

perience, commercial knowledge and attention to detail placed him in an ideal position to posit the appropriate way forward in terms of the development of the international regulation of outer space.

In addition, Haley was conversant with the historical antecedents of international law and the various legal philosophies that sought to explain both its evolution and function. Yet, he was somewhat skeptical about the role that what he regarded as anthropocentric law could play in the regulation of the new frontier of outer space, particularly as he saw that national interests had historically prevailed over some of the fundamental tenets that underpinned (in theory) the 'agreement among nations.' It was for this reason that he strongly argued for the creation of a new set of laws for outer space that were developed primarily through a 'natural law' process and which would be specifically applicable to the unique challenges and opportunities that the use and exploration of space presented.

In the end, however, Haley's vision of a natural system of space law did not crystallize entirely as he would have wished. For a whole range of reasons, the international legal order for outer space is at least partially influenced by 'municipal' concerns, even though the underlying principles do emphasize the common interests that all stakeholders have in adhering to the fundamental principles. Yet, as space technology continues to expand at what appears to be an ever increasing rate, and the realm of space fantasy very quickly becomes space reality, there are undoubted challenges, and even threats, to the stability of this legal order. Issues such as the military uses of outer space, its (possible) future weaponization, the problems of space debris and our sometimes apparent disregard to the integrity of outer space, mean that those with space capability find themselves faced with difficult decisions as to how to prioritize their technological prowess.

As we celebrate the 50th anniversary of his seminal work, *Space Law and Government*, therefore, it is very timely that we heed Haley's strong convictions concerning the fundamental sentiments of 'humanity' that should underpin the legal regulation of outer space, in order to avoid the possibility of alternate 'nefarious' scenarios that may be too frightening to contemplate.

ARCHIVED DOCUMENTS AS EVIDENCE AND LEGAL AUTHORITY: LESSONS LEARNED APPLICABLE TO THE LAW OF OUTER SPACE

*Ryan T. Noble**

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (OST) contains merely 2,200 words, approximately. The aerospace lawyer attempting to interpret the OST faces the great challenge of constructing persuasive, legally defensible arguments from this relatively scant body of material. To overcome this challenge, the aerospace law profession must expand the body of material beyond the four corners of the OST, consider more than its abstract principles, more than the familiar axioms and corollaries of Oliver Wendell Holmes' cautionary introduction to his students,

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹

Resolving ambiguities and abstractions within the law of outer space into useful rules of law requires an investigation into the experiences of the founders. The experiences of the

* The author extends his eternal gratitude to Audrey Uffner Lau, former archivist for the National Center for Remote Sensing, Air, and Space Law, whose friendship and wisdom guided him through both the archives and law school. The author also extends special thanks to James Dunstan whose initiative and generosity led to this commemorative edition of the Journal of Space Law.

¹ OLIVER WENDELL HOLMES JR, THE COMMON LAW 5, 1881 (Paulo Pereira, eds. 2011).

founders provide context to the language of the OST, and provide aerospace lawyers the additional material to support interpretations of the OST. These formative experiences reveal why the present ambiguities arose in the first place and, likely, will provide invaluable wisdom in putting those ambiguities to rest. Through the experiences of the founders, the present aerospace law profession can understand the life of the law of outer space.

Fortunately, the experiences of many of these founders have been preserved in archives. Some sources have been catalogued, and even digitized with optical character recognition, to enable highly productive research.² How to locate these collections, how to research these collections, how to employ archived materials as legal authority, and how to avoid issues of copyright and client confidentiality will be explored below.

I. INTRODUCTION TO ARCHIVE RESEARCH METHODS

There are generally three pathways into archive research, the Subject Guide, the finding aid, and the hard-earned omniscience of the archivist over their collection. Jargon unique to archive management is used to categorically describe the kinds of materials housed in the archive, which can be not only paper documents, but also audio or video recordings, and other forms of documentation. Common archive terms of art are necessary to understand how to use “subject guides” and “finding aids”, and to help communicating with the archivist. Familiarity with these topics will accelerate the productivity of legal research in archives, and hopefully reduce frustrations for those accustomed to more expeditious databases like WestLaw and LexisNexis.³

² Optical character recognition software allows a researcher to search the full text of a document by turning an image of the document into a text file. For more information see, Rose Holley, *How Good Can It Get? Analysing and Improving OCR Accuracy in Large Scale Historic Newspaper Digitisation Programs*, 15 D-LIB MAGAZINE (2009).

³ Jenni Parrish, *A Guide to American Legal History Methodology with an Example of Research in Progress*, 86 LAW LIB. J. 105, 109 (1994) (“Similarly, the first time a lawyer or law student ventures into an archival facility, he or she is typically quite distressed at the paucity of available indexing, relative to the indexing typical of legal publications.”).

A. Archive Terminology

Archives are frequently organized into collections of “manuscripts.” A “manuscript” is a body of personal materials with an organic unity, for example the Andrew G. Haley (Haley) collection⁴ addressed in this article is, strictly speaking, a “manuscript.”⁵ The content of a manuscript is referred to as “papers.”⁶

Where an institution retains documents in the course of its official operations these documents are called “records” and when collected comprise an “archive.”⁷ In this way archivists distinguish between institutional records and personal papers compiled without regard to a specific recordkeeping protocol. The International Telecommunication Union (ITU) Library and Archives collection is a proper archive as it houses the official records of the ITU.⁸

The organization of the papers or records can be according to “provenance” or with “sanctity of original order.” Organization by “provenance” indicates that an archivist or administrator has performed some intentional reorganization of the papers or records, perhaps for ease of researching popular subjects or to separate them by author.⁹ “Sanctity of original order” refers to the arrangement created by the author of the papers and the desire to maintain this natural organization.¹⁰ Even where a collection has been reorganized by an archivist there will often be a careful log preserving each paper’s original location. How Haley chose to organize his papers can tell us what he thought

⁴ The National Center for Remote Sensing, Air and Space Law, *Andrew Hayley Collection*, <http://www.spacelaw.olemiss.edu/archives/haley/> (last visited Sept. 6, 2013).

⁵ Marsha Trimble, *Archives and Manuscripts: New Collecting Areas for Law Libraries*, 83 *LAW LIB. J.* 429, 436 (1991).

⁶ *Id.*

⁷ *Id.* (Hence the term “archive” can be used in a general sense to describe collections of historic documents, or used more specifically to describe institutional record-keeping.).

⁸ ITU, *History of ITU Portal*, <http://www.itu.int/en/history/Pages/LibraryAndArchives.aspx> (last visited Sept. 6, 2013).

⁹ 83 *LAW LIB. J.* 429, 436.

¹⁰ *Id.*

was important, what he thought was related, what papers he referenced frequently.¹¹

Practically speaking, most collections are physically organized into “boxes,” “folders,” and “items”. An “item” describes the individual document, letter, or other documentation. These items are gathered into “folders,” generally according to how the author gathered the items together, or according to the archivist’s design. Folders are then stored in “boxes” for security and preservation. There may not be a substantive rationale behind each box, instead boxes can be organized purely to promote preservation and security of the historic documents.

When a collection is housed in boxes the archivist will measure the collective length of all boxes in “linear feet.” The number of linear feet is then used as an indication of the expansiveness of that collection compared to others. For example, the Haley Collection measures 24.6 linear feet while the Stephen Gorove Collection¹² measures 15 linear feet and the Eilene M. Galloway Collection¹³ measures 13.8 linear feet.

B. Subject Guides

The “subject guide” is a research tool functionally similar to the West Key Note System. Subject guides are organized into a list of substantive topics, or subjects. For each subject the guide will list all the box or folder numbers in which that subject appears. When the specific topic of research is known, for example the ITU Plenipotentiary Conferences, for which documentation frequently is found in the Haley Collection, the researcher can find that subject in the subject guide and see all of the folders in

¹¹ *Id.* (“The point of maintaining groups of records or collections of papers discretely and retaining the office’s or creator’s order is to provide the researcher evidence of the way the files were originally used . . . The arrangement reveals something about the person or office that created it, and the researcher is more interested in the creator’s thought processes than in the archivist’s.”).

¹² National Center for Remote Sensing, Air and Space Law, *Stephen Gorove Collection*, <http://www.spacelaw.olemiss.edu/archives/gorove/> (last visited Sept. 6, 2013).

¹³ National Center for Remote Sensing, Air and Space Law, *Eilene M. Galloway Collection*, <http://www.spacelaw.olemiss.edu/archives/galloway/> (last visited Sept. 6, 2013).

the Haley Collection where the International Telecommunication Union Plenipotentiary Conferences appear.

Unfortunately subject guides are frequently far less thorough than the West Key Number System. Additionally, subject guides do not always exist for an archive collection. In that case, the researcher can turn to the “finding aid.”

C. Finding Aids

The “finding aid” is a combination of inventory and summary of a collection’s contents. A finding aid’s introductory pages generally provide information about the collection as a whole. This often includes administrative information like contact information for collection managers, preferred formats for citing to the collection, protocols to gain access to the archive, or certain restrictions on access to or use of the materials.¹⁴ Substantive information is often included such as the timespan covered by the collection, the originating person or entity that collected the materials, whether the collection includes non-document formats like audio or visual recordings or memorabilia, subject areas covered by the collection, and biographical sketches of prominent persons involved in the collection.¹⁵

The majority of the finding aid is then an inventory of the collection. This inventory can be made at the box, folder, or even item level. The more detailed and descriptive the inventory, the more useful it will be to the researcher. At a minimum, the finding aid will provide the title of a box or folder and its location. The dates or years covered, subject area, and even summary or brief description of the contents may also be provided.

As a research tool the finding aid is most useful in electronic format. This allows the researcher to electronically search the lengthy, comprehensive inventory for occurrences of subjects, names, locations, dates, whatever terms the researcher has identified as relevant. Some finding aids include a list of

¹⁴ 83 LAW LIB. J. 429, 437. *See, for example*, National Center for Remote Sensing, Air and Space Law, *Andrew Haley Finding Aid*, <http://www.spacelaw.olemiss.edu/archives/haley/finding.html> (last visited Sept. 6, 2013).

¹⁵ *Id.*

commonly occurring subject terms that the researcher can use in selecting his or her own search terms. The subject terms list is a good place to start, especially where nomenclature or conventional terminology of the present day differs significantly from the terminology of the collection's era. For example, prior to 1934 the now well-known International *Telecommunications* Union was officially known as the International *Telegraph* Union.¹⁶ Therefore, the history of early radio communication as well as several major ITU conferences on radio communication are catalogued under the International Telegraph Union.¹⁷ The Haley Collection contains inconsistent translations of Russian Cyrillic into English characters so the finding aid should be consulted for the specific translation used in that location and for alternate translations.

Archivists also avoid the use of acronyms, abbreviations, and jargon in finding aids to ensure that the collection will be universally accessible to researchers of various academic and professional backgrounds. Legal researchers should think in more general terms when devising search terms and relevant subject areas. Avoid specialized industry jargon, abbreviations, and especially contemporary terms. When researching a very narrow or specific topic it may be worthwhile to translate the contemporary topic into its archival counterpart. For example, the Haley Collection frequently uses Latin language legal terms of art that today would be more commonly known by their English language translation.

A quick reference for archival terminology is available online from the National Archives.¹⁸ Various handbooks and texts are available to further educate lawyers on archive research.¹⁹ But perhaps the best source is an archivist's personal

¹⁶ ITU, *Overview of ITU's History*, <http://www.itu.int/en/history/Pages/ITUsHistory.aspx> (last visited Sept. 6, 2013).

¹⁷ *Id.*

¹⁸ Excerpted from Maygene F. Daniels, *Introduction to Archival Terminology* (1984), <http://www.archives.gov/research/alic/reference/archives-resources/terminology.html>.

¹⁹ As an introduction to archives and how to research them see, MAYGENE F. DANIELS, *A MODERN ARCHIVES READER: BASIC READINGS ON ARCHIVAL THEORY AND PRACTICE* (Natl. Archives Trust Fund Board, Aug. 1984). For general information on how to research historical topics, see JULES R. BENJAMIN *A STUDENT'S GUIDE TO HISTORY* (5th ed. 1990) and FRANCIS PAUL PRUCHA, *HANDBOOK FOR RESEARCH IN*

expertise regarding the collection for which they are responsible.²⁰

What one does with a particular document, having found it using the methods outlined above, will be highly dependent on the researcher's unique circumstances. General advice on extracting useful information from personal manuscript papers is problematic, so only a few thoughts will be offered here to encourage researchers to reflect on their unique needs.

Valuable information can be gleaned from the context of personal manuscript papers by a meta-analysis that the whole of a manuscript can be greater than the sum of its parts. Consider the frequency of appearance of people or publications and what is implied by the originator's focus on them. An entire collection in perspective can reveal negative space. What is implied by the originator excluding coverage of a subject otherwise popular among contemporaries? Organizational cues such as which subjects the originator grouped together, or treated as disparate units, which materials show signs of being frequently referenced by the originator and which were kept readily available, can all provide insight to the originator's contemporary understanding of their profession.²¹ The originator's correspondence with contemporaries, through letters, telegrams, and other modes, can be very fertile. Humor often serves as a window into the frightening truths we cannot confront directly.²² Watch for repeated occurrences of humor among correspondence.

With useful information in hand the researcher reverts to the role of lawyer. The following sections present how to use

AMERICAN HISTORY: A GUIDE TO BIBLIOGRAPHIES AND OTHER REFERENCE WORKS (1987). When interested in government sources specifically, see JUDITH SCHIEK ROBINSON, TAPPING THE GOVERNMENT GRAPEVINE: THE USER-FRIENDLY GUIDE TO U.S. GOVERNMENT INFORMATION SOURCES (3rd ed., 1998).

²⁰ *A Guide to American Legal History Methodology with an Example of Research in Progress*, *supra* note 3, at 114 ("The scholar must rely much more on the knowledge of the archivist or librarian about a collection, as well as that professional's knowledge of, and interest in, legal history.")

²¹ 83 LAW LIB J 429, 436.

²² John M. Conley & Scott Baker, *Symposium: Empirical Studies Of The Legal Profession: What Do We Know About Lawyers' Lives?: Introduction To The 2005 North Carolina Law Review Symposium*, 84 NC L. REV. 1415, at 1416-1417 (June, 2006).

archived documents as persuasive authority in legal argumentation and how to admit archived documents as evidentiary exhibits.

II. ARCHIVED DOCUMENTS IN STATUTORY CONSTRUCTION

Sharp litigators recognize the potential for extremely persuasive exhibits drawn from metadata, big data, and other e-discovery records. However, the relevancy of decades-old archived letters and reports may be less apparent. The following cases show the very real value archives can have for litigants; they can win the case.

A forty-nine year old letter between the U.S. Attorney General and the U.S. Secretary of Commerce and Labor overturned decades of consistent practice by the U.S. Department of Justice. In *US v. Zucca*, the Department of Justice sought to denaturalize Ettore Zucca but failed to provide an affidavit showing good cause for the denaturalization proceeding, as in their estimation Ettore's former membership in the Communist Party was a sufficient cause.²³ At the mercy of 1950s anti-communist sentiment Ettore turned to a procedural nuance. The Immigration and Nationality Act of 1952²⁴ could be read to require an affidavit showing good cause as a prerequisite to maintaining his denaturalization proceeding.²⁵

The U.S. National Archives held the key to Ettore's case.²⁶ In 1907 U.S. Attorney General Bonaparte opined in a letter to the U.S. Secretary of Labor and Commerce that a good cause affidavit would be necessary under the then newly enacted Immigration and Nationality Act of 1906 (Act).²⁷ Attorney General Bonaparte had been a "leading spirit" behind the Act and the

²³ *United States v. Zucca*, 351 U.S. 91, 92 - 94.

²⁴ Immigration and Nationality Act of 1952, PUB.L. 82-414, 66 STAT. 163 (1952),

²⁵ "The sole question is whether s 340(a) makes the filing of the 'affidavit showing good cause' a prerequisite to maintenance of the suit." *United States v. Zucca*. at 92.

²⁶ *Id.* at n. 10 ("Letter of Attorney General Bonaparte, March 26, 1907 (unpublished, National Archives)").

²⁷ *Id.* at 96 ("Shortly after its enactment, the same Attorney General rendered an opinion to the Secretary of Commerce and Labor to the effect that the filing of an affidavit was 'necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate.'").

Court honored his forty-nine year old construction of the statute.²⁸ The three dissenting Justices highlight the singular power of the archived letter in overturning decades of agency practice and court precedent,

The only authority for the Court's action is an unpublished, informal, and somewhat ambiguous inter-departmental letter of the Attorney General written in 1907. While any Attorney General might well be proud to see his views given such lasting effect, he undoubtedly would be surprised to learn that the authority of such an informal statement could overrule later court decisions and a thirty-year, firmly established position of the Department of Justice.²⁹

Nevertheless, the Court added another decision to the long line of cases holding that, "a contemporaneous construction of a statute by the officer charged with its enforcement is entitled to great weight."³⁰

An archived document was similarly used to overturn decades of consistent practice by the California State Highway Commission in *U.S. v. Certain Parcels of Land in Riverside County*.³¹ The California State Highway Commission administered two roads as state highways and not as county roads for several decades. However, an archived record of the State Highway Commission contained resolutions designating the two roads to be county roads. The consistent practice by the State Highway Commission in administering the roads could not be used to establish the roads as state highways in the face of the archived resolutions to the contrary. The court found,

This Court does not doubt for one moment that the State Highway Commission ... assumed over a period of years that these highways 77 and 192 were actually State highways and treated them as such, while these resolutions of the State

²⁸ *Id.*

²⁹ *Id.* at 101 (Dissent Clark).

³⁰ *Id.* at 96 (*citing*, *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378, 51 S.Ct. 144, 145, 75 L.Ed. 397; *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796).

³¹ *U.S. v. Certain Parcels of Land in Riverside County*, 67 F. Supp. 780 (S.D. Cal. 1946).

Highway Commission (parts of Exs. E, F and H) fixing their status as county roads, remained in the archives of the State Highway Commission and probably forgotten...

The actions of the State Highway officials in assuming highways 77 and 192 to be State highways over a period of years are, of course, entitled to great weight by the court; but, in the fact of documentary evidence to the contrary, and the resolutions of the State Highway Commission therein (Exs. E, F and H), presumptions must fall.³²

Notably, the court expressly recognized that the archived resolutions had been “probably forgotten” by the State Highway Commission. And while the consistent practice by the State Highway Commission was entitled to great weight, any presumptions the State Highway Commission made about the status of the two roads were overturned by the archived resolutions. Accordingly, an agency may be bound by resolutions of which it has no actual knowledge. However, where the court is considering the *subjective intent* of an agency at a particular time, the court may limit its consideration to only sources of information available to that agency at that time.³³

The 10th Circuit has recognized the necessity, and challenge, of archived sources in frank terms. In *Southern Utah Wilderness Alliance v. BLM*, the court addressed the issue of century old, undocumented rights of way across federal lands. For over 100 years a federal statute allowed states to obtain rights of way over federal land without any documentation, as part of the pro-development policy for the American West in the 1800s. Retroactively, states are now defending their undocumented rights of way requiring courts to return to the law and the factual records of the mid-1800s. The opinion in *Southern Utah Wilderness Alliance v. BLM* makes prolific references to treatises and letters from the 1800s demonstrating the ability, and necessity, of lawyers delving into archives. The court stated in frank terms

³² *Id.* at at 781, 800.

³³ *State of New York v. Westwood-Squibb Pharmaceutical Co.*, 981 F. Supp. 768, at 781 (“Although the court has before it over twenty-five years of financial records, a much more limited record would have been available to the PSC in 1917. The intent of the parties on that date would have been significantly more obscure than it is today.”).

that, “rights of way across federal land, which used to be a non-issue, has become a flash point, and litigants are driven to the historical archives for documentation of matters no one had reason to document at the time.”³⁴

In addition to looking to archives to resolve factual questions of land use, the court also looked to archives to resolve questions of law. The meaning of “construction,” as a legal term of art of real property law, was interpreted using treatises, cases, and reports from the mid 1800s to determine what meaning the term had in the context of settlement of the U.S. American West. In its unique tone, the 10th Circuit stated it was “not persuaded. First, it would take more semantic chutzpah than we can muster to assert that a word used by Congress in 1866 has a ‘plain meaning’ that went undiscerned by courts and executive officers for over 100 years.”³⁵

The above cases demonstrate the power archived documents can have, even in the face of longstanding and consistent practice to the contrary. The formal position of an agency can be reversed by both opinions and formal resolutions discovered in archives by sharp litigants. The Haley Collection contains many letters from the U.S. National Aeronautics and Space Administration, the Federal Communications Commission, and various Executive Administrations that express contemporary opinions on the law of outer space. These sources can be persuasive for positions adopted in scholarly publications, opinion letters, and other out-of-court legal opinions. Means for authenticating these archived documents for use before a court, or other proceeding requiring authentication, are explored next.

III. ADMISSIBILITY AND EVIDENTIARY RULES OF ARCHIVAL SOURCES

The genesis of archival practices lies in ancient law and early administrative procedures.³⁶ The need for reliable docu-

³⁴ *Southern Utah Wilderness Alliance v. BLM*, 425 F. 3d. 735, 742 (10th Cir. 2006) (abrogated in part as stated in, *Wilderness Soc’y v. Kane County*, 560 F. Supp. 2d 1147 (2008)).

³⁵ *Southern Utah Wilderness Alliance v. BLM*, *supra* note 34, at 778-779.

³⁶ 37 ARCHIVARIA 122 (Spring 1994).

mentary evidence leads to a desire to preserve records of history and for the ability to authenticate those documents.³⁷ The symbiotic development of archive practices and the rules of evidence continues to the present day as the U.S. Federal Rules of Evidence make special accommodation for the exigencies of authenticating ancient documents. These rules are then integrated into archival practices to ensure the future admissibility of archived content.³⁸ A brief survey follows of methods for authentication that are particularly useful for archived materials relevant to the law of outer space. Authentication for these documents can be supported by their location in an archive, by expert testimony from archivists, by historians placing trust in the documents and routinely using them in scholarship, or by external sources that corroborate the archived documents.

A. Authentication of Archived Business Records

Aerospace corporations have been playing a seeming game of musical chairs throughout the twentieth century, steadily consolidating as there are fewer and fewer chairs around the defense contractor table.³⁹ Consolidation can concentrate not

³⁷ *Id.*

³⁸ *Archives and the Law*, 18 ARCHIVARIA 21-22 (Summer 1984) (from the editorial statement of an edition of *Archivaria* dedicated exclusively to archives and law, "Three articles turn the whole legal question around and show how archival records themselves may be used as evidence before courts of law or other legal bodies. In a piece of detailed legal research and law reform advocacy, Ken Chasse analyzes how the requirements of various evidence acts and court precedents concerning the admissibility - or otherwise - of documents as evidence depends to a great degree on the careful control by records managers or archivists of the creation of records and the integrity of their storage and use . . . Mark Hopkins argues similarly that the judicial implications of records keeping are grave indeed; significant changes are needed if records are to have any weight in court and their custodians any status as expert witnesses. Rod Young looks at the same problem in his case study of the evidentiary and probative value of trade union records, and clearly draws out the implications such legal realities have for records management and archival practices. Chasse, Hopkins, and Young warn archivists, in short, that they can no more ignore the legal implications of the records in their care than they can the conservation, arrangement, description, or research aspects of records keeping.") *Archivaria* is a Canadian publication. Jurisdictions in the United States may reference it to provide context for general legal principles.

³⁹ John Deutch, *Consolidation of the U.S. Industrial Base*, ACQUISITION REV. Q. (2001). William J. Perry, Deputy Secretary of Defense, said as much during a meeting now known as the "Last Supper" Consolidation of the U.S. Industrial Base, ("Between 1993 and 1998, there was a burst of defense industry mergers and acquisitions. Some

only the assets, but also the liabilities of subsumed entities into the parent corporation.⁴⁰ Litigation of those liabilities requires the court to untangle the long history of corporate acquisitions and mergers, often revealed through corporate archives, as was done in *New York v. Westwood-Squibb Pharmaceutical Co.*, hereinafter *Westwood-Squibb*.⁴¹

Westwood-Squibb concerns Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) responsibility over a natural gas manufacturing site in New York.⁴² To determine the proper successor liability the court had to trace ownership of the site back to 1898 when the gas manufacturing facility was originally constructed.⁴³ Beginning with 1898 the court used archived business records to observe, and sometimes decrypt, the chain of ownership and therefore liability.⁴⁴ A 1912 engineering report was of particular importance in proving the intent to purchase the gas manufacturing facility and was authenticated using the ancient document exception to hearsay.⁴⁵

Rule 901 of the U.S. Federal Rules of Evidence requires that to, “satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent

companies were sellers, for example, General Dynamics, Loral (after 1996), Ford Aerospace, Texas Instruments, and North American Rockwell. Other companies were buyers, notably Raytheon, Martin-Marietta, Lockheed, Loral (before 1996), and Boeing. There was a significant decline in the number of prime contractors and top system integrator companies in the defense-aerospace sector.”)

⁴⁰ *State of New York v. Westwood-Squibb Pharmaceutical Co.*, *supra* note 33, 786 (“The general rule is that where a company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor. There are four exceptions to this rule: (1) the successor expressly or impliedly agrees to assume the liability of the predecessor; (2) the transaction is a de facto merger or consolidation; (3) the successor is a “mere continuation” of the predecessor; or (4) the transaction is fraudulent.”)(citations omitted).

⁴¹ *Id.*

⁴² *Id.* at 768 (“In litigation under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) concerning site of former manufactured gas facility, purchaser and successor to prior owner of facility filed cross-claims on issue of successor liability for costs of remediation.”).

⁴³ *Id.* at 772-773.

⁴⁴ *Id.* at 772 (“The events of this case involve a complicated cast of corporations and individuals engaged in a tangled series of transactions stretching back nearly one hundred years.”).

⁴⁵ *Id.* at 780.

claims it is.”⁴⁶ Subsection (b)(8) provides for authentication of ancient documents by “evidence that it:

- (A) is in a condition that creates no suspicion about its authenticity;
- (B) was in a place where, if authentic, it would likely be; and
- (C) is at least 20 years old when offered.”⁴⁷

The *Westwood-Squibb* court determined these elements to be satisfied by the 1912 engineering report because the “document is more than twenty years old and was found in the NFGC archives among similar papers, and thus is in a condition which creates no suspicion as to authenticity and was found where one would expect to find such a document.”⁴⁸

The Haley Collection holds materials from his time at the Aerojet-General Corporation, including an *Agreement between Aerojet Engineering Cooperation and the International Association of Machinists*, correspondence from Theodore Von Karman and Robert W. Walters, and materials related to an *Aerojet Booster*.⁴⁹ Because Haley served as President and Managing Director of Aerojet-General, his personal files may be “a place where, if authentic, [these records] would likely be.”

B. Authentication by Expert Testimony of an Archivist

Where the application of Rule 901(b)(8) is not straightforward, testimony from an archivist can aid the court in determining whether the rule is satisfied. For example, if it is unclear whether a document is at least twenty years old because the document does not contain a date then an archivist can testify

⁴⁶ FED. R. EVID. 901. Once authenticated according to Rule 901, statements within ancient documents are specifically admissible as exceptions to hearsay under F.R.E. 803(16), “Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.”

⁴⁷ FED. R. EVID. 901(b)(8).

⁴⁸ *State of New York v. Westwood-Squibb Pharmaceutical Co.*, *supra* note 33, at 780 (NFGC is one of the natural gas companies at issue in the case).

⁴⁹ *Andrew Haley Finding Aid*, *supra* note 14.

to the document's probable age.⁵⁰ If the document has been moved from its origin or has changed hands then an archivist can testify as to whether the document's present location is "a place where, if authentic, it would likely be."⁵¹ Authenticating ancient documents does not require proving the chain of custody.⁵² Further, changing hands or relocating ancient documents does not necessarily defeat authenticity if the relocation is a natural occurrence for that type of document.⁵³ Authenticity is further supported where historians rely on or use the document in their profession and do not question its authenticity for the purposes of scholarship.⁵⁴

However, using archivists and experts to support authenticity has been strongly criticized because the usual *Daubert* test is not always adequate to assess archivists and historians. Limited resources frequently do not allow for lengthy hearings on the qualifications of an archivist for the relatively routine purpose of authentication.⁵⁵

⁵⁰ US v. Firishchak, 468 F. 3d 1015, 1021-1022 (7th Cir. 2006).

⁵¹ US v. Stelmokas, 100 F. 3d 302, 312 (3rd Cir. 1996).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ US v. Firishchak, *supra* note 50, at 1021, US v. Szehinskyj, 104 F. Supp. 2d 480, 491.

⁵⁵ For a thorough study of the pitfalls of expert archivists and historians as it relates to the Holocaust, see Maxine Goodman, *Slipping Through The Gate: Trusting Daubert and Trial Procedures to Reveal the "Pseudo-Historian" Expert Witness and to Enable the Reliable Historian Expert Witness -- Troubling Lessons From Holocaust-Related Trials*, 60 BAYLOR L. REV. 824, 829 (2008) (David Irving "believes Nazis did not use gas chambers to murder Jews at Auschwitz. At the end of the ten week trial, presiding judge Charles Gray ruled that Irving had intentionally contorted the historical evidence to align it with his politics. David Irving, revealed by Judge Gray as a phony for his faulty interpretation of the history of gas chambers at Auschwitz, had testified a few years earlier in a lawsuit by the Canadian government against Holocaust denier Ernest Zundel. Irving, admitted as an expert historian in that case, testified that the Nazis did not use gas chambers to murder Jews at Auschwitz. Thus, the same historical interpretation that led Judge Gray to rule Irving had deliberately falsified history was admitted as expert testimony on the same historical issue in an earlier case in Canada. Herein lies one possible danger of inadequate gatekeeping; unless flaws in methodology are revealed at the outset, these flaws are difficult to uncover absent a lengthy hearing or trial focused on historical methodology.").

C. Authentication by Corroboration from External Sources

Other documents, having been authenticated, can be used to authenticate an ancient document when these documents corroborate the content or nature of the ancient document at issue. This narrow technique may be particularly useful for aerospace documents because of the extensive body of government documents relating to aerospace that will generally be more easily authenticated.

A survey map found in the collection of a historical society was authenticated as an ancient document because the map was referenced by deeds.⁵⁶ The reference to the map in authenticated deeds provided enough corroboration to authenticate the map itself. Similarly, congressional records, agency commissioned reports, and other documents generated by the government relating to aerospace may make reference to contemporary external documents, thereby providing a means for authentication.

IV. ARCHIVED DOCUMENTS IN INTERNATIONAL LAW

A Nation-State can create binding obligations through the statements of Nation-State officials. Drawing from the opinions of the International Court of Justice, the United Nations International Law Commission has drafted and adopted the *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*.⁵⁷ The Guiding Principles assert that,

Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations...

States concerned may then take [Declarations] into consideration and rely on them; such States are entitled to require that such obligations be respected...

⁵⁶ Burns v. U.S., 160 F. 631 (C.A.2. N.Y. 1908).

⁵⁷ Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, A/61/10 (2006) [hereinafter Guiding Principles].

A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence...

Unilateral declarations may be formulated orally or in writing.⁵⁸

The relevance of written communications between Nation-State officials, and personal records of their oral communications, was made abundantly clear in the decision on the Legal Status of Eastern Greenland.⁵⁹ Denmark and Norway were engaged in discussions over which State had rightful claim to territory in Eastern Greenland. The Minister for Foreign Affairs of Denmark and the Norwegian Ambassador to Copenhagen exchanged demarches and oral remarks during a meeting. The Norwegian Ambassador represented “that the Norwegian Government would not make any difficulties in the settlement of this question [on Greenland].”⁶⁰ Those communications are now commonly referred to as the *Ihlen Declaration*⁶¹.

Regardless of whether the Norwegian Minister for Foreign Affairs was empowered, under the domestic laws of Norway, to unilaterally assess the merits of the Danish claims to

⁵⁸ *Id.* at arts. 1, 4, 5.

⁵⁹ Legal Status of Eastern Greenland (Norway V. Denmark), [1933] P.C.I.J. Ser. A/B, No. 53, 71

⁶⁰ *Id.* at 58.

⁶¹ *Id.* On July 14th, 1919, the Danish Minister saw M. Ihlen, the Norwegian Minister for Foreign Affairs, who merely replied on this occasion “that the question would be considered”. The Norwegian Minister recorded his conversation with the Danish representative in a minute, the accuracy of which has not been disputed by the Danish Government. On July 22nd following, M. Ihlen made a statement to the Danish Minister to the effect “that the Norwegian Government would not make any difficulties in the settlement of this question” (i.e. the question raised on July 14th by the Danish Government). These are the words recorded in the minute by M. Ihlen himself. According to the report made by the Danish Minister to his own Government, M. Ihlen’s words were that “the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland would meet with no difficulties on the part of Norway”. It is this [p37] statement by the Norwegian Minister for Foreign Affairs which is described in this judgment as the “Ihlen declaration”.

Greenland, or empowered to unilaterally cede Norway's claims to Greenland, the ICJ held that it was, "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs."⁶²

While the *Ihlen Declaration* may be a cautionary tale for Heads of State, it demonstrates the value for archival legal research.

V. CONFRONTATION WITH THE RULES OF PROFESSIONAL RESPONSIBILITY

The rules of professional responsibility can threaten the ability of archives to collect the papers of lawyers, and so threaten the availability of content to research. When a university archive requested that a D.C. attorney donate his personal papers relating to his long career in U.S. foreign policy the District of Columbia Bar intervened.⁶³ Despite the long passage of time between the attorney's practice and the requested donation, and even regardless of any passage of time no matter how long, the Bar determined in an ethics advisory opinion that, "the protections accorded client 'confidences' and 'secrets' . . . precludes an attorney from donating to a university archive papers that might reveal the confidences or secrets of the attorney's private or governmental clients without either obtaining the prior informed consent of those clients or deleting those portions of the attorney's papers that contain confidences or secrets."⁶⁴ The transactional cost of reviewing an attorney's entire collection of papers accumulated over a life long career is likely immeasurable. Ethics opinions that are written overly broad and without limitations can foreclose an important source of legal research. Client confidences must be rigorously defended, but

⁶² *Id.* at 192.

⁶³ D.C. Bar Comm. On Legal Ethics, *Donation to University Archive of Papers That Could Contain Client Confidences or Secrets*, Op. 128, Canon 4, DR 4-101 (1983).

⁶⁴ *Id.*

this goal can be accomplished without unqualifiedly prohibiting the donation of a retired attorney's papers.⁶⁵

As a practical matter, the archival researcher may not be exposed to the risk of reprisals from a state bar ethics board as it is the donating attorney that violated the professional rules. The archival researcher probably does not owe a duty of confidentiality to the donor attorney's past clients. However, the archival researcher does have to respect copyrights.

Institutions housing archives frequently have some copyright compliance policy or direction to assist the researcher with obtaining permissions where necessary to publish archive content. The Fair Use doctrine is frequently a powerful tool for scholarly purposes.⁶⁶ However, unpublished manuscripts, which are likely to be found in collections donated by attorneys, require an especially difficult Fair Use determination as court precedents are less than helpful.⁶⁷ More detailed discussions of the doctrine of Fair Use, and general copyright law, can be found in other publications more qualified to opine on this complex topic.⁶⁸

⁶⁵ 83 LAW LIBR. J. 443 ("Archivists and librarians who support historical legal research can work with donors to create access arrangements in which confidentiality is protected while legitimate research is allowed. The Huntington Library, which has a large number of law related collections, leaves the question of access completely to the donor; if the donor imposes no restriction, the library imposes none. This procedure has worked quite satisfactorily for the Huntington.").

⁶⁶ 17 U.S.C. 107(l)-(4).

⁶⁷ Robert Spoo, *Copyright Law and Archival Research*, 24(2) J. MODERN LIT. 210-211 (Winter, 2000-2001) ("Given such a flexible test and the fact-intensive nature of many copyright disputes, it is hard to predict where a court will draw the line between fair use and infringement. In one famous case, the Supreme Court found that the quoting of three hundred words from a two hundred thousand word manuscript constituted infringement, because the nature of the copyrighted work - unpublished memoirs - favored the copyright owner, and the portion quoted, although quantitatively minuscule, was qualitatively the 'heart' of the copyrighted work. [Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, at 565 (1985).]" More recently, the Fourth Circuit held that a defendant's copying of the entire manuscript of an unpublished novel for archival and scholarly purposes was a fair use, as were substantial quotations and paraphrases of the novel in a paper that she delivered at a scholarly symposium. [Sundeman v. The SeaJay Soc., Inc., 142 F.3d 194 (4th Cir. 1998). The disputed work in this case was an unpublished novel written by Marjorie Rawlings, author of *The Yearling*.] Less encouragingly, the court added that if the identical paper were to be published, fair use might not apply."

⁶⁸ See, *id.*; 83 LAW LIB. J. 429; Alexandra Mackey, *Largest Copyright Infringement in History: Five US Universities Sued for Copyright Infringement*, 3 INTELL. PROP.

VI. CONCLUSION

Archives are a valuable, if sometimes overlooked, asset to aerospace law professionals and scholars. The value that archives can hold outweighs the cost of the admittedly significant learning curve to their use. Hopefully, this article has achieved its goal of easing that learning curve for the reader.

The following annexes contain samples from the Frank J. Malina collection housed at the U.S. Library of Congress. Haley and Frank Malina were good colleagues and corresponded regularly on professional and personal matters. These annexes provide a glimpse of the intrigue, and even nostalgia that can be found in archives.⁶⁹

Letter from Andrew G Haley to Frank J Malina, June 1950

The excerpts below are from a collegial letter AGH sent to several of his colleagues to inform, and maybe entertain, them with an account of his travels during the year of 1949 and AGH does this with an eloquence absent from today's social media.

“I will give you a brief resume of my activities, starting with September 7, 1949 when I left for Montreal as Unites States Delegate to the Third North American Regional Broadcasting Conference. Previous to leaving, we contracted to sell the station in Pasadena and we had sold the house on South Orange Grove Avenue [tears and sighs]. We got a furnished apartment on Cote des Neiges Road in Montreal and put the two children in very fine boarding-schools. During the year they have learned more in those schools than they had done here during the previous three years. The Conference adjourned about December 15, 1949, having accomplished nothing in particular and we learned at that time that bilateral talks would be taken up at Havana starting February 1, 1950. So we yanked the kids out of school and took them down to Kentucky for the

BRIEF, 66 (Fall 2011); Ben Fernandez, *Digital Content Protection and Fair Use: What's the Use?*, 3 J. ON TELECOMM. & HIGH TECH. L., 425 (2005); Karyl Winn, *American Archivists' Experience with Copyright*, 18 ARCHIVARIA, 99 (Summer 1984); Doug Whyte, *The Acquisition of Lawyers' Private Papers*, 18 Archivaria, 142 (Summer 1984).

⁶⁹ Copies of the original letters are available from the author upon request.

Christmas vacation. They returned to school in Montreal January 6th and Delphine stayed with her mother for a few weeks while I came back to Washington to get some work done. On January 27, 1950, Delphine and I sailed on the United Fruit boat, S.S. Veragua, for Havana. Thinking that liquor prices would be high in Cuba [as they were in Canada where you can't even buy bourbon whiskey], we carried along too much of the fire water only to find that whiskey is a lot cheaper in Cuba because of lower taxes. We should have taken a few gross of matches as they cost five cents for a small packet. We arrived in Cuba on time for the inauguration of the so-called bilateral talks and kept on talking until March 7, 1950 . . . However, there is a tremendous amount of brotherly love and double-talk in any language you want to speak at any time and at no cost other than the overhead on hookers of scotch, bourbon or rum. When you believe you have a deal all settled you find the boys were talking about Martin and the early glories of the first revolution and had no idea you were talking about the radio business, which they say should not be discussed informally because its national sovereignty makes radio the exclusive world property of this gem of the Caribbean. So there you are – you can have it either with mustard or paprika – but you can be damned sure of winning your point with a few dusty pesos stacked end on end like so many Dollar pancakes served by that famous restaurant on the main drag of Olympia.”

Letter from Andrew G Haley to Frank J Malina, June 25 1957

The excerpts below are from a letter whereby Andrew G Haley reports to Frank J Malina on the progress of establishing a trust fund. Haley also mentions a proposal for the demarcation of sovereign airspace and outer space.

“I received your letter of June 21, 1957 along with the check for \$10,000 for the Trust Fund. We have noted the instructions contained in your letter. I am not proceeding very fast with the Trust Fund until I have a chance for a very thorough talk with Dr. von Karman. I reached him in Ithaca and he left Ithaca for Woods Hole where he is now located. He has promised to come down to see me one day this week. We will make a thorough final investigation of all aspects of the situation – and if we find any real trouble or doubt we will still not proceed and I