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THE CONSTITUTIONAL RIGHTS SUBCOMMITTEE:
THE LENGTHENED SHADOW OF ONE MAN*

LAWRENCE SPEISER**

I. INTRODUCTION

"Reveal Secret Senate Attack on Red Probes;"1 "Dispute Flares in Rights Quiz: Counsel Quits;"2 "Plot to Wreck U.S. Security System Bared;"3 "Strange Plans of Hennings Staff Are Told;"4 when news stories with headings such as these appeared within a three week period during October of 1955 in the Chicago Daily Tribune and other newspapers throughout the country, a safe prediction would have been that the newly established Subcommittee on Constitutional Rights of the Senate Judiciary Committee was not long for this world. The stories were bylined by Willard Edwards of the Chicago Tribune Press Service.

He reported "bickering" among staff members over the scope of planned hearings, and then, citing the supreme source in Washington journalese, wrote: "Some observers believe all hearings may be called off eventually."

Edwards’ October 23rd story was even more lurid than the preceding ones. He related:

Backstage maneuvers on Capitol Hill in a politically inspired campaign to undermine the government’s loyalty-security program were unmasked today. Under the guise of examining “erosion of liberty” in the United States, a senate subcommittee on “constitu-

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*This article is not intended, nor can it be accepted as a definitive study of the Subcommittee on Constitutional Rights. That is still to be done. It is, instead, an all too sketchy survey of a number of areas which were the subject of the subcommittee’s attention under the chairmanship of Senator Hennings.

**Director of the Washington, D. C., office of the American Civil Liberties Union; Member of the California, District of Columbia, and United States Supreme Court Bars.

2. Id., Oct. 12, 1955, § 1, p. 8, col. 3.
tional rights” headed by Senator Hennings (D., Mo.) has laid plans to discredit the system used to remove subversives from the federal payroll.6

In his final story on October 24th, Edwards went on to conjecture that: “The apparent purpose of the staff was not to examine the status of constitutional liberty in the nation but to attack the Justice Department and the F.B.I. and to slash at the government’s system for removing subversives from the payroll.” As proof of this, he noted: “The New York Daily Worker, official communist journal, has given more publicity to the subcommittee’s plans than any other newspaper.”7

With such a beginning, it is surprising indeed that the Subcommittee on Constitutional Rights not only continued to exist but became an effective instrument. Initially the creation of such a subcommittee was suggested in the fall of 1954. There was a precedent for the creation of such a committee in the Senate. In the mid-1930’s, a subcommittee of the Senate’s Education and Labor Committee was established under the chairmanship of Senator Robert M. LaFollette. It conducted an intensive investigation into violations of freedom of speech, although its major interest was in violations involving the attempts of labor to organize.8

The authority for the establishment of the Subcommittee on Constitutional Rights was derived from its parent body, the Committee on the Judiciary, having jurisdiction over “civil liberties.”9 The original members of the subcommittee were Senators Hennings, Joseph C. O’Mahoney (D., Wyo.) and William Langer (R., N. Dak). The other two members also had well-deserved reputations of concern for constitutional rights. However, from the very beginning it was the chairman, Senator Hennings, who gave the committee9 its direction and vigor. In 1955, when the title was adopted, “Subcommittee on Constitutional Rights,” it was with the understanding of the members that “its primary interests were rights guaranteed, recognized, safeguarded or protected under the Constitution of the United States.”

On June 21, 1955, Senator Hennings announced the initial plans for the operation of the subcommittee:

9. RULES AND MANUAL UNITED STATES SENATE, 84th Cong., Standing Com-
10. The terms “subcommittee” and “committee” will be used interchangeably.
The committee will hold a series of general hearings in the fall. At these hearings we intend to have leading citizens from all walks of life—the government, business, labor, education and civic organizations—discuss with us publicly what subjects within our jurisdiction require investigation and legislation. . . .

Following these hearings we shall proceed to specific investigations and hearings upon those subjects which the general testimony shows to be the most important. The problem of our age is to keep our country secure from attack from without and from subversion within and still maintain the American way of life. Our constitutional rights are what particularly distinguish our land from totalitarian countries. . . .

In addition we are looking into a variety of individual complaints where citizens feel that they have been wronged. In some, investigation may reveal that there is no wrong; some belong before courts and not this committee; others may require action by the executive branch of our government. But a number seem to be appropriate for further investigation by us.11

The subcommittee staff, at first, was quite small. The committee counsel was Marshall MacDuffie, who, during the war, had been Chief of the Board of Economic Warfare in the Middle East and Director of the European Branch of the Foreign Economic Administration. The research director was Benjamin Ginzburg, a social scientist from Norwalk, Connecticut, and former government official in a number of agencies. Just before the first hearing of the subcommittee in October, Lon Hocker, a St. Louis attorney and former president of the St. Louis Bar Association, was appointed as chief hearings counsel with equal authority to MacDuffie.

The first hearing of the committee was a rather theatrical production, called a "Citizens' Petition for the Redress of Grievances." This was for the purpose of inaugurating "a survey of the extent to which the constitutional rights of the people of the United States are being respected and enforced and commemorating the 168th anniversary of the signing of the Constitution of the United States of America."12 It was held on September 17, 1955, in the old Supreme Court Chambers in the Capitol which is used for very special occasions. The hearing was attended by chairman Hennings and his two fellow committee members, Senators

O'Mahoney and Langer. In contrast to the usual seating arrangement in a congressional hearing, the Senators were seated below the "witnesses" who occupied the bench above them and addressed the Senators on a wide range of violations of constitutional rights which they urged the subcommittee to investigate. Many of the statements were well thought out and carefully written, but the theatrical aspects of the "show" caused some skepticism about the subcommittee in its first public performance.

The subcommittee had some difficulty holding on to its first staff people. MacDuffie, the staff counsel, soon left. The hearing counsel, Lon Hocker, who handled the first hearings most competently, resigned after the six months for which he had originally agreed to stay.

Over the years, however, the committee was unusually fortunate in attracting dedicated, industrious staff personnel who contributed greatly to the success of the committee, since any congressional committee is only as good as its staff. It is well recognized that Langdon West, Senator Hennings' long time administrative assistant, played a very important role in organizing the staff and suggesting initial projects. Benjamin Ginzburg was most active in the early phases of subcommittee activities concerning loyalty-security programs. Allen Raymond, author of a special study on freedom of information for the American Civil Liberties Union, concentrated on issues involving secrecy in government until his untimely death. Charles H. Slayman, Jr., who previously worked as a professional staff member of Senator Kilgore's Immigration Subcommittee and as a legislative assistant for Senator Lehman, became chief counsel and staff director in July 1956, and continued to direct staff operations until the spring of 1961. Some members have continued on the staff since 1955: Mrs. Lydia Grieg, as office manager; Misses Belva T. Simmons and Marcia MacNaughton as research assistants; and Miss Helen Maynor who joined the staff two years ago. Attorneys William D. Patton, who worked principally on freedom of information matters, and J. Delmas Escoe, who worked on civil rights legislation, are no longer with the staff; Curtis Johnson and Daniel M. Berman, political scientists, did excellent work on a variety of projects for several years before transferring elsewhere.

II. Security and Constitutional Rights

The subcommittee's first major excursion was in the field of government loyalty-security programs. It began holding hearings during November of 1955 and, although no formal report was made, the fact that
hearings were held undoubtedly had an impact on a number of practices of executive agencies. The hearings were conducted under the chairmanship of Senator Hennings, with most of the questioning done by Lon Hocker, the hearings counsel. Although the announcement of the hearings stated that they would be "a survey of the extent to which the rights guaranteed by the first amendment are being respected or enforced in the various government loyalty-security programs," it appears the major focus was on procedural due process. At the time, the loyalty-security programs were estimated to cover one-fifth of the entire working force of this country. Senator Hennings conceived the scope of the inquiry in this area to be as follows:

The subcommittee will examine those practices in the loyalty-security programs which appear to conflict with the citizens' rights under the first amendment. The practices to be examined include the use and effect of the Attorney General's list of subversive organizations by the federal government and of its extended use by States, cities and private organizations. It will also consider the use of the principles of guilt by association and guilt by kinship in determining security risks; and the practice of discriminating against people for invoking their constitutional privilege against self-incrimination. Also coming in for attention will be the authority of the Armed Forces to award less than honorable discharges to draftees on the basis of activities and associations prior to their induction into service.

Although Senator Hennings disclaimed any intention of adjudicating individual cases, it seems fairly clear that the committee and Senator Hennings became advocates in a number of loyalty-security cases in which they felt an injustice had been done. For example, the subcommittee actively pressed its objections to the manner in which the Foreign Claims Settlement Commission was administering the claims of Korean prisoners of war under the War Claims Act. On the basis of secret Army allegations of collaboration with the enemy the Commission had given a preliminary denial to some 250 claims. "Hearings" were allowed by the Commission to those who requested them, but the hearings were conducted under conditions which seemed to the committee to be violations of due process. No opportunity was offered the prisoners of war to confront their

14. Id. at 3.
accusers on the charges of collaboration, which certainly carried the
imputation of treason. The Commission proceedings in many cases were
rushed through to meet what the Commission regarded as a man-
datory one year deadline for the final determination of the cases. Under
this deadline, the Commission gave some claimants only a few days after
informing them of the charges against them to prepare their defense; and
in at least one case, the Commission made its final decision before the
transcript of the hearing had been prepared. Moreover, the Commission
made a number of decisions granting partial awards to the claimants
with the imputation that the claimants had been loyal Americans during
part of their captivity—and were thus entitled to POW benefits for that
time—and at other times had disloyally collaborated with the enemy.
As a result of the subcommittee's negotiations the Commission made several
changes in its policy which served to bring substantial justice to most
of the prisoner of war claimants. The Commission decided to review all
cases even after their deadline, and as a result of the committee's interest
final disallowances were reduced to a relatively small number.15

The subcommittee's intervention in the case of William B. Foster, a
Department of the Army civilian carpenter dismissed as a security risk
in April 1954, was undoubtedly responsible for his reinstatement with full
back pay some two and one-half years later. Foster and his wife were
cought in the toils of the security program because many years earlier
Foster had roomed with a person later shown to be a Communist and
had attended a social affair alleged to have been Communist inspired.
Foster, confident of his own innocence, acted as his own lawyer at the
security hearing and found himself condemned to wear the life long
"badge of infamy" as a security risk. Mrs. Foster, on the other hand, had
the help of an attorney and was cleared in her own case. But the Army
refused to apply her clearance to her husband, even though the wife was
cleared of the same charges on which the husband was condemned. In
April 1956, Secretary of the Army Brucker issued a directive banning
guilt by mere association and calling for evidence of personal guilt in
military personnel security cases. This same standard was then extended
to civilian security cases, and on the urging of the committee the Army
reopened the Foster case, which it had previously refused to do and gave
it a new review. It appointed a special reviewing panel which recommended

15. *Hearings on S. Res. 94 and 165 Before a Subcommittee of the Senate
Committee on the Judiciary, 84th Cong., 2d Sess. 935 (1956).*
the complete clearance of Foster and the recommendation was immediately carried out.

Another case which attracted wide attention was that of government attorney, Clifford J. Hynning, who was fired as a security risk after eleven years’ service in the Treasury Department’s office of general counsel. The original charges against him in June of 1954 were that he was then or had been a member of the Washington Bookshop Association, and he was reported to have said in 1942 that, “Communism is a democratic form of government,” and that it was no menace at that time. During the security hearing, Hynning provided satisfactory answers to the charges, but was still dismissed on the grounds of lack of veracity because he told the security hearing board he did not remember a 1942 interview with an F.B.I. agent which lasted ten minutes and concerned another government employee. After intervention by Senator Hennings and a number of other influential people, including Scott McLeod, State Department security head, and former Senator Harry P. Cain, a member of the Subversive Activities Control Board, the Treasury Department reversed itself, reinstated Hynning and paid him over 20,000 dollars for nineteen months back pay.

The committee’s intervention resulted in a similar restoration of jobs to others who had been suspended under the security program.  

III. THE RIGHT TO TRAVEL

The State Department’s practice of denying passports to persons on the ground that their travel abroad would not be in the “best interests of the United States,” caused a series of controversies to arise over a period of several years.

Regulations were adopted by the State Department in 1952, prohibiting the issuance of passports to Communists, to those who engaged “in activities which support the Communist movement,” and to those persons, regardless of affiliation with the Communist Party, who, there was reason to believe, were “going abroad to engage in activities which would advance the Communist movement.”

A number of cases involving passport denial or revocation attracted wide attention, including that of the subcommittee and its chairman.

16. Memorandum from Benjamin Ginzburg to Charles H. Slayman, Jr., June 29, 1957, entitled “Leading cases in which the committee’s intervention has been successful.”

17. 22 C.F.R. § 51.135 (1952).
Dr. Linus Pauling of the California Institute of Technology was refused a passport on three occasions in 1952, 1953 and 1954, was granted a limited passport in 1953, and after receiving the Nobel Prize in 1954, was granted an unlimited passport.18

In the opening hearings in November 1955, Dr. Pauling testified and described his passport difficulties.19

Scott McLeod, Administrator, Bureau of Security and Consular Affairs, Department of State, who had the major responsibility for the decisions as to who should or should not receive passports was then called to explain the logic or illogic of such decisions.20

Mr. Hocker: As in the case of Dr. Pauling, the charge was made that he was an undercover, if I remember—a concealed Communist. Was that statement made in the case of Dr. Pauling?

Mr. McLeod: I think that is right; yes, sir.

Mr. Hocker: The passport was issued to Dr. Pauling ultimately, was it not?

Mr. McLeod: I believe it was; yes, sir.

Mr. Hocker: Within about a month after the announcement of the award to him of the Nobel Prize; is that correct?

Mr. McLeod: Yes, sir.

Mr. Hocker: At the time the passport was issued to him, was it the opinion of the Secretary that Dr. Pauling was a “concealed Communist”?

Mr. McLeod: It is difficult for me to testify as to what the Secretary’s opinion was. . . .

Mr. McLeod: The record discloses that the decision, the direction to the Passport Office to issue the passport to Dr. Pauling in November 1954, was issued by the Under Secretary for Administration.

Mr. Hocker: Who is that?

Mr. McLeod: At that time, General Saltzman.

Mr. Hocker: Does the record indicate as to whether there was any additional information on this issue, whether Dr. Pauling was a “concealed Communist,” between the date of the issue of the passport in November, and the denial of the passport in October, prior to the announcement of the Nobel award?

Mr. McLeod: No additional information, to my knowledge.

18. See, Pauling, My Efforts to Obtain a Passport, 8 BULL. ATOMIC SCIENTISTS 236 (1952).
20. Id. at 155. The author has tried to keep out lengthy excerpts from hearings, but in this instance admittedly his failure is self-evident. He trusts the reader will at least understand, if not condone, his reasons for doing this.
MR. HOCKER: Does the record disclose as to what was the reason for the change of position with respect to the issuance of that passport, other than the fact that General Saltzman ordered it?

MR. McLEOD: There is no rationale that I know of why this decision was taken.

MR. HOCKER: Of course, it would be a violation of your regulations and, perhaps, of the law, too, to issue a passport to a concealed Communist, would it not?

MR. McLEOD: We are trying very hard not to do that.

MR. HOCKER: I say, it would be a violation of your regulations, perhaps the law too, to issue a passport to a concealed Communist, would it not?

MR. McLEOD: I believe that is correct; yes, sir.

MR. HOCKER: So the issuance of the passport demonstrates that the State Department reached the conclusion that he was not a concealed Communist; is that not so?

MR. McLEOD: Well, now, I think we need to explain that a little bit. The law which prohibits the issuance of a passport to a Communist is not, as I understand it, operative since the party has never officially registered. The case is pending. And the regulations made by the Secretary, obviously may be waived by the Secretary.

MR. HOCKER: The regulations made by the Secretary may be waived by the Secretary?

MR. McLEOD: That is my understanding of the situation; yes, sir.

MR. HOCKER: You mean the Secretary feels that he could waive the regulations against the issuing of a passport to a member of the Communist Party?

MR. McLEOD: I think that is within his discretion, as we understand it.

MR. HOCKER: Does he do that?

MR. McLEOD: I cannot testify as to the basis for his decision. I simply point out that that is possible.

MR. HOCKER: I say, does he do that—has he done that?

(Conference)

MR. McLEOD: Well, yes, I believe that he has done it; yes.

MR. HOCKER: Do you mean to suggest that he has done that in the case of Dr. Pauling?

MR. McLEOD: No, sir.

MR. HOCKER: What is the position with respect to the question of whether Dr. Pauling is a concealed Communist, taken by the State Department; is he or is he not?

MR. McLEOD: Well, I think the departmental decision is that he is not, inasmuch as Mr. Saltzman ordered the passport issued.
MR. HOCKER: Well, if the decision of the Department is that he is not a concealed Communist, does it occur to you that you made a formal charge against him, sent to him, stating that he is a concealed Communist, and then to change within a month after denial of such, and to determine that a passport shall issue, without any additional information—does it seem to you that such a procedure is fair or in accordance with the normal constitutional guarantees to which an American citizen is entitled?

(Conference)

MR. McLEOD: I think we have to put this in context, if I may. This statement that he was a concealed Communist was an allegation furnished to him under our regulations, so that he would have some basis for refuting the information that was in the file, if he cared to do so.

Now, this was only one of a number of allegations that was a part of the total picture.

MR. HOCKER: Do you mean that the Department at the time the allegation was made, did not believe in it?

(Conference)

MR. McLEOD: I do not know if we can say that the Department believed it or did not believe it. We are trying to—

MR. HOCKER: Goodness gracious—

MR. McLEOD: We are trying to arrive at some decision as to whether it was true or not.

MR. HOCKER: Did not the Department in its letter of—preceeding—what was it, June?

SENATOR HENNINGS: June or July of 1954.

MR. HOCKER: Directly state in a letter to Dr. Pauling, July 19, that he was a "concealed member of the Communist Party"? I do not have the letter. Unfortunately, Dr. Pauling took it with him, but it is in the record.

Find the transcript, please.

MR. McLEOD: I think it was an allegation, not a charge or statement . . . .21

* * * *

SENATOR HENNINGS: So that in the light of Mrs. Shipley's determination and the letter of refusal, that would seem to raise the presumption certainly that it was believed at that time that Dr. Pauling was a "concealed Communist"?22

MR. McLEOD: No, sir. I think the letter of final refusal is to the contrary, because it cites section 51.135 (b) which is as follows:

21. Id. at 186-88.

22. It had been determined that the letter of July 19, 1954, was a "tentative denial." The letter referred to here was a "final refusal" written Oct. 1, 1954.
Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes in that line.

Senator Hennings: Then he was denied his passport on the basis not that he was a "concealed Communist," but that he adhered to what you have pleased to term the "Communist line," is that right?...

* * * *

Senator Hennings: October 1, 1954, which reads as follows [speaking of a letter to Dr. Pauling from the State Department]:
"The Department has given very careful consideration to your case, including your letter and its enclosures, and has concluded on the basis of evidence at hand that your activities during the years following World War II have demonstrated a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line, and that accordingly the issue of a passport to you is precluded under section 51.135 (b) as that section is amplified by section 51.141 (b) of the passport regulations.
"The gist of the allegations concerning you were set forth in the Department's letter of July 19, 1954."
And then he was advised—
"You may, if you so desire, appeal this decision to the Board of Passport Appeals."

Do you recall that, Mr. McLeod?

Mr. McLeod: I do not recall it, but I have the copy here.

Senator Hennings: Well, now, their answer when Dr. Pauling was ultimately given his passport, after he had been awarded the Nobel Prize, in order to go to Sweden to accept it—was there any additional evidence presented to the Department that refuted or tended to refute the Department's determination that he had been a "consistent follower" of what was described as the "Communist-Party line?"

Mr. McLeod: I cannot testify absolutely to that, but I can tell you that the file does not disclose any additional information.

Senator Hennings: In other words, he stood in the same position, insofar as your files disclosed information when the passport was ultimately issued to enable him to go to receive the Nobel Prize and the information in your possession when he was denied the passport as indicated by the letter that I have just read of October 1, 1954?

Mr. McLeod: That is right.

Senator Hennings: Is that right?

Mr. McLeod: Yes, sir.
Senator Hennings: Then what was it, Mr. McLeod, that moved the Department to make another and different determination as to Dr. Pauling’s suitability to have a passport?
Mr. McLeod: I can’t answer that question beyond that the decision was appealed to a higher level and Mr. Saltzman arrived at a different conclusion on the same set of facts, insofar as I know. I can’t testify as to what went on in his mind in arriving at his decision.

Senator Hennings: Do you know who appealed it to the higher level—it was not certainly Dr. Pauling, was it?
Mr. McLeod: I think it was just a self-generated appeal.
Senator Hennings: A “self-generating appeal”—what is that, Mr. McLeod—I have not run into that in my experience?
Mr. McLeod: The people in the Department.
Senator Hennings: In my experience in law.
Mr. McLeod: The people in the Department do read the newspapers. We do not operate in a complete ivory tower down there. And when the announcement of the Nobel Prize was made, I think that the question of his passport was then considered at a high level.

Senator Hennings: So that on your own—
Mr. McLeod: As a matter of fact, I think he did write a letter in, as I recall it, to the Secretary, that he had received this high honor and wanted to know whether he could go over there to get it personally.

Senator Hennings: So would it be a fair statement to say that the State Department of our country, the United States of America, after another group in a foreign country had awarded one of our citizens a very high honor, that you were then persuaded that perhaps he had not followed the Communist Party line and was a fit subject to have a passport granted?
Mr. McLeod: I think that is a fair statement for you to make, Senator. I hope you won’t ask me to agree with it.

Senator Hennings: Well, do you disagree with it?
Mr. McLeod: I just do not know what entered into this decision. The file does not reflect it...24

* * *

Mr. Hocker: Who is it that makes the allegation—it is quite a serious allegation, I would say. Let me ask you this, Mr. McLeod: As a former FBI investigator you know, of course, that a concealed member of the Communist Party is a much more dangerous

24. Id. at 191-92.
person than a frank and open, registered member of the Communist Party, do you not?

Mr. McLeod: I would agree with that, yes, sir.

Mr. Hocker: So that you accused the man of being a "concealed member of the Communist Party." That is about as strong an accusation of disloyalty one could make in the present day, is it not?

Mr. McLeod: It is pretty strong.

Mr. Hocker: That is right. I want to know who it was that you considered, under the meaning of that letter, made the allegation that Dr. Pauling was a "concealed member of the Communist Party."

Mr. McLeod: Mr. Hocker, even if I knew I could not tell you who it was because that is security information and we are not permitted to testify about it.

Mr. Hocker: Under the stipulation of the Kamen case, that could have been from some unknown and undisclosed source not even known to the State Department, could it?

Mr. McLeod: I think that is possible, yes, sir.

Mr. Hocker: And do I understand that the State Department writes letters to citizens of the United States on the basis of undisclosed and unevaluated testimony from an unknown source making this grave charge that he is, or grave allegation—I will use your word—that he is a member, a "concealed member" of the Communist Party?

Mr. McLeod: I cannot agree that it is unevaluated. Otherwise I would agree with your statement.

Senator Hennings: Right there, Mr. McLeod, did I understand you to say the Department does not know the source of this information?

Mr. McLeod: In this particular case, I do not know, Senator. . .

* * * *

Mr. Hocker: It means something, no doubt, that the board must be convinced by a "preponderance of the evidence," and I want to know who has to do the convincing—the man that has

25. In the case of Kamen v. Dulles, Civil No. 1121-55, D.D.C. (1955), the parties stipulated that the decision on Kamen's passport application was based in part upon reasons and supporting information of which plaintiff was not apprised by the Department of State; and, that except for information supplied by plaintiff, neither the Passport Office, nor the Board of Passport Appeals, nor the Acting Secretary of State were informed of the identity of informers supplying any of the information upon which the decision was based. On July 14, 1955, the parties in the Kamen case entered a stipulation dismissing the cause on the grounds that the case was moot, a passport having been issued to Mr. Kamen in July of 1955.

the allegation made against him or the man who makes the allegation.27

Mr. McLeod: This is an administrative proceeding where the person who is charged with the responsibility of making the decision is simply trying to make up his mind as to the truth. It is not an adversary proceeding.

Mr. Hocker: What do you mean?

Mr. McLeod: There is no question of burden here, it seems to me.

Mr. Hocker: You say there is no question of burden. Then what is meant by the phrase that you have got to decide by a "preponderance of the evidence?"

Mr. McLeod: I do not know as I could help you on this. I didn't write this regulation.

Mr. Hocker: They are administered, as I understand it, under your supervision.

Mr. McLeod: That is right.

Mr. Hocker: And the man in charge of the supervision of this administration does not know what the regulation means?

Mr. McLeod: I cannot tell you that there is any burden assigned to anyone in this matter of—

Mr. Hocker: The regulation says that the burden is assigned to somebody, does it not?

Mr. McLeod: No; I don't think the regulation says anything about burden, does it?

Mr. Hocker: It says the board shall be convinced by a preponderance of the evidence, does it not?

Mr. McLeod: That does not mean that there is a burden on anyone to produce a preponderance of evidence. It is simply a matter of considering the matter at hand.

Mr. Hocker: You are not a lawyer, are you?

Mr. McLeod: Unfortunately I am not.

Senator Hennings: Does not "preponderance of the evidence" imply burden?

Mr. McLeod: It does not to me. Maybe it does to you.

Senator Hennings: You know what "preponderance" means, of course.

Mr. McLeod: It means the most, does it not? ... 28

* * *

27. The subcommittee has turned its attention to the procedure of appealing from a decision denying a passport under 22 C.F.R. § 51.141(a) (1952): "In making or reviewing findings of fact, the board ... shall be convinced by a preponderance of the evidence as would a trial court in a civil case."

SENATOR HENNINGS: All right. We will accept that.

Of course, you were aware that during some of that period of time where he was being charged with the following the Communist line that he was at the same time being denounced in Pravda and Izvestia as a representative of the capitalistic government or the capitalist world represented by the United States—is that not true, or did you have such information as that?

(There was a short conference).

MR. McLEOD: Mr. Nicholas advises me that this was an argument he engaged in with some Soviet scientists with respect to some scientific theory.

SENATOR HENNINGS: That was the theory of Lysenko, the theory of resonance as it related to the Lysenko doctrine?

MR. McLEOD: Mr. Nicholas informs me that the Soviets changed their views to conform to his [Pauling’s] after this argument took place.

SENATOR HENNINGS: They changed what?

MR. McLEOD: They changed their theory to conform to his after the argument took place.

MR. HOCKER: That is, Russia was following the Pauling line?

MR. McLEOD: Science triumphs.

SENATOR HENNINGS: Russia began to follow the Pauling line, Mr. Hocker says... .

In the spring of 1958, the United States Supreme Court in the Kent, and Dayton cases held that the State Department did not have the authority claimed by Mr. McLeod to exist in the Secretary of State.

IV. CIVIL RIGHTS

In the 85th Congress (1957-1958), all civil rights proposals in the Senate were referred to the Hennings subcommittee. Extensive hearings were held during February and March of 1957, during which forty-five individuals testified in person and 230 others filed statements.

The subcommittee approved a bill and reported it to the full Judiciary Committee, but no further action was taken on it.

29. Id. at 204-05.
Meanwhile, the House passed a bill similar to the subcommittee's bill, which was then taken up by the Senate, and ultimately (with a number of amendments) became the Civil Rights Act of 1957,\textsuperscript{35} the first civil rights legislation passed by Congress in eighty-two years. Unquestionably the extensive hearings held by the subcommittee had an educational effect on the Senate and were responsible in some measure for the final passage of the law. Although it was not as broad as many proponents wished, it still represented a substantial advance.

In the 86th Congress, new civil rights legislation was introduced during the first session in 1959. Extensive hearings were held by the subcommittee, but the only result during the first session was the two year extension of life for the Civil Rights Commission created by the Civil Rights Act of 1957.\textsuperscript{36}

With the opening of the second session in January 1960, Senator Hennings as chairman of the Senate Rules Committee announced hearings, before a subcommittee of that full committee, on voting legislation, mainly focusing on various proposals to insure the right to vote for Negroes who were being systematically denied this right in many southern States. In nine days, twenty-four witnesses were heard and nineteen written statements filed with the subcommittee.

Congress did pass the Civil Rights Act of 1960,\textsuperscript{37} but it was not based on the bill reported out of the subcommittee.

V. CONFESSIONS AND POLICE DETENTION

The Supreme Court in Mallory v. United States,\textsuperscript{38} held that confessions obtained during a delay before arraignment, in violation of rule 5(a) of the Federal Rules of Criminal Procedure, were inadmissible. Rule 5(a) imposes the obligation on the police to arraign a person under arrest before a committing magistrate without unnecessary delay.

The decision generated considerable controversy, particularly in the District of Columbia where the local police insisted that the decision would hamper interrogation and investigation, prior to arraignment, of

\textsuperscript{36} Hearings on S. 435 Before a Subcommittee of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959).
\textsuperscript{38} 354 U.S. 449 (1957).
a person arrested as a suspect in a crime. This claim was not responsive to the fact that the federal rules preclude an arrest unless on probable cause.

A special subcommittee to study the various decisions of the Supreme Court, consisting of members of the House Judiciary Committee, was appointed in 1957. One phase of its study was the Mallory decision. Testimony, principally of police officials, was heard during the summer and early fall of 1957. As a result of this subcommittee's work, the House Judiciary Committee reported out a bill to admit confessions even though obtained during illegal detention.

Similar proposals were made in the Senate and referred to the Senate Judiciary Committee.

During the spring of 1958, Senator Hennings directed the subcommittee to hold hearings on police detention prior to arraignment and confessions obtained from suspects during such detention. Although, of course, nothing was said, it seems apparent that he must have had at least an ulterior motive of slowing the gallop of Congress toward repealing the Mallory rule.

A wide range of witnesses appeared including defense lawyers, police officials and law professors. The subcommittee's massive volume of the hearings includes not only the testimony of the fifteen witnesses, but also a vast amount of other material that had not previously been collected on the subject. It includes a compilation of State statutes relating to arraignment and State rules of evidence governing the admissibility of confessions. There is an excellent periodical bibliography. There is also a collection of all of the opinions of the United States Court of Appeals for the District of Columbia based on the Mallory rule. This publication is one of the most complete handbooks on this subject for interested lawyers and laymen.

Ultimately, no legislation repealing the Mallory rule was passed by Congress, but the margin was close. Bills passed both the House and the Senate, but the Conference compromise was stopped in the Senate on the last day of the 85th Congress.

When Congress returned in 1959 for the 86th Congress, new proposals

39. Hearings on S. Res. 234 Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958). This portion of the hearing was related to Confessions and Police Detention.
40. Id. at 668.
to reverse the Mallory decision of the Supreme Court were introduced. Senator Hennings made his position quite clear in opposing these measures by issuing a statement in which he said:

In 1957, when the United States Supreme Court handed down the controversial opinion which has come to be known as the "Mallory" decision, there were many timid souls and self-proclaimed legal experts who rushed into print with forebodings of impending disaster. The opinion, we were told, would release, upon the District of Columbia, a veritable horde of criminals. We were told the opinion would shatter effective law enforcement, not only in the District of Columbia, but throughout the nation and we were warned that no longer would our police and other law enforcement agencies be able to fulfill their difficult duty of protecting law abiding people.

Somehow, none of these predictions have materialized. Since the decision in the Mallory case, our courts and prosecutors have somehow managed to continue to operate sanely, soundly and efficiently and our police have been able to work within the framework of the decision. Nevertheless, we are again faced with the legislation which seeks to reverse or "clarify" the decision.

I worked for 6 years as a trial prosecutor in the criminal courts and I was thereafter elected Circuit District Attorney of St. Louis, a metropolitan area of over 2 million people. I worked closely with the police in the preparation of the State's cases embracing just such heinous crimes as the one involved in the unfortunate Mallory case and know from eight years of day to day experience in the "gang era" that our nation's police officers and law enforcement officials have a very difficult job. They shoulder a large and indeed, dangerous responsibility. They have the obligation of maintaining peace and order. They must apprehend those who violate the law and secure evidence for their conviction. Faced with this difficult duty, it is only natural that they would oppose the Mallory decision, which restates a field of limitation within which they must work. However, it must be remembered that the primary responsibility of our police and law enforcement agencies is not solely to obtain evidence for conviction but to see that justice is done.

Congressional maneuvering over the past two years to "clarify" the Mallory rule leads to the inescapable conclusion that we would be better off if we left the matter in the hands of the courts. As Congress continues its efforts to "improve" the court-defined rule of admissibility of confessions as evidence in criminal cases, the confusion seems only to increase. Simultaneously, as the courts continue to consider the problem on an individual case by case basis, i.e., on the facts and circumstances attendant upon each
individual case, it becomes apparent that no clarifying legislation is needed. . . .

Law enforcement officials have worked hard to live within the mandate of the Supreme Court, and, indeed, have succeeded in doing so. They have been diligent in assuring an immediate hearing after an arrest so that the person arrested might be fully advised of his constitutional rights. This is exactly what the Supreme Court wanted. This is the way the nation's law enforcement officials should deal with criminal cases. . . .

The United States considers itself a civilized nation and aspires to have its citizens conduct themselves in a civilized manner. We must have procedural safeguards which not only protect the innocent but which secure convictions of the guilty by methods that commend themselves to a progressive, self-confident society.41

None of the proposals introduced were adopted.

VI. WIRETAPPING AND EAVESDROPPING

The subcommittee, in May 1958, began a study of wiretapping, eavesdropping and the Bill of Rights. Here again, it seems apparent that this was Senator Hennings' method of providing defensive material against the pressures for wiretap legislation which was perennially pushed vigorously in other committees of Congress.

Public hearings were held on May 20 and 22, 1958. Witnesses included an official of American Telephone & Telegraph Co., law professors, and the Attorney General of Pennsylvania (who opposed all wiretapping, as did Senator Hennings himself, who was a former prosecuting attorney).42 The committee collected all Supreme Court decisions dealing with wiretapping as well as texts of opinions in the related Supreme Court cases and some of the foreign law on the subject.

Public hearings were also held the following year in July and December 1959. Witnesses included Samuel Dash, former district attorney of Philadelphia, who had recently published a study entitled The Eavesdroppers under an endowment from the Pennsylvania Bar Association, several attorneys in private practice specializing in the defense of criminal cases, and a San Francisco private investigator, Harold Lipset, who

42. Hearings on S. Res. 234, supra note 38. This portion of the hearing was related to Wire Tapping, Eavesdropping and the Bill of Rights.
demonstrated an imposing array of wiretapping and electronic recording devices.\footnote{43. \textit{Hearings on S. Res. 62 Before a Subcommittee of the Senate Committee on the Judiciary, 86th Cong., 1st Sess.} 503 (1959).}

No legislation authorizing wiretapping was adopted in the 85th (1957-1958) Congress or the 86th (1959-1960) Congress. However, the pressures still continue and a wide assortment of bills has been introduced in the 87th Congress. They have been referred to the subcommittee for study. It seems probable that some wiretap authorization bill will be reported out of the Subcommittee on Constitutional Rights, something which would not have occurred under Senator Hennings.

\textbf{VII. Freedom of Information}

The final major area in which the subcommittee maintained a continuing interest was the tendency of government agencies and departments to withhold information from Congress and the general public even when national security was not involved.

Hearings on this subject began in March 1958 and were continued throughout several years until Senator Hennings’ death.

The committee was responsible for the passage of a law providing that the power of federal officers and agencies to keep records did not authorize\footnote{44. 72 Stat. 547 (1958), 5 U.S.C. § 22 (1958).} them to withhold information nor limit the availability of records to the public. However, it was apparent that this bill did not solve all problems because studies and hearings continued after that.\footnote{45. \textit{Hearings on S. 921 Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2d Sess.} (1958); \textit{Staff of Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 85th Cong., 2d Sess.}, \textit{The Power of the President to Withhold Information From the Congress} (Comm. Print 1958); \textit{Staff of Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 85th Cong., 2d Sess.}, \textit{A Bill to Amend the Public Information Section of the Administrative Procedure Act} (Comm. Print 1958); \textit{S. Rep. No. 1621, 85th Cong., 2d Sess.} (1958); \textit{Hearings on S. Res. 62 Before a Subcommittee of the Committee on the Judiciary, 86th Cong., 1st Sess.} (1959); \textit{Staff of Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 86th Cong., 1st Sess.}, \textit{Withholding of Information From the Public and Press} (Comm. Print 1960).}

In April 1959, the subcommittee held a public hearing on the subject of “Secrecy and Science.” In addition to hearing the testimony of Dr. Arthur H. Compton, Nobel Prize winning physicist, the subcommittee received statements from eighteen other Nobel Prize winning scientists who
gave their views on the effect that restrictions on the free exchange of information have had on scientific development and progress in this country.46

In a closely related subject, the subcommittee also instituted a broad study to determine to what extent any of the federal departments and agencies were interfering with communications from their employees to members or committees of Congress. The survey was commenced after it was brought to the attention of an outraged Senator Hennings that the Director of the International Cooperation Administration's mission to Indonesia had issued a directive forbidding his employees to write Members of Congress concerning the ICA operations. The order was rescinded shortly but Senator Hennings ordered the survey to continue.

CONCLUSION

Senator Hennings died on September 13, 1960. His successor as chairman of the subcommittee was Senator Sam J. Ervin, Jr., of North Carolina, who was entitled to the position as the next ranking Democrat in seniority. Many of the studies started under Senator Hennings are being continued. Before Senator Hennings died, there had been some preliminary staff work on the constitutional rights of the mentally ill, and whether the need for adequate legal counsel by indigent defendants in federal courts was being satisfied.

The subcommittee seems now to be firmly entrenched on the Washington scene. Although most of the holders of the subcommittee's major staff positions have now been replaced, it is evident that Senator Hennings has, indeed, left behind him a living legacy.