

ARCHIVAL SYMPOSIA

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# Constitutional Issues and Archives



Mary Boccaccio, *Editor*

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Mid-Atlantic Regional  
Archives Conference

# *Constitutional Issues and Archives*



A collection of essays from the Fall 1987 Meeting of  
the Mid-Atlantic Regional Archives Conference,  
*"Archives: The Living Constitution."*

Mary Boccaccio, *Editor*

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The Mid-Atlantic Regional Archives Conference (MARAC) publishes *ARCHIVAL SYMPOSIA* to provide a forum for analysis and discussion of some of the most important issues facing archivists today. Most of the essays in this series will originate from papers delivered at MARAC meetings, though the editor may select supplemental essays for inclusion.

The series editor welcomes proposals for future publications and comments from readers.

## **ARCHIVAL SYMPOSIA**

Erika Thickman Miller, Series Editor  
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## **Foreword**

### **Public Archives in a Constitutional Setting: Serving Government, Individuals and Society**

During the summer of 1787 a national constitution was written to provide a framework of national government "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." The Mid-Atlantic Regional Archives Conference (MARAC) celebrated the bicentennial of our Constitution at its Fall 1987 conference.

At that conference, entitled "Archives: The Living Constitution," sessions focused on the variety of ways in which archives - as records and manuscripts and as institutions and agencies - exemplified aspects of a living Constitution. The theme for the conference was suggested by Karen Paul, the Program Chair, and was readily agreed to by the Program Committee, of which I was a member. We believed that MARAC needed to join others in the bicentennial celebrations. We wanted sessions that would remind conference attendees of the importance of archives and archival institutions in a democratic scheme of governance. We also wanted attendees to remember that administering archives, and our governments, in democracy is often a difficult task, given the nature of democratic theory and practice, but that in that difficulty lies the strength of our form of government, its responsiveness to We the People.

The conference was a success. Sessions were not only well attended but the first-rate papers presented evoked lively discussions. The success of the conference prompted MARAC to produce this volume. Although MARAC for over fifteen years has provided the region with a forum for its members to discuss the challenges, difficulties, and rewards of administering archives, this collection of essays launches a more regular publications program. Thus, I am pleased that Karen Paul, MARAC's president, asked me to pen the forward of this important volume. It provides me with the opportunity to reiterate the importance of archives, particularly public archives, in our country under its national and state constitutions.

From the founding of the first American colonies, the importance of archives was recognized by the colonists and their governments. Thus, during the seventeenth and eighteenth centuries the colonists provided for the preservation of their archival records, primarily to protect property rights. With the advent of written state constitutions

and the national constitution, archives took on greater importance. Our constitutional forms of government rely heavily on informed public and government officials and employees to function effectively. Archives were increasingly used in the nineteenth century not only to protect and further rights guaranteed by national and state constitutions and as a tool of government administration, but also as a means of informing citizens about their governments.

However, it was not until early in this century, as governments began interacting increasingly with its citizens, that the true importance of archives was recognized. Citizens and governments realized archives must be properly housed, maintained and administered so that their full value may be utilized. This realization resulted in the establishment of state archival institutions and a national archives.

These public archival institutions provide sanctuary for constitutions and the records of the governments established under those constitutions. Thus they provide an important link between citizens and their governments. It is this link that prompted one state archivist to testify before a congressional committee in 1982, that the National Archives not only be made an independent agency but that it be accorded the status of a fourth branch of government. Although this certainly is an overstatement of the importance of the National Archives, it is not so of the importance of its archives and the archives of other public institutions.

Public archival institutions daily justify their existence. Their contents are not just old documents, of little or no practical use. Public archives, as with all archives, constitute an important informational and cultural resource. As storehouses of information, archives are used daily for a wide variety of immediate, practical purposes and needs, with tangible benefits to nearly everyone, even to those who have never directly used them.

The first and primary usefulness of public archives is to the administrators of the government entities in which the archives originated. Archives of governments are their memory, and just as no individual can function satisfactorily without a memory, so it is with governments. With the rapid turnover of personnel and the passage of time, archives take on the important role as institutional memory of government agencies. Increasingly offices are finding that if they rely on personal memories, they often lose their historical perspective and suffer a lack of administrative continuity.

Government archives are used daily by public servants, including legislators and judicial officials, as administrative tools to avoid wasting time and resources, to enhance program development and to provide administrative continuity. They are used to verify

past decisions and continuing obligations, to determine precedents, to conduct ongoing research, to analyze program development, to study the origins of policies and programs and to assure that policy flows smoothly from the past decisions. These archives often allow government officials to learn from - and avoid - past mistakes and to capitalize on past insights.

These archives also have great legal value to governments in defining and documenting obligations, responsibilities, and privileges. Without them, there can be no accurate and indisputable memory of their past acts and commitments. Public archives provide governments with their chief protection against unfounded or ill-founded claims. Archives provide judicial systems with a principle source from which arguments may be drawn to support contentions and decisions. And, perhaps most importantly, archives provide evidence of the obligations and responsibilities of citizens to their government.

The governments under our constitutions owe certain rights to, and confer certain privileges upon, individual citizens, as well as to a wide range of organizations, institutions, and corporate bodies. For individual citizens, archives are indispensable in proving and protecting their rights and privileges, both individual and property. Archives provide a primary source for substantiating claims and determining eligibility for a variety of benefits and entitlements.

But the value of public archives is not limited to the protection of rights and privileges. These archives constantly educate, entertain and enrich our lives. Daily, citizens use them, as they do all archives, for a variety of research activities ranging from the quest for their "roots" to some financial benefit, such as seeking sunken treasure. Through exhibits, public archives provide citizens with appealing, tangible manifestations of our history as well as compelling proof - of the existence of their governments and of their rights as citizens.

Public archives are also important, directly and indirectly, to society. The information contained in them provides a wide variety of immediate and practical benefits to society. For example, archives are used to support medical research that traces genetic and familial diseases and the spread of contagious diseases. Archives are used in research into the infrastructure and in efforts to preserve or restore historic houses and sites. Archives are also used to ascertain the location and severity of past earthquakes and as a source to trace climatological changes as ways of predicting future quakes and weather patterns. Archives are even used in locating toxic waste dumps and in deciding how best to mark and record nuclear waste disposal sites.

"A popular government," James Madison wrote in 1822, "without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives." Indeed, as we celebrate the bicentennial era of our constitutional forms of government, it is important to remember the crucial role public archives play in allowing society to know about the activities of their governments. Archives provide significant information on the management and expenditure of public funds and the delivery of services. They are a major source for the people to hold their governments and public officials accountable.

Public archives do not just provide immediate, practical, and tangible benefits to society. Their value, like all archives, is often indirect. Take for example, the study of history. Without public archives and other documentary sources, there would be no history, certainly no accurate history. Without history, there is no understanding the present, for the present cannot be understood, except by understanding the past. By using the original material found in archives to write their histories, historians allow us to better understand our societies and cultures and to clarify contexts in which contemporary problems exist and future ones can be avoided. Such histories provide a key element in perpetuating our governments and heritages. These histories contribute to a sense of community and national consciousness. Without the latter, there would be no national consensus to support governments. Therefore it is not surprising to find Thomas Jefferson in 1823 stating that "it is the duty of every good citizen to use all the opportunities which occur to him, for preserving documents relating to the history of our country."

The seal of the National Archives contains the Latin inscription "Littera Scripta Manet," which loosely translates as the written word endures. Actually the written word not only endures in archives, but it is relevant. Indeed, public archives have served governments, individuals and society in a relevant manner in this country from the beginning. And, during the past two hundred years public archives have contributed significantly to helping us to maintain a more perfect union, further justice, ensure domestic tranquility, defend ourselves, promote the general welfare and secure the blessings of liberty.

The above may seem like hyperbole, but just think of how our society would survive without public archives. The money loss, to say nothing of inconvenience, that would result to governments and to citizens as well, by the destruction of any significant portion of our

archives, can hardly be calculated. The same is true for organizations and institutions and the people with whom they deal. Without their archives, governments would become less effective and citizens less secure in their lives, liberties and properties.

To this point we have been looking primarily at public archives. But regardless of whether archives are public or private, they are important. They contain information on all human activity and thereby constitute an unsurpassed source for research on virtually every aspect of our existence. We rely heavily on them as a basis for understanding where we have been, to help orient us to our present and to provide guidance for our programs into the future.

As we enter the third century of our national government and the third decade of the information age, we find ourselves concerned more with the future than anytime in history and that archives are taking on greater importance as a source of information. We are also finding that more than ever, the preservation and improvement of governments, organizations, institutions, societies and even civilization itself depends to some degree on the preservation and utilization of our archives.

Because of the importance of archives, archivists have a great responsibility in effectively administering them to ensure that they are preserved properly and made available efficiently. Meeting that responsibility, as we know and can see from some of the essays in this volume, is often demanding and complex. Increasingly, archivists are finding that with the information revolution have come challenges and difficulties of volume and complexity, both with their records and their researchers.

However, these challenges must be met and difficulties overcome if archives are to continue to serve effectively the governments and their citizens, as well as society as a whole. Like our Constitution, archivists must adopt to change - change in the way in which information is created, maintained and used -and make change work for them. Readers of this volume should find it useful in their work, not only as a reminder of the importance of archives but of the insights it provides for meeting the challenges of change. Let us hope this volume is only a harbinger of useful publications MARAC will produce to help us meet our responsibilities.

James Gregory Bradsher  
August, 1988

## **Preface**

While it is certainly very true that no conference ever puts itself together and no book does either, it is equally true that when the first is well done, the second follows more easily. The papers presented here were all basically in final form so this book has been only a question of easy editorial checking. My thanks to the Program Committee for making my job so much simpler.

The authors were all finely tuned to questions dealing with the Constitution and their daily work. The archivists have expressed their thoughts in terms of archival theory and practice. expunction, freedom of information and the right to privacy have certain kinds of effects on documentation and documentation then becomes a basic theme. FOIA, privacy and expungement are realities, legal ones, that archivists must learn to deal with while at the same time being able to maintain documentation. At another level, given the volume of paper and information created, it is necessary for archivists to cooperate. Working together, archivists can maintain the thread of documentation in the public record without having to keep the same information in several locations.

The lawyer, who works in an archives, and the historian, who publishes based on information gained in archives, are both concerned with copyright. Copyright becomes a legal problem because interpretation of the Copyright Law of 1976 is involved, but also bears on documentation and again covers freedom of information and privacy. This time, however, private records are involved instead of public records and commercial gain comes into play. The physician, who has worked in historical epidemiology comments on freedom of information and expunction through the accidental cause of time which results in the lack of documentation he requires. The filmmaker talks about documentation in terms of freedom of speech, freedom of the press, and freedom of information. He also discusses access to information.

The luncheon speaker set a stage and presented an archivist dealing with the Constitution in the most traditional of archival ways, that is in the acquisition of information, preservation of it and reference and access through historical editing projects. His experience is unique and not at all typical but he brings us back to or rather starts us off on a voyage in the cause of documentation. As our society grows and develops, so will our law. As archivists we must be responsive to the laws that affect our work, but we must also be concerned with our ability to document our society.

Mary Boccaccio  
August 1988

## **INTRODUCTION**

The Mid-Atlantic Regional Archives Conference constantly seeks ways to broaden educational opportunities beyond those immediately derived through attendance at meetings. Likewise, the Conference aims to provide an outlet for professional development and to encourage excellence in preparation of conference sessions. To further these goals, MARAC has published this volume of selected papers. The papers express the theme ("Archives: The Living Constitution") of the Fall 1987 meeting in Charleston, West Virginia, which focused on the integral role of archival institutions and archivists within a democratic society.

Publication of selected papers was anticipated by the Charleston program committee in planning the conference, and participants were urged to develop papers accordingly. The reproduced papers generally focus on certain "constitutional" aspects of archives that are embodied in the work of archivists. A diversity of fundamental archival activities, concerns and goals are represented. The papers were selected on the basis of their relation to the general theme, their suitability for publication and overall excellence. Five of the papers are by archivists and four are by professionals from other fields - a doctor, an attorney, a history professor and a film maker. They reflect the broad scope, value, and meaning of archives in our contemporary society.

Roland Baumann, Gregory Bradsher and George Chalou explore the timeless issues of individual privacy versus the public's right to know. This issue is examined within the context of the expungement process, instances where records are expunged or destroyed at the request of an individual in order to protect his or her privacy. Baumann, Bradsher and Chalou fully debate a "living" constitutional issue with which archivists must be able to carefully, knowledgeably and systematically deal.

Martin Cherniak, Herbie Smith and Frank Evans discuss privacy issues faced by archivists in the ever present requirements to document society and government. Cherniak relied on archival records to produce a historical narrative and an epidemiological survey. It explores the role of archives and archivists in documenting disasters, events which because of their political and legal sensitivity can be difficult to capture for the record. This thought-provoking analysis of the role and uses of archives poses as many questions as it answers and provides all archivists with something bordering on the cosmic to contemplate.

Herbie Smith's description of a documentary film enterprise demonstrates the unique value of film and video records as archival sources in a corner of the MARAC region once characterized as having no history, "a place where time stood still," and populated by "yesterday's people." This transcription of a taped talk lacks the visual accompaniment displayed at the original session but delivers a strong message and sets a fine example of a successful collaboration between archives and film makers.

Frank Evans' paper discusses a new cooperative records project between State Archives and the National Archives to help bring under intellectual control the records of national, state and local governments that contain duplicate information, that are fragmented archives placed at different times in a variety of public and private institutions, or that result from administratively divided and parallel functions. Using modern information-handling technology, this project provides for rationalization of archival holdings and more systematic appraisal and retention of records at all levels of government. Could there be a more concrete example of the archivist's progressive, essential and creative role in making certain that once scattered information is brought together and made available to citizens, Government officials and scholars?

The Constitution specifies that "Congress shall have Power...To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The copyright issue of fair use is of special interest to archivists who administer the use of copyrighted materials contained within their collections. Christopher Runkel and Michael Les Benedict discuss the fair use issue and implications of a recent case, Salinger v. Random House, Inc., in which author J. D. Salinger obtained a preliminary injunction against the publisher and author Ian Hamilton. The injunction prevented publication in Hamilton's book, J. D. Salinger: A Writing Life, of copyrighted material taken from unpublished letters deposited in research libraries at Harvard University, Princeton University and the University of Texas. The case is of special interest to archivists because it provides a useful reference for answering similar fair use questions and it highlights and informs us of some of the special problems associated with the use of unpublished letters.

Finally, is Leonard Rapport's "intimate" reminiscence on our profession and ourselves derived from a truly unique archival experience, that of searching for documents relating to the federal Constitutional Convention and ratification of the Constitution. Rapport did this not once, but twice, over a span of thirty years. The remarks were presented as a luncheon address and have not been

edited, except by the author. While demonstrating a direct and concrete relationship between archivists and the Constitution, that of identification and preservation of the documents themselves, Leonard's address also communicates his insights to us as archivists.

As Charleston Program chair and on behalf of the MARAC membership, I offer sincerest thanks to each of the contributors to this volume for their generosity in allowing us to reproduce their work and thus make it available to our entire membership. Special appreciation is extended to Donald Fisher Harrison, Publications Committee chair and to Erika Thickman Miller, Occasional Publications editor for their leadership, interest and support.

Of course, MARAC's deepest gratitude is due Mary Boccaccio who single-handedly performed all "editorial" services, including "acquisition, appraisal, arrangement, description and outreach." This publication and its timely appearance would not have been possible without her enthusiasm and dedication.

As MARAC looks forward to its twentieth anniversary and enjoys the advantages of a sound financial base, we have adopted a progressive publication plan which will be titled *ARCHIVAL SYMPOSIA*. This, the first volume in that series, will constitute an experiment or prototype, if you will, whereby we hope to make more widely available the fruits of our conference sessions. By selecting for our first publication, Constitutional Issues and Archives, we hope to be off to a solid start.

Karen Dawley Paul, Chair  
Mid-Atlantic Regional Archives Conference  
August 1988



**FREEDOM OF INFORMATION  
AND PERSONAL PRIVACY ISSUES**



## **Privacy Act Expungements: A Necessary Evil?**

by Roland Baumann

The theme for this fall 1987 MARAC meeting is "Archives: the Living Constitution." This opening session titled "Privacy Act Expungements: A Necessary Evil?" concerns the issue of freedom of information versus personal privacy. As archivists celebrate the bicentennial of the United States Constitution we are not only reminded of the role we play in ensuring that "Past is Prologue" in a democratic society but also that the preservation and use of our federal documentary heritage over the last two decades has been made possible by exercising the guarantees contained in it.

The United States Constitution does not explicitly state that there is a constitutionally protected right to privacy because privacy rights in public records was not an issue in 1787. Neither were the principles and concepts of archives, as we understand them today, developed before the French Revolution. When Thomas Jefferson, in the Declaration of Independence, designated the "pursuit of happiness" as an inalienable right, he had in mind public happiness and not individual happiness (privacy). But in retracing the concepts of public and private in our history, it is clear that the United States Constitution has been a "living" document and that at times the provisions of the Bill of Rights were used by the courts in the nineteenth century to safeguard privacy. All in all, however, individual privacy or "privacy rights" are a modern reality of the mid twentieth century.

The passage of the Freedom of Information Act (FOIA) of 1966, as amended, and the Privacy Act of 1974, as well as the adoption of an ever expanding number of state right-to-know and privacy laws has done much to usher in a new era in access concepts and practices. Surely much of what was to happen at the level of the federal government, namely individuals seeking to correct or delete inaccurate information, was highlighted and dramatized for us by Alan F. Westin in his timely book, Privacy and Freedom (1967). Westin reported how government used modern technology to engage in electronic eavesdropping and created data files to invade privacy. The 1974 federal Privacy Act, was enacted "to promote governmental respect for the privacy of citizens" in a media oriented mass society. With respect to this federal legislation, we need to know that the Privacy Act operates outside of the Federal Records Act of 1950, as amended, and that public officials/bureaucrats and

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*Roland Baumann*

not the Archivist of the United States determine what is or is not expunged.

In general archivists, librarians and manuscript curators appreciate the issues or dilemmas associated with the debate over individual privacy and the public's right to know. We have all handled researchers in our reading rooms who have sought access to confidential or restricted records (archives). Servicing these patrons not only is one of the stickier issues in reference, but also it is a matter requiring archivists to establish guidelines and procedures to administer access. Less well known is the process of expunging records. In these instances records are expunged, or destroyed, at the request of an individual in order to protect his or her privacy. This process allows individuals to correct or delete improper or inaccurate material about oneself in a government dossier. According to Gary and Trudy H. Peterson, in the "Basic Manual" on Archives and Manuscripts: Law (Chicago, 1985), "Privacy, in its simplest terms is the right of an individual to be let alone, to live a life free from unwarranted publicity." (p.39). Perhaps we need to ask whether "privacy" is a privilege or a "natural right".

The destruction of permanently valuable records, whether they have been scheduled or not, is serious business. The process of expunging records is further a complex, somewhat subtle issue involving the intent of the creators of the federal Privacy Act of 1974. Is expunging records a permissible remedy for an agency's violation of the Privacy Act? Have the federal courts gone too far? If not, can permanently scheduled federal records be expunged, or destroyed, and at what cost? Can permanently valuable records while still in the custody of the Agency/Department be destroyed? How do we balance the interests of individuals against the interests of history? Should one interest be given greater weight than the other? Or in the spirit of the consensus minded Founding Fathers of two hundred years ago, is it possible to develop mechanisms or work out agreements whereby both "privacy" and "history" win? It is safe to say that privacy expungement in particular and access to restricted records in general are matters on which reasonable people - archivists and historians - can disagree. The disposition of the celebrated cases involving journalists Leland Stowe and Penn Kimball, who won loyalty fights, dramatizes these disagreements.

The papers that follow will debate the merits of destroying or retaining certain permanently scheduled records under the Privacy Act. The larger question is one of whether the right to know can always be sacrificed to protect privacy. Some will argue that there is a need to balance privacy and the public's right to know.

In "We Have a Right to Privacy" James Gregory Bradsher largely affirms the individual's right to privacy, as outlined by the Privacy Act of 1974. He argues that usually "no great harm results from...expurgements." Besides, individual privacy is a "natural right" and the right to know is not now or seldom is an "overriding social need." Bradsher does leave, however, a small opening for exceptional cases.

On the other hand, George Chalou in "We Have the Right to Know" traces the historical roots to the larger question of privacy rights in a public society. He concludes that privacy can and ought to be protected under certain prescribed conditions, but it is done without having to sacrifice history. In a modern society, Chalou argues, the public (the governed) has the right to know what the constituted government is doing. He further claims that his view holds the greatest good for the largest number of people. Because there are indeed circumstances when the right to know outweighs privacy, Chalou suggests that the 1974 Privacy Act be amended and that the federal courts stop reading more into the law than was specifically intended. In his argument there is room for both privacy and the right to know.



## **We Have a Right to Privacy**

by James Gregory Bradsher

"Privacy," according to Justice 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." With private papers held by a private institution, no real problem exists, at least for the donor of the papers. Donors simply provide for the opening of records at a certain time, often upon their death. But, a problem does exist for those who have personal communications within the collection. What rights to privacy do they possess? This is often a vexing problem.

Even more vexing is the problem of government records containing information that should not have been collected in the first place, or that is incorrect. With respect to Federal records - but not to archives - individuals can generally have the records amended, or have them expunged, that is destroyed. Daily such Federal records, or portions of them, are destroyed under the belief that the right of privacy is more important than the right of contemporary society as well as posterity to know.

We are aware of the problems of protecting privacy versus the desire of researchers to have access to records. But what we are most likely not aware of is the question of expungement of records scheduled to become archives. What follows is an analysis of the Federal expungement process, with an emphasis on the protection of privacy.

Because of concerns about what got into government records and the growth of computer networks, there was a growing desire in the late 1960's and early 1970's for a law that would allow people to challenge the accuracy of information about them in government files; and if the information was improperly obtained, to amend or expunge that information. Congress, concerned about privacy in the wake of Watergate and the revelations of Federal Bureau of Investigation illegal record-gathering practices, made such provisions in the 1974 Privacy Act.

The 1974 Privacy Act was enacted to promote governmental respect for the privacy of citizens by requiring all departments and agencies to observe certain constitutional rules in the collection, use and disclosure of personal information about individuals. It provides that no agency shall maintain records describing how an individual

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*James Gregory Bradsher*

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, with certain exceptions (primarily criminal investigation records) individuals to request the correction or deletion of improper or inaccurate material.

The Federal Records Act of 1950, as amended, provides the conditions under which Federal records can be destroyed and establishes detailed procedures for destruction. It authorizes the Archivist of the United States to determine if records have sufficient values to warrant their continued retention. This is a contradiction to the Privacy Act expungement process. Under the Privacy Act agencies can make that determination with respect to expungements. 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 "this general statutory command [provisions of the Federal Records Act] must bow to them when they are more specific, as of course it must bow to the Constitution."

The federal courts have found that expungement of records is, in proper circumstances, a permissible remedy for an agency's violation of the Privacy Act. Two cases have expressly held this to be true when an agency has violated the Act's prohibition on maintenance of records describing an individual's exercise of rights guaranteed by the First Amendment. 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. This was done primarily for two reasons: 1) the integrity of archives could not be maintained if individuals could amend them. This 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. 2) and because there were sufficient restrictions, imposed by statute, the transferring agency, and the Archivist, to protect individual privacy.

Because 98% of all Federal records are temporary in nature, their expungement, before their scheduled disposal date, generally poses no problem. But Congress neglected to address permanently scheduled records that would become archives. They can be destroyed. So, is there a problem when valuable records are expunged, in whole or in part, before they become archives? The answer, to a great extent, depends upon our views on privacy.

Thus far we have been reviewing expungements from a legal perspective, but expungements involve real people. Because of the nature of the expungement process, there has been almost nothing written about it (Penn Kimball, The File, 1983) and the people who have been involved in the process. But, it is the human element that allows for a greater appreciation of the complexities involved in the expungement of permanently scheduled records. There is, fortunately, one case that allows us a greater insight into the process. It concerns Leland Stowe, a Pulitzer Prize winning journalist, who in 1986, donated the records relating to his expungement to the Bentley Historical Library.

In 1979, while assembling his papers for donation to the Mass Communication History Center in Madison, Wisconsin, Stowe wrote the FBI, under the Freedom of Information Act, for information relating to himself. He was eventually supplied with 116 pages of materials, most of it an internal security investigative case file. The file covered 30 years, beginning in 1943, with an FBI internal security investigation on Stowe's activities covering the Russian military forces on the Eastern Front, and ending in March 1972, with documents relating to Stowe's unsuccessful attempt to interview J. Edgar Hoover for a favorable piece on the FBI Laboratory 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 not worthy to see Hoover. What was this derogatory information? The documents Stowe obtained revealed he had been the subject of an FBI Internal Security investigation because "he was associated with communist front groups and activities in the World War II period, and also expressed sympathy and support toward the Soviet Union." Additionally, "during a radio broadcast in August, 1947, in which Stowe discussed the Federal Employees Loyalty Program, he made statements implying improper actions on the part of the FBI. His comments prompted the Director to write a letter of protest to the Mutual Broadcasting Company."

Stowe had not been aware the FBI had been monitoring his activities. What clearly struck Stowe was the unsettling realization 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. What really disturbed Stowe was that the file was riddled with factual errors and misrepresentations.

Believing that the "true" story should be told, Stowe attempted to have the FBI amend the records to reflect his version of events.

In summer 1980, he sent the FBI over 700 pages of documents refuting the information contained in the files. The FBI informed Stowe 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, "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 to be destroyed he would have to ask that it be done.

Although he felt a certain obligation to preserve what might be considered an important historical record, Stowe believed the file presented a distorted picture of himself. Unless the file could be amended, Stowe believed the future would be served better by the file's destruction than by its preservation. In November 1980, Stowe wrote the FBI requesting the destruction.

Because the complete file was to be expunged, the FBI, acting under National Archives regulations, requested the National Archives to 'approve' the destruction. NARA regulations allow Federal agencies to expunge up to 99.9% of any record without National Archives 'approval' so the destruction can be documented. Several National Archives appraisers reviewed the file during the winter of 1981-82. Most of them believed the file should not be destroyed. Acting on their advice, the National Archives 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," he was informed, "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 1940's." 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.

"In its present state," Stowe wrote back, "my case file is inevitably one-sided." Stowe wrote that in the file he had found numerous unverified allegations of his being "a Red, a Communist or pro-Soviet fellow-traveller" 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 refutatory 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 counterbalancing documents should be included." "Elemental justice," he believed, "would make such inclusion a prerequisite, and historically indispensable." "Should NARS wish to preserve these documents - together with my FBI file for future historical reference - I would welcome having the combined materials ultimately become available." If the National Archives would not do this, he wanted his file destroyed.

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

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 files? 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. Several things were lost by the destruction of Stowe's file. First was unique information about Stowe; second, evidence of an FBI investigation of a prominent journalist and evidence along with his own papers, to show the unsuspecting impact the FBI had had on his life.

The right to know was sacrificed to Leland Stowe's privacy. Should it have been? The answer lies, for the most part, in how we view the right of privacy in relationship to the right to know - the desire of historians and others to have raw data on which to base their judgments of events, activities, actions and people. Before answering the above question, and justification for it, it is necessary to review these two basic rights. I will focus on privacy, Dr. Chalou on right to know.

Among the major American democratic principles is that the people must be informed and have the ability to be informed. Indeed the right to know is important to our political system, for it is only through free debate and free exchange of ideas that government remains responsive to the people. But in order to know, in order to permit an analysis of government judgments and to be able to correct government mistakes and abuses, one must have access to information. The 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 the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

While achieving an informed citizenry is a crucial goal, counterpoised to it are other vital societal aims, including the right of protecting personal privacy rights. Indeed, one of our most important rights is that of privacy, defined by Justice Brandeis as the right "to be let alone." This right to be let alone, according to Justice Douglas, "is indeed the beginning of all freedom."

Neither the Constitution nor the Bill of Rights or 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. 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." "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." The Supreme Court has recognized 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 of governmental invasions of the sanctity of a man's home and the privacies of life, and the Ninth Amendment's protection of rights, though not enumerated, retained by the people.

These concepts of privacy and their protection grew out of the belief of man having certain inalienable rights, rights found in nature, ones that man did not relinquish when he became part of the society. In the seventeenth century, John Locke argued that personal rights exist antecedent to any governmental or social contract, and may, therefore, be called natural rights, and that the political state was instituted to give security to property as well as to person, both of which are inalienable rights. These natural rights were considered older, more fundamental, and, therefore, more binding than the civil law of any state. After Locke it became commonplace to regard the "reserved" rights of the people as natural and inalienable, their preservation being the very end and function of government.

The Founding Fathers placed great faith in natural rights, believing that men were by nature endowed with certain inalienable rights, including the right to life, liberty and property. These rights not only antedate the existence of government; they are superior to it in authority. In forming our Constitution the people yielded certain alienable rights in order to safeguard the inalienable. But they did

not give up their inalienable rights. These rights are protected in the Bill of Rights. In the nineteenth century laws of nature gave way to laws of man, but they still found refuge in the courts, and by this century a judicial higher law was developed, where due process of law became the main provision through which natural law theories were made part of constitutional law.

In 1905 the highest court of Georgia in the leading case affirming the existence of a right of privacy, declared the right of privacy was both a right "derived from natural law" and one "guaranteed to persons in this state both by the Constitutions of the United States and...Georgia." This approach, where the right of privacy was asserted to be derived from natural law and guaranteed by both federal and state organic instruments, was subsequently followed by many state courts. In 1945 a New Jersey court asserted that "it is now well settled that the right of privacy having its origin in natural law, is immutable and absolute, and transcends the power of any authority to change or abolish it." Twenty years later, Justice Goldberg wrote in Griswold v. Connecticut, with the Chief Justice and Justice Brennan concurring, "I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." "The Ninth Amendment," he wrote, "expressly recognizes, there are fundamental rights...which are protected from abridgment by the Government though not specifically mentioned in the Constitution."

Justice Brandeis in the Olmstead (1928) case 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." The key to this sentence is the word "unjustifiable." Under the Fourth Amendment, privacy is protected only against unreasonable searches and seizures. As Justice Douglas stated in 1952, "There is room for regulation of the ways and means of invading privacy." Similarly, he stated "matters of belief, ideology, religious practices, social philosophy and the like are beyond the pale and of no rightful concern of the government, unless the belief or the speech or other expression has been translated into action."

"I like my privacy as well as the next one," Justice Black stated in his dissent in Griswold v. Connecticut (1965), "but I am nevertheless compelled to admit that government has the right to invade it unless prohibited by some specific constitutional provisions." The right to privacy is not absolute. The Fourth Amendment, in Katz v. United States (1967), Justice 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."

Despite the assertion of the New Jersey court mentioned earlier, the right of privacy is not out of reach of the legislative power. "It is one thing to say that a right has its origin in natural law," one legal scholar (Bernard Schwartz, A Commentary on the Constitution of the United States. Part III. Rights of the Person. 1968) has observed, "and quite another to say that such right is beyond the legislative power to abridge." This means, that the details of the right, and even its very existence, are matters of legislative control. As a Nevada court stated, "the immutability and absoluteness of the right of privacy...finds little support in the mere fact that it had its origin in natural law."

Several supreme court justices share the above belief. In dissenting in Griswold v. Connecticut, Justice Stewart stated that "I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." Justice Black, joining in this dissent, opined 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."

Many legal scholars and jurists, such as Learned Hand and Robert Bork, reject the concept of the higher law. They do not believe that there is a divine will or natural law which provides sanctions for human law. They regard the Constitution simply as an expression of the will of those who ratified it. Its meaning can be gathered only from the words it contains, read in the historical setting in which it was created. If the natural law concept is followed, it is argued, there would be an obvious danger in judges casting about for natural rights and determining which are more "natural" than others. "Declaring himself the servant of the natural-law principle," one legal scholar states (Schwartz), "the judge may, in fact, be its creator."

Thus, the government can invade our privacy, the right to privacy not being absolute. Nevertheless, some protection is afforded. The FOIA and Privacy Act, taken together, set forth the conditions under which information impinging on privacy can be collected, used and disseminated. 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. 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 expungement.

In the process of protecting privacy should the eventual right to know be sacrificed? Should the Stowe case file have been allowed to be destroyed? Should even more important case files be destroyed? As you read this, inaccurate or illegally obtained information, contained in permanently scheduled records, is being expunged to protect someone's privacy. In most cases, no great harm results from such expungements. This is in part because of the nature of the information and in part because of the belief that great weight should be given to privacy, since it is a natural right - not so easily given up to society without exceptional cause, some overriding social need. In most instances the right to know is not an overriding social need, either today or for the sake of history.

The next discussion will try to persuade you that the expungement process should be changed. The point will be made that in some instances someone's right to privacy will have to be sacrificed to our right to know. In some respects I agree, for there are instances when we need to know now as well as in the future. For example, if records document individual or a pattern of government abuses, even ten or twenty years after the event, 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.

However, whatever is done should be made within a workable formula which encompasses, balances and appropriately protects all interests. A balance must be struck between the right to know and the right of privacy, neither of which is an absolute, especially when placed in opposition to the other. In striking the balance, those involved must remember that while the right to know, not only today but also tomorrow, is a political right that is very important to our form of government, the right to privacy is, if not "legally" a natural right, certainly one that should not be sacrificed without exceptional cause.



## **We Have a Right to Know**

by George Chalou

I should like to add a short historical introduction which brings us to a better awareness of our right to knowledge in general and our right to know the operations of our government in particular. The role of the citizenry in an open and democratic society is an essential part of this debate. Let me expand this.

The right to know is the spirit of the Enlightenment. It is one of the fundamental forces in the development of democratic societies and sometimes, today, we tend to take this powerful force for granted in the United States. At the same time the rise of separate disciplines in the sciences, social sciences and humanities over the past two hundred years is inspiring. This rise has increasingly depended upon the sharing of information. The role of established institutions, especially governments, in sharing recorded information received its greatest impetus during the French Revolution. Almost half a century ago Ernst Posner, in an article published in the American Archivist in 1940, described the French Revolution as heralding a new era in archives administration. In addition to establishing a national archival administration in France, various decrees of the National Assembly announced that the written documents of the past deserved preservation. Violent and powerful forces of change were operating against the crown, nobility, and the Roman Catholic Church. These had become suspect institutions in France. The National Assembly ordered that town halls rather than church officials handle, what today, we call vital records.

In addition, the Assembly declared in the 37th Article of Messidor II, of June 24, 1794, that every citizen was entitled to see the records held in each governmental depository in France. This decree opened up the records of the nation for public use. This legal right of access to records spread gradually throughout Europe. Certain legal rights of individuals were recognized in England before the establishment of the Public Record Office in 1838, but the name of the archives establishes the intent of making the records of the nation available.

On this side of the Atlantic we have observed the expanding role of the Federal government over the last century. For example, Article I of the Constitution calls for an enumeration or census to decide the composition of the House of Representatives. This simple function has expanded today into the Bureau of the Census of 9,768 Federal employees performing over 300 kinds of studies or

censuses. The information gathering ability of this Bureau, not alone the abilities of the entire Federal government, would stagger the imagination of the Anti-Federalists of the 1780's.

It is obvious to all of us that the government requests and maintains a vast amount of information. The collecting and sharing of this information and the advent of the computer age during the 1960's made us increasingly aware that the computers of government could collate and concentrate data from many different sources. Dossiers about individuals became a fear. Were we approaching George Orwell's 1984? One of Orwell's main characters, Winston, works in the Records Department in the Ministry of Truth. This was the place where accounts were rewritten and "chosen lies" would pass into the permanent records.

By the late 1960's there was growing fear about the government's collection of personal data and the use of this data. By 1974, this widespread concern led to passage of the Privacy Act of 1974. The Senate report of this bill remarked that all executive departments and agencies were to observe the First Amendment rights of individuals guaranteed in the Constitution.

The basis and primary elements of the Privacy Act have just been explained. I do not wish to go over the same points but do want to add some additional information. The act protects from amendment all records accessioned by the National Archives. It does permit the individual access to records in agency custody accessible by means of personal identifiers. That same person can request amendment of these records which he or she believes are not accurate, relevant, timely or complete. Nowhere, and I must stress this, does the act call for the destruction or expungement of the record.

When we view the intent of the Privacy Act and the intent of the Freedom of Information Act we see a balancing of the right to privacy and the right to know. The FOIA takes into account the personal privacy of living persons and exempts this information from release. It does not, however, permit destruction of the file. Therefore, after many years, this information will no longer be sensitive and can be made available. If these same records have archival value they should be preserved in the appropriate archives.

In contrast, the Privacy Act does permit amendment or correction. The Act does not specify destruction. The actions of agencies and the courts have equated amendment of certain information with destruction of the entire file or files. Even if the file has tremendous legal, evidential or historical value - it can be destroyed.

Before I come to that let me make some additional observations. We have come to find out that the questionable or illegal actions of law enforcement or intelligence agencies are documented in records covered by the Privacy Act. The practice is growing in Federal agencies to have records, including those having archival value, destroyed by agencies either through use of the Privacy Act or court order.

Most of us are aghast at the Ollie North school of records disposal - shred, shred, shred. This quick method of destruction, when it becomes known, gains headlines and unites the archival community. But the quite legal, and to my view, quite dangerous method of destruction (expungement), under the Privacy Act should be stopped. Under this process it is not just files relating to individuals which are destroyed, but individual documents within larger files on organizations or associations also are destroyed. In essence, the integrity of government documentation has been destroyed without the National Archives and Records Administration having any role in the process. Records having permanent value are being destroyed without our knowledge and without our authority by means of the Privacy Act.

Let me now return to the two examples previously described and provide you a more persuasive version of these cases. The Leland Stowe case is an excellent microcosm of what can and does happen. This prominent journalist wanted access to his FBI case file which contained documents created by the FBI between 1942 and 1972. The FBI probably opened an internal security case on Stowe because of his praise of the Russian foot soldier during his on site coverage of the Eastern Front during 1943. The file remained open because of Stowe's "Communist activities and connections." In 1947, Stowe was a radio reporter on the national broadcast for Mutual Broadcasting System. On the air he protested FBI special agents' questioning of Federal Government employees about the books and periodicals they read. Hoover sent a strong letter of protest to the president of MBS. Within two months Stowe was fired. The reporter then became a professor of journalism at the University of Michigan and a roving reporter for Readers' Digest. In this latter capacity Stowe tried several times to interview FBI personnel. Hoover refused every request. In 1981 Stowe received a selected portion of his file from the FBI. The professor believed that the file distorted his entire career and contained many factual errors. The Pulitzer Prize winner attempted to amend his file by adding about 600 or 700 pages of documentation. Stowe wanted this included as a "matter of equity and for the record." After some delays the FBI informed Stowe that the file could not be amended

but added that the file was no longer needed "in view of the age and nature" of the material. Stowe, knowing that his papers would be maintained in the Mass Communications History Center in Madison, Wisconsin, considered the FBI suggestion that his file be destroyed. Stowe still hesitated. When the Bureau agreed that all references to him in all FBI files would be destroyed, he agreed. Growing tired of the ordeal and becoming sarcastic, Stowe replied, "After this I hope that my encroachments on your too numerous preoccupations may be terminated to our mutual relief." Let us reflect on this. Here was a file having significant research value by the NARS FBI Project staff and scheduled as permanent being destroyed by the expungement process. Speaking as one who reviewed this file, it is my personal opinion that Stowe agreed to destruction only because he felt that the Bureau would not add his side to the story and that the file was being retained in a non-Federal repository.

In my opinion this file had research interest to anyone studying 20th century journalism, the molding of public opinion during WW II and the Cold War era, and how liberal dissent or Federal Government employees were monitored during the 1940's. In addition, the file had high evidential value because it shows how Hoover ran the FBI and influenced outside organizations such as the Mutual Broadcasting system.

Another long and similar saga is told by Penn Kimball in his book, The File, published in 1983. In this case both the FBI and the Department of State eventually asked Kimball for permission to destroy files relating to him. Fortunately, Kimball refused, and finally won in court this month.

In conclusion, documentation on how a Federal agency operates and the information it collects, creates and maintains, should be carefully evaluated by professionals in the National Archives and Records Administration. There are ways of protecting personal privacy and FOIA provides just one example. An amended Privacy Act could provide for a long-term hold on entire files if these records contain sensitive information and the file has archival value. It should not be agency officials and/or judges who decide this matter. Expungement has become a Federal agency practice that needs to be reexamined carefully. It is imperative that the Privacy Act be amended. An addition to the present language of the Act should be made which clearly indicates that any destruction of the entire or portion of any record scheduled as permanent in the agency's records schedule must be approved in writing by the National Archives. This would mean that before any expungement or destruction request is executed by an agency, the National Archives would have to approve it. The override of the schedule

should be done only on a case-by-case basis. This amendment would still protect sensitive types of information exempted from release, however, it would preserve the Federal record which was determined to be permanent. Eventually, we have a right to know. To paraphrase a 1978 court opinion, an informed citizenry is needed to check against corruption and to hold the governors accountable to the governed.

I end this debate by stating that if we lose the right to preserve permanent records, we lose the right to know for ourselves and future generations how our government operated. The right to know and hold accountable our government is vital for preserving those individual rights afforded by our Constitution.



**PRIVACY ISSUES IN DOCUMENTING  
SOCIETY AND GOVERNMENT**



## **The Documentation of Disasters - Hawk's Nest**

by Martin Cherniack, M. D.

In Fayette County, West Virginia, a non-descript roadside marker identifies the Hawk's Nest Tunnel, describing in the bland terms of highway historiography a 16,250 foot long water diversion drilled through sandstone in the early 1930's to provide hydro-electric power to the Union Carbide Corporation. The tunnel takes water away from 5.3 miles of the New River. In a recent assay, a sample of the rock was shown to be more than 90% pure metallurgical grade silica, more than ten times the content usually found in anthracite coal, the generic material defining the disease anthra-silicosis. At congressional hearings in 1936 on the Tunnel and on silicosis, it was reported that 476 men had died as a consequence of work on the tunnel, mostly from silicosis. The sources were purely reportorial, however; the only formal study, done by Union Carbide, showed 110 deaths, allegedly less than expected.

In practical terms, my own work revolved about two separate components: 1) a narrative historical account with a reliance on available primary sources and 2) an epidemiological survey to determine the number that had actually died. Neither the appropriate state bodies nor the several corporations involved had assessed the mortality from silicosis on the Hawk's Nest Tunnel. Therefore, an indirect approach had to be taken. A study was designed to detect excess deaths during the tunnel digging years among the predominantly migrant work force by directly measuring deaths from acute disease among local workers and by gauging chronic deaths. The hypothesis was that mortality in the affected worker population could be sufficient to distort total death rates in Fayette County, the smallest relevant geographical unit. Because it was impossible to identify individual workers with any level of completeness, it was assumed that if deaths resulting from tunnel work were as numerous as popular legend implied, county mortality records should be sufficient to detect a cluster of deaths, particularly from respiratory causes among working age men. Because silicosis was not a reportable cause of death in West Virginia, pulmonary death might be the most sensitive specific cause. Thus 5554 death records from Fayette County were analyzed for men and women, ages 10-59, in the years 1925-40. For comparison, total and cause specific rates were also developed for the State of West Virginia and total death rates for 3 demographically similar mining

counties - Logan, McDowell and Raleigh. In effect, the design was a type of cohort mortality study with the important exception that the cohort could not be reliably identified.

It may be already obvious that this was not a customary approach to the conduct of a mortality study. The straightforward review of health statistics would normally lead to summary tables of vital statistics compiled by the State Department of Health and maintained by the National Center for Health Statistics. Death rates stratified by locale, gender, age grouping, race and specific cause of death are the anticipated humus of descriptive population epidemiology. The unexpected and chilling absence of these elementary records necessitated a compilation of mortality rates from the original county and state sources. Hence there were fundamental limitations not only in the transcription of deaths, but also in determinations of the most fundamental vital statistic - census population. Even here, the conglomeration of gender in the 1920 census required statistical tools for differentiation. And overall, there was a turn to varied and primary historical source material. The price of approximation was replicate analyses. Sources included county ledgers of vital statistics, death certificates, raw mortality totals compiled by the state, and unpublished company tabulations of deaths, workers' compensation lists and burials.

No matter what comparison or control population was introduced - gender, county or state - the same disturbing pattern was repeated. Some 250-300 excess deaths, largely from respiratory causes, had occurred among working age men in Fayette County in the early 1930's. When this was conservatively extrapolated to the largely migrant population, it seemed that more than 750 had died within five years of completion of the tunnel. When I first came to these conclusions in a preliminary form in the Spring of 1983, Gauley Bridge seemed an antique but concentrated industrial horror and the legacy of an earlier and, at least, less morbidly dilute time. I wrote

It sometimes seems that occupational health has no classical epidemics, that the surveillance mechanisms of public health had already matured when industrial hazards became prominent.

Subsequent catastrophes at Bhopal and Chernobyl disclose the prematurity of these thoughts, for the destructive warp of the modern industrial world is not subtle. In asking what archivists ought to know or be prepared to know about these types of events, there are several simultaneous assumptions. The future historian will be the beneficiary of intelligently selected and preserved primary sources; that a common cloth runs through diverse environmental assaults; that decentralized public sector and academic

quantification may be insufficiently integrated and that data, though diverse, is available. This discussion would be utterly lacking in interest if history was easily recoverable by administrative means, that is simply as an assembling of specialized data bases, compiled by other groups of technical professionals, with priority assigned by forecast, replete with the according dates and geographical identification.

There was an admirable creativity in soliciting the critical perspective of a medical investigator on the ongoing work of public sector archivists. From a formalistic point of view, the integration of interests is plausible and direct. My own work on the Hawk's Nest Tunnel disaster made special reliance on West Virginia archival sources from the 1930's, a situation which has apparently qualified me to comment on their adequacy. Furthermore, the inadequate maintenance of vital statistics by state and federal public health and statistical administrations necessitated an eclectic approach to information, and a reliance on archival sources. The use of state archives for public health research, rather than more conventional sources involved circuitousness and some methodological invention. Whether the chosen term is primary source or last resort, it is the nature of archival material to represent a more unfinished state than epidemiologists usually consider, at least since the days of Durckheim.

Having acknowledged a collusion of interests in this particular case, it would not seem that current disaster research would automatically result in coordinate activities of public health researchers and archival historians. For one thing, contemporary public health assessments of major environmental insults have gauged human injury in increasingly complex and subtle applications of the epidemiologic method. To take, for example, the cases of Agent Orange, Three Mile Island, the Love Canal and Rocky Flats, the probable assessments of human disease are based on standards of measurement that exceed simple data accumulation. There is a substantial difference in refinement between surveillance and historical epidemiology, with a very different acceptance of tolerable error.

While stating my own interest in regionally assembled historical material, the question will arise whether a "primitive" environmental disaster, like the Hawk's Nest Tunnel Incident, is simply a historical event with safely distant moral lessons, or whether it can still engage current ethical and technical concerns. If patterns of corporate behavior and the degree of federal and state environmental and occupational health intervention has sufficiently changed for the better, then the events are more morally circumscribed. The issue

of technical pertinence delineates the application of this type of work to either history or the more quantitative social sciences.

There were clearly non-reproduced anomalies in the high level of internal inconsistency among West Virginia vital statistics. For example, although deaths for the state and counties were reported in aggregate, cause specific deaths were incompletely recorded, with many causes being omitted, but inconsistently from year to year. Furthermore, black and white cause specific deaths were usually reported as an aggregate, a serious limitation in a study of a workforce that was 2/3 black, nearly five times the rate of the general population. This, confounded by periodic revisions of the International Classification of Disease (ICD) codes, which was a purely external circumstance, greatly complicated the problems of longitudinal analysis.

Inevitably, frequent, albeit conservative, correction factors were introduced to protect consistency in mortality rates. This degree of indirectness and approximation would probably be unnecessary in the industrial world (although still relevant in the third world), and would not be acceptable, except in historical work where no better material survives. Having said all this, the generic utility of the techniques employed and improvised in studying Hawk's Nest might appear to be insubstantial, and relevant only to historical disasters. That is, if the documents are not already in the bins, the event is probably recent enough for a more conventional quantitative study.

The quantitative story inevitably depends on the technical expertise of other specialists, but methods, no matter how scrupulously applied, must still defer to judgement and selection by an interpreter. It is doubtful, for example that the details of the tediously executed studies of the effects of Agent Orange and other phenoxy herbicides on Vietnam War Veterans will engage substantial future interest. The more difficult task of preservation is differentiating the more subtle background organizational, policy and psychological issues from the effluvia of federally mandated accumulations of data. Modern information production further separates the dimensions of interpretation from quantity. In a sense, the general recognition by the public already implies the inevitable spawn of polemical interpretations and the familiar triad of environmental controversy: 1) popular outrage and suspicion of major environmental insult, 2) corporate or institutional denial, and 3) academic or technical assessment separated from the event by years and stating uncertain and popularly incomprehensible consequences. Or, in the case of Gauley Bridge, controversy may result in the very minimal availability of accessible information. That is, environmental disasters that have occurred more quietly, leave a

very different type of public record, usually with greater presence in the courtroom and with less systematized comment by local public officials.

The archivist's interest in environmental disasters must rely on sources accumulated through other technical disciplines. There is some value in a more detached consideration of problems of interpretation that arise in differences in approach. It is frequently the case in technical disciplines that the terms of dichotomies are internalized - such as with threshold or no-threshold theories of carcinogenesis following a low level release of radiation, or probable approaches to the multiple causes of death. This is particularly true when private interests and federal regulatory institutions are in confrontation. However, there are factors other than the divisions in training and perspective which separate specialists in an applied technique from generalists. These involve perceptions of scale and time.

By in large, the interests of public health and medical researchers rely on units considerably smaller and less complex than the individual, or when they are social, take account of a pragmatic present. No matter the intricacy of detail, the future promises the certain obsolescence of his or her work. The past is useful as one margin of a longitudinal assessment, ending in an outcome of current interest. To take the case of Chernobyl, medical assessments rest principally on established parameters of dose and disease. There is the possibility, now the certainty, that previous associations with radiation and lethality will be amended. Much of the data collection is an embellishment of case and exposure definitions. In all likelihood, the social historian who interprets this event or a Three Mile Island will be secondarily interested in dose response quantification, whereas the psychological aspects that accompanied the recognition of a disaster will be more significant. And the radiation biologist of a future generation will have more skillful models and probably be unable to afford an extensive investigation of the science of the time.

By contrast, the archivist's immediate tools are more modest. The present consists of technical limitations, whereas the past and future are of more immediate interest. The archival historian is in the complex position of collecting the relics of a past, first assembled by others. That is, the secondary source material of the present may become the primary source material for a future researcher. The judgments of the archivist bear increasing weight over time. To take the case of the Hawk's Nest Tunnel, could a successful archival effort have lead to its description sooner? As other investigators have attempted to uncover details and met with

few primary resources, the answer would appear to be positive. It turned out, a brief description in an official publication from the West Virginia archives a quarter century after the tunnel was completed, relied exclusively on company sources and belittled the event. There were, of course, limitations in primary sources. Company records were never publicly released, and were laden with discrepancies, confirming too few deaths. State mining and public health authorities either did not investigate or kept inadequate disaster records, except where industrial disasters involved the mining of coal. The quantitative compilations of the plaintiff's attorneys were seized and suppressed by the companies involved as recompense for out of court dispositions. Does the censoring of important quantitative sources absolve deficient record keeping? Before answering the question, it is worthwhile to consider some of the ways in which information can be curtailed.

There are three ways in which the search for information on an environmental calamity can be distorted or fundamentally truncated. The first, and most obvious, is the simple absence or loss of critical information. In the case of Gauley Bridge, for example, the company's judicious maintenance of long term survival records on its entire workforce would have obviated an indirect population study 50 years after the fact. This is probably the most apparent and evident detail of the purported archival gap, but it is, in many respects, the least significant for the archival historian, particularly when given the sophistication and technical complexity of exposure measurement, risk estimation and application of the epidemiological method. In this case, the Gauley Bridge experience is an unsatisfactory precedent. In the case of the Three Mile Island (TMI) incident, the studies recruited by the Centers for Disease Control and other public health and regulatory bodies must stand the test of peer review, and no public information body could be expected to supersede this task.

A second and more provocative obstruction to the availability of information involves deliberate sequestration. This obviously occurred at Hawk's Nest, with the company's reliance on unpublished surveys and the deliberate removal of the plaintiff's attorneys records. Furthermore, because litigation represents a vastly inefficient record of events with limited potential for long-term preservation, the predominant role of the State Court<sup>e</sup> resulted in the loss of key records through discarded testimony. These are not merely historical problems. The private utility which ran TMI was unsuccessful in preventing disclosure only because of the scale of the event, and the testimony of whistleblowers in the nuclear power industry suggests that this was not a unique experience. To

underline the fact that this is not only a problem of private ownership and capitalist conditions of development, reference should be made to the more recent semi-official account of the Chernobyl incident by a deputy editor of *Izvestiya* (Illesh, Chernobyl: a Russian Journalist's Eyewitness Account, 1987). Independent of the mistaken accounts of radiation effects, which is perhaps acceptable from an uninformed lay person, there is a rather implausible depiction of the civil defense response and an extraordinarily misleading account of known adverse human health effects and of radiation levels characterized by international bodies. Here there is valuable heartwood for archival research. Even with national events, the range of opinions, studies, court records and diverse sources may be lost or diffused. Local assemblage would seem fundamental. Hawk's Nest was a national tragedy, but the best materials were confined to the State of West Virginia.

A third area of the misuse of information is more subtle and complex, having to do with a shading over time of impressions and lessons, usually with the tint of good sense. Of course, there would be little point in methodology, if common sense were sufficiently expunged of ideology and cultural eccentricity to provide correct conclusions. But popular understanding may be deflected by intrinsic distortion or by outright manipulation. In the latter case, the archivist may play the democratic role of preserving dissident interpretation. In the case of Gauley Bridge, between the view of the radical labor movement that many hundreds may have perished in essentially deliberate mass murder and the view of the company apologist that the tragedy was real but exaggerated, a balanced view might favor the latter perspective. Since the 476 deaths described by Congress came from a partisan and demonstrably inaccurate source, and the accounts of the victims involved wildly divergent estimates, plaintiff or victim derived sources were clearly inaccurate. Although never published, the company did maintain records of deaths, citing 110 in all, and since statistics seem more substantial than accusation, they would appear to deserve special weight. Furthermore, accounts of mass graves appear to have been exaggeration, whereas the accuracy of the company's internal records of secret burials can be independently confirmed. The body of facts seemed to have convinced the State of West Virginia archivist who commented on Gauley Bridge, and determined that the accounts of the tragedy were overwrought (MacCormick, The New-Kanawha River and the mine war of West Virginia, 1959). Moreover, the small number of actually reported silicosis cases on death certificates, which also can be independently documented all seem to confirm the more modest descriptions of loss of life. That is, a

true but overstated tragedy. For myself, I began with this point of view, slowly derived from various credible secondary accounts. My findings, showing that the tunnel workers were far more right than wrong, was a minor shock. This is not really revisionism, since there was no accepted orthodox view to challenge, but as with Chernobyl, TMI, Times Beach or Rocky Flats, it may be important to preserve the possibility of a divergent view. For Hawk's Nest, the preservation, for example, of the plaintiff's attorneys mortality records, would have gone far to support a dissident, and perhaps more correct interpretation.

In conclusion, I can only restate that for these types of complex health and environmental effects, it is more likely that the secondary sources of today will be the critical primary sources for a future review. Ultimately, the missing hard data is secondary, since you cannot discover what was never deposited. The powerful conforming forces of the commercial press highlight the importance of preserving diverse opinion in its own time.

## **Examples of Films that Document Appalachia**

by Herbie Smith

Appal Shop is in a small town in southeastern Kentucky, one of those places where a number of states come together. You can see Virginia from Whitesburg and the top of the mountain ridge is the state line. We're not too far from Tennessee and the West Virginia line. I make films with this organization. It used to be called Appalachian Film Workshop but the name was shortened. I've been there since 1969 so I'm an old timer. In the organization there are about 30 people working full time in all the departments. There are 6 film and video people.

We were the Appalachian branch of Community Film Workshop. It started in my home town when I was a senior in high school. It was funded by the Office of Economic Opportunity. Part of their notion was vocational education. As you know, that whole agency was cut out. What we did from the initial year was to create our own non-profit organization. Then when the inevitable came, we had some momentum. We had finished some films and were in a position to continue.

Let me fill you in a little more about Appal Shop. There is a theatre company called Roadside Theatre and we have a record company, June Appal Records. We have about 50 albums of music from the region. We have a non-commercial radio station. We also have photographic workshops. Generally this organization is set up to allow people in the Appalachian region to get their hands on the media. We provide the equipment, the training if necessary, the film stocks and materials, the records, the recording studio for people in the region to speak for themselves. And part of the reason that this is so important is that so few times in this country do we have a sense of people outside the major cities, especially for people in this particular place. This Appalachian region wasn't known very well and one of our jobs was to speak from the inside about this place that we're part of. I'm the son of a coal miner. My grandfathers were coal miners. Most of us that work at Appal Shop are from this place. The organization as a whole has been working to produce work and get it out. We have produced over 100 films and videotapes and distribute them through our catalog to a number of educational institutions and libraries. About 7 or 8 years ago we set out to do a film history of this part of the country. Part of the idea behind the series is that there is a notion that this place has no history, a place where time stood still, 'yesterday's people.' There's

another term people used to use, 'contemporary ancestors.' What we try to do is show the history over a period of time. One thing you will see in what we have shot is oral history material. We have in effect a living archives. We're constantly adding to this - recordings, audio interviews, video interviews. We shot what we thought would be important, collected material from archives and then put it together.

Most of the work in the theatre company is plays that people in the company have written. It's a travelling theatre group that performs in the schools, at festivals and other places. Our focus in general is on our own land, this place. We try to perform in the Appalachian region though we do go outside.

I'll say we're better now as film makers coming into archives. There are many film makers who come and go. Film making is a funny business. It's hard to sustain yourself at a certain place, especially a small town like Whitesburg. I think now that we have some sense of the long term and people in the regional archives know what Appal Shop is about. There is a sense that we will treat the material responsibly and that we are not interested in mistreating the material. Sometimes it's very hard for people who realize the value of their collections to open them up for film makers but we're pleased that you all have done that for us. The point is that often it's these wild-eyed people coming in trying to make movies out of this material, that maybe we aren't as respectable as we should be. We've learned not to bring our video cameras the first time we come to the reference desk. It's kind of a funny business in the sense of the editing process. You always want a lot more than you're ever going to use - to edit with, to cut from. I think both of us can share a little in that problem. Film and video material is often hard for archives to wrestle with. It's not a print medium which is much easier.

One thing I wanted to say was to thank you for the Marshall Archives. We drew a lot on that. We've done 2 films of the Buffalo Creek flood. We went up there just after the disaster, shot film and did a half hour show. Then we went 10 years after the disaster and filmed people talking about what had happened to their community, what the resettlement efforts did for them. All the people talked about the disaster after the disaster - the ways that the agencies dealt with them and their communities. We were able to draw on the Marshall Archives. We're finding that in most of our filming we're drawing on a number of archival sources. I'm preaching to the saved here but I think that what you are doing is really important for two reasons. One is that it's just there for the long haul. A number of people who we won't imagine will figure out ways of using

the material that you have. Secondly, and for the present, we're finding that archival material is important to get out. When we went up to Buffalo Creek the first time, our people got thrown in jail for documenting the scene. The point is that this material is not neutral for a lot of people; it's hot. If you're in the situation where there are major industrial problems, then those industries often don't want the goods out there. It's important I think, that efforts of censorship are thwarted. We're glad that we were able to get access to archival film of Buffalo Creek and to use it to produce films which are reaching a broad audience.

Our understanding about releases is that if people agree to be in your film, then they've agreed. We've never had a problem with people balking at the material we shot. Sometimes we've recorded a short conversation [of agreement] at the beginning. In our case, because so many of the people aren't people who regularly appear in other films, people who aren't used to being filmed, then that whole dynamic between the film maker and the person is important. The whole design of our production crew is to have as much intimacy and sense of trust between all of us.

This change in television stations on their nightly news from film to video has really changed the valuable material. When people shot 16 mm film for the news, then they processed it and had the outs. Everybody keeps what they show. Videotapes are recorded over now, used again and again, erasing each time. I don't know what we can do about that. One thing that I was suggesting to a couple of archives is that if there are events you all know are important and should be documented, then for the price of one video tape, @\$10.00, supply a fresh tape to the crew and ask for the one they shot. The station is getting a fresh tape. If they had a fresh tape every time they recorded once, then somebody would have the dope that was on the old tape. The archives would have the tape for a relatively small amount of money. The crew has the big expense of travelling out there, having the equipment and shooting film, but then it's just recorded over. So that's the problem. Everybody saves quite a bit that way.

We always keep our film. We have a vault to store the material. We save all of our tapes from our video productions which are growing. The video tape has become much more massive. In the last 5 years we've produced a series of 1/2 hour shows that are shown on PBS affiliates. There are 4 states that we broadcast the series from. In shooting the series we've accumulated a tremendous amount of video. Our films are available to researchers. We've never turned anybody down. We just ask that people come to us with some specific proposal.



## **Intergovernmental Records Project: A Summary**

Frank B. Evans

The unpublished documentation of the American governmental experience is scattered throughout the United States in thousands of public offices at the local, state and national levels and in a wide range of archival and manuscript repositories. As a result of the nature and history of our federal system, these include records of the national, state and local governments that contain duplicate information; divided archives placed at various times for safekeeping in a multitude of public and private institutions; and records that result from administratively divided, and parallel functions.

It is therefore particularly appropriate that in this Bicentennial Era the State Archives and the National Archives undertake a cooperative project, utilizing modern information-handling technology, to help bring under intellectual control the above categories of Government records and archives and to assist in planning cooperative programs for retention and disposition. Such a project will help make possible both a rationalization of archival holdings and more systematic and coordinated appraisal and archival retention of valuable noncurrent public records at all levels of Government. Not only will the scholar, the citizen and the Government official benefit from the resulting improvement in archival services, but such a project will contribute directly to responsible archival management in a period of increasingly limited budgetary resources.

For the purpose of this project the term "intergovernmental records" is used to refer to records of government origin that:

1) contain duplicate information, in whole or in part, such as some types of military records and employment or housing statistics submitted by localities and states to the federal government.

2) were transferred or abandoned by colonial, territorial, state or federal agencies or officials, and were acquired by unrelated public or private repositories before the establishment of official public archival agencies.

3) result from programs planned, financed, or otherwise initiated or directed by the federal government but implemented by state or local governments, such as entitlements and categorical and block grant programs.

4) relate to shared and parallel governmental functions, for example, naturalization, court, and land records.

The need for a project to locate, describe and share information on intergovernmental records and archives is based upon the following considerations:

1) The nature of our Federal system, two centuries of broad judicial interpretation of the Federal Constitution, and the long trend toward centralization with recurring efforts at decentralization have produced a wide range of records at all levels of government with functional and/or substantive relationships, including duplication of content.

2) The growth of our governmental institutions from 13 colonies to a Federal Union of 50 states has been in process for more than 180 years. In the transition from colonies to States and later in the organization and development of territories and their transition to statehood, little if any attention was given to the appropriate preservation and disposition of the public records involved.

3) Although a number of states date back to colonial origins in the 17th century, the first State Archives was not established until 1901. Nearly 150 years elapsed between the establishment of a de jure central government and the establishment of a National Archives. We do not have an unbroken tradition of responsible custody by the states and national governments of their records and archives during this long period.

4) Throughout our history numerous elected and appointed officials and, in the past century, career civil servants, have frequently been unaware of or indifferent toward laws and regulations intended to protect government records. When combined with the absence of a National Archives until 1934, and of state archival agencies in a number of States until after World War II, the results have frequently been voluntary alienation or deliberate transfer of noncurrent Government records to any convenient repository to help insure their preservation.

The need to identify, describe, and share information on Government records at every level has been proposed intermittently for the past three decades. Most recently the initiative of the Acting Archivist of the United States in inviting State Archivists to meet periodically for a discussion of mutual problems and interests has provided a forum for renewal of the proposal, to which has now been added the desire to share information on appraisal of such records. A project in which the State Archives actively participate with the National Archives to achieve this objective has long been needed and would be of direct benefit to all users of government records and archives.

The purpose of the project is thus to locate, record, and share information regarding these intergovernmental records and archives.

With regard to governmental records in nongovernmental custody, every effort will be made to assure the current custodians that all information they provide is intended solely to facilitate access to and use of the records for reference and research.

Initially the project emphasis will be on identifying records that contain duplicate information at the federal, state and/or municipal levels and on divided archives. This approach promises the most immediate and tangible results in terms of the relatively limited volume of the materials involved and the possible savings from disposal of duplicates. Records of federal programs administered by the states or municipalities will be the second priority, since these also can contribute to better planned accessioning programs. Third priority will be assigned to records relating to shared and parallel functions. Information regarding such records will be of value chiefly in improving and facilitating reference and research services.

The project will result in the creation of an automated data base that could eventually be integrated with other data bases being planned by the State Archives and NARA to facilitate control, access to, and more effective utilization of their research resources. Specifically, the data base on divided government archives will provide information for guides to State Archives now in preparation or undergoing revision, as well as for the current revision of the Guide to the National Archives of the United States. This information could be incorporated into descriptions of related records for relevant record groups, consolidated in an appendix, or published as a separate and supplementary volume, depending upon the quantity and variety of the records involved and the status of the various guide projects. A continuing value of the data base would be to enhance the quality of archival reference services. In helping to uncover and fully identify Government records duplicated in whole or in part among the holdings of federal, state and local repositories, the project will also be valuable in the reappraisal or retention review and rationalization of archival holdings by both public and private repositories. Finally, the creation of a data base of the descriptive information regarding divided government archives would permit convenient updating and revision of the information as records are more fully identified and described and additional records are located through federal, state and regional survey and description projects.

The creation of a data base of information describing records of intergovernmental interest and the inclusion of not only accessioned records but also of record series from federal, state and local schedules with appraisal decisions, would contribute significantly to the knowledge and understanding essential to the development of appraisal guidelines useful to archivists at all levels of government.

## Constitutional Issues and Archives

*Frank B. Evans*

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This data base would assist in rationalizing archival holdings of government records and in planning accessions as previously indicated; the retention review of current holdings would benefit from readily available information on duplicate, similar or related holdings of both state and NARA archival repositories. Future accessions could be planned that would expand research potential by complementing or supplementing current holdings, wherever located, through use of innovative selection and/or sampling techniques and the development of realistic and coordinated documentation strategies. That would be of value to the archival profession in general. Automated storage and retrieval of descriptive and appraisal information on the above types of records, in a format compatible with both the MARC-based RLIN Seven State Project and the Life-Cycle Tracking System being developed by NARA, would ensure the continuing usefulness of the results of the project to all governmental archives and to all users of archives.

The search for divided government archives will be limited to the United States but will necessarily include both public and private repositories. No attempt will be made to locate individual documents; the project will be limited to organic (organizationally and/or functionally related) bodies or records groups, subgroups, series, subseries and file units that constitute part of the archives of government agencies and have been divided between two or more repositories. Federal and state archives that have been accessioned by the National or a State Archives but are located in other repositories under separate arrangements are not included in the project.

With regard to the three other categories of records, the project will be limited primarily to governmental archival repositories at the national and state levels, but county and municipal archives that operate under "home-rule" charters and are independent of state archival jurisdiction will be invited to participate. In dealing with these records the emphasis will be placed on records at the series level. Although many federal and some state schedules, particularly those organized on a functional basis, group a number of series into a single schedule "item," archival (permanent) records are generally described in schedules at the series level.

The initial or pilot phase of the project will involve working with State Archives representatives, NARA specialists and the participants in the RLIN Seven State Project to identify and obtain agreement on the descriptive, and, where appropriate, the appraisal data elements to be requested from repositories. Assistance will be requested from state and federal reference and appraisal specialists in helping to identify records in each category, and from automation

specialists and the NARA Life-Cycle Tracking staff in planning the data base to ensure that it is compatible with the MARC-AMC format and can readily be incorporated into institutional automation programs.

Once the data elements and the data base plan have been agreed upon, the project will be initiated in two states. A state with a history as a colony, as a major participant in the formation of the Federal Union, and as a Confederate State will be valuable in dealing with problems of divided archives and archives containing duplicate information that resulted from these major developments in our history. A second state with territorial government records, a state-wide network of repositories for both public archives and manuscript collections, and which is a participant in the RLIN Seven State Project has also been invited to participate in the pilot phase. States will be selected that will bring to the project strong leadership and professional commitment. NARA is pleased to announce that the state archival agencies of Virginia and Wisconsin will participate in this pilot phase.

Based upon the pilot project experience with divided government archives and those containing duplicate information, letters describing this part of the project and soliciting cooperation will be sent to all public and private repositories that currently have holdings of more than 200 cubic feet. These letters will be accompanied by selected examples of submissions from the pilot states to indicate the kinds of material with which the project is concerned and to serve as a model in providing information on such materials in their custody. Assistance will also be requested of state archival and NARA reference specialists and field branch directors to point out already-known divided archives and those which duplicate information in other repositories, and to describe those in their custody.

A review will be made of the NUCMC volumes and the NHPRC directory, but for the most part the level of description at the repository or collection/record group level is too generalized to permit identification of duplicate and divided archives that have been incorporated into record groups and collections. A review will thus be necessary of more detailed finding aids, such as inventories and registers. Notice of the project with a request for cooperation will also be placed in archival and manuscript journals and newsletters. In the notice reference will be made to the limited mailing, and repositories with fewer than 200 cubic feet of holdings that do include any divided or duplicated government archives will be invited to write for further information, including examples of completed data sheets.

Follow-up activities to the initial mailing to major public and private repositories will concentrate on those repositories with known and probable divided archives. Should personal contact or visit prove necessary, chief reliance will be placed on the assistance that can be provided within the continental United States by NARA branch directors and state archival personnel, assisted by the project staff.

Problems still to be resolved that will impact on the project are the development of a standard for entering appraisal information and agreement on a functions list describing government programs and activities. Cooperation with the RLIN project as soon as possible will enable the Intergovernmental Records Project to assure consideration of its particular needs as well as to contribute to the solution of common problems.

The wide variety and volume of records and archives involved in this project indicate that description and entry into a data base will continue for a number of years. The ultimate success of the project - the value and uses of the resulting data base - will depend upon the degree of cooperation that can be achieved between NARA and the wide range of public and private repositories throughout the country. We need and encourage your support and active participation in this valuable project.

**COPYRIGHT ISSUES AND FREEDOM OF INFORMATION**



## **Salinger v. Random House: The Case**

by Christopher Runkel

This paper analyzes and discusses the case, Salinger v. Random House, Inc., in which author J. D. Salinger obtained a preliminary injunction against Random House, Inc., a publishing company, and Ian Hamilton, the author of *J. D. Salinger: A Writing Life*, an unauthorized biography of Salinger. The preliminary injunction prevented defendants from publishing in Hamilton's book copyrighted material taken from certain unpublished letters written by Salinger.

The case turned upon whether the use of this copyrighted material would be a fair use under federal copyright law. Although the case, and this question, would appear to be of practical interest only to authors and publishers, the case also caught the attention of archivists. The reason for this is probably that the Salinger letters used by Hamilton are deposited with research libraries at Harvard University, Princeton University, and the University of Texas.

In writing this paper, I read and analyzed the following materials: (1) the trial and appellate court opinions issued in Salinger v. Random House, Inc., (650 F. Supp. 413 S.D.N.Y. 1986 and 811 F.2d 90), reh'g denied, (818 F.2d 252 (2d Cir.), cert. denied, (56 U.S.L.W. 3207 Oct. 6, 1987); (2) the Supreme Court's decision in Harper & Row, Publishers, Inc. v. Nation Enterprises, (471 U.S. 539 1985); (3) other significant fair use cases cited by these three decisions; and, (3) pertinent provisions of both the present federal copyright statute, 17 U.S.C. 101 et seq. (1982) (hereinafter referred to as "the Copyright Act of 1976"), and the copyright statute previously in force (hereinafter referred to as "the Copyright Act of 1909"). I did not survey generally the scope of the fair use doctrine with respect to the unauthorized publication of unpublished materials because "[w]hatever glimmerings on [this] subject have appeared in cases decided before May 20, 1985 . . . [my] guidance must now be taken from the decision of the Supreme Court on that date in Harper & Row, Publishers, Inc. v. Nation Enterprises . . . the Court's first delineation of the scope of fair use as applied to unpublished works." Salinger v. Random House, Inc., (811 F.2d 90, 95, citations omitted).

After reading and analyzing both the Second Circuit's opinion in Salinger v. Random House, Inc., (811 F.2d 90, hereinafter referred to as "Salinger II"), and the Supreme Court's decision in Harper & Row, Publishers, Inc. v. Nation Enterprises, (471 U.S. 539

hereinafter referred to as "Harper & Row"), I conclude that the Second Circuit carefully applied Harper & Row to the set of facts before it without attempting to move beyond the Supreme Court's decision. For this reason, I believe Salinger II adds nothing to the continuing development of fair use jurisprudence. Concluding that Salinger II is only an application of existing law does not mean I believe the decision lacks importance for archivists. To the contrary, I believe the decision is significant for at least two reasons. First, by analyzing in detail Hamilton's use of the copyrighted letters, the court of appeals has provided practitioners with a useful resource for answering similar fair use questions in the future. Second, and, perhaps of greater importance, the decision in Salinger II should make archivists more aware of some of the special problems associated with the use of unpublished letters.

The fair use doctrine was developed by judges to allow some unauthorized use of copyrighted material while still protecting the rights of an author to his intellectual property. It has been defined by the Supreme Court as "'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'" Harper & Row, (471 U.S. 539, 549 1985, quoting H. Ball, Law of Copyright and Literary Property 260 1944). The purpose of the doctrine is to balance "the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry." Meeropol v. Nizer, (560 F.2d 1061, 1068 2d Cir. 1977). Because the interest of the copyright holder and the public differ in every instance, the fair use doctrine is applied on a case-by-case basis.

Eleven years ago, Congress codified the common law fair use doctrine in the Copyright Act of 1976. Now found at 17 U.S.C. 107, the doctrine reads:

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and  
(4) the effect of the use upon the potential market for or value of the copyrighted work."

Congress made it clear when it codified the fair use doctrine that its purpose was only to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way," (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 1976), quoted in 4mW. F. Patry, Latman's The Copyright Law (240 6th ed. 1986); (S. Rep. No. 473, 94th Cong., 1st Sess. 62 1975), an intention since recognized by the courts. See, e.g., Harper & Row, (471 U.S. at 539). For those reasons, the fair use doctrine remains a judicially crafted rule of reason.

Ian Hamilton is a writer, poet, and literary critic. In July 1983, Hamilton contacted J. D. Salinger seeking Salinger's cooperation with his then-proposed biography of Salinger. Salinger refused. Hamilton proceeded with his project nonetheless. See Salinger v. Random House, Inc., (650 F. Supp. 413, 416, S.D.N.Y. 1986) (hereinafter referred to as "Salinger I"); see also Salinger II, (811 F.2d at 92). Over the next three years, Hamilton researched and prepared his biography. Among the resources he used were a number of letters written by Salinger to various friends and colleagues. [See Salinger II, 811 F.2d at 92-93]. Hamilton discovered most of these letters in research libraries located at Harvard University, Princeton University, and the University of Texas (hereinafter referred to as "the libraries"), to which they had been donated by persons other than Salinger. Id4m. at 93; Salinger I, (650 F. Supp. at 416). Hamilton also used a bibliography of Salinger materials, written by Mr. Jack Sublette and published by Garland Press in 1984, which "referred to and quoted letters deposited with Princeton's library." Salinger I, (650 F. Supp. at 416).

Each library, before it granted Hamilton access to the Salinger letters, had required him to sign an agreement whereby he agreed not to use the letters in certain ways without the permission of both the library and the owner of the intellectual property rights. See Salinger I, (650 F. Supp. at 416); Salinger II, (811 F.2d at 93). An example of the type of agreement entered into between Hamilton and the libraries is the "Princeton University Library Request for Access to Manuscripts," set forth, in part, in Salinger I:

I [the requester] understand that Princeton University holds manuscripts for purposes of research and scholarship. I agree not to copy, reproduce, circulate or publish them without the permission of Princeton University Library and of the owner of the literary property rights, if any. I assume all responsibility for any

infringement by me of the literary property rights held by others in the material requested. (650 F. Supp. at 416, 417. emphasis added).

In September 1985, Hamilton submitted J. D. Salinger: A Writing Life to Random House in manuscript form. The manuscript contained, in the words of the district court, "very substantial quotation from approximately 70" Salinger letters. Salinger I, (650 F. Supp. at 417). Neither the libraries nor Salinger had given Hamilton permission to use the letters in this way.

In May 1986, galley proofs of the Hamilton manuscript were sent by Random House to book reviewers and potential licensees. See Salinger I, (650 F. Supp. at 417). At some point during this month, Salinger came into possession of a set of the galley proofs. Upon learning that several of his letters had been donated to the libraries and used in Hamilton's manuscript, Salinger took two actions. First, he registered for copyright protection seventy-nine of his unpublished letters. Second, he instructed his attorneys to write Mr. Hamilton and Random House demanding that Hamilton's book not be published "unless and until" all of the material from the Salinger letters was removed. Salinger II, (811 F.2d at 93). On May 30, 1986, this letter was sent to Hamilton and Random House. Salinger I, (650 F. Supp. at 417.E).

In response to the letter, Hamilton and Random House first sought the libraries' permission to quote from the letters. When that request was denied, Hamilton revised his manuscript. The revised manuscript replaced many of the direct quotations with paraphrases, described by the court of appeals as "close paraphrasing." Salinger II, (811 F.2d at 93). The remaining direct quotations had been drawn from letters reproduced in the Sublette bibliography. The revised manuscript contained no quotation from letters available only from the libraries. Salinger I, (650 F. Supp. at 417). Overall, the revised version of J. D. Salinger: A Writing Life retained between two hundred and three hundred words quoted directly from the Salinger letters, or, as the district court found, "something between 0.8% and 2.0% of the content of the copyrighted correspondence." Salinger I, (650 F. Supp. at 417).

Hamilton's efforts to placate Salinger were not successful. On October 3, 1986, Salinger filed suit against Hamilton and Random House in the United States District Court for the Southern District of New York, seeking a temporary restraining order (TRO) and a preliminary injunction prohibiting the defendants from publishing the Salinger biography. In the complaint, Salinger alleged that (1) publication of the book would infringe his copyrights in the unpublished letters and (2) he would be "irreparably harmed" if

defendants were allowed to publish and distribute Hamilton's work. Id.; Salinger II, (811 F.2d at 94). Salinger also alleged that publication and distribution of the biography would violate federal unfair competition laws, specifically section 43(a) of the Lanham Act, Ch. 540, 60 Stat. 441 (1946) (codified at 15 U.S.C. 1125(a) (1982)), which prohibits the false description or representation of "goods and services" placed in "commerce". Salinger II, (811 F.2d at 94); Salinger I, (650 F. Supp. at 426). Finally, Salinger alleged breach of contract by Hamilton in quoting from the Salinger letters owned by the university libraries. Salinger II, (811 F.2d at 94).

On October 3, 1986, the district court granted Salinger's request for a TRO. This order prevented defendants from publishing Hamilton's biography until the court could rule on Salinger's request for a preliminary injunction. By mutual agreement of the parties, the TRO was eventually extended until November 5, 1986, the date the court denied the application for a preliminary injunction. Salinger I, (650 F. Supp. at 417).

In denying Salinger's application, the district court found that Salinger had failed to satisfy the evidentiary burden required of a plaintiff seeking a preliminary injunction. To be specific, the court found that Salinger: (1) had failed to demonstrate any "likelihood of success" on the merits should a copyright infringement action ultimately be brought; (2) would not suffer "irreparable harm" if Random House published Hamilton's book; and, (3) failed to prove that the injury he would suffer due to the publication of Hamilton's book "decidedly" outweighed the injury defendants would suffer if publication did not occur. Salinger I, (650 F. Supp. at 428).

The district court judge based his denial of a preliminary injunction upon the finding that Hamilton's use of the copyrighted letters was permissible under the fair use doctrine. Salinger I, (650 F. Supp. at 423-26). The reasons given by the court in support of this holding were as follows:

Hamilton's use of Salinger's copyrighted material is minimal and insubstantial; it does not exploit or appropriate the literary value of Salinger's letters; it does not diminish the commercial value of Salinger's letters for future publication; it does not impair Salinger's control over first publication of his copyrighted letters or interfere with his exercise of control over his artistic reputation. The biographical purpose of Hamilton's book and of the adopted passages are quite distinct from the interests protected by Salinger's copyright. Finally, although both Hamilton and Random House no doubt hope to realize profit from the sales of the book, it is a serious, carefully researched biography of an important literary figure (of whom

little is known); its publication is of social and educational value. (650 F. Supp. at 423).

The district court also rejected Salinger's Lanham Act and contract claims. In holding that Hamilton did not violate any rights Salinger may have had as a third-party beneficiary under the research agreements Hamilton entered into with the libraries, the court found that the agreements' prohibition against a researcher's unauthorized use of the Salinger letters applied only to those uses that infringed copyright. Salinger I, (650 F. Supp. at 427). This finding was based upon the manifest purpose of the research agreements -- the protection of the copyright holder's "literary property interests." Id. The district court expressly rejected the idea that the research agreements gave a copyright owner "an arbitrary power to block legitimate, non-infringing use." Id.

Salinger appealed the district court's decision to the Second Circuit. On January 29, 1987, that court reversed and instructed the district court to issue a preliminary injunction barring the publication of Hamilton's revised manuscript. Salinger II, (811 F.2d at 100). The discussion that follows analyzes the rationale for the court of appeals' decision.

The court of appeals overturned the district court's decision because it determined that the district court judge had incorrectly applied the fair use doctrine. Salinger II, (811 F.2d at 94). In reaching this conclusion, the court followed the approach taken by the Supreme Court in Harper & Row, (471 U.S. 539 1985). Therefore, to understand the Second Circuit's opinion in Salinger II, it is necessary to first understand the Supreme Court's decision in Harper & Row.

Harper & Row involved the unauthorized use of quotations from the unpublished manuscript (hereinafter referred to as "the Ford manuscript") of former President Gerald Ford's autobiography, A Time to Heal: The Autobiography of Gerald R. Ford. (471 U.S. at 541-42). In March 1979, editors of The Nation, working from a copy of the Ford manuscript, published an article containing material from the manuscript. The article predated the authorized publication, in Time, of excerpts from the then-unpublished Ford autobiography. As a result of The Nation's action, Time canceled its agreement with the copyright owners, Harper & Row and Reader's Digest Association, Inc., to publish excerpts. Harper & Row and Reader's Digest then successfully sued The Nation for copyright infringement, see Harper & Row, Publishers, Inc. v. Nation Enterprises, (557 F. Supp. 1067 S.D.N.Y.), rev'd, (723 F.2d 195 2d Cir. 1983), an outcome the Supreme Court eventually upheld despite The Nation's defense that its use of quotation from the Ford

manuscript constituted a fair use of the unpublished material. Harper & Row, (471 U.S. at 569).

In finding that The Nation's use of quotation from the Ford manuscript was not a fair use of the material, the Supreme Court relied upon the Copyright Act of 1976 and its legislative history, in particular those provisions dealing with an author's right of first publication. The right of first publication, as the term implies, "encompasses not only the choice whether to publish at all, but also the choices when, where, and in what form first to publish a work." Harper & Row, (471 U.S. at 564). The Court began its analysis of the right of first publication by noting that, under the common law, the fair use doctrine "traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works." Harper & Row, (471 U.S. at 550-51). Eventually, the Court concluded that, while in practice narrow exceptions to this absolute rule existed in the common law, "it has never been seriously disputed that 'the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use.'" Harper & Row, (471 U.S. at 551, quoting 3 M. Nimmer), Copyright (sec. 13.05, p. 13-62 n.2 1984).

The Court next turned to an analysis of the right of first publication under the Copyright Act of 1976. That statute codified those rights for the first time at 17 U.S.C. 106(3). By express provision, the Act also made the right of first publication subject to the fair use doctrine, codified at 17 U.S.C. 107. 17 U.S.C. 106. Although this action by Congress could be seen as vitiating the common law's absolute rule against applying the fair use doctrine to the right of first publication, a claim made by The Nation, see (471 U.S. at 551-52), the Supreme Court concluded that, in fact, the scope of the fair use doctrine with respect to the right of first publication remained quite narrow.

The rationale given for this conclusion was that the right of first publication is "inherently different" from the other rights enjoyed by a copyright owner because, as the Court stated, "only one person can be the first publisher." Harper & Row, (471 U.S. at 553). Given the relatively unique status of unpublished works, and the "potential damage" to be suffered by authors as a result of the unauthorized use of their unpublished works, [mid. at 553, the Court found the fair use doctrine to be much narrower in scope with respect to the right of first publication, stating that: "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." Harper & Row, (471 U.S. at 555).

In addition to analyzing the scope of the fair use doctrine with respect to an author's right of first publication, the Supreme Court also applied the four factors to be considered when determining whether an unauthorized use is a fair one. While there is no reason to go through the Court's application of these four factors in detail because each case involving the fair use doctrine "'must be decided on its own facts,'" [Harper & Row, (471 U.S. at 560 ,quoting H.R. Report No. 1476, 94th Cong., 2d Sess. 65 1976), several points should be highlighted.

First, in analyzing the "character and purpose" of The Nation's unauthorized use, the Court held that finding one of the uses enumerated by 17 U.S.C. 107 does not end the inquiry into the purpose and character of the unauthorized work. See Harper & Row, (471 U.S. at 562). Rather, the Court held, the analysis should be much more searching. For example, when the unauthorized use is for "purposes such as criticism, comment, news reporting, teaching, scholarship, or research," the fact finder must also consider separately whether "a publication was commercial as opposed to nonprofit" in nature. See Harper & Row, (471 U.S. at 562). If a publication is found to be "commercial" in nature, the unauthorized use is presumed to be unfair. Id. (quoting Sony Corp. v. Universal City Studios, Inc., (464 U.S. 417, 451 1984). Further, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Harper & Row, (471 U.S. at 562). Finally, the Supreme Court stated, the "propriety" of the unauthorized user's conduct -- whether he acted in "good faith" -- is "relevant" to the character of the unauthorized use. Id. citing Time, Inc. v. Bernard Geis Associates, (293 F. Supp. 130 S.D.N.Y. 1968).

The Court also discussed the "effect" of an unauthorized use on the "market or value" of the copyrighted work. See (17 U.S.C. 107(4)). It concluded that this factor was "undoubtedly the single most important element of fair use," and continued on to say that: "'[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.'" Harper & Row, (471 U.S. at 566-67, quoting 1 M. Nimmer, Copyright, sec. 1.10[D] at page 1-87.

Finally, the Court indirectly addressed the scope of the fair use doctrine with respect to unpublished letters. The Nation, in claiming that its use of the Ford manuscript was fair, pointed out that former President Ford, by contracting for the publication of his memoirs, had shown he was not interested in keeping the contents of his

manuscript from the public. The Court dismissed this argument, stating that The Nation's argument --

[A]ssumes that the unpublished nature of copyrighted material is only relevant to letters or other confidential writings not intended for dissemination. In its commercial guise, however, an author's right to choose when he will publish is no less deserving of protection. Harper & Row, (471 U.S. at 554-55, emphasis added).

The Salinger II court began its analysis of the district court's decision by first noting the relatively narrow scope of the fair use privilege with respect to unpublished works, citing for support the principle that: "Under ordinary circumstances, the author's right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use." (811 F.2d at 95, quoting Harper & Row, 471 U.S. at 555). The court of appeals then continued on to state that, "[t]his proposition was emphasized with respect to unpublished letters," a conclusion the court supported by recounting the Supreme Court's dismissal of the Nation's argument that the scope of fair use is broader when applied to works, like former President Ford's memoirs, about to be published. Salinger II, (811 F.2d at 95). The court concluded from the Supreme Court's consideration of this argument that "unpublished letters normally enjoy insulation from fair use copying." Salinger II, (811 F.2d at 95).

The court of appeals, like the Supreme Court in Harper & Row, then turned to a consideration of the four fair use factors set forth at 17 U.S.C. 107, giving "special emphasis" to the unpublished nature of the Salinger letters.

With respect to the first factor, the "purpose and character" of the use to which Hamilton and Random House wished to put the Salinger letters, the Second Circuit concluded, as a preliminary matter, that J. D. Salinger: A Writing Life fell within at least three of the categories enumerated by 17 U.S.C. 107: the biography could be considered either "criticism", "scholarship", or "research". Salinger II, 811 F.2d at 96. Overall, the court found that Hamilton used the Salinger letters to "enrich his scholarly biography." Id. The court made this finding despite the fact that Hamilton and Random House anticipated making a profit on the publication of the book. See Salinger II, (811 F.2d at 96).

I disagree with the court of appeals' conclusion regarding the purpose and character of the use to which the Salinger biography was to be put. The Supreme Court's decision in Harper & Row clearly requires a court to consider more than just the question of whether the unauthorized use of copyrighted material can be labeled either criticism, comment, news reporting, teaching, scholarship, or

research. Once the unauthorized use of copyrighted material can be placed within one of these categories, the fact finder must then consider (1) whether the character of the use is of a commercial nature or is for nonprofit educational purposes and (2) the "propriety" of the user's conduct. See Harper & Row, (471 U.S. at 562). The Second Circuit, however, misconstrued the Supreme Court's holding with respect to the first of these two considerations.

Section 107(1) of the Copyright Act of 1976 requires courts to consider whether an unauthorized use of copyrighted material "is of a commercial nature or is for nonprofit educational purposes." If the unauthorized user "stands to profit from exploitation of the copyrighted material without paying the customary price," the intended use is commercial in nature. Harper & Row, (471 U.S. at 562). Further, if a use is commercial in nature, it is presumptively unfair. Id. According to the court of appeals, Hamilton and Random House expected to make a profit on the Salinger biography. In addition, Hamilton used copyrighted material from the Salinger letters to enrich his work without obtaining the permission of the copyright owner. For these reasons, I believe that, as a matter of law, Hamilton and Random House intended to use the material quoted from the Salinger letters for a commercial purpose.

With respect to the "nature" of the Salinger letters, the court of appeals found this second factor to weigh "heavily in favor of Salinger" because the letters were unpublished (811 F.2d at 97). The court based its finding upon its interpretation of the Supreme Court's statement in Harper & Row that the "scope of fair use is narrower with respect to unpublished works." (471 U.S. at 564). This statement, the court of appeals stated, refers "to the diminished likelihood that copying will be fair use when the copyrighted material is unpublished," and not that "the amount of copyrighted material that may be copied as fair use is a lesser quantity for unpublished works than for published works." Salinger II, (811 F.2d at 97).

With respect to the third fair use factor, the "amount and substantiality" of the copyrighted material used, the court of appeals disagreed most vigorously with the district court. The district court found that, while Hamilton had taken "a large amount of information" from the Salinger letters, "the information [was] not protected by copyright" because it was fact. Salinger I, (650 F. Supp. at 423). By contrast, the Second Circuit found that the close paraphrasing of copyrighted phrases and word strings, as well as verbatim quotes, enjoyed copyright protection. Stated the court:

Though a cliché or an 'ordinary' word-combination by itself will frequently fail to demonstrate even the minimum level of

creativity necessary for copyright protection \* \* \* such protection is available for the 'association, presentation, and combination of the ideas and thought which go to make up the [author's] literary composition.' \* \* \* 'What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his materials and marshals facts, his choice of words and the emphasis he gives to particular developments.' \* \* \* And though the 'ordinary' phrase may be quoted without fear of infringement, a copier may not quote or paraphrase the sequence of creative expression that includes such a phrase. (Salinger II, 811 F.2d at 98, (citations omitted)).

The court of appeals then surveyed the material from the Salinger letters used by Hamilton and concluded that a "very substantial appropriation" had occurred. Id. The court also concluded, with respect to the substantiality of the matter taken, that the material from the Salinger letters made Hamilton's book "worth reading" "[t]o a large extent." Salinger II, 811 F.2d at 98-99. For all of these reasons, the court of appeals found this factor strongly favored Salinger.

Finally, with respect to the "effect" of Hamilton's and Random House's use of the Salinger material on the "potential market for value of the copyrighted work," the Second Circuit found for Salinger slightly. See Salinger II, (811 F.2d at 99). Again, I believe the Second Circuit misconstrued the fair use principles set forth by the Supreme Court in Harper & Row, although I, too, conclude that the balance of equities favor Salinger.

Any consideration of this factor should focus on the "potential market" for the copyrighted work. Salinger II, (811 F.2d at 99). Although the Second Circuit claims to have done this, I do not believe the court went far enough in its analysis. Harper & Row held that an inquiry into the effect of an unauthorized use of copyrighted material should take into account the potential market both for the original work and for any derivative works, (471 U.S. at 568). The Second Circuit, however, only considered the effect of Hamilton's and Random House's use of the Salinger letters on the market for the letters themselves. Salinger II, (811 F.2d at 99). It did not consider whether the unauthorized use would harm the potential market for a derivative work like Salinger's autobiography. If the Second Circuit had looked at derivative uses like this one, I believe it would have found more strongly in Salinger's favor on this factor.

Overall, the court of appeals in Salinger II found that Hamilton and Random House had infringed Salinger's copyright in his letters. Because it made this finding, which was sufficient to obtain a preliminary injunction, the court did not consider whether Salinger

could recover under the research libraries' use agreements, (811 F.2d at 100).

On July 31, 1987, Hamilton and Random House asked the Supreme Court to review the Second Circuit's decision, No. 87-188, 56 U.S.L.W. 3116 (Aug. 18, 1987). On October 5, 1987, the Supreme Court declined to hear the appeal, 56 U.S.L.W. 3207 (Oct. 6, 1987). To my knowledge, no action has been taken by Salinger to obtain a permanent injunction against Hamilton and Random House. One may not be necessary, if the decision is made not to use the copyrighted letters as part of a Salinger biography.

## **Salinger v. Random House: Implications for Scholars' Use**

by Michael Les Benedict

Archivists, librarians and scholars face a knotty problem when it comes to the issue of fair use in copyright law. By the nature of our legal system, the doctrines of fair use have been developed in cases where the parties have strong economic interests at stake. While the doctrine of fair use itself was created to promote the interests of society in the free flow of ideas, it still has been articulated as part of a system designed to adjudicate the rival claims of different authors to the use of materials that will provide financial benefits. Thus when courts speak of a "right of first publication," they imagine an author consciously deciding to publish materials or to withhold them from publication. Yet the law they establish applies to the unpublished materials of authors who never dreamed of making that decision. It applies to materials the economic value of which is zero, except - as I will point out - for the fact that present copyright decisions make them valuable because copyright holders will be able to disrupt scholarly publication plans.

To understand the problems the trend of recent decisions pose for those of us involved in scholarship -- meaning archivists, librarians, and researchers together -- it is necessary to look briefly at their historical context. Before passage of the 1976 Copyright Act, authors' rights to their creations received two different protections, depending on whether they had published them or not. Before publication an author and his heirs had perpetual "right of first publication," according to the common law. That right could be enforced in the state courts, or if an issue arose over it between citizens of different states, in the federal courts. The right did not arise out of statute and therefore was often called "common-law copyright." Once an author published or widely disseminated his or her work, it was protected solely by the Copyright law of Congress -- a statute. The statute was held to extinguish any common-law doctrines of copyright that might apply to published work. If a creator did not take the steps required by the law to protect his or her copyright, the work passed into the public domain, and anyone could quote it, publish it, copy it, or whatever. The statute specified a time limit to copyright, after which it expired and work passed into the public domain.

Overall, under the statutes copyright holders had pretty much complete control over the right to publish or even copy their work.

But the courts carved out an exception. In order to promote the public's interest in the free flow of ideas, people could in the appropriate circumstances copy or even quote parts of a copyrighted work without securing the permission of the copyright owner. Originally established by English courts, this right of fair use seemed especially appropriate in the United States, because of the language by which the Constitution authorized Congress to pass a copyright law: "Congress shall have Power...To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

As American commitment to the sanctity of private property diminished in the decades after the Great Depression and the New Deal, judges were more and more inclined to give a broad scope to doctrine of fair use. Judges perceived a tension between creators' rights to profit from their creations and the public's interest in the free dissemination of information and ideas. In weighing those rival interests, judges more and more agreed that since the constitutional justification for the Copyright Acts of Congress was "to promote the progress of science and the useful Arts," such tensions should be resolved in the direction of the free flow of ideas and against authors' monopoly in them. In fact, by the 1960's and 1970's, as Americans became more and more rights conscious, judges began holding that there was a tension between copyright and the First Amendment's guarantee of freedom of the press. That guarantee was designed to promote the free flow of ideas, lawyers and judges argued, and a broad view of fair use was the way to reconcile copyright with the public's First Amendment right to know. Naturally, many authors and their representatives felt that their right to profit from their own creations was being seriously eroded.

However, none of this affected the rights of creators to their unpublished, undisseminated work. Except for one or two isolated cases, it was accepted law that fair use applied only to statutory copyright. It did not apply to common-law copyright in unpublished work. Authors of unpublished work had complete and absolute right of first publication. Any unauthorized copying or publication of unpublished materials infringed on that right.

Of course, what that meant was that every time an archivist or librarian or researcher photocopied an unpublished letter or business record, every time a scholar quoted an unpublished manuscript, he or she infringed someone's copyright and was liable for damages. Of course, we all largely ignored this problem, because in nearly every case, the likelihood of a lawsuit was infinitesimal. The publishing value of most unpublished manuscripts was negligible and

therefore the damage to the copyright holder would not be worth the lawsuit. In most cases, the copyright holders did not even know who they were. Given the impossibility of securing authorization for copying and quoting from all the people who might hold copyright in the unpublished materials, given the detrimental impact on scholarship of holding ourselves to such an impossible standard, scholarly users, librarians and archivists ignored the law. But we did not like the situation, and when Congress considered revising the Copyright law in the 1960's and 1970's, in articles and testimony we urged that they do something to establish the legal right of scholars to make fair use of such materials.

In response, in the Copyright Act of 1976, Congress eliminated the distinction between published and unpublished work, bringing both under the protection of the statutory law and expressly extinguishing all other protections. Like published material, unpublished material is now protected by copyright until fifty years after the death of the author, except that no unpublished materials will enter the public domain until 2003, no matter how long ago the author died.

In the congressional reports accompanying the law to provide guidance for its interpretation, Congress observed that under the new law "[c]ommon law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection." Not only did this imply that scholars would now be able to make the same fair use of unpublished materials they could of published materials, but the congressional reports specifically confirmed this by stating that scholars would have fair use of materials of "scholarly value to historians, archivists, and specialists in a variety of fields" in a system applied "equally to unpublished works, to works published during the life of the author and to works published posthumously." And one should remember as of 1976 the scope of fair use had become quite broad, as I have already discussed.

However, the revival of conservatism in the nation since the mid 1970's has revitalized the notion of the sanctity of property. This has affected legal scholarship and court decisions in a variety of areas. One of these is in the area of copyright law, where it has precipitated an angry counterattack on the broad scope of the kind of fair use that prevailed in the 1960's and 1970's. In speeches, articles, briefs and arguments before courts, copyright lawyers have applied free market economic theory to copyright questions, insisting that there is no tension between copyright and society's interest in the promotion of knowledge and the arts. Rather, they say, the

framers of the Constitution intended to promote knowledge by harnessing the profit motive. Undermining copyright undermines the economic incentive of artists and others to create, they argue. In fact, they often seem to reverse the view of the 1960's and 1970's, now implying that there is no inconsistency between fair use and the promotion of progress in the arts and sciences, and thus an inconsistency between fair use and the constitutional justification for copyright itself. Deeply committed to the sanctity of private property, many copyright lawyers in recent years seem to have come to believe that any use of a copyrighted work constitutes an appropriation of the copyright owner's property - a taking, a sort of theft. They admit grudgingly that doctrines of fair use hold that such an appropriation is sometimes justified in the interests of society-at-large, but they don't like it and are suspicious of the motivations of those who directly benefit.

Part of this effort to narrow the scope of fair use has been to insist that, despite the congressional language I quoted above, publication does retain an "all-embracing importance as a dividing line" between different degrees of copyright protection. Making general arguments and quoting out of context from the congressional reports, some copyright lawyers went so far as to argue that under the new law fair use still did not apply to unpublished materials. Others argued that use of unpublished materials could be fair only in "extraordinary circumstances," and that has become the more widely articulated view.

This effort has been largely successful, and the recent case of Salinger v. Random House has made it more so. In Harper & Row v. The Nation, the Supreme Court accepted the argument that under the Copyright Act the scope of fair use was more restricted when applied to unpublished than published materials. However, the Court did not incorporate into its opinion the most restrictive language urged by those opposing any fair use of unpublished work. It clearly rejected the extreme notion that fair use remained inapplicable to unpublished work, and it did not say it applied only in "extraordinary circumstances." Instead it said that "Under ordinary circumstances, the author's right to control the first public appearance of his undissemintated expression will outweigh a claim of fair use." Of course, by this the Court may well have meant that a claim of fair use will be upheld only in extraordinary circumstances. After all extraordinary is the literal opposite of ordinary. But in the way we naturally use English, the court's language can connote a less restrictive meaning. It may mean as little as "All other things being equal, the author's right to control first publication will outweigh a claim of fair use." In another part of its opinion, the Court used

language suggesting this less restrictive interpretation, saying only that when the right of first publication is involved, "the balance of equities in evaluating...a claim of fair use...shifts" - in other words creating a presumption, no more, against the claim.

Despite this, in Salinger v. Random House, the usual three judge panel of the second circuit Court of Appeals interpreted the Court's language to mean a claim of fair use can be sustained only in extraordinary circumstances. "[W]e think the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression," the judges explained. The Salinger case, which the full circuit court refused to re-hear on petition of Random House, and to which the Supreme Court refused certiorari, seems certain to lead lawyers and judges to accept the narrower interpretation of the Supreme Court's language in the Harper and Row case.

Now, neither case is necessarily wrongly decided, although there are problems with both. One of the most fundamental principles of copyright law is that all that is protected is an author's expression - the words in which he articulated ideas or transmits information - not the ideas or the information itself. No one can copyright an idea or a fact. But in Harper and Row it is clear that what made the right of first publication in President Ford's memoirs valuable was not the form of their expression, but the information and opinions he disclosed - especially the events surrounding his elevation to the presidency during Watergate and what relation that bore to his decision to issue a pardon to ex-President Richard Nixon. That is why Time magazine was willing to pay an extraordinary amount to Harper and Row for the right to print excerpts before publication of the book, and that is why it refused to pay after the information was leaked. Plainly Time had not paid for Ford's literary expression. It had paid for the news. And when Harper and Row sued the Nation for the loss, on the grounds that the Nation had violated Ford's right to first publication, it was really trying to get compensation for its failure to control the news - which was valuable and uncopyrightable - not Ford's literary expression, which was copyrightable but not valuable. When assessing the affect on the market of the Nation's use of the memoirs, the Court clearly lost sight of that distinction.

In the Salinger case, the reclusive Salinger made no effort to conceal the fact that he was trying to protect his privacy, not his economic interest in his unpublished letters. Declining Hamilton's request for his cooperation in the biography, Salinger responded bitterly, "[I]t has always been an unassimilative wonder to me that it

is evidently quite lawful, the world over, for a newspaper or publishing house to 'commission' somebody...to break into the privacy not only of a person not reasonably suspected of criminal activity but into the lives as well, however glancingly, of that person's relatives and friends." Salinger's single-minded concern with his privacy rather than economic damage is also demonstrated by the fact that he did not sue for the infringement of several unpublished literary works that Hamilton quoted, works with clear economic value. He sued only over the letters. As a public figure, it is extremely doubtful Salinger could have sustained an invasion of privacy action against Hamilton for a scholarly biography. But he could and did try to prevent Hamilton from quoting his unpublished letters located in various manuscript repositories.

Obviously, the right of first publication has always implied the right not to publish at all, and everyone understood that this decision might turn on non-economic factors such as a desire for privacy. But since fair use never involved unpublished material, the desire of the author for privacy never had been considered as one of the criteria for determining whether a use was fair. Therefore when Congress, in the report accompanying the bill, instructed judges to continue to apply the traditional criteria for determining fair use, it naturally left a desire for privacy off the list. In the Harper and Row case, likewise, there was no issue of privacy, because Ford intended to publish his memoirs. The Court naturally ignored what role an author's desire to maintain privacy ought to play in weighing a claim of fair use and how that desire ought to relate to the traditional criteria.

As a consequence, the second circuit court seemed to consider a desire to maintain privacy an inappropriate criterion for adjudicating a fair use claim, when it decided the Salinger case. At no point did the court discuss that desire. It seems obvious that an author's desire to maintain privacy is directly related to evaluating the nature of the work being quoted, a traditional criterion for determining whether a use has been fair. That is, the fact that a work is unpublished ought to raise the question of why it is unpublished - whether it was the author's conscious decision to withhold it from publication or whether the author simply had no interest in publishing it, was unable to publish it, or never considered publishing it. But rather than taking notice that Salinger was choosing to withhold his letters from publication in order to maintain privacy, the court simply gave the Supreme Court's language in Harper and Row the most restrictive possible interpretation, reading it as establishing practically a blanket rule that fair use does not apply to unpublished work, without reference to why it is unpublished.

What are the implications of this for scholars? First, under the Harper and Row doctrine as presently understood, scholars have the legal right to quote unpublished materials only in extraordinary circumstances. Those circumstances have not yet been defined, and it is hard to know what they would be in the case of scholars. One can perhaps imagine the courts sustaining a journalist's quotation and close paraphrase of unpublished materials in an 'expose' of wrong-doing. But it is difficult to envision what would qualify as extraordinary circumstances in a piece of scholarly research. As a practical matter, of course, a scholar can assess the likelihood that his scholarship will come to the attention of copyright holders. Obviously a biography or a literary analysis of a particular individual will be more likely to do so than a general history or a study of a literary genre. Quotation of more recent unpublished materials poses a larger risk than quotation of older ones. Works presenting embarrassing or negative information about people whose unpublished materials are quoted is riskier than those which do not, since offended copyright owners now have a potent tool with which to impede publication. Quotation from the papers of minor personages are less likely to get the attention of copyright owners, who in such cases probably won't know who they are, than quotations from the materials of well-known people. But unfortunately, the present trend toward restricting the scope of fair use creates the potential for copyright holders of otherwise valueless unpublished materials to seek payment for permission to quote them. This may become a serious problem for archives publishing microfilm editions of manuscripts in their collections.

If a scholar can be certain that the unpublished material is unregistered, then the old practical protection will pertain: infringing on the copyright of the heirs of an obscure individual will not give rise to damages worth a lawsuit. However, if the materials are registered before a researcher publishes them - even a rush registration in anticipation of publication, as in Salinger's case - then the researcher could be liable to statutory damages for each infringement of a separate and independent work. These can range from zero, if the infringer was an employee of a nonprofit educational institution, library, archives or public broadcasting service and had reasonable grounds for believing the use made of the materials was fair, to \$50,000 if the copyright owner can demonstrate that the infringement was committed willfully. Ordinary statutory damages will range from \$250 to \$10,000 as the court considers just.

Unfortunately, it is not clear what a separate and independent unpublished work is. Salinger copyrighted the letters held in each manuscript repository separately. Did that make each collection an

independent unit? If letters are grouped according to recipient, might that be a unit? Does the definition turn on how the materials are registered, leaving copyright owners free to define what are separate units any way they wish? If so, then statutory damages may mount and provide an obstacle to the quotation even of unpublished materials which have no significant economic value. By the same token, the courts have not yet given guidance about what "willful infringement" might mean in the context of scholarship. Almost certainly, the decisions that repositories make about how to inform users about copyright will play a role in this. Finally copyright owners can seek injunctions to prevent publication of infringing material, thus imposing an additional burden on researcher and publisher.

It is unclear how the Harper and Row and Salinger decisions affect the scholar's right to photocopy unpublished materials. The "extraordinary circumstances" limitation on fair use articulated in the courts has been based on creators' special interest in their right of first publication. Mass photocopying does constitute a type of publication and is clearly a violation of an author's right of first publication. But what of the usual single copy photoduplication, which becomes the property of the user and is designated solely to aid research?

Photocopying comes under both the fair use provision of the new Copyright Law (107) and a separate section (108) pertaining specifically to reproduction by nonprofit libraries and archives. A scholar making a copy at other institutions - for example, a corporate archives or library - would have to justify it as fair use under the general provision (107). In this case, the criteria for determining whether a use is fair are the same as in the case of quoting. One of these is the nature of the use. Finally photocopying of single copies for scholarly research is significantly different from quoting in a publication. But the nature of the work - another traditional criterion - remain the same: it is still an unpublished manuscript or letter. In the Harper and Row and Salinger cases this factor transcended all others. Would it do so in the case of photocopying?

This question may well force courts to confront the issue of privacy. Logic suggests that the balance between fair use and copyright in unpublished materials is different when the unpublished materials are the private letters of living people than it is when the materials are the business letters of a nineteenth century industrialist. Given the apparent reluctance of the courts to acknowledge that copyright can be used to protect privacy - a position many copyright lawyers seem instinctively to agree with - it

is difficult to predict the outcome. Might courts again decide to rely entirely on the status of the material - that is, the fact that it is unpublished - to restrict its use, rather than import questions of privacy into copyright law? In that case, the simple fact that material was unpublished would militate against a fair use right to photocopy. Courts would, in effect, assume that nonpublication was an intentional decision that ought to be carefully respected. It is possible that this will be the next area where researchers and archivists will face difficulty. The descendants of authors of letters in archival repositories now can investigate those materials and register them with the Copyright Office. This would enable them not only to try to prevent their quotation, but to try to prevent their photoduplication. They might do this simply to try to extract a fee for permission. But more likely would be efforts to prevent diffusion of embarrassing material.

What about photoduplication in nonprofit libraries and archives governed by the special section 108? In effect, this section substitutes a statutory rule governing photocopying at such institutions for the criteria traditionally used to determine whether photocopying constituted fair use. Since, with one irrelevant exception, section 108 makes no distinction between published and unpublished works, one might well argue that their publication status is irrelevant. But, as pointed out above, the Copyright Act as a whole made no such distinction though that did not stop lawyers and judges from inventing one, and there is no reason to think they will be less creative here. Indeed the Office of the Register of Copyright has already formally reported its opinion that section 108 does not authorize any photocopying of unpublished manuscripts for users. Once again the question is, will judges impose a distinction between published and unpublished materials? Will they still consider the fact that material is unpublished to weigh against a right to photocopy it?

Thus the law of copyright regarding unpublished materials has been thrown back into uncertainty and confusion. Of most serious concern to researchers is that to a large extent we will not be the people deciding how to react to this retrogression. It is publishers who will make policies regarding quoting from unpublished sources. It is librarians and archivists who will determine whether to permit photoduplication of unpublished manuscripts. The natural tendency of legal advisors is to counsel such actions as offer maximum protection from the danger of lawsuit. It is the natural tendency of administrators to take that advice. Historians must hope that they remember that we are all in the business of scholarship. Librarians and archivists owe it to their institutions not to take undue risks; they owe it to scholarship not to be unduly timid. They must make their

legal advisors aware of the importance of both their commitments, so that they will offer advice based on a careful balancing of risk to institution versus risk to scholarship. Moreover, they should become more active in getting the views of scholars before lawyers and judges. They must urge their legal advisors to work to achieve a law of copyright that promotes the creation of art and the new formulation of ideas by protecting the rights of creators. But they must also urge them to promote society's interest in the free flow of ideas by fashioning a fair and realistic concept of fair use.

***Luncheon Address  
Friday, October 16, 1987***

**From Maine to Georgia with Camper and Camera**

by Leonard Rapport

In 1958 I became associate editor of the Documentary History of the Ratification of the Federal Constitution and the Bill of Rights, a National Historical Publications Commission project. The Ford Foundation had given the NHPC \$125,000 to pay the cost of collecting, editing, and publishing these documents. The project was to be completed--ended--in five years. I remained with the project eleven years. The editor was Robert E. Cushman, for many years head of the department of political science and government at Cornell University. After his death in 1969 in his 80th year, the project moved to Madison, Wisconsin where Prof. Merrill Jensen of the University of Wisconsin took over the editorship. Jensen is now dead but the project, in its 30th year, continues alive and well at Madison. So much for an estimated five years.

The NHPC had sought an associate editor with a Ph. D. in the early Federal period, somebody preferably with a book or two to his or her credit, somebody presumably of about assistant professor rank. When there was no rush of applicants from academe, the position was raised from GS-9 (\$5,985) to GS-11 (\$7,030). That didn't increase the attraction. With the editor on the scene and waiting for somebody to hit the road and begin collecting documents for him to edit, the situation became embarrassing. The National Archives then directed a stream of GS-11 handcuff volunteer archivists to Prof. Cushman. Since it was an even-grade transfer and required resigning from the competitive civil service, amounting to giving up permanent status with no assurance of a job to return to after the five years were up, there were no acceptances, or at least none that satisfied Robert Cushman.

I had just completed, without any public disasters, about fifteen months as acting head of the Labor, Transportation, and Welfare Branch, a branch dealing mostly with typewriter-era records. I had, the year before, finished at night on the GI Bill at age 44, my higher education with an M.A. in history, with a dissertation on the U.S. Commission on Industrial Relations, 1913-1915. I had no courses in the early or even the late Federal period, and if queried on the Constitution I had to stop and think when differentiating between the

two showpiece engrossed documents on display in the National Archives exhibit hall. (Later, when I used to explain to keepers of records that I had come looking for documents relating to the Federal Constitution I was sympathetic with those who brought out whatever they remembered they had on the Declaration of Independence. It was, after all, seven or eight years before the bicentennial of the Declaration, eighteen years before the bicentennial of the Constitution.)

But what the hell, it sounded interesting and it would get me out into the open air, so when the desperate editor-in-chief offered me the associate editorship I signed the letter prepared by the personnel office wherein I resigned my tenured position and acknowledged I was in my right mind and knew what I was doing. In exchange the Civil Service Commission, by a stroke of a pen, transformed me from archivist to historian. So much for an accomplished Federal period scholar.

The search was to be not only for the official records of the state ratifying conventions but also for contemporary documents expressing opinions about the proposed constitution during the months when its ratification was being considered, debated, and voted on. This involved locating and examining, almost literally, every contemporary newspaper, broadside, pamphlet, speech, letter, diary, journal, sermon, or other writing of the period. The more obscure the writer the better; what Madison, Washington, and the other great white fathers had said and written and thought was generally available and familiar. A greater coup would be to find something by a semi-literate farmer or artisan; anything by a woman other than Mercy Warren or Abigail Adams would be treasure indeed; finding anything by a black would be a miracle.

Looking back I realize I was an innocent abroad in time. There would have been advantages if the project, and my odyssey, could have started ten or even three or four years later. In 1958 publication of the Hamer Guide to Archives and Manuscripts in the United States was three years in the future, as was the publication of the first volume of the National Union Catalog of Manuscript Collections (though I did have access to the correspondence files of the Hamer Guide). For the archives and repositories of the original thirteen states, comprehensive guides and finding aids were, with a few exceptions, primitive or non-existent. The National Archives was a shining exception; and a few repositories such as the North Carolina State Archives, Duke, and the Historical Society of Pennsylvania had adequate published guides describing their holdings as of the late 1930s, thanks to the WPA's Historical Records Survey. Beyond that the great resource was the mind and

memory of the brilliant and generous editor of the Jefferson Papers, Julian Parks Boyd, with his amazing knowledge of what was where.

As for copying, the general availability of the xerox or electrostatic copier was still about ten years in the future.

And so I embarked on my odyssey. (I should here add that this was my second, not my first, odyssey. A quarter of a century earlier, at the bottom of the Depression, during the last half year of Herbert Hoover's administration and into the first months of FDR's, I had journeyed in a 1920's Dodge truck with a moving picture road show, from the coal-mining hills of Pennsylvania through Maryland, Virginia, North Carolina, Tennessee, Arkansas, Oklahoma, and as far as west Texas, a most instructive experience. The hours were sometimes nearly a hundred a week, the pay was \$17.50 a week with no per diem for lodging or meals. On the ratification project odyssey the per diem was, for lodging, meals, and other expenses except transportation, \$12 a day, which by the end of eleven years had increased to \$16).

After a few months of this second odyssey I realized I would have to be able to do my own copying. I got for the project a second-hand Exakta 35 mm. single lens reflex camera, an electronic ring light, a tripod that could be inverted, some developing equipment (for it did no good to get back to Washington with dozens of cartridges of exposed film and have the National Archives photolab tell me they were all hopelessly over- or under-exposed and that I would have to go back and film them all over again), and some books on copying and developing. I filmed during the day and developed half the night.

During those eleven years I worked in some 150 to 200 repositories, filming thousands of pages of newspapers, imprints, and documents before wearing out the Exakta and replacing it with an Olympus Pen FT half-frame camera that got 72 exposures on a cartridge and had a built-in exposure meter and didn't need special lighting. I eventually bought personally a 1963 VW van whose previous owner had converted it to a home-made camper; and during the final years I added a Model E portable electrically operated Recordak microfilm camera that weighed 80 pounds and broke down into two cases, had lights and a light meter, and took a hundred-foot roll of film with the capacity of about 900 exposures to the roll, which I could send or take back to the National Archives photolab for developing. I also carried the small camera and a portable dark room with developing supplies, two typewriters, a reference library and a refrigerator. I kept, among other things, beer and bulk film; and I carried a supply of the National Archives's printing of Frank Evans' bibliography of archival literature which I

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*Leonard Rapport*

passed out to the folks in the hinterlands much as early explorers and travellers assured their entry and welcome with trinkets and other exotic gifts.

Quite early in this odyssey the NHPC began sponsoring two other projects and I took on the additional responsibility of searching for their documents. They were the documentary histories of the First Federal Congress and of the First Federal Elections. I don't recall what their completion dates were to be, but both projects are still alive and thriving.

On the greatest of all odysseys Ulysses wandered a year less than I did, getting back to Ithaca ten years after the fall of Troy. (The Greeks, by leaving the documenting of those ten years and of the ten preceding years of warfare to a blind poet rather than to archivists and historians, saved time and money.) Homer did not record for Ulysses any more voyages, but Alfred Lord Tennyson, in his poem "Ulysses," did. He had a restless Ulysses in his old age recalling the cities, men, manners, councils, and governments he had seen and known; and this stirred him to round up and exhort his old companions to "Push off and sitting well in order smite the sounding furrows, for my purpose holds to sail beyond the sunset, and the baths of all the western stars, until I die." For those who might not like the implied conclusion of the trip he offered the incentive that they might "see the great Achilles, whom we knew" and perhaps "touch the Happy Isles" of which they would have had fond memories.

That poem, the theme of my high school senior class yearbook, may have prepped me, 54 years later, for my third, and what may or may not be last, odyssey. It came about thuswise:

Early in the search for ratification documents it occurred to me that some day there might be interest in updating Max Farrand's Records of the Federal Convention of 1787. Since it involved little additional effort I began collecting copies of contemporary documents relating to the convention that were not included in Farrand's classic three-volume work which the Yale University Press published in 1911. In 1966 the Press offered me the job of completely revising and updating that work. Although I had by then been on the ratification project eight years with the first volume not yet in sight, for reasons I cannot now understand I thought I could single-handed, in my spare time, do this smaller but formidable project. I couldn't, of course; and now, with all the money that has been spent in this bicentennial year there has been no attempt to revise the 1911 volumes. Eventually the Press and I dropped the idea. But I continued to collect the documents even after I left the ratification project and returned to the National Archives (when by

another stroke of the pen I was transformed from historian back to archivist).

In 1984 the bicentennial program of the National Endowment for the Humanities gave a generous grant to a project sponsored jointly by the American Historical Association, the Library of Congress, and Project '87 to collect constitutional convention documents not in Farrand. Jim Hutson, head of the Library of Congress's manuscript division, was to edit and the Yale University Press was to publish them. By this time I had 42 years of creditable federal service--seven and a half military, 35 years and a day archival. On the last day of October 1984 I retired and the next day began turning over to Hutson the documents I had collected. Then I began my third odyssey, this time mostly in a 1952 DeSoto.

This odyssey lasted about fifteen months and took me over the same ground I had travelled in the 1950's and 1960's. I revisited all the state archives and all the state historical societies and most of the other major repositories in the original thirteen states, this go around adding Vermont; and I went to some places I did not visit in the earlier years. Sometimes I sat in the same search rooms, sometimes even at the same tables. Whether or not these were the same, almost never were the people. The fingers of one hand, certainly of two, would number the faces that were familiar. I see here at this meeting three persons whom I met on the 1950's-'60's odyssey; and I see many more I met on the recent one.

I am sure that by now it has occurred to you that this archivist has been paid to spend more time in more archival repositories--at least in this country--than any other archivist may ever have been. With what wit or wisdom did this experience endow him?

I have a hundred anecdotes of adventures and misadventures, strange and wondrous, some of which challenge belief. I jotted down a list, a long list; but there isn't time even to begin. So the minutes remaining I will devote to the great Achilles of the profession I met on these odysseys, and to the repositories in which they flourished; and to the archival oarsmen who correspond to those Ulysses exhorted and without whom neither he nor I could have accomplished our journeys.

Already I had known some of the great Achilles. The foremost was Ernst Posner. I survived the 35 years and a day without ever having an archival course, in or out of the National Archives. My only regret on that score is that it means I missed having listened to Posner. I also knew T. R. Schellenberg, though for some years he viewed me, as he did my peers, with disdain if not distaste. After his fall he became quite human, quite friendly.

These two were probably the Achilles in the National Archives building. Below them I knew the NARS Ajaxes, Nestors, and so on down the order of battle.

After I began the odysseys I came to know some other Achilles: Julian Boyd, Lester Cappon, perhaps Arlene Custer, perhaps one or two others. And again, the Ajaxes, Nestors, and on down the line. And I came to know some others who were, and by some still are, considered among the Achilles, an opinion they themselves shared and helped promote. To them I was able to apply a simple test. If I sit in your archives or whatever it is you run and discover your holdings are in disorder, in a mess, and your finding aids non-existent or non-usable, and it is not possible for me or for anybody else to find what we need among your holdings, then perhaps on the poet's "ringing plains of windy Troy" you may have--to mix some metaphors--contributed more to the ringing and to the winds than to the battle; that about archives you may not have known your ass from third base.

But I finally got to one archives out in the geographical boondocks run by a state archivist about whom neither I nor anybody else had ever heard and so of course he wasn't among the Achilles. But he had pulled his records out of the contorted mess he had inherited and returned them to their original order; and in that archives I worked much more efficiently than I had in any other state archives; and that experience, not lectures, writings, or edicts, convinced me that those French expressions were right. Of the state archivists of the 1950s-60s odyssey I believe all but perhaps three are dead; and of the three only one--the one just mentioned--is still on his feet and still working as an archivist, being too ornery to die or retire. He was one of the organizers of MARAC, he's managed to get himself to this meeting, and he is president-elect of the Society of American Archivists.

On my return odyssey to the state archives and to the other repositories of the original thirteen states I found most to be far ahead of where they were in the 50s and 60s. Some of this change was due to the achilles and ajaxes and nestors of old; but most, I believe, is attributable to you who have come since and who belong to the regional archival organizations and to an SAA liberated from the dominance of NARS and the state archives by the enfranchisement of the SAA membership through the adoption of the mail ballot. Don't let the old guard snow you with tales of the golden age. If indeed there ever was one you are in it, of it.

Now permit me, if you will, to add to what I have said about the greats and non-greats of old and about you, a last word about some people in this profession who aren't the achilles at the top nor

the schleppers at the bottom and who sometimes don't belong to MARAC or to any other archival organization and who fear, or did fear, certification, and who may be known only to their colleagues and to their archival customers and who are peculiar enough, strange enough, to want and be willing to devote a working life to a narrow subject field without much possibility or desire of promotion. I, of course, am not one of those peculiar persons, nor, of course, are you; though I am somehow hearing the old Quaker musing, "All the world is queer save me and thee; and sometimes I think thee is a little queer." Twenty-five years ago I expressed my feelings about those persons in a piece in Archiviews, titled "Farewell to an Archivist"; and it was reprinted in the July 1962 American Archivist under the title "Leo Pascal, 1909-1962." The reading time is brief; and allow me, with its reading, to acknowledge in some measure the debt I owe to folks such as you and to persons such as them for all you and they did for me during my years in the National Archives and during my stays in your and their search rooms and stack areas from Maine to Georgia.

To have called him a gentleman and a scholar while he was still around would have been to risk the raucous laugh that sometimes startled new archivists and stray searchers in the snack bar. His schools turned out few such. He had prepped on the streets of industrial Cleveland (at six he sold extras of the Lusitania sinking); and that city of the bitter depression years, rather than the Western Reserve University, had been his real alma mater.

He had taught--occasional fill-in jobs in the toughest Cleveland schools. When these would end he would try, if there was a chance, to fill in for the janitor. To dozens of school systems he wrote offering to teach for room and board. None took him up. And until he came to Washington, he was always on the streets before daylight delivering papers on his Plain Dealer route, his one steady job from boyhood.

He suspected most gentlemen-and-scholars. Those whom he considered the real McCoy he respected. But he had an unerring nose for the phony, the pompous, the self-anointed. He scented them out, particularly in his own profession; and he was too compulsive to keep his mouth shut. For himself, he was satisfied to be called an archivist.

To him an archivist was somebody who took care of the records, who found whatever had to be found, who answered the letters, who recognized and brought in from official attics and cellars the useful and threw out the useless, who described records (those hilarious-pathetic sessions translating his understandable words into jargon!), who boxed and labeled and shelved, who did whatever

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had to be done. Often he did these things the hard way, sometimes the very hard way. But after the terrible years of the 1930's nothing within the sheltering Civil Service seemed to him hard.

He claimed to be able to carry any load, and he did. He carried more than his share: goldbricks, incompetents, those too busy on their way up (or down) to be bothered with drudgery. He was attracted to the lost souls who wandered into archival work; occasionally the part of their load that he shouldered helped make the difference between those who found themselves and became archivists and those who didn't and drifted on to other things.

Once he had been head of a small branch. That was many years ago. For almost two decades he was of that sometimes peculiar, sometimes cantankerous, middle bracket who, with enduring integrity, hold together archival institutions. He wasn't a Fellow of the Society of American Archivists. Rather, he claimed with pride that he was the only professional in the National Archives who had qualified for a laborer's rating.

Before there was a course he trained or helped to train many would-be archivists. It was a sometimes wearing, sometimes infuriating, experience. But most survived it and they emerged with much that was good. Also, they learned that if they asked they would always get from him what help he could give, that in an hour of need this unlikely father-image would be there to take over, to fill in, to cover. He was there when they came in the morning and when they left at night; work went home with him; the night and weekend guard shifts knew him. Each year, almost to the end, he took only the hour or two of sick leave he grudged to the dentist, regularly passed up part of his annual leave.

During the last several years he slackened his pace. Perhaps he began to doubt that another depression really was just around the corner. In the snack bar a new generation listened to this young grandfather's oral history of square pegs in round holes (who can forget the Keystone Kops chase through the stacks?) and took his mountain-railroad tour of the social landscape as seen by a gas-light-era American transplanted to modern suburbia.

Cancer touched him. Not recognizing the killer, he waved him off. "If you can walk you go to work." But the day came when other arms had to help him, the indestructible, out of the stacks, into a cab. It was the last time he saw the building in which he spent most of his working life.

Let's go back to the last few minutes of a better day. The stack doors are locked, the alarm is set, the kidding centers on him, the fall guy. He folds that morning's Washington Post, flips it backhand (The Plain Dealer's best route boy) 30 feet across the room into an

outbasket. Out into the evening. From the FBI offices the eternally young girls, and his appraisals thereof. Across the Avenue to Jake's and the second-hand books. Into Hodges and a toss to see who buys the dark beer. A second glass. Then the rush (spearing, in passing, an olive from the end of the bar) to the bus stop. And there, fidgeting, waiting, he recalls the long years before suburbia, before dependence on buses, when (in his words) he was the Great Pascal, King of the Old Southwest.

Well, Old Leo, the Great Pascal: The Southwest, the Old Southwest, past whose red-brick houses of the Hayes-Garfield-Arthur years you once biked to work, is gone. And you, Old King, with your Duryeas and Stutz Bearcats and Hudson Super Sixes and your readings from McGuffey and your Lincoln's doctor's medical diploma, you're gone. And from those of us who at one time or another steadied ourselves against your stubborn rock-strength and got reassurance from your erratic, generous heart, something too has gone.



## **Editor's Note**

Each author presents his own view and not necessarily that of his employing institution.

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## CORRECTION

*Constitutional Issues and Archives*, "From Maine to Georgia with Camper and Camera"

Page 73, third line from bottom of page should read

"and a refrigerator in which I kept . . ."



