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## Historians, Archivists, and the Privacy Issue

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## HISTORIANS, ARCHIVISTS, AND THE PRIVACY ISSUE

Walter Rundell, Jr., and Bruce F. Adams

Paradox, Reinhold Niebuhr has told us, lies at the heart of history. The issue of privacy, as it concerns historians and archivists, dramatically underscores his observation. Most of us affirm the need for personal privacy and applaud governmental measures to insure it. Yet if such measures interfere with the legitimate efforts of scholars to search into the past, our enthusiasm quickly becomes tempered. The other aspect of the paradox is the tendency for governmental agencies to blur the issue by assuming for themselves the privacy meant to protect private citizens. When such occurs, those scholars supporting the principle of privacy for persons reverse themselves to oppose the notion that governmental actions deserve the same protection afforded individuals. Historical scholars are likely to embrace the paradox by supporting privacy until it interferes with objective analysis of the past and by supporting it for the citizen but opposing it for the government.

Historians long have stood at the periphery of the increasingly vociferous controversy that roars about this issue. While they have looked on, events, which they have neither set in motion nor controlled, have placed the very sources of history in jeopardy. And now, instead of a ring-sider, the historian must become a participant; for he is already a victim, squeezed between the seemingly paradoxical threats. The old, familiar antagonist--government secrecy and security classification--has weakened little, despite several recent executive orders ostensibly intended to limit its powers. And a newer force, also an enemy of government secrecy, has emerged recently as a potentially graver menace. This is the crusade to safeguard

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Professor Rundell is chairman and Mr. Adams a member of the Department of History at the University of Maryland. Professor Rundell is also a member of the Council of the Society of American Archivists. This paper was read by Professor Rundell at the American Historical Association annual meeting in Chicago, December 29, 1974.

personal privacy.

The matter of government secrecy and the system of security classification have been debated for many years. Much of the drama of this debate has been public and is familiar to us all. The press and television have given wide play to statements by proponents of all points of view, especially their own, which, quite naturally, comes down on the side of free access. But both sides suffer from arguing over material which usually remains unknown; so the merit of the protagonists' claims, like the strength of a punch thrown in shadow boxing, is difficult to gauge. Unable to use specific weapons, they fight with slogans--"the free press," "the right of the people to know," the ominous and dependable "danger to national security." The media attack in editorials, government officials counter with somber talks and stubborn, but sincere, silences.

We expect newsmen to act in one way and government officials in another. To hear James Schlesinger talk like Daniel Ellsberg would surprise us all. We can even say that the foregoing slogans have become set pieces for familiar characters in traditional roles, but this is not to make light of them. It has been many years since Thurman Arnold pointed out so brilliantly in The Symbols of Government<sup>1</sup> that our society thrives on precisely such drama. Surely we can not callously assume that the actors in this drama do not appreciate the importance and the validity of what their antagonists are saying. But just as we insist that a lawyer defend a guilty felon, so we must approve the strange forms this debate often takes. From the debate we hope for a compromise we all can work with. Until, of course, the continuous debate again alters the compromise.

In his years on the Supreme Court, Justice Potter Stewart has made decisions which more radical supporters of each side of this debate would deem contradictory. A fairer observer will realize, however, that his vantage point has given him an excellent view of the drama. Speaking at the Yale Law School's 150th year convocation last month, he said, "The press is free to do battle against secrecy and deception in government, but the press cannot expect from the Constitution any guarantee that it will succeed." Ingenuity, specific laws passed by Congress, what Justice Stewart called "the tug and pull of the political forces in American society," and not law suits based on the imprecise First Amendment are the tools the press must employ to root out information held by the government.



"There is no constitutional right to have access to particular government information or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a free press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." <sup>2</sup>

The media are principally concerned with current events, with, if you will, history in the making. Historians in the last several decades have become increasingly concerned with recent history. At precisely the same rate their professional interest has grown, awareness of and frustration with the problems of the access debate have also developed among historians. Numerous stories circulate about individual historian's encounters with reluctant government officials, archivists, and gummy red tape. Serious questions have been raised about whether a democratic society can function properly without easy access to information generated by its government. Not too long ago the case was stated effectively: "Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and--eventually--incapable of determining their own destinities."<sup>3</sup> When President Nixon said this in March, 1972, Watergate, those troublesome tapes, executive privilege, and the exposure of his brazen dishonesty (perpetrated, of course, in the name of national security) all lay down the road. But he was dead right. When the White House withheld information from the people, they began to distrust those in power and finally learned that the integrity of the Nixon presidency was nonexistent.

Nixon's efforts to maintain the secrecy or privacy of White House operations brought to general attention a problem that many scholars have had in getting access to government data. One of our graduate students at the University of Maryland has written a dissertation on James M. Landis' career. In the course of his research he needed to see some FBI records from 1940-1941 concerning Harry Bridges. These records totaled 2,839 pages, contained in three archives boxes, yet the searching and reproducing fee quoted by the FBI came to \$1,498.90, something beyond the means of the average graduate student.<sup>4</sup> Another researcher--could his name have been Yossarian?--needed data from the Department of Agriculture. He described his problem thus:

"The only way that I could make my request specific was to get access to the indexes by which these files were recorded. When I asked for access to the indexes, I was told they were internal memoranda, and not available to me. Therefore, I had to make my request in a broad fashion and they came back with a bill for \$85,000 which we regretfully had to turn down."<sup>5</sup> Such responses from governmental agencies belie any effort or intention of complying with the Freedom of Information Act and can only create in citizens distrust and cynicism for their government. Frustrated researchers have learned that despite tremendously improved storage, cataloging and retrieval systems, many sensitive, and therefore important, collections of archival papers remain inaccessible. Those areas of the past which are usually most shrouded in secrecy--administrative, diplomatic, and military affairs--are precisely the areas in which historians find they must reply upon federal statutes regulating access and upon the probity of government officials.

Some of these officials have been politicized. Their experience has made them part of the political process; their frustration has placed them in the drama. How they act in a politicized environment depends upon their background, conditioning, ambition, and philosophical outlook. Bureaucrats often find it easier to protect the interests of their agency by making access to its records difficult than to grant easy access to searchers. After all, what the researcher never finds out about the agency cannot hurt it. In this sense, the agency is maintaining its own privacy against unwanted intrusion. Career bureaucrats naturally harbor a proprietary feeling about their agencies and frequently seek to promote their welfare ahead of that of the public. From time to time, however, civil servants put the commonweal before particularism, and they become true heroes or heroines of our republic. Archivists can take great pride in the fact that one of their own recently qualified in the role of heroine. Mary Walton Livingston blew the whistle on President Nixon for backdating the donation of his vice-presidential papers to the National Archives.<sup>6</sup> Her action proved that the ideals on which our democratic society was founded can shine through and prevail against the tawdriness of those in political power.

American liberal political tradition maintains that a democratic society must continuously inform itself about the functioning of its government. This is, of course, one of the stronger motivations to study and write recent



history. Constitutional guarantees of freedom of speech, assembly, and of a free press, which protect the idea that an informed society is a free society, symbolize this tradition most powerfully. Those among us grateful for the services of the National Archives and Records Service (NARS) and familiar with its history may feel that the difficulty J. Franklin Jameson encountered in persuading the government of the need for a National Archives denies these symbols. But Jameson's struggle can be seen as analogous to our own. Government does not always behave as its symbols suggest, and now as then government must be pressured to make itself accountable to the governed. The symbols and slogans are only convenience. They stand for our own beliefs and make them expressible if not eloquent, and they belong to us all to use as persuasively as we can. A very good recent book about part of this problem, entitled Classified Files: The Yellowing Pages,<sup>7</sup> concludes that all forms of the Freedom of Information Acts ultimately depend on the "good will of officials responsible for interpreting and enforcing" classification. Can it be otherwise? In the drama we ought to demand more effective legislation, and we might get some. But legislation in such a blind area can do little more than create an atmosphere or a climate of opinion in which secrecy will be avoided where possible and classification sensibly limited.

There are too many intricate and delicate problems of domestic politics and international diplomacy to expect all closed doors to be immediately opened. In our own work on university committees and boards, we recognize the benefits of closed meetings, and surely we feel the pressures to open them. Congressmen in more candid moments admit they behave differently in the presence of cameras and work better at compromise out of the public eye. Yet more and more we insist they open their committees and caucuses, or at least the archival records of these meetings, while the participants are still alive and vulnerable. The paradox pervades our social life. Where the conflict flares is in the gray area, the nebulous line that we call "reasonable" limits of secrecy and security. We all have opinions about "reasonable" and excesses and abuses, and it is about this that we must join debate.

An issue has recently arisen on college and university campuses that underlines the conflict between the need for privacy in communication and the individual's right to know. Whether the Family Educational Rights and Privacy Act, the

so-called Buckley Amendment, offers a "reasonable" solution to the problem of students' access to information concerning them in the files of registrars' offices and placement services remains to be tested. But it certainly reemphasizes the paradoxical nature of the problem.

Students, as citizens, should have the right to confront and correct inaccurate information in their files. The privacy issue intrudes, however, when students get access to confidential letters of recommendation in their dossiers. Ironically, those letters got there through students' requests of faculty to write in their behalf, the professors writing with the explicit understanding that the communication was privileged and that the student would have no access to it. Such assurance was the only way a candid and therefore helpful comment could be made. With the Buckley Amendment becoming operative on November 19, 1974, no professor who wants to avoid litigation will henceforth write an uncomplimentary assessment of a student. As a result, admission and placement dossiers will become unreliable guides to a person's abilities and character. Though only the naive use them uncritically, the Buckley Amendment renders them virtually useless.

But what about students' access to those letters written under the assurance of privacy? If students now gain access to such documents, are not the legal rights of the writers compromised? And might not the writers be in a position to sue those institutions betraying their trust by granting access to the privileged information? Harvard University has solved this problem by requiring that graduates, who want their dossiers sent out, request a letter to the Harvard placement service, from references granting release of the statement. Naturally, some deponents might not want to give a blanket release, thereby enabling the subject of the letter to know what had been said. In such case, the writer would have the embarrassing task of explaining his unwillingness to the student he had written for. It would be fairly obvious that the writer had been less than glowing in his comments, unless he chose to stand on the principle of confidentiality alone. The necessity for any of the foregoing alternatives tragically highlights the absence of trust, concern, and responsibility that used to characterize higher education. Such absence is merely another aspect of the decaying fabric of American society.

Personal privacy, as distinct from government secrecy, is an issue older than man, so anthropologists tell us, and



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one quite full of paradox. All animals and primitive humans show need for physical or psychological privacy of some sort. But conversely they also exhibit the social urge to reveal themselves to others and to know about these others. As with the "need" and "right" to secrecy, we are unable to set precise limits to privacy. But we do have attitudes about what is reasonable and excessive, perhaps even a double or multiple standard. Certainly we demand to know more about public officials--their voting record, the state of their physical and mental health, even their marital fidelity--than we would consider telling employers about ourselves.

At least one prominent public official has recently been amazingly willing to inform his fellow citizens of his extra-marital shenanigans. His hijinks have been faithfully recorded on video tape from Washington's Tidal Basin to the stage of Boston's Pilgrim Theater. Mr. Mills manifestly has not sought the privacy most individuals would desire. His antics call to mind those of another Southern politician whose entire career was flamboyant, decidedly unlike that of Mills prior to the Tidal Basin debacle. Even when he sought privacy, Governor Earl Long of Louisiana attracted attention by his eccentricity. In one of his more aberrant moments in July, 1959, Ole Earl withdrew from persistent reporters by drawing a pillow case over his head before entering the leading Fort Worth hotel--attired normally otherwise.<sup>8</sup> There was a man who treasured privacy!

When we write biography, such anecdotes and intimate details of private life add flavor, color or personality to our subjects. But what if our subject, or near relatives, are still living? What is the privacy of a public man? In practice public figures and historical subjects have different "rights" from private citizens. At least we treat them as though they have. But to what degree can we make this distinction? As historians and archivists interested in preserving the record of the past for its legitimate uses, recalling that Robert Todd Lincoln destroyed many of his father's personal papers reminds us of the fragility of the past. No way has been devised to insure against such occurrences, whatever the distress of those dedicated to preserving and interpreting the records of the past. Robert Todd Lincoln may be judged culpable, for he knew his father belonged "to the ages," as Stanton put it. What about someone like Willa Cather, who deliberately destroyed her personal records to prevent prying scholars from knowing more than she chose to reveal of herself in her fiction?



Not a public person, to be sure, yet because of her literary prominence did she have the artistic right to deny the world further access to her creative wellsprings? She thought she did, but she has left us the poorer. Her intense desire for privacy has denied us deeper understanding of the human condition, the ultimate aim of historical scholarship.

In the legal sense, privacy and its invasion are complex and changing matters regularly debated in the courts and legislatures. In the last several decades American jurists and legislators have declared more and more areas of citizens' private lives legally inviolable. At the same time privacy has also become a hot political issue.

In large part the rapid growth of concern for privacy is a reaction to the technological revolution that has occurred since World War II. A great variety of vastly improved eavesdropping and visual snooping devices offer law enforcement agencies, as well as private detectives and electronic voyeurs, unprecedented opportunity to invade the privacy of others. The illegitimate use of these devices creates a continual stir, while even authorized wiretapping emerges every few years for a political and legal airing. Only five or ten years ago, criminal cases frequently were thrown out of court for violations of privacy by the police, who often misused their new arsenal of surveillance techniques. It happens less frequently now, but only because civil libertarians and enforcement officials have debated the right and proper use of these techniques, as well as their abuse. Enforcement agencies have trained their personnel in the resulting legal compromises.

Since the 1960s another facet of this technological revolution--the computer--has become principal villain in the privacy drama. Specifically, the compilation and sharing of personal record data through computer systems has come under attack as a serious invasion of privacy. In 1974 several bills were presented in Congress to regularize the use of such records and to make them available to the individuals about whom they were kept. H. R. 16373, which billed itself the "Privacy Act of 1974," explained the problem clearly.

The Congress finds that--

- (1) the privacy of an individual is directly

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affected by the collection, maintenance, use and  
dissemination of personal information by Federal  
agencies;

(2) the increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from any collection, maintenance, use, and dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use and dissemination of information by such agencies.

Incidentally, and apparently inadvertently, such privacy legislation, particularly H. R. 12206, seriously menaced the very functioning of NARS.

H. R. 12206, "A Bill . . . to provide that persons be apprised of records concerning them which are maintained by Government agencies," proposed to require that

(a) Each agency that maintains records, including computer records, concerning any person which may be retrieved by reference to, or are indexed under such person's name, or some other similar identifying number or symbol, and which contain any information obtained from any source other than such person shall, with respect to such records--

(1) refrain from disclosing the record of any information contained therein to any other agency or to any person not employed by the agency maintaining such record, except,



(A) with notification of the person concerned or, in the event such person, if an individual, cannot be located or communicated with after reasonable effort, with notification of members of the individual's immediate family or guardian, or, only in the event that such individual, members of the individual's immediate family, and guardian cannot be located or communicated with after reasonable effort, upon good cause for such disclosure, or

(B) that if disclosure of such record is required under section 552 of this chapter or by any other provisions of law, the person concerned shall be notified by mail at his last known address of any such required disclosure.

Agencies were also enjoined to:

(2) refrain from disclosing the record or any information contained therein to individuals within that agency other than those individuals who need to examine such record of information for the execution of their jobs;

(3) maintain an accurate record of the names and addresses of all persons to whom any information contained in such records is divulged and the purposes for which such divulgence was made;

(4) permit any person to inspect his own record and have copies thereof made at his expense, which in no event shall be greater than the cost to the agency of making such copies;

(5) permit any person to supplement the information contained in his record by the addition of any document or writing of reasonable length containing information such person deems pertinent to his record; and

(6) remove erroneous information of any kind, and notify all agencies and persons to whom the erroneous material has been previously transferred of its removal.

No statute of limitations exempted retired personnel files. No exception was provided for NARS. Frightened by the prospect of having to request permission of

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Revolutionary and Civil War veterans at their last known address before opening their files to historians, the Archives staff mobilized to make Congress aware of what the archivists hoped was merely an oversight. They estimated that H. R. 12206, if enacted, would initially cost NARS almost one million dollars. Annual recurring costs, depending upon the interpretation given separate paragraphs, ranged between \$340,000 and \$2 million. Federal Archives and Records Centers faced expenses more than double these.

One-time costs of S. 3418, a similar but more comprehensive bill presented to the Senate in May, were estimated at over 5.5 billion dollars. S. 3418 required that every individual in every record system be notified of his right to see and petition to amend his file. The National Archives alone holds over one billion such files, and Federal Archives and Records Centers contain even more. Annual recurring costs under S. 3418 were estimated at almost \$13 million for all of NARS. Even beyond the staggering expenses, delays forced by procedural requirements promised to render the system useless to historians.

Through the General Services Administration, the Archives presented its case on the Hill. At least one representative addicted to polka dots and broad-brimmed hats was heard to express the opinion that historians are busybodies, who have no more right to poke about in the private lives of the dead than the government has of invading the privacy of the living. Fortunately, this point of view did not prevail. Section 204 (b) of S. 3418 as revised August 26 now reads:

Federal agency records pertaining to identifiable individuals which were transferred to the National Archives of the United States as records which have sufficient historical or other value to warrant their continued preservation by the United States Government shall for the purposes of this Act, be considered to be maintained by the National Archives and shall be subject to the provisions of this Act . . . .

Several minor exceptions to this broad exemption follow, but they no longer endanger the historical services of



NARS. H. R. 16373, which replaced H. R. 12206, provides similar exemption for archival records. Both the Senate and House bills passed on November 21, 1974. A joint committee is expected to resolve differences between the two. [The differences were resolved and the measure signed into law by the President on December 31, 1974.]

This scare seems to have passed. But historians and archivists had best not relax too deeply. The problem promises to return. Our federal bureaucracy continues to grow, and it will continue to guard some information jealously. Computers and data systems are also here to stay, and the debate over their use and abuse will only grow stronger as the hardware and techniques improve. We will have to remind our government and ourselves that we do serve a function in this society, that the study of history, as part of a liberal education, does help us understand and deal with the complex forces of our political, social, and economic life. The rationalizations for the study of history are myriad. Our individual versions probably differ significantly. At base, however, many are embodied in the symbols of American political life. We should appreciate the antagonistic forces in the clash of secrecy, privacy, and the historian's need to know. But in the drama taking place, it is our part to use these symbols to continue to demand and provide access to the records of the American democratic experiment. By so doing, we can confirm that ours is indeed a free and open society where the government exists for the welfare of its citizens and not merely to aggrandize its own power. The concept of citizens' privacy is sacred, but the government must not use privacy to cloak dishonesty and other activities inimical to the public good. Historians and archivists should have little doubt about which government the sage had in mind when he said: "Eternal vigilance is the price of liberty."<sup>9</sup>

FOOTNOTES

<sup>1</sup>New Haven: Yale University Press, 1935.

<sup>2</sup>November 1, 1974 in Washington Post, November 2, 1974,  
p. 2.

<sup>3</sup>President Nixon, upon issuing an Executive Order in 1972 dealing with classification and declassification of government documents. Senate Report No. 93-854, "Amending the Freedom of Information Act," 93d Cong., 2d Sess., p. 5.

<sup>4</sup>Donald A. Ritchie to W. R. and B. F. A., December 8, 1974.

<sup>5</sup>Hearings before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Committee on the Judiciary, U. S. Senate, and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 93d Cong., 1st Sess., Vol. II, p. 97.

<sup>6</sup>Washington Post, October 3, 1974, p. A4.

<sup>7</sup>Carol M. Barker and Matthew H. Fox (New York: Twentieth Century Fund, 1972).

<sup>8</sup>"Irate Long Returns to Texas," Dallas Morning News, July 12, 1959, Sec. 1, p. 1.

<sup>9</sup>John Philpot Curran, "Speech upon the Right of Election," 1790.