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*poster by Fred Moore for the
National Resistance Committee*

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4 October 2020

FOIA Appeals
Deputy Archivist of the United States (ND)
National Archives and Records Administration (NARA)
8601 Adelphi Road, Room 4200
College Park, MD 20740-6001

(by e-mail to <foia@nara.gov>)

FOIA Appeal of Denial of Expedited Processing

Dear Deputy Archivist:

This is an appeal of the denial of expedited processing of a FOIA request to NARA for records legal custody of which was transferred to NARA at the expiration of the statutory mandate for the National Commission on Military, National, and Public Service (NCMNPS).

I submitted this request to NARA by e-mail on 21 September 2020, and included a request for expedited processing. I have been told that a portion of this request has been assigned tracking number **ER0566**.

On 1 October 2020, I received an e-mail message from Lynn Goodsell, Reference Branch Chief, Electronic Records Division (RRE), NARA, <cer@nara.gov>, that my request for expedited processing of this request (or some portion thereof) has been denied. According to that e-mail message:

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After carefully considering the merits of your request, I have concluded that the circumstances in this case do not warrant expedited processing.... Based on this determination, your request will be placed in our regular processing queue.

With respect to the criteria for expedited processing, this e-mail message stated that:

In accordance with 36 CFR 1250.28, the National Archives and Records Administration may, at its discretion, expedite the review of records requested under the Freedom of Information Act and move a request to the head of a FOIA processing queue, if the requester meets one of the following criteria:...

No good-faith reading of the cited provision of NARA's FOIA regulation, or of the relevant provision of the FOIA statute, supports the interpretation that whether to expedite processing is at the discretion of NARA. Pursuant to the law and the regulations, NARA *must* expedite processing whenever the statutory or regulatory criteria are met.

5 U.S.C. § 552(a)(6)(E)(i), provides that "Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records — (I) in cases in which the person requesting the records demonstrates a compelling need; and (II) in other cases determined by the agency." According to the section of NARA's FOIA regulations cited above, "NARA processes requests and appeals on an expedited basis whenever we determine that one or more of the following criteria exist:.." The words "shall" and "whenever" allow of no discretion. Expedited processing is discretionary only if the specified criteria for "compelling need" are not met.

It is apparent that the determination with respect to my request for expedited processing of this request was made by a decision-maker who was fundamentally mistaken as to the applicable standard for expedited processing, and thought that this decision was a matter of agency discretion rather than of right pursuant to both the law and NARA's regulations. A decision made by applying the wrong standard is contrary to the FOIA statute, invalid on its face, and must at minimum be reversed and remanded, or reviewed *de novo*.

Whatever analysis the decision-maker may have conducted of the statutory and regulatory criteria, they made explicit that they did not consider these criteria to be dispositive, but believed this to be a decision which NARA could make at its discretion. The statement, "I have concluded that the circumstances in this case do not warrant expedited processing," does not indicate whether this conclusion was based on the statutory criteria or also on other (improper) "discretionary" factors.

To the extent that the decision-maker discussed (as what they thought was *dicta*) the statutory and regulatory criteria for expedited processing, despite wrongly believing the decision with respect to expedited processing to be discretionary, their analysis was as follows:

You state that Congress is currently considering legislative proposals related to the recommendations of the NCMNPS, including H.R. 6415 and H.R. 5492 and “that records responsive to this FOIA request will be essential for Congress and the public to understand the basis for the various recommendations of the NCMNPS, and to assess the weight which should be given to any or all of those recommendations.” However, the final report of the Commission, which was issued in March 2020, describes the Commission’s mission and methodology, as well as the organization and individuals consulted; panelists, speakers, and statements received, and background information about the Commissioners and Commission staff. Furthermore, the NCMNPS website (<https://www.inspire2serve.gov/>) contains additional reports; hundreds of documents, including fact sheets and meeting minutes; as well as links to the Commission’s social media profiles. It appears that a great deal of the information you seek is already publicly available and you have not explained how the specific records you requested would provide significant additional information regarding the activities of the Commission.

For purposes of determining entitlement to expedited processing, “the term ‘compelling need’ means — ... (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. (vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person’s knowledge and belief.” 5 U.S.C. § 552(a)(6)(E).

I included such a certified statement in my original request. The NARA decision-maker did not contest, and appears to have waived any objection to, the facts (1) that I am “a person primarily engaged in disseminating information” and (2) that there is urgency to inform the public concerning the activities of the NCMNPS. Courts have recognized that Congressional debate can create sufficient urgency to warrant expedited FOIA processing, and that delay through standard processing can result in irreparable injury to that legally recognized interest. See *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 2007 WL 4208311, N.D. Cal., 27 November 2007 (granting motion for preliminary injunction requiring expedited processing); see also *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 542 F. Supp. 2D 1181, N.D. Cal. 2008 (requiring expedited processing of request for information relevant to pending Federal legislation).

The only issue raised by the NARA decision-maker against expedited processing of this request is “how the specific records you requested would provide significant additional information regarding the activities of the Commission.”

Much information concerning the activities of the NCMNPS has been made public, mainly through the release of NCMNPS records in response to my FOIA requests to the NCMNPS and my publication of those responses, with analysis and commentary, on my Web site at <<https://resisters.info/commission-foia.html>> and additional pages and files linked

from there. The majority of these records have never been posted on, or linked from, the NCMNPS Web site.

As discussed in detail below, most of the records responsive to this request, including many of the specific records mentioned by the NARA decision-maker, are not in fact “already publicly available”. The NCMNPS obfuscated the historical record of its activities by posting, as NARA’s decision-maker noted, “hundreds of documents,” thereby creating an appearance of thoroughness and transparency. But while minutes of *some* meetings were posted, even the existence of some key meetings wasn’t disclosed. Some witnesses and advocates for some legislative recommendations were invited to testify at public hearings, but others – whose identities remain unknown – were invited to meet with the NCMNPS behind closed doors. Some comments from members of the public were posted publicly, but others were not. Some comments were included in the NCMNPS count of public comments. *Most* were not.

The issue is not that *some* records were made available by the NCMNPS, but that many others were not. Which records were, and which were not, made public, may itself be significant in showing bias (or lack thereof) between advocates for particular legislative recommendations; in impeaching (or not) the NCMNPS and former NCMNPS members; and in suggesting (or refuting) the need for *de novo* research and public hearings by Congress.

As I explained in my request:

The records responsive to this FOIA request will be essential for Congress and the public to understand the basis for the various recommendations of the NCMNPS, and to assess the weight which should be given to any or all of those recommendations, now that the NCMNPS has dissolved.

Records responsive to this request are essential to avoid having the public and Congress be forced to rely on purely conclusionary reports and recommendations by the NCMNPS.

For example, records of research conducted or commissioned by the NCMNPS, including the terms of reference, questions assigned, limitations placed on research, assumptions made as the basis for research, research methodologies, who conducted the research (and what biases or preconceptions they may have had), and the sources consulted will be important to public understanding. None of the NCMNPS’s research records were disclosed by the NCMNPS prior to its expiration.

In addition, records of the NCMNPS’s activities responsive to this request are likely to be highly probative of the credibility that Congress should afford to NCMNPS witnesses and the NCMNPS’s report, and the weight that they should be given in Congressional decision-making.

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As noted in my request, Congress has scheduled hearings concerning what, if any, action to take on pending bills related to the report and recommendations of the NCMNPS. At one of those hearings, which has been postponed but could be held at any time at the call of the chair of the Senate Armed Services Committee, the only announced witnesses are former members of the NCMNPS. See <<https://www.armed-services.senate.gov/hearings/20-03-31-final-recommendations-and-report-of-the-national-commission-on-military-national-and-public-service>>. The credibility of these prospective witnesses is an urgent issue for Congress.

As has been discussed in detail in my reporting and that of other observers of the NCMNPS (to the extent that its activities have been subject to public observation, which most of them have not), the NCMNPS throughout its existence placed a high priority on perception management. The NCMNPS was, throughout its existence, highly selective in what information it chose to make public, and what information it kept secret. A key issue for Congress in assessing the report and recommendations of the NCMNPS is whether the information the NCMNPS chose to make public, and its self-description of its activities and consultations and the comments it received, is accurate, complete, or fairly described.

NARA's decision maker noted that, "the final report of the Commission, which was issued in March 2020, describes the Commission's mission and methodology, as well as the organization and individuals consulted; panelists, speakers, and statements received, and background information about the Commissioners and Commission staff." But the question to which the records responsive to this request are relevant is whether those *descriptions* by the NCMNPS are *accurate, complete, or fair*.

We now know, primarily through records released in response to my FOIA request to the NCMNPS, that some of those descriptions are materially inaccurate and incomplete. Records responsive to this request are urgently needed for Congress and the public to be able to compare those descriptions with the NCMNPS records of the activities described, to determine the extent and assess the significance of those errors and omissions, and to assess the degree and nature of bias in the selection by the NCMNPS of which activities, consultations, and public comments to disclose.

My request is for 20 specific categories of records, the significance of each of which is discussed in more detail below. Responsive records in each of these categories, which are not now publicly available, are relevant and significant for assessing the credibility and weight to be given by Congress to the report and recommendations of the NCMNPS and to former members of the NCMNPS, either in public testimony or in private lobbying of Congress.

Item (1) concerns the NCMNPS "VOTE-A-RAMA" conducted in July 2019. Although the NARA decision-maker notes that "the NCMNPS website (<https://www.inspire2serve.gov/>) contains ... meeting minutes," the decision-maker appears to have mistakenly inferred that minutes of all NCMNPS meetings had been posted on that Web site. That's a natural inference, especially since – despite my FOIA requests for the NCMNPS schedule of meetings – neither

any comprehensive schedule of NCMNPS meetings nor any evidence of the existence of most of the meetings for which no minutes were posted was ever posted on that Web site.

No minutes of the July 2019 meeting, and no record mentioning either any voting meeting of the NCMNPS at any time, or any meeting by the NCMNPS in July 2019, have ever been posted on the NCMNPS Web site. The first public disclosure of this meeting or of the fact that it or any NCMNPS meeting included a “VOTE-A-RAMA” was not until two weeks before the expiration of the statutory mandate for the existence of the NCMNPS. On 4 September 2020, in partial response to a FOIA request I had made eight months earlier on 1 January 2020, the NCMNPS released two e-mail messages (one with redactions), revealing this meeting and the “VOTE-A-RAMA” for the first time. See <<https://hasbrouck.org/draft/FOIA/VOTE-A-RAMA.pdf>> and <<https://hasbrouck.org/draft/FOIA/July-2019-planning.pdf>>.¹

This previously undisclosed meeting was the longest meeting of the NCMNPS, extending over five full business days, in contrast to the typical two to three-day monthly NCMNPS meetings. This is the only NCMNPS meeting at which any votes are now known to have been taken. It appears likely – and the records responsive to item (1) of this FOIA request will likely clarify – that this was the meeting at which most of the substantive decisions of the NCMNPS concerning its legislative recommendations were made.

But despite the unsupported claim by NARA’s decision-maker that “the final report of the Commission... describes the Commission’s ... methodology”, neither that report nor any of record which was ever made public by the NCMNPS describes anything about the decision-making methodology of the “VOTE-A-RAMA”, what questions and what options with respect to each of those questions were considered, or which were adopted.

Records responsive to this portion of this request are essential to understanding when the NCMNPS made which of its decisions, and which questions (if any) remained undecided at the conclusion of the “VOTE-A-RAMA”. In all of their public statements and publicly-disclosed records (until the release to me of the “VOTE-A-RAMA” e-mail messages on 4 September 2020), the NCMNPS and its members claimed to be “consulting” the public and soliciting public comments through 31 December 2020 that would be “considered” by the NCMNPS. Many commenters, in reliance on those statements, took as much time as they thought they

1. I have diligently tried to obtain more information about the “VOTE-A-RAMA”. As soon as I learned of the “VOTE-A-RAMA” on 4 September 2020, I added a request for additional records pertaining to the “VOTE-A-RAMA” – which should have been, but weren’t, disclosed in response to my earlier FOIA requests – to a follow-up FOIA request I was preparing. That request to the NCMNPS concerns many of the same records as this one. That request was submitted to, and received by, the NCMNPS at its designated FOIA request submission addresses by e-mail on 15 September 2020 and by postal mail on 17 September 2020. See copy of request and U.S. Postal Service receipt signed on behalf of the NCMNPS at <<https://hasbrouck.org/draft/FOIA/NCMNPS-FOIA-15SEP2020-received.pdf>>. I presume that there was insufficient time for the NCMNPS to take any action with respect to this request before the NCMNPS was dissolved. Legal custody of this request, and responsibility for responding to it, was transferred to NARA along with the potentially responsive records and all other NCMNPS records when the NCMNPS mandate expired. I have not yet received any notification from NARA of the tracking number assigned to this request by the NCMNPS (if any) or by NARA, or of the status or expected date of completion of action by NARA with respect to this request.

had available to prepare their comments, and submitted them near the deadline. Were these comments actually considered? Or had the NCMNPS already made up its mind?

Advocates for some significant legislative and policy options were consulted only after the “VOTE-A-RAMA”. For example, members of the NCMNPS met with anti-war and anti-draft organizations and advocates for ending Selective Service registration rather than expanding it to women only in November 2019, months after the “VOTE-A-RAMA”. During that meeting, members of the NCMNPS claimed that the NCMNPS was still “considering” whether to recommend continuation or expansion of Selective Service registration. Was this true? Or was the NCMNPS only going through the motions of pretending to “consult” advocates for certain policy options, when in fact those options were no longer under consideration? Records responsive to this portion of this request are needed to answer this question.

In order to know what weight to give the recommendations of the NCMNPS, Congress needs to know whether they were the outcome of genuine consultations with representatives of all major points of view, and genuine consideration of all of the comments submitted, or whether the much of the comment period and some or all of the “consultations” were a sham conducted after decisions had already been made.

If the NCMNPS falsely claimed to the public and advocates for certain options that it was still “considering” their input, when in fact those options had already been ruled out by decisions during the “VOTE-A-RAMA”, that would impeach the credibility both of the claims in the NCMNPS report that it reflects “consideration” of all of the public comments and “consultations”, and the credibility of former members of the NCMNPS as potential witnesses.

Congress and the public urgently need these records before the Congressional hearings.

Item (2) is for “All instructions for what research was to be conducted or commissioned by, for, or on behalf of the NCMNPS, including any e-mail messages or other communications of decisions regarding what research was to be conducted, the terms of reference for such research, research methodologies, and what issues or questions or policy options were or were not to be included in the scope of research.” *None* of this information was ever disclosed by the NCMNPS. Congress needs to know which recommendations of the NCMNPS are based on research, which are not, and which of the options Congress might consider and which of the potential positive or negative implications of those options were the subject of research.

Item (3) is for contracts between the NCMNPS and researchers. These are needed to determine how much research was actually conducted, what persons or entities conducted it, and what contractual directives research contractors were given. No information whatsoever concerning any aspect of these contracts or contractors has been made public. To assess the weight which should be given to a report and recommendations purportedly based on “research”, Congress needs to know who conducted that research, how deeply they were

authorized or funded to probe, and whether they were contracted to conduct open-ended research or were directed to conduct research to support predetermined conclusions.

Item (4) is for records related who carried out or commissioned research by, for, or on behalf of the NCMNPS. Congress needs to know whether researchers were competent and what biases they may have had. Were they impartial? Were they balanced? What were their points of view or likely biases? Did they have expertise on all options purportedly considered by the NCMNPS, or only on some? None of this information has been disclosed to date.

Item (5) is for reports of research produced or commissioned by, for, or on behalf of the NCMNPS. It appears likely that some significant (although undisclosed) portion of the NCMNPS budget may have been spent on research. But none of that research was ever made public by the NCMNPS. Congress and the public need these records of NCMNPS research to know which of the recommendations of the NCMNPS are supported to a greater or lesser degree by what research, which are contrary to these research results, and which are on issues where no research was conducted or only some options or factors were researched. This is particularly critical to deciding whether, to what extent, or on which issues Congress can or should rely on the NCMNPS report as research-based, and which issues or options were inadequately or incompletely researched (or not at all), and call for further study by Congress.

Item (6) is for records of messages, Q & A, comments, or “chat” submitted to or sent or received by the NCMNPS through Facebook, YouTube, or Zoom, including comments, Q & A, and chat associated with livestreamed or posted video or audio recordings of NCMNPS events. None of these records were ever disclosed by the NCMNPS. “Private” messages sent between users of these platforms, including the NCMNPS as a users, are visible only to those users.

The NCMNPS repeatedly and explicitly encouraged members of the public to submit comments to the NCMNPS through these platforms. Those comments are a significant part of the administrative record of comments received by the NCMNPS from the public, but none of them were made public, and it is unclear whether any of them were even counted by the NCMNPS. Many members of the public – and an especially large fraction of members of the public young enough to be subject to, or potentially subject to, Selective Service registration – engage in more messaging through these platforms than by e-mail.

These records are needed to assess whether the NCMNPS excluded from consideration and/or disclosure some categories of public submissions submitted through channels of communication that it explicitly and repeatedly encouraged members of the public to use.

Item (7) is for records of usage by the NCMNPS of Web-based services including but not limited to Facebook, Twitter, YouTube, Instagram, Medium, LinkedIn, Eventbrite, Zoom, and Google Analytics. The NARA decision-maker notes that “the NCMNPS website (<https://www.inspire2serve.gov/>) contains... links to the Commission’s social media profiles.”

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But (1) even if they were public (which they aren't, as discussed further below), "profiles" are not the entirety of the records of the NCMNPS accounts and activities on these platforms, which also include records of, *inter alia*, "private" messaging which may be as significant as e-mail; (2) all of these records are designated as "temporary" and planned for deletion pursuant to NARA Records Schedule DAA-0220-2020-0001; and (3) none of these records are freely and publicly available, but are available, if at all, only to the extent that the commercial operators of these platforms, in their sole discretion and subject to whatever terms and conditions they wish to impose, choose to make them available to their users or others.

Most of these platforms are "walled gardens" accessible only to users who have chosen to register, provide personal information, and accept the respective platforms' terms, subject to change at any time. To Facebook, a "public" posting is a posting which a user has designated to be made available to all other registered Facebook users unless Facebook, Inc., in its sole discretion, decides not to make it available to some or all other users or others. Facebook sometimes makes limited previews of some content available to non-members, as a "teaser" to attract them to join, but that content is limited in a manner entirely at Facebook's discretion.

In short, posting on commercially controlled third-party platforms does not constitute "public" availability and is not a basis for withholding of records in response to a FOIA request.

Access to records subject to FOIA may not lawfully be conditioned on registration with a commercial service provider or compliance with its terms, nor may discretion to grant or deny access to records subject to FOIA lawfully be delegated to such an entity. The law is clear that no conditions whatsoever may be imposed on use of records disclosed in response to FOIA requests, and that certainly would apply to a requirement to accept Facebook's terms or Facebook "cookies" (or those of any other service provider) to access records subject to FOIA.

If an agency solicits and receives comments and communications from members of the public through these platforms, in its official capacity and as part of its official activities, as the NCMNPS did, that agency must retrieve and release those records on request.

Item (8) is for "records of Web analytics (such as numbers of visitors, attributes of visitors, dates of visits, pages visited, etc.) to the NCMNPS Web site at <<https://inspire2serve.gov>>, including but not limited to all records of, or obtainable through, the Google Analytics account associated with the Google Analytics tracking cookies included in the HTML code on pages of the NCMNPS Web site."

These records are not publicly available, and none of them were disclosed by the NCMNPS. Access to Google Analytics records is limited to the account holder (the NCMNPS or its contractor) and the operator of the service (in this case, Google) or its contractors.

These records are needed to understand the nature, extent, and demographic and/or other biases of the public consultation carried out by the NCMNPS through its Web site – which, presumably, is why the NCMNPS installed these cookies and set up this account.

Item (9) is for “all versions of all files that are, or have at any time, been available from the NCMNPS Web site at <<https://inspire2serve.gov>>... including any change logs or records of the start and end dates of when each version of each file was available on the site.”

According to NARA Records Schedule DAA-0220-2020-0001, “The website will be transferred to the University of North Texas (UNT) upon termination of the Commission under the provisions of the affiliated archives relationship established in 2006 (<http://www.archives.gov/press/press-releases/2006/nr06-00.html>).” The Web page at that URL contains no mention of the University of North Texas or archiving of Web sites. Perhaps the file has been moved or the content of that Web page has been revised, as has that of many files on the NCMNPS Web site. This underscores, of course, the significance of the distinction between providing a URL or link to a Web page or site where responsive information might at some particular time have been found, and providing a copy of the record itself. But the reference to “the website” in the singular leaves it unclear whether that refers to the complete history of the NCMNPS Web site, or only to a single snapshot of the contents of the site at some one moment in time, perhaps most likely at the end of the NCMNPS’s existence.

In the final weeks of the existence of the NCMNPS, many files which had been available on the NCMNPS Web site, including *inter alia* announcements and descriptions of events, were removed without explanation. Was this innocent, or was it an attempt to shape the historical record, and the record available to Congress and the public, of the activities of the NCMNPS?

The complete history of the NCMNPS is needed to assess whether the final Web site of the NCMNPS at the end of its existence is innocently incomplete, or deliberately and misleadingly so, and to know what the public was and was not told about NCMNPS activities.

A Web site is subject to constant change, and knowing not merely what information the NCMNPS chose to make (or not make) available, but when it did so, is essential to assessing the extent to which, and the timing of when, the public was made aware of the activities of the NCMNPS, and whether or to what extent members of the public had a meaningful opportunity to participate in or comment on them. Was notice of planned NCMNPS events posted soon after they were scheduled, and in sufficient detail to enable interested persons to arrange to travel to the venues of these events and to know what topics would be discussed? Or were they publicly announced only long after favored stakeholders had been privately notified and invited, and too late for many or most members of the public to travel to attend, so that the NCMNPS could “pack the house” with supporters of predetermined constituencies or points of view, and stage-manage the publicly visible response to the NCMNPS at these events?

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Item (10) is for “All e-mail messages, including attachments, received at <info@inspire2serve.gov>, or <national.commission.on.service.info@mail.mil>.”

These addresses were designated by the NCMNPS in its *Federal Register* notices, on its Web site, in its press releases, and through all other channels of communication for submission of public comments. But only a handful of those messages were ever made public, and not until 11 September 2020, just a week before the expiration of the NCMNPS’s statutory mandate, as part of a partial response to a FOIA request I made on 1 January 2020.

It’s unclear how many other comments were submitted to the NCMNPS by e-mail, which ones were and were not included in the NCMNPS counts and summaries of selected comments, and whether those not included or not counted were not received, received but deleted or cast aside unread as “spam” by filtering algorithms given the power of gatekeepers over public comments, received but ignored or kept secret, or received and deleted.

These records are needed to assess whether the summaries and counts by the NCMNPS of the public comments it received accurately or completely reflect the comments submitted, which is critical to assessing the need for additional or *de novo* public hearings by Congress.

Items (11), (14), and 15 are for records of the receipt, processing, and release or withholding of records by the NCMNPS in response to FOIA requests. These records are needed to assess whether the NCMNPS acted in good faith in responding to FOIA requests, and what bias it may have displayed – through how requests for particular types of records were construed, what searches were conducted, how promptly after they were identified as responsive records were processed, how soon after redactions were completed the redacted records were released, and what records were released and withheld – in those actions.

Evidence of the presence or absence of bad faith or bias by the NCMNPS in FOIA processing is needed both because it is relevant to the processing of FOIA requests and appeals that were pending with the NCMNPS when its existence ended and legal custody of its records was transferred to NARA, and because improper selectivity in responding to FOIA requests could be part of a pattern of selective disclosure and reporting and distortion by selective omission from the public record that impeaches the overall credibility of the NCMNPS.

To know what weight to give to the recommendations of the NCMNPS and testimony of former members of the NCMNPS, Congress needs to know whether it should, or should not, trust that the NCMNPS has reported fairly and accurately on the comments it received from the public, only some of which it made public, and the basis for its recommendations.

Items (12) and (13) are for records of two petitions submitted to the NCMNPS with 25,497 and 12,611 signatures respectively, as well as individual comments of the signatories, both asking that Congress end Selective Service registration entirely rather than try to expand it to young women as well as young men.

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The final report of the NCMNPS states that the NCMNPS received “4,300+ Public Comments”, and includes selected excerpts from a handful of selected comments. But the final report includes no tabulation or count of the public comments. Records released in response to my FOIA requests reveal that the NCMNPS, unsurprisingly, did tabulate and “score” the public comments. But the NCMNPS withheld both these tabulations and the scoring criteria.

It is apparent from this count either that the signatories of these petitions were omitted from the count of comments made public by the NCMNPS, or that each of these petitions, including the individual comments of some signatories, was counted as a single comment.

Few of the comments – not including either of these petitions – and only summaries (of unknown accuracy) or excerpts from others, were ever posted on the NCMNPS Web site.

Extracts from individual comments by those who delivered these petitions to the NCMNPS, mentioning but not including these petitions, were included in some aggregated summaries of comments posted on the NCMNPS Web site. A one-page scan of the cover sheet to one of these petitions was released to me on 16 September 2016, two days before the dissolution of the NCMNPS, in response to one of my FOIA requests which I had submitted eight and a half months earlier on 1 January 2020. These are the only evidence of the existence of these petitions in any of the records made public by the NCMNPS.

The petitions themselves, including the numbers and names and other information provided by the signatories and the individual comments of those who included them, were never made public by the NCMNPS – for as-yet-unknown reasons that may be elucidated by records responsive to items (11), (14), and (15) of this request, as discussed above.

This is especially significant because (A) the signatories of these petitions constitute almost 90% of the individuals known to have submitted comments to the NCMNPS (since the NCMNPS did not disclose all the comments it received, there may be any number of others, from unknown people and points of view, that were submitted to the NCMNPS but that remain unknown to the public or to Congress), and (B) these petitions advocated the repeal of Presidential authority to order registration with the Selective Service System, rather than expansion of this authority to include women as well as men – the legislative option most diametrically opposed to the recommendations determined or predetermined by the NCMNPS.

The most plausible inference strongly suggested by the evidence now available is that when the NCMNPS received public comments overwhelmingly opposed to its preferred policy option, the NCMNPS or someone acting on its behalf decided to conceal this inconvenient fact either by destroying records of the vast majority of the comments received by the NCMNPS, or by not making them public, not counting them, silently withholding them even when they were requested pursuant to FOIA, and not mentioning them in its report to Congress.

If the NCMNPS simply hid or threw away the evidence of public opinion that it didn't agree with or didn't like, including almost 90% of the public comments it received, that is *prima facie* evidence of gross bad faith and gross malfeasance sufficient to fundamentally discredit the NCMNPS report and impeach the credibility of former members of the NCMNPS.

Records responsive to this item, and to items (11), (14), and (15), are needed by Congress and the public to determine what happened, why, and who was responsible:

Did the NCMNPS retain records of these petitions, but conceal them and improperly withhold them even when records of all public comments were requested pursuant to FOIA, and omit the substance of these comments from its report to Congress?

Or did the NCMNPS destroy, or attempt or plan to destroy, or direct or knowingly countenance the destruction or planned or attempted destruction of, all records of most of the members of the public who submitted comments to the NCMNPS, and of what they said?

Who made, and who was aware of, these decisions? Congress needs to know, in order to assess the credibility of former NCMNPS members or staff as witnesses or policy advocates.

Members of the NCMNPS served in that capacity as paid, although temporary and part-time, Federal employees, as of course did other NCMNPS staff, both full- and part-time. Records responsive to this portion of this request are urgently needed to inform, and to assess the need for, possible Congressional oversight investigations, referrals to other appropriate oversight bodies, and/or complaints to NARA of improper destruction of Federal records.

Item (16) is for NCMNPS e-mail messages to, from, or mentioning NARA.

These records are needed because they may contain evidence bearing on which records the NCMNPS planned to destroy when its statutory mandate expired, and whether or how it planned to deal with FOIA requests and appeals pending when its statutory mandate expired. That information is needed to attempt to determine the extent to which the NCMNPS may have crafted and carried out its records retention and destruction policies to mislead Congress and the public – with or more likely without the awareness by NARA of these intentions – through deliberately created gaps in the permanent historical record of NCMNPS activities.

These records would include any consultations between the NCMNPS and NARA concerning which records should be deemed temporary, and which should be deemed permanent. Although there are broad general specifications for this in NARA Records Schedule DAA-0220-2020-0001, there is considerable ambiguity and room for interpretation and discretion in practice. Did the NCMNPS make its designations of “temporary” (scheduled for destruction or expungement at the expiration of the NCMNPS mandate) or “permanent” records in accordance with whatever guidance it may have received from NARA? Did the NCMNPS seek to influence NARA to adopt definitions that would leave room for the NCMNPS

to categorize embarrassing records (such as records of the “VOTE-A-RAMA”) or records not supporting its recommendations (such as records of the signatories of the petitions discussed above) as “temporary”, and thereby consign them to a historical “black hole” and prevent them from being considered by Congress? Do the designations by the NCMNPS of which records were “temporary” and which were “permanent” show a pattern indicative of bias or bad faith? How the NCMNPS categorized records with respect to whether they were temporary or permanent may provide significant evidence supporting or impeaching the credibility of the NCMNPS and its report.

Since part of the point of this request is to obtain records of which records the NCMNPS designated as temporary or permanent, there is of course no way for me to know in advance what those determinations were. Nor is that necessary for, or relevant to, my entitlement to request these records from NARA – the current legal owner of these records – or NARA’s obligation to conduct a search reasonably calculated to retrieve all responsive records.

If records are in NARA's legal custody, they are subject to FOIA, regardless of how or when they they came into NARA's custody, regardless of whether they have been designated by NARA (or were designated by any other agency) as permanent or temporary, and regardless of the intended retention period (if they were not potentially responsive to this and/or other FOIA requests) assigned to them by NARA pursuant to a NARA records schedule or otherwise.

A search reasonably calculated to retrieve all records responsive to this request will necessarily include a search of both “temporary” and “permanent” records in NARA’s legal custody, regardless of the intended retention period.

The retention period planned by NARA would be relevant to the scope of the search required by FOIA if and only if the request were limited to records meeting certain criteria with respect to the intended retention period. This request contains no such limitation.

In addition, if the NCMNPS became aware that records had been improperly destroyed, these records should show whether that was reported to NARA. Records of whether that did or did not happen are needed to assess the degree of bad faith in the destruction of records by the NCMNPS, which goes to the overall credibility of the NCMNPS and its members and staff.

Item (17) is for NCMNPS e-mail messages to, from, or pertaining to the U.S. Department of Justice (DOJ).

One issue for the NCMNPS was whether to recommend continuation, expansion, or elimination of the current Selective Service registration requirement. Much evidence including statements by members and former members of the NCMNPS and the public comments submitted to the NCMNPS (almost 90% of which, as discussed above, addressed this specific issue) suggests that this was the most important and controversial issue for the NCMNPS.

Edward Hasbrouck, <<https://resisters.info>>

Noncompliance by young men subject to the registration and address update requirements, and inability to enforce the law against those who do not comply voluntarily, have been the Achilles heel of the current Selective Service registration program. Any competent, diligent, and good-faith research or consideration of the issues that would be posed by trying to expand the registration requirement to women as well as men would necessarily include consideration of the likely extent of voluntary compliance and noncompliance and the methodology, cost, preparedness for, and likelihood of success of enforcement efforts.

Violations of the Selective Service registration requirement are criminal violations of the Military Selective Service Act (MSSA). The Criminal Division of the DOJ is responsible for enforcement of the current registration requirement, and would be responsible for enforcement of any expanded registration requirement applicable also to women.

But none of the records made public by the NCMNPS give any indication that the NCMNPS ever requested or received any information from the DOJ about past, present, or possible future enforcement experience, plans, preparations, or budgets. No witness from the DOJ testified at any of the hearings or public events held by the NCMNPS. No meetings between the DOJ and the NCMNPS are mentioned in any of the files ever posted on the NCMNPS Web site or any of the records released in response to any of my FOIA requests to the NCMNPS. The DOJ did not participate in any of the regular inter-agency meetings convened by the NCMNPS staff with representatives of at least 25 other Federal agencies.

The final report of the NCMNPS recommends that Congress amend the MSSA to extend Presidential authority to order registration by women as well as men, but does not mention compliance or noncompliance as an issue and includes no enforcement plan or budget.

It is urgent for Congress to know to what – if any – extent the NCMNPS consulted the DOJ regarding the history and the lessons drawn by the DOJ from its past efforts to enforce the Selective Service registration requirement; the reasons for the decision by the DOJ in 1988 to suspend investigation or prosecution of suspected violations of the MSSA referred to the DOJ by the Selective Service System or otherwise; any estimates by the DOJ of the past, current, or prospective numbers of violators of the MSSA (including if the registration requirement were to be expanded to women); whether the DOJ believes that an expanded Selective Service registration requirement could be enforced, and if so how and at what cost; and any DOJ plans, preparations, or budget for attempted enforcement of an expanded Selective Service registration requirement applicable to young women as well as young men.

The most plausible interpretation suggested by the available evidence is that the NCMNPS, anticipating that any research or consultation with the DOJ would produce evidence against the predetermined recommendations of the NCMNPS, and that any DOJ witnesses invited to testify at NCMNPS public hearings would testify that the DOJ has no estimate of the current number or percentage of violators of the MSSA and no plan or budget for how to

enforce an expanded registration requirement, adopted a deliberate “see no evil, hear no evil” approach to the DOJ and the issues of compliance, noncompliance, and enforcement.

If that is so – a question for which records of the NCMNPS communications with the DOJ are urgently needed – it is evidence of why Congress cannot rely on the NCMNPS to have considered these issues, and why Congress will need to consider them *de novo* and call witnesses from the DOJ. These records are urgently needed to assess the need for Congress to call witnesses from the DOJ and ask them the key questions that the NCMNPS didn’t ask.

Items (18), (19), and (20) of my request are records related to the categories discussed above, and needed to understand and assess the significance of those related records.

All of the items in this request are needed to assess what the NCMNPS considered to be its purpose, and what it did and didn’t do, so that Congress knows where its work should start.

The NCMNPS was created by a provision of the National Defense Authorization Act (NDAA) for Fiscal Year 2017 that was included in neither the House nor Senate version of that bill, but was inserted behind closed doors by the House-Senate conference committee. There is no public record, aside from the statute itself, of why Congress and the President created the NCMNPS, or what they intended to NCMNPS to do. But the members of the NCMNPS, each of whom was appointed by a specific Congressional leader or by the President, presumably were given instructions by those who appointed them as to what they were supposed to do.

The House and Senate versions of the FY 2017 NDAA differed in whether they included a provision amending the MSSA to expand Presidential authority to order registration with the Selective Service System, and criminal penalties for nonregistration or failure to report address changes, to women as well as men. The NCMNPS was created to address that issue.

The draft has been, of course, one of the most controversial issues in U.S. history, whenever it has been used. The last time registrants were called up for inductions, millions violated the MSSA. Tens of thousands were driven into emigration or exile. Thousands were imprisoned. Opposition to the draft influenced Congressional and Presidential elections.

Compliance with the MSSA is lower today than ever, in significant part because criminal enforcement was abandoned in failure by the DOJ in 1988 and has never resumed. It’s reasonable to assume that any attempt to expand Selective Service registration to women would prompt more resistance and more controversy.

The NCMNPS wanted us to believe that its purpose was to conduct an impartial inquiry and make recommendations informed by research and public consultation. They tried hard to create a record of their activities that would support that interpretation.

But an interpretation that is at least equally likely, in light of the evidence above, is that the NCMNPS was created by Congress and the President to provide them with “political cover” and an excuse for enacting new legislation with minimal or no Congressional hearings or debate, relying on the “informed and expert” recommendations of the NCMNPS, and that the members of the NCMNPS were partisan political appointees selected for their ability and willingness to advocate for, and to construct a record that would support, policy recommendations consistent with the outcomes already sought by those who appointed them.

The members of the NCMNPS did their job. But did they see that job as open-minded inquiry, or as the construction of a pretext for Congressional and Presidential action?

The records responsive to each item of this request are urgently needed to help answer that question and to assess whether Congress and the public can or should rely on the recommendations of the NCMNPS, or whether Congress needs to conduct its own full inquiry, including full public hearings, before acting on any of the recommendations of the NCMNPS.

Please respond as soon as possible to confirm your receipt of this appeal and to advise the reference number assigned to this appeal and the expected date of completion of NARA action with respect to this request, including action on this appeal.

I note that 5 U.S. Code § 552 (a)(6)(E)(ii) requires that, “Notwithstanding clause (i), regulations under this subparagraph must ensure — ... (II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.”

I look forward to your expeditious consideration of this appeal of the denial of my request for expedited processing of my request. To avoid unnecessary delays, please contact me immediately by telephone or e-mail should you have any questions regarding this appeal and/or request.

I certify under penalty of perjury that the statements above are true and correct to the best of my knowledge and belief.

Sincerely,

Edward Hasbrouck