**[\*I]**

**FREEDOM OF INFORMATION AND SECRECY IN GOVERNMENT**

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-FIFTH CONGRESS

SECOND SESSION

ON

**S. 921**

AND

THE POWER OF THE PRESIDENT TO WITHHOLD

INFORMATION FROM THE CONGRESS

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MARCH 6, 1958

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PART I

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THURSDAY, MARCH 6, 1958

UNITED STATES SENATE,

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,

OF THE COMMITTEE ON THE JUDICIARY,

*Washington, D.C.*

The subcommittee met, pursuant to call, at 11:03 a.m., in room 104-B, Senate Office Building, Senator Thomas C. Hennings, Jr.,chairman of the subcommittee, presiding.

Present: Senators Hennings and Hruska.

Also present: Charles H. Slayman, Jr., chief counsel and staff di-rector; William D. Patton, assistant counsel; and Wayne H. Smithey,professional staff member, Committee on the Judiciary.

Senator HENNINGS. Since the hour of 11 is a few moments past, the subcommittee will please come to order.

I would like to make just a short opening statement, if I may.

The Senate Constitutional Rights Subcommittee is very pleased indeed, and I want to add that I am particularly pleased, to have my friend, the Attorney General of the United States, accept our invita-tion to be with us today for a discussion of the important matter of freedom of information and its corollary, alleged unnecessary secrecy in Government. It is indeed most gratifying that we have our newAttorney General accepting our first invitation to be with us. The time and date agreed upon are those which proved most convenient and mutually satisfactory. To have the chief legal officer of the United States Government here this morning is indeed most gratifying to us all.

We meet here today in the absence of any hostility or acrimony whatsoever. Questions of whether there is a legally recognized privilege lodged in the Chief Executive to withhold information from theCongress and the public on his own determination and, if so, whether such a privilege may be delegated to remote subordinate officials and employees are the basic questions which the chief legal officer of the executive branch, the Attorney General, we hope will discuss with us today. We look forward to hearing his analysis of the issues which are so intricately connected with the whole doctrine of checks and balances in our form of National Government. Only when the American people and their lawmakers have maximum access to accurate information, commensurate with genuine national defense interests,can our system of government operate in the most enlightening and useful manner. Accordingly, many of us believe the burden should be on public officials who withhold information to furnish sound reasons and lawful authority for so doing.

**[\*2]** Again, I want to repeat that we are fortunate to have our Attorney General here with us today, in the spirit of good will, mutual respect, and trust.

Now, Mr. Attorney General, you may, if you care to, proceed with any written statement that you have prepared that you would like to read, or you may testify in a more or less impromptu fashion, predicated upon your study and familiarity with this subject matter, oryou may read your statement and intersperse it as you please. In other words, we are happy to give you full latitude to do exactly as you wish. I now recognize the distinguished Attorney General of the United States, Mr. William P. Rogers.

**STATEMENT OF HON. WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES**

Mr. ROGERS. Mr.Chairman, thank you for your comments and also I want to thank you for your courtesy in delaying my appearance until now. I do recall that I told you I would be happy to appear.

Senator EHENNINGS. You did, indeed.

Mr. ROGERS. And I appreciate your giving me this time because I have been rather busy the last few weeks, and it was very helpful to me to be permitted to appear at this time this morning.

I would like, with your permission, to read the prepared statement I have. I, of course, would be perfectly happy to be interrupted at any time.

Senator HENNINGS. I might say, Mr. Attorney General, that Senator Roman Hruska, the distinguished Senator from Nebraska has just come to the hearing. I have just made a short statement, Senator, a copy of which I will hand you if you care to read it, expressing our appreciation to the Attorney General for his being here this morning.

Senator HRUSKA. Thank you.

Senator HENNINGS. You may now proceed in any fashion you please, Mr. Rogers.

Mr. ROGERS. I was saying, Mr. Chairman and Senator Hruska, that I think it advisable to present this statement or parts of it, at least, because I do think there is a good deal of misunderstanding in thisfield and I think that this committee is serving a useful purpose in that regard because I think it helps to clarify the matter.

Preliminarily, I might say that I think that the mere stating of the question quite often causes misunderstanding because usually the question is stated in terms of what right does the Executive have to withhold information, and, is secrecy a good thing, and so forth, which suggests the answer. I think it is just as incorrect to state the question in those terms, suggesting that there is secrecy that should not exist and that the Executive is withholding things as it would be to state the question this way: What right does Congress have improperly to demand documents from the executive branch of the Government? I think if the question was stated that way, it would be unfair to the Congress.

Senator HENNINGS. Yes, I think the converse would be equally true.

Mr. ROGERS. I think that, really, the way to state the question is, as between the two branches of the Government and considering their powers under the Constitution, what exchange of information can be given.

**[\*3]** Senator HRUSKA. Mr. Attorney General, Would an alternate way of putting it be this, if you don't mind. I have heard it put this way one time: The duty of the President and the executive department on occasion is to withhold information. Isn't there an affirmative duty on occasion to do that?

Mr. ROGERS. I think so, but I think the mere suggestion of withholding and secrecy carries that implication. I think really the question is how does Government properly function with mutual regard and respect for the other branch's functions. Our Congress has very clear functions and it requires information from the executive branch and it is entitled to get a good deal of information. On the other hand, I think you recognize the problems in the executive branch, that the executive branch of the Government has. There are certain things that can't be given, just the way there are certain things the executive branch of the Government certainly cannot demand from the judiciary branch of the Government, and so forth.

I don't want to dwell on this too much to begin with because I think I deal with this considerably in the statement, but I do think that the stating of the question is apt to affect your attitude toward the subject. And I might say, from my personal opinion, I have great respect for the work of a congressional committee and for the work of the Congress generally, that I think that over the years the work of congressional committees has been very effective in the cause of good government, and I would think that overemphasis on questions like the right to withhold and too much secrecy, and so forth, is a disservice to the operation of the Government because somehow it creates in the public mind that there is secrecy for the sake of secrecy. The fact of the matter is there is probably no government in the world that provides more information to its citizens than the American Government, and one of the difficulties you have in the executive branch of the Government is to have preliminary discussions without having to kind of publicize it or about it, and that can be very destructive of the whole governmental process, if that is the case.

Fortunately we don't have that problem in the Department because lawyers, I think, are a little more aware of their obligation to their clients than others. But it seems to me that this idea of exchange of information between the branches of the Government can be worked out very intelligently and reasonably by men who are willing to do it, and for that reason I compliment you, Mr. Chairman, and this committee for pursuing this in the spirit you have.

Senator HENNINGS. The Attorney General is aware that there are two bills, one which I introduced, S. 921, and one which Senator Johnson of Texas introduced on my behalf, S. 2148. S. 2148 would amend section 3 of chapter 324 of the act of June 11, 1946 (60 Stat. 238) "to clarify and protect the right of the public to information." The first bill, S. 921, has as its title, "To amend section 161' of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records."

Mr. ROGERs. I will comment on those later.

Senator HENNINGS. I assume the Attorney General has seen those.

Mr. ROGERS. Yes, I have.

Senator HENNINGS. I ask that they now be made a part of the record.

**[\*4]** (Bills S. 921 and S. 2148 are as follows:)

[S. 921, 85th Cong., 1st sess.]

A BILL To amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 161 of the Revised Statutes of the United States (5 U. S. C. 22) is amended by adding at the end thereof the following new sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

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[S. 2148, 85th Cong., 1st sess.]

A BILL To amend section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238) is amended to read as follows:

"SEC. 1002. Public Information.

"In order to provide adequate and effective information for the public-

"(a) ORGANIZATION AND FoRMs.-Every agency shall separately state and promptly file for publication in the Federal Register and the Code of Federal Regulations: (1) descriptions of its central and field organizations, including delegations by the agency of final authority; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available; (3) descriptions of all forms for public use and instructions related thereto including a statement of where and how such forms and instructions may be obtained; and (4) every reorganization, amendment, or revision of the foregoing.

"(b) RULES.-Every agency shall separately state and promptly file for publication in the Federal Register and in the Code of Federal Regulations: (1) all procedural rules; (2) rules relating to the availability of information to the public; (3) all statements of general policy or interpretation formulated and adopted; (4) all other rules; and (5) every amendment, revision, or repeal of the foregoing.

"(c) ORDERS AND OPINIONS.-Every agency shall promptly file its orders and opinions, or make them available to the public in accordance with a rule published in the Federal Register and the Code of Federal Regulations stating where and how they may be obtained, copied, or examined. No order or opinion shall be valid or effective until it has been published or made available for public inspection.

"(d) PUBLIC RECORDS.-Every agency shall promptly make available to the public, in accordance with a published rule stating where and how such records may be obtained, examined, or copied, all records, files, papers and documents submitted to and received by the agency. Public records include, but are not limited to, all applications, petitions, pleadings, requests,, claims, communications, reports or other papers and all records and actions by the agency thereon, except as the agency by published rule finds that withholding is required by subsection (f) hereof. Every individual vote and official act of an agency shall be entered of record and made available to the public.

"(e) EFFECT OF FAILURE To PUBLISH.-No rule, order, opinion or public record, shall be relied upon or cited by any agency against any person unless it has been duly published or made available to the public in accordance with this section. No person shall in any manner be required to resort to any organization or procedure not so published.

"(f) EXCEPTIONS.-The provisions of this section shall not require disclosure of subject matter which is (1) specifically exempt from disclosure by statute, (2) required to be kept secret in the protection of the national security, or (3) of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy; however, nothing in this section authorizes withholding of information or limiting availability of records to the public except as specifically stated in this subsection."

**[\*5]** Senator HENNINGS. Proceed.

Mr. ROGERS. Mr. Chairman, as you might expect, this question of jurisdiction of respective branches of the Government has arisen from time to time since the beginning of our National Government. In the Department of Justice we have made a careful study of numerous incidents which have occurred and which illustrate many facets of the problem. We have submitted to the committee, Mr. Chairman, through you, a lengthy compilation of those cases and we are in the process of preparing some additional ones from the year 1948 to 1953, which we will submit to you. I think when that is completed you will have about as thorough a documentation of the history of this problem as I know about.

Mr. SLAYMAN. Mr. Chairman.

Senator HENNINGS. Mr. Slayman.

Mr. SLAYMAN. At the time of the Judiciary Committee hearing on Mr. Rogers' nomination, we discussed this material. He gave his permission for us to print it. We have received copies from the Government Printer.

Senator HENNINGS. Thank you very much.

Mr. SLAYMAN. It probably could go in the appendix of the record at this time.

Senator HENNINGS. Yes. Without objection, it will be received and made a part of the appendix of the record.

[The study submitted, "Is a congressional committee entitled to demand and receive information and papers from the President and the heads of departments which they deem confidential, in the public interest?" is appendix exhibit No. 10.]

Mr. ROGERS. I will, as I say, in due time submit for your consideration the experiences in 1948 and 1953, which will, I think, make a very complete study of this whole problem.

Now I think I mentioned just a moment ago that in the Department of Justice we try to make all the information available to the Congress and to the press that we can, and I think that we have been able to provide a great deal of information that in some instances was withheld formerly. I think that we will continue to do that, bearing in mind that the legal problems are a little different, sometimes from others because there gre certain matters that we can't discuss because we would otherwise violate the canons of' ethics.

With reference to the right of the public to know generally as distinguished from the legislative branch, it seems to me that there are four principles which it is well to keep in mind:

1. While the people are entitled to the fullest disclosure possible, this right like freedom of speech or press, is not absolute or without limitations. Disclosure

must always be consistent with the national security and the public interest.

2. In recognizing a right to withhold information, the approach must be not how much can legitimately be withheld, but rather how little must necessarily be withheld. We injure no one but ourselves if we do not make thoughtful

judgments in the classification process.

3. A determination that certain information should be withheld mustbe premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying nondisclosure no longer pertain.

4. Nondisclosure can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal, or pecuniary reasons.

All persons agree, I think, that information which would adversely affect our national security should not be disclosed. Then, too, there are compelling reasons for nondisclosure in the field of foreign: affairs, **[\*6]** in the area of pending litigation and investigations which may lead to litigation, information made confidential by statute, investigative files and reports, and, finally, information relating to internal government affairs. President Eisenhower's letter of May 17, 1954, to the Secretary of Defense concerns this last category of information.[[1]](#footnote-1) I will discuss it a little later, if I may, in my prepared statement.

Now with reference to my own general views on the subject, I stated them a couple years ago and if the committee would permit me, I would like to restate them here because I believe them equally strongly today.

\* \* \* Just as no private citizen or business entity can conduct its business under constant public scrutiny, so judges, legislators, or executive officials cannot conduct all public business at every step of the way in public.

A considerable part of Government business relates to the formulation of policy and to the rendering of advice to the President or to agency heads. Interdepartmental memoranda, advisory opinions, recommendations of subordinates, Informal working papers, material in personnel files, and the like, cannot be subject to disclosure if there is to be any orderly system of Government. This may be quite frustrating to the outsider at times. No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges In conference, to an executive session of a congressional committee or to a Cabinet meeting In order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative, or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and Members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of nondisclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously, it cannot be If Government is to function.

The question was discussed a year or so ago in the Yale Law Journal by a former Government official who said this:

There are serious weaknesses in the assumption \* \* \* that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter. \* \* \* The executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious exaniple is the data, deroga- tory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberation incidental to the making of policy decisions. Undoubtedly the official who makes such a decision should be answer- able to Congress for its wisdom. But the subordinate civil servants who advise him must be answerable only to him. \* \* \*

\* \* \* \* \* \* \*

It is one thing for a Cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public: it is quite another thing for a middle-aged, middle-ranking civil servant, who needs his job, to do so. The Secretary's own responsibility to Congress for wrong decisions is a sufficient guaranty that he will not long tolerate incompetent or disloyal advisers; and he is certainly in a much better position to detect such undesirables than is any member, or even any committee of Congress.

I think maybe that is a little overstated. I don't believe I would state it quite that strongly, but at least it does present another point of view.

**[\*7]**

1. Appendix exhibit No. 13. [↑](#footnote-ref-1)