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SENATOR THOMAS C. HENNINGS, JR., AND THE "RIGHT TO KNOW"

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In his last three years, Senator Thomas C. Hennings, Jr., carved a lasting name as a staunch fighter against arbitrary government secrecy. It was a short period at the end of his career of thirty years in public life, and yet it is likely to be considered as the most significant.

The stentorian-toned Missouri Democrat emerged as the leading figure in the Senate in the investigation of government secrecy policies. The work of the Hennings subcommittee had already become an important starting point for scholars with an interest in the history and law of government information policies.

The tall and impressive St. Louis lawyer led the Senate fight to amend the so-called "Housekeeping Statute"[1] to make it clear this record custody law should not be used to withhold records from the public, the press or the Congress. He directed the legal research on the broad "executive privilege" claim of the Eisenhower administration. This research set the stage for the Senate defeat of the nomination of Lewis Strauss for Secretary of Commerce.

Before his death on September 13, 1960, Senator Hennings had prepared a comprehensive bill[2] to amend the Administrative Procedure Act[3] to reduce the possibility of having that law used to hide records from the public or from lawyers before federal administrative agencies. That bill had cleared the Judiciary Subcommittee,[4] and Hennings was at work on a general public records law.[5]

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1. REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1958).
2. S. 921, 85th Cong., 1st Sess. (1957).
3. 60 Stat. 237 (1946), 5 U.S.C. § 1001-1011 (1958).
4. 104 CONG. REC. 9131 (1958); S. REP. No. 1621 85th Cong., 2d Sess. (1958).
5. S. 2780, 86th Cong., 2d Sess. (1960); 106 CONG. REC. 190 (1960) (remarks of Senator Hennings).

The death of Senator Hennings brought the work in this area to a halt as far as the Senate was concerned. It is apparent that it will be months before some other Member of the Senate takes the government information field as an issue for special attention. Many have an interest in the subject, but most of the senior Senators are too busy with regular committee business. They object to arbitrary secrecy when it stands in the way of an investigation in which they have a special interest, but few see it as Senator Hennings saw it—a major problem involving threats to our democratic system of government.

In 1955 Senator Hennings was made chairman of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. At first, the problem of government information policies was only a small part of the subcommittee's work. However, from late 1957 until his death in September 1960, the problem of unjustified and arbitrary government secrecy was of major concern to Tom Hennings.

Senator Hennings did not begin the investigation of government secrecy with the same speed as Representative John Moss, the California Democrat. In 1955 Representative Moss, a former California newspaperman, was named chairman of a special Government Operation Subcommittee on Government Information Policies. The Moss subcommittee had one major function, and John Moss concentrated with a fury from the start.

Representative Moss was not a lawyer, and in his initial thrust his instinctive newsman's distrust of government secrecy was the inspiration behind his inquiry. He acquired a depth of knowledge of the law as he and his staff progressed.

Senator Hennings was a slow starter. The big St. Louis lawyer was a liberal with other causes to fight in 1955 and 1956, and it was not until 1957 that he directed Chief Counsel Charles H. Slayman, Jr., to give major attention to the information field.

By 1957 there had been a number of significant occasions where the so-called "executive privilege" was used as a grounds for withholding information from the public, the press, the Congress, and even the General Accounting Office.[6] The Executive branch has always been reluctant to pro-

6. *Hearings on the Availability of Information from Federal Departments and Agencies Before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 1st Sess. 1-425 (1955), 84th Cong., 2d Sess. 426-2005, 2645-3032 (1956), 85th Cong., 1st Sess. 2006-2644, 3033-3322 (1957), 85th Cong., 2d Sess. 3323-3920 (1958), 86th Cong., 1st Sess. 3921-4620 (1959).

duce records or testimony that might be embarrassing to the administration in power. A variety of excuses were used, but never had there been such a broad claim of a right to withhold all records that might include opinions, conclusions or recommendations.

This questionable doctrine had previously been used to withhold documents from several Senate committees conducting important investigations such as the Dixon-Yates investigations, the Loyalty-Security investigations, and the East-West Trade investigations.

An official of the International Cooperation Administration (ICA) had even testified that if the Eisenhower doctrine of "executive privilege" was used to its fullest extent that it could serve as authority for withholding almost every Executive department record from Congress.[7]

Senator Hennings was outraged at the unlimited scope of this claim by the Eisenhower administration. He said that there was probably some justification for the limited withholding of records by the President when there was some "clear danger" to the national interest. But, he considered it ridiculous for the Eisenhower administration to claim that all officials of the Executive branch have an inherent right to refuse to produce any records except final decisions.[8]

Hennings asked Attorney General William P. Rogers to testify before his subcommittee on the legal basis for the claimed "executive privilege." When Rogers defended the most extreme use of "executive privilege," Chairman Hennings was amazed. When Rogers refused to change his position, Hennings criticized:

> [T]he startling and dangerous thesis advanced by the Attorney General to the effect that the President and the heads of the Executive branch to whom they delegate it, have an unlimited power to withhold from both the Congress and the public any information or papers which they in their own discretion decide should be withheld.[9]

The Missouri Senator had hoped that it would be possible to use sweet reason and logic to convince Attorney General Rogers and others that this extreme claim of "executive privilege" should be abandoned in the best interests of good government. Senator Hennings believed in a "government of laws," and he saw grave danger in unlimited power and discretion being

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7. *Hearings on S. Res. 62 Before a Subcommittee of the Senate Committee on the Judiciary,* 86th Cong., 1st Sess. 336 (1959).

8. Hennings, *Secrecy in Government,* The Progressive, April, 1959, p. 21.

9. Hennings, *The Executive Privilege and the People's Right to Know,* 19 FED. B.J. 2 (1959).

read into the phrase "executive privilege." If there was such unlimited discretion then ours was but a government of men, Senator Hennings said.[10]

Senator Hennings and Representative Moss surveyed the various government agencies and found that the so-called "Housekeeping Statute" was being used as authority to withhold information from the public.[11] That statute read:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and the property appertaining to it.[12]

Nothing in the statute gave authority to withhold, but it was being interpreted that way by many agencies. Hennings and Moss proposed an amendment which simply added this sentence:

> This section does not authorize withholding information from the public or limiting the availability of records to the public.[13]

The Eisenhower administration opposed the amendment, but it was passed with huge majorities. The President signed it with some reluctance, and with a statement asserting that even in the face of the amendment there was still an arbitrary right to withhold. The President said:

> In its consideration of this legislation the Congress recognized that the decision-making and investigative processes must be protected. It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an Executive department to keep appropriate information or papers confidential in the public interest. This power in the Executive branch is inherent under the Constitution.[14]

Senator Hennings and Representative Moss were irritated at this statement. They felt it was an effort to nullify the amendment and did not believe that its legislative history could in any way be interpreted as endorsement of the broad "executive privilege." Senator Hennings declared:

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10. *Ibid.*

11. *Hearings on the Availability of Information from Federal Departments and Agencies, op. cit. supra* note 5; *Hearings on S. Res. 62, op. cit. supra* note 6; STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 85th Cong., 2d Sess.; THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM THE CONGRESS (Comm. Print. 1958).

12. REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1958).

13. 72 Stat. 547 (1958), 5 U.S.C. § 22 (1958).

14. Press release, Office of U.S. President Dwight D. Eisenhower, August 12, 1958.

> At the same time he [President Eisenhower] helped to lay one unlawful secrecy practice to rest by signing the freedom of information bill . . . the President in an accompanying statement raised the specter of another, which, if allowed to grow unchecked, could become a much greater danger to our democratic system of self-government than the misuse of the "Housekeeping Statute" ever has been.
>
> Freedom of information about governmental affairs is an inherent and necessary part of our political system. Ours is a system of self-government—and self-government can work effectively only where the people have full access to information about what their government is doing.[15]

Senator Hennings pointed out that shortly after the first amendment to the Constitution was adopted, James Madison, who had a leading role in writing it, declared that: ". . . the right of freely examining public characters and measures and of free communications thereon, is the only effective guardian of every other right."[16]

The Missouri Senator recognized the right of the President to withhold certain information from Congress under his power in conducting foreign affairs. And he also recognized the need for specific laws and regulations in the interests of military security and in certain other areas. He was of a firm belief that where such secrecy could be justified, the Executive branch should seek legislation clearly establishing the area to be covered by secrecy. However, Hennings reasoned that a claim of unlimited discretion was merely an opening for broad assumptions of power.

Even where the President had some color of right to withhold information under his constitutional authority to conduct the foreign affairs of the nation, Senator Hennings felt that this was a "privilege" with "relatively narrow limits." He asserted that:

> [T]he Executive privilege to withhold information from the public would seem to exist only in cases where it is necessary in the effective exercise of another Executive power and where divulgence of information would constitute a "clear and present danger" to the national interest. In the absence of enabling legislation by the Congress, information may be withheld from the public by the President only when these two tests are met.[17]

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15. Hennings, *supra* note 9, 1-2.
16. Hennings, *supra* note 9, at 6.
17. Hennings, *supra* note 9, at 11.

Senator Hennings was not content to criticize the excessive secrecy in government, for he did not criticize until he was prepared to make constructive suggestions as to what legal standards should be met where secrecy was to be imposed "in the national interest."

It would be inaccurate to make it appear that Tom Hennings was the one clear mind in the Senate studying the information problem, and the one strong voice speaking against arbitrary secrecy. He was a leader, but he had able and energetic supporters on many phases of this problem. These included Senator Estes Kefauver (D., Tenn.), Senator Olin Johnston (D., S. Car.), Senator John McClellan (D., Ark.), Senator Sam Ervin (D., N. Car.) and Senator Joseph O'Mahoney (D., Wyo.). In the House, the leader was Representative John Moss, with strong support from such men as Representative Porter Hardy (D., Va.), Representative George Meader (R., Mich.), Representative Edward Hebert (D., La.) and Representative Dante Fascell (D., Fla.).

All of these men were important figures in the analysis of a subject that could be confusing to the public and frustrating to those striving to be understood on a matter they believed vital to the nation's future.

By background and temperament, Senator Hennings was particularly well qualified for his dominant role in asserting the "right to know." He had been a prosecutor, as Assistant Circuit Attorney of St. Louis, from 1929 through 1934. He had served on the Governor's staff, and he had lectured on criminal law at Benton College of Law from 1934 to 1938.

It was in 1934 that Hennings was elected to Congress, where he served three terms before leaving Congress to become circuit attorney for St. Louis and later a lieutenant commander in the United States Naval Reserve. Hennings was in the private practice of law until he was elected to the United States Senate in 1950.

His was a lengthy experience with government at local, state, and federal levels. It was a broad experience dealing with the judicial, executive and legislative functions of our government. Senator Thomas Hennings understood the balance of these functions and the need for constant examination of this area to assure ourselves that the government was retaining the important characteristic of a government of laws and not of men.

In the last months of his life, Senator Hennings was seriously ill. He relied heavily upon Chief Counsel Charles Slayman, Jr., an able and hard working lawyer with a dedication to the "right to know" that was as strong as that of Hennings himself. Slayman carried on with the information fight

for months after illness had forced Senator Hennings to reduce the size of his work load.

It might be argued that a more free-swinging and eye-catching job by the Hennings subcommittee would have been more effective in forcing public attention to the information problem. It is true that a less responsible investigation might have caught more public attention, and stirred the public to an outrage that would have forced retreat on "executive privilege" and made possible a fast passage of amendments to the Administrative Procedure Act and a comprehensive public records law. Such an investigation might have made the Hennings subcommittee a household word.

But, it is well to remember that Senator Hennings became a committee chairman in 1955, toward the end of the era of Senator Joseph R. McCarthy. Senator Hennings was a courageous fighter against the methods of Senator McCarthy, and he was a man too fair to engage in flamboyant investigative techniques when he had been critical of the trait in others.

Also, despite the quickness of his mind, he had a good lawyer's slowness to jump to broad conclusions. He had learned the wisdom of exploring all the arguments of the other side before becoming too strong an advocate. It made him stronger when he did act. When he became convinced of what was right, he believed in first seeking to convince his opponents by persuasion and logic. He was a genial man, and had a preference for friendly debate rather than bitter exchanges.

Though he was an ardent Democrat, he did not approach the "right to know" issue as a partisan political figure. He sought to arrive at conclusions that would represent a well balanced government policy whether a Democrat or a Republican occupied the White House.

Tom Hennings believed in the ability of the people to understand government and make right decisions concerning their own government if given sufficient facts. His was a deep belief that the idea of the American Democracy is inevitably bound up in the simple right of the people to know what the government is doing.

On his death bed, Senator Hennings wrote:

> I have faith in my fellow citizens, an unshakable faith in their determination and ability to seek and find the truth behind any issue before expressing their ultimate opinion at the polls. I have faith that false issues will be discarded and that true ones will be faced with calm appraisal and solved only on the basis of proper consideration and intelligent reasoning.[18]

18. 107 CONG. REC. 2510 (daily ed. Feb. 24, 1961).

His time was too short, but the hearings and reports of the Hennings subcommittee, his speeches, and his writings provide a comprehensive guide for future students of this right which Tom Hennings found so vital—"the right to know." His article in the special *Federal Bar Journal* issue (January 1959) on "executive privilege," is an eloquent legal argument in support of his belief in "the right to know."

Tom Hennings fought for all the broad range of rights guaranteed by the Constitution, but all of his work for civil rights and press rights only convinced him that the "right to know" was the most important. He learned that other rights are meaningless if the public, press and Congress can be arbitrarily barred from facts dealing with routine operations of government.

Tom Hennings was not privileged to complete his work, but his record will be remembered as clearly pointing the way for those who follow him.