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"Privacy," according to Justice of the United States Supreme Court William O. Douglas, "involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The individual," he believed, "should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing."[1] For the private manuscript repository the protection of an individual's right to privacy, at least that of the donor, presents no insurmountable problems. Donors may simply purge files in advance of deposit or place certain restrictions on their disclosure.

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1 *Warden v. Hayden*, 387 U.S. 323 (1966).

More vexing is the problem of government records which contain information that either should not have been collected in the first place, or that is incorrect. Unfortunately, many government files contain inaccurate information and, infrequently, illegally obtained information. With respect to such federal--not archival--records, individuals can generally have the records amended, or have them expunged, that is, destroyed. Daily, federal records or portions of them, are destroyed based on the belief that the right of privacy is more important than the right of contemporary society as well as posterity to know.

Archivists are aware of the problems of protecting privacy versus the desire of researchers to have access to records--the right to privacy vs. the right to know.[2] But what archivists are most likely not aware of is that records including those scheduled as archival are expunged. What follows is an analysis of the federal expungement process in the context of one specific expungement case. This analysis

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2 Walter Rundell, Jr. and Bruce F. Adams, "Historians, Archivists, and the Privacy Issue," *Georgia Archive* 3 (Winter 1975): 3-15; Alan Reitman, "Freedom of Information and Privacy: The Civil Libertarian's Dilemma," *American Archivist*, 38 (October 1975): 501-508; James Gregory Bradsher, "Researchers, Archivists and the Access Challenge of the FBI Records in the National Archives," *Midwestern Archivist* 11 (1986): 95-110; Philip P. Mason, "The Archivist's Responsibility to Researchers and Donors: A Delicate Balance," in Alonzo L. Hamby and Edward Weldon, eds., *Access to the Papers of Recent Public Figures: The New Harmony Conference* (Bloomington, Indiana: Organization of American Historians for the American Historical Association-Organization of American Historians-Society of American Archivists Committee on Historians and Archivists, 1977), 25-37; Barton J. Bernstein, "A Plea for Opening the Door," *ibid.*, 83-90. Norman A. Graebner, "History, Society, and the Right to Privacy," in Rockefeller Archive Center, *The Scholar's Right to Know Versus the Individual's Right to Privacy. Proceedings of the First Archive Center Conference, December 5, 1975* (n.p.: Rockefeller Archives Center, n.d.), 20-24.

is provided for four reasons: first, to acquaint readers with the right to know, the right to privacy, and their relationship to the expungement process; second, to help them decide if expungements of permanently scheduled records are something they can accept; third, to explain why the current law and procedures governing expungements should be changed; and fourth, to suggest changes in the manner in which expungements are handled.

Among the major American democratic principles is the right of the people to be informed and have the ability to be informed. Indeed, the right to know is important to the United States' political system. The Supreme Court and its justices have continually expressed the importance of free and open discussion. Chief Justice Charles Evans Hughes stated that "it is only through free debate and free exchange of ideas that government remains responsive to the people."[3] Justice Douglas wrote that "the vitality of civil and political institutions in our society depends on free discussion" and that "full and free discussion has indeed been the first article of our faith. We have founded our political system on it."[4]

Just as the right to know is important, so too is the importance of using records as a means of studying the past, especially the recent past. In order to know, in order to conduct an analysis of government activities and judgments and to influence the correction of government mistakes and abuses, researchers must have access to information. If information is withheld, it cannot be acted upon. The Federal Freedom of Information Act (FOIA) is based on this premise.

"The basic purpose of [the] FOIA," according to the Supreme Court, "is to ensure an informed citizenry, vital to

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3 *De Jonge v. Oregon*, 229 U.S. 353 (1937).

4 *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Dennis v. United States*, 341 U.S. 494 (1951).

the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[5]

While achieving an informed citizenry is a crucial goal, counterpoised to it are other vital societal aims, including the protection of personal privacy rights. Indeed, one of the most important rights of Americans is that of privacy, defined by Justice Louis D. Brandeis as the right "to be let alone."[6] This right according to Justice Douglas, "is indeed the beginning of all freedom."[7] Neither the Constitution nor the Bill of Rights nor any amendments explicitly mention any right to privacy. However, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.[8] In 1961, the Supreme Court stated the right to privacy must be considered a basic constitutional right "no less important than any other right carefully and particularly reserved to the people."[9] "This notion of privacy," Justice Douglas observed, "is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live."[10] The Supreme Court has recognized that a right of privacy is guaranteed by the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, the Fourth and Fifth Amendment protections from govern-

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5 *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 242 (1978).

6 *Olmstead v. United States*, 277 U.S. 478 (1928).

7 *Public Utilities Commission v. Pollak*, 343 U.S. 467 (1952).

8 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

9 *Mapp v. Ohio*, 367 U.S. 656 (1961).

10 *Poe v. Ullman*, 367 U.S. 497, 521 (1961).

mental invasions of the sanctity of an individual's home and the privacies of life, and the Ninth Amendment's protection of rights, though not enumerated, retained by the people.[11]

But the right to privacy is not absolute. Justice Brandeis also stated that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[12] The key to this sentence is the word "unjustifiable."[13] Under the Fourth Amendment, privacy is protected only against unreasonable searches and seizures. The Fourth Amendment, Justice Potter Stewart stated, in delivering the opinion of the court, "cannot be translated into a general constitutional 'right of privacy.' That Amendment protects individual privacy against certain kinds of government intrusion. Other provisions of the Constitution," he wrote, "protect personal privacy from other forms of government invasion. But the protection of a person's 'general' right to privacy. . .is, like the protection of his property and of his very life, left largely to the law of the individual states."[14] Because the right of privacy is not out

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11 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Terry v. Ohio*, 392 U.S. 1 (1968).

12 *Olmstead v. United States*, 277 U.S. 438 (1928).

13 *Davis v. United States*, 328 U.S. 605 (1946).

14 *Katz v. United States*, 389 U.S. 350, 351 (1967). "I like my privacy as well as the next one," Justice Hugo L. Black stated in his dissent in *Griswold v. Connecticut*, "but I am nevertheless compelled to admit that government has the right to invade it unless prohibited by some specific constitutional provisions." *Griswold v. Connecticut*, 381 U.S. 510 (1965). He opined that there is not a constitutional right to privacy, believing it was not found in the due process clause or the Ninth Amendment, nor "any mysterious and uncertain natural law concept." Also dissenting in the same case, Justice Potter Stewart stated that "I can find no such general right of privacy in the Bill of Rights, in any other

of reach of the legislative power, the details of the right of privacy, and even its very existence, are matters of legislative control. As Justice Douglas stated in 1952, "There is room for regulation of the ways and means of invading privacy."[15]

In order to function effectively and exercise their powers intelligently, governments today require more and more information and accumulate more and more records.[16] Daily the federal government collects, with legislative approval, millions of personal details about the lives of American citizens. Much of this accumulated information about the attitudes, activities, and performances of individuals is found in case files.

These case files often contain inaccurate information and infrequently, illegally obtained information. But even if the information was legally obtained and is true, it often may not provide a full and faithful portrait of an individual. Over time information stored in case files becomes less relevant to the purposes for which it was collected and often becomes more misleading. However, once in a case file, the information can, in a short period of time, attain a legitimacy and authority that is lacking in other less formal types of files.[17] Like the agencies that created the files, the files themselves often have a life far beyond the lifespan of individuals who are the subjects of the files.

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part of the Constitution, or in any case ever before decided by this Court."

15 *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

16 James Gregory Bradsher, "A Brief History of the Growth of Federal Records, Archives, and Information, 1789-1985," *Government Publications Review* 13 (1986): 491-505.

17 Stanton Wheeler, "Problems and Issues in Record-Keeping," in Stanton Wheeler, ed., *On Record: Files and Dossiers in American Life* (New York: Russell Sage Foundation, 1969), 5, 23; Jerry M. Rosenberg, *The Death of Privacy* (New York: Random House, 1969), 145.

Although the government can legally invade privacy in the process of gathering information about citizens, some protection is afforded. The due process clauses of the Fifth and Fourteenth Amendments impose requirements of procedural fairness on the federal and state governments when they act to invade a person's privacy.[18] The federal Freedom of Information Act and the Privacy Act, taken together, set forth the conditions under which information impinging on privacy can be collected, used, and disseminated.[19] When the federal government wrongfully invades privacy, an individual, acting under the due process concept and the Privacy Act itself, can remedy the wrongs in several ways, including requesting expungement- -that is, destruction of information in records or the records themselves.

Because of the concerns about what information finds its way into government records, the growing computerization of files, and potential and actual invasions of privacy, many civil libertarians in the late 1960s and early 1970s called for a law that would allow a person to challenge the accuracy of information about him in a government dossier and, if the information was improperly obtained, provide a mechanism for its destruction.[20] This is in keeping with the legal

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18 *Roviaro v. United States*, 353 U.S. 53 (1957); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *In re Ruffalo*, 390 U.S. 544 (1968); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

19 The Freedom of Information Act of 1966 (PL 89-487) and the Privacy Act of 1974 (PL 93-502) are codified in 5 *U.S.C.* 552.

20 Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), 387-388; Arthur R. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (Ann Arbor: The University of Michigan Press, 1971), passim; Aryeh Neier, *Dossier: The Secret Files They Keep on You* (New York: Stein and Day, 1975), 186-199.

maxim that for every wrong, there should be a remedy. Congress, concerned about privacy, made such provisions in the Privacy Act of 1974.

The Privacy Act was enacted "to promote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch. . .to observe certain constitutional rules in the computerization, collection, management, use and disclosure of personal information about individuals."[21] It provides that no agency shall maintain records describing how an individual exercises rights guaranteed by the First Amendment and provides that only such information as is relevant and necessary to accomplish a purpose of the agency shall be maintained. It also allows individuals to correct or delete improper or inaccurate material.[22]

The Federal Records Act of 1950, as amended, provides the conditions under which federal records can be destroyed

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21 U. S. Cong., Senate, *Protecting Individual Privacy in Federal Gathering, Use, and Disclosure: Report to Accompany S.3418*, 93d Cong., 2d sess., S. Report 93-1138 1974, 1.

22 5 *U.S.C.* 552a(e)(1),(7). "Each agency that maintains a system of records. . .shall permit the individual to request amendment of a record pertaining to him, and promptly, either make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or inform the individual of its refusal to amend the record in accordance with his request. . . ." 5 *U.S.C* 552a(d)(2); Several courts have construed the act to authorize expungements, as well as amendments. *R.R. v. Dept. of Army*, 482 F.Supp 770 (D.D.C. 1980); *Churchwell v. United States*, 554 F.2d 59 (8th Cir. 1976); *White v. Civil Service Commission*, 589 F.2d 713 (D.C. Cir. 1978). Certain types of records can be exempted, such as criminal law enforcement files. 5 *U.S.C.* 552a(j)(2).

and establishes detailed procedures for destruction.[23] It authorizes the archivist of the United States to determine if records have sufficient administrative, legal, fiscal, evidential, or informational values to warrant their continued retention. Under the Privacy Act agencies determine if records are to be expunged, notwithstanding the Federal Records Act. Soon after the adoption of the Privacy Act, questions were raised about the archivist's lack of involvement in making expungement decisions. A circuit court, when viewing the two acts, expressly held that the Federal Records Act must yield to statutory or constitutional rights elsewhere guaranteed, stating that "this general statutory command [the provisions of the Federal Records Act] must bow to them when they are more specific, as of course it must bow to the Constitution."[24]

Federal courts have found that expungement of records is, in certain circumstances, a permissible remedy for an agency's violation of the Privacy Act.[25] Two cases have expressly held this to be true when an agency violated the act's prohibition on maintenance of records describing an individual's exercise of rights guaranteed by the First

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23 44 *U.S.C.* 3301-3314 sets forth the procedures and conditions under which federal records may be destroyed or otherwise disposed. It ends by stating that "the procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter." 44 *U.S.C.* 3314. This is a contradiction to the Privacy Act expungement process. For a discussion of the disposition of Federal records, see James Gregory Bradsher, "An Administrative History of the Disposal of Federal Records, 1789-1949," *Provenance* 3 (Fall 1985): 1-21, and "An Administrative History of the Disposal of Federal Records, 1950-1985," *ibid.*, 4 (Fall 1986): 49-63.

24 *Chastain v. Kelley*, 510 F.2d 1236 n.4 (D.C. Cir. 1975).

25 *Hobson v. Wilson*, 737 F2d 126 (D.C. Cir. 1984).

Amendment.[26] It is equally well established that expungement of records is a proper remedy in an action brought under the Constitution.[27] Just last year the U.S. Court of Appeals for the District of Columbia Circuit observed that "document destruction, if feasible, is the ultimate relief available in a Privacy Act suit challenging the accuracy of agency records."[28] Thus, federal records can be, have been, and will be expunged with complete legal approval.

Federal archives, however, cannot be expunged. In drafting the Privacy Act, Congress specifically prohibited their destruction under the act.[29] That archival material was exempt from almost all provisions of the Privacy Act was the result of three arguments that National Archives made to Congress. First, the National Archives argued that archives were not current records used to make determinations about individuals which could adversely affect them. Second, it was argued that the integrity of archives could not be maintained if individuals could amend them. "The fact that

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26 *Clarkson v. Internal Revenue Service*, 687 F.2d 1368, 1376-1377 (11th Cir. 1982); *Albright v. United States*, 631 F.2d 915, 921 (D.C. Cir. 1980).

27 *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975); *Chastain v. Kelley*, 510 F.2d 1235 (D.C. Cir. 1975); *Matadure Corp v. United States*, 490 F. Supp. 1368 (S.D.N.Y. 1980).

28 *Melvin D. Reuber v. United States of America and Litton Industries, Inc.*, No. 84-5880, D.C. Cir. September 18, 1987.

29 5 *U.S.C* 552a(1)(3). As the House report notes, "a basic archival rule holds that archivists may not remove or amend information in any records placed in their custody. The principle of maintaining the integrity of records is considered one of the most important rules of professional conduct. It is important because historians quite properly want to learn the true condition of past government records when doing research; they frequently find the fact that a record was 'inaccurate' is at least as important as the fact that a record was accurate." U.S. Cong., House of Representatives, *Privacy Act of 1974: Report together with Additional Views to accompany H.R. 16373*, 93d Cong., 2d sess. H. rep. 93-1416, 1974, 21.

records are incorrect," according to James E. O'Neill, former deputy archivist of the United States, "is as much a part of history as if they were correct."[30] And, third, the National Archives argued that there were sufficient restrictions imposed by statute, the transferring agency, and the archivist, to protect individual privacy.

"The foundation of our arguments," O'Neill observed in 1976, "is the demonstrated tradition of the National Archives of assuming the ethical responsibility of protecting the privacy of individuals. It has always been a major part of our business," he maintained, "to balance the legitimate need to protect individuals from unwarranted invasions of their privacy against the equally legitimate demands for access to information. Our record in this area was a major factor in Congress' decision to grant the National Archives the exemption from the Act."[31]

Because ninety-eight percent of all federal records are temporary in nature, their expungement, before their scheduled disposal date, generally poses no problem.[32] Congress, however, neglected to address the issue of expunging permanently scheduled records that would become archives. They can be destroyed. So, is there a problem when permanently valuable records are expunged, in whole or in part, before they become archives? The answer depends upon a variety of factors, including what information is contained in the records, who is involved, the importance of the records to posterity, and societal views on privacy.

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30 James E. O'Neill, "Federal Law and Access to Federal Records," in Hamby and Weldon, eds., *Access to the Papers of Recent Public Figures*, 41.

31 *Ibid., 41.*

32 For a discussion of what percentage of records are permanent, see James Gregory Bradsher, "When One Percent Means A Lot: The Percentage of Permanent Records in the National Archives," Organization of American Historians *Newsletter* 13 (May 1985): 20-21.

Rather than attempting to delve deeper into the legal and theoretical aspects of expungements, it is more worthwhile to approach the subject from a personal perspective, because expungements involve real people. Because of the nature of the expungement process, there has been little written about it or the people who have been involved in the process.[33] But it is the human element that allows for a greater appreciation of the complexities involved in the expungement of permanently scheduled records. A case that allows insight into the process concerns Leland Stowe, a Pulitzer Prize winning journalist, who in 1986 donated the records relating to the expungement of his Federal Bureau of Investigation (FBI) file to the Bentley Historical Library at the University of Michigan. Not everything can be told about the Stowe expungement case, primarily because some of the information in his file was not made available to him, and, more importantly, to protect the privacy of third parties. However, what can be made public is illustrative of the problems involved in the expungement process, will serve as a basis to address concerns about expungements, and will assist in making a decision about whether the current law should be changed.

"Once one of the most celebrated foreign correspondents of his time, Leland Stowe (1899-)", it was written in a January 1985 *Ann Arbor Observer* article, "now passes practically unnoticed through the streets of Ann Arbor."[34] The name Leland Stowe means nothing to most Americans today, even in his hometown, but during the 1930s and 1940s, he was among the most successful and most admired

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33 For an account of one person's excursion through the expungement process, see Penn Kimball, *The File* (New York: Harcourt Brace Jovanovich, 1983) and *Penn T. Kimball v. Department of State*, Civil Action No. 84-3795, U.S.D.C. Southern District of New York.

34 Raymond Stock, "The Extraordinary Career of Leland Stowe," *Ann Arbor Observer*, (January 1985): 37-45.

foreign correspondents.[35] Working for the *New York Herald Tribune*, Stowe covered the League of Nations between 1927 and 1931 and the end of the Spanish dictatorship and founding of the Spanish Republic from 1929 to 1931. For his 1929 coverage of the Paris Reparations Commission, he received the Pulitzer Prize. In 1933 he covered the Reichstag fire trial in Berlin and published his first book, *Nazi Germany Means War*. Returning from Europe in 1935, he became a roving Western Hemisphere correspondent and then returned to Spain on leave of absence in 1937, and again in 1938, to cover the plight of the homeless and orphans from the Spanish Civil War.

In September 1939 Stowe joined the *Chicago Daily News* and went to Finland in December when that country was invaded by Russia. The following year he covered the German takeover of Norway and wrote a book about it, *No Other Road to Freedom*. In 1942 he became the first western correspondent to spend time with Russian combat forces. During the war he spent thirty-four months overseas traveling with the armies of seven different nations, reporting in forty-four countries and colonies on four continents, and in the process became one of the premier war reporters of the era. By the end of the war, he had won virtually every major award for foreign reporting and received honorary degrees from three universities, including Harvard.

Returning to the United States in 1944, Stowe published another war book, *They Shall Not Sleep*, became a correspondent for the American Broadcasting Corporation radio network, and wrote for the *New York Post* syndicate. He also did commentary for the Mutual Broadcasting System. In 1946 he published *While Time Remains*, condemning the

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35 Biographical information on Stowe came from a draft copy of "Leland Stowe," an entry prepared by Jack Schnedler, *The Dictionary of Literary Biography*, and Stock, "The Extraordinary Career of Leland Stowe," *Ann Arbor Observer*, 37-45.

decision to use the atomic bomb against civilians and calling for world cooperation, even world government, to control nuclear weapons. In 1949, he warned in *Target You* of Soviet territorial ambitions and discussed them again in his 1952 *Conquest by Terror: The Story of Satellite Europe.*

During the late 1940s and early 1950s, Stowe held a variety of positions, including director of Radio Free Europe's News and Information Service (1952-1954). In 1955 he began a twenty-one year part-time career as a roving editor for *Reader's Digest*, and the following year began a fourteen year tenure as a professor of journalism at the University of Michigan. He continued writing books, publishing his eighth in 1984.

In 1979, while assembling his papers for donation to the Mass Communications History Center in Madison, Wisconsin, Stowe wrote the FBI, under the FOIA, for information relating to himself. He believed, because of the views he had expressed during the Spanish Civil War, that he must have been investigated.[36] He was eventually supplied with 116 pages of materials, most of it from an internal security investigative case file. The file covered thirty years, beginning in 1943 with an internal security investigation of Stowe's activities on the Eastern Front and ending in March 1972 with documents relating to his unsuccessful attempt to interview J. Edgar Hoover for a favorable piece on the FBI Laboratory that he was writing for the *Reader's Digest.*

These latter documents indicate he was refused an interview with Hoover because of derogatory information in the files. That is, he was considered not worthy to see Hoover. What was this derogatory information? The documents Stowe obtained revealed that he had been the subject of an internal security investigation because "he was

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36 Stowe's typewritten chronology of his dealings with the FBI, 6 December 1982, in Leland Stowe Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan, 1. Hereafter cited as Stowe Papers.

associated with communist front groups and activities in the World War II period, and also expressed sympathy and support toward the Soviet Union." Additionally, the file indicated that during a radio broadcast in August 1947, while discussing the Federal Employees Loyalty Program, Stowe "made statements implying improper actions on the part of the FBI." His comments prompted Hoover to write a letter of protest to the Mutual Broadcasting Company.[37]

The release of the file was quite enlightening to Stowe. He had not been aware the FBI had been monitoring his activities and personal communications.[38] He believed that the file was riddled with factual errors and misrepresentations, and he was disturbed that the file represented him as a person of uncertain loyalty to the American government, of being unduly admiring of the accomplishments of the Soviet government, and as being an associate of others of similar disposition. The allegations in the file, Stowe realized, had been disseminated and had a negative impact on his life. He believed that what he once considered unrelated setbacks in his professional life in the 1940s and 1950s--loss of a series of lucrative speaking engagements and a failure to obtain a routine security clearance to continue a job with Radio Free Europe--were the result of the distribution of this derogatory information about him.[39]

Believing that the "true" story should be told, Stowe attempted to have the FBI amend his file. On 30 August 1980 he sent the FBI over seven hundred pages of documents giving his version of events. A month later the FBI informed Stowe that certain information maintained in their

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37 Copy of FBI memo (FBI file 100-192690-31) from M. A. Jones to Mr. Bishop, February 27, 1972, Stowe Papers.

38 Michael V. Smith, "The Problem of Determining Motives in FBI Surveillance of Journalists and the Case of Leland Stowe," a paper prepared at the University of Michigan's Department of Communication, [1984], 6, 7, 16 n. 11. Stowe Papers.

39 *Ibid., 8.*

files was exempt from the correction and amendment provisions of the Privacy Act, but that it was their policy to consider each request on an individual basis in order to reach an equitable determination consistent with the best interests of both the individual and the government. As for his documents, Stowe was told that the information contained in his file was "an accurate recording of what was furnished to us by several sources, and is completely relevant to the purpose for which it was collected." However, he was informed that "in view of the age and nature of this material its continued retention is unnecessary, and could be destroyed in its entirety." Stowe was told that if he wanted the file destroyed he would have to ask that it be done.[40]

Stowe wrote the FBI on 6 November 1980 to ascertain what would be destroyed. The FBI responded two weeks later, informing him that the destruction of FBI records concerning him would include index cards, one investigative file of which he was the subject, and all references in other files identifiable with him.[41] Although he "felt a certain obligation to preserve what might be considered an important historical record," he "believed it likely that the data might contribute to a future history that would be insensitive to the FBI's distortions and to the lives of those who--like himself--had been unknowing and essentially innocent victims of the agency." Unless the file could be amended, "Stowe believed the future would be served better by the file's destruction than by its preservation."[42] On 24 November 1980, Stowe wrote the FBI approving the destruction.[43]

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40 Thomas H. Bresson to Leland Stowe, 30 September 1980, Stowe Papers.

41 Thomas H. Bresson to Leland Stowe, 19 November 1980, *ibid.*

42 Smith, "The Problem of Determining Motives in FBI Surveillance of Journalists and the Case of Leland Stowe," 9.

43 Leland Stowe to Thomas H. Bresson, 24 November 1980, Stowe Papers.

Because the complete file was to be expunged, the FBI, acting under National Archives regulations, requested that the National Archives document that the records would be destroyed.[44] Several National Archives appraisers looked at the file during the winter of 1981-1982. Most of them believed the file should not be destroyed. Acting on their advice, James E. O'Neill, then assistant archivist for presidential libraries and director of the National Archives Records Appraisal Task Force, wrote Stowe in hopes of discouraging him from his disposal request. Stowe was told that "the destruction of this case file would create an enormous gap in the historical record of the FBI. Your professional career," O'Neill wrote, "would be of considerable interest to anyone doing a study of 20th century American journalism, the molding of American public opinion during WWII and the early Cold War era, and how the government monitored dissent during the 1940s." Stowe was informed that if he withdrew his disposal request the file would not be opened to the public until the year 2022, fifty years after the case file was closed.[45]

"In its present state," Stowe wrote O'Neill, "my case file is inevitably one-sided; perhaps, in some degree unavoidably so--but much more so because of the Bureau agents' acceptance of charges made against me without any recorded effort to check up on their validity or veracity." Stowe wrote that in the file he had found numerous unverified allegations of his being "a Red, a Communist or pro-Soviet

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44 The National Archives regulations are set forth in GSA Bulletin FPMR B-74 Archives and Records, Subject: Disposal of Federal records in response to requests made pursuant to the Privacy Act, 17 January 1978. These regulations allow federal agencies to expunge up to 99.9 percent of any record without National Archives involvement. If complete destruction is requested, agencies must involve the National Archives in the process, so the destruction can be documented.

45 James E. O'Neill to Leland Stowe, 11 March 1982, Stowe Papers.

fellow-traveler" and "also many easily disprovable reports and interpretations concerning my journalistic writings and ideological attitudes. These discrepancies," he wrote, "are especially noteworthy because the agents' reports were totally lacking any counter-balancing or refutory facts--readily available at the time--about my professional and public career." His file, he believed, was "demonstrably distortive--frequently extremely so--of my journalistic record and all factual evidence of my dedication to democratic principles and my lifelong loyalty to our American form of government is omitted."

Therefore, Stowe continued, if his file was to be preserved for historical purposes, "I firmly believe that my own counter-balancing documents should be included. Elemental justice," he believed, "would make such inclusion a prerequisite, and historically indispensable. Should NARS [National Archives and Records Service] wish to preserve these documents--together with my FBI file for future historical reference--I would welcome having the combined materials ultimately become available, among the Archives' important and most useful collections--even if not until the year 2022 AD." If the National Archives would not do this, he wanted his file destroyed.[46]

During the summer of 1982, the National Archives informed Stowe that he could not attach material to his file when it was accessioned. Thus, he desired his file to be destroyed. The next summer the archivist of the United States "approved" the file's destruction.[47]

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46 Leland Stowe to James E. O'Neill, 29 March 1982, *ibid.*

47 Early in 1986, Stowe was informed the FBI was processing his request and that the file would be destroyed in the near future and that he would be notified when the expungement was completed. James E. O'Neill to Leland Stowe, 27 February 1986, *ibid.*

Stowe's case is an excellent example of the dilemma faced by those dealing with the right to know, the right to privacy, and the expungement process. What was lost and gained in the destruction of his file? Stowe gained the satisfaction of knowing that what he believed was a file full of false allegations, errors of fact and interpretation, and misrepresentations, was destroyed. His reputation, and his privacy, will be protected. It could be argued that nothing was lost by the destruction. After all, other FBI files will reveal its internal security activities--legal and illegal. With respect to Stowe, if someone was interested in him and his encounter with the FBI, they could obtain information elsewhere. Stowe himself did not think his case file particularly important, writing the National Archives that until it contacted him, he considered "its value seemingly very slight."[48]

Three things were lost by the destruction of Stowe's file. First was unique information about Stowe. Second was evidence of an FBI investigation of a prominent journalist. And third was evidence, along with his own papers, to show the impact of the FBI on his life. Had Stowe received a security clearance he might have assumed an even higher position with Radio Free Europe, and thus, the last thirty-five years of his life might have been very different.

The right to know was sacrificed to Leland Stowe's right to privacy. Should it have been? In the process of protecting privacy should the eventual right to know be sacrificed? Should the FBI have been allowed to destroy the Stowe case file? The Stowe case is not an isolated example. Inaccurate or illegally obtained information, of varying importance, contained in permanently scheduled records, is being destroyed to protect privacy rights on a continuing basis. In most instances, no great harm results from such expungements. In part, this is because of the nature of the

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48 Leland Stowe to James E. O'Neill, 29 March 1982, *ibid.*

information; in part, it is because of the belief that great weight should be given to privacy, since it is basically, if not legally, a natural right and not so easily given up to society without exceptional cause.[49] In most instances, the right to know is not an exceptional cause, either today or for the sake of history, but there are exceptions.

During the Nixon administration, the White House had the FBI illegally wiretap seventeen American citizens that it believed were responsible for leaks. Subsequently, the public learned of these wiretaps, and Congress held hearings about them.[50] Some of those who were wiretapped wanted the related records made public, while others wanted to keep the contents of the files private, and one person wanted his file expunged. What if all seventeen individuals had asked to have their wiretap files expunged, based on the fact that they should not have been wiretapped? If the files were destroyed to protect their privacy and to right a government wrong, will history know? The answer is no. If there is no record of the misdeed, then for all practical purposes it did not happen. Is this what archivists and historians want?

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49 On privacy as a natural right, see Bernard Schwartz, *A Commentary on the Constitution of the United States. Part III. Rights of the Person* (New York: The Macmillan Company, 1968), 169-258; Louis Brandeis and Samuel D. Warren, "The Right to Privacy," *Harvard Law Review* 4 (15 December 1890): 193-220; Charles Grove Haines, *The Revival of Natural Law Concepts* (Cambridge: Harvard University Press, 1930), 85; Henry Steele Commager, "Constitutional History and the Higher Law," in *The Constitution Reconsidered*, edited for the American Historical Association by Conyers Read, revised edition with a new preface by Richard B. Morris (New York: Harper & Row, Publishers, 1968), 230, 232.

50 David Wise, *The American Police State: The Government Against the People* (New York: Vintage Books, 1976), 31-95.

The answers to the above questions lie, for the most part, in how the right of privacy is viewed in relation to the right to know--the desire of historians and others to have raw data on which to base their judgments of events, activities, and people. On one hand privacy is an important right, not so easily sacrificed without good reason and with due process. Yet, there are instances when it is necessary to know now as well as in the future when an individual's privacy must be sacrificed for the greater good of society. For example, if records document individual or a pattern of government abuses and nobody knows, no action can be taken to correct the situation. With information available to it, society can, through one or more branches of government, mandate changes.

Under current expungement procedures, historically valuable information is legally destroyed. Professional archival judgments carry no weight in the process of balancing privacy with the right to know, because under the law the decision whether or not to expunge does not lie with archivists, but with the individuals and agencies involved. Thus, there is a need to change the way expungements are handled if permanently scheduled records of exceptional value are to be preserved and eventually made available for research.

The easiest solution, though perhaps not the best, would be to have Congress change the Federal Records Act to provide that once records have been appraised as having enduring value, they be considered archival, and thus not subject to expungement. This, of course, would mean a change in the United States' definition of archives, much along the lines of the French Archival Law of 1979 that provides that permanently valuable records become archives the minute they are created or received.[51]

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51 Michael Duchein, "Archives in France: The New Legislation of 1979," *Archivaria*, 11 (Winter 1980-81): 128.

If there is to be a change, it must be made within a workable formula which encompasses, balances, and appropriately protects all interests. The "determination of the propriety of an order directing expungement," according to a circuit court, "involves a balancing of interests; the harm caused to an individual by the existence of any record must be weighed against the utility to the Government of their maintenance."[52] The court was thinking in terms of current administrative usefulness to the government, not future uses in terms of informational and evidential values. As the expungement process now works, federal agencies, in approving expungement requests, are protecting the interests of privacy, but not the interests of those who want to know.

Assuming that in some instances the right to know takes precedence over the right to privacy, who should be responsible for making the decision--the choice between retention and destruction? Federal agency personnel should be excluded for the same reason they are excluded from having the final say on appraisal judgments--because they are, for the most part, not as experienced or as well trained as federal archivists in judging the archival value of records. If federal agencies are eliminated, three choices remain: the legislature, the courts, and archivists.

Congress, although responsible for amending the Privacy Act, cannot directly involve itself in the expungement process. "The conflict between the general public's right to know what its government is doing and the individual's right to have some control over the dissemination of personal information held by the government is an extremely difficult one to resolve" according to one legal scholar. "And it is doubtful," he adds, "that any legislative formula could offer more than general guidelines for handling the kaleidoscopic factual problems that are certain to arise."[53] This was written four years before Congress enacted the Privacy Act.

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52 *Paton v. La Pradae*, 524 F. 2d 868 (3d Cir. 1975).

53 Miller, *The Assault on Privacy*, 153-154.

It encompasses a great deal of truth. There are so many situations that Congress could not adopt legislation covering every specific situation. Thus, realistically, Congress can only amend the act to provide some general guidelines covering expungements of permanently scheduled records.

If the Privacy Act is amended, it should provide that agencies must have the approval of the National Archives before any portion of permanently scheduled or as yet unscheduled records are destroyed under an expungement request. Such a provision would be based on the premise that archivists are better qualified than agency officials to determine the historical value of records and are adequately trained to balance privacy and the right to know. If the National Archives believes that records should not be expunged, in whole or part, the involved citizen should be informed and given the opportunity to appeal the decision, or possibly to suggest a partial expungement, such as name and other personal identifiers, or to agree to keeping the file closed for an appropriate length of time. The person could be given the opportunity to amend the record, within reason, and the record would either be opened at its normal time or after an extended period of time, or the individual could be allowed to attach a statement indicating where countervailing evidence is located.[54] These options are in keeping with a federal court's finding that expungement is a "versatile tool" where "expungement of only some records, from some Government files, may be enough, as may the placing of restrictions on how the information contained in the records may be used. It is a tool which must be applied with close attention to the peculiar facts in each case."[55] If a compromise cannot be reached by both parties, then the decision should be rendered by the courts.

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54 For a brief discussion of a person's ability to dispute information, see Regina C. McGranery, "A Donor's View," in Hamby and Weldon, eds., *Access to the Papers of Recent Public Figures, 54-56.*

55 *Chastain v. Kelley, 510 F.2d 1236 (D.C. Cir. 1975).*

Courts frequently have been called upon to determine whether privacy exists as a legal right and, if so, then to what extent and under what conditions. Constitutional rights of free speech, press, and assembly are often set up in opposition to privacy rights and the courts called upon to strike a delicate and often difficult balance between privacy concerns, on the one hand, and constitutionally protected interests in free expression, on the other.[56] Expungement cases could be handled by the courts through two methods. The first would be to let the courts review the documentation and render a decision. If the decision was unsatisfactory to either the National Archives or the individual, then a court hearing could be held, and its decision appealed to a higher court if necessary.

Privacy expungements involve complex and subtle issues. They are issues on which archivists can disagree, both as to whether the right to know or the right to privacy should be given greater weight and as to what records are of such importance that they are worthy of being preserved, despite being the subject of a legitimate expungement request. As the federal expungement process now works, archivists have no influence in the process. The decision to expunge permanently scheduled records completely--just one step removed from being archives--is left in the hands of the agencies and their officials who have custody of the records. These officials, in most instances, do not mind destroying records--not only to protect the rights of citizens but also to protect their agency from lawsuits for having certain information and not destroying it.

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56 Adam Carlyle Breckenridge, *The Right to Privacy* (Lincoln: University of Nebraska Press, 1970), Chapter 3, "Rights in Conflict," 55-82; Paul Bender, "Privacy," in Norman Dorsen, ed., *Our Endangered Rights: The ACLU Report on Civil Liberties Today* (New York: Pantheon Books, 1984), 237-258.

Under the current expungement process not only is history shortchanged, but the present society's ability to know fully what its government is doing to its citizens is also. Thus, there is a need to change the current process, to amend the Privacy Act along the lines outlined earlier. By doing so, by bringing archivists into the process, a balance can be struck between the right to know and the right to privacy. Neither is an absolute, especially when placed in opposition to the other. But while gaining a greater role in the expungement process, archivists should remember that while the right to know, not only today but also tomorrow, is a political right that is very important to a democratic form of government, the right to privacy is certainly one that should not be sacrificed without exceptional cause.

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