In the Valley of Decision: What To Do about the Multitude of Files of Quasi Cases

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Abstract: In 1887 the Congress delegated, for the first time, legislative and judicial powers to an executive agency, the Interstate Commerce Commission. Today, under such delegations and in accordance with the constitutional right to due process, federal agencies conduct quasi-judicial and quasi-legislative proceedings that create hundreds of thousands of case files a year. Certain agencies each year select for transfer to the National Archives case files of important cases in accordance with selection schemes that were devised as far back as forty years ago. This large and inexorably increasing body of records is seldom used and almost never for the reasons for which it was selected—importance and precedent. The agencies publish in considerable detail their important and precedential decisions and the reasoning leading to these decisions; and these published reports, rather than the case files, are widely used. The relatively few users of the case files are almost always seeking in these files incidental information concerning various subjects that usually have little or no relation to the importance of the cases. The article urges appraisers to keep in mind an obligation to the taxpayer of justifying the cost of maintaining in perpetuity such an ever-increasing body of records, and to the researcher of selecting cases for which there is a reasonable expectation that their future use will justify such cost. Attempting to balance these two considerations leads to the conclusion that such appraisals are not likely to approach perfection and that the best appraisal is that which does the least harm.

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> It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi.[1]

By August 1787 the convention of delegates then meeting in Philadelphia had essentially completed framing a form of government based on a clear separation of the legislative, judicial, and executive powers. On that day members of the convention walked to the banks of the Delaware River to watch move slowly through the water what delegate William Samuel Johnson described in his diary as "Fitchs Steam Boat." There is no evidence that this example of a primitive technological development had any effect on the delegates' draft Constitution. Nor is it likely that any of them suspected that this application of steam to propulsion would some day challenge the separation of powers that had so concerned them.

Some of the delegates lived to see bigger and more efficient steamboats multiply on the nation's inland and coastal waterways. This proliferation created no problems that their Constitution could not take care of. The last survivor of the federal convention lived long enough to learn that a locomotive named after him, the James Madison, had hauled carloads of people from Baltimore, over the state line, and into the District of Columbia. But this extension of steam power to land transportation seems not to have raised in the mind of the old man at Montpelier any doubts as to the ability of the Constitution, by then a half-century old, to handle such a development.

A half-century after Madison's death, however, the perceptive English observer, James Bryce, noted the grip the railroads had come to have on the commerce of the United States, and the result:

> As the Federal courts decided a few years ago that no state could legislate against a railway lying partly outside its own limits, because this would trench on Federal competence, the need for Federal legislation, long pressed upon Congress, became urgent; and after much debate an Act was passed in 1887 establishing an Interstate Commerce Commission, with power to regulate railroad transportation in many material respects.[2]

To this commission Congress delegated quasi-legislative and quasi-judicial powers. In so doing, Congress acknowledged that it had neither the time, staff, nor expert knowledge to legislate the many intricate regulations and rules needed to manage the interstate railroads; nor were the federal courts, for the same reasons, able to adjudicate the complex disputes that daily arose between the railroads and those who were dependent on their services. Thus, in the centennial year of the Constitution, Congress breached the walls that the convention had so carefully erected to separate the powers of government.

Quasi-legislative is defined as "having a partly legislative character by possession of the right to make rules and regulations having the force of law." An example of an agency with such power is the Interstate Commerce Commission (ICC). Quasi-judicial is defined as "having a partly judicial character by possession of the right to hold hearings on and

[1]Justice Oliver Wendell Holmes in *Springer v. Philippine Islands*, 227 U.S. 210 (1928).

[2]*The American Commonwealth* (London: Macmillan, 1888), 3:400.

conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions arrived at and enforced after the general manner of procedures in courts." The National Labor Relations Board (NLRB) is an example of an agency with such power.[3]

Where the ICC, the first federal regulatory commission, fitted into the structure of the federal government was not clear. Political scientist Robert E. Cushman collected expressions of Congress, the Supreme Court, and various ICC commissioners, who, at different times, declared that "the function exercised by the commission is wholly legislative" or that the Commission was a "purely administrative body," "an executive body," "a judicial tribunal," or "the arm of Congress."[4]

For the next quarter century—until Congress in 1914 created the Federal Trade Commission (FTC)—the ICC was the sole federal regulatory commission. Between 1914 and the introduction of the New Deal, Congress from time to time established regulatory agencies such as the Federal Radio Commission (1927), the Federal Power Commission (1930), and the Food and Drug Administration (1931). During the New Deal years 1933–1938, however, Congress created eight regulatory agencies, of which the National Labor Relations Board, Federal Communications Commission, Federal Deposit Insurance Corporation, Security and Exchange Commission, Civil Aeronautics Board,[5] Farm Credit Administration, and Federal Home Loan Bank Board still exist. Some two dozen additional independent regulatory agencies have been created since 1938.

Within the executive agencies are also a number of bureaus, offices, boards, or other units that conduct quasi-judicial and quasi-legislative proceedings.[6] Almost all are presided over by one of the 1,200 administrative law judges (ALJ's) whose number is more than twice the total of the federal district court judges who hear all federal civil and criminal cases. Throughout the executive branch, ALJ's and other specially authorized persons are conducting annually more than 600,000 adjudicative proceedings, each resulting in a case file. These case files resemble the case files of courts of record and their contents are similar. A file may begin with a complaint or an order for a public hearing and thereafter may include correspondence, orders, motions, subpoenas, objections, depositions, affidavits, stipulations, briefs, transcripts or testimony, exhibits, and decisions.

The testimony and exhibits usually form the bulk of the file. The testimony in most cases, particularly those of individuals appealing their social security entitlements or benefits, is taped, and the cassettes are retained without being transcribed. In some cases a second pro-

[3]The definitions and the examples of the ICC and the NLRB are from *Webster's Third New International Dictionary of the English Language Unabridged* (Springfield, Mass.: G&C Merriam Company, 1961).

[4]"The Constitutional Status of the Independent Regulatory Commission," *Cornell Law Quarterly* 24 (December 1938): 13–14.

[5]The Civil Aeronautics Board went out of existence on 31 December 1984.

[6]Just how many quasi-judicial proceedings there are I was not able to determine until, on my return from my stay at the Bentley Historical Library as an Andrew Mellon Fellow, the Records Disposition Division of the Office of Federal Records Centers and the Civil Archives Division of the Office of the National Archives agreed to have me conduct a survey of the executive agencies to see how widespread the adjudicative proceedings are. I identified about a hundred organizations at all levels that conduct such proceedings—proceedings that a century ago would have been conducted in the federal courts.

ceeding within an agency by an appeals board or panel may create its own (though thinner) case file. Under the due-process provision of the U.S. Constitution, most of these cases can be appealed to a federal court, which creates its own case files.

There are probably as many agencies with quasi-legislative powers as there are agencies with quasi-judicial powers; and some agencies, including the ICC, have both.[7] Though these agencies in their rule-making capacity act to some extent as a committee of Congress acts, their case files often resemble the quasi-judicial case files.

The making of "substantive rules of general applicability" requires that an agency give general notice in the *Federal Register*, outlining the subject of the proposed rule and the issues involved and the time and place of any hearings. The agency gathers information on the case and invites interested parties to submit arguments, views, comments, and data. If hearings are held, any interested parties may testify, and the testimony is recorded. There is no right of cross-examination, and it is not required that the presiding officer be an administrative law judge. The agency considers all the evidence, makes any modifications it believes necessary in the proposed rule, and publishes the final version in the *Federal Register* and later in the *Code of Federal Regulations*. The preamble to the published rule in the *Federal Register* summarizes the testimony and other comments. The case file created in the course of this rule-making procedure serves as a basis for the agency's decision making. An affected party who believes the record does not support the final rule can petition a federal appeals court, and the case file serves as a basis for a judicial review of the rule. Thus, the rule-making case files are needed for a longer period of time than are the adjudicative case files.

A comparison of the number of rule-making proceedings and the number of adjudicative proceedings reveals a startling contrast. The *Federal Register* publishes the final versions of about 6,000 rules of general applicability a year for all government agencies. The Social Security Administration alone conducts about 300,000 adjudicative proceedings each year.

Because the ICC was the original quasi-agency and because its handling of its case files has a bearing on the appraisal of all quasi-case files, it is necessary to review the establishment of that agency.

The ICC's first chairman and its dominant member during its first four and a half years was Thomas McIntyre Cooley. Cooley was an outstanding lawyer and a founding professor of the University of Michigan Law School. He was the author of then standard works on jurisprudence and constitutional theory, a historian, a president of the American Bar Association, and a jurist whose name was mentioned, in his later years, whenever there was a vacancy on the U.S. Supreme Court.

In 1857 Cooley was selected as reporter of the Michigan Supreme Court, a position that required a lawyer of analytical ability to identify in each case the main issues and to prepare for publication a report giving the verdict, the reasoning leading to it, a summary of the arguments, and verbatim excerpts of any particularly pertinent testimony. For seven years Cooley published his report, and they were models of their kind. In 1864 he was elected a member of the court and over a period of twenty

[7]On 1 April 1985 another agency with quasi-legislative powers will be added. The National Archives and Records Administration Act gives the new NARA the authority to make rules.

years he served as a justice and chief justice. During his first year he seems to have continued to report the cases.

President Grover Cleveland's appointment in 1887 of a Republican, Cooley, to the ICC offset other appointments that were obviously made in payment of political debts. The Democratic majority on the Commission joined in unanimously electing Cooley chairman.

When Cooley took over the chairmanship of the ICC, there was no precedent governing the recording of the cases heard by such a commission. Within weeks Cooley was negotiating with prospective publishers to publish the ICC's cases in much the same way that the Michigan and U.S. Supreme Courts published their cases. In his journal he recorded an early decision to edit and publish a regular series of case reports.[8] Congress apparently had not anticipated that the ICC would publish its cases; at that time only the Supreme Court, of all the federal courts, had a reporter and published its cases. Nevertheless, Cooley's decision was upheld when Congress amended the Interstate Commerce Act several months later.

> The Commission may provide for the publications of its reports and decisions in such form and manner as may be best adopted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.[9]

It is speculation to say what would have happened had Cooley not been the chairman of this first regulatory commission to create quasi-case files. Undoubtedly, because of the lawyers on the Commission the docketed case file format of the courts would have been adopted; there was no likely alternative. It is certain that private publishers of legal records would have published reports of cases they considered precedent-setting, important, or saleable to their clientele. Whether the ICC without Cooley would have published these reports, whether the Commission would have ensured that almost every case was published, or whether the reporting would have approached the standard set by Cooley are less certain. What seems certain, however, is that, given Cooley's character and background, the route the ICC followed was almost inevitable. The later regulatory agencies followed the ICC practice; almost all began publishing their cases, and these volumes are on library shelves throughout the country. The existence of these volumes has had a profound effect on the use of the federal regulatory case files in the National Archives and in the agencies and must be taken into account in the appraisal of these case files.

Courts or quasi-proceedings require that a witness testifying as an expert qualify himself in order that those who must weigh his testimony may have something by which to judge the validity of what he has to say. My recommendations for the National Archives' policy

[8] "Friday July 29 [1887]. . . . It has been decided that we shall have a regular series of reports & that I shall edit them. But I refused to allow my name to be used." "Saturday July 30, 1887. . . . Also prepared some decisions for reports. We have made arrangements for the publication of a series of reports by L.K. Straus & Co. of New York on the model of the U.S. Supreme Court reports. . . ." Bound volume "Personal Memoranda 1879–1894," Box 7, Thomas Cooley Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor.

[9] Interstate Commerce Act, Part 1, Section 14 (3) (Amended March 2, 1889).

on quasi-case files, and particularly the quasi-judicial case files, are subjective and are clearly based on my own experience with them, so I likewise wish to qualify my recommendations by relating how I arrived at opinions contrary to those I once held and contrary to those that are now part of the National Archives' appraisal guidelines.[10]

Within a few months of my arrival at the National Archives thirty-five years ago, I found myself at a desk in the stacks in the Labor–Transportation–Welfare Branch, surrounded by case files of the NLRB, the National War Labor Board of World War II (NWLB), the Wage Adjustment Board of World War II (WAB), and, perhaps, of another board or two that no longer comes to mind. Because I had no particular background or interest in labor (or transportation or welfare) and likewise no training or particular interest in archival matters, I learned on the job.[11] One of my first assignments was to locate space under stairways, at the ends of dead-end aisles, or in other unaccountable places that would accommodate the increments of ten or fifteen boxes of selected case files that arrived regularly from the various NLRB regional offices. The shelf space at the end of the NLRB record group that had originally been left open for these increments had already been filled. In the course of finding temporary resting places for the NLRB selected case files, I discovered all the nooks and crannies of the branch's various stack areas; and I also discovered why and how this selection process came about. By the end of World War II it had become apparent that to continue to accession all NLRB case files, as the branch had been doing, would eventually fill all the vacant space available for all the branch's record groups. Consequently, in 1945 G. Philip Bauer drafted the selection criteria that has been used for the NLRB case files ever since. Bauer's criteria provided that the agency, "in concert with representatives of the National Archives,"[12] select three percent of all cases (later amended to one to three percent) based on importance due to: issues involved; influence on the development of principles,

[10]The guidelines for selecting case files for permanent retention are set forth in a records management handbook, *Disposition of Federal Records* (Washington, D.C.: National Archives and Records Service, 1981). "Table 4—Permanent Records Appraisal Guidelines. . . . Selected Case Files. . . . Those chosen normally fall under one or more of the following categories. The case: a. Established a precedent and therefore resulted in a major policy or procedural change; b. Was involved in extensive litigation; c. Received widespread attention from the news media; d. Was widely recognized for its uniqueness by established authorities outside the Government; e. Was reviewed at length in the agency's annual report to the Congress; or f. Was selected to document agency procedures rather than to capture information relating to the subject of the individual file.

"Categories a through e establish the exceptional nature of a particular case file while category f relates to routine files chosen because they exemplify the policies and procedures of the creating agency. The types of case files selected for permanent retention under the criteria established above include, but are not limited to, research grants awarded for studies; research and development projects; investigative, enforcement, and litigation case files; social service and welfare case files; labor relations case files; case files related to the development of natural resources and the preservation of historic studies; public works case files; and Federal court case files."

The application of these guidelines is not rigid, however, and there is considerable tailoring to particular series of case files.

[11]For the labor records the best education came from performing archival chores for labor historians and economists such as Philip Taft, Sidney Fine, and Joseph Dorfman and the students they sent to use National Archives records (though usually not the case files).

[12]Schedules sometimes call for the National Archives to participate in the selection process, but I do not recall any such actual participation.

precedents, or standards of judgement in certain matters; contribution to the development of methods and procedures; intensity of public interest; effect upon the national or local economy or upon industry; or because of attendant strikes, lockouts, etc. These criteria, minus the last provision and with the addition of cases exemplifying the unique character of the issues or procedures involved as demonstrating the NLRB's resourcefulness, govern the selection today.

Philip C. Brooks, then administrative officer of the National Archives, praised Bauer's work as a "significant job" and "an experiment drawing up standards of selection." This scheme was the model for later National Archives case files selection schemes and is the ancestor of the guidelines that appear today in the National Archives' *Disposition of Federal Records*.[13]

When I arrived, the accessioned NLRB case files totalled about 3,300 feet. Some use was made of these files, but the use was almost entirely in the years through 1945, for which there was total retention. Of the 500,000 docketed case files of the NWLB, there was a ten percent selection. Some, but not much, use was made of these case files. For the WAB, the entire 16,246 cases heard by that agency during 1942–47 were on the shelves. I do not remember that these case files were ever used.

When I left the branch after eight years, the NLRB case files and non-case file series totalled about 4,000 feet. The NWLB case files had been reduced, by internal disposal, by half, to a five percent selection. The 16,246 WAB case files remained intact and untouched until 1974, when they were reappraised and destroyed.[14]

Today the accessioned NLRB records total 5,140 cubic feet, of which 5,010 are case files. The last accession of selected case files, those closed in 1957–59, arrived in the National Archives more than twenty years ago. Since then the NLRB has continued to transfer annually to the Washington National Records Center (NCW) a one- to three-percent selection of its case files. These case files, unaccessioned but designated permanent, now total about 3,200 feet. Each year the NLRB selects and ships to NCW nearly 200 feet of selected case files, which the National Archives has scheduled for eventual accessioning.

I found Bauer's selection scheme to be impressive and intellectually convincing. I was also impressed by the appraisal reports, written by archivists whose knowledge and judgement of labor records I respected, that accompanied the early installments of these case files:

> These records have enduring value as source material for the study of labor relations and as precedent material for future labor dispute cases. (1946)
>
> To provide researchers in the industrial relations field with primary source material on the policies and procedures developed by the NLRB to guide its handling of the enormous union shop authorization operation. (1952)
>
> Will be of enduring value to political scientists, economists, and economic historians as primary sources for study of the development of NLRB's functions and policies, and of the course and character of labor-management relations in American industry. (1960)

Even though researchers then were not using these records for these purposes, I reminded myself that an archivist has to be able to envision the future.

[13]See footnote 10.

[14]I discuss this reappraisal in "No Grandfather Clause," *American Archivist* 44 (Spring 1981): 148.

Over the next three decades, however, I came to believe that the selection scheme was based on assumptions that have not stood the test of time. If Bauer, one of the two best minds I ever encountered in the National Archives, had maintained a connection with these records, he would have recognized what was happening and would have acted on it.

My apostasy was gradual and I cannot date its beginning. In 1958 I left the Branch and its predominantly twentieth-century records to spend the next eleven years in the eighteenth century. In the 1970s I returned to appraisal matters; and in 1975 I was writing skeptically about the case files of another regulatory agency:

> It is my understanding that during the past forty years there has been little research use of these particular case files. It is doubtful that reducing their total to 3% or less will cause an increase in their use.
>
> Selective sampling of case files may be a token gesture that we make because we can't or won't put the taxpayer to the expense of keeping entire collections of case files, and yet we are reluctant to commit the irrevocable act of destroying them all. So we sample; but as Frank Evans said last week, if and when researchers do come to use them they so often want something other than what was saved.[15]

I concluded by wishing that NARS would devise some method of keeping tab on the uses made of case files.[16]

In January 1979 I officially submitted a suggestion that the National Archives consider using the computer to keep a record of the uses made of its holdings. I particularly had in mind the NLRB case files as an example when I wrote: "We have thousands of feet of case files sampled according to selection schemes based in part, at least, on predicted use. Some of the samples have been here thirty-five to forty years. What use, if any, has been made of them, who were the users, were the uses those on which the sampling schemes were predicated?" The National Archives rejected the suggestion for the reasons that it would cost at least $9,000 a year, it was not "programmatically feasible," it was believed that within seven years NARS would probably acquire a new archival storage facility, and the branch heads were well able to determine which records were being used and which were not.

Two years later, in 1981, I had the opportunity to analyze, from the available reference service forms, the uses researchers were making of the accessioned NLRB case files. Although reference service forms are supposed to be kept for five years, those for the NLRB case files were available for about two and a half years. In that time eighteen persons had requested NLRB case files. Most of the users spent no more than a single day with the case files. From reviewing the reference slips or from talking with the staff members who had served the researchers, I was able to identify the interests of most of the users, and I was able to talk with some users by long-distance telephone.

Most had used case files of the years for which there was total retention. Of those who used the selected cases of the later years, none used them for any of the reasons, as outlined by Bauer, for which they had been selected. For example, one user was a lawyer representing a cor-

[15]I no longer use the word "sample" when I mean "select."

[16]Memorandum to Director, Records Appraisal Staff, Office of the National Archives, 7 October 1975. Copy in my possession.

poration in a proceeding with a union with whom the corporation had been previously involved; and the corporation could not find its copy of the transcript of the earlier NLRB case. That case happened to have been selected for preservation. Another user was studying union labor in a large corporation and wanted all cases involving that company. Most of the cases that he found were in the period of total retention. Only one of his cases was in the one- to three-percent selections. He said he had found this case file only marginally useful, having obtained most of the information he wanted in the eleven pages devoted to the case in the NLRB's publication *Decisions and Orders*.[17] Almost every user was looking for cases relating to a company, a union, a subject, or a place. Among those sought were cases relating to a union local, to the animated film industry, to race relations in a tobacco manufacturing company, and to labor unrest in the Kansas–Missouri–Oklahoma mining region. Most users wanted every pertinent case, regardless of its importance; and almost always their interest lay in the transcripts and exhibits.[18]

A survey of eighteen people who used a series of records during a period of two and a half years will not produce conclusive findings. While serving as an Andrew Mellon Fellow at the Bentley Historical Library, I initiated a study of the published books and journal articles that would seem, from their titles or from other clues, likely to have used or cited NLRB case files.[19] Of the fifty-six books examined, thirty-seven used or referred to NLRB cases. Of these thirty-seven, thirty-three used the published decisions. In these thirty-three volumes were more than 7,000 footnoted references to published NLRB decisions. Only four books indicated that the authors had seen and used actual case files. Two of the four were books on the automobile industry during the turbulent 1930s;[20] the third book was on strikes at the Kohler Plumbing Company; and the fourth was on William Randolph Hearst.

Of the thirty-three likely articles in the *Journal of Labor History* and in the *Industrial and Labor Relations Review*, twenty-four cited published cases and three had vague citations that indicated the authors may have actually used NLRB case files. Six ignored NLRB cases. I later visited the NLRB library and examined its collection of books about the agency, many of which were written by NLRB officials while with the agency or after leaving it. Citations were made to hundreds of published cases, but only one volume indicated that the author may have looked at case files; and these cases were in the period of total retention.

As for the case files of the other regulatory agency that the dictionary cites as an example, those of the ICC, early on I bumped into them in another stack area of the Labor–Transporta-

[17]The published volumes of the NLRB *Decisions and Orders*, in the tradition established by ICC Chairman Cooley, are prefaced with the statement that they include "all important Decisions and Orders issued by the Board during the period." There are nearly 300 volumes, each now running approximately 1,500 double-column pages, set in small type. A case may occupy anywhere from one to forty or more pages. The volumes include about 2 or 3 percent of all cases.

[18]Since this survey I have learned of an Australian who may have been using these selected case files for some of the reasons for which they were selected. I am told that he found about 20 percent of the cases he wanted.

[19]The study was undertaken by Jim Tobin, a graduate student in labor history under Prof. Sidney Fine of the University of Michigan. Fine has used these case files as extensively as anyone.

[20]By Professor Fine.

tion–Welfare Records Branch. The expression is literal. One of the ICC case files included as an exhibit a large iron tire, weighing several hundred pounds, which was leaned against the file shelf and partly blocked the aisle. The tire had survived the scrap drives of World War II (and, perhaps, of World War I). It seemed to symbolize what many of us considered to be the most conservative federal agency, in records keeping and in other matters, we had ever encountered. When the ICC transferred the first installment of its docketed case files to the National Archives in 1939, ICC Chairman Joseph B. Eastman made his own appraisal, writing the Archivist, "They are records of permanent value and under the laws administered by the Commission must be preserved."[21] As late as the 1950s the ICC seemed to have almost every record it had ever created or received.

The National Archives has accessioned all of the ICC docketed case files from 1887 to 1924, for a total of about 3,800 feet. Several years ago I looked at the reference service forms for these and found few users. For two of the previous five years I could find no evidence of anyone asking to use them.

Involvement of the federal government in labor, transportation, and welfare matters is common in the twentieth century, but these ICC case files were of the nineteenth century and were among the Branch's earlier records. Because I like older records, I took an interest in them. In the ICC's first two years I found three "Jim Crow" cases with first-hand testimony of blacks who paid for first-class accommodations and had been forced into Jim Crow cars. Also during its first years the ICC heard cases on immigrants from Castle Garden (the predecessor of Ellis Island) with detailed accounts of their transportation to the inland states and territories. I wrote letters describing these cases to scholars, from Johns Hopkins University to Harvard, who were working in the subject areas. They replied with thank-you letters and promises to come or to send graduate students, but I never saw any of these visitors.[22] I talked about these case files at a National Archives conference,[23] and, in the Winter 1983 issue of *Prologue*, I discussed the early case files and included illustrations reproduced from case file exhibits.[24] The chief of the General Records Division, where the accessioned ICC case files are now held, says the article has attracted no users.

I conducted a cursory examination of publications that, from their titles, would seem likely to contain citations to these case files and found that even though all the ICC case files of nearly a hundred years exist, references to them seem even scarcer than those to the NLRB case files. University of Michigan

[21] In 1978, when the Records Disposition Division was negotiating with federal judiciary officials in an effort, eventually successful, to schedule some federal court case files for destruction, at least one of the officials negotiating for the courts maintained that the English common law, the U.S. Constitution, and federal statutes required that these case files be maintained in perpetuity.

[22] A recent study of Jim Crow laws cites twenty-eight cases from the published *ICC Reports*, including the reported versions of the three cases tried in 1887–88. The author also cites eleven twentieth-century docketed case files that are among the unaccessioned ICC case files now in the Washington National Records Center at Suitland, Maryland. See Catherine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* (New York: Columbia University Press, 1983).

[23] Jerome Finster, ed., *The National Archives and Urban Research* (Athens, Ohio: Ohio University Press, 1974), 107–108. The conference was held in 1970.

[24] "The Interstate Commission Formal Case Files: A Source for Local History" (15 (Winter 1983): 229–42.

Professor Isaiah Sharfman, in his classic 3000-page, five-volume history of the ICC, probably the most detailed history of any regulatory agency, cites about 2,500 ICC cases, always from the published *Reports*; he makes no reference to a case file.[25] Felix Frankfurter edited a case book of ICC case files entirely from the published reports; he made no reference to a docketed case file.[26]

In my cursory search for citations to ICC case files I found so few of them that when, in a book by Columbia University Professor Harvey Mansfield, I came upon a single citation to a document in an ICC case file, I wrote asking the circumstance. He replied that he had not looked at any case files; a lawyer who had been involved in the case had given him his own copy of the document that he had had reproduced from the case file.[27]

What help in appraising these quasi-case files can be derived from recollections of three decades (allowing for the distortions of memory), from a brief survey of published citations to a single series of case files of a single agency, from an inquiry into the research interests of eighteen users of this series, and from other odds and ends of evidence? How applicable is all this to the several hundred series of quasi-judicial and quasi-legislative case files created by the many agencies of the federal government?

A prime question to be answered is: why should we save any of these case files? The only way I can justify the cost of saving them—the cost of acid-free folders and boxes and deacidification and maintenance through the centuries in a humidity- and temperature-controlled environment and the other expenses of eternal preservation—is that they will be used, and used in ways that will justify these costs.[28] I cannot resort to that last refuge of the uncertain archivist and argue for their retention as part of our documentary or cultural heritage; graffiti on our bridges, and automobile graveyards along our backroads also fit these categories.

Most of the use of these case files will be generated by the information they contain. Their traditional evidential values, however defined, will be protected in the one instance by the publications of rules in the *Federal Register* and in the *Code of Federal Regulations*, in the other by the major regulatory agencies publishing their decisions in series such as those of the reports of the ICC and NLRB. Some of the case files of major rule-making proceedings will be kept after their agencies' administrative need for them ends, not because of the incidental information they contain, but because of what their contents may reveal of the conditions that led to the adoption of the regulations. It is necessary, however, to keep in perspec-

[25] *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* (New York: The Commonwealth Fund, 1931–37), 5 vols.

[26] *A Selection of Case Files Under the Interstate Commerce Act* (Cambridge, Mass.: Harvard University Press, 1915).

[27] *The Lake Cargo Coal Rate Controversy: A Study in Governmental Adjustment of a Sectional Dispute* (New York: Columbia University Press, 1932), 257, f.n. 34. The footnote reads, "Record in I.C.C. Docket 15007, p. 4714." Mansfield had more than a hundred citations to cases in the *ICC Reports*.

[28] Expecting suggestions that the National Archives microfilm all these case files, thereby anticipating all conceivable uses, reducing the cost of preservation, and avoiding the need to make appraisal decisions, it is necessary to recognize that these are not census forms specially designed for a specially constructed camera that permits microfilming at speeds hard to believe. Microfilming case files is hand work, and requires the unfastening and unstapling of documents of all sizes, shapes, colors, and densities; the opening and flattening of bound materials; the unfolding and flattening of oversize exhibits; and the turning of two-sided documents. Case files are the "stoop labor" of microfilming.

tive the importance of quasi-legislative regulations. They grow out of a delegation of the legislative power. Congress, being archivally a law unto itself, keeps everything relating to its acts; but even the *U.S. Code* contains a multitude of acts whose natures are such that no one is likely to inquire into their backgrounds. The case files of the regulations of an agency like the ICC have no such immunity from appraisal. The ICC, for example, has many more case files documenting regulations relating to safety requirements of box cars and gondolas than it has to proceedings that have determined vital transportation policies of the nation's railroads.

Thus, the main appraisal problem is to determine whether or not the quasi-case files—and mostly they will be the quasi-judicial cases—contain information of value sufficient to justify their permanent retention and to determine how to identify these particular cases. The creation of this information is almost always incidental to the purpose of the case. The descriptions of Jim Crow cars derive not from an unbiased investigation by the ICC but from what the plaintiffs and the defendants—the involved parties—had to say about those cars.

This exposes the appraiser to some hard choices, and to some that are not so hard: a legal historian, writing in the *American Archivist*,[29] considered what types of non-federal court cases should be retained and preserved and concluded that none should be destroyed. In fact, he favored the retention of all records of the judicial branch. He gave examples of a number of possible uses of court case files: "For example, evidence of lawyer-client relations might be found in an attorney's motion to be permitted to withdraw from representing a party." The quasi-case files contain many such motions. The case files also contain hundreds of thousands of return-receipt-requested cards that someone with patience could use to study how long it takes mailed letters to get from place to place. But there are other and better sources, and I would not advocate keeping quasi-case files for such uses.

The kind of information that the appraiser should try to identify would be information that is, by consensus, of importance and preferably unique or of a high order. The closer these case files come to the experience of individuals or to specific places, things, or events, the closer they approach these values. The case files that are less likely to have such information of value are those whose contents consist mostly of arguments of lawyers and the testimony of experts and contain information that is not first-hand but rather is drawn from other sources (often published) that are otherwise available. What seems most often to attract researchers to the NLRB case files is the direct testimony of persons—strikers or bosses—who are describing first-hand events as they saw them. The case file of an economic regulatory agency may, on the other hand, consist mostly of lawyers presenting and arguing facts and figures compiled by statisticians, economists, and accountants, information that may be summarized adequately in the agency's published decisions and that might, if necessary, be reconstituted from the same sources the experts used.

The nature of an agency's cases may change with time. The handwritten charges and complaints the ICC received directly from wheat growers in the Dakota Territory differ greatly from the

[29]Rayman L. Solomon, "Legal History and the Role of Court Records," *American Archivist* 42 (April 1979): 195–98.

communications the agency receives today. A different value can be assigned to ICC case files of an era when almost everything and everybody traveled by rail and when other sources of information were sparser than they are today. Likewise, a better case can be made for preserving all, or most, of the NLRB case files of the 1930s, when labor first obtained and exercised the right, under federal law, to organize, than for saving the case files of later decades. Aviation, which in Alaska assumed much the same role that the railroads had in the contiguous states in the nineteenth century, may have produced case files with useful incidental information about that state, particularly when it was a territory.

Yet, notwithstanding the obviously favorable examples, the information in these quasi-case files is seldom urgent, seldom so unique that it cannot be derived from other sources. That is the heart of the matter. Even if the 1887–88 Jim Crow cases did not exist in case file form or as published in the ICC *Reports*, it is probable that the essentials of these accounts could be duplicated, with some effort, from case files of local, state, and federal courts in the southern states, from the newspapers of the region, and from other sources.

Thus I recommend that the National Archives should keep better records of what use is being made of these case files, both those accessioned and those that are yet to be accessioned, down to the individual case file. Although the past is not necessarily prologue, it is good to know, when deciding what to select for retention of continuing series of case files, what has been and what is being used by whom and for what purposes.

The appraisers should be permitted and encouraged to spend considerably more time on the appraisal of an agency's quasi-case files. These appraisers are staff members of the Records Disposition Division of the Office of Federal Records Centers,[30] a division that has fewer than twenty archivists to handle the appraisal of the records of all the agencies of the federal government. When a series of case files of a regulatory agency comes to a division member for appraisal, it may be one of four hundred items on that agency's pending general schedule, all of which demand the appraiser's attention. The Records Disposition Division is a fire department for a government whose agencies are always pulling alarms. Until this staff is considerably enlarged it is only a dream to believe it will be able to permit appraisers to make the time-consuming but necessary studies of the major regulatory agencies; their case files; and what uses have been, are being, and may be made of their case files. To assist them the National Archives might want to call in outside consultants.[31] The cost of all this work may seem high; but the cost is higher for accessioning and preserving thousands of feet of case files that are not being used and for which there is little reason to expect they will be used, or of selecting for preservation case files for certain reasons and having researchers use them instead for reasons not taken into consideration in the selection scheme.

When necessary—as, for instance, when under a court order—the National

[30]The Division has recently become part of a new office of the National Archives and Records Administration.

[31]To find scholarly consultants who have actually used the case files being appraised or who have any serious intention of using them would be difficult. They might have to be of the "do as I say, not as I do" school.

Archives assigns people and money to appraisal. In 1980 the National Archives embarked on the most expensive appraisal project in the history of the world, assigning to the appraisal of the FBI case files seventeen of its brightest and best archivists, almost all with doctorates in history. The National Archives hired the most competent consultants available, including a nine-person advisory committee. All in all, including National Archives and FBI salaries and travel to the field offices, the appraisal probably cost one million dollars. (Predictably, since it did not call for total retention, the appraisal did not satisfy the plaintiffs in the case that produced the court order.)

Also, in 1981 the Records Disposition Division successfully concluded one of its most difficult appraisals, one that extended over a decade, when it completed a schedule for the records of the federal courts.

The National Archives now has under way an appraisal of more than 100,000 feet of litigation case files from the Department of Justice, dating from 1940 to the present, which are increasing at the rate of 5,000 feet a year. These files are being appraised by a special task force of three archivists and a supervising archivist, and the task is scheduled to last twenty-seven months.

An earlier, prototypical appraisal was the Massachusetts Superior Court Records Project. Its object was to decide what to do about the records of the state's major trial court, and particularly what to do about the court's post-1859 case files. A staff of five, under the direction of a lawer-scholar, spent the better part of a year on this appraisal. Assisting the staff was an active advisory committee of nine scholars prominent in the fields of legal, social, and minority history; criminology; law; demography; and statistics.[32]

I should not be allowed to conclude without stating how, if I could, I would apply all I have been advocating to the NLRB and the ICC case files. Considering first the NLRB case files: I would not immediately stop the NLRB from selecting according to the present criteria the annual one to three percent of all case files.[33] This is partly in recognition of an agency that for forty years has conscientiously selected case files in accordance with the criteria.

If I were inclined to save the "important" cases (which I am not), I would flirt with the idea of saving the two or three percent that the NLRB publishes in its *Reports and Decisions*, since the board says that these include "all" its important cases. This would simplify the selection; and the NLRB publishes detailed classified indexes, with scope notes, to its published cases and to related court cases as well. Since most users seem content with what they find in *Reports and Decisions*, however, this would probably assure even less use of the case files than is currently made of them.

I would prefer, however, to lift the lid of Pandora's box and see whether it is possible to devise some criteria that would identify the kind of information

[32]Michael Stephen Hindus, Theodore R. Hammett, and Barbara M. Hobson, *The Files of the Massachusetts Superior Court, 1859–1959: An Analysis and a Plan for Action* (Boston: G.K. Hall and Company, 1980). This is a most useful and pertinent analysis, not only for the criteria adopted (with which I do not always agree) but especially for those criteria that the project staff considered, tested, and rejected, with explanations for those rejections.

[33]It is worth keeping in mind that 1 to 3 percent of all case files amounts to much more than 1 to 3 percent of their total footage. By whatever criteria case files are selected, they will support the Massachusetts Superior Court project's theory that files selected for retention are apt to be "fat" files, the files of cases that go to hearings.

that researchers now seek in these case files. If such criteria or guidelines could be devised, the National Archives might try to involve the NLRB's administrative law judges in the process, having them nominate cases whose informational content merits preservation. They might also nominate the handful of cases whose unquestioned importance demands retention. The ALJ's conduct the proceedings, hear the testimony, see the exhibits, and render the decisions; and they better than anyone else know the nature of the case and the contents of the case file. Then I would recommend that the National Archives, not the agency, make the final decision as to what to preserve. If this proposal were put into effect and proved successful, it might be applied to the case files already accessioned (with care taken not to dispose of anything that has been cited in a publication).

Of the early ICC case files, it would be preferable to preserve all files dating from the period when the railroads represented almost the sole means of transportation up to, probably, some date in the first decade of the twentieth century. For the remainder of the period for which there are accessioned case files, to 1924, the ICC's subject card index could be used to select cases to retain. Outside advisors could be consulted on this.

For the unaccessioned ICC case files from 1925 to 1977 that are now in the Washington National Records Center (and are many times greater in quantity than the 1887–1924 accessioned case files), subject selection should be used. The selection should require only a fraction of the time being devoted to the Department of Justice litigation case files. Inevitably, some cases would be destroyed that should have been saved. But, given the nearly total lack of interest in these case files, they are not likely to be missed.

What to do about the ICC docketed case files from 1977 onward presents no problem. Since 1977 the ICC has employed a crew that comes in at the end of the working day and films on microfiche the case file documents that have accumulated during the day. Each case file is reproduced for the agency's administrative convenience on a separate microfiche. The cost of this filming is considerable; the cost of preserving the resultant microfiche is small enough that all the cases can be preserved and the microfiche can serve all research uses—conceivable or presently inconceivable—of these case files.

My proposals apply to two of the largest and most promising collections of case files of any of the regulatory agencies. The proposals would probably apply to some of the other regulatory agencies; but in each instance an appraiser who has made a careful study of the agency, its records, and the research potential of the agency's case files should make that determination. The case files of some of the minor regulatory agencies may not justify any degree of preservation. The Records Disposition Division has acted correctly in almost always appraising for total destruction the adjudicative cases files, scattered throughout the nonregulatory agencies of the federal governments, that result from due-process proceedings. The great majority of these case files are proceedings of the Social Security Administration, the Veterans Administration, the Railroad Retirement Board, and the Immigration and Naturalization Service, and most relate to individuals. These case files are not maintained in separate series but are made part of the individual's personal case file, to be retained usually for his lifetime.

Almost every action suggested here applies to the massive category of quasi-

case files, those of the adjudicative cases. The rule-making cases are far fewer; they are retained far longer by the agencies; and they are less subject to simplified appraisals. The proceedings that result in landmark rules of general applicability—whether dealing with economic matters, the environment, transportation, or any other subject—tend to be more self-evident than the relatively few adjudicative proceedings that can be termed "landmark."

It is not easy for the National Archives' appraisers to bring themselves to condemn records in which they recognize a modicum of value but do not find enough value to justify the cost of preserving them. This accountability to the taxpayer distinguishes these appraisers and renders them vulnerable. From among the multitude of the living and the dead, the archivist or curator of a private repository can choose to acquire and preserve the papers or records of a dozen, a score, or a hundred persons or organizations and pass over all the others—for lack of space or lack of funds, by reason of collecting policy or disinterest—without feeling guilty that what he, or others who share his task, ignores will probably perish. The appraisers of public records confront a body of records equally impossible to preserve in totality. Unlike those who are not accountable for what they choose not to acquire, however, these appraisers must squarely face the converse of the appraisal process: they must pronounce and sign the decision that orders the destruction, immediate or eventual, of what they choose not to accession.

These appraisers can find support in a statement made by G. Philip Bauer in 1944—advice to which the National Archives was then less receptive than it was to his NLRB selection scheme the next year.[34] In a paper presented at the National Archives that year and published two years later, Bauer maintained that all records have values, great or small; but

> the burden of proof should rest upon the side of the affirmative, that is, upon the averment that certain records have sufficient value to warrant the expenditure of the necessary public funds for their preservation. . . .
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> Obviously the National Archives and the Government at large cannot undertake to preserve or require to be preserved all records that have value. . . . There is no way of precisely balancing imponderable values against costs. But the costs at least are calculable and can be accurately broken down so that an appraiser may ask himself in every case whether the public benefit to be derived from saving certain records is sufficient to offset the necessary expenditure of public money.

The National Archives appraiser, trying to solve the problems presented by the quasi-case files, differs from his fellow professional, the government physicist or chemist, who follows certain established procedures and arrives at a result or product that is verifiable and repeatable and can withstand challenge. The procedures I have suggested and the

[34]"The Appraisal of Current and Recent Records," *National Archives Staff Information Paper*, 13 (Washington, D.C.: National Archives, 1946). In this pamphlet Bauer discussed case files of the labor board, commenting that "The issue of precedent is not seriously involved here; for precedent, insofar as it has any significance for the boards in questions, operates normally through the instrumentality of their printed decisions and not through their case files." If he were today to contemplate the footage of accessioned and accessionable NLRB case files selected in accordance with his scheme, which is tilted toward the precedential, I believe he would be inclined to act on another statement in this pamphlet: "a stern and true cost accounting is a prerequisite of all orderly appraisal."

advice I have offered are not the equivalent of the third law of thermodynamics. As he reaches his decision on these case files, the appraiser must be aware of one immutable law: there are no perfect appraisals and the best appraisal is the one that does the least harm.