

# Senate Debate on Public Records

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OF CONSIDERABLE interest to archivists, historians, and records administration people throughout the country is the recent widespread discussion concerning the "right" of government officials of cabinet or other policy-making rank to remove certain records from their office files on the grounds that such records are their personal papers. This matter was the subject of a debate which took place in the Senate on February 11, 1947. Senators Ferguson of Michigan, Brewster of Maine, and Barkley of Kentucky were among those whose remarks were indicative of legislative interest in drawing the line between public and private papers. Considerable attention was also given to an appraisal of the operation and adequacy of current Federal disposal legislation and to the legal significance of certain public records. Several noteworthy passages, extracted from the *Congressional Record* of February 11, 1947 (Vol. 93, pp. 1017-1022) illustrate the senatorial approach to the problems cited above.

Concerning the never-ending argument as to the definition of "public" vs "private" records Mr. Brewster asked:

MR. BREWSTER. From the Senator's study of the question up to this time is there a clear distinction between public records, and private records which are the property of the individual?

MR. FERGUSON. The line of demarcation between what is a personal record and what is a public record is somewhat blurred; it is not clear cut.

MR. BREWSTER. If any of the records removed were public documents, then was it not clearly a violation of law for any official, however high his position, to remove them? If they were not public records, but simply personal or private records then it would not be the concern of the Government or of any official what was done with them. Does that distinction cover the situation?

MR. FERGUSON. If they were public records there is ample law on the statute books today to take care of the situation.

MR. BARKLEY. ....

It is one thing to keep personal files of personal matters. I suppose, also, there would be no objection to a highly placed official making copies of certain files in his office for his own use later if he wished to use them to

write a book about matters which transpired while he was in office. But I cannot conceive that any public officer would remove official files. I do not know whether a letter written to the Secretary of the Treasury or the Secretary of Agriculture and a carbon copy of the answer to such letter would always necessarily be regarded as public documents. Probably they would be.

MR. FERGUSON. If the letters related to the public business they would be public documents.

MR. BREWSTER. An interesting question may be presented upon which I think it would be helpful to have reaction of the minority leader. Suppose the minority leader had telephoned the Secretary of the Treasury, Mr. Morgenthau, regarding official business pending in the Senate. It is my understanding that records of most such conversations were kept and constitute some of the records included among those taken away by the former Secretary. I ask the Senator from Kentucky whether such telephone records would be considered in any sense as official or public records. It represents an interesting question.

MR. BARKLEY. Yes, it does. There is no law requiring that a conversation over the telephone with an executive officer be taken down.

MR. BREWSTER. No.

MR. BARKLEY. And as a matter of fairness to the Member of the Senate or the Member of the House or anyone else, he ought to know that his conversation is being taken down; but I would be willing to wager my head against the hole in a doughnut that not one out of a thousand conversations so held was ever within the knowledge of anyone outside the executive departments known to be taken down or a record being made of it.

MR. BREWSTER. The Senator from Kentucky means that the Senator at one end of the line was not apprised of the fact that the conversation was being taken down?

MR. BARKLEY. He was not apprised of the fact that his conversation was being taken down. No one but the one at the receiving end of the call knew anything about that.

MR. BREWSTER. I understand the Senator from Kentucky does not approve of that practice?

MR. BARKLEY. I do not. I think it is —

MR. FERGUSON. Mr. President —

THE PRESIDENT pro tempore. The Senator from Michigan has the floor.

MR. BARKLEY. If the Senator from Michigan will indulge me a moment further, let me say that if such a practice is to be indulged in, whether the individual at this end of the line is a Senator or a Member of the House or a private citizen, he ought to be notified as soon as the conversation begins that what he is saying is being taken down so that he will know the fact, and he is entitled to a copy of it if he wants it, after the conversation is concluded.

MR. FERGUSON. Mr. President, in reply to that statement, let me say that there is no law on the statute books which provides that public officials must keep records. They can do business out of their hats if they desire. But the law states that after they make records, including records of telephone con-

versations, such records must be preserved as public records, and not be destroyed except in compliance with law.

Senator Ferguson later proceeded to evaluate the existing disposal legislation with specific reference to the inviolability of public records:

MR. FERGUSON. ....

Public records make up the backbone of history. All men with a deep sense of the historical know this to be so. Men of integrity are diligent in their efforts to see that the public records are as complete as possible, scrupulously safeguarded, and properly preserved where the people may have ready access to them. That is the real significance of public museums, libraries, and Government archives.

We have had a long succession of laws specifically designed to protect and to preserve official papers. The latest of these is the act concerning the disposal of records, approved July 7, 1943, as amended July 6, 1945 (57 Stat. 380-383; 59 Stat. 434). It dovetails with and complements the act to establish a National Archives of the United States Government, approved June 19, 1934 (48 Stat. p. 1122).

As I examine these laws, I am impressed with their complete command of the subject, and it is difficult for me to look beyond them for new legislation to handle any of the cases we have been discussing. What is sorely needed, in my estimation, is the forthright enforcement of the present laws in the public interest. . . .

. . . While the law does not mention the records made by individuals in the course of the public business, it would be a farcical presumption for us to exclude them, since it is obvious that records do not appear by spirit writing, but at the hands of individuals in charge of Government agencies and conducting the public business.

After defining public records, the law then proceeds to charge the National Archives Council and the Archivist with the duty of preparing regulations for the disposal of records and of carrying out procedures for the preservation of records.

The National Archives Council charged with making such regulations was to be composed of the Secretaries of each of the executive departments or their alternates, the chairman of House and Senate Committees on the Library, the Librarian of Congress, the Secretary of the Smithsonian Institution, and the Archivist of the United States. I hold in my hand a rather elaborate manual for Federal officials on the subject *How To Dispose of Records*, as promulgated by this Council.

MR. BREWSTER. Under the definition which is contained in that manual, let us consider the case of a Cabinet officer who, following the close of a conference on public business with other Cabinet officers, goes to his office and dictates to a Government employee a record of the conversations carried on and the conclusions reached, whereupon the notes of the dictation are transcribed by the employee on Government time and the transcript is preserved

in the Cabinet officer's public office for his future information. Would that be such a record as is outlined in the manual?

MR. FERGUSON. I have no doubt that that would be such a record as is contemplated by the manual to which I have referred, because it would be one of the records upon which the official acted; it would be a part of the policy formulated by the Government. Although the Government officer is not officially required to make such a record, for, as I said before, he could do his business out of his hat, yet when he does make it it is just like the record of a court or the opinion handed down by a judge in a court. I may say that the acts to which I have referred apply to courts as well as to executive agencies. When a judge dictates an opinion it then becomes a part of the official file, and it should remain so.

Otherwise we could not trace the history of the United States; we could not determine what caused a certain Cabinet officer to act as he did. The official record indicates that he acted, for instance, because his fellow Cabinet officers decided upon a certain path, a certain road, and a certain goal.

If the officer were to remove the record and subsequently were to become a witness as to what the record contained, as we all know in court proceedings the destruction of a record always is presumed to indicate that it would speak the truth if it were available, and that a witness' contradiction of what was stated in the document should not be considered.

Mr. President, let us consider merely the opening lines of the manual to which I have referred. It declares:

Records produced, received, and maintained in the course of operations of agencies of the Federal Government are the property of the Government and can ordinarily be disposed of only after authorization has been obtained from Congress.

The relative weight of certain classes of records when introduced as evidence in a trial or hearing was touched upon in a subsequent exchange between Senators Brewster and Ferguson:

MR. BREWSTER. In connection with the records regarding Secretary Stimson, of which the Senator speaks, and the events transpiring in the month of November before the Pearl Harbor attack, and the discussions with various officials, concerning which inquiry was made of the Secretary of War, from the Senator's experience as a judge and as a member of the committee, how would he evaluate a record made at a particular time by the Cabinet officer regarding the conversations and the conclusion in the conferences, as against the later recollection of the Cabinet officer after a period of 5 years?

MR. FERGUSON. I should be compelled to say, as the law clearly indicates, that the best evidence is the record made at the time.

MR. BREWSTER. That, is it not, is a principle well established in law?

MR. FERGUSON. Yes; it is a principle well established in law.

MR. BREWSTER. If the official in testifying at the later time elected to take the records to refresh his recollection, but refused to permit the tribunal to examine the records, how would that be considered in any court?

MR. FERGUSON. The court would cast great doubt on the testimony, and should so charge the jury, if there were a jury.

MR. BREWSTER. Would not any court necessarily order the production of a document which had been used for purposes of refreshment, and have it presented to the court as an essential document, for cross-examination?

MR. FERGUSON. That is the practice, and the law is that a man cannot give verbally his idea of what is in a record made as of a certain time, because the record itself is the best evidence. We could not apply that rule in the Pearl Harbor hearing because the man who had the record and was testifying was not a plaintiff or a defendant, and it was contended that the disclosure would harm not him but the Government of the United States. That is why the committee had to take what it could get from public officials without recourse to the record itself.

MR. BREWSTER. Is there not a clearly established doctrine in a law referring to what is known as past recollection recorded?

MR. FERGUSON. The Senator is correct.

MR. BREWSTER. As distinct from the use of memoranda for refreshment, if they do not take on a character which would sufficiently authenticate them?

MR. FERGUSON. That is correct.

MR. BREWSTER. The records made by the Secretary daily following conferences would have a higher responsibility or import, would they not?

MR. FERGUSON. Yes; records taken as of given dates are in law considered as speaking the truth.

Aside from the personal and political issues involved, the fact that the Congress is showing a healthy interest in a problem that has often been left for the archivist to solve is worth noting. It is symptomatic of a growing appreciation on the part of the American people that public records are a vital part of the fabric of our national life.