ARCHIVES

Examination of Disclosure of and Access to Records in Archives

By

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Introduction

Konnichi-wa. Gary Stern desu. Mina-sama ni oaidekite taihen ureshii desu.

I want to thank President Kikuchi for accepting Archivist Weinstein's recommendation and bringing me here to your National Archives. It is truly an honor for me to be here at this institution, and to be able both to share my experiences with you and to learn from you. I also want to thank Yumiko Ohara for all of the assistance she has given me in arranging this trip, and providing me with background information.

Last summer, President Kikuchi asked the Archivist of the United States, Allen Weinstein, to select a "senior archivist from NARA" to participate in this research seminar. Let me note that we at the National Archives and Records Administration refer to ourselves as NARA, which may be a bit confusing to someone searching on Google for Nara, your renowned ancient capital. It was confusing to me as well, when Ms. Ohara sent an email asking me if I wanted to visit Nara on this trip.

In any event, in response to the request for an archivist, Professor Weinstein asked me, the General Counsel, to represent NARA at this event. You might wonder why he selected a lawyer, instead of an archivist, to speak here at the National Archives of Japan. Well, it actually makes good sense, because your topic, the "Examination of Disclosure of and Access to Records in Archives," is

fundamentally rooted in the law. For the National Archives of the United States, as for our state and local archives, and for you as well, the public access and disclosure of archival records is controlled by laws, and often challenged by lawsuits. Thus, while archivists may control the records of these great institutions, it is often the lawyers who ultimately decide whether someone can actually see the records.

As archivists, and lawyers like me who help archivists, we all know the great historical value of our collections. While I may be a lawyer by trade, I am an historian at heart (and therefore would qualify to be an archivist). One of the great joys of my job is that I get to see and work with so many great records of United States history (although still not often enough), ranging from our great Charters of Freedom, to the everyday writings of military officers, or President Lincoln's Emancipation Proclamation freeing the slaves (just put on display earlier this month), records on the assassination of President Kennedy, tapes of President Nixon dealing with the Watergate scandal, and more recently the records relating to the impeachment of President Clinton and to the investigation by the 9/11 Commission, to countless other fascinating moments of history.

I greatly enjoyed my tour of your Archives this morning. I believe President Kikuchi saw our new Public Vaults gallery in Washington last year, which we are very proud of. Not too long ago, we also put on display the U.S. copy of the March 31, 1854, Treaty of Peace and Amity (although we call it the Treaty of Kanagawa), in commemoration of the 150th anniversary of the opening of diplomatic relations between Japan and the United States.

The records of a National Archives also have importance to foreign governments. I only recently learned something that many of you may know well, which is that for the last 30 years, the National Diet Library of Japan has engaged in an ongoing project of microfilming records at NARA, copying millions of pages of our historical records that are of interest to your government.

It goes without saying that the principal mission of any archives is to make its collections available to the public as quickly and completely as possible. That mission, however, must be balanced with the need to protect sensitive information:

whether personal private information about individuals or the most sensitive national security secrets. It is the never-ending job of archivists, and their lawyers, to find the proper balance between access and protection.

I know from personal experience what that balance is like. Whereas now I defend the National Archives and the government against lawsuits brought by researchers, for seven years, in the late 1980s and early 1990s, I was one was a lawyer with the American Civil Liberties Union who made FOIA requests and brought lawsuits against the government, including NARA. The ACLU is a non-governmental organization and one of its missions was to promote openness in government and oppose excessive government secrecy. I even was one of the plaintiffs who won a major case against the U.S. National Archives and the President of the United States, to stop them from deleting emails, way back in 1989, when email was relatively young and rare in the government. (I'll tell you more about that case later.)

Finding the right balance is one of the major things that I have been spending much of my time doing since last summer, in helping to make access decisions for records pertaining to President Bush's Supreme Court nominations of John Roberts and Samuel Alito. Rarely have we had such an immediate opportunity to show how archival records really matter to the workings of government. Indeed, last August all of Washington - the White House, the Senate, and the press - were waiting anxiously on the doorsteps of the U.S. National Archives (and the Reagan Presidential Library, which is also part of NARA) for the next opening of records on Judge Roberts.

Not only did we demonstrate the importance of records, but we also showed that we could work quickly and effectively in processing the records, so as to make as many of them available as possible, while at the same time protecting the small amount of sensitive information in the documents (mostly personal privacy of other individuals): within six weeks we had done what would normally take us at least six months. And most of the questions that the Senate Judiciary Committee asked Roberts during his confirmation hearing were based on the nearly 80,000 pages of records from the 1980s that were obtained from the U.S. National Archives. (In contrast, we found only about 1000 pages on Judge Alito,

although the two most controversial documents, which also became the major focus of questioning by the Senators, came from us.)

Of course, we did not have to make these decisions all by ourselves. We have laws, and the rules derived from the laws, that guide and prescribe us. I have had an opportunity to review your Law Concerning Access to Information Held by Incorporated Administrative Agencies of 2001, and I noted from other materials that this Information Access Law was passed approximately 30 years after the creation of the National Archives of Japan. Perhaps it's no coincidence that it also took the United States about 30 years from the creation of the National Archives of the United States in 1934 to the initial passage of the Freedom of Information Act in 1966. I hope it doesn't take you as long as it took us to get our FOIA working in an effective manner.

In this lecture, I will attempt to provide a general overview - the Big Picture - of the laws, rules, and practices that govern the records of the National Archives of the United States. Afterwards, and tomorrow, we can go into more details and discuss any questions or comments you may have. I will try to respond to the list of topics that Ms. Ohara provided me, although not necessarily in the order that was presented to me. And I hope what I have to say is not lost in translation.

Now, I do have a small dilemma. I just recently came to realize that the issues that give NARA the greatest challenges concerning access to and disclosure of records, and which therefore provide the most interest and excitement to me - I'm speaking of Presidential records and national security records - are the areas of perhaps least relevance to the work that you all do, since the National Archives of Japan does not, at this point, have control over the records of the Foreign Minister or, I believe, of the Prime Minister. I will try not to spend too much time on these topics, although I still think it is important to discuss them a little bit.

Now let me walk you through the basics of how we do things at NARA.

I. Outline of NARA's System of Access to Records and Organization in Charge

I will start by giving you a brief history and description of the U.S. National Archives. We were created in 1934 by President Franklin D. Roosevelt. Prior to that time, there was no centralized depository for the records of the U.S. Government. The Library of Congress held the papers of many, but not all, of the Presidents. Each federal agency - e.g., the Departments of State, Justice, War and Navy (before there was a Department of Defense), Agriculture, etc. - kept what it thought important. The first job of the new National Archives was to go to each agency and collect all of the "permanent records" that they held. Unlike your law, our statute allows the Archivist of the United States to require agencies to transfer records to us. The next job was to advise the agencies on how to manage their records into the future, what they could dispose of, and when they had to transfer the permanent records to us.

Significantly, the new laws governing the U.S. National Archives did not include the official papers of the President, which until 1978 were considered the President's private property. (Similarly, the records of individual Members of Congress and Federal Judges are, even to this day, considered their personal private property.)

So President Roosevelt did something special: he decided to build, at his own expense, a special building (he called it a library, even though it was really an archives) that would hold all of his presidential papers (and other important materials of his life and career), and then he donated both the library and the papers to the National Archives. All of his successors, and even his immediate predecessor, President Herbert Hoover, followed suit and have built and donated to NARA a Presidential Library to hold the records of their presidency (and life). (President Nixon was the exception, which is about to change later this year.)

Thus, today, NARA is a nationwide institution, with four locations in the Washington, DC, area, and fourteen regional archives, seventeen records centers around the country (which store the records of agencies until they are ready to throw them away or transfer them to us), and currently eleven presidential libraries, but soon to be 12 (Nixon), and then 13 (G.W. Bush) around the country. We have over three million cubic feet of permanent records, which amounts to something like 9 billion pages of records, not to mention a vast collection of photos,

movies, sound recordings, maps, charts, museum items, and an exponentially expanding world of electronic records - now terabytes; soon to be pedabytes.

For ease of administration, NARA divides the management of our holdings into three main organizations: federal agency records in the Washington, DC area; federal agency records in regions around the country; and Presidential records and papers at the Presidential Libraries. But we also divide our records in accordance with the system of Government established in the U.S. Constitution: Executive branch records - including the President and the Executive Departments; Legislative branch records - the Congress and its support agencies; and Judicial Branch records - the Supreme Court and the lower courts.

With respect to access and disclosure, our records are divided yet again, this time into two broad categories: federal and presidential. Broadly speaking, the Federal Records Act (FRA) applies to all U.S. Government agencies, in all three branches, except for the heads of each branch: i.e., it excludes the Congress (and individual members of Congress), the Supreme Court, and the President. There are over 350 such federal agencies (or sub-agencies) throughout the government. Just to make things even more complicated, the FOIA only applies to FRA (federal) records of the Executive branch.

The Presidential Records Act (PRA), since 1978, and other special statutes apply to NARA's holdings at the Presidential Libraries.

Ⅱ. Legal System Concerning Disclosure Of Records, Procedures For Review Request, Procedures Of Access Examination

a. Federal Records Act

The Federal Records Act (FRA) is NARA's core governing statute. Not only does it establish and create the National Archives as a now independent government agency, but it also addresses the full life-cycle of records management, preservation, access, and disposal.

Under the FRA, the Archivist of the United States has the authority to transfer permanent records from agencies into the National Archives. Just as important, one section of the FRA, called the Records Disposal Act, mandates that no

government record can be destroyed (or otherwise disposed of) without the approval of the Archivist. Through the process of "scheduling" the records of each government agency, NARA determines which records are transferred to us as permanent, and how long all other records must be kept until they must be destroyed.

For purposes of this conference, the most important provision of the FRA is 44 United States Code (U.S.C.) section 2108, which addresses how we deal with "statutory limitations and restrictions": i.e., at what point in time we can provide public access to sensitive information. (Access to most of the legal documents discussed in this lecture is available from NARA's website.[1]) This provision has three basic elements:

- Whatever restrictions applied to the records at an agency can continue to apply when the records are transferred to NARA;

- The restrictions are supposed to expire after 30 years; but

- The Archivist can extend restrictions beyond 30 years upon the request of an agency.

This provision does not mean that NARA has an absolute "30-year rule" before it can open records, as many European archives do. To the contrary, it means only that there is a presumption that no records should remain restricted for more than 30 years. Indeed, most permanent records are transferred to NARA in less than 30 years, and most of them can be opened to the public immediately (although not before we can process them into archival folders and boxes; and given the size of what is coming in and the decreasing size of our staff, we are following farther and farther behind).

Thus, to give an example, the White House and the Department of Justice (DOJ) were somewhat surprised when NARA opened to the public a highly confidential legal memo on abortion, written by Samuel Alito in 1985 when he was

[1] http://www.archives.gov/about/laws/

an attorney in the Solicitor General's Office, the office in the Justice Department that represents the U.S. before the Supreme Court. The Department of Justice still owns, and will not release, its Solicitor General files from the 1980s. But in 1999, the Justice Department transferred to the National Archives nearly 22,000 boxes of permanent records from the 1970s and 1980s, such as from the Attorney General's Office, the Civil Rights Division, and other DOJ components, and put no restrictions on these records, based on a records schedule that authorized transfer of these permanent records after 15 years. Well, it turns out that an assistant to the Attorney General had put a copy of some of the Alito Solicitor General memos in his files. Since we had the document, and there was nothing restricted in it, we could open it to the public even though DOJ itself would not.

On the other hand, a presumption can be rebutted, and, in fact, there are several types of records that are routinely restricted for more than 30 years: most notably, classified national security information and personal privacy information of living persons (including census records), but also certain types of law enforcement information.

Except for federal records that contain classified national security information, NARA is solely responsible for deciding whether archival records can be disclosed to the public. This is because when the records are transferred (or "accessioned") into the National Archives, NARA also receives all legal rights in the records. For the first 30 years of the U.S. National Archives, until the FOIA was passed in 1966, access and restrictions were based on archival standards and established by NARA in official regulations. Now we do so in accordance with the Freedom of Information Act (FOIA) and any other governing law or regulation. (I will discuss the FOIA process in the next section.)

There are times when NARA may consult with the originating agency to determine if there are particular sensitivities in the records, but NARA retains the ultimate authority in reviewing and opening the records. For example, after September 11, we worked closely with agencies when we initiated a program called "records of concern," to determine if there were any open records that might pose a danger for terrorist activities - such as detailed design drawings of buildings, bridges, dams, etc. In only a very few instances did we close records

that had previously been opened, where the vulnerability seemed particularly high.

b. Records at Presidential Libraries

I had prepared a relatively detailed explanation of the special laws, rules, and issues that relate to Presidential records. However, I was told just last week that these records are of less interest to the National Archives of Japan. It's too bad, because for us, Presidential records, which comprise a very small proportion of NARA's archival holdings (less than 10 percent), not only cause the most controversy and complications, but also provide the greatest amount of interest to researchers. That's no accident, since the Presidency is naturally where the most important and controversial activities of the government occur.

In any event, I will give you a basic outline of how the rules are somewhat different when it comes to Presidential records, because there are several different legal arrangements that govern such records.

As I noted before, NARA's Presidential Library system holds the papers and records of all Presidents from President Hoover (1929-1933) forward. These papers are deposited in eleven Presidential Libraries throughout the United States up through President Clinton (with a special exception for the Nixon papers, due to the unique circumstances of Nixon's resignation and the Watergate scandal). Even as I speak, we are working with President George W. Bush on preparing his records for transfer to us on January 20, 2009, and the creation of his Presidential library.

The Presidential collections include official gifts and other artifacts received by the President, as well as pre- and post-Presidential papers, the papers of the First Ladies, and papers of associates and friends of the Presidents. The Libraries also have Museums, which display permanent exhibits of the papers and artifacts documenting the life and times of each President; these museums also host temporary exhibits, educational conferences, and offer a wide variety of education and outreach programs.

Prior to the presidency of Ronald Reagan, and with the special exception of

President Nixon, presidential papers were considered the personal property of each President, who could do with them what they wished. In the nineteenth century, many presidents donated their papers to the Library of Congress or to a state historical society. In a few instances, the papers were destroyed or sold by family members. This all changed, as noted above, in 1938, when President Franklin D. Roosevelt donated his Presidential papers and a library to the newly created National Archives of the United States. Every subsequent president, as well as his immediate predecessor, followed suit, each one donating a building along with their papers.

For these donated papers, no federal law governs access. Rather, access and restrictions are based exclusively on the terms of the donation, per a deed of gift, established by the former President or his heirs. The Library Director, a NARA employee, is responsible for implementing the deed. These deeds were fairly consistent, with the restrictions generally limited to national security, law enforcement, and personal privacy. A few Presidents created review committees that could screen records, as well as researchers, before authorizing access. Because the Freedom of Information Act (FOIA) does not apply to these donated records, NARA has been able to systematically process and open large volumes materials at the older Presidential Libraries.

The unique circumstances of President Nixon's resignation over the Watergate scandal compelled Congress to pass a law in 1974, the Presidential Recordings and Materials Preservation Act, to seize the otherwise private Nixon presidential papers and place them in the National Archives (44 U.S.C. § 2111 note). Nixon had negotiated a deed of gift whereby he would have been able to destroy the White House tape recordings, and other important evidence. This was the first time that the U.S. Government exercised statutory control over presidential materials. The Nixon statute also required that NARA process and open the tapes and papers as soon as possible, and established restrictions for national security, personal privacy, and other rights and privileges of persons named in the materials. Again, however, the FOIA does not apply to these records. After over 20 years of heated litigation by former President Nixon and his estate, challenging the legality of the statute and NARA's regulations, the system for processing and opening Nixon materials finally settled down in the 1990s and

now works well.

More importantly, four years after Nixon's resignation, Congress passed the Presidential Records Act (PRA) of 1978 (44 U.S.C. § § 2201-2207), which changed the legal ownership of official Presidential papers from private to public, beginning with the next President to take office, which was Ronald Reagan in 1981. Since then, all official records created or received by the President and his staff are government records, and they are automatically transferred to NARA immediately upon the end of the President's term of office, for deposit in a presidential library that still has to be built and donated by the former President.

The PRA created a graduated process for public access. For the first five years after the President leaves office, there is no public access. For the next seven years, the President can impose six presidential restrictions, which are very similar to five corresponding FOIA exemptions. After twelve years, only the FOIA applies, except that the FOIA exemption for confidential advice, deliberative process, and other privileges, does not apply. However, the PRA mandates that NARA cannot disclose any Presidential record without first providing notice to both the former and incumbent Presidents, through their designated representatives, so that they both have the opportunity to review the records in order to decide whether to assert a constitutionally based privilege, known as the Executive privilege. This "notice process" has been guided by a somewhat controversial Presidential Executive order (E.O. 13233) issued for this specific purpose.

Because the PRA relies on the FOIA for access, it has led to the creation of significant backlogs. As you probably know, in processing records systematically, archivists prefer to begin at the beginning of a collection or file series and review through to its end. This type of systematic processing can be done at the pre-PRA Libraries. However, in FOIA processing, archivists must pull files and/or documents from multiple collections and series that relate to the request. This approach requires an extensive search to identify relevant files and records.

Further, in order to maintain the provenance, or order, of the documents, archivists must carefully document the removal of records from their original file

location. Moreover, the experience of the PRA Libraries has been that researchers typically ask for files that often contain high closure rates. Archivists must prepare withdrawal sheets for each closure, which further contributes to the time required to process FOIA requests.

At the Reagan Library, for example, the normal FOIA backlog for unclassified requests now runs over four years, and it is up to five years for classified records. Another disadvantage is the potential misconception by a requestor that he or she has received all of the information that the Library has on the requested topic, when, in fact, significant documents may be in unidentified or misidentified files that the Library has not yet processed. I'm sure you face this problem as well, of not knowing if you've found everything that the researcher is asking for.

On the other hand, the advantage of being able to make a FOIA request for specific Presidential records is that it can provide researchers more timely access to records of their particular interest. Since FOIA requests tend to be topic oriented, researchers get a clear understanding of how the administration dealt with their topic, since all relevant identified files must be reviewed. In contrast, systematic processing provides the researcher with a more thorough knowledge of an entire collection, and therefore the creator's role, and places the records in a proper context.

The PRA also provides three ways to gain "special access" to Presidential records that are otherwise not available to the public: 1) a subpoena or other judicial process issued by a federal court; 2) a request by the incumbent President for on-going business; or 3) a request from either House of Congress or from a committee or subcommittee if such records are needed for the conduct of Congressional business. In addition, the PRA provides that a former President or his designated representative shall have access to the Presidential records of his administration.

Ⅲ. Laws and regulations other than Federal Records Act on records in custody of NARA (FOIA, Copyright Law, etc.)

a. FOIA

As noted above, since 1966, the principal legal control over access to National Archives records is the Freedom of Information Act (5 U.S.C. § 552). The FOIA establishes that all agency records of the Executive branch are presumed to be publicly available, if requested by any person, unless one of nine exemptions applies. If no exemption applies, then the record cannot be withheld. Some of the exemptions are discretionary, meaning that an agency can choose to make a record available even if that exemption might technically apply. Other exemptions are mandatory, such as national security, taxpayer, or certain types of law enforcement information.

As I noted before, however, the FOIA does not apply to all U.S. Government records. It only applies to the Executive branch. It does not apply to records of the Legislative and Judicial branches of government: i.e., the Courts, Congress, and other Legislative branch agencies and commissions. And, the FOIA does not apply to donated presidential papers that pre-date the PRA, and it applies to PRA records with special exceptions.

When records are transferred from another agency to our agency, NARA assumes full legal custody and control over them. Typically, however, such records are transferred to NARA when they are 20-30 years old, and only when the agency no longer has a need to keep and use the records. This long time period before NARA gets most records has the effect of wearing off most of the concerns that an agency would have about public disclosure.

The vast majority of NARA's records reflect the official policy decisions and actions of senior government officials, and the sensitivities, such as the internal deliberations and confidential advice between officials, usually relate to the immediacy of these activities. With the passage of several years, if not decades, there is very little cause for concern in the disclosure of this type of information. Note, as well, that only approximately 2 to 3% of federal records come into the Archives. The remaining 97% remain in the legal control of the agencies until they are ready to be destroyed, and are not of direct interest to the U.S. National Archives (except for the separate business function we provide in storing agency

records around the country).

There is a small portion of records that come to the U.S. National Archives very soon after their creation: first, there are Presidential records; but we also get the records of special investigations and commissions - the most notable recent acquisitions being the records of the 9/11 Commission and Independent Counsel Ken Starr, who investigated President Clinton's relationship with Monica Lewinsky shortly after the investigation was over. These records require the most careful attention and review.

Although the FOIA has nine exemptions (5 U.S.C. § 552(b)), there are four that apply most readily to archival records: exemption (b)(1), for classified national security information; exemption (b)(3), for other statutes that specifically require withholding of information; exemption (b)(6), for personal privacy information; and exemption (b)(7), for law enforcement information.

Information covered by exemptions (b)(2), for internal agency rules and procedures, and (b)(4), for trade secrets and other business information obtained from private sources, are less prevalent in NARA's permanent holdings; exemptions (b)(8), for bank-related information, and (b)(9), for oil well information, are even rarer.

Finally, exemption (b)(5), for confidential advice, internal deliberations, attorney-client, and other privileges - which probably covers the largest amount of NARA's records - generally does not apply to our archival records because of the passage of time, which serves to dissipate the sensitivity over internal deliberations (even our Supreme Court recognized this point in its ruling that former President Nixon's right to claim executive privilege "erodes over time").

I was not surprised to find semblances of at least six of our FOIA exemptions in your Information Disclosure Law under Article 5: The Obligation to Disclose Corporate Documents. Although the order of these exemptions should not really matter, I was intrigued that whereas our first exemption is for national security (b)(1) (which is section (4)(a)), yours is for personal privacy (which is our (b)(6)).

b. Privacy

For NARA, withholding personal privacy information is one of the least controversial and contentious things we do. Most researchers understand and respect the need to protect the privacy of individuals, particularly in information created and maintained by the Government, and also appreciate that the U.S. National Archives strives it is NARA's policy to minimize the withholdings for personal privacy. Indeed, we have helped settle FOIA lawsuits that were brought against other agencies, by agreeing to have the records transferred to NARA so that we, instead of the agency, could do the review and screening of the records in accordance with our standards for protecting privacy.

Under NARA policy, personal privacy information of living persons is restricted for 75 years after the date of the document (the FBI withholds such information for 100 years from the date of birth), unless the person's death is clearly established. However, to decide whether information is private, we use a "balancing test," which was established by court cases interpreting the FOIA. Under this test, we must balance the public's right to know against the privacy of the individual involved. This means that privacy information is not automatically withheld. Rather, it depends on the sensitivity of the information and the context of its use, including whether the person was a senior government official or a well-known public figure.

Under the balancing test, we first determine if there is a protective privacy interest, and then determine if there is a public interest, which, according to the Supreme Court, means: "does the information say anything about what the Government is up to?" Information that, for example, informs the public of violations of the public trust has a strong public interest. To be released, information must shed light on an agencies performance of its statutory duties; Disclosure must benefit the public overall, not just the requestor.

If both interests exist, then we balance whether the public interest outweighs the privacy interest - information about important government activities have a high public interest, and information about senior, well-known public

officials have a low privacy interest. Note that a higher standard, and different FOIA exemption, applies when there is privacy information that relates to a law enforcement investigation.

Information generally cannot be withheld from the person to whom it pertains - what we call first-party requests. For the most part, a dead person has no privacy interests, which is why the FBI, for example, routinely releases records it has compiled when the subject of their investigation is dead. Note, however, that some details may be withheld to protect the privacy of their family. (The Privacy Act, 5 U.S.C. § 552a, does not apply to records at the U.S. National Archives.)

The toughest calls that we make on personal privacy tend to come from Presidential records. The Nixon Watergate tapes, for example, are full of candid conversations where President Nixon and his advisors are saying very mean things about various individuals. As it turns out, we end up opening quite a lot of these conversations: in large part because the participants are now dead; but the other major reason is if the information was already out in the public domain, because of public investigations by Congress and news media coverage. Since most of the persons are "public figures," then they have less of a privacy interest.

We also had numerous privacy withholdings in the Judge Roberts papers at the Reagan Library, which I discussed earlier, because he was often writing memo about a personal complaint of an outside person who was trying to contact the President. While we thought we did a good, and balanced, job of withholding only the bare minimum, we were in fact sued last fall by researchers who think we should have released everything. That case is currently pending in court.

c. Privilege

Separate and apart from the FOIA exemptions is the authority established in the U.S. Constitution itself of the President to protect sensitive deliberations and activities of his office and the Executive branch. This is known as executive privilege. The FOIA recognizes this privilege, among others, in exemption (b)(5), which, as noted above, generally is not applied to archival records. The President, however, may assert this privilege based on his own constitutional authority, as can

even a former President.

Indeed, there are special procedures for doing so for records covered by the Presidential Records Act twelve years after the end of the presidency. In 2001, President Bush issued Executive Order 13233 for this purpose. This EO has caused a significant amount of controversy, as well as a lawsuit against NARA by a group of research organizations, because of a concern that it could be used by both the former and current President to withhold large amounts of Presidential records. So far, however, Executive privilege has only been used one time under this EO, for a total of 64 pages, while NARA's presidential libraries governed by the PRA have opened over one million pages.

The lawsuit, meanwhile, is still pending after four years. It is focused principally on the provisions in the order allowing former Presidents, and even the family of a deceased former President, to improperly assert executive privilege, causing delays in the opening of records, and the provision suggesting that there may be a Vice Presidential executive privilege. The case was initially dismissed by the District Court in March 2004, on the grounds there was no live controversy that could be adjudicated, since no privilege had been claimed. The Plaintiffs then asked the court to reinstate the case, because executive privilege had subsequently been asserted over a small group of records, which the court agreed to do in May 2004.

In September 2005, the court issued an opinion upholding the assertion of privilege by the incumbent President as permissible under existing case law. The court reiterated that both of the Supreme Court's cases from the 1970s relating to President Nixon "indicate that a president's assertion of executive privilege can only be overcome with some 'demonstrated, specific need' on the part of the party seeking the privileged documents." The court then noted that "[p]laintiffs have presented no argument or case law suggesting that the Court's view is incorrect," and that [p]laintiffs have conceded that they are in no position to make" the requisite showing of need.

The ultimate test under this Executive Order is whether it is resulting in an increased withholding of records. So far, it has not.

d. Copyright

We are often asked if our archival records are subject to copyright. The basic answer is no. As a general rule, the Copyright Act (17 U.S.C. § 101, et seq.) does not apply to U.S. Government records. The law makes clear that there is no copyright in government documents. Rather, such records are considered to be in the public domain, and free for anyone to use as they see fit. Accordingly, NARA does not have to deal that extensively with copyright concerns. The exception, however, is for private sector materials that have been received by or donated to the government, particularly with respect to photographs, films, and other non-print media.

However, for copyrighted materials in our holdings, the law provides that under certain conditions libraries and archives are authorized to furnish a photocopy or other reproduction of materials. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." This is known as the "fair use" exception. If a researcher uses a photocopy or reproduction for purposes in excess of "fair use," he or she may be liable for copyright infringement. However, any violation of this rule is between the researcher and the copyright owner. NARA usually stays out of that conflict.

We provide notice to all researchers that it is their responsibility, not NARA's, to determine whether the records are subject to copyright, to identify the copyright owner, and to obtain permission before making use of this material that in any way may violate the Copyright Act.

e. Special Statutes and Orders

Finally, there are occasions when NARA, along with other agencies, must conduct special reviews of a particular collection of records for priority disclosure, either in response to a statute passed by Congress or an order from the President. These statutes deal mostly with declassifying national security information.

i . JFK

The most famous such instance concerned records about the assassination of President John F. Kennedy. Congress passed a law in 1992, largely in response to a Hollywood movie by Oliver Stone on JFK, requiring all agencies of the government to collect, review, and declassify, where possible, for public disclosure all records on the JFK assassination, and then to give the records to NARA for preservation. (The President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. § 2107 note.) Most importantly, Congress established unusually narrow classification standards for continuing to withhold classified information, and also created an absolute cutoff of 25 years (in the year 2017), after which all the records had to be released.

Back when I was a lawyer for the ACLU, I advocated in support of this statute, believing that it would be an important precedent in support of declassification and government openness. What I did not understand then, but know very well now since I've worked at NARA, was how much the archivists at NARA disliked this statute: not because of the standards for declassification, but because of how much time and effort it took to conduct this kind of special search and review, at the expense of conducting systematic review over entire series of records. While the JFK assassination collection has been a boon to researchers interested in this topic, it, and its successors, cause significant pain and disruption to the way the U.S. National Archives prefers to process and open records.

A new documentary that recently aired in Germany, and which alleges that Cuba was behind the plot to kill President Kennedy, has brought renewed interest in NARA's JFK collection.

ii . Human Rights Abuses: El Salvador; Guatemala; Chile; Argentina

In the mid-1990s, during the Clinton Administration, the President ordered federal agencies to conduct a special search and declassification review for records in the custody of the U.S. Government concerning human rights abuses in Central and South America. This effort started in response to Truth Commission inquiries that were taking place in El Salvador, Honduras, and Guatemala. Subsequently,

Congress passed a follow-up statute in 2003 requiring agencies to declassify and release information concerning the murders of American citizens, including several churchwomen, in El Salvador and Guatemala.

Then, after former Chilean President Pinochet was arrested in London, a new directive was issued in 1998 with respect to human rights abuses in Chile related to the 1973 coup d'etat. This coincided with my new job as General Counsel for NARA, so I sat on the inter-agency working group for this project, which was chaired by the National Security Council, and included the Department of Justice, Department of State, Department of Defense, FBI, and CIA.

NARA, which had a significant number of records in our presidential collections, played an important role in advocating for maximum disclosure of these historical records. The end result was the disclosure of approximately 24,000 documents, totaling over 100,000 pages, concerning U.S. activities in Chile. These documents were then used by Government officials in Chile and Spain, as well as historians and scholars.

iii. Nazi War Crimes

In 1998, Congress passed the Nazi War Crimes Disclosure Act, yet another statute requiring all government agencies to "identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Nazi war criminal records of the United States" (This law is considered to be an extension of the FOIA, at 5 U.S.C. § 552 note). This law set up a special commission, composed of high level representatives of the heads of major classified records-holding agencies - NSC, State Department, CIA, DOD, DOJ - and three public members, and is chaired by NARA. It also incorporated the narrow standards used in the JFK Assassination records act for continuing to withhold classified information.

As some of you may know, it was amended in 2000 by what is called the Japanese Imperial Government Disclosure Act, to include records relating to war crimes committed in the pacific theater as well.

Seven years later, the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group (IWG) continues to work to complete its mission. To date, it has declassified and opened over 8 million pages of records, including approximately 200,000 pages related to the Japanese Imperial Government, mostly from U.S. intelligence agencies files from the Cold War. (This is in addition to the millions of pages that were opened at the U.S. National Archives in the 1970s and 1980s, including approximately 20 million pages related to the Imperial Government).

The IWG has also held numerous public meetings, sponsored research papers and other scholarly writings, and created finding aids for these records in NARA's holdings: including a historical study of the Nazi-related records, U. S. Intelligence and the Nazis, and three more publications forthcoming: a volume of essays in Japanese War Crimes Research in the US National Archives, a 1700-page Guide to Japanese War Crimes Records in the National Archives (on CD), and a final report to Congress.

Ⅳ. Criteria for declassified / classified records, how to decide conditions of access and use of the records in custody of NARA

I understand as well that the National Archives of Japan does not yet have any of the national security records from the Foreign Ministry, so therefore you do not have to deal very much in the access issues related to classified national security information. Nonetheless, in the hopes that you will someday be the repository for all of the historical records of the Japanese Government, including the Foreign Ministry, let me give you a brief overview how things work for us.

NARA has no independent authority to classify or declassify national security information. We must rely entirely on the agencies that created, and classified, the information to review their classified information in our holdings, or provide us guidelines so we can declassify and publicly release the information ourselves.

In 1995, President Clinton issued Executive Order 12958, which, for the first time, required that classified permanent records (whether or not they have been

transferred to the U.S. National Archives) over 25 years old must be automatically declassified, unless the information fell within certain exceptions. (Once again, I provided input into drafting this E.O. when I was at the ACLU.)

For the past ten years (with two time extensions), agencies have been reviewing their records to find the exceptions, such as for CIA sources and methods, and other highly sensitive defense and foreign policy information, and have cleared nearly one billion pages for release. Roughly 500 million pages remain to be reviewed, which must be completed by December 2006, after which they will be subject to automatic declassification.

The FOIA prohibits the disclosure of classified information under exemption (b)(1). (Some classified information is also protected under exemption (b)(3), when a separate federal statute applies to the information, such as for cryptologic information - i.e., secret codes, nuclear weapons information, and information relating to CIA intelligence sources and methods.)

Thus, NARA is bound to uphold the decisions by the national security agencies on whether classified information can be declassified and released. NARA often advocates within the government for the timely review and release of such information. One of the most important, and little known, groups in the Government dealing with this issue is the Interagency Security Classification Appeals Panel (ISCAP), which was set up under EO 12958 to review agency decisions not to declassify information. This panel is comprised of representatives from six agencies: NARA, the National Security Council, the Department of Defense, the Department of State, the Department of Justice, and the CIA. Thus, ISCAP is somewhat similar to your Information Disclosure Review Board.

What is remarkable is that in a majority of cases, the panel votes to overturn the agency decision and release more information. This is an important demonstration of what an independent review by persons with no direct stake in the information can make. More important, this review is done by national security experts within the Executive branch, who have the knowledge and expertise to make informed decisions. In contrast, FOIA lawsuits that challenge classification withholdings in federal court are rarely successful, in part because the

courts generally defer to the agency decision, and argue that the judges do not have the expertise to second guess the agency experts.

At the same time, we are stuck if an agency refuses to declassify the information. One of the most remarkable lawsuits we faced in recent years was a FOIA case for the six oldest classified records in the National Archives. These documents date from World War I (1917), and concern how to make invisible ink for spying. Even though we have the documents, the CIA stepped in and argued that this information about an intelligence method must still be protected. The requesters lost the case, and the documents are still classified.

V. Classification of conditions of access and use, and system of including the classification in catalogs for users

Now that I've explained all of the restrictions, let me turn to how things work in practice. The primary purpose of the National Archives of the United States is, of course, to make our records available to the public for research. We start, therefore, with a presumption that permanent records in our custody should be available for use, unless there is a specific reason to withhold all or part of them. We take our cue from the agency that created and transferred the records to us. It is the agency's responsibility to tell us if there is any sensitive information in the records that needs to be withheld. When federal records are transferred to the Archives, the agency must fill out a special form (Standard Form 258) that describes the records and whether there are any restrictions on their use. We depend on this form in determining how much, if any, we have to review the records before making them available.

We know, for example, that records from the Department of Justice often contain sensitive information about criminal law enforcement and individual privacy, so we review these records even if the Justice Department tells us that the records are open for public use. Similarly, records at the Presidential libraries are always screened page-by-page, because of the high-level sensitivities, including unmarked classified information, that exist throughout these collections. In contrast, however, records from an agency such as the Department of Agriculture rarely contain sensitive information after they're transferred to us.

Given the size of NARA's holdings, we are far from having a comprehensive inventory or set of finding aids for everything we have. We publish a Guide to Federal Records in the National Archives of the United States, which lists over 500 record groups of agencies and sub-agencies.[2] We also have developed an Archival Research Catalog (ARC), which is a new, online catalog of NARA's nationwide holdings in the Washington, DC area, Regional Archives and Presidential Libraries. With ARC, a researcher can search for descriptions of our holdings by keyword, digitized image, location, organization, person, or topic. But we are very far from cataloging all of our records, and it does not mean that a copy of the records itself has been digitized and is available online.

VI. Procedures of Requesting Access to Restricted Records

So, now that I've explained all of the laws and rules, what is a researcher supposed to do to get access to the records?

The simple answer is: "Just ask for them."

Most of the records we have are already open for public use. But if a record is closed, in whole or in part, NARA will review the record upon request. The important factor is whether the record is part of an otherwise open collection or in an entirely closed collection. Records that have been restricted from processed, open collections are identified through what we call "withdrawal sheets," which is a form that describes the restricted record and the reason why it has been withheld (usually referring to a FOIA exemption). A person in the research room who comes upon a withdrawal sheet can then make a FOIA request for the restricted information. Depending on how long ago the record was originally withdrawn, NARA will re-review it to see if the further passage of time allows the restricted information to now be disclosed: if, for example, the person died. In general, however, if it's been less than two years, then NARA will not re-review.

Unfortunately, due to the volume of records that get accessioned every

[2] On line at http://www.archives.gov/research/guide-fed-records/.

year, and our relatively small staff, we have large amounts of unprocessed records that are "restricted" only because they are simply not yet publicly available. Researchers can also make FOIA requests for records from these unprocessed collections, which requires NARA to both search and review the material. This is what took place this past year when news reporters began asking us for records on Supreme Court nominees John Roberts and Samuel Alito. In 1999, we had received approximately 22,000 boxes of records from the Department of Justice from the 1970s and 1980s. Both men worked at the Justice Department in the 1980s, during the Reagan Administration. Very little, if any, of these boxes had been processed. Thus, NARA staff had to search through large segments of these unprocessed boxes to locate responsive records. Once we found them, very little information within the boxes had to be restricted from public disclosure.

A similar process took place at the Reagan Library, because John Roberts had also worked as an attorney in the Reagan White House. The Library found nearly 60,000 pages of Roberts's files. After a quick, but careful, review, we withheld roughly 2000 pages, mostly to protect the personal privacy of persons who were discussed in the documents. As I noted before, we have now been sued, by a public interest organization, People for the American Way that wants to know what is being withheld.

There is a parallel process for requesting, and appealing, declassification review of classified information under Executive Order 12958, known as "mandatory review" requests. This process is useful particularly for the records NARA holds that are not subject to the FOIA, such as at Presidential Libraries before 1980.

Ⅶ. Judicial Review and Appeals of denial of access to records

Notwithstanding the high level of deference that courts give to agencies in national security cases, there is no doubt in my mind that the fundamental key to a successful FOIA system is the availability to requestors of independent judicial review of agency withholding decisions. Without an effective judicial review process, agencies would have little incentive to cooperate with FOIA requests and to disclose as much as possible. Indeed, while very few FOIA lawsuits result in an

outright victory for the requester, many lawsuits result in a release of more documents, by forcing the agency to re-review and justify each and every withholding.

This point is clearly demonstrated by our early experience with the FOIA. When the FOIA was passed in 1966, it had a very weak judicial review provision, which essentially resulted in the courts almost always deferring to the agency decision. In 1974, Congress amended the FOIA and established a "de novo" review standard, which allows the courts to review the case from the beginning and make their own, independent decision as to whether the agency has properly applied the exemption to withhold information. In the subsequent 30 years, the courts have built up a huge body of case law - roughly 5000 decisions, including 13 from the Supreme Court - that interprets every aspect of the FOIA. (The Department of Justice publishes an 1100 page guide to the FOIA, which is also available on the web.[3]) And there have been many decisions in which the courts have rejected an agency's decision and ordered the release of government information over the agency's objection.

I could not tell from your Information Access Law whether it provides for an effective system of independent judicial review, or whether you have had enough time to adequately test this part of the process. I look forward to discussing this issue with you later today and tomorrow.

However, before a requester can file a lawsuit, she must first file an administrative appeal within the agency. Each agency must review the appeal, by a person not involved in the original decision to withhold, and determine whether each of the withholdings was proper. As with court review, this appeal process does sometimes result in the disclosure of additional information, and is supposed to be completed in four weeks.

I can tell you again from recent experience how this works: in the pending lawsuit against NARA over the withholding of personal privacy information in the White House documents on Judge John Roberts, we first had to do a second,

[3] http://www.usdoj.gov/oip/foi-act.htm.

appellate review of the roughly 2000 documents, and then a third review for the lawsuit itself; in each review, we determined, upon further consideration, that a few additional documents could be released.

I also know this from my personal experience, in my former life at the American Civil Liberties Union, before I joined the government, when I used to file FOIA lawsuits against the government, including the U.S. National Archives. I filed many FOIA requests for government records. After usually waiting quite a long time, such as for documents about the Iran-Contra scandal during the Reagan Administration, I was often frustrated by how many documents were withheld; so, I would file an appeal, which sometimes resulted in the release of a few more documents,. And on very rare occasions, I would file a lawsuit, which again, often did result in us getting more documents, even if we ended up losing the lawsuit.

Ⅷ. Measures taken for records including restricted information at the time of providing them to users (e.g., masking, etc.)

The FOIA ultimately requires us to segregate and redact the exempt information from the non-exempt information: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." However, in order to speed up the initial archival processing and screening of records, NARA frequently starts with what we call a pass/fail system: i.e., if there is any restricted information on a page of a document, we withdraw the entire page (and insert a withdrawal sheet). This saves a huge amount of time, as it is very laborious to redact, or black out, specific lines on a page, particularly if no researcher comes in to review the pages. Only when a researcher specifically asks for the withdrawn page does NARA go back and do the specific redaction.

We are also now using an electronic redaction system, which involves scanning the document, blacking out sections on the computer, and then printing the redacted copy. It's somewhat cumbersome because no one has yet figured out how to protect the electronic redactions from being unmasked (and there have been several embarrassing instances of this happening to other agencies).

Ⅸ. Problems and issues of NARA's system of access to records, now and into the future

If there is one core problem that NARA faces now, and into the future, in ensuring maximum access to records, it is a lack of "resources," which really means people, which really means money. We simply don't have enough money in our budget to hire enough people to keep up with the always increasing number of records that we receive and need to process. Our backlog is getting bigger. At the Reagan Presidential Library, for example, requesters now have to wait four to five years before we even start searching for the records we request, and we estimate that it will take 100 more years to process and open the entire collection.

For classified and declassified records, we face a different, although related, problem; some agencies are concerned that highly sensitive national security information, such as nuclear weapons data, may have been inadvertently released; accordingly, these agencies are re-reviewing hundreds of millions of pages of recently declassified records to find, and reclassify, these "mistakes." These concerns have been heightened since September 11, 2001, and have added further to the backlog for providing access to records.

And finally, there is the mounting challenge of electronic records. Emails are multiplying the volume of records coming into the National Archives, and complicating the search and review process. For example, the volume of records at Presidential Libraries has been growing steadily over the years. The Reagan Library has approximately 55 million pages, and the Clinton Library has nearly 70 million pages of paper files. However, the Clinton Library also has nearly 20 million emails (with attachments), which we have estimated equal as much as an additional 40 million pages of paper (more than the entire collection at each of our older Presidential Libraries). We are estimating that President George W. Bush will transfer over 50 million emails to the Library.

More than 15 years after I helped file the first major email lawsuit against the government, the challenges of both preserving, and making available, emails and other electronic records remains significant. Scott Armstrong, my former co-plaintiff, and a continuing watchdog and critic of government information practices,

never misses an opportunity to complain about the on-going failures of the U.S. National Archives in this area. He speaks of a "gap" in the historical record that exists because so many important email records are being lost day by day, year by year, and now decade by decade. And he has a point, because we know that, unless you have a system that automatically archives every single email, sent and received - which, in the U.S. Government only the White House has - most people do not save or print out most of the emails that they are supposed to.

As I mentioned at the outset, back in 1989, on January 18, two days before the end of the Reagan presidency, White House officials were clearing out their offices and files to make room for the incoming President George H.W. Bush. One thing they were doing was wiping clean the White House computers, some of which still contained email messages about the Iran-Contra scandal. Scott Armstrong and his colleagues at the National Security Archive, another non-governmental organization that collects and disseminates U.S. national security documents, and is one of the most frequent FOIA requesters in the country, learned about this imminent destruction of potentially valuable historical records. They filed FOIA requests for the documents, but when they went to NARA to complain, the Archives said that because the emails were supposed to have been printed out, it was not necessary to preserve the electronic versions of the email, which were considered to be non-record.

Scott came running to my organization, the ACLU, and asked us to file an emergency lawsuit to stop the destruction of the email backup tapes. We stayed up all night, and went to court the next morning, the last full day of Reagan's term, to file suit against the White House to stop the deletion, and against NARA for failing to require that the White House keep its email records.

And we won! By that afternoon, a federal judge had ordered the White House to stop all deletions and create a backup tape of the entire email system.

Subsequent court rulings in this case, which went on for many years, established the important legal principle that government emails and other electronic documents must be treated as records separate and distinct from the paper printouts. This means that email records are subject to records

management requirements just like paper: i.e., scheduling, disposition, and preservation.

Now, ironically, I am the one defending NARA against similar lawsuits by many of my former colleagues at the public interest groups, like Scott Armstrong, who still think NARA isn't doing enough to preserve government emails. To which I say, yes, we (that is the government) are probably not doing enough; but we are doing the best we can.

In fact, we have made major progress on finding a solution to the problem of long-term storage and preservation of electronic records, and just recently awarded a major contract, for over $300 million, to build an Electronic Records Archives (ERA). This system should start working by the end of 2007, and will be able to preserve and access e-records indefinitely, without having to worry about migrating or updating to subsequent generations of software and hardware.

The equally difficult problem, to which we still don't have any good answers, is how to search through these records efficiently and effectively in order to make them publicly accessible (and we only have to worry about searching for words in an alphabet that contains 26 letters, as opposed to the many thousands of characters among the kanji, hiragana, and katakana that you have to deal with).

NARA's recent experience is a case in point: several years ago, the U.S. Government filed a lawsuit against all of the major tobacco companies. NARA, along with numerous other federal agencies, received a subpoena from the companies for all government records concerning U.S. policy on tobacco and smoking, including the newly arrived Clinton presidential emails. A key-word search of the email database resulted in roughly 200,000 "hits" of potentially responsive emails. NARA staff, including most of my lawyers, had to review every one of these 200,000 emails to determine which ones were actually responsive, and which were "false positives": in the end, approximately half were non-responsive.

A senior lawyer on my staff is involved with outside organizations that are exploring better ways to conduct such searches, and deal with the problems of losing electronic information. When I told him that I was coming to this conference

in Japan, he gave me an article he had written, which mentioned that, on October 24 of every year, there is Buddhist memorial service at the Daioh Temple of Rinzai Zen Buddhism in Kyoto, at which the head priest conducts a prayer for lost information. Recognizing that many 'living' documents and software are thoughtlessly discarded or erased without even a second thought, this temple apparently hopes that "through the holding of its 'information service' the 'information void' will cease to exist."

We will need good technology, in addition to good prayers, to catch up with this enormous problem.

In sum, the challenge of providing access to archival records is never ending. We all strive for the perfect balance between openness and protection of sensitive information. Because our supporters are much greater than our critics, I think we're getting it pretty close to right.

I hope that this has given you a sense of how things work in the U.S., and some perspective for the work that you do here.

Thank you. Domo Arigato.