U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
Transcript of National Archives History Office Oral History Interview
Subject: Jason R. Baron
Interviewer: Stephanie Reynolds
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[BEGIN RECORDING]

Stephanie Reynolds: Okay. I've got the recording started. Thank you for participating in the National Archives Oral History Project. We're documenting the history of the agency by preserving firsthand accounts of events. My name is Stephanie Reynolds, and I'm based out of our National Archives facility in Denver, Colorado. I'm assisting the agency historian, Jessie Kratz, on this important project. Today is Monday, September 25th, 2023, and I'm speaking with Jason R. Baron. Okay, Jason, just to get it started, could you just tell me a little bit about your background, like your education, where you're from, that sort of thing?

Jason Baron: Of course. Thank you so much, Stephanie, for the opportunity to participate in this really important project. I am an enthusiastic supporter of oral history. My own background is that I was born and raised in Massachusetts. I'm the son of an MIT [Massachusetts Institute of Technology] professor, I went to Wesleyan University in Middletown, Connecticut, and then I went on to Boston University School of Law. I graduated there in 1980. I started working in the federal government at the Department of Health and Human Services in 1980, and then transferred to the Justice Department in 1988, to work in the Civil Division's Federal Programs Branch. While there, I defended lawsuits involving the FOIA [Freedom of Information Act] and federal recordkeeping policies, among many other types of lawsuits. I was there for 12 years. In 2000, I took a visiting scholar position at the University of British Columbia. And then I was very lucky that there was an opening at the National Archives for a position as the first director of litigation at the National Archives, posted in 2000. And I was very privileged and honored to be accepted there. So then I spent 13 years at NARA [National Archives and Records Administration], which we'll get into. So really, I know that you first want to speak to the Justice Department portions of my career, and I'm happy to do that.

Stephanie: Yeah, that's exactly what I was going to ask you about, to rewind back to your time at DOJ [Department of Justice]. I know that you've covered a lot of high-profile cases, and I didn't know if you wanted to go into any detail about any of those cases, for example, like the PROFS case and how that morphed into the *Public Citizen v. Carlin* case? Do you want to talk about any of those things?

Jason: I'd be happy to. The PROFS case—*Armstrong v. Reagan*, *Armstrong v. Bush*, *Armstrong v. Executive Office of the President*. It had different titles. It was really the most important case of my career. And it is one of the most important cases that the National Archives ever faced. It is a landmark case that established, in particular, that electronic mail can be a federal record and a Presidential record and should be preserved in electronic form as well as paper form, when appropriate.

So the case was filed on the last day of the Reagan administration, in the afternoon on January 19th, 1989, by Scott Armstrong—who wrote the book called *The Brethren* with Bob Woodward—and a number of other plaintiffs, including Gary M. Stern, who became general counsel at NARA many years later in 1998. But in 1989, the plaintiffs had heard from John Fawcett, who was then the head of Presidential Libraries at NARA, that backup tapes containing Iran-Contra [Affair] PROFS notes from Ollie North and John Poindexter were going to be destroyed at the end of the Reagan administration. They were going to be recycled. And because they believed that there was unique history on those backup tapes in the PROFS notes that may or may not have ever been printed out either because of the special counsel investigation of Lawrence Walsh into Iran-Contra, or otherwise by staffers at the National Security Council, they went into court, sought a temporary restraining order, and got one from the late Judge Barrington Parker.

I should add that John Bolton, as assistant attorney general of the Civil Division, argued the case. And that afternoon, he said that backup tapes are sort of like furniture. They're like chairs and desks. They can be thrown out at the end of an administration. The court did not accept that. The court said that there might be a case here for the plaintiffs and issued a temporary restraining order for 392 backup tapes being preserved. That case went on to seven years of litigation with four appeals to the U.S. Court of Appeals for the DC Circuit. It had many ramifications to it.

The case expanded in 1992 at the end of the George H. W. Bush administration when . . . the late Judge Charles Richey issued a second . . . TRO [temporary restraining order] and preliminary injunction, stopping further destruction of any backup tapes from the Bush 41 [President George H. W. Bush] administration before Bill Clinton came into office on January 20th, 1993. And Judge Richey finally got to the merits of the case on January 6th, 1993, when he held that email in paper form was different from email in electronic form. It did not have sender and recipient information. And so in his mind, the computer knew something that the printed versions of email didn't. The [computer] had all the recipients of email. So, this was—he didn't say the word metadata—but it's the first judicial decision that recognizes that metadata is important and makes electronic versions different from paper versions of records. And that

decision was affirmed by the U.S. Court of Appeals for the DC Circuit, and it remains an important landmark decision.

Along the way, there was an appeal on issues of whether courts should even be involved in Presidential decision-making. And an early decision, the first appellate decision in the case, is still very relevant to today. It said that plaintiffs don't have standing to micromanage the President's recordkeeping. And so, any portion of the case that involved Presidential records was off-limits. But at the time, the backup tapes were the National Security Council's backups and the NSC's status as to whether it was Presidential, that it was covered by the Presidential Records Act, or was a federal agency, was left for a remand, as was recordkeeping guidance . . . left to the district court to further rule on. Plus, the case got expanded to all the other components of the Executive Office of the President [EOP] through amended complaints. And so OMB [Office of Management and Budget] and USTR [Office of the United States Trade Representative] and the Office of National Drug [Control] Policy and others were caught up in the case. It wasn't just about the original backups. It was the email from all of the White House in the Bush administration and the Clinton administration.

And so what are the outcomes of the case? Well, I'm going on at length because this is really important to how the government works today and what happened with the National Archives. One of the outcomes of the case was that emails have been archived by the White House since 1994. Up till then, email was not considered a record, but the case said it was. And it was only considered a record if somebody printed out the emails. But because of the case, John Podesta went to Bill Clinton. They succeeded in getting money appropriations out of Congress for what was known as the ARMS system at the White House. That was the original system that archived email. And at the end of the Clinton administration, there were 20 million Presidential emails, 32 million from the EOP as a whole, and that number has only increased over time. So since 1994, White House records have been archived because of the Armstrong case holdings and the voluntary position of the White House that everything should be archived electronically.

So now if you fast forward to 2023, NARA is holding on the order of 700 million emails between the Reagan administration and the Trump administration, which comes to about 3 billion pages. And as an aside here, I'm on record in many of my talks that we need better ways to access that information, including through artificial intelligence, because only .5 percent of the 700 million emails have been opened and are accessible to the American people. Think about that. Ninety-nine-and-a-half percent of White House emails as of 2023 remain unopened. And there are reasons for that, but we can talk about that some other time.

So this, the Armstrong case, also led to NARA issuing email regulations in 1995, and they still are in existence. They've been amended. . .. The last thing I'm going to say about this, there's one more thing that happened, which is that the case ended up deciding that the National Security Council was a Presidential component and produced Presidential records as opposed to federal records. And that was another decision that was held in the case. So the case is important in many ways.

It did have a successor case that you mentioned, *Public Citizen v. Carlin*, and it involved the General Records Schedule [GRS] 20, which has now been superseded. At the time, that schedule was an attempt by NARA to satisfy the Armstrong holding, but also not impose electronic recordkeeping throughout the government, which at the time in the 1990s, agencies considered to be extremely burdensome and costly. NARA got hundreds and hundreds of comments on a notice of proposed rulemaking, which was issued as a one-time thing, with respect to the General Records Schedule 20. The bottom line was that the GRS 20 said that emails could be printed out, but they had to have the metadata that the Armstrong case and Judge Richey decided. So [emails] had to either have sender and recipient information printed out, or agencies could archive email in some form. Plaintiffs objected—a different set of plaintiffs, with Public Citizen being the lead—objected that that really wasn't in conformance with the Armstrong case, that everything should be electronically saved. And this was kind of a makeweight solution, a halfway solution with still allowing the government to print emails with metadata. And plaintiffs wanted [to litigate] this [in] court. They lost in the court of appeals. And so the government at that time did not have to electronically archive email or come up with email schedules for every agency.

If you fast forward to 2016 because of a memorandum issued in 2012, which we can talk about, titled the *Managing Government Records Directive,* NARA and OMB required all agencies to electronically manage their email. And so the print-to-paper era of Armstrong and the *Public Citizen v. Carlin* case came to an end in 2016, and now every government agency has to manage its electronic records and particularly manage its email electronically. So the Armstrong cases had profound implications for the rest of the government. I will pause and not go into the Capstone archiving policy that I'm happy to do. But in any event, the echoes of that case, the way that that case set policy continues as a really, really important precedent to this day. I was honored to be lead lawyer in the case from 1992 until it ended in the late 1990s. And also, I was the lead lawyer on the *Public Citizen v. Carlin* case.

Stephanie: Yeah, it sure reverberated through the entire, you know, through the years since the 80s, 90s, to today and continuing on how records are being managed for sure. What [CROSS-TALKING].

Jason: . . . and how lawsuits can or cannot sue the President, whether complaints can be filed that survive a standing analysis that courts don't throw them out because of something that is happening in the Oval Office. In the White House, for example, there was a lawsuit by CREW filed—Citizens for Responsibility and Ethics in Washington—filed against the Trump administration, all about the use of ephemeral apps like Signal and Confide that were used by individuals at the White House. And the suit was all about whether those should be considered records and preserved. And the courts threw the lawsuit out, not because they didn't think they were records. The DC Circuit said, "Of course, they're probably covered under the Presidential Records Act. But the President decides what is a record and cannot be micromanaged." [Paraphrasing.] And so the court dismissed the lawsuit. So, the early Armstrong case has implications for what is going on currently in many lawsuits.

Stephanie: You said that you were the lead on the Armstrong case. Can you talk about what your role was in that case?

Jason: Well, I was the guy standing in court when many of the events happened. I was not the lead at the beginning in 1989. Other lawyers were, who worked for John Bolton and then others in the Bush administration. Again, it was filed on the last day of the Reagan administration and carried over to the Bush and the Clinton administration. But I came in June 1992, and as lead lawyer, I was the person defending the merits of the lawsuit.

The positions of the United States, DOJ and NARA had already been set out in briefs prior to my entering my appearance. But there were many rounds of further briefing in 1992, and I was arguing the case in late 1992. I was standing there when a preliminary injunction was issued by the court. I was there during the Presidential transition as lead lawyer. That was an unhappy experience of transitioning from George H. W. Bush to Bill Clinton. The court held Archivist Don Wilson in contempt for failing to abide by certain preservation standards with the handling of backup tapes. And the transition was chaotic. At the end of the Bush administration, there were a lot of things that went wrong. The court got upset that its own guidance hadn't been immediately satisfied. That is when the court ruled that email was a record. It wanted to have the EOP change all of its systems and do archiving and do restoration of tapes, whatever. On all sorts of grounds, the court thought that the White House and the Executive Office of the President were moving too slowly, and so it accepted plaintiffs' arguments on lots of grounds, including alleged mishandling of backup tapes. And the Archivist was held in contempt. It's the only time, to my knowledge, the Archivist of the United States has ever been held in contempt by a court. That ruling was stayed by the U.S. Court of Appeals for the District of Columbia, and ultimately the DC Circuit overruled the contempt finding.

But it was a fraught time. And as the head lawyer of the case, I took a lot of flak from the court as to what the government was doing. I think Judge Richey and I had a good working relationship, but I could only defend the government's actions to a certain extent. And it was a highly visible experience and written up in *The New York Times* and *The Washington Post* repeatedly as to what was going on. And I stayed on the case, and what I was happiest about is that I did have a role in settling aspects of the case with respect to electronic recordkeeping. There were various stipulations of settlements that let the case go forward and let the White House develop its own archiving system. And plaintiffs did not object—they had a role in both the email regulations in giving comments and also in understanding what was going on at the White House.

I really was privileged to play a role in quieting down the case, in some respects. And then the case went on with respect to the National Security Council's status. In any event, it is a great privilege to be able to stand up in court as a Justice Department lawyer and say that you're representing the United States. You're representing the White House and NARA. And because of my role in the case and my great interest in recordkeeping, as a result of the case, you know, I continued on the *Public Citizen v. Carlin* case.

But I was absolutely enthralled with everything about the National Archives. And I loved it as an institution. I got to know many people who I thought were consummate public servants. And so, when an opening came up for a position as director of litigation, I applied. Miriam Nisbet, who had been special counsel to the Acting Archivist Trudy Peterson, left for an appointment at the American Library Association. So when the Office of General Counsel and Gary Stern—who was the general counsel in 2000, replacing Elizabeth Pugh, who had been general counsel for a couple of years—when that position was opened, I thought it was the perfect position for me having spent all this time on the Armstrong case. And I thought I could play a useful role going forward at the National Archives. I was delighted to be there.

Stephanie: Okay. So, you've brought up a few things here that I want to touch on. First, I want to go back to the email regulations in 1995 that came out of that Armstrong case. Did you have any input on that?

Jason: Well, yes, actually I did. I worked very closely with Jim Hastings and others to essentially draft those regulations. After those regulations were put into effect, I was honored to be given an award from the Archivist [John Carlin] for my role. It is and it was a very special thing. I think Justice Department attorneys do get involved in agency policies from time to time. But I really

felt that I wanted to be “all in” on how to solve the email recordkeeping issues that arose in the case. And so I actively assisted NARA personnel in that.

Stephanie: So, did working on that and working with NARA on these lawsuits, did that really give you the interest in email and electronic records and the legality surrounding all of that? Or were you already interested in those things?

Jason: Well, Stephanie, I actually did my honors thesis in 1977 on recordkeeping and also on how the FBI [Federal Bureau of Investigation] and its criminal databases were accessed by Interpol. So I've always been interested. I took a FOIA seminar in law school. All I can say is that Malcolm Gladwell believes that if you do anything for 10,000 hours, you become a subject matter expert. And I spent almost that many hours on the Armstrong and the GRS 20 cases over a period of my eight years remaining at the Justice Department. I did other litigation, but—. So it was natural for me to go on. And when I came to the National Archives, the Armstrong case followed. The backup tapes followed with me! There were still issues regarding preservation of the backup tapes, and continuing issues about disposition of those tapes over time. In any event, when I came to the National Archives, I was in my dream job. And I'm happy to talk to you about all of the things that happened on my watch in the 13 years I was there.

Stephanie: Yeah, certainly. So it sounds like because of some of the Armstrong cases and working with NARA, that that built some interest in you wanting to move over to the National Archives. Is that correct?

Jason: I had great interest in pursuing these policies and assisting NARA further.

Stephanie: So did the Archives make this position for you, do you think? Or they posted it and you just saw that it was open?

Jason: They did not make the position for me. But no, as I said, Miriam Nisbet left and there was a reformulation of the position. She had been special counsel, but Gary Stern and others, Chris Runkel and others, believed that there should be a broader mandate for a director of litigation that covered both federal court litigation, as well as administrative proceedings like EEOC [Equal Employment Opportunity Commission] administrative hearings under Title VII [of the Civil Rights Act of 1964] or MSPB [Merit Systems Protection Board] hearings. And so there was a broader portfolio for the director of litigation. I should add that there have been three successor directors of litigation since I left in 2013, but I was privileged to be the first in this position, as there were many candidates that applied for the job.

Stephanie: Did you find it challenging to be the first one?

Jason: Well, first, what I wish to say here is that Gary Stern, who has been general counsel since 1998, and continues through the date we're having this discussion, has been the finest civil servant I've ever met. He has set the tone for the General Counsel's Office for 25 years as someone who is nonpartisan, fair, gives appropriate advice both to appointees from Democrat and Republican administrations, and is always on top of everything. He comes out of Vassar and Yale Law School. He is one of the smartest lawyers I've ever met. And he's one of the kindest. And what he allowed all of his staff to do is to blossom in the job, whatever responsibilities they have. They can go with whatever interests them as much as they want.

And in my case, early on, I told Gary that I thought of the job as more than just a litigation job. It was also an educational job of what the Federal Records Act means to government agencies, and that I would be happy to act in a public-facing way to go out and give talks and briefings and be involved in the world. He not only allowed me to do that throughout the government, but he also allowed me to pursue outside interests in terms of the greater legal community. And I'll tell you how.

It was the case of *U.S. v. Philip Morris*, which involved a RICO [Racketeer Influenced and Corrupt Organizations Act] racketeering case against seven tobacco companies that was filed in the Clinton administration, which was all consuming to many federal agencies for many years. There were 100 billion dollars at stake originally that the Clinton administration said was the remedy that should be disgorged back to the American people from these companies, because they had been in a conspiracy since the 1950s to withhold information about cigarettes and about cancer from the American public. And that case went on for a very long time.

But in 2001 and 2002, right after I started, the Justice Department received a request for documents directed to many, many agencies, including the National Archives. The National Archives was asked for all documents related to tobacco going back to the Eisenhower administration. And because NARA owns Presidential Libraries and runs them . . . there were tremendous numbers of paper records. There were also, in the Clinton email collection that was accumulated because of the Armstrong case, 20 million White House emails and 12 million other EOP emails all to search for responsive records. And I should add that the request from Philip Morris and the companies to the government for documents was 1,726 paragraphs long, where . . . the last paragraph said, "All the prior paragraphs apply to the National Archives."

So I was tasked by the Justice Department tobacco litigation team to go search 20 million emails. And the way to do that in 2002 was simply to type in keywords and use a vendor who

had put up the emails on a platform—I believe it was Booz Allen—and do a search. So there were search terms that were used, and I was asked to create the search terms. I actually got about 25 individuals, lawyers in the office as well as archivists, to go look at 200,000 emails that were found to be responsive to a set of search terms. At the end of that process, after six months, I believe, we found about 100,000 responsive records. There were a lot of false positives that were there—you type in the word "smoking" as a keyword and you get a lot of policies on smoking in bathrooms, but it has nothing to do with tobacco policy. Or you type in Marlboro, you get lots of emails that have to do with Upper Marlboro, Maryland. Any term you type in will get false positives, get a lot of noise. You have to separate that out. Plus, you have to look for various categories that would be privileged and have a discussion about that with the other side. In any event, that all went forward. I don't think we have the time to talk about all the particulars of the litigation, but what I emerged with afterwards is that I saw the future in some respect. And I saw that if there were 20 million emails of Clinton, that at the rate of growth of email there would be tremendous numbers in the future.

I've been proven right. There are 700 million now. And when you get up to those kinds of numbers, keyword searching doesn't work. And so I went on a quest to find better ways to search than lawyers did in 2002. That led to a whole other set of actions and developments that I was part of that really don't relate to the history of the National Archives as such. It relates to my personal history in going to computer scientists at the University of Maryland and at the National Institute of Standards and Technology using lawyers in my office to work with me on a research project called the Text REtrieval Conference, TREC Legal Track, which by itself set the basis for finding that machine learning and AI [Artificial Intelligence] methods worked better than keywords, were much more efficient, and were just as good. And so all of that work started out of the *U.S. versus Philip Morris* case, and I continued it in various forums and wrote about and spoke about it and then did research on it, and it ended up influencing the case law that came afterwards where judges accepted that machine learning methods could do a very good job in answering document requests. And that continues to this day.

There's a growing number of hundreds and hundreds of cases that accept that AI methods for search, known as technology-assisted review or predictive coding, work well if the parties are able to talk to each other about what is going on with the software. . .. I feel very good about the role that I played in evangelizing AI methods early on, and it was all originally due to these requests to NARA for a search. No one had ever searched 20 million emails in 2002. So, the fact that that obligation was imposed on NARA in the litigation led to thinking about better ways to search. And not to toot my own horn, but there was a documentary about my career and about another lawyer's career in 2014 called *The Decade of Discovery*, that outlined the case and the efforts that I had made, and I'm very proud of being part of that documentary. The

documentary had many other individuals—judges and lawyers—in it, and it was basically tracking the way that the law developed in terms of this area.

So if you fast forward to today, I have sometimes now been a critic of NARA. One of my failures in my time at NARA was not being able to push sufficiently for tools, software, that would do the machine-learning-type methods that I think would help with huge volumes of electronic records that are coming in, that were known to be in the White House. And now for the rest of the government, there are directives that say that the entire government will be transitioning to electronic records and accessioning permanent records to the National Archives after June 2024. That's the latest deadline as of now. But I've been pushing for NARA to use machine learning more and more, especially due to the experiences of searching for records of Supreme Court nominees for John Roberts in 2005 and Elena Kagan in 2010. They both worked in the White House in prior administrations as younger lawyers. NARA had to search for those records. and then later, after I left my position, for Brett Kavanaugh's records. I think [these experiences] have all convinced NARA officials that when you're asked for records of Supreme Court nominees and they end up being, you know, on the order of 900,000 emails, you need a better way than keyword searching to search. And that was a matter of some [considerable] back and forth [with Congress], the last time with Justice Kavanaugh being nominated.

So, because of those [appointments], and the special role NARA plays in historical records and needing to search during the nomination process for individuals who worked in the prior administration, plus litigation, plus FOIA requests, there are many reasons that one needs machine-learning methods that are well-known in e-Discovery in the private sector to be employed. And I believe steps are being made now [by NARA] in 2023 to have more robust search methods. But I've been out there in the ten years since I've been at NARA to argue that NARA should be a leader on this. And in various forums, I've made that point. I think, yeah, things are changing. And there's also machine learning that is being done at NARA in other contexts involving searches of web online records. Pam Wright, in the Office of Innovation, has done excellent things in terms of advancing the ball for the use of machine learning and AI in other ways. But in the litigation world with email, email is not a web record. It's not put up online presumptively as soon as it's created. So even now, I've told you that only .5 percent is up there. So there are different worlds of records that NARA has, and there are tremendous efforts to deal with digitization and putting up all portions of the collection. But with respect to email records from the White House and the coming wave of email from all government agencies, NARA is going to really need to, in the future, consider artificial intelligence to help.

Stephanie: Okay. Again, lots of topics here. So, you mentioned Gary Stern. He really allowed you to blossom in the job and kind of, you know, look into things that were important to you or

that you were interested in, and so that led you to learning more about keyword searching and FOIA and machine learning and all these other things that you were looking into in terms of being a successful director of litigation, specifically at NARA. Do you think that you need to be given that latitude to really learn and look into being in the forefront of records in terms of, you know, searching records, providing access, FOIA, e-Discovery, things like that? Do you think that's largely what helped make you successful as the director of litigation at NARA?

Jason: I think that every director of litigation—there have been four of us—has brought their special strengths and expertise to the job. I did believe, and I still believe, that it's extremely helpful to have been a trial lawyer at the Justice Department—as was Alina Semo, who succeeded me [at NARA] after we worked together in the Federal Programs Branch at the Justice Department. The fact is that when you are a former Justice Department lawyer who comes to the National Archives, you have a certain respect for your colleagues that they know that you know how litigation works. And so while others can do a fine job without having been at the DOJ, I always felt that in my own case, it tremendously helped, because I knew how litigation worked. I was a lead attorney [at DOJ]. And I was happy to be second chair on any number of lawsuits as director of litigation at NARA and play a different role. But being able to talk as a peer to one's former colleagues and new colleagues, you know, in the Justice Department Civil Division, was a big plus. So that's really one set of expertise. Others bring their own expertise. They can be experts in privacy. They can be experts in other ways with classified records. And so it's a great thing to have, you know, expertise in any number of areas. Obviously, if you're director of litigation, your focus in the General Counsel's office is primarily on assisting on litigation and helping the general counsel frame the arguments for NARA, hearing what NARA's position has to say, and being a strong advocate for NARA in all of its ways.

But inevitably, you get involved in non-litigation areas, as in writing memoranda, including in interacting with, for example, the Office of Legal Counsel if there's a difference of opinion between NARA and another agency. I wrote a couple of memoranda that were part of [inter-agency] disputes, and we were successful. But in other ways, I did believe that, because of my role in Armstrong and having helped fashion the email regulations, that I had something to say about electronic records and email as a matter of policy. And that wasn't always well-received by staff who thought that I should stay in my own swimming lane. But I think I had tremendous support from Paul Wester, who was the first chief records officer of the United States, and support from his successor, Laurence Brewer. And the two of them are absolutely wonderful. They have been wonderful civil servants. Mr. Wester, Paul, is now at the National Agricultural Library as director. During his years and in Laurence's years, I think they understood that Gary

and I, and others in the General Counsel's Office, had a role to play in assisting in the fashioning of policies.

And one instance that I will say . . . I was heavily involved was in the *Managing Government Records Directive.* Actually, Gary Stern took the lead in working with OMB in creating a memorandum that Barack Obama issued in 2011 to the entire government, saying that the era of recordkeeping needs to step up to embrace technology and so we should really pay attention to it, and that recordkeeping is the backbone of transparency and open government. That's a phrase that Gary actually put forward and then others took the mantle up. And so Gary fashioned something that ended up being this memorandum that was adopted by the President, issued, and then that [was] followed in 2012 with something called th*e Managing Government Records Directive.* And that was a mandate from OMB and NARA to tell the government that there were certain deadlines that had to be met. The original deadline was 2019 for transitioning to electronic recordkeeping, and all accessions at the National Archives after 2019 would be in electronic form.

I remember there was a series of retreats and facilitated meetings where we were brainstorming about what the *Managing Government Records Directive* would look like, and I played a role. One day I channeled JFK [President John F. Kennedy] [with respect to going to the Moon], in suggesting that by the "end of the decade" we would be asking for electronic records solely to be accessioned, so we would become an electronic records repository. There would always be legacy paper, but whatever. And that was adopted. The 2019 date was originally adopted. It went to 2022, and now it's June 2024—in a series of updates and revisions to that policy. But the central mandate was set in 2011-2012 by the efforts of Gary, and I contributed to the fashioning of the directive.

Now how the government would then go about archiving email and what policies were in effect, I'm very happy to have played a role in the development of what is known as the Capstone archiving approach to email. Because as you recall, Armstrong was all about email being a record. And NARA then said you could still print to paper with metadata, but that didn't work. No one in government was really paying attention to the regulations. There was massive noncompliance, in my view. And so I believed that senior officials' email should be archived, presumptively, that we should just deem all senior officials in government that are designated by their agencies as such to create permanent records. It was a disruptive idea because up till then, email was scheduled. Every email was to go to its own record schedule, depending on its subject matter. But this was a different way, a role-based way of archiving email. It was controversial in the beginning. There were individuals on Paul Wester's staff that believed that senior officials' emails contained a lot of junk, noise, temporary records, that would be swept

up if all of their emails were deemed to be permanent. And they were right. . .. But the problem is, as I tried to say in many places, the National Archives could either accept zero percent of email from the government, or it could take in a huge amount, which historically would contain records that it wouldn't normally take a lot of temporary stuff, but then it would have the good stuff, the permanent stuff. So, what did you want? Zero percent or too many records?

I think the National Archives was right in adopting a Capstone policy that said to the agencies voluntarily, if they wanted to adopt this as a way to meet the *Managing Government Records Directive*, that all email from senior officials would be deemed to be permanent and everybody else's email would be preserved for seven years. Two-hundred-and-fifty components or more of the government have adopted Capstone. Today there are hundreds of millions of emails being preserved in cabinet agencies. And that, of course, leads to what I was talking about before, a search issue of how you search them for responsive records. But the fact that they are kept means that for history's sake, the emails of senior officials in the administrations from 2016 on, will be preserved for the American people. I think that's a tremendous plus to history and, look, there'll be issues about search and filtering for sensitivities and exemptions but at least we have those emails. And so in that, I played a role.

The word Capstone was not mine. It was invented by a gentleman named Ken Hawkins, who was on the staff at NARA. But as to the idea, I remember pulling out a dollar bill and on the back there's a pyramid with a capstone on it. And the idea, I think, resonated with me early on that that should be a government policy. And then Ken came along and named it Capstone. So I was very pleased to be part of that effort.

Stephanie: Yeah. I mean, like you said, it was kind of a landmark thing where this was unheard of before. I remember being at a conference one time, just attending and sitting with others nearby and talking about it and expressing it as more of like this role-based approach that the senior officials would be permanent. And it just blew their mind. They didn't really understand it yet, but it was still new. The idea was still new. But like you said, there's so many agencies now that have adopted that approach, and I think it has made it a lot easier to get those emails captured, although there are issues. [CROSS-TALKING] Go ahead.

Jason: The reason that it has been widely adopted is that there are no alternatives that work. Because if you rely on people to drag and drop into folders, they won't do it. Nobody wants to spend extra time on every email. There are just too many emails, and now there are text messages and other forms of ephemeral apps that may or may not be incorporated into Capstone. There's a recent policy that Laurence [Brewer] put out that urges agencies to think about expanding the Capstone repository to other forms of electronic messaging, consistent

with various legislation that exists on the subject. And so it's a workable thing, because it's automated, but it's not the end. It would be nice if through means of AI, there could be some greater differentiation and granularity to email to separate out good stuff and, you know, wheat and chaff, noise and signal. But for now, it is a very good first approximation of what an archiving scheme should be, in my view. But it has been controversial, and there are flaws.

Stephanie: Well, I think, you know, agencies are working toward making it a more efficient and smooth process. I know that when we inspect agencies, some of them talk about the challenges of having to track, for example, like an acting senior official. When did they get in the role? When did they leave that role and, you know, no longer are senior officials and that sort of thing? But they're all working on processes to improve that. But I think the basis of it is pretty sound in terms of keeping all of the senior officials' emails. And there are agencies accepting Capstone or using that approach for electronic records now, too.

So, in terms of the M-12-18, what goes into crafting a government mandate like that?

Jason: Well, in the first instance, I mentioned brainstorming on the part of NARA individuals. But that brainstorming effort was aided greatly because the memorandum from President Obama originally set up a process where agencies would comment by certain dates, and OMB followed that, so that NARA received hundreds and hundreds of comments. I forget the exact number, but the way that NARA staff dealt with it is to read every one and, in a spreadsheet-fashion, decide what action should be taken, whether it should be accepted, rejected, accepted in part. So there were hundreds . . . of comments that agencies had as to what would be appropriate in a *Managing Government Records Directive*. In the end, we did accept many of those comments. But it was mostly fashioned in a way by NARA staff, because they are the experts and we were the ones that set the 2016 date and the 2019 date that was in that mandate that really are the hooks in later memos. We've seen an evolution in terms of the Federal Records Center Program and NARA insisting that agencies transition to managing all of their records and not storing paper records in the future in Federal Records Centers. So while that may be a legacy aspect of the National Archives history, which is very important, you know, it won't continue. Agencies are supposed to be managing electronic records . . . privatizing paper storage and using their own resources. So that's a point that is worth talking to individuals about, that has been . . . a very important, core part of the National Archives in the 20th century with respect to the Federal Records Centers.

These memos developed over time, but I think the 2012 memo set the basis. It's foundational for the other joint memos that have come out, and we'll see how the overall transition goes. COVID slowed down transition efforts. That's why the date was extended from 2022 to 2024.

There are complexities in electronic recordkeeping that everyone knows, but we will get there. And so the oral histories of the future will, I think, incorporate the notion that the entire government is sending permanent records in electronic form to NARA. And frankly, 50 years from now, if not sooner, 99.9999 percent of what records there are at the National Archives will be in electronic and digital form. That is not to say that the Declaration of Independence and the Constitution—the Charters of Freedom—and the records of the 19th and 20th century are not important, and of course legacy paper has continued to come into NARA in the 21st century. All of those records remain important. And as permanent records, they need to be curated. And the National Archives contains thousands of treasures and documents, whether it's maps or photographs or in all kinds of media. But the future is electronic, and one of the giant challenges is how to provide access to government records. And NARA is in the access-building business according to its strategic plan. And so "making access happen" has been in the current strategic plan and the last one, and that is a tremendous challenge in the future. We've seen the dawn of the electronic age on my watch and, you know, it will continue with a faster pace in the coming years.

Stephanie: Yeah, I think the M-12-18 was really huge to the records management community in pushing the federal government to do business electronically faster than the pace that they were doing it before. But in terms of now you've got all of these, for example, emails coming in, like you said, the volume just keeps growing. What are some of the issues around being able to even ingest that as an agency for NARA? You know, we're telling agencies to send us everything electronically, but the issue then is being able to accept everything that we're telling them to send us.

Jason: Yes, that's an issue. And I'd like to talk about what I consider an even greater issue. The issue of formatting records in accessioning to NARA has become a much more sophisticated exercise over time. Back in the 1990s, there were still regulations that talked about ASCII [American Standard Code for Information Interchange] and EBCDIC [Extended Binary Coded Decimal Interchange Code] as the transfer mechanisms for electronic records. And I'm sure in other histories, you can discuss with individuals who know more than I do about the Center for Electronic Records that started in the 1970s, with Charles Dollar as the first head and Ken Thibodeau following. There were certain formatting requirements that that office required, and then it reviewed records to see whether they met the standards so that they could be accessioned permanently. Today, there are a whole set of transfer requirements in all sorts of media, and every couple of years, there's some updates of those. There's also been digitization standards for both permanent and temporary records that have been recently issued. And it is a big deal because, obviously, NARA does not want to be like the Smithsonian and keep every type of proprietary software that's out there for every format that could be. And with

backwards compatibility, it's a huge issue when you're thinking about permanent records. We're thinking about the life of the Republic, and that can be hundreds or thousands of years into the future. And so NARA needs to get it right as to what it's accepting, when it's accepting millions or billions of records in electronic form. There are absolutely very important issues about transfer formats. Beyond that, however, dealing with the volume of records—what I have been interested in ever since the tobacco case and my interest in searching for responsive records there—is very important.

The obstacle to opening up records is the fact that they are chock full of PII or personally identifiable information. And when you have Social Security numbers or you have other types of personal information, both in numerical form and textual form, traditionally archivists have looked at every page and redacted or put in sheets or, you know, . . . withdrawal slips, to say that there is personal information on certain pages or certain documents. That can't be done in the electronic world. You can't look at every object. And so, again, there is a need for AI and machine learning to help human review in looking at whether collections have personal information in them.

So most recently, I've been involved in research that looks at, particularly, Exemption 5 of the FOIA, to see whether through various methods, including generative AI, but mostly classical machine learning methods, software can differentiate what are facts and what are opinions in documents so as to tell the human reviewers what to redact in terms of the FOIA exemption world. There are lots of sensitivities in NARA records, both in email and other electronic records, and you will not be able to open access to the American people of billions of electronic objects until we do a better job of filtering for these sensitivities. Otherwise, it defaults to human review, which is just impossible to do in real time. You need the help. Not that you're giving over to the software to do everything and just release based on what the software says, but the software can help in rank ordering what is important, seeing what parts of collections have sensitivities and the parts that don't. And then combined with human review, it could expedite the process.

There's a tremendous challenge that NARA faces. Otherwise, as I've written about, that 99.99 percent that I'm talking about that's digital will become a dark archive. For example, my father fought in World War II in the 3rd Army under Patton, and he was in a certain regiment battalion. I can go to AII. I can ask for boxes. I can find that regiment with finding aids and with the help of subject matter experts. And I can be given a set of boxes at a time . . . and I can look for records. . .. But when hundreds of millions of records are at NARA in electronic form, you can't sit at a terminal, and you can't sit at your home through a portal and look through these collections. They're all dark. They're all closed to the public because of this PII and personal

information problem. So we need to help solve that to make accessible the history of the American people in the 21st century. Otherwise, the Archives will not be a place where you go to find records or even that you sit at home and search for records. Yes, there'll be a tremendous number of records that are online, but that's the tip of the iceberg. The iceberg will be mostly dark archives. That's . . . what I have been so concerned with and giving public presentations on.

Stephanie: Do you think that machine learning is there yet to help with some of these issues?

Jason: So machine learning . . . absolutely. It's a solved problem with respect to searching for responsive records. The e-Discovery, private-sector, legal community knows how to do that based on methods that were evangelized in the 2000s, between 2010 and 2020, and I had a role in that. But filtering for sensitivities is a really difficult problem. And until that is solved better than it is now, we are [still] in the soup of human review. And also for, like, declassification of records, that's a whole other issue that I haven't touched. So there's lots of ways that we can advance the ball, and hopefully NARA will be given the resources to help and other agencies will be given those resources, too.

Stephanie: We're going to follow up with a few more questions here, and we'll go on from there. Right now, I wanted to ask about just the overall history of the Office of the General Counsel. I'm not really familiar with the start of that office. I was wondering if you can tell me a little bit more about that.

Jason: Right. So, of course, the National Archives became independent in 1984. And at the time of its independence, Steve Garfinkel was general counsel at the General Services Administration, and he carried over into NARA. It was the "National Archives and Records Service" [NARS] at GSA between 1950 and '84, but with its independence going forward [the agency became NARA]. The first general counsel that I had occasion to interact with was Gary Brooks, who's passed away. He was an excellent lawyer, and he was an institutional memory. And I remember meeting him in 1988 as a new DOJ attorney talking about a lawsuit involving an envoy to Richard Nixon [Kenneth Rush] and documents that had been stored at the State Department. I remember coming into warren-like rooms, I think it's 305, but it was on the third floor of Archives I in kind of a closed space with low ceilings and two rooms. It had a couch in the outer room. Oh, it had a secondary little area. He had a tiny office that you walk into, and that was the extent of the General Counsel's Office at NARA. It was him and one other individual in a very small space. And it was very intimate. And I talked to him, and I thought he was great. I thought he was just the perfect person to talk to about records in general. And I think that may have triggered my interest in all things at the National Archives. But [later], he

was caught up in the Armstrong litigation. And for his own sake, there were issues as to whether he had acquiesced with what the Justice Department lawyers, including myself, wanted, which was something called the Bush-Wilson Agreement where Don Wilson, who was the Archivist at the time, signed an agreement with George H. W. Bush to basically address the problem of what to do with backup tapes at the White House during the pendency of the Armstrong case. And that agreement was eventually found to be inconsistent with the Presidential Records Act. And Gary [Brooks] got caught up in that maelstrom. Acting Archivist Trudy Peterson decided that he wasn't the right person going forward to be general counsel. But I always have believed that Gary acted honorably, and he was somebody I always looked up to—Gary Brooks.

After him, Chris Runkel, in the General Counsel's Office, served admirably on a couple of occasions as acting general counsel in the interim between others. Elizabeth Pugh, who was in the Civil Division at Justice with me, and was essentially my supervising attorney on the Armstrong case, came to be the replacement to Gary Brooks and Chris Runkel as acting in 1996 as general counsel at NARA. She was only here for two years at NARA, and then she went on to be a general counsel at the Library of Congress. During her time, the office expanded. When Archives II was built out, there were . . . a suite of offices that were actually in the back of the building and then, due to her, eventually the GC office moved towards the front of the building to be directly closer to the Archivist's office. And after her, Gary Stern, who I've already mentioned, came in 1998, and I was lucky enough to be hired by him in 2000. So he, as of this recording, is still general counsel, one of the longest serving general counsels in government.

In my time, there were on the order of 12 lawyers and other staff members total. There was a FOIA specialist and a couple others that made up the office. It's generally been around that size. You'd have to ask others what the exact number of FTEs is today, but historically, the General Counsel's Office has been a very small shop, doing all sorts of things including in terms of supporting litigation, supporting the management of NARA in Title VII cases or MSPB cases that are brought against officials by individuals settling those cases. I was supervisor to the head FOIA person who handled the active records of NARA that are within the scope of FOIA requests. There's another office at NARA that handles FOIA requests coming in for archival records. But for NARA records, the general counsel assumes that. General Counsel assumed the RESOLVE program of mediation of disputes. And, you know, lawyers . . . wear many hats. And one of the best hires I ever made was Stephanie Abramson, who's currently still there as procurement and EEOC counsel. I supported the movement of lawyers going from journeyman status to a GS-14 level as a cap to being a GS-15 non-supervisory position. I thought that the talent in the General Counsel’s Office was always great, and I enjoyed working with colleagues. And as I've said before, Gary Stern has set a very high bar for what constitutes collegiality and

outstanding work by all, and he is just respected by everyone who's ever worked with him. So that's my little mini capsule of NGC [Office of General Counsel].

Stephanie: Yeah. I can't imagine walking into, like, this little tiny room. It sounds like a dungeon, [LAUGHS] and you've got two or three people there. [LAUGHS]

Jason: It was on the third floor. Every room there, you know—that were little rooms around the corridors. So yeah.

Stephanie: So, it's grown a little bit since you first started there. [LAUGHS]

Jason: Yes.

Stephanie: I also wanted to ask you about, you know, during your time that you were at the Archives, Sandy Berger . . . this whole incident about unauthorized removal of classified records, just everything surrounding that. Are you able to tell me anything about that case?

Jason: Yeah. Sandy Berger was the National Security Council legal director during the [later part of the] Clinton administration. Head lawyer. And he was very much involved in events involving Osama bin Laden and what happened in the Clinton administration with various matters . . . like the bombing of the World Trade Center and incidents that were precedent to 9/11. For reasons that only Mr. Berger knew, he was very interested in reviewing documents that he had been associated with in the Clinton administration, after the Clinton administration. And so in 2003, and I believe in parallel with ongoing proceedings that happened [due to] . . . the 9/11 Commission, he wanted to independently review documents. And he did that at Archives I in offices that were not a SCIF [Sensitive Compartmented Information Facility] but were traditionally the offices where senior representatives went to look at documents. There was a long tradition at the National Archives to give deference to former officials who still retained their top-secret status or security clearances to review documents. And nothing like what happened with Sandy Berger ever had happened before. There was a culture of deference, just like until Les Waffen stole NASA [National Aeronautics and Space Administration] tapes and photographs out of AII and was convicted for that. There were never any guards checking briefcases or anything else walking out of AII. That came into being because of a bad actor who violated every principle that, you know, archivists are trained under to preserve records, and so whatever his motives were . . ..

But similarly, there was a culture and tradition of respect. And the staff were, unfortunately, subject to being present in a series of meetings where they only slowly came to realize that

over the several times that Sandy Berger was in these offices that he was engaged in taking certain documents. And, of course, it turned out that he took them out in his pants or his socks or whatever. Staff noticed that. They marked certain documents. They ultimately found him out that he had been taking documents and storing [some of] them in a dumpster. The Inspector General, Paul Brachfeld at the time, was upset that the General Counsel, Gary Stern, and others in the Office of Presidential Libraries that had been interacting with Sandy Berger, hadn't alerted him in a timely way for him to somehow either entrap or, you know, be more active between these various meetings where there was some suspicion that something's going on till the time that individual staff members reported what was going on. And he launched an investigation, which led to an in-house investigation that really, in my view, should never have taken place in the way that it did. Ultimately, Mr. Brachfeld, as inspector general, referred his findings of investigation of NARA staff to the Justice Department for possible criminal referral, but nothing ever happened; in my view, they did nothing wrong. But along the way—I mean, Sandy Berger did something wrong, and he was prosecuted, and he pled out to a misdemeanor, and then he passed away. And we can discuss his case. But that's separate.

The history here, though, is that there was a long investigation of NARA employees. Allen Weinstein was involved in getting advice from Paul Brachfeld as to whether to engage in any kind of disciplinary action. And I was acting general counsel during this time because Gary Stern was involved in conversations that took place in October 2003, which was the time period of the original incident. The investigation went on for years. The House of Representatives had an Oversight [Committee], behind-closed-doors [staff] meeting. I testified, or at least I spoke on the record, at this meeting representing the Archives. I also was very much involved in ensuring that the Inspector General's Office did not release the names or circumstances of employees who, in their view, had done something wrong, but weren't publicly named. It was very important to me to protect the interests of NARA staff. And that's what a good general counsel or acting general counsel would do. That means coming to grips with, and disagreeing with, decisions that the inspector general might make.

In the incident that really brought things to a head for me was that, along the way, the inspector general's lawyer and the Inspector General Paul Brachfeld wanted to release a report of their investigation in a way that, although they redacted names, it would have been clear who was involved in terms of their view that they had done something wrong, that they had aided Sandy Berger in this effort and that they shouldn't have. And so it would be obvious to any reader who these people were. And I objected to the level of redactions, anticipating FOIA requests and other requests. I believed the IG report was not sufficiently redacted for purposes of keeping personal privacy. And I went to bat for these employees. One or more of them had a private lawyer, but I, as the in-house lawyer, . . . I went to bat with them right up to the

Archivist Allen Weinstein. And I came close to being a former whistleblower, because at a meeting with Allen Weinstein, the question of whether Paul Brachfeld would get his way and the report would go out the way that he wanted it to go out, or in a more redacted way that I was suggesting, this was for the Archivist to decide. He's the only person at the agency who the inspector general . . . [must by law] report to in any fashion. That's by the Inspector General Act of '78. So, it was the Archivist's decision. Allen Weinstein sided with me. I did not have to be a whistleblower. That didn't make the inspector general happy. But, you know, one has to deal with that. And if you're acting general counsel, you have to deal with it.

So, this was a very tense time. To this day, I believe no one at NARA acted improperly, and I would defend them on that again with whatever facts that came out. But in any event, there was a great deal of tension, and that tension continued between the inspector general and the General Counsel's Office during Mr. Brachfeld's tenure. He ultimately was suspended on other grounds and left the agency under circumstances that I'll let others speak to. But during the time here, it was a very fraught relationship with him.

Stephanie: Yeah, I guess so. I bet the staff really appreciated you standing up for them. We all know when your name gets out there, you know, it can be kind of hard, even if you haven't done anything wrong, to turn your career around after that.

Jason: That's right.

Stephanie: Yeah. I wanted to ask you about the Presidential Records Act. I know it's been in the news a lot recently, but you also served under, I think it was three different Presidential administrations. So I was just wondering if you could talk about that a little bit.

Jason: Well, I've been in government since Jimmy Carter. But at the Justice Department, I've mentioned previously that there was a rough transition in terms of the litigation involved in the Armstrong case between George H. W. Bush and Bill Clinton with the handling of backup tapes and otherwise. And the problem is, whenever there's a Presidential transition, there are lawsuits that involve Presidential records. There are lawsuits, there are subpoenas, there are access requests from Congress. And they're caught up in this transfer where records need to be appropriately preserved and indexed and transferred in appropriate ways for either paper or electronic form. It's very difficult. And there are legacy issues that carry over to the next administration. So, 1992-93 was one.

2000-2001 between Clinton and George W. Bush was another. And at that time, there had been a glitch in the email system—that I talked about [earlier] that had been implemented in 1994—

with missing records of various types. All emails with the letter D were missing, last names with D. And there were certain emails that were mixed up. Because of that and because of other transition issues, there had to be a restoration of backup tapes that carried over into the George W. Bush administration under special circumstances. And there were pending preservation obligations and litigation. So that was one thing.

Let me go to, however, the end of the George W. Bush administration, the transition to President Obama. During the last couple of years of the George W. Bush administration, there had been a lawsuit that had been filed to challenge the fact that allegedly 22 million emails were missing from the White House archive, the email archive that was in existence. And the [public interest group] Citizens for Responsibility and Ethics in Washington brought this lawsuit—*CREW v. EOP*. And there were meetings that were ongoing. Gary Stern and I had gone to the White House, the West Wing, and talked to White House Counsel Fred Fielding. And it played out that when there was this transition, particularly with this litigation, the Obama administration didn't want to—really, it wasn't their issue. It was the Bush administration that had the allegations of 22 million [missing] emails. So there was an ongoing series of settlement discussions going on.

I had a role in playing with the settlement of the case, because at one of these conversations, one of these settlement meetings with White House lawyers and Gary Stern as representing NARA and plaintiffs' counsel and some outside counsel that they had hired—one of whom was in Saudi Arabia or was in the Middle East on the line—there were a lot of people gathered at a meeting at the White House and on the phone. And I was part of that meeting. And at some point during the meeting—I was at a hotel at a conference, I was taking it from my hotel room—at some point in the meeting, I realized that people were laughing because someone had fallen asleep in the meeting and started to snore. And it was completely disruptive. The meeting couldn't go on because of this loud snoring, and they couldn't hang up because there are all these lawyers from different parts, you know, in government and in the Middle East on the line. They didn't want to sever the connection. Well, I realized it was myself. I was the one who had fallen asleep and was snoring. And I must say that what happened after that is that it broke the ice. [After] that meeting, what followed was a settlement of that lawsuit. And [all] because the parties were talking to each other, they were amused. I think if I had been in the room with Gary, he would have kicked me if I ever fell asleep. But in any event, . . . they don't teach you that in law school about how to settle lawsuits. It was my unique way of contributing to this transition!

Presidential transitions are hard, and of course, we are aware in more recent times of the indictment of former President Trump for taking records out of the White House and having

boxes at Mar-a-Lago. And I've been very critical in the media about that. Of course, the Presidential Records Act was enacted in order to have the American people own records, not the President own records. So up through Nixon, all Presidents from George Washington to Richard Nixon had owned their records. After Nixon left office, there was a special statute to take back his records for the American people. Gerald Ford and Jimmy Carter owned their own records. But the Presidential Records Act of 1978 said that from Ronald Reagan on, the American people owned the records. They're to go to the National Archives as soon as there's a transfer. So on January 20th, each time there's an inauguration, the last one being in 2021 between Trump and Biden, legal custody of all Presidential records go to the National Archives. And any departure from that is inconsistent with the Presidential Records Act. And it becomes especially very problematic if classified records are brought to some other place.

And so now there's been an indictment of President Trump, a former President, and I must say that it's inconceivable to me during my time in government that a President would take 15 or whatever the number of boxes are, of unclassified and classified Presidential records and claim that they were his. But there always have been issues with each Presidential transition, not perhaps as highlighted in the news as this last one, but during my time it always was fraught, and litigation made it more difficult.

These are huge operations. In the Clinton era, they used to have C-5 A planes coming in during the last year, taking pallets of documents in huge crates and boxes. That was in an era when there were tremendous numbers of paper records. . .. I know that the Obama Center, which is operating under a different model than prior Presidential Libraries, has been leading an effort with NARA to digitize all of its records, so it wouldn't have any paper records in Chicago when the building opens—it[‘s records] would all be in electronic form. Whether these records are accessible goes to the issues that I've been talking about. But in terms of the form of it, there's less and less paper records now, and more electronic records. And that's why actually the current scandal, the current controversy with respect to removal of records at Mar-a-Lago, is kind of a retro scandal. It involves paper documents, not the tremendous amount of electronic documents that are part of these transfers.

I also will say that NARA's role becomes much more prominent at the end of a Presidential administration. NARA officials get involved because there's the potential for a library, and there have been Presidential Libraries in the traditional sense through George W. Bush. They were getting larger and larger, and Congress put restrictions in effect that basically they had to be better endowed because of their special public-private nature—that through private sources there had to be an increase in the percentage of the endowment to allow it to go forward and

then NARA to take it over and assume expenses after being built. And because of that, there's been a different model with President Obama, and we don't know what his successors will do.

But anyway, NARA is very prominent when it occurs to the President and his staff that they're going to be dealing with NARA. Presidents have representatives after office that are talking with NARA officials all the time about matters involving their records, because they can assert executive privilege or otherwise. I was privileged, because of the litigation I was involved with, to have occasion to meet Vice President Cheney at a Christmas party where other NARA officials were there. It was at his [VP] residence, and we all met him and we met other senior officials. And I also was present once [at a meeting with President George W. Bush], along with Gary Stern and Adrienne Thomas, who was the Acting Archivist at the time, Nancy Smith, and Sharon Fawcett, who was head of the Presidential Libraries. We went over and met President George W. Bush in the Roosevelt Room right next to the Oval Office during the last couple of weeks of his Presidency. He had just concluded his last press conference. He couldn't have been more charming. He knew things about us. He was sort of briefed beforehand. He hung out for a while. He took pictures with us. I thought he just was sort of the kind of person who you'd want to hang out with and have a barbecue with and, you know, go to a football game with.

In any event, . . . Gary and others at the Archives, the Archivist of the United States, of course, more routinely met with Presidents and their staff, and particularly in the last days of the administration, the last weeks or months. There is a tremendous effort behind the scenes generally, and I've been part of it . . . [getting] to work with White House officials for an orderly or smooth transition. It never completely happens, but there's a tremendous effort to make it as smooth a transition as possible, and that can take many months or years. When a President is in the second term of a two-term Presidency, they know they're leaving. When there's a one-term President like George H. W. Bush, he loses an election, he's not as prepared for that transition, that part of the chaos there. When a President is in denial that they have lost an election, it becomes even more chaotic.

Stephanie: Yeah. And what about NARA's role in enforcing that Presidential Records Act?

Jason: So, NARA does not have a police force. That's what I've said to everyone in the government when NARA does try to inspect or audit recordkeeping practices. There isn't any monitor of a police force from NARA in special uniforms, like the Public Health Service, going over and looking over the shoulder of a records manager. Similarly at the White House. Yes, there are a couple of people on detail who, according to public reports, were very frustrated when records were torn up or shredded or flushed down the toilet. Those individuals can't possibly be responsible for alone enforcing the carrying out of the Presidential Records Act in

the last days. The PRA does not have a provision for enforcement. But the good people at NARA . . . are acutely aware of their responsibilities and very conscientious in preserving records for the American people notice things. When they find that there are gaps in some portion of records that they believe should have been transferred, they ask questions. And in case of the latest incident with former President Trump, Gary Stern and others were asking questions for a year until they got the return of 15 boxes. So there is a felt responsibility on the part of consummate civil servants to do the right thing, to ensure that Presidential records are properly transferred to NARA.

Let me segue, though, to an important other part of the general counsel's duties, which is replevin. Apart from making sure that Presidential records go to NARA, there's also a responsibility that is felt throughout NARA—but actually executed by attorneys in the General Counsel's Office working with others, including in the IG's office—to have to take steps to get records that have walked out of government improperly returned. If documents have been taken out of the White House at the end of, or an abrupt end of an administration like what happened in FDR and JFK, any records that are then sold on the open market, whether it's eBay or an auction or whatever, there's a responsibility . . . and a duty to try to retrieve those for those Presidential Libraries or back into federal agencies.

There was a Cuban missile [crisis] map that JFK annotated and, through the efforts of Gary Stern and others working with the Justice Department, that was a litigated case. NARA got the return of that map from when it was being sold on the equivalent of eBay or somewhere. I was involved in something called the Grace Tully Collection, where there were 5,000 or so documents taken by Grace Tully, who was, with Missy LeHand, . . . [one] of FDR's top assistants. FDR, of course, died suddenly in 1945, in his fourth term—and Grace Tully walked out with 5,000 documents. She [later] claimed that they were hers. She passed away in the 1980s. They eventually came to Conrad Black, who was a noted publisher, and then [after his passing] his estate was selling them. It came to the National Archives' attention that many of these should have been part of what would be records and objects at the FDR Presidential Library, that they shouldn't have been taken. So there was a lawsuit that was drawn up but not filed, because we attempted to settle with the parties, with essentially Christie's holding the materials on behalf of Conrad Black's estate. And there was an inventory that was created by an archivist, Bob Clark, at the FDR Library, and me, where the two of us were sitting at Christie's going through a collection of documents to see which ones really should be considered U.S. Government records. Some of them might be gifts to Grace Tully, but documents that were drafts of FDR's speeches in his nominations at conventions and other important documents, correspondence that Grace Tully should not have had, we made a claim for. And there was a special legislation allowing for some compensation being given to the [Black] estate that [former Rep.] Elizabeth

Holtzman, now in private practice, was assisting with. There was a great deal made of the return of the collection in 2010; the Archivist and others were present, including members of Congress, at a ceremony when we had gotten the return. And I felt very good about the role that I played. During my time at Christie's, during the week that I was inventorying these records, . . . things like Picassos and Monets and other artwork that Christie's was selling would be walked by in the back room where I was. This was an experience that I never thought I would have as a lawyer at the National Archives doing inventorying of records! And so you never know.

I have had many other unexpected experiences. . .. I've experienced a joint sovereign Navajo and English ceremony in Lenexa in a limestone cave, celebrating an agreement between Secretary Gale Norton of Interior and John Carlin, the Archivist. This was in 2004, —. . . to [have] . . . 200,000 boxes of Bureau of Indian Affairs records in one place, to consolidate them from around the country into this newly formed American Indian Records Repository that is maintained in archival conditions in this limestone cave. And it was quite something to be part of, you know, Navajo dancing and speeches and whatever in this cave. This was another event that I never thought I'd be part of, but I was a drafter of the memorandum of understanding with [Department of the] Interior senior officials. And so I did get involved there. Just all sorts of incidents, all sorts of experiences, that I never thought I would have as a director of litigation that I had along the way.

Stephanie: Were there other [CROSS-TALKING].

Jason: Let's stop the tape, because I need water. Or you can just have the tape go. But let me just for a moment...

Stephanie: Okay.

Jason: Sorry about that, Stephanie.

Stephanie: Oh, that's okay.

Jason: Okay. Going on. All right. What else can we cover?

Stephanie: I didn't know if you wanted to talk about the Pearl Harbor incident?

Jason: The Pearl Harbor incident was that [Director] Cynthia Koch of the FDR Library basically wanted me to take back a huge painting of FDR's sailboat, the Amberjack meeting the USS

Indianapolis. That painting was gifted to FDR, but he never took possession of it. He was on the Indianapolis, but he never actually physically took it. Later the painting ended up in the captain's quarters in Pearl Harbor. I went there on a mission from Cynthia to go about getting it back. And I'd already told her that we don't own it. NARA doesn't own it. But I succeeded, probably because of my daughter being [there with me], eight years old and cute. I don't know.

Stephanie: [LAUGHS]

Jason: As part of the meeting, I got an agreement to have the painting displayed at the Library for one year on a loan. During that time, Ms. Koch decided on her own to write to the Secretary of the Navy and claim ownership on behalf of the National Archives. That was not something that I had advised her to do, and for whatever reason, she did that. She thought it was important to do that. I got a call from the head of the 7th Fleet, the lawyer for the 7th Fleet, telling me that I was a bad lawyer and having negotiated in bad faith this transfer of loan. That was not the best day. Not a good day. We ended up actually having the painting for two years on loan. There was a ceremony . . . a reception and an event celebrating the painting being at the Library. But it was returned. I'm not sure whether I'm banned from Pearl Harbor now, but that was another experience along the way.

Stephanie: Well, yeah, you've got so many. In terms of awards, I know that you've won three Archivist awards, which has to be something of a record, I think. And I know you've won numerous other awards. Do you want to talk about any of them in particular and maybe what these mean to you in your career?

Jason: Well, let me say—and you didn't quite ask me this, but . . . I know you were going to ask me about my impressions of the Archivists that I've worked under.

Stephanie: That's right.

Jason: And I don't want to avoid the question. Let me just lead up to it by saying that I've had the privilege of working under [Archivists] John Carlin, under Allen Weinstein and David Ferriero. And John Carlin didn't like lawyers very much for whatever reason, I thought. But he was very effective in getting the Electronic Records Archives funded. Originally that project failed, and we don't have time for that in this interview, but you should talk to others about it. He was very good at getting money [for NARA from Congress]. He was a former Governor of Kansas, and he knew how to work legislative levers. Allen Weinstein, from his background as an academic, knew a lot about history. He was someone who I had difficulty hearing, because he was such a soft talker that you couldn't even hear him when you were three feet away. Allen

Weinstein suffered from Parkinson's [Disease], and ultimately, he's now passed away. I won't say anything more about him. He had a difficult tenure with some degree of controversy. I will let others speak to that. David Ferriero is a very impressive person. He always struck me as the brightest person in the room. He cared a lot about how the Archives could sustain itself and was a tremendous presence during his years as Archivist, was in the forefront of all of these memoranda—the 2012 memorandum with OMB—and constantly . . . understood the cutting edge of where the Archives should be on electronic records issues.

I'm personally grateful to David Ferriero for participating in a really lovely ceremony in the Chandelier Room 105, whatever it's called now . . . but it is on the corridor with the Archivist's office. . .. In 2011, I was very privileged to receive something called the Emmett Leahy Award. It's an international award recognizing one's impact in the records and information profession. I was the first federal lawyer to win the award, and only the second lawyer in 40 years. And I ended up chairing the Emmett Leahy Committee [during five of the next] 10 years [while I served on the Committee]. David Ferriero was very, very gracious in his speech. There were other speeches that day that said that it was the equivalent of a Nobel Prize. And everyone was waiting for me to retire in that room, but I stuck it out for a couple more years. So, it was a very special event. He also was very gracious when my mother passed away in sending a note. I wish him well in whatever next steps he does.

Stephanie: I know we've got just a few minutes here. Do you have a minute just to talk about your part in the FOIA Advisory Committee? I know this was after you retired from NARA.

Jason: . . . The FOIA Advisory Committee works with the Office of Government Information Services [OGIS]. Miriam Nisbet was the first head of OGIS, and Alina Semo is the current head. And they both have been very passionate about working with this FACA committee, a Federal Advisory Committee Act committee, to get input from both government representatives and outside representatives. Now, I have served for two terms, and I'm on the current term of it to advise the Archivist and to make recommendations about improving the administration of FOIA. I have been pretty much an evangelist on the same issues that we've been talking about during this interview, that there is a need for artificial intelligence and machine learning to play a role in filtering sensitivities, FOIA exemptions, and for recordkeeping purposes generally. And I served on a subcommittee a couple of terms ago that tried to integrate recordkeeping—Federal Records Act issues—and FOIA issues, because they're often siloed in agencies where the FOIA officer and the records officer are basically doing whatever they're doing, but they're not talking together. There's a whole field of information governance that would encourage that, along with lawyers and cybersecurity people and whomever, CISOs [Chief Information Security Officers] and CIOs [Chief Information Officers] . . .. So I think the advisory committee

aspirationally has the role of trying to make progress in government, making it more efficient under the FOIA, to have improvements. There have been 52 recommendations to date. One of the aspects of the current term of the committee, the 2022-2024 term, is to evaluate past recommendations and how they've been implemented by the government. So, expect a report in 2024 about that. Alina Semo and Kirsten Mitchell and others on the staff of OGIS do a tremendous job in trying to make sure that the committee functions well, along with all of their other important duties in OGIS.

Stephanie: Okay. Hey, I know you left the Archives in 2013. What does it feel like to still see the Archives when you're in the DC area or . . .? What does it feel like to finally have moved on from the National Archives?

Jason: I left the Archives after 13 years on October 1st, 2013, during a government shutdown, and I was responsible for Jay Bosanko and three others coming in that day and actually getting paid to process my exit! And let me say this—I say this in many kinds of public forums when I'm asked: my time at the Archives was a dream job for all the reasons that I've talked about in this interview. You get involved in so many different aspects of American history and litigation against the government, and you're playing a substantial role. It's an organization that doesn't have many layers. And so you could go talk to the Archivist—just as the general counsel, and director of litigation—walk into the Archivist's office or the Deputy Archivist and . . . discuss serious matters that involve Presidential records. You get to go to the White House. You get to go for [high-level] meetings, go all around the government. I've gone to all sorts of black box agencies, you know, from CIA [Central Intelligence Agency], NSA [National Security Agency], and you can go down the list.

My time in all of these experiences that I've had was a tremendous education, and I loved every minute of it—maybe not every minute of the Sandy Berger time, but almost every minute of it. I worked for 33 years in government, and my last government position was at NARA before going to private practice and then now in academia. And I said in my retirement party when I left NARA that I still feel the same way as I did coming to Washington as a 19-year-old doing summer jobs and then after law school, that I believe public service is the highest calling one can do. And I know that every night when I left Archives I—I had offices in both Archives II and in Archives I—but when I was at Archives I and leaving in the evening after a long day, you know, you cross Pennsylvania Avenue, go to the Metro, you look down east and down the avenue and you see the Capitol lit up. It's a tremendous feeling that you are part of the Nation's history. Main Archives is such a wonderful building with a history, and you're part of the workings of government in an important way and that you have a mission to do the right thing for the American people to preserve their history. And I was caught up in that. And it never

ceased to affect me walking out of that building. And I feel that way to this day that the finest civil servants that I know have been at the National Archives, and I admire them and their mission. I admire what everyone does. They wake up every morning to preserve records and to provide access to American people and the world. And so, you know, I salute them, and I will always, always look fondly back at my time in government and especially at the National Archives.

Stephanie: That's really great. Yeah, I think NARA has a really important mission, and you played a huge part in that.

Jason: I played a small part. We all are part of a relay race in life where you get the token for a while, you're given the token by someone, and then you hand it off to the next person. And if you've done your part in the relay race, running as fast as you can, doing as much as you can to help, you know, knowing that your time is limited, you value that time and then you hand it off to others to continue.

Stephanie: Okay. Well, hey, I think I've kept you over our time here, so I just want to say thank you for participating in this. I'll go ahead and get you that transcript as soon as I can, and then I'll reiterate in my email some of the points that we talked about previously. But yeah, thank you so much for all this information. It's been really great and interesting. I hope you had a good time too. And I hope [CROSS-TALKING].

Jason: I did! This is a lot of fun with all these memories and thank you for giving me the opportunity. And, of course, I wish you all the best and want you to keep interviewing people.

Stephanie: Yes, yes. I will. All right. Well, thank you so much. And yeah, I'll be talking to you soon then.

Jason: Thanks, Stephanie.

Stephanie: All right. Have a good rest of your day.

Jason: All right. Bye.

[END RECORDING]