

Acceptance of the 2011 Emmett Leahy Award

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I am profoundly grateful to Charles Dollar, John Phillips, and Jim Coulson, for their remarks here today, and to each of the members of the Emmett Leahy Award Committee for the great honor and privilege you have bestowed on me. I couldn't do any better here than to quote Adrian Cunningham, last year's winner of the Emmett Leahy Award in Australia, when he said that "adding my name to the distinguished list of previous award recipients, when there are so many other seemingly more worthy recipients who have not been so recognized, was both totally surprising and also immensely humbling." I feel exactly the same way.

Let me also say my thanks to David Ferriero, Archivist of the United States, and to Judge John Facciola, for their very kind words, for all of their past support and encouragement, and of course for taking time to be present today. I wish to also note "for the record" – as we lawyer types say, but it seems especially appropriate in this setting – that also present are: Deputy Archivist Debra Wall; colleagues from the White House; several past Emmett Leahy Award winners; numerous colleagues from NARA, including the terrific attorneys and archivists I work with in our Office of General Counsel; and many other close friends and colleagues from both the public and private sectors. These include a number of members of The Sedona Conference® – some of whom I recently climbed The Great Wall of China with on the day before we conducted an e-discovery workshop in Beijing. And I can't leave out former students from classes I have taught at the University of Maryland, as well as friends and family. I couldn't be happier that all of you took time out for this occasion.

My intent is to write up a more scholarly paper on what I see as the future of information management and the law for future uploading to the Emmett Leahy webpage. Today, however, I would like to make more personal remarks, as after all, at least on this occasion, the Emmett Leahy Award is not being presented at a formal records management conference, but at a somewhat more informal type of gathering – falling somewhere between a press conference and a substitute for a retirement party.

Maybe it was in fact destiny that I have spent my life thinking about records. However, I confess I couldn't really have imagined what my professional career would consist of when in 1977 I wrote an honors thesis in college on the privacy implications of a vast electronic database maintained by the FBI and accessible by the international organization Interpol. Later, after graduation from law school, in one fashion or another I always somehow got myself involved in the thick of records-related matters, including in major litigation.

It is a tremendous honor to be the first practicing attorney in the federal government to receive this award, and I believe only the second lawyer to ever be so honored. I have never had a dull moment as a federal lawyer in 30 years of giving legal advice and litigating cases. I was very lucky to work first in the General Counsel's office at HHS on large class action cases, and then for a dozen years at the Department of Justice. I will always be grateful to those who encouraged me to think about coming to work at DOJ, and for having faith in me while I was there. During my time at DOJ, I got the chance to work on recordkeeping lawsuits of landmark importance, most notably the Armstrong case, also known as the PROFS case. My then supervisor, Elizabeth Pugh, who later became General Counsel at NARA, asked me in June 1992 if I wanted to take the lead on the ongoing Armstrong lawsuit, saying that it wasn't going to amount to much more work and would in any event soon go away on appeal! Her "hoodwinking" me ended up with my spending 10,000 hours on successive lawsuits concerning White House e-mail, and was the start of nearly 20 years of my continuously attending to the subject of preserving electronic records of the government as a whole.

When I came to NARA, I quickly was engulfed in a huge RICO lawsuit brought by the U.S. against big tobacco (U.S. v. Philip Morris), which involved searches of millions of White House emails. This early experience at NARA led to what my colleagues in the e-discovery world have heard me describe as my personal Grail Quest, in attempting to educate the legal profession about more advanced, more efficient ways lawyers can use to search through vast collections of electronically stored information. This journey led me to pursue two of the smartest people in the information science world, Dr. Ellen Voorhees at NIST, and Dr. Douglas Oard, a professor of both advanced computer science and information studies at the University of Maryland, who together green-lighted and fostered the TREC Legal Track.¹ Over the past five years, the TREC Legal Track has proven to be a unique

research platform evaluating competing search methodologies in a legal setting. I was subsequently approached by members of the AI and Law community to foster what blossomed into an international series of so-called “DESI workshops,” that have brought together academics and lawyers to think about profound issues of information retrieval in the legal space.² Along the way, Emmett Leahy award winner Bob Williams gave me an early showcase at Cohasset’s 1996 Managing Electronic Records Conference, to discuss an emerging law of metadata, and Emmett Leahy award winner Luciana Duranti invited me to teach at the University of British Columbia for a semester and to take part in InterPARES. I am so very grateful for those invites and for all the invites – many from those in the audience today – to present and lecture at past conferences, workshops and events.

I am also so very grateful to Richard Braman at The Sedona Conference® – a true visionary – who has been so supportive of all of my efforts to advance the path of the law, especially on the subject of search and information retrieval, in a just and reasoned way. Also, for the past 11 years, I have been enormously privileged to work in my “dream job” for NARA’s General Counsel, Gary M. Stern, who gives his staff the freedom to pursue their interests, wherever they may lead to around the US and the world (so long as we’re available 24/7 on our blackberries). I couldn’t have done any of this or achieved so much without his support in particular, or the support of successive Archivists and senior staff at this incomparable institution.

And of course, I have been privileged to have such a wonderful family. My wife Robin has put up with my late nights and weekends worrying about records management and e-discovery for going on 20 years this December. And seeing my high-achieving daughter Rachel blossom in high school is the most meaningful award of all. My late Dad, Judson R. Baron, taught aeronautics at MIT. If he were around today, and if I told him I had received a Nobel Prize, he would say something like: that’s very good son, but just so you know, Linus Pauling and Madame Curie each received two Nobel prizes, so keep up the good work. Charles, please tell me that no one has received the Emmett Leahy award twice! Seriously, though, I do feel a certain responsibility, now that I have received this honor, to clearly lay out my vision, admittedly from a lawyer’s perspective, of some aspirational elements of information governance in the 21st century having to do with public and private sector records. And so today, let me make three basic points before this audience of records experts and e-discovery lawyer gurus

First, we need to declare an official end to the end-user being expected to act as de facto records manager. I typed that college honors thesis on an IBM Selectric typewriter, and didn’t have a PC at my work desk until 1987. With the profound changes in the workplace that have since occurred, it has become a cliché to point out that we are overwhelmed in both our professional and personal lives with the growth of electronic communications, first via e-mail, then voice mail, then the Web, with endless possibilities now for engaging in messaging and social networking on a vast array of mobile devices as well as using PCs. With the notion of secretaries who acted as office managers controlling the workflow of documents receding into distant memory, we are all seemingly tasked by our organizations to exercise responsible records management in addition to carrying out our primary job functions. This was last possible about 15 years ago, when the volume of email traffic was far less in terms of messages of substance or lasting importance to the organization.

It makes no difference, at least in my personal view, whether the government remains stuck in a print to paper paradigm for purposes of official recordkeeping, or chooses to spend millions in adopting electronic recordkeeping software that highly depends on end-users performing manual recordkeeping functions – those approaches are all a legacy of late 20th century thinking that we need to shake off and move away from. I am calling for workers of the world to unite (especially in the public sector), in opposing efforts to enslave them in recordkeeping responsibilities when there are new and better automated ways to perform this vitally important function. Especially in a time of fiscal scarcity, it is all the more important that we be lean, smart and agile on the recordkeeping front. We need to understand that there are the technological means to accomplish recordkeeping in 2011, if institutions have the will to convert to them. A cadre of committed folks at NARA are leading the way in testing automated capture technologies with smart filters and auto categorization techniques, and I will continue to champion these approaches. I promise to work with the best and brightest people both in this organization and throughout government to ensure the success of these new approaches to capturing email and other forms of electronic records, so as to relieve all of us of what is approaching an impossible burden not to mention an unattainable goal.

Second, we all need to be more creative and interdisciplinary in our professional lives. My life and career has consisted of rowing between islands of excellence, including bringing “good news” from the world of information retrieval and artificial intelligence to the world of lawyers. I strongly believe that the legal community has been too

insular in its approach to e-discovery, and needs to partner with academia and industry – including in insisting on optimization in e-discovery searches through the adoption of best practice standards, some of which may yet end up as recognized international standards.

But even on such seemingly mundane matters as how to execute a legal hold over records and information, we lawyer types remain largely stuck in a paradigm that too often relies on people, rather than automated technologies, and doesn't otherwise best utilize interdisciplinary resources. So my second call to arms is to say to the legal community that they best serve their clients by bringing in records managers as well as CIOs and IT staff early on in litigation and investigations. The records community particularly in government should be sitting at the table when agencies are in litigation crisis mode, as well as when decisions are made on procurement of new IT systems. The Rosetta Stone I talk about in my lectures needs to be used more, for lawyers, IT staff, and records staff to better understand each other's needs, and to best leverage the power of technology to solve legal and information management problems.

Third, at the start of the second decade of the 21st century, I believe we need to recognize that the time is now to prevent what I have termed the coming "digital Dark Ages." Archivists and corporate information managers can take the lead on this. The ongoing, exponentially increasing explosion of information means that over the next several decades the world will be seeing records and information growth orders of magnitude larger than anything ever experienced by humankind on this planet to date.⁴ We all need better ways to search thru these expanding universes of public and private sector electronically stored information. Nearly a century ago the archivist Hilary Jenkinson said we need "to neutralize the threat of hopeless unwieldiness"⁵ in our collective archives, and that was never more true than now.

This Administration has been pushing from Day 1 for policies that serve to ensure greater openness and transparency throughout government, and indeed, Archivist David Ferriero has often been quoted as saying that effective records management is the backbone of open government. But lest we forget, T.R. Schellenberg observed that "[i]n working with his materials an archivist has the dual objective of preserving them and making them available for use."⁶ The challenge for all of us is in both preserving and making accessible electronic records – otherwise, there is a near certainty that most of the history of the early 21st century, measured by volume of discrete electronic files, will not be open and available any time soon. Indeed, due to the need to protect privacy and due to other restrictions in place on discrete segments of these records, vast collections of e-records may end up being de facto inaccessible to historians and researchers for 75 years or more. In light of this identifiable certainty, the need exists to use new automated tools and technologies to ensure that personally identifiable information is properly filtered out of email archives, that new forms of software such as clustering algorithms are used to sort and categorize records worthy of more immediate opening in vast collections, and in general that automated technologies are more greatly employed to ensure that access to the public sector's permanent electronic records is guaranteed in the near term.

A couple of years back I said while presenting at the DELOS conference held in Rome, hosted by 2009 Emmett Leahy Award winner Maria Guercio, that our present daily collective digital experience is like standing underneath the climactic moments of a July 4th fireworks. (This metaphor I trust will work better in this room than it did in Italy.) As I said, we are all experiencing in our professional and personal lives a vast illumination, representing all the data that overwhelms us on a daily basis. But as in a July 4th fireworks display, the illumination is followed by sudden darkness. The paradox of our age is information overload followed by a future inability to access anything of importance – either because it was not preserved in the first place, or more perversely, to again echo Jenkinson, because it cannot be easily found amongst the unwieldy bulk of what has been preserved.⁷ We have a duty as stewards of future scholarship not to let that future happen – so we all need to be smarter in preventing or mitigating this potential information dystopia.

Those are my three calls to action.

When I'm in the Archives building late at night, here on the Mall, ready to go home, I go thru the large doors you all came through, and cross Pennsylvania Avenue. I always stop and turn to my right, looking East, where the Capitol dome is lit up. The sight still brings a clutch after all these decades in this city, still moves me to think that I am so very lucky to have spent my time doing my small part as a dedicated public servant to advance the cause of good government. I have always wanted to be "the man in the arena," Theodore Roosevelt's phrase,⁸ not a mere critic on

the sidelines. As this year's honoree, I wish to dedicate the rest of my life in continuing in these causes, in dedicating my efforts towards education of the bench, the bar, of my federal colleagues, and students in the classroom, on the enduring importance of good records and information management principles in the digital age.

And one last thing: as many of you know, I had a countdown clock to retirement after 30 years of federal service, and the alarm did go off six months ago as to my eligibility. It has been such a great privilege to be able to work on important issues involving electronic records during my time as a lawyer at this agency. However, given all the exciting things that are happening in the records and information management space, and the leadership exhibited by the Archivist, the news I wish to make today is ... no real news: I just plan on sticking around for a little while longer.

Thank you again to the Emmett Leahy Committee for this tremendous honor.