Secrets of History and the Law of Secrets

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THE TIMING OF THIS APPEARANCE CATCHES ME at an appropriate moment for this particular meeting. Due to the outcome of the November election, I feel much more immersed in matters of archival and historical interest than I am in subjects of futuristic interest.

Also, I come to you after considerable indoctrination in the ways and concerns of your professions. I have become the object of this indoctrination because of my involvements with the historical papers of two Presidents (although only the latter of the two involvements was of my choosing) and, as a member of the Public Documents Commission, with the papers of other Presidents—those to come. The credit for making me one of your disciples goes to those persuasive members of your organizations who have written and talked to me and who, in some cases—lest I not be persuaded—have sued or threatened to sue me.

But even as a disciple of yours, I still harbor ideas which may be heresy. Possibly, I feel too strongly about the importance and value of privacy, not just for people in private life (to whom privacy relates by definition) but also for persons fulfilling public functions. Personalized criticism, instinctive suspicions, parochial observations, speculative thoughts, tentative judgments, calculated posturing, emotional pleas, shifted positions, sour dissents, and *quid pro quo* efforts to compromise: these are as much a part of human reflections and deliberations in government as they are anywhere else. And I question any policy that puts such occurrences in the public domain simply because they take place in a government office or conference room and involve government officials on government time.

Of course, I recognize that historians have a sense of patience which would lead them to say: "We do not ask for such matters to be put in the public domain now but let there be a record of them so that at least our progeny can some day see that record."

On that preliminary note, I would like to explore now my dual topics: secrets of history and the law of secrets. As a definition of historical secrets I suggest that they consist of information which historians want to know but can't find out, including:

(a) That for which the records made and perpetuated are not available to historians; and
(b) That for which no sufficient record has been made or perpetuated.

A broader definition would be information which anyone wants to know but can't find out. Included would be all hidden subjects of interest to journalists and other curious people. But at this meeting of archivists and historians, I propose to talk mainly about the problems of secrets as they relate to your professional interests over the long run, rather than to the interests of journalists and other curious people

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in the short run. What archivists want to preserve and historians want to know may not differ much in content from what journalists want to know. However, archivists and historians, unlike journalists, are not bothered by transitory secrets. A practice or law that allows for transitory secrets is not objectionable to archivists and historians if it does not thwart their longer-range interests.

Transitory secrets may even be a boon to historians. If the dawn of historical research and publication were not preceded by the dusk of secrecy, much of your work might lose its market appeal. The Library of Congress catalog shows fifty-six different titles which are each characterized as "The Secret History" of some famous event or person. And many a historian, whatever the title of his work, owes his reputation to personal discovery of a hidden or suppressed store of papers. Moreover, if it were not for hard-to-find historical source material, the fun and fascination of hide-and-seek would be left to children and lost to grown-up historians.

Secrets do have other functions, of course, beyond posing challenges to historians. Even in an open and democratic society, secrecy performs valued functions—in the voting booth, the jury room, the judge's chambers, the army general's command post, the psychiatrist's office, and the family bedchamber, to name some of the many places where the society encourages and the law protects secrecy.

The right of secrecy is in many respects like the right of privacy. Both serve to protect persons from unwarranted exposure of information about themselves and from unwarranted interference with their thoughts and decisions. The law of privacy places a seal of secrecy on individual census data and on personal income tax information. At the same time, the law of secrecy places protection of privacy on an undercover agent of the CIA and on a clandestine operator in the FBI. Both kinds of laws protect persons from unwarranted exposure of information about themselves. The law of secrecy protects the confidentiality of communications between the President and his advisers. At the same time, the law of privacy assures to every man and woman open access to information on birth control techniques. Both kinds of laws protect persons against unwarranted interference with their thoughts and decisions. Thus, secrecy and privacy have useful functions in common and they serve the needs both of public persons and of private citizens.

Nevertheless, many defenders of the right of privacy are vocal in opposing the right of secrecy, especially when it is asserted by public officials. They want seekers and holders of public office to reveal on demand all manner of information about themselves and their subordinates. They want persons in government routinely to disclose what they are thinking, talking, and doing at each step on the way to the public decisions they must make.

All three branches of the federal government, the executive, legislative, and judiciary, presently have policies that call for appointed and elected officials to file within their respective branches information on their personal financial matters, although only in the case of the federal judiciary are the disclosures automatically made open to public inspection. It is most likely that in the next year, legislation will be passed to require public financial reporting by every holder of an executive position in the federal government, every representative and senator, and every federal judge. The reporting would reveal all of his or her assets, liabilities, and income, and those of spouse and minor children. Even without any compulsion of law, candidates for President and Vice President and for Congress in many cases have found it politically expedient or necessary to make personal information public that theretofore they had kept secret from even close friends.

These personal financial records of public officials may not provide highly-

sought-after resources for historians, but the time is close when the law will eliminate the chance of their ever remaining among the secrets of history. Probably of greater interest to historians are current developments in the law to make public officials inform the public not about their personal affairs but about their official actions and not only about their actions but also about how and why they have proceeded to act as they did.

This is a nation that is said to be governed by laws and not by men or women. Yet, many seem to think we cannot trust our government if we know only of its laws and rulings by which we are to be governed. However appropriate and necessary may be the actions of government, we are not, it seems, to feel capable of judging their merits without perceiving the kinds of human behavior that contributed to the results.

Obviously, if the behavior involves venality or the inducement of private gain, we ought to know that; and such is the reason for demanding disclosure of personal financial information by public officials, although the remedy, while broad in its sweep, is no safeguard against concealed corruption. But what other kinds of behavior are we to worry over that could debase the value of otherwise meritorious government actions? Is a public official's decision to be suspect because it involves introspection and spontaneity if it is otherwise appropriate? And if the decision is the result of much extrospection and probing, is it to be faulted because the outcome cannot be reconciled with all external influences and considerations? Or if a decision is reached through group deliberations, does it detract from its merits that the process, within the group, involved dissensions and animosity which ended in compromise or accommodation?

The Congress has now declared the policy of the United States to be "that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government." That is the stated purpose of the recently enacted "Government in the Sunshine Act" which requires all meetings of government agencies headed by a commission or board to be open to the public. The law also prohibits the members from ever jointly conducting agency business except in the open. The expectation presumably is that we can now better learn how much to trust the manner in which officials make decisions, entirely apart from judging the conclusions they reach.

So far no such law applies to single-headed agencies. This is probably due to the circumstance that unless the solitary decision-maker can be ordered to soliloquize about his thought-processes the public can learn nothing from having his deliberations conducted in public. Neither does it apply to the President and to the manner in which the President's staff members advise him and he chooses between available options. Nonetheless, certain critics deplore the traditional doctrine that protects the confidentiality of the presidential decision-making processes. Also, the judiciary has not been touched by any law or rule of "Sunshine" even for multi-judge courts. Yet, certain legal scholars have advocated that deliberations of the U.S. Supreme Court be opened to the public. Likewise, the Members of Congress continue to preserve their own rights to secrecy about their individual vote-deciding processes and about informal efforts made to influence their own or their colleagues' votes; although recent Congressional rules make for many more open committee sessions than in the past and require a record to be made of the remaining closed sessions.

Historians are, of course, vitally interested in the whys and hows of governmental processes and actions, more so than in the final published texts that are issued to document and explain a statute, a regulation, or a decision. The stuff of

history is not the books by which lawyers practice their profession. Rather it is whatever record exists of the myriad circumstances, thoughts, and utterances of individuals that precede and count toward official actions taken. The more complete the record compiled by or about everyone involved, the more perceptive and accurate can be the explanations and judgments of historians about important past events and developments.

A case could be made then that historians ought to be cheering at developments in the law that cut away at the remaining veils of secrecy in government. But, it also can be argued that laws designed to control information practices in the immediate interests of open government will in the end work to weaken and distort the records available to historians.

As the Congress has solemnly declared, the public may be entitled to the fullest *practicable* information about decision-making by public officials. But what is *practicable?* What happens when the law to make such information public has the effect of telling a decision-maker that his every utterance to a colleague may become a popular measure of his fitness for the office he holds and a test of the merits of his or his colleagues' ultimate decision? He is likely at times to be impelled either into deceit or into hypocrisy, deceit in the form of informal secret colloquies or hypocrisy by way of failing to express unorthodox views or opinions which he would otherwise like to urge. In either case, he will hardly dare to make and leave behind a record of his dissembling. Yet, this would be information of greater importance to historians than the unsecret record which the law mandates him to make.

No doubt secrecy in government has been used to disguise or hide biased judgments or, what is worse, misuses of power. But laws that seek to eliminate secrecy by forcing conversations either to be open or to be recorded for future reference will simply assure that all the truly objectionable behavior will take place under cover or off the record. At the same time, such laws will tend to make the remaining records far more bland and unrevealing than they otherwise would be. In that case, neither the cause of better government nor the cause of better historical accounts will be well served.

Those opposed to any privacy or secrecy in the performance of public functions can claim, of course, that idealism is on their side. However, they probably have far too ideal a notion of decision-making in government. Not that it is any worse than in businesses or in labor organizations or in academic institutions, but by the nature of human weaknesses and in the absence of superhuman omniscience and objectivity, it is not much better. I suspect that neither the decision-makers whom we call upon to serve in government nor the people whom they serve are quite ready for the openness that the strongest advocates of complete records and total sunshine in government are urging. If such openness is achievable, and I doubt that it is, citizens might find it hard to appreciate knowing all there could be to know about the human workings of government. Secrets of a sort could well be as important to the happiness of citizens with their government as they are to the happiness of friend with friend and spouse with spouse.

Thus, much can be said for leaving certain secrets to preservation by archivists and to later discovery and revelation by historians rather than attempting to outlaw entirely the practice of secrecy in government. The kind of information best left to the care of archivists and the uses of historians is information unlikely ever to be recorded even for history if the law should declare that persons in government are supposed to keep no significant aspects of their performance in office off the record or out of the public gaze. As archivists and historians, you should therefore be wary

of supporting laws to do away with the practices of secrecy that will only add to the problems of secrecy in the long run. The secrets of history which occur because no sufficient record is created in the first place are going to increase immeasurably if the law operates to deter the making of private records in public life or to force them into the public domain. Far better for your purposes is a policy that encourages the public person to memorialize the hidden side of his experiences and observations, entirely safe from the reach of public disclosure except at a time and on terms which are his or hers to determine.