the proposed records schedule and permanently retain CBP’s custodial medical case files. As described above, the records in this schedule have significant legal, research, and historical value. Based on these considerations, the records warrant continued preservation. Please contact Eunice Cho, Sr. Staff Attorney, ACLU National Prison Project, echo@aclu.org, Raul Pinto, Deputy Legal Director for Transparency, American Immigration Council, rpinto@immcouncil.org, and Karla Vargas, Senior Attorney, Texas Civil Rights Project, kvargas@texascivilrightsproject.org, with any questions.

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⁶⁸ *Id.*

⁶⁹ See, e.g. D.C. Code § 12-301 Md. Code Ann. Cts. & Jud. Proc. § 5-109; N.Y. CIP.L.R. 214-A; Penn. Cons. Stat. § 5524; c.f. Angelina Chapin, *Teen Mom And Prematurely Born Baby Neglected At Border Patrol Facility For 7 Days*, HUFFINGTON POST (June 13, 2019), https://www.huffpost.com/entry/teen-mother-and-her-premature-infant-neglected-in-border-patrol-custody-for-seven-days_n_5d02ae24e4b0304a120c411b.

⁷⁰ See, e.g. Ariz. Rev. Stat. Ann. § 12-543; Cal. Civ. Proc. Code § 338; N.M. Stat. Ann. § 37-1-4; *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1092 (5th Cir.1991); *Diamond v. Davis*, 680 A.2d 364, 381 (D.C. Ct. App. 1996).

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3. American Immigration Council
4. American Oversight
5. Americans for Immigrant Justice
6. Asian Americans Advancing Justice | AAJC
7. Asian Texans for Justice
8. AZ Immigration Alliance
9. Border Network for Human Rights

10. Boston College Law School Civil Rights Clinic
11. Carolina Migrant Network
12. Center for Constitutional Rights
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14. Chacón Center for Immigrant Justice at MD Carey Law
15. Citizens for Responsibility and Ethics in Washington (CREW)
16. Civil Rights Education and Enforcement Center
17. Cornell Asylum & Convention Against Torture Appellate Clinic
18. Deportation Research Clinic, Buffett Institute for Global Studies, Northwestern University
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20. Fight for the Future
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23. Government Accountability Project
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26. Hope Border Institute
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31. Immigration Equality
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40. Lawyers for Good Government
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45. MN8
46. Muslim Advocates
47. National Center for Lesbian Rights (NCLR)
48. National Coalition for History
49. National Immigrant Justice Center
50. National Immigration Law Center
51. National Immigration Project

52. National Korean American Service & Education Consortium (NAKASEC)
53. Network of Concerned Historians
54. No More Deaths
55. Northwest Immigrant Rights Project
56. Open The Government
57. Project On Government Oversight
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59. Refugees International
60. Robert F. Kennedy Human Rights
61. Rocky Mountain Immigrant Advocacy Network
62. Samaritans
63. Southern Border Communities Coalition
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65. Texas Civil Rights Project
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