GOVERNMENT IN THE SUNSHINE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON REORGANIZATION, RESEARCH, AND INTERNATIONAL ORGANIZATIONS

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 260

A BILL TO PROVIDE THAT MEETINGS OF GOVERNMENT AGENCIES AND OF CONGRESSIONAL COMMITTEES SHALL BE OPEN TO THE PUBLIC

MAY 21 AND 22; AND OCTOBER 15, 1974

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GOVERNMENT IN THE SUNSHINE

TUESDAY, MAY 21, 1974

U.S. SENATE,
SUBCOMMITTEE ON REORGANIZATION, RESEARCH,
AND INTERNATIONAL ORGANIZATIONS,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 1224, Dirksen Senate Office Building, Senator Abraham Ribicoff [chairman of the subcommittee] presiding.

Present: Senators Ribicoff, Chiles, and Percy.

Also present: Richard A. Wegman, chief counsel and staff director; Marilyn Harris, chief clerk; George Patten and Margaret Maruschak, assistants to Senator Chiles.

OPENING STATEMENT OF SENATOR RIBICOFF

Senator RIBICOFF. As chairman of the Reorganization Subcommittee, I welcome the opening of hearings on S. 260, the "Government in the Sunshine Act." Because Senator Chiles, the chief sponsor of S. 260, has an active interest in this legislation, I have asked him to serve as chairman for these hearings.

During the first session of the 93d Congress, Senator Chiles and I submitted a questionnaire to many interested persons and organizations regarding S. 260. The responses to the questionnaire have been enlightening and are contained in the committee print: "Government in the Sunshine: Responses to Subcommittee Questionnaire."

James Madison once remarked, "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives."

Trust and confidence in the institutions of the government has markedly declined, as we all well know.

Openness, rather than secrecy, should be the norm of a free society, and should also be the means to restore the confidence and faith in the institutions created by our Founding Fathers.

Congressional committees have recently opened their meetings to the public in record numbers. Many important pieces of legislation have now been drafted by committees in open sessions.

It is my hope that the hearings on S. 260 which begin today will encourage open and constructive discussion on this bill.

I have a conflict because the Finance Committee opens up its National Health Insurance hearings today in which I have an active interest as well.

The committee will stand in recess until Senator Chiles arrives and at that time he will be acting chairman of these hearings.

[A recess was taken.]

Senator CHILES [presiding]. We want to reconvene our hearings.

I understand Senator Ribicoff has just opened the hearings for us.

Senator CHILES. We will insert a copy of S. 260 in the record.

[See appendix, p. 311.]

OPENING STATEMENT OF SENATOR CHILES

Senator CHILES. Today I think it might be appropriate to quote a remark that Woodrow Wilson made in 1884. He commented that "Light is the only thing that can sweeten our political atmosphere—light thrown upon every detail of administration in the departments—light blazed full upon every feature of legislation—light that can penetrate every recess or corner in which any intrigue might hide; light that will open to view the innermost chambers of government."

I do not think we would find many people today who would argue the point that our political atmosphere needs sweetening. The mood is distrustful, suspicious, even cynical. We face numerous crises—but perhaps the worst one of all is the so-called "crisis in confidence"—the crisis of people's lack of trust in their government and in their elected leadership.

GOVERNMENT IN THE SUNSHINE ACT

S. 260, the Federal Government in the Sunshine Act, is one major effort to meet that crisis and help end it. I believe that democratic self-government and informed citizenry just naturally go hand in hand. It is essential that we conduct public business in the open, "in the sunshine." Only with such openness can the public judge and express through its vote or voice, whether governmental decisions are just and fair.

While serving in the Florida State Legislature I helped enact the Florida Government in the sunshine law which provided that all meetings of any board or commission of any State agency, or any other political subdivision at which official acts are taken would be open to the public at all times; minutes of these meetings of State agencies would be kept; and penalties be given for persons in violation of the law.

I served in the Florida State Senate under Florida's law for 3 years and during that time became totally convinced that the lawmaking process was neither inhibited nor damaged. Closed doors are not necessary to sound resolution of conflicting views and interests.

I believe openness works—it certainly has worked well in the House this past year. Major legislation, including the emergency energy bill considered by the House Interstate and Foreign Commerce Committee, was considered in open markup. It has worked well in the committees of the Senate that have opened their meetings. It has worked well in the Committee on Government Opera-

tions which by rule opened up its meetings; it has worked well in the Committee on the Interior and Insular Affairs, which opened up its meetings; and it has worked well in the Committee on Banking, Housing and Urban Affairs.

Open meetings, I believe, offer the opportunity for a candid look at how legislators work. Predictions of disaster are repudiated by actual experience. Through open meetings the media can do a better job reporting and is less dependent on "leaks."

In my experience, there are not many secrets on Capitol Hill. Any "secret" meetings I have attended were usually reported in full in the newspapers—only I sometimes hardly recognized it was the same meeting I attended. It all depended on who did the leaking and who he leaked the story to.

SENATE SURVEY ON OPENNESS

In a brief survey of the Senate I note that 60 Members have supported "openness" in one form or another during this Congress. That is, 60 Members have either:

(1) Cosponsored S. 260;

(2) Voted to support the Humphrey-Roth amendment which have altered Senate rules to make all committee meetings open unless voted closed by a majority—similar to the rule now existing in the House; or

(3) Voted to support the Sunshine amendment to the Congressional Reform Act—an amendment which the Senate passed by a most encouraging 2 to 1 vote this past March 20.

Thomas Jefferson in a letter to John Adams once critically commented on the closed sessions of the framers of our Constitution. I believe that criticism is very appropriate today. Jefferson said:

> I am sorry they began their deliberations by so abominable a precedent as that of tying of the tongues of their members. Nothing can justify this example but the innocence of their intents and ignorance of the value of public discussion.

I do not believe we are ignorant of the value of public discussions. And as for our intentions—I must believe that they, too, are of the highest order. We are intent upon increasing governmental visibility and this effort is only a part of an overall intent to assure accountability to the people. But how can that effort be one of good faith if we do not resolve to meet in public? How can our rhetoric about need for citizen participation and involvement be meaningful unless we restore the link between the people and the Government—by letting the people in on the Government.

The words of S. 260 are not etched in stone. There will be no little controversy over the provisions, I am sure. But I am also confident that the direction in which S. 260 moves is the right one and I look forward to hearing the comments of the individuals before this committee today and tomorrow—the first 2 days in a planned series of hearings on the bill.

WITNESSES

This morning we will hear from several Senators and Congressmen—Senators William Roth, and Dick Clark; and Congress-

man Bill Gunter of Florida. We will also hear testimony from the National Newspaper Association, the Secretary and General Counsel, Mr. Bill Mullen, and Mr. Charles S. Rowe, Editor of the Free-Lance Star of Fredericksburg, Va., and member of the Association's Freedom of Information Committee.

Tomorrow our witness list will include the Honorable Reubin O'D. Askew, Governor of Florida, who will no doubt tell us of his personal experience with the "Sunshine Law." Also on the agenda tomorrow will be Mr. Lou Harris of Lou Harris Associates, Inc. Mr. Harris recently presented before the Subcommittee on Intergovernmental Relations of this committee—the results of a comprehensive survey of public attitudes he took in September of 1973. I was very impressed with his findings and his observation that the elimination of secrecy was one way to reestablish some measure of public trust in government. Also appearing before our subcommittee tomorrow will be the former Secretary of HEW, the chairman of Common Cause, Mr. John Gardner; Congressman Dante Fascell, who has been the leader in opening up committee meetings in the House of Representatives; Ron Plesser, staff attorney with Ralph Nader's Center for the Study of Responsive Law; and Mrs. Jeanne Malchon, former president of the Florida State League of Women Voters.

Before we begin receiving testimony, I would like to take a moment to express my personal thanks to a number of people who have been very helpful in the work preliminary to these hearings—Professor Richard Stewart of Harvard Law School, who played a primary role in the drafting of S. 260; Mr. David Cohen of Common Cause, with whom I and my staff have worked very closely in the planning of a conference we jointly sponsored with Common Cause—the first of its kind—last February 1, from which issued a number of valuable suggestions and recommendations regarding S. 260; Professor Bill Rodgers of Georgetown University, who participated in that conference and was so helpful in the redraft of the work that resulted, Jon Mills, Director of Florida's Center for Governmental Responsibility, who has provided valuable assistance and support for this proposal, and, of course, to Chairman Abraham Ribicoff for his support and the cooperation of his very able subcommittee staff in the preparation for these hearings.

MR. JUSTICE BRANDEIS QUOTED

Let me close my remarks this morning by repeating a quotation from Supreme Court Justice Louis D. Brandeis—one that I hear repeated more and more, I am happy to say, around Capitol Hill—Justice Brandeis once remarked that:

> Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman.

I am anxious to hear what our witnesses this morning have to say about the legislative form that disinfecting sunlight should take.

Senator Percy.

OPENING STATEMENT OF SENATOR PERCY

Senator PERCY. Senator Roth, do you have 3 or 4 minutes so that I could make my opening statement first? Regretfully, I have a Foreign Relations Committee meeting that I have to get to for quorum purposes.

I do not imagine any one of the three of us needs to be converted to the concept of open Government. The two of us, Senator Roth, are cosponsors of the chairman's bill. I have been looking over your remarks and they are extraordinarily good. I commend you as I commend Senator Chiles for his leadership in this field.

I think it is very pertinent that we have these hearings. I hope that Senator Roth in his testimony would not mind commenting also on what his personal opinion is about whether we should open up the House and Senate proceedings which we possibly will have on impeachment.

My own feeling is that in this case the national interest is best served by opening the proceedings right up. The chance we are taking in having 38 people on the House Judiciary Committee in on a secret that could be leaked and cause injury to many people, including the defendants, is too great. When we have this enormous responsibility placed in the hands of 535 Members of Congress, with the consequences of possibly undoing the work of 45 million voters who voted for the President, I would hope that we would open these proceedings to the view of the American people. We should do so in a way that is in accord with the dignity and serenity of a judicial proceeding as that is just exactly what the House and Senate would be performing.

Restrictions on the use of television equipment should be very tight. I could not care less whether it is all in living color. If they have to use fast black and white film, I technically can certify they can do it without the glare of lights and without the necessity of having numerous cameras in the House and Senate chambers.

I think more and more of our proceedings should be opened up. Certainly we now have had sufficient testing of the openness principle so that we have a precedent for the impeachment proceedings to be open.

RECORD OF OPENNESS TRACKED

I think the precedent that we have is in large measure attributable to you, Senator Chiles, and to Senator Roth for the leadership that you have provided. I am proud of the record of openness. Though it is not as far as we would like to have gone, we have made a real start.

In the 92d Congress, Senator Metcalf and I sponsored a bill in this committee which became the Federal Advisory Committee Act. It required for the first time that the numerous secret meetings of advisory committees in the executive branch be open to the public. As a result of that act, new light is pouring into some of the dark corners of Government.

At the beginning of the 93d Congress, a successful effort was made in the Senate to permit the committees of the Senate to

establish their own rules governing the opening or closing of business meetings. This was a step in the right direction, but it was only one step.

At that time, Senator Roth offered a floor amendment, which Senator Brock, Senator Chiles, and I cosponsored, to make all Senate committee meetings open to the public unless voted closed. That effort failed narrowly by a vote of 38–47, but it set the tone for the future.

Early last year, the Government Operations Committee took the initiative permitted us by the new Senate rule to establish our own openness rule for committee business sessions. I supported that committee rule wholeheartedly and I believe our members no longer need to be convinced of its efficacy.

Our committee openness rule has worked remarkably well. It has helped get Senators to meetings on time and be more attentive. This business of our sitting around for a 10 o'clock meeting until 11 or 11:30 to try to get a quorum is a terrible way to run the people's business. Audiences who sat outside and waited to hear what happened could not even determine what was happening and why it was happening. At least now that we have an audience there everyone knows who is not making it possible for us to do business in the Senate.

At no time has the audience interfered with our work or been demonstrative. Most of all, the openness rule has removed the suspicion that so many people have about what goes on behind those closed doors when we really do the work of the Senate by writing bills.

Inspired by our committee's success and by Senator Chiles' bill, I offered in subcommittee an amendment last year to the budget reform bill to require that all meetings of the new Senate Budget Committee be open to the public. That amendment was adopted unanimously by the Subcommittee on Budgeting, Management and Expenditures and was incorporated in the bill as reported by the full Government Operations Committee. Unfortunately, my amendment was deleted in the Rules Committee markup of the budget reform bill.

That set the stage for our greatest victory to date, in which the Budget Committee openness provision was reinstated in S. 1541 by Senator Chiles' successful floor amendment. As a floor manager of the bill I strongly supported the Chiles amendment and it carried by the overwhelming vote of 55–26, with the help of Senator Roth who spoke out in favor of it.

That brings us to the bill before us today, S. 260, which goes the extra mile and requires all business meetings of all Senate committees to be open unless voted closed for specific cause. The bill applies these same rules to Federal regulatory agencies and Government commissions, so that they, too, will be operating in the sunshine.

Mr. Chairman, I fully support the objectives of this bill and I am delighted to see by his testimony that Senator Roth does too. I thank you very much, Mr. Chairman.

Senator CHILES. Thank you, Senator Percy.

Senator Roth, I understand you have some other commitments, so we will take your statement right now.

TESTIMONY OF HON. WILLIAM ROTH, U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Thank you, Mr. Chairman. I welcome the opportunity to come before the committee today to testify on behalf of the open meetings legislation sponsored by Senator Chiles. My statement will be brief because I am also testifying this week before the Intergovernmental Relations Subcommittee on the general problem of governmental secrecy and I want to avoid duplication.

Senator CHILES. Senator, we are delighted to have you as our leadoff witness. You have long been a champion in this fight and we did together enjoy one of the small victories so far. I am pleased to have you as our leadoff witness today.

Senator ROTH. I thank the chairman and I would just like to say I am looking forward to some more victories and I hope that the subcommittee meeting today is the start of another step forward.

I would also like to say that I know we all appreciate the strong support and leadership that Senator Percy has played in this area of opening up the governmental process.

Patrick Henry once said, "To cover with a veil of secrecy the common routine of business is an abomination in the eyes of every intelligent man." The Government in the Sunshine Act, which I have the pleasure of cosponsoring, is an effort to remove the veil of secrecy that has descended upon the common business of two branches of our Government—the legislative branch and the executive branch. It is necessary that we do this because there is a public right to know and also because there is a public need to know.

OPEN MEETINGS ADOPTED

We have already made major strides in the Congress. Last year, the House adopted a general open meeting rule for House committees. An amendment in the Senate, which I had jointly sponsored with six other Senators, failed by a 38 to 47 margin in March 1973. However, some individual Senate committees, including this Committee on Government Operations, did adopt some open meeting rules. Contrary to many of the fears that have been expressed, it was soon discovered that Senators could do business in public. The experience of these committees, I am sure, helped account for the favorable vote this past March on the Chiles-Roth amendment restoring the antisecrecy provision which applied to the proposed Joint Budget Committee.

One very significant feature of the "Government in the Sunshine Act" is that it would not only complete the process of providing a general antisecrecy rule for the standing, select, and special committees and subcommittees of the Senate, but would also provide, for the first time, antisecrecy rules for conference committees. It makes, in my judgment, no sense at all to have the entire legislative procedure open except for the final and in some ways, most important round—the conference committee. Yet, by force of habit, conferences have traditionally been closed door affairs, not only hiding the deliberations from the public but often from those Senators and Representatives not on the conference committee, as well.

GOVERNMENT AGENCIES

Let me turn now to the provisions of S. 260 which relate to the Government agencies. Here the general emphasis is to make the Federal bureaucracy more responsible and more accessible to the citizen. We all recognize that in a country of more than 200 million people we cannot conduct public business in the style of ancient Athens or New England town meetings. But, there should certainly be some way to counteract the growing tendency of bureaucracy to pull down the veil of secrecy over the common routine of business and shut out the citizen and even the Congress from the deliberations and decisionmaking process.

BUREAUCRATIC SECRECY

Bureaucratic secrecy was brought very forcefully to my attention when, as a freshman Congressman in 1967 and 1968, I began to compile the first comprehensive catalogue of the more than 1,300 Federal domestic assistance programs. I had started by sending a questionnaire to the Federal agencies asking them to identify their programs, state the purposes, list the eligibility requirements, specify the act of Congress authorizing each program, and similar information. I was shocked to discover that such information had not been available simply because of neglect, but also because the agencies did not necessarily consider it public and had vested interests in not publicizing some of it. In fact, in several cases agencies took elaborate measures to try to prevent my obtaining this information. One agency, I might add, even refused to let me have their telephone book.

One of the most persuasive arguments for shedding some light on the workings of the bureaucracy relates to the steady erosion of the traditional distinction between Congress as the rulemaking body and the executive branch as the rule-implementing branch. Today, a great deal of the legislation we deal with is introduced by request and originated with the executive branch. Most of the agencies seem to believe that their task is to devise strategies for pushing this legislation through Congress with as little change as possible. They no longer interpret their function as presenting Congress with alternatives and a balanced appraisal of legislative proposals. Instead they support the postitions already adopted within the agencies—often with one-sided testimony, one-sided "talking papers," and a panoply of sophisticated lobbying techniques. The biggest lobbyists in Washington today are not those paid by industry or labor. They are the agency officials whose salaries are paid for by the taxpayers.

One of the goals of this legislation should be to cast light on the pros and cons involved in the formulation of policy. In any discussion of these pros and cons, it is essential that a broad public interest perspective be brought into play and that the debate not be limited to rather narrow bureaucratic interests.

In closing, I would like to call your attention to one problem which I think you will encounter, even though it may not be explicitly articulated, the fear that too much sunshine confuses the public and favors demagogues rather than responsible leadership.

My own belief is quite the contrary. The American people are indeed the inelligent men of whom Patrick Henry spoke. The vast majority understand that complex problems rarely have simple solutions. If we want to generate public confidence in the institutions of Government and public understanding of the policies that are adopted, Government must be open and must be honest. Let the public in on the considerations involved and the reasons for the action taken. This course will favor a responsible government, responsible leadership, and a responsible electorate.

Mr. Chairman, in closing, I just hope that we are able to report this legislation out and get a favorable vote in the very near future on the Senate floor.

Senator CHILES. Thank you, Senator. I know your time is short but I would like to just ask you a couple of questions.

SHIELD OF POWER

Really aren't we talking in some of these instances, about power and about the tendency of whoever holds power to try to shield that power and try to retain it to themselves? And so certainly if they can close off people from viewing that power and what they have, they are going to, are they not?

Senator ROTH. I think unfortunately, that is the tendency. You see it in all branches of the Government, in all fairness, in all administrations I have been involved in any way. I suppose it is human nature to want to do so, and that is the reason we need to have legislation on the books that compels people to be open because it is too easy to slide into this practice of putting a veil around what we are doing.

As I mentioned, the best illustration of this that I have had personal experience with was with the domestic categorical programs where the agencies refused to supply the information. They would not even identify them.

Senator CHILES. Do you not sometimes find that they almost feel like they have some divine right to refuse that information even though they are created by an act of Congress? Here you are trying to perform the functions of Congress, seeking this information and they feel that once they have the power to close, or once they have closed off information then they cannot give it up.

Senator ROTH. That is correct, and, of course, another reason in this particular case, the reason they did not want to give detailed information is that they wanted to be able to change the programs at will. Of course, that did not work in the interests of our people back home because if you are a school superintendent or county administrator or mayor, you have to know what the programs are. They just frankly, in many cases, would tailor a particular program to meet some particular group and the program may have been fine but that is not the way you work in Government. All programs should be available to everyone.

Senator CHILES. Have you also noticed that where we in Congress are very much distressed when bureaucratic agencies or executive agencies keep secrets from us, we do not feel that same compunction about some of our own secret functions that we perform here?

Senator ROTH. As I say, I guess this must be human nature because I have noticed some of the greatest critics of the executive branch are the most reluctant to open up the legislative processes, and like you, I feel very strongly that our processes should be open. I hope that we are able to make some progress this year but I think if we can get this legislation adopted, it will do a great deal to help erase the crisis of confidence.

Senator CHILES. Again, I applaud your efforts for the change in Senate rules because I find from the Florida fight, the most difficult program is one of education. Most people in this body, as well as down there, are well-meaning, they want to do exactly the right thing, feel like they are doing the right thing. But there are some here who fear that it will not be workable or that you almost have to have these closed sessions so you can be on a first-name basis to get the job done. It is only through being able to educate those people and perhaps force some of the meetings open so they can see that they do work that you can then bring them around to the right kind of thinking. I think we are seeing that begin to happen in the Senate, thank goodness, and I hope that we can speed it up with this legislation.

Senator ROTH. I must just say in closing, that I agree with your earlier statement that our experience in the Government Operations Committee shows that openness indeed is not a handicap. I think it, if anything, helps the process. If anything else, maybe it gets people there on time and that is a plus. I do think——

Senator CHILES. I think it seems to have Senators a little more prepared when they are there, too. The staff does not mark up most of the bills.

Senator ROTH. That is correct. Anyhow, Mr. Chairman, I look forward to working with you on the markup of this legislation and its being favorably reported out.

Senator CHILES. Thank you very much.

Senator ROTH. Thank you.

Senator CHILES. Senator Clark?

TESTIMONY OF HON. DICK CLARK, U.S. SENATOR FROM THE STATE OF IOWA

Senator CLARK. Thank you very much, Mr. Chairman. I appreciate the opportunity to join you today to lend my support to S. 260, the "Federal Government in Sunshine Bill", and certainly your leadership, Mr. Chairman, in introducing legislation and arranging for these hearing is well known and I could only hope that your efforts lead to the rapid adoption of S. 260. It certainly is one of the most important bills that this Congress will consider. I am well aware of your own work in your home State of Florida in the legislature and in the work with Senator Roth last year and the debates on the floor.

As you know, recent public opinion polls have revealed that only 20 to 30 percent of the Nation's people approve of the way Congress is doing its job. I hope to be here tomorrow to hear Mr. Harris explain that poll in most detail. But surely this widespread dis-

enchantment with the Congress is caused in large part by the veil of secrecy that surrounds so much of its work. Secrecy necessarily breeds suspicion, and people justifiably resent being shut out from committee deliberations where vital decisions are made that affect their welfare and their pocketbooks.

If we really are a government of the people, then the process of government should be open to the people who send us to represent them in Washington. That is why I was one of the original co-sponsors of S. 260 when it was introduced last year. And with all that has happened in the past months to further erode confidence in Government, the need for this bill is even more urgent today than it was when the bill was introduced.

PEOPLE'S DISTRUST OF SECRECY

When I worked as an administrative assistant in the House of Representatives in the 1960's and early 1970's, I was very much aware of people's distrust of the secrecy which had characterized House proceedings for decades. In 1973, the House reversed this practice and opened almost 80 percent of its markup sessions to the public. And since then, the House has proved that openness works. While opponents of the new rule said it would interfere with House business, a Common Cause survey of House committee practices last year showed that at least as much work was done in 1973 as in the last comparable sesson, and it was done in public view.

Two subcommittees which I have chaired have been open in every phase and no one has even suggested that this is improper or counterproductive and I think that is the way the entire Senate would find its business.

It is high time that the Senate—and the Federal agencies—followed that example. The closed-door tradition in Congress and the executive branch is totally alien to the spirit of democracy. It is a tradition that breeds distrust, ignorance, and apathy—qualities that are becoming all too pervasive as the Nation approaches its 200th birthday.

LET THE SUN SHINE IN

S. 260 would require that all meetings of Federal agencies and congressional committees be open to the public—with only certain very limited exceptions. It would, as the bill's nickname implies, let the sun shine in on deliberations which should never have been closed off in the first place. It would insure that Congressmen and Senators are fully accountable to their constituents at all stages of the legislative process, increasing public interest and public respect for the legislative process and for Congress as a whole.

The bill also would give the public an equal chance to influence legislation—an advantage which today is mainly held by lobbyists and special interest groups that are able to closely follow the work of Congress.

As for the executive branch, open meetings would be an effective tool to help guarantee that the Federal agencies always protect the public welfare.

The bill does permit congressional committees and Federal agencies to close any session to the public if national security, personnel, or other sensitive matters were to be discussed. But it would take a majority vote to close the session—the exact reverse of current Senate practice which dictates that all sessions are closed unless a majority of the committee votes to open them.

Mr. Chairman, over the last few months, everyone in this country has become aware of the awesome and frightening impact of governmental secrecy. A truly democratic government should have nothing to hide from the people. Indeed, the more open a government is the more likely it will be honest and effective.

In this country, the people have a right to expect nothing less than that—absolute honesty and absolute openness. And the passage of S. 260 would be a significant step toward that goal.

Thank you, Mr. Chairman.

Senator CHILES. Senator Clark, I am delighted with your statement, and I am pleased that you were an early supporter of the concept of government in sunshine and open meetings.

You had an opportunity to take a little trip around your State in 1972, I think. I wonder if you heard from your people when you were walking around your State some of the comments that I heard in 1970, a feeling of being closed out from the Government and from what happens up here, and not being able to participate or not being able to understand.

Senator CLARK. Certainly that mood was the single most pervasive mood every place that I went in the State.

Senator CHILES. Did you notice it cut across every kind of line? Did you get that from the banker—as well as from the fellow who works on the farm and get it from the black man as well as the white man?

Senator CLARK. Absolutely. If there was one prevailing theme, it was the Government does not represent us. It responds to special interests rather than our interests. It does things in secret, behind closed doors. That is the feeling. In fact, government is not as bad as most people think it is, but there is the strong feeling that you explained.

Senator CHILES. And at most of these meetings that are closed, nothing improper is taking place, but people think there is. That is just as dangerous, is it not?

Senator CLARK. In the year and half I have been here, I have never once heard anything in closed meetings that could not be open. Every one of those could have been open.

Senator CHILES. I used to sit on the Agriculture Committee and I know you sit there now. I used to often wonder at the markup sessions why in the world that door was closed. Someone could easily wonder what was going on behind it, but I never knew anything that was taking place there that had to take place behind a closed door.

Senator CLARK. Absolutely correct.

Senator CHILES. I wonder again in this attitude that you found so prevailing in your people out there, how do you think that perhaps this legislation would help that?

MEETINGS IN PUBLIC VIEW

Senator CLARK. The idea that things are done behind closed doors, secretly, without public scrutiny is enough to make people suspicious—and understandably suspicious—and I think if we were to do away with that practice and just say all these meetings are going to be open, people would feel that the Government at least was operating in public view. At least they would know the press could go in. We could go there, their representatives, could go in and view this. And I think as much as any single thing this would help restore confidence in Government, both in the executive and the legislative branch. I do not know of any single act that we could undertake in the Congress that would help to restore confidence any more than this would.

Senator CHILES. Well, at this stage we probably have a lot of work to do and a lot of steps that have to be taken and I see this as one of those steps.

Senator CLARK. That is right.

CAMPAIGN REFORM

Senator CHILES. And I hope it could be an important one. Campaign reform certainly we know has to be changed. I think there are a series of steps that we now need to take to try to give people some confidence back in their leadership and their government.

Senator CLARK. I think that is very true. I believe this is the most important one, but, as you say, there are several others. Certainly, campaign finance reform is about as basic.

Senator CHILES. Well, I am delighted again in your testimony and in your support and I look forward to the challenge that is ahead of us in trying to see if we can get this legislation adopted.

Senator CLARK. Thank you very much.

Senator CHILES. Thank you.

Our next witness will be Mr. Bill Mullen, secretary and general counsel of the National Newspaper Association, and Mr. Charles Rowe, editor of the Free Lance-Star of Fredericksburg, Va.

TESTIMONY OF CHARLES S. ROWE, EDITOR OF THE FREE LANCE-STAR, FREDERICKSBURG, VA., ACCOMPANIED BY BILL MULLEN, SECRETARY AND GENERAL COUNSEL OF THE NATIONAL NEWSPAPER ASSOCIATION, WASHINGTON, D.C.; AND THEODORE S. SERRILL, EXECUTIVE VICE PRESIDENT, NNA

Mr. MULLEN. I am Bill Mullen, Mr. Chairman. Actually, Mr. Rowe is our principal witness and I am accompanying him.

Senator CHILES. Fine. Mr. Rowe.

Mr. ROWE. The National Newspaper Association is delighted to have this opportunity to appear on the opening day of your hearings on S. 260, the Federal Government in the Sunshine Act, in order to give our strong support to the concepts underlying this legislation.

My name is Charles Rowe. I am the editor of the Fredericksburg, Va., Free Lance-Star, a 21,000 circulation newspaper published 6

days a week. Fredericksburg is located about an hour's drive from Washington, D.C.

I am a member of the Freedom of Information Committee of the National Newspaper Association and it is on behalf of that organization and at its request that I appear here today. I am accompanied by NNA's executive vice president, Theodore A. Serrill and its general counsel, William G. Mullen, who has engaged in previous correspondence with the subcmmittee concerning this legislation.

NNA is a national trade association which represents America's hometown community newspapers. Nearly 5,500 weekly newspapers and more than 950 dailies currently support this active organization which in a way is a composite of the 47 State, regional and other national newspaper organizations which actively affiliate with it and support it.

NNA believes there is a real need for this type of legislation. We urge the Congress to act positively on the subject and to proceed to enact legislation to open all meetings of Federal agencies and the Congress to the people.

S. 260 is not uncomplicated. In its present form it may in fact raise more questions than it answers. But we are encouraged by the fact that hearings on the bill are now underway so that these questions may be fully explored and answers provided.

NNA has long been an active supporter of legislation to open government processes to public examination. Only a fully informed public can make meaningful judgments concerning government actions, proposals, and officials. NNA actively supported efforts to create a Federal law to require that records maintained by Federal agencies be open and available to the public for inspection and copying. Those efforts resulted in the enactment in 1966 of the Nation's first Federal Freedom of Information Act. More recently, NNA has actively supported efforts and suggested specific means of improving the effectiveness of that law. These efforts have resulted in a recent overwhelming vote in the House of Representatives favoring several improvements in the law and the Senate, we are pleased to note, will soon have the opportunity to vote in favor of a similar bill.

OPEN MEETINGS AT THE STATE LEVEL

Several States have enacted legislation in both the open records and open meetings areas. Of course, the open meetings law of the State of Florida is one of the Nation's most famous, due partly to its "sunshine" nomenclature. In large measure we believe that Florida's law has been properly recognized because it does more than pay lip service to the concept of open meetings. Florida's law does in fact require all meetings of State and local government agencies, commissions and boards to be open to the public. And it imposes meaningful sanctions to guarantee compliance.

Florida's law and similar laws in other States provide a ready answer to those who contend that such laws hamper the operations of government. Experience teaches that the opposite is actually the case. Open meetings laws permit citizens to become better informed with the way in which their government operates. Respon-

sible elected or appointed government employees and officials discover that operating in the sunlight of public information and opinon has no detrimental effect whatsoever on their ability to function to the benefit of those they serve, and actually improves their effectiveness.

As the Jacksonville, Fla., Times-Union, an NNA member, stated in an August 6, 1972, editorial:

> If the public is privy to the pro and con discussions which precede government decisions, it is much more likely to accept these decisions as being the right ones. When they are merely served up without prior public discussion, then they are more likely to be suspect.

Or as you have stated, Senator Chiles:

> Even if no hanky-panky is going on, the cloak of secrecy heavily implies its possibility.

OPEN MEETINGS IN VIRGINIA

I might interpolate here that in Virginia we have had an open meetings law for 6 years, I guess, and when the bill was being debated, there were comments from all levels of government to the effect that legislative and administrative bodies simply could not function if they had to open up meetings that had previously been closed. The bill was enacted. It is not as strong as the Florida sunshine law but it does provide that most government meetings have to be open.

The result, I think, would have to be conceded by all people at all levels of government to have been beneficial, not only to the people but I think also to the government agencies and legislative bodies involved. And certainly the Virginia experience has borne out what you said, that predictions of disaster are repudiated by actual experience.

Senator CHILES. Our greatest problem is to get people to try and to see that the fears—they have all kinds—have provided to be groundless. The only thing is I have to be kind of sympathetic to that kind of feeling because I once experienced the same feeling when they started talking about a Florida sunshine law. I thought you just cannot do that. There are certain things that we just need to do in camera, or in private, and we are going to do the right thing. We have been elected to do the right thing. So I went through the same kind of thing myself.

Mr. ROWE. In the 6 years we have had the bill the Commonwealth of Virginia has survived and I would say survived quite well and I think the benefits have come largely in the areas of public participation in these sessions. It has benefited the public to have a feeling that they can express their concerns and opinions, that they will be heard, and I think it has benefited the legislators and administrative bodies to have this public input over and above the input that you had prior to open meetings when it was largely those with the greatest lobbying clout whose views got heard.

Senator CHILES. From your experience and your observation of those Virginia meetings, did you not find that the legislators or the government officials involved, once they are participating, talk just as frankly as they did before and that that in itself is very beneficial to the public because they hear some of the frank problems. They

many times only saw a result afterwards and they never really got a chance to hear some of the frank discussions of what the problems are in some of the legislation.

Mr. ROWE. Senator, in answer to that, not having been privy to the secret meetings I do not know how frank the discussions were but they certainly are quite frank now and I see no indication that legislators generally are inhibited in any way by the presence of the public.

OPEN MEETINGS ARE HELPFUL TO THE PUBLIC

Senator CHILES. Well, my experience is certainly that it is virtually the same. You know, you always think, well, we cannot really discuss some of these things frankly in an open meeting like we would in a closed meeting. But once the meeting is open, very quickly you are discussing the problem the same way and that in itself, is I think, very beneficial to the public. They get a chance to see some of the problems that you are wrestling with. If you did not have that openness you would have some newspaper taking a shot at you or somebody saying that they compromised on the bill but never any real basis for saying why sometimes you had to compromise or what the fights were or what the different sides were. I just think it is very healthy to the public if they can see that real give-and-take which is necessary in the legislative process.

Mr. ROWE. And I think it ultimately gives them a much greater appreciation of the legislative problems that are faced.

Senator CHILES. That is it exactly, exactly.

LEAKED INFORMATION FROM CLOSED MEETINGS

Mr. ROWE. Today, as always, there is great criticism of the press. Allegations of its being inaccurate in its reports of various matters abound. Some criticism can be traced to the fact that reporters need to rely on leaks of what transpired or what was said at a so-called public meeting that was held in private. Since no member of the press or public is present at such meetings and since no transcript is available so that leaked information might be verified, some inaccuracies as well as partisan, self-serving statements often occur during transmission.

The legislation, we believe, would serve a valuable end in eliminating this source of frustration for the press and public officials alike, and would lead to more accurate and, indeed, more comprehensive coverage of Government activities, and increased public confidence in Government.

Naturally, it can be expected that this legislation will attract a good deal of attention in the Nation's Capital—the center of the Federal Government. Here in Washington it will be of great benefit not only to the Washington press corps, but also to those many organizations and individuals such as citizens groups and trade associations that are concerned with actions of Federal agencies and departments.

I can assure you, however, Mr. Chairman, that this legislation, if properly drawn, also will benefit citizens and newspapers concerned

with the activities of officials and employees of field offices of Federal agencies and departments located in all corners of the country. In order to assure this result, however, we suggest that the bill be clearly examined to make certain that its open meeting requirement applies equally to covered meetings or hearings, wherever held, by all personnel of Federal agencies and departments in addition to the actual members of their designated representatives of such agencies.

For this same reason we suggest that it be made clear that field hearings held by congressional committees, even where a quorum may not be present, be open to the public.

You will note, Mr. Chairman, that we have referred to departments as well as agencies. We do this even though we realize that S. 260 as presently drafted, may not be interpreted as applying to executive departments of the Government. It is our hope that any question on its application to the entire executive branch can be removed and that the bill will be drafted so as to clearly apply to all parts of the Federal Establishment. In this connection, we are in agreement with the comments of Theodore C. Sorensen, who stated in a letter to the committee dated October 29, 1973, that there is no reason why the principle of open meetings should be restricted to multimember Federal agencies. As Mr. Sorensen noted:

> Today's crisis of confidence caused by excessive secrecy centers primarily on the Executive departments headed by a single individual, not the administrative agencies. Top executives in these departments, and in the single member administrative agencies outside the Executive departments, often hold decision-making meetings with other officials or information or advice-seeking meetings with outside groups, relating to public policy, property, contracts or funds that deserve coverage under your bill. Without trying to define here all the kinds of meetings which should be covered, I would hope that the Subcommittee staff could explore this possibility.

This legislation, we believe, will serve a high purpose if it can be drafted in a way to fully restore the confidence of the public in our institutions of Government. That Congress is concerned with this problem insofar as its own relations with citizens are concerned is well demonstrated by recent hearings held by the Joint Committee on Congressional Operations. NNA submitted its ideas on how Congress can improve the presentation of Government policies to the public to that committee. Since we believe that these suggestions have some application to the subject of your hearings we are making copies available for your examination.

IS S. 260 TOO RESTRICTIVE?

Insofar as agencies are concerned, the bill requires meetings to be open only when official action is considered or discussed. We hope the committee's report will clearly indicate that this language is to be given a broad interpretation, not a narrow or restrictive one.

We see no reason to allow an exemption from open meeting requirements for either congressional, agency, or departmental meetings where staff, personnel, or management matters will be the subject of discussion. This legislation, should it be enacted, will be examined closely for loopholes by the Federal bodies it attempts to govern. There is no need for Congress to provide additional and

unnecessary provisions whereby Federal officials can evade the intent of Congress. Many agency or department actions that directly impinge on the public could be interpreted, we fear, by Government agencies to be personnel or management matters, thereby escaping public scrutiny if this provision is retained.

In addition, public tax dollars support the staff and management of such agencies and the public is fully entitled to know how dollars are being spent and managed or mismanaged.

We also question seriously the wisdom of the exemptions contained in sections 101(a)(3), 102, 103, and 201(b)(3), allowing closed meetings where an individual may be "disgraced," among other things. We think this provision is overly broad and subject to interpretations which will have the effect of subverting congressional intentions. We urge its elimination. We also point out the inconsistency in the language of these sections in the May 8, 1974, committee print of S. 260. The provision for the House of Representatives is not the same as those for the Senate or agencies.

We also urge the committee to consider seriously and positively those provisions calling for fines for willful violations of the act by Federal officials or employees. Some State laws contain strong sanctions, such as fines. Others invalidate action taken in a meeting that was closed to the public. Similar measures appear to be the only way of assuring compliance with the act.

It is also our hope that the committee will specifically direct that any exemptions from open meetings requirement are to be interpreted narrowly, both by the agencies concerned and by the courts.

NEED FOR SUNLIGHT IN GOVERNMENT

In conclusion, Mr. Chairman, we can only reiterate our belief that there is a pressing need for this type of legislation—particularly now when it has been so well demonstrated that citizen confidence in government is at an extremely low ebb. We also believe that this is an extremely favorable time to enact such a law in the light the success of similar laws in so many of our State government experimental laboratories. This success demonstrates that open meetings legislation is oftentimes the best antidote for lack of citizen confidence in government.

We wish you well in your efforts to apply the disinfectant of sunlight to the ailments affecting our great government and assure you that the National Newspaper Association and its members stand ready to assist you in this important cause. We would appreciate the opportunity of submitting additional views at subsequent dates as we receive data from our members around the country.

Thank you, Mr. Chairman.

Senator CHILES. Mr. Rowe, I want to thank you very much for your very complete and comprehensive statement. I think it is an excellent statement on the bill. And we would like very much to have your additional views as our hearings go forth. I hope Mr. Mullen will be able to be present and follow the work of the subcommittee as we proceed with some additional hearings and then hopefully, through some kind of a markup on the bill.

I note with interest your statement that the press is under attack now and that part of this does stem from trying to obtain information and make that information available to the public. Sometimes that informtion does come in distorted ways.

I commented earlier that to date I have never really sat in on a secret meeting in the Senate. I have sat in on a number of closed meetings but they all were in the paper generally the next day. I failed to recognize some of the meetings as being the meetings at which I had participated because it appears that a leak usually leaks favorable to the leakor and then perhaps to whoever is reporting the leak. There is no way of checking that, as you say. There is no transcript. And then after that day it is old news, and so many times it never really is corrected.

OPEN MARKUP ON CPA

We marked up in this particular committee, Government Operations, the consumer protection bill last year. It was interesting because those were closed sessions and we held a number of meetings because we had a number of amendments offered to the bill. Every day it was almost like reading an adventure story to read what took place in the meeting the day before and try to relate it to what really took place. This year we marked up the same bill. We did it in open session. And it is just amazing the difference in the way it was reported and really what took place.

In the first instance I thought some members were very much maligned. They were offering what they thought were beneficial amendments to the bill with good reasons. But they always were said to be torpedoing the bill or doing something else to the bill and I really think in many instances some of them were cast in a bad light. That simply would not have been true had the meeting been open.

So I think the point you make there is so valid and so necessary.

FLORIDA PRESS CORPS PURSUED OPENNESS

A point that I would like your comments on is in Florida we really have a government in the sunshine bill now because of the press. The press in Florida began to sort of pursue the subject and were pursuing it. We had a very active Capitol press corps and an active governmental press corps and they started pursing the subject prior to the time the bill was even introduced. And if you had a closed meeting, either some newspaper was thrown out of the meeting or your picture was taken as you went in and as you came out and there were some statements about these people, and the fact that they participated in a closed meeting. Before long when you started running for office in Florida everybody wanted to know how you stood on this open meeting-closed meeting situation. Many of us knew the minute that government in the sunshine bill hit the floor it was going to pass. It took 6 years to pass the bill. It was kept in committee for a long time. But the day that bill went out on the floor, it passed because everyone then was "in the sunshine" and had to report how they stood on that matter.

We really have not had that kind of press support here. I know it is different in a national area. But I am concerned in that the press up here seems to be kind of business as usual. We are used to the fact that we cover these meetings by leaks. I do not find much momentum in the Washington press corps and see very little really about the subject in the national press. That, I think, would be something that could be very beneficial, not that the press has to be activist, but on this subject, I think that many people are not informed that this legislation is now pending. I would say from Common Cause and the League of Women Voters we are having more support, grass roots support, for this legislation. Also, we have strong support from States that are now passing sunshine bills. Florida has a sunshine bill and every Congressman in Florida, every Senator in Florida is just going to be for this concept because it is a very strong felt thing, you know, in our State.

I see that now coming from other States as they pass a State sunshine bill or State openness bill, but we really do not see that kind of support in the Washington press corps, or in the national press.

Mr. ROWE. I am disturbed to hear about that lack of support, Senator. I really could not put my finger on the reasons therefor. Perhaps some people survive on leaks here and would rather have their well-placed sources and not have to compete for news that is appearing in open session.

Senator CHILES. Well, there is no doubt that much of the sort of news that comes from here is from undisclosed sources and for certain columnists I am sure their business is based on their sources, and they can get information that no one else can have.

Mr. ROWE. Some people will be concerned about the proliferation of meetings they will have to cover.

Senator CHILES. I have heard that.

S. 260 WILL BENEFIT THE PUBLIC

Mr. ROWE. This bill is for the benefit of the public, not the press, and if we cannot get somebody from the staff, those members who have a great interest should have staff present.

Mr. SERRILL. Senator, I am happy I am here today because it is one of our own responsibilities to encourage our State constituent associations to support a bill of this nature. If there is that observation on your part that there is a lack of support out in the States I think it is our responsibility to help encourage and to inform our State associations such as the Florida Press Association, which you are familiar with, so that we can get at least much more visibility for this particular type of legislation.

Senator CHILES. Most of us here mirror what our people are thinking about and I do not think there has been really the groundswell of support for this, except in States, as I say, where the question has clearly been raised. And yet I think most people, when they really think about it at all, very much want open meetings. We see now through the work of the League that we are building up support in that way.

Mr. MULLEN. Mr. Chairman, this is one reason why we are happy to be here today because not only can we inform Congress that we as an organization support this bill but our being here also serves to introduce our members to the existence of the legislation. I think you will find a great deal of support from the types of publishers associations and editors that our association represents around the country because they are familiar, like those in Florida, with the operation of these types of laws that operate at the State and local level.

PROBLEMS OF PASSING LEGISLATION

Senator CHILES. I am also delighted in your comments that have pointed out some areas that you think are too broad in the bill and should be pruned or changed. I want to respond because this is one of those meetings where we ought to allow the public to respond. It is a little different when you are trying to pass that bill than when you are sitting over there where you are trying to find what is wrong with it. From our standpoint, we are trying to design a piece of legislation that cannot be nitpicked to death. Having seen what happened in Florida and experiencing just some of the comments that start arising up here, no one wants to be against this kind of legislation, but everyone would like to find a little better piece of legislation that is coming down the road. So they are not really against it, but they just think it needs little changes or there are certain things that we have to adjust.

NATIONAL SECURITY

Certainly national security is the first question that you can raise and we are concerned with that. We are trying to draw a definition of national security so it cannot be used for everything. We recognize that there are problems.

We have held a couple of these meetings, as I say, going over it with people that have been in the executive agency, some distinguished law school personnel and all, trying to get their ideas on how we can try to define national security and how we can set up also an appeal process so someone could challenge the closing. If you notice in the meetings it can go right to the floor where you can raise that issue. But if you did not have an exception, an exception for national security, you just could not pass this bill because the first thing everyone tries to say is, wait a minute, that will work all right in Florida but it is not going to work up here because of national security. So you have to say, yes, you are right, and we recognize that, and so we have provided for that.

Then they go to the next argument. Well, wait a minute. You are not going to defame people in those meetings, are you? We are concerned about people's reputations and how they can be ruined, so you are not going to get into that, are you?

We are trying to anticipate these questions. We say wait a minute, we are going to take care of that.

Again, what we need to do is try to define those things so narrowly that they cannot be used as you fear they may be. I am delighted you are pointing them out because they are in the back of our minds.

We know that they could be used. But what we have tried to do in each of these exceptions is to take over one more reason that somebody could give, I am not against sunshine legislation but I am for protecting the rights of individuals, and I am just going to have to vote against this thing, or I am for protecting the secrets of this country, and our diplomatic relations, and I am going to have to vote against this. And we have got to somehow in that balance come up to where we think we can get 50 percent of the votes to pass this measure.

I am hoping the time is now right. We started drafting this bill 2 years ago, you know, at a time when we did not have much of a groundswell. There were two introducers two cosponsors to start with, and now we fortunately have 26 and it appears to be something that is building a momentum. Maybe we need to look at those exceptions again and determine whether they are too broad or not, but this was our thinking and Mr. Sorenson raises a very good point. I wish he would tell us, though, how we should try to open up individuals. What we have tried to do is say if it is an individual that is holding a meeting over which decision—he has decisionmaking power, that he has to keep a record of who he talks to so that the public at least will be entitled to see if it is someone going to set milk prices. So at least the public gets that kind of visibility.

But I do not know how we open up one man in his office at all times because it is just not done on a formal basis as where you have two or more, you know. And when a hearing time is set or a meeting is set, you have got some basis upon which you can work. But other than trying to make him keep a log of whom he talks to on the subject, I do not know how to do that with one individual.

If you can improve on what Mr. Sorenson says there, we would like to know that if there is a way to do that.

FREEDOM OF INFORMATION ACT

Mr. SERRILL. Senator, it appears to me possibly your office and also your staff might look at the eight exceptions in the Freedom of Information Act in which we were involved in 1966. Some of them were much broader than we in the press would like to have had. Now, that is under consideration again and some of those eight exceptions were too broad and experience of the last 7 years has shown——

Senator CHILES. We would be delighted to——

Mr. SERRILL. It just occurred to me now. I again appreciate the privilege of listening and being part of this.

Senator CHILES. We looked at them to start with and if you have noticed, we have interwoven ours with those exemptions feeling that should some one raise one of those areas we would say, wait a minute now; that was one of the exceptions set in the Freedom of Information Act. So basically, we have tried to kind of weave through that pattern. If anything, I think we have tried to tighten our exemptions and not make them as broad. If there is a way in which we can tighten more, we would like to do that, too, at the same time keeping in mind that we have the practical job of trying to pass a piece of legislation if we can and trying to anticipate wherein we will get

the most heat or where we will have the most difficult time moving the legislation along.

I am convinced, that should we pass this bill, if somebody still wants to do the wrong thing, in many instances they can still do it. You can really still do it even in Florida if you want to violate the law, if you want to do the wrong thing.

On the other hand, when you pass the bill, as has happened in Florida, you do set a standard and you say this is the right thing and this is what we declare to be the public policy of the country and most people will repair to that standard and will try to follow it. Plus we have you gentlemen of the press that are going to help people along when they do not repair to that standard. And so now you set something that you can be critical of, something about which your political opponent can be critical of, if you fail to comply. Our biggest thing is changing the attitudes. We all have to feel that really this ought to be an open process—that there must be some valid, cogent reason to close part of the process, otherwise it all ought to be open to the public. Right now the converse of that is true, as you well know. Most of the agencies, certainly most of the Members of Congress, have the feeling that our own processes, whatever they are, are ours and we are entitled to close them. It is only if we decide to open them, that they are open. We just do not seem to have the attitude that the public's business belongs to the public—that everything should be open unless there is very valid reason to close.

S. 260 WILL HELP RESTORE CONFIDENCE IN GOVERNMENT

So my hope is that we pass this bill to help change that attitude and change that kind of feeling. I think this legislation would really have some effect and would be doing something toward restoring confidence in Government. There are still so many ways to go around the law and people continue to love to raise this point. They said, all right, you are going to have a meeting of the Interstate Commerce Commission. It is going to be in the open but those guys can get back somewhere and make their decision. They can. And in Florida we found school boards that were doing that in breakfast meetings and the court challenged those breakfast meetings and when they said they were wrong most of the school boards, I feel, changed. In most of them there will be somebody who says I am not going to participate in that. That is not what the law says. When he says that, then he becomes the good guy and the others are not and that get across very quickly, I think.

So I think it was the attitudinal thing, even in Florida, that was more important than the fact that someone could violate it if he wanted to.

Mr. ROWE. Certainly, the ingenuity of public officials who want to slither through a loophole is just incredible. They will find one if there is the slightest possibility.

Senator CHILES. Yes, sir. And again, I say it is the heat that you all can give us and the heat of the elective process certainly with those of us who have to face election that will help this situation. We have to take to the stump and defend that kind of practice.

We are delighted to have you all with us this morning and have your testimony and we look forward to continuing to work with you.

Mr. ROWE. Thank you, Mr. Chairman.

Mr. MULLEN. Thank you, Mr. Chairman.

Senator CHILES. We have one more witness that we are going to have this morning, Congressman Gunter. We know his airplane has landed and he is on his way in. So I think we will take a 5 or 10 minute recess and wait for him and then take Congressman Gunter before lunch.

[A recess was taken.]

Senator CHILES. We will reconvene our hearings and our next witness will be Congressman Bill Gunter.

Congressman, we are delighted to have you testify before us today and know that you have similar legislation like this in the House and that you have been taking a position of leadership in the House in trying to open up our process. This is something of long reputation with you having served in the Florida Legislature with you under our sunshine atmosphere in Florida. We are delighted to have your testimony.

TESTIMONY OF HON. BILL GUNTER, REPRESENTATIVE IN CONGRESS FROM THE 5TH CONGRESSIONAL DISTRICT OF THE STATE OF FLORIDA

Representative GUNTER. Thank you very much, Mr. Chairman, and I certainly want to apologize to you and your staff for my tardiness this morning. We had an airplane problem down there in Florida. The sun was shining but the wind must have been blowing in the other direction. But I really appreciate the opportunity to appear before you, Senator, and to speak in behalf of S. 260, popularly known as the "Federal Government in Sunshine" bill, introduced, of course, by yourself.

This legislation represents a continuation of an effort originally begun at a time, as you have recalled, when you and I both had the opportunity to play a role in the Florida State Senate in the enactment of similar legislation applying to our State government.

The success of the Florida experience since the enactment of a comprehensive "Government in the Sunshine" law provides meaningful guidance, I believe, for those of us considering such legislation on the Federal level.

I have been privileged to sponsor legislation in the House similar to the bill now before you. It is my strong belief that the time is right to enact such legislation, and that opening the processes of Congress and other agencies of the Federal Government is indeed mandated by the troubling events of recent times, if a shattered public faith and confidence in the institutions of government is to be restored.

This legislation, of course, offers no panacea to the problem of accomplishing that restoration of faith and confidence.

But surely it is a necessary beginning. For the people cannot have faith in government they cannot see. And all too often, and for far too long, the institutions of government have receded into the con-

fusing shadows of secrecy and beyond the pale of true public accountability.

It is a problem that has long been recognized on the congressional level by an increasing number of our colleagues. Certainly the conduct of the executive branch which has come to light only in retrospect has been shocking and sobering. Such conduct might never have come to light had it not been for the accidental revelations which served to bring that conduct to the forefront of public attention and scrutiny in an unprecedented way.

But the time to achieve accountability in government is not after the fact and after the damage is done. The time to achieve public scrutiny and accountability of elected and appointed officials is simultaneous with the current and open operations of each of the two branches of Government.

And if the need for greater openness was already increasingly recognized by many of our colleagues in the House and Senate even before the sad and tragic disclosures of recent times, certainly we approach the question today with an added appreciation of the grave withdrawal of public trust and confidence in general.

TRUST IN GOVERNMENT AT LOW EBB

At a time when the restoration of a shattered faith has become one of the most serious and challenging problems confronting those of us with legislative and political responsibility, certainly the question of openness in the operations of Government takes on an added dimension of urgency that renders the need to do so not merely desirable but, by now, undeniable.

For public faith is a fragile thing and we address now matters affecting nothing less than the character of our national political soul for the immediate future and the long run.

It is imperative that public faith and trust be restored. And I know of no way to accomplish that under a continuing cloak of secrecy that renders the actions of Government indecipherable and the actions of elected officials unaccountable.

As long as Government continues to be an evermore mysterious force in the lives of citizens, they will increasingly see not only the phantoms that are there, but phantoms that are not, to which blame is assigned with all the full exaggeration of political hallucination at its most extreme, with all the mortal consequences that can produce in a still free but yet troubled land.

The first duty of Government today is visibility to its own people. That means visibility not simply in terms of end result, but in terms of the very process, and of those responsible within that process and accountable to the people they are chosen to serve. The full measure of public confidence in their institutions and leaders will be restored only if the fullest measure of visibility and accountability is achieved.

At this point, Mr. Chairman, I would ask permission to submit the remainder of my statement for the record and I will be happy to respond to any questions you might have.

Senator CHILES. Your statement in full will be submitted in the record and I have had occasion to read your statement and I think

it is an outstanding statement. We are delighted to have that as well as your testimony and your appearance here today.

I would like to question you just briefly on what you think—you mention that you think perhaps the time has come when we have an opportunity with this bill. I would like to get your views on what you think that opportunity is in the House in the event that we are fortunate enough to get this bill out of committee and out of the next committee that it might go to and out of the floor, whether you think a House bill could come out of committee on its own now or whether if this legislation got to the House, what kind of atmosphere it would receive there. I would be delighted to get any reading that you might have on that.

THE TIME IS NOW FOR OPENNESS

Representative GUNTER. Mr. Chairman, I will just say that if there was ever a time in our history when the pressure is on for openness, when the people are calling out to their elected representatives for a goldfish type atmosphere in the Congress and across the board in Government, it is now. I think that pressure will serve us in the House.

There are problems in the House of Representatives with respect to this type of reform, as you are well aware. I can report to you as a new Member of the 93d Congress that by and large, among those newly elected Members of the House, we have broad support for this concept on both sides of the aisle, among Republicans and Democrats, and we have better than 60 new Members there. I think we are winning converts perhaps by the public pressure, perhaps through other means, among those more senior Members in the House. And I just have to believe that we must do everything we can and that is why I am joining you in this great effort which I think will do so much to again restore the faith and confidence which we have lost in the public.

PROBLEM OF EDUCATION

Senator CHILES. As you know, one of our great problems is the problem of education, that many people very well meaning have the feeling that you just could not operate properly under these kinds of rules. Now that the House has opened up through its rule, which has gone further than the Senate in providing that meetings shall be open unless specifically closed, do you see a change in the attitude of Members now that many of your sessions are held in the open, including markup sessions? Is that working for a beneficial change in the field?

Representative GUNTER. There is a lot less fear, Mr. Chairman, than I felt when I first came to the House and when we were fighting the battle of opening up the committee sessions in a reform of the rules of the House. In fact, you can hear open comment in that regard. I introduced recently an amendment that would have hopefully been attached to the Bolling reform resolution which has been delayed now by the Democratic Caucus's action, but that amendment would have mandated open sessions of House committees rather than basically making that a permissive situation at the behest or at the move of the committee concerned, and there was good support,

I felt, for that approach. Again, it is in keeping with your legislation in the Senate and our similar bill in the House except that it only fits the House—only had to do with the House committees and our own rules.

What I am saying is that this experience has most certainly helped those who had these fears to see that the Government in the sunshine is not the phantom and the terrible situation that they had pictured it in their own minds.

We still have problems over there, though, Senator, because by and large, the markup sessions which are the critical sessions of the committees when, as you know, the bills themselves are actually drawn, when some of the deals are made, if you will, by and large are held behind closed doors.

CLOSED MARKUP SESSIONS IN THE HOUSE

Senator CHILES. They have not opened up a lot of the markup sessions.

Representative GUNTER. That is exactly right. The percentages look a great deal better now because you can say that 80 percent of committee meetings are now open, but it is the 20 percent where the decisions are made are not open and, of course, those are the ones that really need to be open.

Senator CHILES. Right, Well, what I was hoping, of course, is that the House, having taken the lead, going further in their rules, that it would be much easier for the Senate. Once you have removed the mote from your own eye, you want to cast it out of your neighbor's eye—and in this situation—to get to the executive branch and decide you want to really kind of disinfect them with a little sunlight. But I am sorry to hear all of the markup sessions have not been open in the House.

Representative GUNTER. Well, I think we are making progress and I certainly do not want to disparage that. In fact, I am greatly encouraged by what has been done.

Senator CHILES. Of course, in Florida, it is a little harder for us to answer this question because having the sunshine law in Florida, our people expect us to be very strong for this, I think. And I think that is certainly persuasive on all of us that represent Florida in the Congress.

I wonder, do you notice any of your colleagues talking about whether this question is being presented to them in their States, whether they are hearing about this from their people? I am concerned that we have not really gotten the constituency of broad support out in the States that we have, for example, in the State of Florida and some other States.

Representative GUNTER. Yes. We did some research in connection with the amendment I spoke of that was to be proposed to the Bolling resolution and found that better than 30 States had requirements relating to their State legislatures similar to that imposed upon our Florida Legislature, and imposed in the legislature over here in the Senate. And so certainly, more than half of the Senate legislatures concerned are already operating by and large in this fashion, with open meetings. And frankly, I have heard from Members in the

House who have said that there is some pressure, that there are the resolutions coming from the State legislature and there is the feeling from back home that this job should be done at the Federal level, too. But not to the degree and extent that I would hope for.

I would like to see that pressure increase. I think frankly, the national press, the press here in Washington, has a tremendous responsibility to help in this fight and I have not seen the vigor or the real gauntlet thrown down as you are well familiar happened in Florida by a very active and persistent press corps in the State Capitol in Tallahassee.

Senator CHILES. I again thank you for your testimony, your appearance, and your support, your continuing support in this principle. I look forward to seeing if we can make a little progress this year.

Thank you very much.

Representative GUNTER. Thank you, Mr. Chairman.

[Representative Gunter's statement follows:]

PREPARED STATEMENT OF HON. BILL GUNTER, MEMBER OF CONGRESS, FIFTH DISTRICT, FLORIDA

Mr. Chairman: I appreciate the opportunity to appear before your subcommittee this morning in behalf of S. 260, popularly known as the Federal Government in the Sunshine Bill, and introduced by my friend and distinguished colleague, Lawton Chiles.

This legislation represents a continuation of an effort originally begun at a time as you have recalled when you and I both had the opportunity to play a role in the Florida State Senate in the enactment of similar legislation applying to our State Government.

The success of the Florida experience since the enactment of a comprehensive "Government in The Sunshine" law provides meaningful guidance, I believe, for those of us considering such legislation on the Federal level.

I have been privileged to sponsor legislation in the House similar to the bill S. 260 now before you. It is my strong belief that the time is right to enact such legislation, and that opening the processes of Congress and other agencies of the Federal Government is indeed mandated by the troubling events of recent times, if a shattered public faith and confidence in the institutions of government is to be restored.

This legislation, of course, offers no panacea to the problem of accomplishing that restoration of faith and confidence.

But surely it is a necessary beginning. For the people cannot have faith in government they cannot see. And all too often, and for far too long, the institutions of government have receded into the confusing shadows of secrecy and beyond the pale of true public accountability.

It is a problem that has long been recognized on the Congressional level by an increasing number of our colleagues. Certainly the conduct of the Executive Branch which has come to light only in retrospect has been shocking and sobering. Such conduct might never have come to light had it not been for the accidental revelations which served to bring that conduct to the forefront of public attention and scrutiny in an unprecedented way.

But the time to achieve accountability in government is not after the fact and after the damage is done. The time to achieve public scrutiny and accountability of elected and appointed officials is simultaneously with the current and open operations of each of the two branches of Government.

And if the need for greater openness was already increasingly recognized by many of our colleagues in the House and Senate even before the sad and tragic disclosures of recent times, certainly we approach the question today with an added appreciation of the grave withdrawal of public trust and confidence in general.

At a time when the restoration of a shattered faith has become one of the most serious and challenging problems confronting those of us with legislative and political responsibility, certainly the question of openness in the operations of Government takes on an added dimension of urgency that renders the need to do so not merely desirable but, by now, undeniable.

For public faith is a fragile thing and we address now matters affecting nothing less than the character of our national political soul for the immediate future and the long run.

It is imperative that public faith and trust be restored. And I know of no way to accomplish that under a continuing cloak of secrecy that renders the actions of government indecipherable and the actions of elected officials unaccountable.

As long as government continues to be an ever-more mysterious force in the lives of citizens, they will increasingly see not only the phantoms that are there, but phantoms that are not, to which blame is assigned with all the full exaggeration of political hallucination at its most extreme, with all the mortal consequences that can produce in a still-free but yet-troubled land.

The first duty of government today is visibility to its own people. That means visibility not simply in terms of end-result, but in terms of the very process, and of those responsible within that process and accountable to the people they are chosen to serve. The full measure of public confidence in their institutions and leaders will be restored only if the fullest measure of visibility and accountability is achieved.

That is why I believe this legislation is so vital and why I believe the urgency of the need and the purpose to be served far exceed that represented before the present crisis of confidence descended on us in such troubling measure.

But its merits serve the better purposes of government in any climate and at any time.

The legislation addresses problems well recognized for a long time and deeply troubling to many who have thought seriously about the functioning of our governmental institutions.

As a Member of Congress who has made a commitment to do what I can to encourage and bring about greater openness in the meetings of committees and subcommittees in the House, I quite naturally commend the sections of the bill which deal with that question in general with respect to the operations of Congress.

But I am no less concerned with other problems addressed in the legislation. However great the need may be to continue to call attention to congressional reform, I would like at this point to refer to an area of concern addressed by the legislation which is no less important and seldom draws the attention it deserves. I refer specifically to that portion of the bill which addresses the need for greater openness by the regulatory and other agencies of government.

Perhaps no other portion of government operates in greater anonymity and cloaked more in confusing procedures and the mantle of secrecy than the regulatory agencies of government. Yet their vast power over the affairs of the public seems to dwarf at times the ostensible Constitutional powers assigned to the Congress itself. Where the Congress all too often has seemed unable to grapple successfully with the great and immediate problems of the moment, the regulatory agencies, in virtual anonymity, issue forth decisions of immense impact on the economy as a whole and the lives of citizens individually. Even congressional oversight is limited by practical circumstances, for the mechanisms to exercise such oversight have not existed in law or practice.

Nowhere has this been more true, perhaps, than in the area of ex parte contacts between interested parties having business before these agencies, and commission officials having the responsibility to regulate these parties. Seldom is this world of unofficial contact between the special interests being judged and their judges glimpsed by those outside the community of interested parties and regulatory officials.

But enough has been glimpsed to warn us that without strong action to establish absolute guidelines of conduct, the future tendency of the regulatory agencies will continue as in the past—that is to take on the coloration more

and more of the industries to be regulated and less and less to act in behalf of the broader public and consuming interest. And it has been the clear experience that rules and regulations promulgated by regulatory agencies themselves have not proved sufficient to eliminate the abuse of the ex parte communication.

The rules of procedure of the Federal Power Commission, for example, provide, in effect, that the relationship between the Commission and hearing examiners with petitioners appearing before the Commission shall be as the relationship between judges and practitioners before a Court. The rules provide:

"All persons appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States."

In turn, these ethical standards are set forth in the Canons of Professional Ethics of the American Bar Association, which provide in part that:

"Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstruction of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor . . ."

The record is too long and well known, however, Mr. Chairman, to argue the point that such strictures have never been sufficient to guarantee a code of conduct for regulatory agencies and those appearing before them. In fact, that the opposite has more often than not been the case appears generally taken for granted.

One of the few available public insights into this process was provided in hearings held by a Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce over a decade ago and which provides a useful chronicle of the kinds of ex parte contacts and more insidious social relationships between regulatory agency members and petitioners having business before them—a chronicle of golf games, dinner parties, plane rides, cocktail parties, social visits exchanged in private homes, attendance at weddings.

The following passage of testimony by then-FPC Commissioner Arthur Kline with respect to certain contacts with a Washington representative of a petitioner before the FPC, who coincidentally himself happened to be a former Commissioner, will be sufficient to indicate the insidious nature of such contacts and the reluctance to publicly discuss them.

The committee counsel asked Commissioner Kline about a September 11th call to his office paid by the Washington representative, former Commissioner Harrison Wimberly, and asked if the call had in fact been made.

Answer. That is correct.

Question. Do you recall what you discussed with him at that time?

Answer. No, I don't recall . . .

Question. Now, on November 14, 1958, did Mr. Wimberly call on you again?

Answer. That is correct.

Question. Do you recall what he discussed at that meeting?

Answer. No, I do not. I might say as far as Mr. Wimberly is concerned, I don't believe that he ever discussed any business matter with me on more than two or three occasions. Now that is not true of some of these other representatives who never came in except on business. But in his case, I don't think he ever, except on two or three occasions, did discuss business matters. He just came in to visit.

Question. Now, turning to 1959, on Feb. 2, did Mr. Wimberly call on you and do you recall what he discussed at that time?

Answer. No, I am sorry, I do not.

Question. On April 3, 1959, he called again.

Answer. I guess from seeing just that date on a piece of paper, I cannot recall at all.

Question. There is a press release of the Power Commission in April 1959 . . . Do you recall whether or not on February 2 visit Mr. Wimberly discussed that matter with you?

Answer. No, I am certain he did not . . . and I don't ever recall him having discussed (that) . . .

Question. On April 3, Mr. Wimberly called on you again. Do you recall what he discussed then?

Answer. No, I do not.

Question. Again on April 20,

Answer. I do not recall what was discussed.

Question. Again on May 29.

Answer. I have no recollection then as to what was discussed.

Question. Again on October 21. Do you recall what was discussed at that meeting?

Answer. No, I have no recollection, unless there are some—unless my memory might be refreshed through some press release or something of that nature . . ." (Emphasis added in all cases.)

Other social visits described in the testimony, Mr. Chairman, were more intimate:

Question. On the dates mentioned, do you recall whether or not you had occasion to attend a dinner party given by Mr. Wimberly?

Answer. Well, now, I don't believe—I believe I testified to attending a dinner party, but I don't believe I testified to attending one at that time. I believe the dinner party I attended was, I got to thinking about it, was in February. I think that is when his daughter was, an announcement of her marriage was made, and I am positive that I didn't attend a party. I know it wasn't a dinner party and I don't believe we were over for cocktails or anything during the Christmas season. It is possible we could have been but I don't believe so.

Question. Do you recall any social event you might have attended during those days that have been mentioned, December 26, 27, 28?

Answer. Yes, I am certain that it was between Christmas and New Year's. There is almost always a cocktail party or two somewhere and I am certain I attended some of them.

Mr. Chairman, Commissioner Frederick Stueck was also the recipient of Mr. Wimberly's social calls, according to the testimony, as the following excerpt from the House hearings will indicate:

Question. Do you recall what you did discuss with him?

Answer. Mr. Wimberly comes in to pay a social call more or less. Frequently, he may have a new story to tell. Occasionally, the need for expedition, or the need for handling of matters . . .

Commissioner Stueck was asked about instances in general where representatives of interested parties stopped just short of the borderline on such social visits from getting into discussion of the merits of cases: "Well, I think sometimes they get right on the line."

Mr. Chairman, the preceding, very brief examples serve, I think, to illustrate a continuing problem with respect to maintaining the integrity of regulatory proceedings which are in actuality quasi-judicial in nature and the decisions resulting therefrom having so much the effect of law for the purposes of both the industries being regulated and in terms of the public interest either preserved or forsaken in given instances by those decisions.

It is time, I believe, to clearly spell out a code of conduct for regulatory agency behavior in this regard.

But it is also time to open the doors of these regulatory agencies to the light of day in order that the processes by which the public interest is either safeguarded or jettisoned may be subject to full scrutiny.

It is even more imperative, Mr. Chairman, in an instance where power such as that exercised by the regulatory agencies is exercised by those not elected by those they are charged with representing, where public accountability is least possible in any instance, and where other types of oversight have proved feeble as a matter of practical history.

One section of the legislation before this subcommittee would work to provide a remedy to these problems raised. I believe it is long overdue and urgently needed.

I commend this provision together with the other provisions contained in this legislation, and thank the committee for this opportunity to express my whole-

hearted support and my strong recommendation that it receive favorable consideration by the Senate.

Thank you.

Senator CHILES. We will recess our hearings now until tomorrow morning at 10 o'clock.

[Whereupon, at 11:50 a.m., the hearing was recessed, to reconvene at 10 a.m., Wednesday, May 22, 1974.]

GOVERNMENT IN THE SUNSHINE

WEDNESDAY, MAY 22, 1974

U.S. SENATE,
SUBCOMMITTEE ON REORGANIZATION, RESEARCH,
AND INTERNATIONAL ORGANIZATIONS,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:07 a.m., in room 3302, Dirksen Senate Office Building, Senator Lawton Chiles (acting chairman of the subcommittee) presiding.

Present: Senators Chiles and Percy.

Also present: Marilyn Harris, chief clerk; and George Patten and Margaret Maruschak, assistants to Senator Chiles.

HEARINGS RESUMED

Senator CHILES. Today we are going to resume our hearings on the Federal Government in the sunshine bill, S. 260. Our witnesses today will include Hon. Reubin Askew, Governor of Florida; Hon. Dante Fascell, U.S. House of Representatives; and former Secretary of HEW and chairman of Common Cause, John Gardner; Lou Harris of Lou Harris Associates; Ron Plesser of the Center of the Study of Responsive Law; and Mrs. Jeanne Malchon, former president of the Florida League of Women Voters and a strong advocate of sunshine for many years.

Yesterday our witnesses offered the subcommittee some valuable insights and recommendations and I am hopeful that today's testimony will also prove fruitful.

We are glad to have with us today observing our hearings the senior government class of McLean High School with Mr. McMahon, who is their teacher who has brought them here today from McLean, Va. We are delighted to have them here.

Governor, we will be delighted to have you be our lead off witness and we are very happy to have your testimony here knowing of the efforts that you made in getting Florida a government in sunshine law that we have now been under for a number of years. One of the great problems we are having up here is the same problem that we experienced in Florida and that is the problem of education, trying to really educate well-meaning people that the people's business should be carried out in the open and that this would not handicap their decisionmaking but rather would help to restore the people's confidence. So we are pleased to be able to avail ourselves of your experience, as Governor in a State that probably does have the most open law of any State in the Nation.

TESTIMONY OF REUBIN O'D. ASKEW, GOVERNOR OF THE STATE OF FLORIDA

Governor ASKEW. Thank you very much, Senator. And let me begin by commending you on your leadership in this field. And also by acknowledging a mistake I made 2 two years ago.

It was the second year of my administration—the second time in modern Florida history—that the responsibility for preparing budget recommendations rested solely with the Governor, and I might say parenthetically that that change in our government came about largely as a result of your leadership as chairman of the Senate Ways and Means, if you will recall, in 1967. But it was upon the Governor rather than six separately elected members of the State cabinet as it had before executive reorganization in 1969 when we had what we called the budget commission.

Since the decisionmaking was now singular—as opposed to the collective budgetary decisions of the past—these deliberations no longer came under the public meeting requirements of Florida's sunshine law.

It had seemed to me that the open sessions of the previous year amounted to little more than bureaucratic grandstanding by department heads who sought appropriations levels they had no real hope of receiving. Such posturing may have impressed the particular constituency of each department, but it proved little help in setting spending priorities to me for the coming fiscal year.

In hopes of encouraging more candor, speeding the process and making it more productive, I decided in 1972 to receive the requests of department heads in the privacy of my capitol office.

It quickly became apparent, however, that the hoped-for efficiency would not be worth the price.

Newspaper and television reporters crowded the reception area outside, angrily and persistently questioning the need for secrecy. Obviously, if the meetings were not opened, their reports could plant the seeds of doubt and suspicion in Florida's mind.

OPEN MEETINGS IN FLORIDA ARE HELPFUL

I told the press I was wrong, and the meetings were opened.

And I have since found other ways to encourage more candid and productive budget presentations in public sessions. In fact, I believe the presence of reporters has helped achieve the kind of spending priorities which best serve the interests of the people.

Not, I might add, that all that many reporters are present at these meetings after they were opened. Another lesson of that experience was that a closed door is a lot more newsworthy in Florida these days than the drafting of a multibillion dollar budget request.

Frankly, I think that speaks well for my State and your State.

For it demonstrates how far we have come since the days when the chairman of a Florida Senate Judiciary Committee could meet on several important bills by simply walking down a legislative hall—alone—but with the pocketful of proxy votes. You and I recall

well, I think, my first bill as a House member. When I went to the Senate, I convinced the one live person who chaired the committee to vote for the bill and he voted four proxy votes against me and that killed the bill.

Senators routinely went into executive session to consider matters of appointments or suspension—and all too often, issues of broader public interest came up as well.

Members of the State cabinet regularly held private breakfast meetings in a downtown Tallahassee hotel to thrash out the more controversial items on the agenda of their public meeting later in the morning.

School boards, county commissions and city councils settled the more difficult local problems behind closed doors, emerging for little more than the formal vote in public.

Government reforms rarely come easy, and the enactment of Florida's Government in the Sunshine Law was certainly no exception.

Beginning in 1961, bills were repeatedly introduced in the legislature to ban secret meetings, and they were repeatedly buried in committee.

The fate of the early "sunshine" bills was not surprising, given the close ties that existed between the large special interests and a malapportioned legislature. This relationship was more suited to private wining and dining at a local steak house than to any sharing of mutual concerns in public view at the Capitol.

Nor could the legislature see any wisdom in encouraging at other levels of government the kind of openness that would only contrast with the coziness of Tallahassee.

Florida's press, among the most aggressive in the Nation, was nosy enough as it was.

Court-ordered reapportionment in 1967, together with an impromptu sit-in by a few reporters in what proved to be the last executive session of the Florida Senate, paved the way for passage that same year of what we have come to know as the sunshine law. I am proud to say that you, Senator Chiles, and I, both State senators at the time, were among those who helped Senator J. Emory Cross of Gainesville win the victory he had long and vigorously sought.

THE PUBLIC'S RIGHT TO KNOW

The law, which has subsequently withstood several legal tests and emerged even stronger, is based upon the simple premise that the public has the right to know when, how, and why its business is being conducted.

All meetings of any board or commission of any State agency, or any other political subdivision, must be open to the public at all times. Violations are subject to criminal penalties.

Predictions that too much sunshine would lead to unnecessary embarrassment of public employees, costlier land acquisitions, and other problems have not been borne out by the Florida experience.

Even one of the most influential lobbyists has conceded that, "My initial fears were baseless and that as a law it is a good thing."

"How many times immediately come to mind," John C. Lee asked his fellow lobbyists in a speech last fall, "when those who are members of your respective organizations were shafted by officials taking action in a meeting about which you had no advance knowledge?"

While compliance was not always immediate, and officials were sometimes wont to see implied exemptions in the act, the combination of civil and criminal actions has left little uncertainty about the meaning and purpose of Florida's law.

In a case brought by the St. Petersburg Times against the Pinellas County School Board, an appellate court held that, "It is how and why the officials decided to so act which interests the public * * * the legislature could only have meant to include therein the acts of deliberation, discussion, and deciding occuring prior and leading up to the affirmative 'formal action' which renders official the final decisions of the governing bodies."

That, of course, is exactly what the legislature did intend. Only by seeing the decisionmaking process evolve, either first-hand or through the media, can our citizenry be fully informed.

And only through an informed citizenry can our democracy be both meaningful and responsive.

As Thomas Jefferson wrote nearly 200 years ago, "Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day."

Never before in our history has it been more important that our people be enlightened, and that they be given reason to once again place their faith and confidence in their government.

Excessive secrecy is one of the reasons for the crisis in confidence which was so dramatically revealed by the survey conducted late last year by Louis Harris and Associates for another subcommittee of the Committee on Government Operations. It breeds wild rumors, self-serving leaks, suspicion, and distrust.

It insulates those who govern, and it isolates, alienates, and frustrates those who elected them.

Open meetings of congressional committees and Federal agencies provide a means of restoring confidence, of encouraging wider participation in our governmental processes and making them serve the interests of all people, rather than just the influential few.

Accordingly, I strongly endorse the proposed Federal Government in the Sunshine Act introduced by Senator Chiles. I recognize that you face more difficult and complex questions at the Federal level in deciding what exceptions may be necessary. But I would urge you to except only those meetings wherein secrecy is absolutely essential, and to open all others to full public view.

This ends my formal remarks, Mr. Chairman.

Senator CHILES. Thank you very much, Governor. I appreciate your very fine and comprehensive statement.

FEARS RAISED OF MEETINGS BEING DRIVEN UNDERGROUND

I want to ask you a couple of questions. One of the fears that is always raised by some of the critics of this legislation is that all you do when you pass this legislation is just send the process

underground one more step. There is always going to be the get-together and it will just be one step removed. That, of course, is a point that anyone can raise, but I would like to know what your observation has been from your experience as a State senator, as an observer of meetings of, say, city commissions, county commissions, school board meetings, the cabinet level meetings, those that you know, you have some knowledge of, and whether you think that really has happened in Florida, that there are still closed meetings and they just take place one step removed.

Governor ASKEW. Well, as you recall, some of the very same charges being leveled at the bill that you introduced were leveled at the Florida act and it simply has not proven to be the case. I am sure from time to time, there may be violations of any law, both intentionally and unintentionally, but having observed this act both from the standpoint as a member of the legislature and as Governor and being called upon as Governor to review the actions of members of commissions throughout the State, some indictments, some charges, I have found that the act has been substantially complied with throughout all of Florida, and those who say that it simply drives it further underground, at least as the Florida experience, to my best knowledge it has not proven to be the case at all.

SITUATION CHANGE DUE TO OPEN MEETINGS

Senator CHILES. Have you found that the Florida law has set a standard and changed the attitude from one of an attitude of prevailing secrecy and a prevailing closing of everything to one of an attitude of openness?

Governor ASKEW. Absolutely, because I believe that the significant thing when you consider our law, it was not necessarily that someone is subject to civil injunctive relief for criminal penalties. They have now determined that it is really in their own interest of the public that they discuss them in public. This is a point I was trying to point out when I closed my budget hearings because under the law it was a singular decision that I made. Therefore, it could never be a violation because it was my decision. But I found that opening it up, even though it was a singular decision, was in my best interests and the public's interests to know why I was asking some of the questions I was asking and to put some of my department heads on the spot for them to prioritize their own request. And the significant thing is that we have learned that it works. It works and admittedly in the Federal Government when you have legitimate questions of national defense and maybe some areas that are not necessarily present within State government, I believe that once Congress and the Federal Government ever works under it, they will not want it any other way.

So it is not just the question of what may happen if you do not do it. You are so right when you say it has changed the attitudes of people.

Now, it was a traumatic thing for many politicians. I think it was a traumatic thing for all of us to accept the fact now that we could not have collective bodies where you could not traditionally

go in a corner and settle a problem, but having been Governor for 3½ years, to my knowledge, the cabinet from which I work a great deal, to my knowledge there have been not only no violations to my knowledge, but there has been a whole change of attitudes for respect for the law.

Senator CHILES. Going back to the earlier days when we did not have the law, the members of the cabinet used to feel that they could not really get into a fight in public, so they always knew what exactly any vote was going to be and what their decision would be before there was a formal cabinet meeting. The meeting was the time that they solemnized the vote, but the decision had already been made. That is not the practice now, is what you are saying?

Governor ASKEW. No. No, it is not.

Senator CHILES. And it works in the decisionmaking process where you sit there at the table and have this discussion, where people can listen to it and understand what the real different points of view are?

Governor ASKEW. Well, I cannot say with any personal knowledge what the operation was, say, within the Governor and the cabinet prior to my becoming Governor except I can recall breakfast meetings at the Duvall Hotel prior to a cabinet meeting, but the intention even then was not so much to deprive the public of the opportunity of being heard as it was the feeling that if you have any real differences, you really ought to air them to yourself, you know.

Senator CHILES. Yes.

Governor ASKEW. So it was not so much trying to deny the public, and I do not even know in some instances that it was improperly motivated at all.

Senator CHILES. I think that is true. Most of these closed meetings are not improperly motivated.

Governor ASKEW. What they say is, let's don't hang out the dirty laundry in public. But the fact of the matter is let the public decide what extent something should be laundered.

SHOULD THE PUBLIC SEE THE CONCESSIONS?

Senator CHILES. Do you not also think that that is part of the real process of government, that the public should see that there are strong differences, that there are strong conflicting opinions and there are compromises and adjustments and fights that have to go on? Is that not part of the process they should see and observe?

Governor ASKEW. Yes, and I think as I view in retrospect how it worked, say, in Florida prior to the law, then you recognize that it was a lack of confidence in the people, you know, in acceptance of the process itself, not expecting it to be perfect, that I think resulted in a system that was not in the public interest.

Senator CHILES. Sort of a paternalistic attitude that many of us have had and some of us still have that we know what is best for the people and they will only understand a certain portion of

this, so we should not confuse them with a fight or with the conflicts, that we should spoonfeed them, so to speak.

Governor ASKEW. You are completely correct, and I believe that once the people are given an opportunity for a broader participation and an understanding of why Government does as it does, I think it will result not only in substantial confidence being regained within it but greater support, Mr. Chairman, and I think it is also important to point out as you well know, but for the record, that as you seek to make a substantial transition such as this, you have to anticipate that you are going to have a lot of questions raised as to whether they will fall within the law or whether an incident will not fall within the law and we have been going through a process in Florida of questions being raised, first of all, what constitutes a formal meeting, what comes under it, must it be a majority? We have determined in Florida that it does not have to be a majority. You can have less than a majority if you try to have a private meeting to really decide what you are going to do in a public meeting. So I believe that what you are proposing, and the critics should particularly understand, is a beginning. It is a beginning of a process where we are going to have to have a commitment to a first goal and not be subject to every criticism that it will not be perfect from the very beginning, but that the thrust of it may be one of the most significant things that the Federal Government will have ever done. And I believe as I view back my time in government, which exactly parallels yours in terms of when we came to State government, probably the two greatest and most significant things in Florida government during our time has been reapportionment and the sunshine law because the effects of that are felt in every direction and every decisionmaking process.

Senator CHILES. Have you noticed any difference in what you perceive to be the attitudes of the people in Florida towards their government, State government and local government, with the passage of the sunshine law?

Governor ASKEW. Yes, I do. I think that there has been a feeling of more of them being part of the process rather than being an audience for spoonfed decisions.

Senator CHILES. I thank you very much for your testimony and for your appearance.

Governor ASKEW. I thank you, Senator, and even at the risk between good friends of sounding self-serving, again I would like to commend you for your leadership because this act substantially seeks to rock the boat, but when it comes to helping people participate in their government to a better degree, the boat needs rocking.

Senator CHILES. Thank you very much.

Our next witness will be Congressman Dante Fascell. Congressman Fascell is the introducer of legislation similar to this sunshine legislation in the House, and has long been an advocate for opening the process both of the congressional operations and of the executive branch, and we are delighted to have him here to testify today.

TESTIMONY OF HON. DANTE FASCELL, REPRESENTATIVE IN CONGRESS FROM THE 15TH CONGRESSIONAL DISTRICT OF THE STATE OF FLORIDA

Representative FASCELL. Thank you, Senator. I was very happy to follow your lead and cosponsor your bill in the House. I think it deals with a very important issue. Openness in government and the right of people to know what their officials are doing is more important now than ever in our history and it always has been important. We must conduct our public business in a fishbowl because there is no other way to conduct it properly. A democracy cannot operate in the darkness. It has to operate in bright, broad daylight; in the sunshine.

The unprecedented secrecy that we see in our executive branch has subverted the very nature of the democratic form of government and the unfortunate result has been a loss of confidence, the worst which we have seen in the history of our country. Our national leadership has sunk to the lowest ebb that we have ever known. So it is absolutely essential for the American people to have access to the information which comes from the very people they selected or appointed to run their Government. The days when government could make decisions affecting the lives of millions of people in a dark room are gone forever, or ought to be.

I commend you, Senator, for the leadership you have taken in this role. It is a very difficult one, obviously. I was delighted to hear our Governor testifying about the excellent and positive results in Florida operating in the sunshine. I think all of the fears that have been expressed in all of the meetings that I have ever attended here are the very ones that have been answered by the experience in Florida. I am confident those fears would be dissolved by experience at the Florida level if we just get enough votes to pass the bill.

OPEN MEETINGS CHAMPIONED BY FASCELL

Senator CHILES. Congressman, I want to commend you for the fight you made in the House early this year in which you prevailed upon them to change the rule to a rule of openness unless it was voted by a majority, as I understand it, in an open meeting to close the meeting, rather than a rule that a meeting would be closed unless a majority tried to open it. We tried to follow your lead in the Senate. We fell a few votes short.

Representative FASCELL. We both decided to grab a half loaf while we could. We had a lot of good help doing it, of course, and fortunately we were successful in the House, Senator. That change, I am happy to say, had the same results that occurred in Florida with the passage of the sunshine law. The change of rules has been extremely effective in the House. Although meetings of the House committees can be closed for any reason if the committee decides by recorded vote in open session to do so, studies show, and people who follow me will give you the details on that, that we have gone from practically zero to a very high percentage of open meetings.

A great deal of that, of course, is due to the very strenuous efforts, the followup, and the leadership of the people in Common Cause who have done a fantastic job, not only helping with the education on the legislation in the first instance, but in the followup to see how effective it really is.

EFFECTIVENESS OF OPEN MEETINGS

Although relatively general, the result of the questionnaires which were sent to committee and subcommittee chairmen last September by Chairman Julia Butler Hansen of the House Democratic Caucus Committee on Organization, Study and Review to measure the effects of the new open meetings requirement, is also of interest. While there is only a partial response, it indicated not only that a growing number of meeting which had previously been closed were being held in open session but also that the impact of the requirement was generally considered positive by the chairman.

The following question was asked: "Generally, how would you describe the impact of the rule upon the activity of the committee/subcommittee? Approximately 43 percent of the responses indicated a favorable impact, ranging from "acceptable" to such observations as "members and staff better prepared," "safeguards 'the public's right to know,'" and "significant and far-reaching effects," 49 percent saw only a slight impact on the committee.

Also significant was the response to a question asking what the most negative aspect of compliance with the rule has been: 43 percent reported that they could discern no negative effect; 24 percent failed to answer the question; only 12 percent of those replying indicated some delay may have been caused, and only about 10 percent implied that compromise was hindered by the new rule.

I think the response to the Hansen questionnaire, Mr. Chairman, indicates support for open meetings and it indicates that the committee work can go on and that it can be done in open session.

Some of our committees had been doing that but the message even then did not get through to other committees. So let me relate my own experience on Foreign Affairs where our markup sessions were all in closed session. The question there arose not only from the standpoint of national security, the sensitivity of other governments and people in foreign lands, but also whether effective compromises could be made and whether there would be delay and hindrance in the consideration of the legislation.

Result: We have more members attending more meetings for markups than we have ever had. Result: We got our legislation out faster. Result: We had absolutely no reduction in candor of discussion and absolutely no reduction in the ability to reach compromises which were essential to get the bills out. We did not have to have a whole host of caucuses and meetings on the side in order to reach those decisions. Everybody just came there, Republicans and Democrats, minorities within each side, and hammered the thing out while everybody was looking. There was no impingement on national security and no fracture of foreign sensitivities. All I can say is that on that one committee, and we have every

complaint that Appropriations, Ways and Means, and Armed Services have alleged, the result of open meetings has been a big plus.

OPEN COMMITTEE MEETINGS ARE EFFECTIVE

Senator CHILES. That certainly has been our experience, I think, in the Government Operations Committee of the Senate which is the committee upon which I sit that has opened up its meetings. It has been exactly the same thing. I think we have handled varied and complex legislation, the impoundment bill, the emergency energy bill, all kinds of different legislation—consumer protection law, the gamut—and all those sessions have been in the open and I think the work product comes through just as usual. If anything, I think members are certainly better prepared and will be present more times.

Representative FASCELL. Obviously there is the reluctance of a great many people who are used to the old way, and feel somehow that openness will weaken their power or decisionmaking process. Once they stick their feet in the water and find out that they still have the power and still have the capability of the decisionmaking process, then I think the fight is all over. But obviously we have to get past that ridge in this body. I know that it is not an easy job. I am pleased that you have taken the leadership because I know you are determined to persevere. It is going to get done in the Senate. You are going to have a lot of help.

Senator CHILES. You are loading my boat now.

Representative FASCELL. I know I am loading your boat but I have the same problem in the House. It is my boat, too, so we will rock it together if we can.

I would like to get specific for a minute before we go on. There are two provisions in this S. 260 print—I guess I am working off the print—relating to the committee procedure which I would particularly advocate as well as the general open meetings provisions and that is a transcript requirement and some provision for enforcement.

TRANSCRIPTS OF MEETINGS

I am not familiar with your actions in the Senate but in the House there is no requirement that committees keep transcripts of meetings. Each committee is directed to keep a complete record of all committee action which is to include a record of votes on any motion on which a record vote is taken. These are required to be available for public inspection and certain information regarding the description of the vote is required. However, there is no requirement as I understand it, that there be a transcript of any meeting. A check with some of the House committees indicated that each has set its own policy. Some keep transcripts of all meetings, some have transcripts of some meetings, some have only official minutes and some have transcripts of the open meetings available to the public and some are only available to the members.

I think an accurate and full record available to the public even in open meetings is desirable. I certainly think that public access to an edited transcript of a closed meeting should be supported. I

do not think the requirements ought to be limited to closed meetings. That is the main observation I wanted to make.

Dealing with enforcement, I think it is absolutely necessary that there be some right of appeal when decisions are made to close certain meetings or a portion of a meeting or to delete part of the transcript. The Select Committee on Meetings proposal, although probably difficult from a practical standpoint, is the best solution I know of and, therefore, I think it ought to be retained.

With respect to the separate provisions for the House and Senate committee meetings it appears that, although both sections were identical when the bill was originally introduced, Senator, changes have been made with regard to the sections in the Senate version, and I do not detect, at least in the committee print, that similar or corresponding changes have been made in the House version. While I know each House will ultimately make the decision on its own procedures and rules, it seems to me that wherever we can they ought to be similar or the same, as much as possible. We did a cursory check and found 14 differences. It just may be an oversight.

Senator CHILES. Probably in our rewrite we wrote the Senate provision and——

Representative FASCELL. Yes, and did not rewrite the House provisions. That is exactly what I thought. Anyway, I thought I had better call attention to that. I think it would be best if we could get to the greatest extent possible, some uniformity.

The other point is that on one section here—let us see, I cannot recall it right now, I can pick it out, though—you make an effort to treat hearings and meetings exactly the some and we do not do that in the House. We treat them separately. We have three separate rules in the House.

There is an effort, it seems to me, when you read that change in conjunction with section 104 of your bill that you are trying to eliminate the difference, but it is really not quite clear to me that that has been done when you compare the House rules with the new section in the bill. So I think we ought to take a look at that and be absolutely sure. If necessary, say specifically that the other two House rules have been superseded. Otherwise there will be some doubt as to whether the bill eliminates the distinction between hearings and meetings now maintained in the House rules.

If we are going to go to all of this trouble with respect to the Congress, we need to go to twice the trouble as to the executive agencies. There I have several suggestions, Mr. Chairman.

SUGGESTED CHANGES FOR S. 260

Section 201(a) provides that "all meetings [including meetings to conduct hearings] of [a quorum of the members of] such agencies or a subdivision thereof authorized to take action on behalf of the agency at which official action is considered or disclosed shall be open to the public."

That raises a presumption to me, I would like to get rid of that presumption. Presumably—I know we have discussed this many times, but I thought I had better state my opinion while I have an opportunity. Presumably, all agencies are supposed to meet to con-

duct official business. I cannot imagine that they would meet to conduct unofficial business. The wording of that particular section leaves that inference, however. It seems to me it might be wise, while we have the chance, to just strike out the word "official" and just have it apply to any meeting.

TRADE SECRETS

In section 201(b)(5) regarding trade secrets, the provision affecting executive agencies is far broader than that affecting congressional committee meetings. The section regarding agencies requires that only one of the three requirements be met, while the section which applies to congressional committee meetings requires that all three requirements be met.

I think they ought to be uniform. But in trying to do that, I decided there was a conflict in reading those requirements. If you look at it when you have time you will see what I mean. One of the requirements is that you would have an exemption where the information was required to be kept confidential by statute.

If the information is confidential by statute you do not need any other criteria. So to add two other criteria to that requirement seems to be an unnecessary burden; also a conflict. If the very nature of the information ought to be confidential, other than that because it was on an application, or because it would cause an irreparable harm and injury, then I do not see why you have to throw in the statutory criteria as well. I think they ought to all read the same way and not hang all three requirements on the exemption. Either hang requirements one and three together, that is, where it is given on a confidential basis outside of an application and would cause an irreparable harm or injury, or requirement two is required to be kept confidential by statute, would be a single requirement or write all of them in the alternative.

Senator CHILES. Fine.

Representative FASCELL. I would also, of course, like to see the exemption for meetings for the disposition of adjudications deleted. I know we have been round and round with that one. That is a personal preference on my part. I do not think meetings and advice would go underground. I do not think the general counsels would have to change their attitude. I think the whole proceedings could be laid out in the open. I recognize the language in that section as a practical compromise. But from a personal standpoint I think the fears are magnified and the Governor has certainly reinforced my feelings on that in his testimony today.

EX PARTE COMMUNICATIONS

One other thing, I strongly support the ex parte communication section in this bill. As you know, I introduced that bill in the House first in 1960 and got absolutely no place. I finally got the Judiciary Committee to hold some hearings. The American Bar Association has been on that part of the bill since 1956 by resolution after they studied the matter for a year and a half. I think it is absolutely vital that we open up this whole question of pres-

sure, political or otherwise, on our regulatory agencies by following the theory that is expressed here in the ex parte communication section and put it all on the record.

Senator CHILES. Does that not really do two things? That is a tremendous protection, I think, for people in the agencies when they are tempted to be pressured because they can always say, yes, we will be glad to get that letter and you know it becomes part of a public record. Sure, you can come over here and we will meet with you and we have a transcript of that which goes in the record. So that in itself gives them a tremendous protection. And, two, it gives the public the ability to see who that agency official talked to prior to the time he raised the price of milk or he sold wheat or he did something else. The public certainly is entitled to know what interest and what type of people and what groups he talked to in making that decision.

Representative FASCELL. Absolutely, Senator, and look, it does not take any power away from an elected official. I have heard expressed many times that such a requirement would weaken the opportunity to get that final word in; to get a favorable action; or unfavorable action or whatever you're trying to do; whether you are a Senator or Congressman or high-powered lobbyist or somebody else in Government.

The truth of the matter is all you are required to do is decide which side you are going to get on and go over and testify. This strengthens the position of the side you support and protects the agency.

Senator CHILES. Right.

Representative FASCELL. Then you are on the record. Everybody has a fair crack at you. They can cross examine you. And that is it. So if an official or member or anyone wants to exercise power, fine. I do not think any of us are saying do not exercise power in behalf of your constituents with a regulatory agency if you want to, but just do it on the record. It is the hidden exercise of power that is damaging.

So that is the end of my observations on the legislation, Mr. Chairman. I think you have done a great job. I know you have made a great effort to meet the objections, legitimate objections, serious concerns and reservations that have been raised by the executive agencies, the independent agencies and others. A lot of those have been met in your rewrite. I think it is time now for us to really move ahead. I certainly hope that the Senate is inclined to follow your leadership on this very important matter. I cannot think of a more important reform right now, today, than for the Congress to take the lead in opening up Government, executive and congressional and to restore the confidence of our people in the institutions of our Government.

Senator CHILES. Well, we thank you for an excellent statement and your comments and certainly the leadership role that you performed in this effort.

Give me some kind of feeling, if you will, as to what you think the House might do if we were able to pass some kind of bill out of the Senate. Do you have any kind of feeling you could give me?

FORTHCOMING OPEN MEETING LEGISLATION FROM THE HOUSE

Representative FASCELL. I have a feeling, Mr. Chairman, and it depends on how we approach the matter, and we are going to have to resolve the practical problem of a single bill or separate bill. So it just depends on who you talk to over there as to the kind of response and feeling you get.

But let me deal with the committee which is the counterpart over in the House side, Government Operations Committee. I think we would get a fair response over there. The chairman of the subcommittee having jurisdiction has seemed to have acted rather sensibly and responsibly with respect to the whole idea of open meetings. I am sure that he would be very responsive.

The other committee that might get jurisdiction, I cannot say. I just have not had a chance to sit down and counsel with them yet. I think the general climate, however, would be reasonable for success.

Senator CHILES. We have two of those committees over on this side, too. There is another committee on this side that I do not know what is going to happen if we are able to get a bill out of the Government Operations Committee, which I feel we can do.

Representative FASCELL. I have the same feeling about our committee.

Senator CHILES. Well, thank you very much for your testimony.

Representative FASCELL. One other thing, Mr. Chairman. I did have a prepared statement, so I suppose for the sake of accuracy and clarity, I had better put it in the record if it is OK.

Senator CHILES. We will include your statement in the record and we are delighted with the analysis that you made on the sections of the bill.

Representative FASCELL. I hope it was constructive.

Senator CHILES. Very, very much so; and we are delighted to have your testimony.

[Representative Fascell's statement follows:]

PREPARED STATEMENT OF CONGRESSMAN DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE 15TH CONGRESSIONAL DISTRICT OF THE STATE OF FLORIDA

Mr. Chairman, thank you for this opportunity to appear before the Subcommittee to express my strong support for the objectives of your bill, S. 260, the "Government in the Sunshine Act."

I commend the distinguished Senator from Florida for his leadership, dedication and extremely hard work in developing a bill which will effectively open the deliberations of the Executive and Legislative Branches. Because of your continuing efforts, the Subcommittee now has before it a strong "sunshine" bill with many important provisions.

Secrecy in government must be eliminated. The confidence of the American people in elected officials and in government in general has declined to a record low. The Congress must act to restore that confidence.

Many reforms have been advocated and are needed. But in my judgment, opening up the operations of the Congress and the Executive agencies to public scrutiny is one of the most important.

Only if decisions of government are reached in the open—in the sunshine—can confidence in the system be restored. Openness and accountability, as proposed by S. 260, must be the rule.

Former Attorney General Ramsey Clark succinctly stated the importance of openness in the foreward to his 1967 Memorandum to executive departments and agencies outlining the guidelines for implementing the then new Freedom of Information Act. Clark said:

"If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure."

As the Committee knows, we were successful in the House in March of last year in amending the Rules to strengthen the presumption that all committee meetings—including those for the markup of bills—should be open unless action is taken in open session by a recorded vote to close such meetings. I was pleased to sponsor that resolution in the Democratic Caucus and in the House of Representatives.

The change in the Rules has been extremely effective. Although meetings of House Committees can be closed for any reason if the Committee decides by recorded vote in open session to do so [hearings can be closed only by a recorded vote when disclosure of testimony, evidence or other matters to be considered would endanger the national security or would violate any law or rule of the House of Representatives], a study by Common Cause showed that subsequent to adoption of the rule, 79.2% of all House committee meetings held to markup bills were held in open session. That study also found that 86.6% of all Subcommittee meetings for markup of legislation were held in open session. As Common Cause pointed out, this was an increase from virtually 0% to almost 80%.

Although relatively general, the results of a questionnaire sent to Committee and Subcommittee Chairmen last September by Chairman Julia Butler Hansen of the House Democratic Caucus Committee on Organization, Study and Review to measure the effects of the new open meetings requirement may also be of interest. Although there was only a partial response, it indicated not only that a growing number of meetings which had previously been closed were being held in open session, but also that the impact of the requirement was generally considered positive by the Chairmen.

The following question was asked: "Generally, how would you describe the impact of the rule upon the activity of the Committee/Subcommittee?" Approximately 43% of the responses indicated a favorable impact, ranging from "acceptable" to such observations as "Members and staff better prepared," "safeguards 'the public's right to know'", and "significant and far-reaching effects." 49% saw only a slight impact on the Committee.

Also significant was the response to a question asking what the most negative aspect of compliance with the rule has been. 43% reported that they could discern no negative effect. 24% failed to answer the question. Only 12% of those replying indicated some delay may have been caused, and only about 10% implied that compromise was hindered by the new rule.

In general, I think the response to the Hansen questionnaire indicated support for open meetings and demonstrated that Committee deliberation can and does work when done in open session. The big plus of course is that the public has greater access to elected officials and can view actual bill writing sessions. As should be the case, the public has access to virtually all of the bill writing process.

There are two provisions of S. 260 relating to committee procedure that I would particularly advocate, as well as the general open meetings provisions. These are the transcript requirement and some provision for enforcement.

I am not familiar with the requirements for keeping meeting transcripts in the Senate, but in the House there is no requirement that committees keep transcripts of meetings. Each committee is directed to keep a complete record of all committee action which is to include a record of the votes on any motion on which a record vote is taken. These are required to be available for public inspection and certain information regarding a description of the vote is required.

However, there is no requirement that there be a transcript of any meeting. A check with some of the House committees indicated that each has set its own policy. Some keep transcripts of all meetings, some have transcripts of some meetings, some have only official minutes, some transcripts of open meetings are available to the public, and some are available only to Members.

I think an accurate and full record, available to the public even though the meeting was open to the public, should be required. I also strongly support the requirement for public access to edited transcripts of closed meetings, but do not think the requirement should be limited to closed meetings.

The second provision which I think is key is that dealing with enforcement. It is necessary that there be some right of appeal when decisions are made to close certain meetings or a portion thereof, or to delete portions of transcripts when a significant number of Members feel that should be done. The Select Committee on Meetings proposal, although difficult from a practical standpoint, is the best solution proposed that I have heard of and should be retained.

With respect to the separate provisions regarding House and Senate committee meetings, it appears that although both sections were identical when the bill was originally introduced, changes made in the section regarding Senate meetings—as printed in the Committee Print which I have—were not made in the corresponding provisions regarding House meetings. A quick check indicates 14 such differences. For the sake of uniformity, I think the corresponding provisions should be, to the greatest extent possible, identical, although I understand that each House must work its will on its own procedural rules.

One other point should be raised with respect to the section regarding House proceedings. In the present House rules, meetings for the transaction of business are treated separately from hearings. In S. 260, however, they are treated jointly, and only one House rule is amended, that which now deals with hearings. Since provision is made under Section 104 (1) that provisions of the bill will supersede other rules to the extent that they are inconsistent therewith, it may be the bill's intent to consolidate the House rules by indirectly nullifying other existing and pertinent rules. I think the provisions should be consolidated and the Committee Reform Amendments of 1974 now pending in the House would make that change. I raise the issue only because the present treatment in S. 260 is not clear to me, and perhaps some clarifying change should be made. Here again, though, the necessary changes can and will be made in the House.

Certainly if the deliberations of the House and Senate committees are to be open to public scrutiny, deliberations of executive agencies should be equally accessible.

In reviewing the provisions of Title II regarding executive agency meetings, several suggestions occur to me.

First, Section 201(a) provides that "all meetings (including meetings to conduct hearings) of (a quorum of the members of) such agencies or a subdivision thereof authorized to take action on behalf of the agency *at which official action is considered or discussed* shall be open to the public."

Presumably, agencies meet only for conducting official business. The presumption is made with respect to House and Senate committee meetings where no distinction is made regarding meetings held to conduct official business. The distinction with respect to executive agencies could be construed to indicate the intent of Congress that some agency meetings are not required to be open. For uniformity, and to eliminate the possibility of misinterpretation, it would seem advisable to delete the language regarding official action, and simply provide that "all meetings shall be open."

Second, with respect to the exemption in Sec. 201(b)(5) regarding trade secrets, the provision affecting executive agencies is far broader than that affecting congressional committee meetings. The section regarding agencies requires that only one of the three requirements be met, while the section which applies to congressional committee meetings requires that all three requirements be met. The exemption probably should be uniform in all three instances, Sec. 101, Sec. 102, and Sec. 201. Furthermore, there appears to be a manifest conflict in the three criteria which must be met. If a Federal statute requires the information to be kept confidential, no further criteria should apply.

I would also like to see the exemption for meetings for the disposition of a case of adjudication deleted. Such meetings to reach decisions on matters which have been considered in hearings would seem analogous to congressional markup sessions. It seems to me that this would be the point where accessibility and openness is most important—the deliberation of the agency members and the decision making itself. As I understand subsection (e), the entire transcript of such meetings would be available, since no authority is given to delete

portions. This is better than allowing the meeting to be closed and the transcript edited, and while I believe the objective of openness would better be served by eliminating the 201(b)(6) exemption, I recognize the effort in this section as a compromise to meet practical, operational objections which have been raised.

I strongly support the provision regarding *ex parte* communications. This is an issue which I have been concerned with since 1960 when I first introduced legislation entitled the "Agency Hearing Standards of Conduct Act." That bill proposed a mandatory requirement that all communications with an agency, direct or indirect, regarding matters adversary in nature, be made openly and as a part of the agency proceeding in question. As proposed, it would have applied to all agency hearing proceedings which by law are subject to notice and opportunity for hearing. After notice of hearing, it would have been unlawful for any agency employee connected with the case to permit, entertain, or consider any interview, argument or communication concerning the case except through official hearing procedures. Any such attempts would be required to be disclosed as S. 260 requires. Although hearings were held in the House Judiciary Committee in 1960, no further action was taken.

Mr. Chairman, the Congress and the Executive Branch exist for the people. Our business is their business, and it must be conducted in full public view. The "Government in the Sunshine Act" should be enacted so that business will be conducted openly, and confidence in the integrity of the government restored.

Senator CHILES. Our next witness will be John Gardner, former Secretary of HEW, and chairman of Common Cause.

Mr. Gardner and Mr. Cohen, we are delighted to have you both here today and we want to just say at the outset how much we appreciate the help that Common Cause has given us. I think the workshop that we had in conjunction with Common Cause on this bill certainly was very beneficial in the redraft of the bill and giving us a chance to come together with some people from the executive branch as well as the legislative branch and get some kind of feeling of the problems that could be legitimately raised—the fears and everything else across the board. It certainly helped very much, I think, in our understanding of the legislation.

We also are indebted to you for your efforts in the little sunshine victory that we had in the budget act. I wish we could say that that vote would be the same vote on the sunshine bill but I guess we do have to realize that the new Committee on the Budget that that bill created did not have a named chairman and the amendment did not affect all of the existing committees and chairmen, and so perhaps that was a different set of circumstances. But certainly, it was a positive step and we now have, as we were noting yesterday, some 60 Members in the Senate who have expressed themselves in one form or another as being for sunshine. We think that this is a habit that will grow and Common Cause is helping it to grow.

TESTIMONY OF JOHN GARDNER, CHAIRMAN OF COMMON CAUSE, WASHINGTON, D.C., ACCOMPANIED BY DAVID COHEN, EXECUTIVE VICE PRESIDENT

Mr. GARDNER. Thank you, Mr. Chairman.

I have with me David Cohen, executive vice president of Common Cause.

I am greatly honored to have the opportunity to appear before this committee and I must say I am honored also to appear following

Governor Askew and Dante Fascell, two of the ablest public servants I know.

Mr. Chairman, you yourself have exercised very impressive leadership in the struggle to open up the political and governmental process and in my judgment, it is an historic step. It is an idea whose time has come. I am convinced that from here on in we are going to see steady movement and Common Cause is going to do all that it can do to nudge history along.

We commend the initiative of the committee in considering the significant advances in open government contained in S. 260. And we do urge that strong legislation be passed in this session.

Recent public opinion studies reveal that the Nation's Government has lost the respect and confidence of the vast majority of citizens. Lou Harris, who is going to testify, may comment further on that. It is not really surprising. Citizens have seen corruption at all levels of government. They have seen big money buy political favors. They have learned that they do not have access to their own Government. To most of them, Government is remote, unconcerned, and ineffective.

How can we rebuild the confidence of the American people in their own political and governmental institutions? One sensible way would be to make those institutions worthy of their confidence. If we are to accomplish that, the key word is accountability. We have seen grievous abuses of power, but the problem is not power as such; the problem is power that cannot be held accountable. We need to strengthen those instruments of accountability which now exist and devise new ways of making Government more responsive.

The two basic obstacles to accountable Government are money and secrecy—the scandalous capacity of money to buy political outcomes and the old, bad political habit of doing the public business in secret. You are concerned in these hearings, of course, with the latter of the two problems.

SECRECY

Citizens associate the phrase "government secrecy" with the most sensitive issues of national security. But most Government secrecy has nothing whatever to do with national security: it touches every field of Government activity—agriculture, commerce, taxation and so on—and has infected State legislatures, county boards of supervisors, school boards, the Congress of the United States and the executive branch of the Federal Government. Many politicians and bureaucrats just do not like to do the public's business out in plain view of the public.

Governmental secrecy takes many forms. Too much of the legislative process still occurs behind closed doors, particularly in the Senate. Executive departments still resist legitimate citizen efforts to obtain information. Documents by the thousands are classified without regards to established criterion or the public right to know. There is inadequate disclosure of the financial holdings and activities of public officials. Claims of executive privilege make a mockery of the constitutional powers of Congress to obtain the information on which to base sound legislation. Regulatory agencies are often unduly

protective of data supplied by regulated industries, and often meet in secret to set rates and make other decisions affecting millions of Americans. And most special interest lobbies operate out of view of the public, thanks to loophole-riddled lobby disclosure laws.

Secrecy is fatal to accountability. Citizens cannot hold government officials accountable—if they do not know what government officials are doing. All the great instruments of accountability that the citizen must depend on—Congress, the courts, the electoral process, the press—may be rendered impotent if the information crucial to their functioning is withheld. Thus, does secrecy perpetuate abuses of power, diminish the responsiveness of government and thwart citizen participation.

A decision by the House Democratic Caucus only 13 days ago illustrates the kind of abuse which secrecy facilitates. Under heavy pressure from specal interest lobbyists, the caucus voted to derail a comprehensive plan to reorganize the House committee system. Opponents of the plan succeeded in getting the caucus to vote by secret ballot. Even the vote on whether to have a secret ballot was unrecorded. The caucus then voted 111 to 95 to send the measure to a review panel—a maneuver many observers saw as effective defeat of the plan for this session. And the constituents of Democratic Caucus members were denied knowledge of how their representatives voted on a crucial issue.

SECRECY IN REGULATORY AGENCIES

The secrecy which veils the activities of regulatory agencies warrants a special note. These agencies make decisions which affect all Americans in specific ways, from the quality of television commercials to the price of gas and electricity. Yet, there is remarkably little public scrutiny of what goes on inside the agencies.

The Federal Power Commission exemplifies the problem. It is no secret that the industries regulated by the FPC have played a role in the Commission's membership and decisions. Effective public scrutiny of the FPC is the obvious countervailing force. But not surprisingly, the Commission has moved to minimize such scrutiny.

Last May, for example, the Senate Antitrust and Administration Procedures Subcommittee tried to obtain the reports on natural gas reserves which 79 gas producers had submitted to the Federal Power Commisson. The reports were needed to determine whether well-head gas prices should be deregulated; but the FPC claimed that the reports, which it uses in setting gas prices, were confidential and refused to release them. Critics charge that the gas producers underestimate how much natural gas is available, and thereby induce the FPC to set higher prices. Given the FPC's devotion to secrecy, such charges can never be publicly tested. Responsible outside evaluation of producers' estimates and FPC action becomes impossible. Not only does the FPC keep reports on reserve secret, but it was disclosed last fall that a Commission official ordered the documents destroyed. This was prevented, not by a concern for the public interest, but by a temporary shut down of the Arlington incinerator.

Additional evidence of the need for openness comes from the Interstate Commerce Commission. The industries it regulates have

devised several ways of influencing the Commission's decisions. There is evidence that Commissioners have been cleared by industry executives before being officially nominated for the post. Industry has been adept at tempting Commissioners with lucrative positions after they leave the ICC. Twelve of the last 17 Commissioners to leave have accepted positions with a company regulated by the Commission. Industry executives have also taken high posts within the ICC. Campaign money from industry has flowed into the campaigns of key Congressmen on ICC oversight committees. In 1973, 16 industry groups rented desk space at ICC to keep track of hearing decisions, rate changes, and policy information.

Agency secrecy makes it extremely difficult for the citizen-consumer-taxpayer to counter the behind-the-scenes influence of the industries being regulated. The ironic thing is that Government secrecy is no problem for the special interests: They have ways of knowing all that goes on. The only ones left in the dark are the citizens.

OPENNESS WORKS

Opponents of open Government talk constantly of the innumerable problems that would result from public meetings and full citizen access. But these objections simply do not stand up against the overwhelmingly positive experience of legislative committees in Congress and around the country which have opened their proceedings. These committees have shown that openness works, and that rather than impeding business it promotes better discussions and more responsive action.

In 1973, for example, the House of Representatives reversed its long-standing tradition of doing its business behind closed doors. Dante Fascell played a very significant role in bringing it about. The House opened over 80 percent of its bill-drafting meetings to the public in 1973. This openness did not impede the committees' work, nor did it force committees to do their real business outside the meeting room as opponents of public meetings had contended. Additional information on House committee practices under the open meetings rule is contined in appendix I.

Mr. Chairman, I would like to say that we are submitting a rather substantial set of appendices[1] here and appendix I contains very interesting data on the experience to date.

Three Senate committees regularly hold open markup sessions, and the committee members who have given us an evaluation are generally pleased with the results. Senator Thomas J. McIntyre, Democrat from New Hampshire, for example, wrote "Frankly, I was quite skeptical and reluctant to support open markup last year but on the basis of my experience in the Senate Banking, Housing and and Urban Affairs Committee, my own attitudes have changed in favor of the additional openness in the committee and I am now persuaded that this is an appropriate and useful procedure." This statement was in response to a Common Cause inquiry on the effect of openness in the Senate. The responses we received are contained in appendix I.

See pp. 76–129.

The experience in State legislatures across the country attests to the feasibility and value of open committee meetings. The Federal Government is far behind the move toward openness which has touched almost every State capitol, a movement which Florida has led. Most State legislatures now have open meeting requirements, and Common Cause has identified 17 States which have taken significant steps in this direction over the last 18 months alone. State legislators have repeatedly noted that open committee sessions are generally more orderly, well-attended, responsive, and characterized by a higher level of debate. A review of State open meeting statutes and some assessments of their effect are contained in appendix 2.

THE SUNSHINE ACT

The Government in the Sunshine Act is designed to establish the principle of openness in the affairs of the Federal Government. It is the most comprehensive antisecrecy measure to come before Congress since the Freedom of Information Act of 1966. The obligation of Congress to pass this legislation is crystal clear. The public, through the polls, has declared its disgust with the present state of politics and Government. It awaits some sign from the politicians that they sense the trouble they are in.

There are several provisions of the bill that are particularly important. The bill establishes a presumption of openness in meetings of Congress and regulatory agencies, requiring a majority vote (in open session) to close the meeting—and then only if certain exemptions apply. It guards against the customary abuse of "national security" as a justification by defining this exemption in specific terms. It establishes thorough review procedures to prevent violations.

The provisions on ex parte communications in regulatory agencies have major significance. Such contacts are prohibited during on-the-record agency proceedings, and the bill requires that communications which violates this ban be entered in the public record. This will disclose and help prevent attempts by outside parties to influence agency decisions. We in Common Cause believe the prohibition should apply once a petition is filed with the agency instead of at a time the proceeding is noticed for the hearings on public comments.

There are two other problems which we urge the committee to consider. First, only agencies with "two or more members" are covered by title II. This applies almost exclusively to regulatory agencies. It exempts all executive departments and agencies within the Executive Office of the President, such as the Council of Economic Advisors, Council on Environmental Quality, and OMB. We recognize the difficulties in extending the bill's applicability to other executive agencies and departments. It is a very difficult thing. Nevertheless, we urge the committee to explore the possibilities along these lines.

Second, the bill applies to agency meetings "at which official action is considered or discussed." Taken literally, this could mean that telephone conservations, casual discussions over lunch, or chance

meetings in the coffee room must be publicly announced, open to the public, and transcribed for publication. Abundant experience with such legislation at the State level suggest that the problem could be solved by a more specific designation of the kind of meetings covered by the bill. It could apply, for example, only to those agency meetings "at which official action may be taken or at which decisions regarding such acts may be made." This exempts informal meetings at which official matters are merely discussed. It also has the important effect of requiring that all official acts and decisions must occur in open meetings. The public will be able to ask in regard to any agency action: "At what open meeting was this decision made?" If no such meeting was held, the action could be illegal and rendered null and void.

LOBBYING DISCLOSURE

Mr. Chairman, I would like to address myself briefly to a second subject which is lobby disclosure, and as some of Dante Fascell's remarks indicated, it is intimately related to the whole issue of openness. If you care about openness in government you have got to care about lobby disclosure. Once again the problem is secrecy and a breakdown in accountability.

Lobbying plays a legitimate and often valuable role in American politics. Professional lobbyists frequently provide legislators valuable and useful assistance in research and drafting. Often they serve as important ombudsmen, letting Congress, the President, and executive branch officers know what their clients are thinking, how Government programs are working, where adjustments need to be made and injustices remedied. Lobbying also provides a vehicle for interest group representation completing the geographical representation assured by the structure of Congress.

Yet, in the minds of most citizens what began as a constitutionally guaranteed right "to petition the Government for a redress of grievances" has degenerated into the sleazy art of manipulating Government affairs outside the proper channels of accountability. The description is surely unfair to many lobbyists, but fair or not, the all-too-frequent under-the-table deals, secret payoffs and slick con-jobs have given lobbying a bad name. And the bad name will be perpetuated—deservedly—as long as so many lobbies operate secretly and use money in ways that corrupt the public process.

THE PRESENT LAW

Information about the receipts and expenditures of lobbyists is supposed to be provided by the Federal Regulation of Lobbying Act of 1946. But the law is almost totally useless. It is a sham and a hoax. It is encumbered by ambiguities and loopholes and impossible to enforce. It applies only to lobbying of the legislative branch, although some of the most effective and surreptitious lobbying today is practiced on executive agencies. The scant information which lobbyists do report is often preposterous. Huge discrepancies exist between a lobby's elaborate activities to influence legislation and the modest expenditures actually reported. Some organizations which

lobby extensively report no expenses at all. Some do not even bother to register. Anyone innocent enough to believe the official lobbying report would form a bizarre and misleading impression of modern lobbying practices.

For example, the National Association of Manufacturers spends enormous sums mobilizing grass roots business pressures on Congress. This involves a countryside communications network through which member corporations and businesses are urged to contact their Congressmen on key issues. NAM's 1972 filing with IRS indicates that over $2.5 million was spent that year on numerous items—staff, research, printings, mailings, telegraph, and so forth—related to this kind of lobbying. Yet, the organization does not even file a lobbying report under the present law.

Common Cause has compiled numerous illustrations of this problem, many of which are cited in appendix 3.

NEED FOR DISCLOSURE

Our emphasis is not on prohibition of lobbying activities, but on their full disclosure. This can only be accomplished by a new lobby registration law, and by a new executive branch program for logging lobby contacts. Most of the abuses can be traced to the secrecy which hides lobbying from public scrutiny.

The root problem is secrecy. It enables lobbyists to offer lucrative favors and deals which border on outright bribery. It enables lobbying organizations to spend large sums to generate constituent mail to Congressmen without disclosing either the practice or the cost. It makes it easy for special interest representatives and public officials to maintain cozy relationships beneficial to each. It conceals the aims, expenditures and financial backing of lobbyists. It creates suspicion even where suspicion is unwarranted, and erodes public confidence in the integrity of Government. And perhaps worst of all, it makes it impossible to hold public officials accountable for their part in the lobbying game. Without the complicity of those being lobbied, the undue access and influence of certain individuals and groups would evaporate overnight.

INGREDIENTS OF REFORM

A new lobby disclosure law is needed and I would here acknowledge some very good work of Senators Kennedy and Stafford in working toward such a law. In the judgment of Common Cause, the new law would involve the following ingredients.

First, a broad definition of lobbying which embraces all forms of communication with members of the legislative or executive branch to influence legislation or other official actions. It should cover individuals and organizations which lobby directly, solicit others to lobby, or employ lobbyists so long as they either receive or spend over $100 during a calendar quarter. Exemptions for the media and Government officials should be allowed.

It is important that the legislation apply to those who lobby in relation to their employment, even though they are not specifically hired as lobbyists. This is a gigantic loophole in the present law.

Last year, for example, executives in some of the Nation's largest corporations were involved in a highly-coordinated lobbying campaign for Federal funding of the bankrupt Northeast railroads. They personally visited numerous Congressmen in this effort, and General Motors executive met privately with Transportation Secretary Claude Brinegar. The law does not cover this sort of "incidental" lobbying by corporate executives, so none of their activities or expenses were reported.

Second, lobbying of the executive branch should be covered by any new legislation. The present law applies only to lobbying of Congress, as do the other proposals before this committee. This is a glaring inadequacy—some of the most effective and secretive lobbying today involves personal contacts by special interest representatives with officials in executive departments.

The now famous milk deal of 1971 illustrates the point. The dairy lobbyists were under no requirement to report their private sessions with administration officials. Had such requirements existed, it is doubtful that these officials, the President included, would have been so cooperative or so accessible.

The kind of requirements needed to disclose lobbying of executive agencies are illustrated in appendix 4, which is a model Common Cause regulation on lobbying submitted to the new Federal Energy Administration. The regulation would also require FEA officials to log all communications and written material from lobbyists in a public record. Such logging should be a basic requirement for all executive departments of the executive branch of this Government.

Third, comprehensive disclosure requirements should require lobbyists to report, among other things, the source and amount of their income, itemized expenditures, the names of officials they have contacted, the actions they have tried to influence, and what they have given or loaned to public officials in money, services or other favors.

One only has to look at the reports filed under the present law to appreciate the need for tighter disclosure provisions. For example, the American Retail Federation, after engaging in very extensive activities to defeat a bill that would have reformed the billing practices of credit companies, reported spending a total of $6,350 for the year during which this campaign was waged. There was no useful itemization of how the money was spent.

It has been argued that strict disclosure requirements impose unrealistic burdens on the lobbyists who have to comply with them. Our own experience totally refutes the argument. Common Cause has had little difficulty in filing detailed lobbying reports on the Federal level or in the 28 States where our lobbyists have complied with State statutes. Our experience in these States is reviewed in appendix 5, which also contains a brief on constitutionality of disclosure requirements.

Fourth, the new bill should contain strong enforcement provisions. Such provisions are needed if the new law is not to become as laughable as the present law. Effective enforcement requires an independent agency with ample enforcement powers. The Federal Elections Commission provided for in the campaign reform bill passed by the Senate is a good example. If such a commission is established,

it should have the responsibility of also enforcing lobby disclosure requirements. Whatever enforcement body is designated, it should have the power to investigate possible violations, to issue subpenas and take depositions, to initiate court actions and to prescribe regulations. It should be required to publish the information reported in lobbying statements.

Mr. Chairman, that constitutes the extent of my testimony. I want to say again that I believe you are engaged in a historic enterprise, and I think the time has come when it will move.

Thank you very much.

Senator CHILES. I want to tell you how much I appreciate your statement and your help, as we said earlier, and the work that you have done, and the submission you made to use in the appendix is certainly going to be very invaluable to use and it helps very much I think in building our record for this and it certainly is going to be an asset to the committee.

I want to tell you how much I appreciate your work in doing that, your work in this regard.

Senator PERCY. Mr. Gardner, I want to join Senator Chiles in expressing our deep appreciation to you and to Common Cause. I think you have been of inestimable help in providing citizen support for those of us here who believe that opennness is in the general interest.

Because of the grave importance of the impeachment process, I wonder if you could give us your feelings as to whether or not the proceedings which may take place in the House and the Senate should be opened up to the public through controlled use of media. I am not saying open to the glare of lights and cameras and the confusion that surrounded the Watergate hearings, but if it were properly done and properly controlled, so that we were not conscious of the media being present and the atmosphere and serenity were retained. Could you give us your views as to how much of the proceedings of both the House and Senate you feel should be opened up to the American public?

Mr. GARDNER. Well, Senator, first, let me say that we are grateful for the very strong antisecrecy stand that you have taken over and over again on all of the matters that I have testified on.

In response to your question, Common Cause feels very strongly that there should be maximum openness in the Senate proceedings and the House proceedings with respect to impeachment to the extent that the proceedings go to the full House and to a Senate trial. We have not taken this position impulsively. As you know, we have been studying the effect of openness for 4 years now. We have seen it in all kinds of situations. Thanks to the astonishing record built by the State of Florida where the proceedings of the legislature are televised and just about everything done is out in the sunshine, we have a very good idea of how open government functions.

There have been other opportunities to observe the effects of openness and in fact, the Cassandras have been consistently wrong. All through the battle for openness from the very beginning it has been said that this will result in tumultuous and demagogic proceedings; but the plain fact, as demonstrated just about every

time it has been tried, is that it leads to greater sobriety, greater prudence, a sense on the part of the lawmakers involved that they are on public view and on public test.

Now, all of that is by way of clearing away some negative comments. I must add a very positive reason. We have clearly the task of resolving the charges that have been made with respect to the President's conduct. That must be done fairly, it must be done expeditiously and lawfully. But we have another task that we must face sooner or later and that is to heal the terrible skepticism of the American people with respect to their own processes. Sooner or later we are going to have to face the kind of deep loss of confidence that has occurred. And it has struck us that an open process, one in which the American people can see their own processes working, would be a step in that direction.

Senator PERCY. Thank you very much, indeed.

Mr. Chairman, I have some additional questions. I ask unanimous consent that they be sent in writing to Mr. Gardner and that the record be held open for a period of 1 week for his response. In the interests of time this morning I think it would be easier to do it that way.

Senator CHILES. Yes, indeed.

Senator PERCY. Thank you very much.

[The following material was subsequently received for the record:]

QUESTIONS SUBMITTED TO JOHN GARDNER, COMMON CAUSE, BY SENATOR PERCY

Question No. 1. Common Cause is known as the "Citizens' Lobby." In your practical experience, do open business meetings in Congress really give citizens an equal chance to influence legislation, or do open business meetings tend to make special interest lobbies stronger because they are better informed? Is the public really represented in the audience or is it only the special interests that are represented?

Answer. The new open meetings rule in the House has enabled Common Cause to institute a new program "Inside Congress: the Capitol Connection." We have observed the committee process of 10 committees in the House and 3 in the Senate on a continuous basis. It enables us to report to our members the committee practices of their Representatives and Senators. The people who observe these committees for Common Cause have noted that all interests are represented in the audience—public interest groups, special interest, the private citizen and the press. Open meetings make better informed participants of all those who have an interest in the functioning of our government. However, the information access is secondary to the importance of the rights of citizens to know how decisions are made.

Question No. 2. I have seen the Common Cause survey of House Committee meetings. It shows that in 1973, 3 of the most important committees of the House—Appropriations, Armed Services, and Ways and Means—conducted many of their meetings in closed session despite the openness rule in the House. How can we guard against that happening in the Senate in the future?

Answer. The most recent Common Cause report on secrecy in the House Committees indicates that the Ways and Means Committee has made tremendous strides towards openness in the second half of the 93rd Congress. Our records show that the committee has, since the first of the year, conducted open mark-up sessions on legislation dealing with pension reform, windfall profits in the petroleum industry, tax reform, tariff exemptions, the Renegotiations Act and the public debt ceiling. In the Budget Reform Act of 1974 the Senate under your leadership, Senator Percy, provided that the rules of the Senate Budget Committee contain an open meetings rule similar to the House rule but which provides for the possibility of closed sessions only when dealing with legislation in limited areas. This is even a stronger protection than the House has and one that should govern all Senate Committee meetings.

Question No. 3. Has Common Cause done a similar survey for Senate Committees? Certainly the Government Operations Committee would score almost 100%, but how have other Committees of the Senate done on voting their business meetings open?

Answer. We have observed the proceedings in the Senate Government Operations, Interior and Insular Affairs, and Banking and Housing Committees, however we have not compiled any such survey. These three committees have a rule which presumes openness and obviously leads the Senate in anti-secrecy action. There have been occasions when committees and subcommittees of the Senate have had open mark-up on specific legislation. The Senate Commerce Committee recently held an open mark-up on the proposed Resource Conservation and Energy Recovery Act.

Question No. 4. In your testimony (p. 9) you suggest that the scope of Senator Chiles' bill be broadened to require open policy meetings of "line" Executive Departments and Agencies, as well as Regulatory Agencies and commissions. How could this be accomplished in practice? We can't very well open a Cabinet Officer's door to the public, can we?

Answer. We recognize the practical problems in extending the bill's open meetings requirements to single-member agencies and departments. Our main concern is that the decision-making process in these agencies be made open to public scrutiny and participation, and we urge the Committee to consider ways of accomplishing this through S. 260. For example, the legislation could require that only certain kinds of policy-making meetings in the Executive Departments should be open. This could even entail the creation of a special public forum within the departments where various policy questions would be routinely discussed and decided upon.

Question No. 5. In the Congress, the meetings most often closed are those of Conference Committees, which often are the most crucial in shaping legislation. We discovered in the FEA conference that the House conferees were reluctant to open the conference to the public even though they conduct all their regular Committee business in public. However, we encountered no such reluctance on the part of the House conferees on the Budget Reform bill when we moved to open that conference, but there again the first meeting had been closed by force of habit. Would you agree that it should be incumbent upon us to try to open every conference committee that we serve on?

Answer. The conferees in the FEA conference established a historical precedent in having the first open conference. We are urging that the public have access to the entire legislative process and this would definitely include conference committees.

Senator CHILES. Thank you all very much for your testimony. The newspaper articles and the appendixes to your statement will be inserted in the record.

Mr. GARDNER. Thank you, Senator.

[The newspaper articles and the appendixes referred to follow:]

[From the Albany, Ga., Herald, January 29, 1974]

THREE HOUSE COMMITTEES BLASTED FOR SECRECY POLICY

Washington (AP)—Georgians serve on three House committees which have been criticized for maintaining a policy of secrecy despite an open-meetings rule.

Common Cause, a watchdog organization here headed by former Department of Health, Education and Welfare Secretary John Gardner, said the House committees have continued their tradition of closed "mark-up sessions," or meetings in which legislation is drafted.

The committees cited by Common Cause were Appropriations, Ways and Means and Armed Services.

WORST RECORD

Most strongly criticized was the Appropriations Committee, which Common Cause said is "among the most secretive in Congress" and has one of the worst records."

Sixth District Rep. John J. Flynt Jr., a ranking Democrat on the committee and an influential member of its defense appropriations subcommittee, defended closed sessions.

"I don't think any other system would work," said the Griffin congressman. He justified closed sessions on two grounds: time and national security.

"It's not that I have any objection to open meetings per se. But if we opened them all up, we'd have no security."

Third District Rep. Jack T. Brinkley of Columbus said he felt the same way about the Armed Services Committee. Security precautions were the most frequent reason for closed meetings, he said.

Ninth District Dep. Paul Landrum is a ranking member of the Ways and Means Committee.

Common Cause additionally cited the Ways and Means Committee for failing to vote publicly on holding closed drafting sessions, despite a requirement in the anti-secrecy rule that this be done.

Common Cause did have praise for some House committees in its report Monday. It was especially complimentary toward the House Commerce Committee, which claims Eighth District Rep. W. S. "Bill" Stuckey among its members and which was active in the second half of 73 on energy matters.

[From the Oregonian, Portland, Oregon, February 1, 1974]

HOUSE LESS SECRET

The open meetings rule for committees and subcommittees engaged in drafting bills adopted by the House of Representatives in March, 1973, resulted last year in opening almost 80 per cent of such meetings. But the Senate clings to its tradition of such meetings closed to the public. Thus reports Common Cause, the "people's lobby," after a survey.

Hearings on bills after these have been drafted and introduced usually have been public. But before the 1973 rule was adopted, only the House Interior and Education and Labor committees were accustomed to do their bill drafting, called "mark-up," with the doors open. Some House committees now are open at all sessions, but some are not. The greatest numbers of secret meetings (which must be voted in open session) were held by Appropriations, Ways and Means, Agriculture, Armed Services, House Administration and Interstate and Foreign Commerce.

There are some legitimate reasons for calling closed meetings in the process of drafting legislation, but these should be few and adequately documented. The improvement in openness in lawmaking—clearly the business of the people—is welcome. But the House has a way to go, yet. And the Senate remains a fortress of secret power. Citizens and their lobbies should keep the pressure on. It is their right to know what makes their elected officials act as they do.

[From the San Antonio Evening News, San Antonio, Tex., February 4, 1974]

SENATE HAS ITS OWN 'PRIVILEGE'

Some senators who fume about President Nixon's use of "executive privilege" and who complain about White House secrecy should look closer at Senate rules and practices.

"Senatorial privilege" surfaced recently in relation to two Florida grand juries' investigation of Sen. Edward J. Gurney's political fund-raising practices.

Gurney has pledged full and open cooperation. But Senate rules are complicating that. Florida prosecutors subpoenaed Mrs. Alfhild Michal, a Gurney aide, to testify and asked her to bring certain records and documents, which were not subpoenaed.

Under Senate Rule 30, no senator, or Senate employe can testify about Senate business or provide evidence from Senate files without approval of the Senate.

A Senate resolution authorized Mrs. Michal to testify, but specifically forbade her to take the requested documents, pending a detailed subpoena.

Unless a new, broadly drawn resolution planned by Gurney is approved by the Senate, separate approval will be needed for each request for testimony and documents.

So the Senate has its own brand of privilege which can be used to withhold testimony and evidence.

There is another matter of senatorial secrecy. While the House of Representatives now mostly writes legislation in open session, the Senate clings to secrecy.

Common Cause reports that almost 80 per cent of all House committees and subcommittees have opened their bill "drafting meetings" to the public.

Secrecy continues to govern all but a few committees in the Senate, which has refused to adopt an anti-secrecy rule like that in the House.

It is fine that senators are outraged by White House efforts to withhold material from the public. But this will smack of hypocrisy until the Senate opens up more of its own business.

[From the Flint Journal, Flint, Mich., February 5, 1974]

ANTI-SECRECY POLICY GAINS

Although there is cause for disappointment and resentment at the failure of Congress to follow through on reform of government operations, the positive steps taken deserve recognition.

The most shining example of reform arising from current disenchantment with government is the record made by the House of Representatives in its new policies dealing with open committee meetings.

In sharp contrast to the Senate's complete failure to respond to demands for less secrecy in its operations, the House last March adopted an anti-secrecy rule covering all House committee and subcommittee meetings for bill-drafting. Although far short of a total open meeting rule, it did require that a recorded vote be taken by the committee before it could go into closed session.

Common Cause, the people's lobby organization, has released a survey it took covering House committee meetings dealing with writing legislation during 1973. The results are impressive. Almost 80 per cent of all House committee and subcommittee sessions were open.

The anti-secrecy rule was adopted after a campaign by Common Cause and other citizen groups which emphasized the right of the people to know what is done to legislation in committee. Prior to the adoption of the new House rule, only the House Interior Committee and the Education and Labor Committee had held open meetings while drafting legislation. (Most "hearings" to obtain information have been public in both the Senate and House.)

Although the House record is impressive, there are serious flaws in the record. One is that three key committees—Appropriations, Ways and Means and Armed Services—have the poorest records in the House. The poorest record of all was Appropriations which had only one open session of 19 reported meetings and that one dealing with budget generalities. Furthermore, two of these committees were among the worst offenders in taking advantage of a loophole in the new rules.

Under the rules, committee members must vote in open session to close a meeting, but they permit one vote to cover a succession of meetings providing they deal with the same bill. The Ways and Means Committee took one vote in June to close 36 mark-up (bill preparation) sessions on trade reform that stretched over more than three months. Armed Services took three votes for 10 closed sessions. Although there were 168 closed sessions of committees and subcommittees in 1973, there were only 71 separate votes to close meetings.

On the other hand, Judiciary, Banking and Currency, Government Operations, Education and Labor and Interior committees all held only open meetings.

This year's experience under the new rule resulted in some clear instances beneficial to the public's right to know while the arguments of the opposition that it would delay legislation to open meetings failed to materialize.

The report should provide strong arguments for the expected push to have the House amend its rules sufficiently to make holding of closed sessions even more difficult and another campaign to persuade the Senate to adopt similar rules.

[From the Washington, D.C., Roll Call, February 7, 1974]

COMMITTEE SECRECY DOWN

The House committee system has conceded grudgingly to a new anti-secrecy rule passed during the early days of the 93rd Congress, by closing only 30% of its bill drafting sessions in full committee and only 15% of its mark-up meetings in subcommittees in 1973—a drop of 8 to 11 percent from previous Congresses.

Of 808 legislative mark-up sessions, which were held after March 7, 1973 when House Members approved a reform measure calling for open mark-up and voting sessions, House committees opened 245 of 352 meetings (or 70%) and subcommittees opened 395 of 456 sessions (87%), according to a survey by Common Cause citizens today.

The Common Cause survey is based on information supplied by House committees which are required under Congressional rules to report all meetings to House officials for publication in the Congressional Record, but does not include all committee business sessions. Traditionally, business meetings, which include discussion and organizing in addition to mark-up and voting of bills are open.

The House figures, compared to overall percentages from years in which all committee business sessions were counted, may set a new level of openness on Capitol Hill. In the 92nd Congress, for example, the House and the Senate came under the 1970 Legislative Reorganization Act which was intended to open up public business at the federal level, but closed 38% of all committee meetings. In the 89th through 91st Congress, closed sessions ranged from 39% to 41%.

In the past, the House held closed mark-up sessions unless a committee voted to open them. The new rule requires a recorded vote in committee to close sessions. And the result appears to place the House ahead of the Senate which rejected a similar anti-secrecy vote last year, although it claimed a more open committee system in previous years.

The anti-secrecy rule also provides voters with their Representative's position on key matters. But, the survey found, three key House committees continued to hold bill drafting sessions behind closed doors; while most House committees are conducting business in the open. Here's a breakdown:

- The money-powers of the House—the Ways & Means and Appropriations committees—held two-thirds of their collective mark-up sessions behind closed doors.
- The House defense arm, Armed Services, closed 11 (of 21) mark-up sessions—all dealing with the committee's major annual legislation, the authorization bill for the Department of Defense.
- Eleven House Committees own perfect records by holding all full committee mark-up sessions in public. Among these were Banking & Currency, Education & Labor, Government Operations, Judiciary, Interior & Insular Affairs, Merchant Marine & Fisheries, Post Office & Civil Service, Public Works, Rules, Science & Astronautics, Internal Security and District of Columbia.
- The House Interstate & Foreign Commerce Committee, which closed 13 of 43 sessions, went behind doors on one proposal: The Northeast Railroad Reorganization bill. Its subcommittee on Transportation & Aeronautics, likewise on the rail bill, accounted for all 19 (of 74) closed sessions held by Commerce subcommittees.
- The House Foreign Affairs closed only one (of 18) mark-up sessions, that on emergency assistance to Israel in early December, but violated the rule by not voting on the record to close the meeting.
- The House Administration Committee held all of its 18 sessions behind closed doors, but committee Members never voted to close the meetings. The House Administration Committee, notes Common Cause, claims it is not covered by the House's anti-secrecy rule because its announced meetings deal with internal budgetary or personnel matters, describing this as "pending business" or "pending legislation."

House Administration, however, will be concerned with campaign spending and public financing bills this month, and therefore would be covered by the House rule.

[From the Publishers Auxiliary, Washington, D.C., February 9, 1974]

SENATE CLOSES MOST COMMITTEE SESSIONS

Washington—In the House of Representatives, open legislation-writing sessions are the rule rather than the exception while in the Senate, much of the public's business continues to be done behind closed doors.

This is the conclusion of a survey taken by Common Cause, a citizen's action group, to determine the effectiveness of an open meetings rule adopted by the House in March 1973.

The survey showed that almost 80 percent of all House committees and subcommittees opened their bill-drafting, or mark-up meetings to the public.

"The open meetings that now characterize the House are in stark contrast to the Senate where secrecy continues to govern the conduct of all but a few committees. The Senate has refused to adopt an anti-secrecy rule like that in force in the House," said Common Cause. The survey results were released at an all-day conference sponsored by the citizens' group on Sen. Lawton Chiles' (D.-Fla.) Government-in-the-Sunshine bill.

Common Cause said despite the House's good record for 1973, the year was less than perfect. A number of major committees—including the powerful money and military committees—continued to do a large portion of their work in private meetings. There was evidence, however, of some signs of opening up, said the group.

Last year was the first year under the new policy when the House reversed its decades-old tradition of doing all of its important committee work behind closed doors.

The House rule requires all committee bill-drafting sessions to be open to the public unless a majority of a committee's members vote, in an open session, to close it to the public.

Common Cause has been monitoring the effect of the rule and found that most bill-drafting sessions, 79.2 percent, complied.

Until 1973 only the House Interior and Education and Labor Committee regularly conducted their business in the open. "Consequently," said the report, "the open-meetings record represents an increase from virtually zero to almost 80 percent of the sessions."

When full committees and subcommittees were compared, the subcommittees had a better record of public sessions, 86.6 of their bill-drafting meetings were open compared to 69.6 percent for full committees.

Among the open session hold outs were some of the most powerful House committees. These included the Appropriations, Ways and Means and Armed Services Committees which closed their sessions from half to virtually all the time, according to Common Cause.

"The anti-secrecy rule did not impede the activities of the House as opponents of the rule had contended it would," Common Cause found. "Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more delay than in earlier years when secrecy prevailed."

The citizens' organization also noted that many sessions were closed without the benefit of a recorded vote as required by the rule.

It praised the committees with perfect records: the Judiciary, Banking and Currency, Government Operations, Education and Labor, and Interior.

The House Foreign Affairs Committee held 17 open meetings and only one closed session when it considered emergency assistance to Israel.

[From the Des Moines Tribune, Des Moines, Iowa, February 13, 1974]

MORE OPEN CONGRESS

In its first nine months under an anti-secrecy rule, the House of Representatives conducted 79 per cent of its committee and subcommittee bill-drafting meetings in public. The rule requires such sessions to be open unless closed by a committee vote in public. Previously, meetings were presumed closed unless the committee voted to open them.

Common Cause, the citizens lobby, surveyed bill-drafting, or mark-up, sessions from Mar. 7, 1973, when the rule took effect, through Dec. 21, when Congress ended its work for the year. Hearings on proposed legislation, traditionally open to the public, were not included in the survey.

Subcommittees held 86.6 per cent of their mark-up meetings in public; full committees conducted 69.9 per cent of theirs in the open. Thus almost a third of full committee sessions were held behind closed doors. The powerful Appropriations, Ways and Means and Armed Services committees met at least half the time in secret.

The survey disclosed that the anti-secrecy rule did not impair the legislative process. There was no significant difference between the number of bills enacted, passed, or reported by the House and its committees in 1971 and 1973, years when each Congress was in its first session.

Unlike the House, the Senate still holds most of its committee proceedings in secret. It rejected an open-meetings proposal similar to the one adopted by the House but approved a rule allowing each committee to adopt rules for open meetings.

Senate leaders expressed concern about "hecklers" in committee rooms and voiced fears of being "swayed by outside sources." The record of the House rule undermines these arguments and makes the Senate's reluctance to insure the public's right to know the public business even more unjustifiable.

[From the Buffalo Grove, Ill., Herald, February 14, 1974]

HOUSE OPENING MEETINGS

(By Bob Lahey, Political Editor)

Growing cynicism on the part of the public toward government may eventually bring about some salutory results in the conduct of the public business.

Since discovery of Paul Powell's shoebox hordes of cash, there has been growing pressure for public accounting of personal finances by candidates for public office, and it is now becoming the rule for candidates to try to outdo their opponents in the frankness of the financial accounting.

Illinois' Open Meetings Law has gone a long way toward preventing elected officials, from park board members to the state legislature, from shutting themselves behind closed doors to conduct the public business.

That same atmosphere is now beginning to seep into the committees of the U.S. Congress, where previously it was the rules that proposed legislation be drafted out of the sight and hearing of the public.

A survey by Common Cause, the self-styled "people's lobby" organization, showed that nearly 80 per cent of all "mark-up" sessions by House of Representatives committees and subcommittees were opened to the public in 1973 after the House adopted a new rule on closed meetings.

While Common Cause claims part of the credit for adoption of that rule, U.S. Rep. Samuel H. Young, R.-10th, gives much of the credit to freshman members of the House, most of whom committed themselves to open meetings as part of their 1972 campaigns.

Both are probably correct. Young pointed out that "the great majority of congressmen elected for the first time in 1972" supported adoption of the open meetings policy. Their commitment to that policy is a reflection of the closer attention being paid to "ethics" and "confidence in government" issues by candidates throughout the country. And Common Cause probably deserves a share of the credit to waking candidates to such issues.

Under the rules adopted last March, committee meetings must be open to the public unless the session relates to issues involving national security. Without the issue of national security, the meetings may only be closed on a record vote of the committee membership. Since national security can only be invoked in limited matters, the onus is on the congressmen to demonstrate their interest in conducting congressional business above board.

Young said he voted against closed sessions of the Interstate and Foreign Commerce Committee on each of the 13 occasions that the committee chose to close its doors. That committee conducted 30 open meetings, while its subcommittees held 55 open meetings and 19 closed sessions.

(U.S. Rep. Philip M. Crane, R-12th, serves on one committee with one of the best records for open meetings, and one with the worst. In 1973, the Banking and Currency Committee conducted all 15 of its meetings in public, and subcommittees did the same. The House Administration Committee, of which Crane is also a member, conducted 18 meetings, all closed, and took no record votes to close the meetings.

(According to Common Cause, the Administration Committee claims it is exempt under a provision excluding meetings dealing with internal budget or personnel matters.)

There has been resistance to the open-meeting policy in some committees, notably two of the most powerful. The Appropriations Committee held only one public meeting, while voting to close 18 others. The Ways and Means Committee conducted 24 open meetings, while closing 40.

Nonetheless, the 80 per cent public meetings was in sharp contrast to the 44 percent of the previous year, and continued pressure from the public can be expected to bring more improvement.

Open meetings could eventually even spread to the Senate, which continues to resist following the House example.

[From the Washington Post, February 14, 1974]

HILL CUTS SECRET MEETINGS

(By Prudence Crewdson, Congressional Quarterly)

For the first time in at least two decades, the number of congressional committee meetings held in secret dropped off sharply last year.

A Congressional Quarterly study shows that only 16 per cent of all 1973 committee and subcommittee sessions were closed to the public and press, compared with 40 per cent in 1972 and similar figures for the past two decades.

The dramatic reduction was largely the result of a March, 1973, decision by the House to require each committee either to draft legislation in the open or take a public vote on whether its proceedings should be closed.

The Senate rejected an attempt by reformers to adopt the same procedure.

The figures reflect the difference. House committees, which used to be more secretive than their Senate counterparts, closed only 10 per cent of their meetings in 1973, while Senate committees closed their doors 23 per cent of the time.

In the House, the powerful Armed Services, Appropriations and Ways and Means committees closed their bill-writing sessions more often than any of the others, although even they were more open than in past years.

In the Senate, the Armed Services, Rules and Administration, and Public Works committees were the most secretive.

Reformers who backed the House anti-secrecy rule are pleased with the results, and although some members and aides remain dubious they seem to be adjusting to the new system.

"Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more delay than in earlier years when secrecy prevailed," concluded Common Cause, the citizen lobby that pushed for the new rule and has been monitoring its operation.

Opponents of the rule had warned that it would encourage members to show off for the press and allow lobbyists to intrude on deliberations.

"If we open up our executive sessions to the public every lobbyist in America is going to be there," said Harley O. Staggers, chairman of the House Commerce Committee.

Now, after a year in which his committee held open mark-ups on such crucial and controversial subjects as petroleum allocation and emergency energy conservation, Staggers thinks that "in some cases, it's been better than before."

But "there are still some cases where closed markups are better," he added. "We wouldn't have had 150 amendments to the energy bill if the lobbyists hadn't been in there."

Ways and Means held closed sessions to draft the international trade reform bill throughout the summer, but later in the year opened up most of its

sessions on pension reform. Social Security and federal debt ceiling legislation.

"I'll be damned if I'm going to spend the next year and a half explaining to my people why I voted against open meetings," James A. Burke (D-Mass.) declared in June, as he reluctantly voted against the Ways and Means majority who closed the trade bill meetings.

As the markup sessions proceeded through the summer, it was no secret that both the free-traders who supported the bill and the labor lobbyists who opposed it had inside contacts who kept them regularly informed.

But Ray Dennison, an AFL-CIO lobbyist, says he always prefers open mark-ups because they equalize things and keep everyone honest.

"Fifteen administration spokesmen were up there inside the committee feeding the administration line . . . and they made statements we knew were false," he charged. Executive branch officials are allowed to attend closed markups to provide technical assistances.

Al Ullman (D-Ore.), who temporarily replaced the ailing Wilbur D. Mills (D.-Ark.) as the committee's chairman in July, contends that the officials were there to represent "the public interest"—not to lobby. "I would rather have in-depth, competent staff and open meetings, but on trade we didn't have that," he said.

"The idea is to equalize access to information," says Common Cause vice president David Cohen. "Lobbyists and power-brokers have all the information they need already. The public needs more."

[From The News and Observer, Raleigh, N.C., February 16, 1974]

CONGRESSIONAL COMMITTEES OPEN UP

(By Prudence Crewdson)

Washington—In 1973, for the first time in at least two decades, the number of congressional committee meetings held in secret dropped off sharply.

A Congressional Quarterly study shows that only 16 per cent of all committee and subcommittee sessions were closed to the public and press last year, compared with 40 per cent in 1972 and similar figures for the past two decades.

The dramatic reduction was largely the result of a March 1973 decision by the house to require each committee either to draft legislation in the open or take a public vote on whether its proceedings should be closed.

The Senate rejected an attempt by reformers to adopt the same procedure.

The figures reflect the difference. House committees, which have been more secretive in the past, closed only 10 per cent of their meetings in 1973, while Senate committees closed their doors 25 per cent of the time.

In the House, the powerful Armed Services, Appropriations and Ways and Means Committees closed their bill-writing sessions more often than any of the others, although even they were more open than in past years.

In the Senate, the Armed Services, Rules and Administration and Public Works Committees were the most secretive.

Reformers who backed the House anti-secrecy rule are pleased with the results, and although some members and aides remain dubious, they seem to be adjusting to the new system.

"Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more delay than in earlier years when secrecy prevailed," concluded Common Cause, the "citizen lobby" that pushed for the new rule and has been monitoring its operation.

Opponents of the rule warned that it would encourage members to show off for the press and allow lobbyists to intrude on deliberations.

"If we open up our executive sessions to the public every lobbyist in America is going to be there," warned Harley O. Staggers, chairman of the House Interstate and Foreign Commerce Committee.

After a year in which his committee held open mark-ups on such crucial and controversial subjects as petroleum allocation and emergency energy conservation, Staggers thinks that "in some cases, it's been better than before."

But "there are still some cases where closed mark-ups are better," he added. "We wouldn't have had 150 amendments to the energy bill if the lobbyists hadn't been in there."

When House committees did shut their doors, they sometimes met resistance.

The House Ways and Means Committee held closed sessions to draft the international trade reform bill throughout the summer, but later in the year opened up most of its sessions on pension reform, Social Security and federal debt ceiling legislation.

"I'll be damned if I'm going to spend the next year and a half explaining to my people why I voted against open meetings," James A. Burke, D-Mass., declared in June, as he reluctantly voted against a majority of Ways and Means members who decided to close the doors during deliberations on the trade bill.

As the mark-up sessions proceeded through the summer, it was no secret that both the free-traders who supported the bill and the labor lobbyists who opposed it had inside contacts who kept them regularly informed of developments.

But Ray Dennison, an AFL-CIO lobbyist, says he always prefers open mark-ups because they equalize things and keep everyone honest.

"Fifteen administration spokesmen were up there inside the committee feeding (members) the administration line . . . and they made statements we knew were false," he charged. Government officials are allowed to attend closed mark-ups to provide technical assistance.

Al Ullman, D-Ore., who temporarily replaced the ailing Wilbur D. Mills, D-Ark., as the committee's chairman in July, contends that the officials were there to represent "the public interest"—not to lobby. "I would rather have in-depth, competent staff and open meetings, but on trade we didn't have that," he told CQ.

"The idea is to equalize access to information," says Common Cause vice president David Cohen. "Lobbyists and powerbrokers have all the information they need already. The public needs more."

He credits his group and other reformers with pressuring the Ways and Means Committee into opening up its sessions after the trade bill deliberations.

Reformers see the new House rule as only one step toward their goal of "government in the sunshine."

Sen. Lawton Chiles, D-Fla., plans to open hearings in March on his "sunshine bill," which would open up not only almost all congressional committee sessions—including House-Senate conferences—but meetings of multi-member federal agencies as well.

[From the Home News, New Brunswick, N.J., February 17, 1974]

Congress Held Few Secret Meetings

(Congressional Quarterly)

Washington—In 1973, for the first time in at least two decades, the number of congressional committee meetings held in secret dropped off sharply.

A Congressional Quarterly study shows that only 16 percent of all committee and subcommittee sessions were closed to the public and press last year, compared with 40 percent in 1972 and similar figures for the past two decades.

The dramatic reduction was largely the result of a March 1973 decision by the House to require each committee either to draft legislation in the open or take a public vote on whether its proceedings should be closed.

The Senate rejected an attempt by reformers to adopt the same procedure.

The figures reflect the difference. House committees, which have been more secretive in the past, closed only 10 percent of their meetings in 1973, while Senate committees closed their doors 25 percent of the time.

In the House, the powerful Armed Services, Appropriations and Ways and Means Committees closed their bill-writing sessions more often than any of the others, although even they were more open than in past years.

In the Senate, the Armed Services, Rules and Administration and Public Works Committees were the most secretive.

Reformers who backed the House anti-secrecy rule are pleased with the results, and although some members and aides remain dubious, they seem to be adjusting to the new system.

"Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more

delay than in earlier years when secrecy prevailed," concluded Common Cause, the "citizen lobby" that pushed for the new rule and has been monitoring its operation.

Opponents of the rule warned that it would encourage members to show off for the press and allow lobbyists to intrude on deliberations.

"If we open up our executive sessions to the public every lobbyist in America is going to be there," warned Harley O. Staggers, chairman of the House Interstate and Foreign Commerce Committee.

After a year in which his committee held open mark-ups on such crucial and controversial subjects as petroleum allocation and emergency energy conservation, Staggers thinks that "in some cases, it's been better than before."

But "there are still some cases where closed mark-ups are better," he added. "We wouldn't have had 150 amendments to the energy bill if the lobbyists hadn't been in there."

[From the Deseret News, Salt Lake City, Utah, February 18, 1974]

LESS SENATE SECRECY, PLEASE

Congress is supposed to be a public body, not a private club.

Consequently, the decision of the House nearly a year ago to open more of its committee meetings to the public is a testimony to the lawmakers' good judgment.

The continuing failure of the Senate to do anything comparable can only be considered a sorry reflection on that body's apparent lack of confidence in the public it is supposed to be serving.

That much should be clear from this week's report by Congressional Quarterly that in 1973, for the first time in at least two decades, the number of congressional committee meetings held in secret dropped sharply.

Compared to the 40 percent of all committee meetings that are usually closed to the public and press, only 16 percent were closed last year.

The dramatic reduction is largely the result of the House's decision to require each of its committees either to draft legislation in the open or take a public vote on whether or not its proceedings should be closed.

An even greater reduction in congressional secrecy would take place if only the Senate would adopt a similar procedure. In 1973 House committees closed only 10 percent of their meetings, while Senate committees closed 25 percent. There's no excuse for the Senate to go behind closed doors more often than the House.

Despite fears that open meetings would slow down committee work by allowing lobbyists to intrude on deliberations, 57 House panels reported no increase in lobbying since the adoption of the rule on open sessions.

Even many lawmakers who opposed the new House rule think it worked reasonably well during its first year in operation.

In fact, according to Common Cause—which sent observers to monitor the committee meetings—the new rule actually resulted in higher attendance and better preparation by many committee members.

These findings bear out the experience of the House Education and Labor Committee, which for many years conducted its business in public without experiencing serious difficulties.

What's good for the House is good for the Senate—and even better for the public. The public has a right to demand that more Senate committees come out from behind closed doors so their performance can be more readily examined and evaluated.

[From the Geneva, N.Y., Times (Rochester Market Area), February 22, 1974]

SENATE STILL COVERS UP

(Milwaukee Journal)

The House of Representatives has let the sun shine in. Thanks to a new anti-secrecy rule, it is finally writing legislation out in the open—at least most of the time.

Common Cause, the citizens' lobby that has fought for less secrecy in government, reports that in 1973, the first year of the rule, almost 80 per cent of all

House committees and subcommittees opened their bill drafting meetings to the public. The rule, quite simply, requires all committees writing legislation to open these sessions to the public unless a majority of a committee's members vote, in an open meeting, to close the doors. Thus there is a presumption of openness that makes it much harder for congressmen to play it cozy.

The gains obviously are not complete. Several major committees, including the powerful money and military committees, continue to do an exceedingly large portion of their work in secret. But, Common Cause reports, even these committees, show signs of loosening up. The glaring laggard is the Senate, which has refused to adopt the antisecrecy rule. As a result, only three of its committees have voluntarily opened their business to public view. The many senators who are justly complaining about White House secrecy and coverups ought to look homeward.

[From the Palo Alto, Calif., Times, February 23, 1974]

CONGRESS SHOULD LET IN MORE LIGHT

(Editorial Roundup)

In a frenzy of self-righteous reform, Congress decreed more openness in the working of its committees last year. To be opened up so the public's business could be transacted in full public view were those meetings in which committees gathered to draft the laws which govern the land.

That was nearly a year ago. The record, alas, does not match the rhetoric. The House of Representatives did reverse its decades-old tradition of doing all of its important committee work behind closed doors and opened about 80 per cent of its bill drafting meetings to the public.

The Senate refused to adopt an antisecrecy rule and, with a few exceptions, kept its committee meetings closed to the public. And in the House, the most powerful committees, such as Ways and Means and Armed Services, continued to do the lion's share of their work in meetings from which the public was excluded.

Even the Senate Watergate Committee, whose activities were seen by millions of people, resorted to closed meetings. The committee closed its doors when it decided on the entire format for conducting the hearings, and again when it decided which witnesses to hear. The crucial move to subpoena presidential tapes was made in secret.

The antisecrecy rule did not delay the activities of the House as the opponents of the rule have said it would. Statistics compiled by Common Cause, a citizen group dedicated to having the public's business conducted in public, show many important and complex bills were drafted by committees in full view of the public and brought to the House floor for a vote with no more delay than in the earlier years when closed meetings were the common practice.

It is important in this day and age when we are trying to restore public confidence in our government for Congress to come down hard on the side of open meetings. The Senate has another chance to adopt the antisecrecy rule this year. It should act to end the gloom of the closed meetings. Letting in the light has not hurt the House.

—Sacramento Bee.

[From the St. Louis Globe-Democrat, February 23, 1974]

ANTIDOTE FOR SECRECY

The beneficial effects of an open meetings rule adopted by the House of Representatives last March have been shown in a survey by Common Cause, the "citizens lobby" which helped to secure approval of the new rule. In 1973, the survey revealed, almost 80 per cent of all House committees and subcommittees opened their bill-drafting sessions to the public—a practice that was in sharp contrast to the Senate, which declined to adopt an open meetings rule and where secrecy continued to shroud most committee proceedings.

One House group in which the anti-secrecy rule appears to have had a salutary result was the Interior Committee, where lobbyists in open meetings

were unable to have their favored restrictive provisions included in a bill to control strip mining. Among the important House committees which continued to hold most of their meetings in secret, however, was the Ways and Means group, which writes tax legislation. It should not be surprising then that the Ways and Means Committee, under the chairmanship of Representative Wilbur Mills of Arkansas, has stood fast against attempts to secure the approval of legislation to remove unjustifiable loopholes in the tax laws and make taxation more equitable. Members of Congress find it easier to resist reform and to go along with lobbyists' pleas when meetings are closed.

In an effort to provide for still more open government, Senator Lawton Chiles of Florida has introduced a bill requiring all meetings of committees in both houses and in the regulatory agencies (when official action is to be taken) to be open unless there is a majority vote to close the doors for specified reasons. Even so, if meetings are closed, a transcript must be made public, with only stipulated exceptions in proceedings allowed to be kept secret. This measure, now in Senator Abraham Ribicoff's Subcommittee on Reorganization, Research and International Organizations, would be a healthy antidote to the still prevailing secrecy that aids special interests.

[From The Boston Globe, February 24, 1974]

CONGRESSIONAL PANELS CUT NUMBER OF SECRET MEETINGS

(By Prudence Crewdson, Congressional Quarterly)

Washington—In 1973, for the first time in at least two decades, the number of secret congressional committee meetings dropped off sharply.

A Congressional Quarterly study shows that only 16 percent of all committee and subcommittee sessions were closed to the public and press last year, compared with 40 percent in 1972 and similar figures for the past two decades.

The dramatic reduction was largely the result of a March, 1973 decision by the House to require each committee either to draft legislation in the open or take a public vote on whether its proceedings should be closed.

The Senate rejected an attempt by reformers to adopt the same procedure.

House committees, which have been more secretive in the past, closed only 10 percent of their meetings in 1973, while Senate committees closed their doors 25 percent of the time.

In the House the powerful Armed Services, Appropriations and Ways and Means Committees closed their bill-writing sessions more often than any of the others, although even they were more open than in past years.

In the Senate, the Armed Services, Rules and Administration and Public Works Committees were the most secretive, the report shows.

"Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more delay than in earlier years when secrecy prevailed," concluded Common Cause, the citizen lobby that pushed for the new rule and has been monitoring its operation.

The House Ways and Means Committee held closed sessions to draft the international trade reform bill throughout the summer, but later in the year opened up most of its sessions on pension reform, social security and Federal debt ceiling legislation.

"I'll be damned if I'm going to spend the next year and a half explaining to my people why I voted against open meetings," James A. Burke (D-Mass.) declared in June, as he reluctantly voted against a majority of Ways and Means members who decided to close the doors during deliberations on the trade bill.

Opponents of the rule warned that it would encourage members to show off for the press and allow lobbyists to intrude on deliberations.

"If we open up our executive sessions to the public every lobbyist in America is going to be there," warned Harley O. Staggers, chairman of the House Interstate and Foreign Commerce Committee.

After a year in which his committee held open mark-ups on such crucial and controversial subjects as petroleum allocation and emergency energy conservation, Staggers thinks that "in some cases, it's been better than before."

But "there are still some cases where closed mark-ups are better," he added. "We wouldn't have had 150 amendments to the energy bill if the lobbyists hadn't been in there."

Reformers see the new House rule as only one step toward their goal of "government in the sunshine."

Sen. Lawton Chiles (D.-Fla.) plans to open hearings in March on his "sunshine bill," which would open up not only almost all congressional committee sessions—including House-Senate conferences—but meetings of multi-member Federal agencies as well.

[From The Kansas City Star, Kansas City, Mo., February 24, 1974]

PULLING THE SHROUD OF SECRECY FROM CONGRESSIONAL DOORS

Nearly a year has passed since the House voted to open its business meetings—namely mark-up sessions where bills are actually written—and the Senate took a stand to maintain its secrecy. Despite a tendency toward a more open-door policy in both houses, the public and press are still being locked out of the decision-making process far too much of the time.

The international trade reform bill, for example, was put in final form by the House Ways and Means Committee in secret. Yet it was well-known that business interests that favored the measure and labor officials who opposed it were fed inside information from the committee. Ray Dennison, an A.F.L.-C.I.O. lobbyist, said "15 administration spokesmen were . . . feeding (the members) the administration line," and "they made statements we knew were false." Dennison told Congressional Quarterly that administration officials leaked information to the business sector. A participant acknowledged this was true but charged that committee members friendly to labor kept the A.F.L.-C.I.O. and other unions equally informed.

The implication is clear. The special interests had the insider position and the public which will pay for and live by the legislation was deprived of its rightful place in this vital procedure. If Dennison is correct about the false information, it is scandalous. Had the meetings been open the information could have been challenged and the committee could have pursued the truth.

Ways and Means was not the only major disappointment. A survey by Common Cause, the public service lobby, showed that nearly one-third of full House committee business sessions were held behind closed doors. How could this be when the House agreed last March to an open meetings rule?

The House left itself a big loophole. Proceedings can be closed by a majority committee vote. The mark-up meetings are usually the most important step because committee members must commit themselves on the final language and amendments. It is the moment of truth, despite what they have pledged in a campaign or promised the special interests. Without knowing all the positions taken by their legislators the public cannot make a valid judgment on the record. The public has no way of knowing how well it is being represented.

Common Cause also found that other influential House committees worked beyond the public view. The Appropriations Committee, which allocates tax money, secretly held 18 reported meetings that dealt with matters of substance. The Armed Services Committee conducted about half its mark-up meetings in private.

The Senate rejected an open meetings rule last year. Bill-drafting sessions can be open if committees approve it, under a change made in 1973. Until then a Senate rule closed mark-up sessions. The issue was forced by the House action and two Senate committees that adopted the open sessions policy. Senators who believe in open government should speak out on this issue and work for a rule that automatically opens all mark-up meetings. The Democrats, who hold a majority, could do it.

Even with notable exceptions, far more committee and subcommittee meetings were open after the March 7 rule change. Rep. Harley O. Staggers, chairman of the House Interstate and Foreign Commerce Committee, concedes that in some cases openness has resulted in improvement. But he still opposes the new rule. "We wouldn't have had 150 amendments to the energy bill if the lobbyists hadn't been there—we'd only have had 10 or 15," Staggers points out. The bill wouldn't have had 150 amendments if the legislators had had the courage to write what they considered the best bill in the public interest, whether the lobbyists were there or not.

Openness in government sometimes takes courage. And as this country seeks ways to rebuild confidence in its government, courage and openness should go hand in hand.

[From the Durham, N.C., Herald, February 26, 1974]

CONGRESS SCORES IN OPENING DOORS

(By Prudence Crewdson, Congressional Quarterly)

Washington—In 1973, for the first time in at least two decades, the number of congressional committee meetings held in secret dropped off sharply.

A Congressional Quarterly study shows that only 16 per cent of all committee and subcommittee sessions were closed to the public and press last year, compared with 40 per cent in 1972 and similar figures for the past two decades. The dramatic reduction was largely the result of a March 1973 decision by the House to require each committee either to draft legislation in the open or take a public vote on whether its proceedings should be closed.

The Senate rejected an attempt by reformers to adopt the same procedure.

The figures reflect the difference. House committees, which have been more secretive in the past, closed only 10 per cent of their meetings in 1973, while Senate committees closed their doors 25 per cent of the time.

In the House, the powerful Armed Services, Appropriations and Ways and Means committees closed their bill-writing sessions more often than any of the others, although even they were more open than in past years.

In the Senate, the Armed Services, Rules and Administration and Public Works committees were the most secretive.

Reformers who backed the House anti-secrecy rule are pleased with the results, and although some members and aides remain dubious, they seem to be adjusting to the new system.

"Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more delay than in earlier years when secrecy prevailed," concluded Common Cause, the "citizen lobby" that pushed for the new rule and has been monitoring its operation.

Opponents of the rule warned that it would encourage members to show off for the press and allow lobbyists to intrude on deliberations.

"If we open up our executive sessions to the public every lobbyist in America is going to be there," warned Harley O. Staggers, chairman of the House Interstate and Foreign Commerce Committee.

After a year in which his committee held open mark-ups on such crucial and controversial subjects as petroleum allocation and emergency energy conservation, Staggers thinks that "in some cases, it's been better than before."

But "there are still some cases where closed mark-ups are better," he added. "We wouldn't have had 150 amendments to the energy bill if the lobbyists hadn't been in there."

When House committees did shut their doors, they sometimes met resistance.

The House Ways and Means committee held closed sessions to draft the international trade reform bill throughout the summer, but later in the year opened up most of its sessions on pension reform, social security and federal debt ceiling legislation.

As the mark-up sessions proceeded through the summer, it was no secret that both the free-traders who supported the trade bill and the labor lobbyists who opposed it had inside contacts who kept them regularly informed of developments.

But Ray Dennison, an AFL-CIO lobbyist, says he always prefers open mark-ups because they equalize things and keep everyone honest.

"Fifteen administration spokesmen were up there inside the committee feeding (members) the administration line . . . and they made statements we knew were false," he charged. Government officials are allowed to attend closed mark-ups to provide technical assistance.

"The idea is to equalize access to information," says Common Cause vice president David Cohen. "Lobbyists and power-brokers have all the information they need already. The public needs more."

He credits his group and other reformers with pressuring the Ways and Means Committee into opening up its sessions after the trade bill deliberations.

Reformers see the new House rule as only one step toward their goal of "government in the sunshine."

Sen. Lawton Chiles, Fla., plans to open hearings in March on his "sunshine bill," which would open up not only almost all congressional committee sessions—including House-Senate conferences—but meetings of multi-member federal agencies as well.

[From the Glendale, Calif., News-Press, February 27, 1974]

SUNSHINE ON CAPITOL HILL

It is not glamorous or exciting but the effort to open up committee proceedings in the Congress to public view is surely one of the most important citizen reform efforts now under way in this republic.

Changing century-old traditions of secrecy is a slow and sometimes painful process. But some success has already been seen in the House of Representatives.

The Senate is another matter.

The House approved a new anti-secrecy rule last March 7. Since then, Common Cause reports that 79 per cent of all House committee meetings held to draft legislation were open to the public, including both committee and subcommittee meetings.

That is a good beginning but it is fair to say that many of the closed meetings could have been opened without endangering national security and with advantage to the public interest.

And the Senate has refused to adopt any antisecrecy rule at all.

In California, where all of our Legislature's standing committees are required to make all decisions in public, it is easy to forget the secretive ways of other state legislatures and the Congress.

Sunshine is the best disinfectant. Open meetings are healthy when the public's business is under discussion.

That is as true on Capitol Hill in Washington as it is in Sacramento.

[From the Stillwater, Minn., Gazette, March 1, 1974]

SHARP DECLINE IN SECRECY

AN EDITORIAL

About a year ago the House of Representatives decided that thenceforth committees must either open their sessions to the public or vote publicly to close a given session. This has had a salubrious effect. The House is now being far less secretive than before in conducting its business. That is all to the good, since the business of the House is in the last analysis the public business.

The Senate rejected this reform at the time the House adopted it, and the figures dramatize the consequent difference since the House rules took effect. Last year only 10 per cent of all House committee meetings were held behind closed doors. In the Senate, 25 per cent of committee sessions were held in secret.

That difference is all the more significant in light of the fact that in past times the House has tended to be more secretive than the Senate. Now, even when House subcommittee sessions are lumped with those of the main committees, it turns out that only 16 per cent of the 1973 total were barred to the public. The comparable figure a year before was 40 percent.

The general argument that openness serves the public interest is hard to contradict. Even so, concern must be felt about the contention that open sessions tend to slow down the legislative process; considering the great number of bills submitted, that is an important factor.

As to this point we cite the conclusion of Common Cause, which has been monitoring House operations under the new rules. It finds that "many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for voters with no more delay than in earlier years when secrecy prevailed." If this continues to be so, those who champion barring the public from committee and subcommittee sessions will have little ground left to stand on.

[From the Carroll, Iowa, Times Herald, March 2, 1974]

SECRECY DECLINE

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(EDITORS NOTE.—The above article also appeared in the Fairmont, W. Va., Times, March 5, 1974; the Winsted, Conn., Citizen, March 5, 1974; the Greeley, Colo., Tribune, March 5, 1974; and the Gardner, Mass., News, March 6, 1974.)

[From the La Porte, Ind., Herald-Argus, March 7, 1974]

AIRING OUT CONGRESS

Common Cause, the citizen lobby, bugged congressmen about closed-door, secret committee and subcommittee sessions until in March of 1973 the House of Representatives finally reached a decision to require new procedures in calling committee sessions.

The House ruled a year ago that each committee either must draft legislation in open session or take a public vote on whether committee hearings should be closed.

Here it is, a year later, and the Congressional Quarterly reports that only 16 per cent of all U.S. congressional committee and subcommittee sessions were closed to the public and press since March of 1973. The comparable figure on closed sessions in 1972 was 40 per cent.

Influential congressmen foresaw dark incidents occurring as a result of public hearings. The Senate rejected the open-door policy adopted by the House, but even there committee hearings were closed only 25 per cent of the time after March of 1973, which is about half the number of closings before the House passed its "sunshine rule."

The House itself only closed its doors 10 per cent of the time in the last year, and then only after an open vote by the committee.

Those fears expressed by congressmen in advance of adopting the anti-secrecy rule have not come to pass. They feared that lobbyists would stage big shows before the press, and that an open-door policy would result in delays

in bill passage, a condition that is traditional in Congress and could not be worsened by open hearings.

One congressman continued to complain. He blamed the 150 amendments which have been attached to the energy bill on open hearings and resulting confusion.

Common Cause does not agree. Its spokesmen insist that Congress has maintained its bill passage pace, and that lobbyists' activities are not a factor in feeding information to the public.

CC says it is not lobbyists who need more information. They are fed inside dope on congressional committee maneuvering. It's the public that needs more information on congressional behind-the-scenes operations.

Even the House Ways and Means committee, long a secretive body, opened its doors to hearings after closed sessions to draft an international trade reform bill. It held open sessions on pension reform, social security and federal debt-ceiling legislation.

Reformers say there is still a lot to be done. Those with a power thrust, such as labor lobbyists and big business and money interests, still are on the inside, but the cause for the public is gaining momentum.

Sen. Lawton Chiles, Democrat of Florida, has introduced what he calls the "sunshine bill" which would open up not only almost all congressional committee sessions—including House and Senate conferences—but also multi-member federal agencies' meetings.

Sen. Chiles is calling for "government in the sunshine." That makes a good slogan. Congress needs airing out, and there is only one way to do it. Open those committee doors.

[From the Fullerton, Calif., News Tribune, March 8, 1974]

OTHER VIEWS—SENATE SHOULD FOLLOW SUIT

In a frenzy of self-righteous reform, Congress decreed more openness in the working of its committees last year. To be opened up so the public's business could be transacted in full public view were those meetings in which committees gathered to draft the laws which govern the land.

That was nearly a year ago. The record, alas, does not match the rhetoric. The House of Representatives did reverse its decades-old tradition of doing all of its important committee work behind closed doors and opened about 80 per cent of its bill drafting meetings to the public.

The Senate refused to adopt an antisecrecy rule and, with a few exceptions, kept its committee meetings closed to the public. And in the House, the most powerful committees, such as Ways and Means and Armed Services, continued to do the lion's share of their work in meetings from which the public was excluded.

Even the Senate Watergate Committee, whose activities were seen by millions of people resorted to closed meetings. The committee closed its doors when it decided on the entire format for conducting the hearings, and again when it decided which witnesses to hear. The crucial move to subpoena presidential tapes was made in secret.

The antisecrecy rule did not delay the activities of the House as the opponents of the rule have said it would. Statistics compiled by Common Cause, a citizen group dedicated to having the public's business conducted in public, show many important and complex bills were drafted by committees in full view of the public and brought to the House floor for a vote with no more delay than in the earlier years when closed meetings were the common practice.

It is important in this day and age when we are trying to restore public confidence in our government for Congress to come down hard on the side of open meetings. The Senate has another chance to adopt the antisecrecy rule this year. It should act to end the gloom of the closed meetings. Letting in the light has not hurt the House.—Sacramento Bee

[From the Hanford, Calif., Sentinel, March 19,1974]

SUNSHINE ON HILL

It is not glamorous or exciting but the effort to open up committee proceedings in the Congress to public view is surely one of the most important citizen reform efforts now under way in this republic.

Changing century-old traditions of secrecy is a slow and sometimes painful process. But some success has already been seen in the House of Representatives.

The Senate is another matter.

The House approved a new anti-secrecy rule March 7 last year. Since then, Common Cause reports that 79 per cent of all House committee meetings held to draft legislation were open to the public, including both committee and subcommittee meetings.

That is a good beginning but it is fair to say that many of the closed meetings could have been opened without endangering national security and with advantage to the public interest.

And the Senate has refused to adopt any antisecrecy rule at all.

In California, where all of our Legislature's standing committees are required to make all decisions in public, it is easy to forget the secretive ways of other state legislatures and the Congress.

Sunshine is the best disinfectant. Open meetings are healthy when the public's business is under discussion. That is as true on Capitol Hill in Washington as it is in Sacramento.

APPENDIX I

In March, 1973, the House of Representatives adopted an open meetings rule requiring all committee bill-drafting sessions to be open to the public unless a majority of a committee's members vote, in an open session, to close a meeting. The effect of this rule on committee activity has been a major interest to Common Cause. This appendix contains the following material on this topic:

1. Two editorial memorandums on the results of an on-going Common Cause survey of House committee practices under the new rule;
2. A survey by Congresswoman Julia Hansen (D.-Wash.) of all chairmen of standing committees and subcommittees in the House regarding their assessment of the open meetings rule; and
3. Replies by some Senators on the Government Operations, Interior, and Banking, Housing and Urban Affairs committees to a Common Cause inquiry on the effect of openness in those committees.

NEWS FROM COMMON CAUSE,
Washington, D.C., January 1974.

EDITORIAL MEMORANDUM

MOST COMMITTEES IN HOUSE OF REPRESENTATIVES SWITCH TO OPEN BILL-DRAFTING SESSIONS IN 1973 UNDER NEW ANTI-SECRECY REQUIREMENT

The attached editorial memorandum reports the results of a Common Cause survey of House committee practices in 1973 under an open meetings rule adopted by the House of Representatives in March 1973.

The survey shows that writing legislation in public became the standard as a result of the rule. Almost 80% of all House committees and subcommittees opened their bill-drafting meetings to the public. But some committees—Appropriations in particular—continued to do much of their work in secret.

The open meetings that now characterize the House are in stark contrast to the Senate where secrecy continues to govern the conduct of all but a few committees. The Senate has refused to adopt an anti-secrecy rule like that in force in the House.

We have prepared a two-column bar graph that illustrates the open and closed sessions of House committees in 1973. You are free to reproduce the graph and to use any of the material in the memorandum in any manner you wish. If you have any questions, please phone our office.

Writing legislation in public became the standard for the House of Representatives in 1973.

In the first year under its new anti-secrecy rule, the House reversed its decades-old tradition of doing all of its important committee work behind closed doors and opened almost 80% of its bill-drafting meetings to the public.

The 1973 record was less than perfect, however. A number of major committees—including the powerful money and military committees—continued to do a large portion of their work in meetings from which the public was excluded. But even these committees showed some signs of opening their sessions to public view.

The performance of the House committees was in stark contrast to the Senate where secrecy continued to shroud most—although not all—committee proceedings.

The Senate has refused to adopt an anti-secrecy rule, although three committees voluntarily open their business meetings to the public. A proposed new budget committee would have to hold its meetings open to the press and public as the result of an amendment backed by Common Cause. The amendment is in a not-yet-enacted Senate bill establishing the new budget unit. Overall, however, the House now is a much more open body than the Senate, and the performance of Representatives is more easily examined by citizens.

These conclusions have been reached by Common Cause, a national citizens action organization which is monitoring the new anti-secrecy rule in the House. Common Cause, with 300,000 members in all parts of the country, lobbied for the rule before it was approved by the House March 7, 1973.

The House rule requires all committee bill-drafting sessions to be open to the public unless a majority of a committee's members vote, in an open meeting, to close a session. The presumption is for open meetings.

The rule was adopted in the belief that the public has a right to know what is done to legislation in committee, which usually is the most important point in Congressional action on a bill. For example, Representatives' positions on key amendments may not be available to citizens when votes are taken in secret meetings.

MAJOR CONCLUSIONS

The following major points emerge from the Common Cause survey of bill-drafting sessions of House committees from March 7, 1973, when the anti-secrecy rule took effect, through Dec. 21, 1973, when Congress adjourned for the year.

Most Meetings Open. Most bill-drafting sessions were open to the public in 1973. After the anti-secrecy rule went into effect on March 7, 1973, 79.2% of all House committee meetings held to draft legislation were open to the public. This includes both committee and subcommittee meetings. It covers *only* sessions for bill-drafting (or mark-up as they are called on Capitol Hill); hearings on proposed legislation traditionally have been open and thus were not included in the survey. Until 1973, only the House Interior and Education and Labor Committee regularly conducted their business in the open. Consequently, the open-meetings record of 1973 for bill drafting represents an increase from virtually zero to almost 80% of the sessions.

The record for House subcommittees is considerably better than for full committees. Subcommittees held 86.6% of their bill-drafting sessions in public compared to 69.6% for full committees. This latter figure is one of the few major disappointments in the survey results. It means that almost a third—30.4%—of full committee sessions were still conducted in secret in 1973. The following table sets forth the complete figures:

	Overall 1973 (Mar. 7 to Dec. 21)		Full committees		Subcommittees	
	Number	Percent	Number	Percent	Number	Percent
Bill-drafting meetings held	808	100.0	352	100.0	456	100.0
Open meetings	640	79.2	245	69.6	395	86.6
Closed meetings	168	20.8	107	30.4	61	13.4

A number of committees, including several major ones, had perfect open-meeting records in 1973.

Key Committees Still Secret. Some of the most powerful House committees held many of their mark-up sessions in secret. Included were the Appropriations, Ways and Means and Armed Services Committees. These committees closed their sessions from half to virtually all of the time.

No Change in Work Output. The anti-secrecy rule did not impede the activities of the House as opponents of the rule had contended it would. Many important and complicated pieces of legislation were drafted by committees in open session and brought to the House for votes with no more delay than in earlier years when secrecy prevailed. Statistics on House activity in 1973, compiled by Congressional officials, show no significant difference between the number of bills enacted, passed or reported by the House and its committees in the 1971 and 1973 sessions. (These are comparable years because each was the first session of its respective Congress.)

Repeated Secrecy Votes Avoided. Representatives avoided taking a vote at each day's session they wanted to close to the public. The anti-secrecy rule requires committee members to vote in open session to close a meeting, but it allows one vote to cover a succession of meetings on the same bill. For example, the Ways and Means Committee took one vote in June to close 36 mark-up sessions on trade reform that stretched over more than three months.

During 1973, there were 168 closed sessions of committees and subcommittees but only 71 separate votes to close meetings.

In lobbying for the House anti-secrecy rule, Common Cause had argued that Representatives ought to be required to go on record for or against secrecy every time a closed committee meeting was held.

The practice of taking only one vote was used more by some committees than by others. In addition to the Ways and Means Committee, the Agriculture Committee took one vote to close six sessions, the Commerce Committee took four votes for 13 closed meetings and the Armed Services Committee took three votes for 10 closed sessions. By contrast, the Appropriations Committee took 18 separate votes to close its meetings.

Few Violations Noted. Committees and subcommittees generally abided by the requirement that a vote to close be taken in public before a secret meeting was held. Common Cause was able to identify less than a dozen instances in which secret business meetings were held without a vote being taken to close or in which the vote was taken in secret.

MAJOR CLOSED COMMITTEES

Although the overall record of open meetings was good in 1973, some of the most powerful committees held many secret sessions.

The Appropriations Committee, among the most secretive in Congress, had one of the worst records. Of 19 reported meetings, only one was open and that was an early session devoted to budget generalities. But some of the Appropriation subcommittees had a better record. Of 26 meetings by subcommittees, eight were open to the public. Six were on supplemental money bills while two were on the regular fiscal 1974 appropriations bills for the Transportation and Treasury Departments and the Postal Service. The Transporta-

tion and Treasury-Postal subcommittees held open mark-ups on their supplemental money bills and thus were the only appropriations subcommittees with perfect open mark-up records in 1973.

The House Ways and Means Committee, the other money powerhouse committee, held 40 closed and 24 open meetings. Its open mark-ups occurred after September. The committee held a long series of closed sessions on trade reform from June through September. In the fall, the Committee, under pressure from Common Cause and other groups, reversed its position and held numerous open meetings on pension reform, social security and the national debt limit. But some secrecy remained. One pension bill meeting was closed and a second remained open only after a move to close failed. On Nov. 29, the Committee closed a meeting to discuss and reject a Senate-passed proposal for public financing of federal elections.

The Armed Services Committee and its subcommittees, which handle the military bills in the House, closed half of their meetings. The closed mark-ups were during action on the Committee's major annual legislation—the authorization bill for the Department of Defense.

One other committee—House Administration—deserves mention. This committee reported holding 18 closed meetings and no open sessions. It took no votes to close. The Committee claims that it is not covered by the House's open-meetings rule because that rule exempts meetings dealing with internal budget or personnel matters. Because of the committee's jurisdiction and because its announced or reported meetings almost invariably are described as "pending business" or "pending legislation," it has been impossible to challenge the long string of secret meetings or the absence of votes to close. However, the Committee soon will be dealing with substantive legislation when bills to provide public financing of federal elections come before it. This probably will occur in February. When it does, the House rule will apply without question.

MAJOR OPEN COMMITTEES

A number of major committees had perfect records of open meetings in 1973. The Judiciary, Banking and Currency, Government Operations, Education and Labor, and Interior Committees all held only open meetings. The Judiciary Committee's record is significant because it is the center of attention in the 1974 Congressional session as it considers impeachment proceedings against President Nixon. An important question the Committee must decide is whether to hold open meetings on the impeachment issue. Common Cause has urged the Committee to do so.

A good open-meetings record was compiled by the busy and powerful House Interstate and Foreign Commerce Committee. This Committee handles many subjects, including health, communications, power, transportation and securities. During 1973, it held 13 closed sessions, about one-third of its total of 43 meetings. However, most of the closed sessions were on one proposal—the northeast railroad reorganization bill. The Committee held open sessions on many other bills, including the controversial petroleum allocation and emergency energy conservation bills near the end of the year. The petroleum bill directed the President to begin allocating oil and oil products among suppliers and users to prevent shortages. The energy bill was major legislation intended to give the President emergency powers including gas rationing, to deal with the fuel crisis.

House Commerce subcommittees compiled an even better record. They closed only one-quarter of their meetings. These closed sessions were all in one subcommittee, Transportation and Aeronautics, and—like the full committee—dealt mostly with the northeast rail bill.

The House Foreign Affairs Committee held 17 open meetings and only one closed session. However, the closed meeting, Dec. 12 on emergency assistance, to Israel, was accomplished by unanimous consent. This was a violation of the House rule requiring a recorded vote to close a meeting.

COMMON CAUSE PRESSURE KEPT MEETINGS OPEN

Common Cause volunteers attended many committee meetings. Their presence in the meeting rooms helped deter some committees from quietly slipping into secret session when nobody was looking. The organization occasionally got an assist from news reporters who find the anti-secrecy rule useful in collecting information for stories. For example, a Wall Street Journal reporter happened to be the only non-committee person present at a Ways and Means session which members wanted to close. When he was asked to leave he refused until the Committee took an official vote to hold a secret session.

The House Commerce Committee almost went into secret session when it took up the emergency energy bill, the omnibus legislation that will cover everything from gas rationing to fuel oil supplies. Common Cause learned that some committee members were maneuvering to close the meetings so that their action on the energy crisis would be less visible to the public. CC Vice President David Cohen wrote a letter to each member urging that no sessions be closed. The CC volunteer for the committee, Penny Williams, hand delivered it to the members as they arrived for a meeting. No more was heard of closed meetings. (Similar letters were sent to other committees during the year. Representatives who opposed closed meetings often reported that such support from citizen groups assisted their efforts to resist secret meetings.)

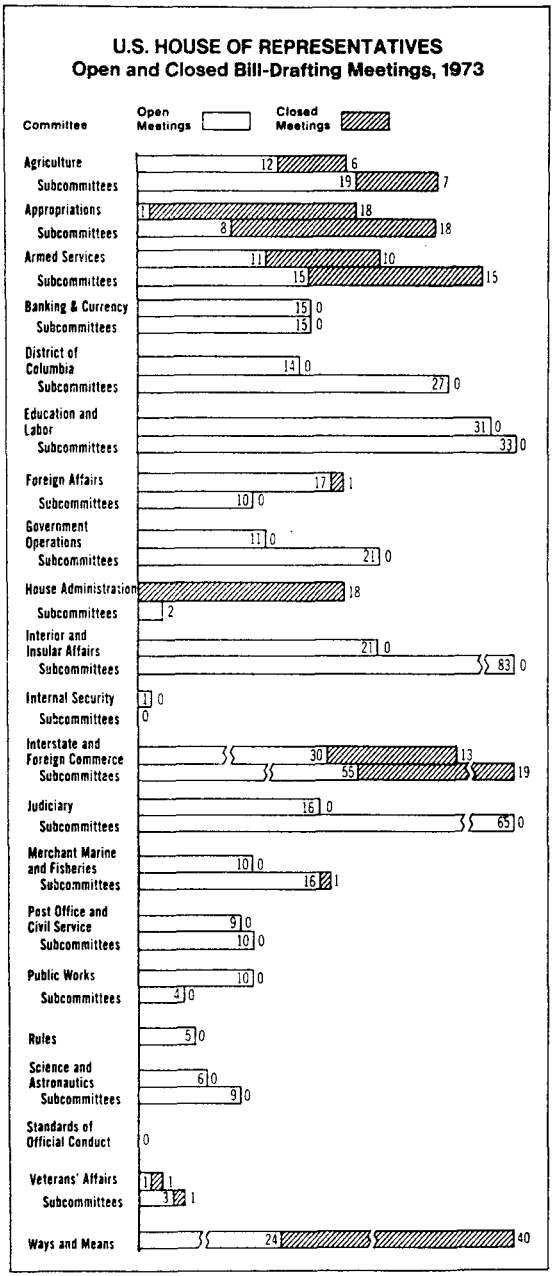
(This particular event also illustrated the potential impact that citizen attention to their Representatives can have. Mrs. Williams reported that "those who received the letters were delightfully gracious, shook my hand, said they were happy to meet me and had been wondering who I was." She had been attending Commerce Committee meetings for some time before the day she delivered the letters. Her experience is not uncommon. Other CC volunteers have reported that when Representatives become aware they are being observed in their work by citizens, they sit up and pay attention.)

Unfortunately, the results are not always so favorable. Another instance involving a Common Cause volunteer showed the resentment of the rule that still prevails among some House members. The volunteer, Connie Keneally, visited a House Administration subcommittee meeting on a bill to allow citizens to register to vote by post card. She was told by staff members that the meeting was closed and she would have to leave. Subcommittee chairman John Dent (D.-Pa.) said she could stay while the subcommittee went into the back room to discuss the bill. That would have been a closed meeting and Miss Keneally asked to see the recorded public vote that should have been taken first. Dent assured her one had been taken but couldn't produce it. "My God, honey, can't you take our word?" he said. (A committee staff member had told her it was a voice vote.)

When challenged on the secrecy vote, Dent led his subcommittee members out of the committee room and into the office of full committee chairman Wayne Hays (D Ohio). Miss Keneally followed, asking to see the vote to close *that* meeting. Hays insisted that she leave. Her effort had its effect. The next time Dent convened his subcommittee, the members broke with tradition and met in open mark-up session. (Dent called it "an open executive session.") A second open mark-up session followed at which the voter registration bill was approved.

INFORMATION COVERED BY SURVEY

Common Cause's survey was made primarily from information about meetings published in the *Congressional Record*, supplemented by visits to many committee offices and meeting rooms. Congressional rules require committees to report meetings to House officials who then publish the report in the *Record*. It is not clear that this requirement is strictly enforced; Common Cause discovered some meetings that were not reported. Nevertheless, it is believed that the figures used in this report represent the bulk of House committee and subcommittee mark-up sessions and give an essentially accurate picture of the operation of the anti-secrecy rule.


U.S. HOUSE OF REPRESENTATIVES
Open and Closed Bill-Drafting Meetings, 1973
Committee
Open Meetings
Closed Meetings
Agriculture 12 6
Subcommittees 19 7
Appropriations 1 18
Subcommittees 8 18
Armed Services 11 10
Subcommittees 15 15
Banking & Currency 15 0
Subcommittees 15 0
District of Columbia 14 0
Subcommittees 27 0
Education and Labor 31 0
Subcommittees 33 0
Foreign Affairs 17 1
Subcommittees 10 0
Government Operations 11 0
Subcommittees 21 0
House Administration 18
Subcommittees 2
Interior and Insular Affairs 21 0
Subcommittees 83 0
Internal Security 1 0
Subcommittees 0
Interstate and Foreign Commerce 30 13
Subcommittees 55 19
Judiciary 16 0
Subcommittees 65 0
Merchant Marine and Fisheries 10 0
Subcommittees 16 1
Post Office and Civil Service 9 0
Subcommittees 10 0
Public Works 10 0
Subcommittees 4 0
Rules 5 0
Science and Astronautics 6 0
Subcommittees 9 0
Standards of Official Conduct 0
Veterans' Affairs 1 1
Subcommittees 3 1
Ways and Means 24 40

NEWS FROM COMMON CAUSE,
Washington, D.C., May 22, 1974.

HOUSE COMMITTEES CONTINUE BILL-DRAFTING IN OPEN SESSIONS

REPRESENTATIVES' VOTING RECORDS ON CLOSED COMMITTEE MEETINGS COMPILED BY COMMON CAUSE

House committees in 1974 have continued and improved their excellent 1973 record of open meetings for drafting and voting on legislation. Through the third week in May, 88% of committee mark-up sessions in the House have been open to the public and press.

Common Cause has compiled totals of open and closed committee meetings as part of its monitoring of a 1973 rules change that required committees to meet in open session unless they specifically vote to go behind locked doors. As part of this monitoring project, CC has compiled the individual record of each Representative who has had an occasion to vote on closing a committee mark-up session. The tabulation shows only 23 Representatives have consistently voted for open sessions, while 137 have always voted to close. Some 184 Representatives serve only on committees that always meet in public; these Congressmen therefore are not on the CC list.

Common Cause released its analysis as Chairman John Gardner testified in behalf of Senator Lawton Chiles' "Government-in-the-Sunshine Act" before the Senate Government Operations Subcommittee on Reorganization, Research, and International Organizations. In his testimony, Gardner emphasized the need for open proceedings in the regulatory agencies and urged Congress to strengthen lobby regulation.

This report describes the open and closed record of House committees in 1974 and lists in a separate table the record of each Representative who has voted on opening or closing a committee mark-up session in 1973 or 1974. You are free to use the material in any manner you wish.

House committees in 1974 continued to improve on their excellent 1973 record of open meetings for drafting and voting on legislation.

From Jan. 1 through May 16, 88% of all House committee meetings called to draft bills were open to the public. In 1973, almost 80% of these so-called mark-up sessions were open.

Through May 16, 1974, House committees and subcommittees held 281 bill drafting meetings of which 34 were closed and 247 open.

Some major committees—primarily Appropriations and Armed Services—continued to do much of their work behind closed doors in 1974. However, one of the most powerful, Ways and Means, has done a nearly complete turnaround. It reported holding only one secret session out of 35 bill-drafting meetings.

These figures were compiled by Common Cause, a national citizens action organization which is monitoring anti-secrecy practices of House committees.

The House committees' open-meeting actions are the result of a 1973 rules change in that chamber that required all mark-up sessions to be open to the public unless a committee took a public vote to close a session. CC has been compiling data under this new rule.

The performance of the House committees was in stark contrast to the Senate where secrecy continued to shroud most committee proceedings. The Senate has refused to adopt an anti-secrecy rule.

As a result of the House rule, Common Cause has compiled for the first time a record of Representatives' votes on open and closed committee meetings. The anti-secrecy monitoring project has been under the direction of CC volunteer Frank Howard and CC lobbyist Pat Keefer.

INDIVIDUAL RECORDS

From March 7, 1973, when the new rule took effect, through May 16, 1974, 251 Representatives, more than half the House membership, had the opportunity to vote on closing or keeping open a committee bill-drafting session. The other Representatives in the 435-member House serve on committees where all meetings have been open and the issue never came to a vote.

Of the 251 Representatives, only a small number—23—always voted for open meetings. They were: Bill Alexander (D Ark.); Clarence J. Brown (R Ohio); Charles J. Carney (D Ohio); Silvio Conte (R Mass.); Frank Denholm (D S.D.); Thomas Foley (D Wash.); Louis Frey (R Fla.); William Gunter (D Fla.); Michael Harrington (D Mass.); Jerry Litton (D Mo.); Spark M. Matsunaga (D Hi.); Wiley Mayne (R Iowa); John McCollister (R Neb.); John Melcher (D Mont.); Richardson Preyer (D N.C.); Paul G. Rogers (D Fla.); Fred B. Rooney (D Pa.); William Roy (D Kan.); Louis Stokes (D Ohio); W. S. Stuckey (D Ga.); Charles Thone (R Neb.); Samuel Young (R Ill.); and John M. Zwach (R Minn.).

The list is almost evenly divided between parties: 14 Democrats and nine Republicans.

(A complete tabulation of the 251 Representatives' votes is shown in the accompanying table.)

A substantial number of Representatives—137 or 31.5% of the House--always voted to close committee mark-up sessions. These Representatives generally serve on the major committees: Appropriations, Armed Services, Commerce, Ways and Means.

RECORDS OF COMMITTEES

So far this year two committees, Appropriations and Armed Services, and their subcommittees have accounted for 27 of the 34 closed mark-up sessions recorded in 1974.

	Open	Closed
Appropriations	1	2
Subcommittees	8	7
Armed Services	5	6
Subcommittees	2	12

The Appropriations subcommittees that were open were: Housing and Urban Development, Space, Science, Veterans (2 meetings); Foreign Operations; Treasury; Transportation; Legislative; and Interior (2 meetings).

The only other committee to hold more than a single closed mark-up session in 1974 was the Interstate and Foreign Commerce Committee and its Transportation and Aeronautics Subcommittee. Each unit held two closed sessions on a bill that provided the death penalty for attempted airplane hijackings.

OPEN AND CLOSED COMMITTEE MEETING VOTES BY REPRESENTATIVES, 1973–74

This table records votes cast by House members for open or closed bill-drafting (mark-up) meetings by House committees. The table covers the period from March 7, 1973, when an open meetings rule for committees went into effect, through May 16, 1974.

During this period, only 251 Representatives had the opportunity to vote for or against open mark-up sessions. The other Representatives served on committees where all mark-ups were open and the issue never arose; their names do not appear on the table.

HOW TO READ THE TABLE. The figures in the columns labeled "closed" and "open" tell the number of committee mark-up sessions that a Representative voted to close to the public or to keep open. A number of committees took just one vote to close a series of mark-up sessions. Consequently, Common Cause tabulated the number of open or closed sessions that would have resulted from a Representative's votes; it is this tabulation that appears next to each person's name. For example, assume that Representative X cast one vote in committee that covered six subsequent mark-up sessions. If the vote was to close, the CC record shows six votes to close; if his vote was to keep the session open, his record shows six votes for open meeting. Absences from committees when an open/closed vote occurred is shown in column 3. An * [footnote (1)] indicates the Representative always voted to close mark-up sessions.

	Closed	Open	Absent
Alabama:			
Tom Bevill (D)	14	2	7
John Buchanan (R)[1]	1	0	0
William Dickinson (R)[1]	31	0	0
Jack Edwards (R)	17	2	4
Bill Nichols (D)[1]	14	0	6
Arizona:			
John Rhodes (R)	12	8	7
Arkansas:			
B. Alexander (D)	0	6	0
Wilbur Mills (D)[1]	41	0	3
California:			
George Brown (D)[1]	7	0	0
Del Clawson (R)	0	0	2
James Corman (D)	5	39	0
R. V. Dellums (D)[1]	1	0	19
B. Goldwater, Jr. (R)	0	0	15
Charles Gubser (R)[1]	9	0	16
Robert Leggett (D)[1]	16	0	12
Robert Lagomarsino (R)[1]	1	0	0
John McFall (D)[1]	20	0	7
Robert Mathias (R)[1]	1	0	6
John E. Moss (D)	0	13	2
Jerry L. Pettis (R)	41	2	1
Edward R. Roybal (D)	3	15	6
Leo Ryan (D)	0	0	1
B. F. Sisk (D)[1]	7	0	1
Burt L. Talcott (R)[1]	20	0	5
Lionel Van Deerlin (D)	2	13	0
Victor Veysey (R)	6	10	9
Bob Wilson (R)[1]	19	0	7
Charles H. Wilson (D)[1]	10	0	13
Colorado:			
William Armstrong (R)[1]	22	0	0
Donald Brotzman (R)	5	39	0
Frank E. Evans (D)	4	18	5
James T. Johnson (R)	0	0	6
Patricia Schroeder (D)	19	3	0
Connecticut:			
Robert Giaimo (D)	5	19	6
Robert H. Steele (R)	0	0	1
Delaware: P. S. du Pont (R)	0	0	1
Florida:			
Charles Bennett (D)[1]	22	0	0
J. Herbert Burke (R)	0	0	1
Bill Chappell (D)[1]	19	0	7
Dante Fascell (D)[1]	1	0	0
Louis Frey (R)	0	1	14
Sam Gibbons (D)	3	40	1
William D. Gunter (D)	0	6	0
Claude Pepper (D)	1	1	0
Paul G. Rogers (D)	0	13	2
Robert L. F. Sikes (D)[1]	19	0	10
C. W. (Bill) Young (R)[1]	17	0	5
Georgia:			
Jack Brinkley (D)[1]	10	0	7
John W. Davis (D)	0	0	1
John Flynt (D)	13	2	16
Phil M. Landrum (D)[1]	42	0	2
Dawson Mathis (D)[1]	6	0	0
W. S. Stuckey (D)	0	2	13
Hawaii:			
S. Matsunaga (D)	0	1	7
Idaho:			
Steven Symms (R)	0	0	6
Illinois:			
John B. Anderson (R)	0	0	2
Leslie Arends (R)[1]	17	0	0
Harold Collier (R)	40	1	3
E. J. Derwinski (R)[1]	1	0	0
Paul Findley (R)	1	6	1
Edward Madigan (R)	0	0	6
Ralph Metcalfe (D)[1]	30	0	5
Robert H. Michel (R)[1]	16	0	11
Morgan Murphy (D)[1]	2	0	15
George O'Brien (R)	0	0	17
Melvin Price (D)[1]	24	0	1
Dan Rostenkowski (D)[1]	41	0	3
George Shipley (D)[1]	7	0	20
Sidney Yates (D)	2	20	2
Samuel Young (R)	0	5	10

	Closed	Open	Absent
Indiana:			
William Bray (R)[1]	17	0	0
Lee Hamilton (D)[1]	1	0	0
Elwood H. Hillis (R)[1]	9	0	0
William Hudnut (R)	1	3	11
Ray Madden (D)[1]	2	0	0
John T. Myers (R)[1]	22	0	4
J. Edward Roush (D)	2	22	3
Iowa:			
John Culver (D)	0	0	1
H. R. Gross (R)[1]	1	0	0
Wiley Mayne (R)	0	6	0
William J. Scherle (R)[1]	20	0	7
Neal Smith (D)	12	2	16
Kansas:			
William Roy (D)	0	1	14
Keith Sebelius (R)[1]	6	0	0
Garner E. Shriver (R)	20	2	3
Joe Skubitz (R)[1]	21	0	14
Larry Winn (R)	0	0	1
Kentucky:			
J. B. Breckinridge (D)	4	11	0
Tim L. Carter (R)[1]	13	0	2
William Natcher (D)[1]	24	0	5
Frank Stubblefield (D)[1]	1	0	6
Louisiana:			
F. Edward Hebert (D)[1]	17	0	0
Gillis Long (D)[1]	2	0	0
Otto E. Passman (D)[1]	19	0	7
John R. Rarick (D)[1]	6	0	0
David Treen (R)[1]	14	0	9
Joe D. Waggonner (D)[1]	44	0	0
Maine:			
Peter N. Kyros (D)	1	10	4
Maryland:			
Goodloe E. Byron (D)[1]	14	0	1
Marjorie Holt (R)[1]	23	0	0
Clarence Long (D)	3	14	8
Massachusetts:			
Edward Boland (D)	8	9	10
James A. Burke (D)	3	40	1
Silvio Conte (R)	0	7	18
M. Harrington (D)	0	1	0
Torbert Macdonald (D)[1]	15	0	0
Michigan:			
William S. Broomfield (R)[1]	1	0	0
Elford Cederberg (R)[1]	34	0	1
C. E. Chamberlain (R)[1]	43	0	1
Charles Diggs (D)	0	0	1
John Dingell (D)[1]	24	0	11
Martha Griffiths (D)[1]	42	0	2
Lucien Nedzi (D)[1]	16	0	7
Donald W. Riegle (R)	0	0	1
G. Vander Jagt (R)	0	0	1
Minnesota:			
Bob Bergland (D)	6	1	0
Donald Fraser (D)[1]	1	0	0
Joseph Karth (D)	5	38	1
Ancher Nelsen (R)	4	1	10
John M. Zwach (R)	0	7	0
Mississippi:			
David Bowen (D)[1]	7	0	0
G. V. Montgomery (D)[1]	19	0	4
Jamie L. Whitten (D)[1]	30	0	3
Missouri:			
Richard Bolling (D)[1]	2	0	0
Bill Burlison (D)[1]	24	0	3
Richard Ichord (D)[1]	21	0	4
Jerry Litton (D)	0	6	0
William Randall (D)[1]	1	0	27
James W. Symington (D)	1	11	3
Montana:			
John Melcher (D)	0	6	0
Richard G. Shoup (R)	33	2	0
Nebraska:			
John McCollister (R)	0	12	3
Dave Martin (R)[1]	2	0	0
Charles Thone (R)	0	7	0
New Hampshire:			
Louis Wyman (R)	9	3	16

	Closed	Open	Absent
New Jersey:			
P. Frelinghuysen (R)[1]	1	0	0
Henry Helstoski (D)[1]	2	0	13
John Hunt (R)[1]	12	0	8
Edward J. Patten (D)	7	11	7
New Mexico:			
Harold Runnels (D)[1]	15	0	10
New York:			
Joseph Addabbo (D)	20	3	4
Jonathan Bingham (D)	0	0	1
Hugh L. Carey (D)	39	3	2
Barber Conable (R)	39	2	3
James Delaney (D)[1]	2	0	0
Benjamin A. Gilman (R)	0	0	1
James Hastings (R)	2	12	1
Carleton King (R)[1]	1	0	16
Norman Lent (R)[1]	11	0	4
Robert C. McEwen (R)[1]	16	0	9
Donald Mitchell (R)[1]	14	0	6
Otis Pike (D)	21	4	0
Bertram Podell (D)	10	13	12
Ogden R. Reid (D)	0	0	1
Howard W. Robison (R)[1]	23	0	2
John J. Rooney (D)[1]	2	0	24
B. S. Rosenthal (D)	0	0	1
Samuel Stratton (D)[1]	20	0	0
Lester Wolff (D)[1]	1	0	0
North Carolina:			
J. T. Broyhill (R)	14	1	0
L. H. Fountain (D)[1]	1	0	0
Walter Jones (D)[1]	6	0	0
Wilmer Mizell (R)	0	0	6
R. Preyer (D)	0	11	4
Charles Rose (D)[1]	6	0	0
Earl B. Ruth (R)[1]	16	0	9
Roy Taylor (D)[1]	1	0	0
North Dakota:			
Mark Andrews (R)	18	1	9
Ohio:			
C. J. Brown (R)	0	2	13
C. J. Carney (D)	0	10	5
D. D. Clancy (R)	6	38	0
Samuel Devine (R)	13	1	11
T. Guyer (R)	0	0	1
Wayne Hays (D)[1]	1	0	0
D. R. Latta (R)[1]	1	0	1
C. E. Miller (R)	7	14	2
William E. Minshall (R)[1]	19	0	9
W. E. Powell (R)[1]	3	0	23
Louis Stokes (D)	0	5	20
Charles Vanik (D)	3	40	1
Charles Whalen (R)[1]	1	0	0
Oklahoma:			
John Jarman (D)[1]	33	0	2
James Jones (D)[1]	12	0	10
C. R. McSpadden (D)[1]	2	0	0
Tom Steed (D)[1]	21	0	1
Oregon:			
Edith Green (D)	12	6	7
Al Ullman (D)[1]	43	0	1
Wendell Wyatt (R)[1]	11	0	15
Pennsylvania:			
Edward G. Biester, Jr. (R)	0	0	3
R. L. Coughlin (R)	16	2	1
Daniel Flood (D)[1]	26	0	7
George Goodling (R)	0	0	6
William J. Green (D)	3	40	1
H. John Heinz (R)	1	4	10
Joseph M. McDade (R)	6	8	11
Thomas E. Morgan (D)[1]	1	0	0
John P. Murtha (D)[1]	6	0	0
Robert Nix (D)[1]	1	0	0
Fred B. Rooney (D)	0	15	0
H. T. Schneebeli (R)[1]	44	0	0
Joseph P. Vigorito (D)	0	0	6
John Ware (R)	2	1	12
Gus Yatron (D)[1]	1	0	0
Rhode Island:			
Robert Tiernan (D)	1	16	9
South Carolina:			
Mendel Davis (D)[1]	19	0	1
Floyd Spence (R)[1]	21	0	9
Edward Young (R)	0	0	6
South Dakota:			
Frank Denholm (D)	0	6	0

	Closed	Open	Absent
Tennessee:			
LaMar Baker (R)	0	0	6
Robin L. Beard (R) [1]	10	0	7
John J. Duncan (R)	41	2	1
Joe L. Evins (D) [1]	19	0	8
Richard Fulton (D)	5	38	1
Ed Jones (D) [1]	7	0	0
D. Kuykendall (R) [1]	33	0	2
J. H. Quillen (R) [1]	2	0	0
Texas:			
Bill Archer (R)	4	39	1
Omar Burleson (D) [1]	44	0	0
Bob Casey (D) [1]	25	0	3
J. Collins (R) [1]	2	0	11
E. de la Garza (D) [1]	6	0	0
Bob Eckhardt (D)	1	10	4
O. C. Fisher (D) [1]	23	0	0
Abraham Kazen (D)	0	0	1
George H. Mahon (D) [1]	29	0	0
J. J. Pickle (D)	2	11	2
W. R. Poage (D) [1]	6	0	0
Robert Price (R) [1]	0	0	25
Richard White (D) [1]	16	0	6
Charles Wilson (D) [1]	1	0	0
John Young (D) [1]	1	0	1
Utah:			
K. G. McKay (D) [1]	26	0	0
Virginia:			
J. T. Broyhill (R) [1]	43	0	1
Robert Daniel (R) [1]	18	0	4
W. C. Daniel (D) [1]	23	0	0
J. K. Robinson (R) [1]	23	0	4
D. E. Satterfield (D)	14	1	0
William Wampler (R) [1]	1	0	6
G. William Whitehurst (R) [1]	17	0	0
Washington:			
Brock Adams (D)	30	1	4
Thomas Foley (D)	0	6	0
Julia Hansen (D)	18	1	4
Floyd Hicks (D) [1]	24	0	1
West Virginia:			
Robert Mollohan (D) [1]	20	0	2
John M. Slack (D) [1]	18	0	10
H. O. Staggers (D) [1]	32	0	0
Wisconsin:			
Les Aspin (D) [1]	12	0	8
Glenn Davis (R) [1]	22	0	9
David Obey (D)	1	22	2
Vernon Thomson (R) [1]	1	0	0
C. Zablocki (D) [1]	1	0	0

[1] Representative always voted to close.

Note.—(D) means Democrat; (R) means Republican.

REPORT ON HANSEN QUESTIONNAIRE

Scope of data

145 Standing Committees and Subcommittees of the House of Representatives received questionnaires. Of these, 83 returned questionnaires. Response according to Committee is listed below:

Committee and subcommittees	Total responding	Total
Agriculture	6	10
Appropriations	8	14
Armed Services	3	9
Banking and Currency	6	9
District of Columbia	5	7
Education and Labor	7	9
Foreign Affairs	7	11
Government Operations	7	8
House Administration	2	9
Interior and Insular Affairs	3	8
Interstate and Foreign Commerce	2	6
Judiciary	3	8
Merchant Marine and Fisheries	4	6
Post Office	4	7
Public Works	5	7
Rules	1	1
Space and Aeronautics	5	7
Standards of Official Conduct	1	1
Veterans' Affairs	3	6
Ways and Means	0	1

Question 1. During the 93rd Congress (prior to the August recess), approximately what percentage of the Committee/Subcommittee meetings have been open?

Answer. Of the 83 subcommittee and committee chairmen who returned questionnaires, the percentage of open meetings reported was as follows:

(73)[1] 61 committees reported that 100 percent[2] of their meetings were open.
(2.5) 2 reported that 99 percent were open.
(1.2) 1 reported that 98 percent were open.
(1.2) 1 reported that 95 percent were open.
(1.2) 1 reported that 85 percent were open.
(2.5) 2 reported that 80 percent were open.
(1.2) 1 reported that 50 percent were open.
(1.2) 1 reported that 32 percent were open.
(1.2) 1 reported that 25 percent were open.
(1.2) 1 reported that less than 5 percent were open.
(2.5) 2 reported that no open meetings had been held.
(2.5) 2 did not respond to the question.

The information reported on some questionnaires was not adequate to determine percentages:

6 reported that "all but one" meeting had been open.
11 reported that "all but two" meetings had been open.

The Committees and Subcommittees who reported that all of the meetings had been open were:

	Total	Response
Education and Labor	9	7
Interior and Insular Affairs	8	3
Merchant Marine and Fisheries	6	4
Post Office and Civil Service	7	4
Rules	1	1

The District of Columbia and the Science and Astronautics Committee and their Subcommittees reported that 100% of their meetings were open with the exception of one organizational meeting.

Of the 83 Subcommittee and Committee Chairmen who responded, 9.6% of them indicated that one half or less than one half of their meetings were open.

Question 2. Approximately what percentage of the Committee/Subcommittee hearings were open?

(65) 54 reported that 100% of their hearings were open (15 did not answer this question. However, of these 15, all but 2 answered the previous question with the response that "all meetings" were open. If one were to assume that "meetings" was intended to be an inclusive term, the number of hearings open would increase to 67 or 81%.)

(2.5) 2 reported that 99% were open
(1.2) 1 reported that 98% were open
(3.5) 3 reported that 90% were open
(1.2) 1 reported that 78% were open
(1.2) 1 reported that 71% were open
(1.2) 1 reported that 38% were open
(1.2) 1 reported that 25% were open
(2.5) 2 reported that none of their hearings were open
1 reported that all but one hearing were open
2 reported that the full committees did not hold hearings
1 questionnaire was unclear

Of the total number of Subcommittee and Committee Chairmen responding, 3.6% reported that less than half of their hearings were open. The Commit-

[1] Number in parentheses is percentage based upon 83 questionnaires unless otherwise indicated.

[2] Three respondents answered Question No. 1 with 100 percent. However, the answer to a later question indicated that in the case of one committee, 4 meetings had been closed, and in the case of another one had been closed. On a third questionnaire, there is the comment "except for markup sessions and informal meetings."

tees and their Subcommittees which responded to the questionnaire and whose committees reported that 100% of their hearings were open were as follows:

Banking and Currency
District of Columbia
Education and Labor
Government Operations
Interstate and Foreign Commerce
Post Office and Civil Service
Public Works
Rules
Science and Astronautics
Veterans' Affairs

Question 3. Prior to adoption of H.Res. 259, what was the policy of the Committee/Subcommittee regarding open meetings? During the 92nd Congress?

This question sought to get a feel for the impact, if any, that discussion of the pending passage of the resolution might have had on the policies of the Committee. The answers indicated that the question was not clearly stated, as some responded to the second part on the basis of the 93rd Congress as a whole rather than according to policy after adoption of the resolution. Nevertheless, the information regarding the policy of the Committees and Subcommittees in the *92nd Congress* is of interest:

(36) 30 reported that the committees held closed markup and executive session meetings

(18) 15 reported that hearings were open

(12) 10 indicated that hearings were open, subject to limitation. As reported these limitations included:

7 except in cases of national security
1 upon the decision of the chairman

(10.8) 9 indicated that all the meetings were open

(4.8) 4 reported that all meetings were closed

(4.8) 4 replied that meetings were generally closed

(3.6) 3 replied that Committee policy complied with the rules of the House; 3 reported that all meetings were open subject to certain limitations such as meetings were the adoption of investigative reports

(3.6) 3 reported that the Committee's policy was to hold open meetings unless there was a vote to close; 1 reported that all hearings were open unless vote to close; 1 reported that 50% of the meetings were closed.

Question 4. Of the total number of votes taken to close meetings, approximately what percentage have been taken the same day as the meeting? Prior to the day of the meeting?

Percentages regarding votes taken to close meetings are based on the total number of committees reporting that votes had been taken to close meetings (35 committees and subcommittees)

Votes on the day of the meeting:

(43) 15 reported that 100% of the votes taken to close a meeting had been taken on the same day as the meeting

(8.5) 3 reported that 50% of the votes taken to close a meeting were taken on the same day as the meeting

(2.9) 1 reported that 33% of the votes were taken on the same day

(2.9) 1 reported that 10% were taken on the same day

(2.9) 1 reported that the number was "very small"

Votes taken to close meetings prior to day of meeting:

(11.5) 2 reported that 100% of the votes were taken prior to the meeting.

(2.9) 1 reported that 90% of the votes were taken prior to the day of the meeting.

(2.9) 1 reported that 66% of the votes were taken prior to the day of the meeting.

(8.53) 3 reported that 50% were taken prior to the day of the meeting.

(2.9) 1 reported that a "large percentage" were taken prior to the meeting.

(2.9) 1 reported that one vote had been taken prior to the meeting.

Question 5. For purposes of determining when a vote should be taken to close a meeting, what does the Committee/Subcommittee consider a "meeting?"

(28.9) 24 of the total number of Committees returning questionnaires reported that they defined a meeting as: "any markup session, regardless of whether or not it extends over a period of more than one day."

(18.1) 15 of the total respondents answered with "each day on which a meeting is held."

(8.4) 7 checked both of the above answers.

(9.6) 8 responded with "other." Of these, 2 indicated that their Committee had not discussed the matter. Additional responses were as follows:

"any purpose for which the Subcommittee meet" including hearings

"any meeting called by chairman"

"any formal, open hearing about which the press and the public had been notified."

"no formal rule"

"undecided"

"everything except informal meetings"

Question 6. Has the Committee/Subcommittee received any complaints from the public about votes taken to close a meeting at the beginning of the meeting?

Only one Committee reported that it had received a complaint regarding its votes to close a meeting on the same day as the meeting.

Question 7. Has the Committee/Subcommittee closed a hearing on the basis of national security? If so, what criteria was used to determine that it was a national security issue?

Eight committees (9.6%) reported that they closed meetings for security purposes. In response to the question as to the criteria used to determine whether or not it was a national security issue, two (2) responded that the Administration identified material to be presented in the hearing as classified, one was in response to a request from the witness, and one Committee closed because of the official position held by the witness. Judiciary Committee reported that witness would be available only in a closed session.

Did any members of the Committee/Subcommittee object to the meetings being closed?

IMPACT ON THE WORK OF THE COMMITTEE/SUBCOMMITTEE

1. Since approval of the resolution, lobbying activity has (1) ——— increased (2) ——— decreased (3) ——— remained about the same.

There has been —— change —— no change in the type of lobbyist. (For example, increase in lobbyists on behalf of citizen groups.) If there has been a change, please explain.

(68.7) 57 Committees reported that lobbying activity has remained about the same since passage of the resolution.

(10.8) 9 Committees reported that lobbying activity has increased.

None reported a decrease in lobbying.

(67.5) 56 reported that there has been no change in the type of lobbyist since the passage of the resolution.

(8.4) 7 reported that there has been a change. Identified increase in activity was as follows:

2 reported increased activity among consumer interest groups.

2 reported increased activity from "citizen groups."

2 reported increased activity from "special interest groups."

1 reported increased activity among environmental groups.

2. What evidence is there that open meetings have affected citizen participation in the governmental process?

(61.4) 51 Committees reported that they could see no evidence of an increase in citizen participation.

(22.9) 19 reported what they felt was evidence of increased citizen participation. Evidence as reported was:

13 pointed to increased attendance at hearings.

2 mentioned correspondence received from individual citizens.

2 mentioned increase in testimony on bills from consumer or "citizen" groups.

1 cited inquiries from citizens re: Committee work.

1 cited the interest by public groups in markup session.

(6.2) 5 reported that they felt they had no basis on which to make a conclusion.

(1.2) 1 reported that there was "little evidence."

3. What would you say has been the most positive impact which the requirements of the rule has had upon the Committee/Subcommittee?

(30.0) 25 Committee and Subcommittees reported that they could discern no impact.

(8.4) 7 reported that they felt they had insufficient information on which to make a judgment.

(37.3) 31 reported what they felt were indicators of positive impact:

(6.0) 5 reported that more members attended Committee sessions and attended more often.

(4.8) 4 reported that they felt citizens participation had increased.

(3.5) 3 reported that members have increased the extent of their participation.

(2.5) 2 reported that public knowledge of proceedings had improved.

(2.5) 2 reported that the Committee had greater leverage in getting officials of the Executive Branch to testify in open hearings.

(2.5) 2 reported that members were generally better prepared for the meetings.

2 mentioned the fact that meetings previously closed are now open.

Additional illustrations of positive impact included:

increased public interest.

"good."

fairer press reports.

members on record regarding issues.

improved public reaction.

affect on drafting of controversial legislation.

increased public understanding of the Freedom of Information Act and the principles of open government.

members spend more time considering legislation.

the public attends markup sessions.

more members are participating.

One Subcommittee Chairman merely said that it was a "victory for the reformers."

What would you say has been the most negative aspect of compliance with the rule?

(43.4) 36 members reported that they could discern no negative effect of the new rule.

(7.2) 6 reported that they felt members were reluctant to speak openly and candidly.

(6.0) 5 complained of a tendency on the part of its members to use the Committee meetings as a forum for speeches.

(3.5) 3 complained of longer sessions.

(2.5) 2 felt that work was delayed.

(2.5) 2 believed that too much direct pressure upon the members of the Committee was created.

(2.5) 2 mentioned the difficulties Committee had in obtaining rooms which were large enough for the meetings. 1 reported "little difficulty" in our Subcommitte 1 reported inadequate information on which to base a judgment.

Additional negative aspects mentioned once were as follows:

difficult to maintain order.

poor legislation resulted.

difficult to obtain a quorum when necessary to close a meeting.

poor newspaper coverage.

lobbyists drafting amendments and handing them to members during the markup session.

awkward administratively.

4. Generally, how would you describe the impact of the rule upon the activity of the Committee/Subcommittee?

(49) 39 saw no or only a very slight impact upon the Committee.

(21.7) 18 identified what they felt was a generally favorable impact.

(10.8) 9 felt the impact has been "good", "beneficial", "salutary", etc.

(4.8) 4 found the impact "acceptable", "not unfavorable".

(1.2) 1 found members and staff better prepared for the meeting.

(1.2) 1 felt that it further safeguards "the public's right to know".

(1.2) 1 felt that the Subcommittee was better equipped to deal with the Executive branch.

(1.2) 1 felt that members were generally more responsive to public recommendations.

(1.2) 1 felt that the change was "significant" and "far reaching".

(3.5) 3 identified what they felt were generally negative impacts, 1 "a waste of time" 1 "complicates procedures" 1 "reluctance of members to speak candidly"

Additional comments included:

extended markup sessions

members learn what the public feels about a bill at an earlier date

"slightly liberalizing"

we can "live with it"

LETTER SENT TO SENATOR CHILES FROM DAVID COHEN[1] AND REPLIES RECEIVED AS OF MAY 21, 1974

COMMON CAUSE,
Washington, D.C., April 18, 1974.

HON. LAWTON CHILES,
U.S. Senate,
Washington, D.C.

DEAR SENATOR CHILES: Common Cause has long advocated that the Senate adopt an open meetings rule similar to the one adopted by the House in March 1973. We believe the Senate Government Operations Committee has taken an important and commendable initiative in establishing a presumption of openness in its mark-up sessions.

Because of the claims that open mark-ups carry some potential problems, we have been closely observing the effect of the openness rule on committee activity in the House. For the same reason, we would like to obtain your evaluation of how openness has affected the work of your committee.

As you know, some opponents of open mark-up sessions have argued that the presence of the press and public would impede a committee's work, that open and frank discussion would cease, and the real business of the committee would be done elsewhere. Has that proved true in your experience?

It was also argued that meetings would become shams, characterized by grand-standing to win favorable publicity, and that the watchful eye of special interest lobbyists would make it difficult for the committee to legislate in behalf of the general public interest. Has that proved true in your experience?

Most members of the House, when surveyed on the impact of the new rule, shared the view that openness did not interfere with committee business. Do you agree with this?

Thank you for your cooperation.

Sincerely,

DAVID COHEN,
Director of Operations.

U.S. SENATE,
Washington, D.C., April 22, 1974.

MR. DAVID COHEN,
Common Cause,
2030 M Street N.W.,
Washington, D.C.

DEAR MR. COHEN: I have your letter of April 18 asking for my evaluation of the effect of the open mark-up rule on the business conducted during this Congress in the Committee on Banking, Housing and Urban Affairs.

I am glad to have been involved in the effort that was made at the beginning of this Congress to enact an open mark-up rule applicable to all Senate committees. As you may recall, when that effort failed, I offered the proposal that the Banking Committee modify its rules so as to permit open mark-ups.

I was of course pleased that that effort was successful and have been even more pleased with the results. To my knowledge, open mark-ups have not prompted Members of the Banking Committee to hold any secret caucuses or other behind-the-scenes discussions. On the contrary, it is my judgment that the rule has greatly facilitated the Committee's conduct of its business by

[1] Similar letter was sent to members of three committees.

providing Members with a new incentive to attend mark-ups, and to be well prepared to participate in the Committee's deliberations. I am firmly convinced that these advantages far outweigh any negative effects of the change from closed to open mark-ups.

I am glad to hear that your survey of House Members indicates that a majority of them believe that openness does not interfere with Committee business. I am confident that a majority of the Members of the Committee on Banking, Housing and Urban Affairs feel the same way. I will continue to do all that I can to pursuade a majority of my colleagues to adopt that point of view—and vote accordingly the next time the issue is presented to the full Senate.

Sincerely,

ADLAI E. STEVENSON III.

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C., April 23, 1974.

MR. DAVID COHEN,
Common Cause,
2030 M Street N.W.,
Washington, D.C.

DEAR MR. COHEN: Thanks for your letter of April 18th. I am glad to have your request for my reaction to the open committee mark-up sessions.

I believe the Senate Banking, Housing and Urban Affairs Committee was the very first one to adopt a rule of complete openness in our meetings with the single exception of action on confirmation of appointees.

I must say that in the beginning I had some misgivings as to how open mark-up sessions would operate. I did feel that it might have a restraining effect on open discussion that is so necessary in getting a consensus in the committee. However, I went along with it, and I have been pleased to note that it has not restrained or restricted our operations in any way. Our discussions are open and frank, just as if no others were in the committee room other than our committee members. I have been pleased with the result.

Sincerely,

JOHN SPARKMAN.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., April 24, 1974.

MR. DAVID COHEN,
Director of Operations,
Common Cause.
2030 M Street NW,
Washington, D.C.

DEAR MR. COHEN. This responds to your letter of April 18 concerning open mark-up sessions on our committee.

In my opinion our experience of the new policy for the last year indicates the following:

1. It is more difficult and time consuming to arrive at a consensus and consequent committee action than it was in the closed session days.

2. While open and frank discussion continues to occur and the real business of the committee is still done in the mark-up sessions such discussion is not of the same quality as before. Individual and party positions are more likely to be worked out beforehand and more or less "set in concrete" at the mark-up.

3. There is a certain amount of grandstanding and speaking for publication.

4. The audiences are almost invariably balanced, with full press coverage, and I can discern no greater committee difficulty in attempting to legislate on behalf of the general public interest. The question, as always, is *what is* the general public interest.

5. The advantages include that public, administration, and special interest groups are immediately apprised of new formulations and point out to staff and committee members any pitfalls which may appear. Such observation has several times been a benefit to the committee and to the general public interest.

I have not yet determined to my own satisfaction whether the disadvantage of the extra time required in an already burdensome schedule and the other disadvantages mentioned above are outweighed by the obvious popularity of the move.

Sincerely,

PAUL FANNIN.

U.S. SENATE,
Washington, D. C., April 25, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR DAVE: As a member of the Senate Interior Committee I welcome the opening of markup sessions and I have found that public interest is much better served by opening committee meetings.

I am advocating the same thing in the other committees on which I serve and would welcome your help.

With best personal regards.

Sincerely,

JAMES ABOUREZK.

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS,
Washington, D.C., April 26, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR DAVE: Thank you for your letter of April 18 requesting my views about the viability of open mark-up sessions.

As you know, I am a strong supporter of opening mark-up sessions to the public. Every business meeting of the Government Operations Committee in this Congress has been open to the public, and it is my belief that the quality of the work done at those meetings has not been impaired.

In answer to your specific questions, I have not found that opening up mark-up sessions has impeded the Committee's work, has curtailed frank discussion, and has caused the real business of the Committee to be done elsewhere. I have also found that our meetings have not been characterized by Senators grandstanding to win favorable publicity. I know of no case where opening up the meeting has interfered with the Committee business.

Recently I have made two statements in support of the concept of opening up the activities of Congress to more public scrutiny. The first was testimony I gave before the Joint Committee on Congressional Operations. The second was a statement I made on the Senate floor in support of Senator Chiles' amendment to open mark-up sessions of the new Senate Budget Committee—an amendment for which you lobbied so effectively. I am enclosing both of those statements and I am hopeful that they will be helpful to you.

I might add that the progress that has been made toward opening up the activities of Congress over the past two years has been due in large part to the hard work of your organization.

With very best wishes, I am

Sincerely,

EDMUND S. MUSKIE.

[ATTACHMENT 1]

MUSKIE NEWS

FOR RELEASE: P.M.'s, Wednesday, February 20, 1974.

MUSKIE SAYS OFFICALS FAIL TO COMMUNICATE

Senator Edmund S. Muskie urged today that Members and committees of Congress step up efforts to "encourage more responsible press coverage" of their work and intensify their study of proposals to televise Congressional activities.

"Relations between officials and the press are the key to restoring public contact and, ultimately, public confidence," he said.

Testifying as the first witness in hearings on Congress and the Media before the Joint Committee on Congressional Operations, Muskie said: "(T)he traditional means which most public officials use to communicate with their constituencies are simply *not* reaching those who need to be educated about the way government operates. On the contrary, those who benefit most from these regular avenues of contact are those who are already the best informed and those who have a personal stake in a particular governmental function."

Muskie based his remarks on a Lou Harris public opinion survey conducted for his Subcommittee on Intergovernmental Relations last fall. The findings, he said, showed that "in general, Americans are not well informed about their government at any level" and "in every case, the less educated, the poorer and those who did not vote do not participate in the communications process."

Noting that government officials do not respect the media as much as the public does, Muskie said: "Our problem with the press is not that it investigates too much, but that it reports too little . . . A Congressional investigation receives more attention when important voices—but not necessarily significant questions—are raised. The opposite is true for the activities which constitute the bulk of our productive work in the Senate—the actual exercise of legislating."

He said that greater efforts by Members of Congress and committee staffs to brief journalists in advance of important legislative debates or mark-up sessions "may be able to increase the informative coverage our work merits." And he recommended conducting more Congressional hearings out of Washington to promote "added attention . . . for an issue" which cannot compete for coverage in the Capital.

Urging thorough study of the financial, practical and policy questions involved in recording and broadcasting floor debates and committee mark-up sessions through a Congressional television service, Muskie concluded: "If such broadcasts—such a network, perhaps—could perform a truly informational role, the considerable cost of establishing it should be weighed against the price we now pay for public ignorance."

The full text of Muskie's prepared testimony is attached.

TESTIMONY OF SENATOR EDMUND S. MUSKIE BEFORE THE JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

I would like to begin today by congratulating the Chairman on his timely initiative in holding these hearings. If the strength of a democracy depends in the best of times on the degree to which its people are well informed, certainly the axiom carries even greater force today. When public confidence in the leadership of all institutions, and especially government, has reached an all-time low, while the complexity of the nation's problems reaches an all-time high, communications between the American people and their leaders should be better than ever before.

But we know that is not the case. Indeed, that is why we are here—because we recognize that in general, Americans are not well informed about their government, at any level, and that we in public life are somehow failing to communicate to those we represent what government is all about today.

My testimony today contains no quick answers to this dilemma. I do try to suggest ways in which we can change some of our practices in Congress to encourage more responsible press coverage and I raise some questions—for which I hope this Committee will seek answers—about the means we might consider of using television to present Congressional activities directly to the public. But before making proposals, I want to set out some of the evidence about the seriousness of the problem we confront.

I.

In December of 1973, the Subcommittee on Intergovernmental Relations released a comprehensive study on the attitudes and expectations of Americans toward their government. That study, prepared by the Subcommittee staff and by Louis Harris and Associates, gave us fresh insight into the state of public awareness of government and its functions in the United States today.

The general public was asked a number of questions designed to measure the degree of public knowledge of government. The answers were almost uniformly discouraging.

While 89% of the public correctly identified the Governor of their state Only 46% were able to correctly identify their Congressman.

Only 59% correctly named one U.S. Senator from their state, and only 42% could name the other Senator as well.

And only 62% correctly identified the composition of the U.S. Congress, even when given the correct answer as a choice among three incorrect ones. A full 20% believed that the Congress is composed of the Senate, the House and the Supreme Court.

A different set of the study's findings shows how inadequate the traditional paths of communication between officials and their constituents are today. While a number of these specific findings do not relate directly to Congress, they are parallel to our own situation and should help us discuss alternative proposals for change.

II.

First of all, it is apparent that public officials think they are communicating with the public better than they actually are.

When asked how up to date they would rate the people in their area on what is going on in Federal, state and local government and in politics, the state and local officials sampled gave the public a higher rating in three out of four cases than the public gave itself.

These officials were fairly accurate in their estimate of public awareness of what is going on in the Federal Government and in politics. But when asked the same question about their own level of government, they missed the mark by a mile. Local officials over-estimated public information about local government by 26 points, the same margin of error State officials showed in assessing public knowledge of state government.

Federal officials were not included in our sample, and we cannot draw any conclusions about them on this point. Nevertheless, it is obvious that for state and local officials, at least, their communications with their constituents are successful only in their own minds.

III.

My second point is more complex, but also, I think, more significant for our discussion. According to the study, the traditional means which most public officials use to communicate with their constituencies are simply *not* reaching those who need most to be educated about the way government operates.

On the contrary, those who benefit most from these regular avenues of contact are those who are already the best informed, and those who have a personal stake in a particular governmental function.

In one question, state and local officials were asked what means they use to keep in touch with those they serve. They responded as follows: 42%—personal conversations and contact; 42%—public and community meetings; 36% through the media; 36%—answering correspondence; 29%—answering telephone calls; and 21%—keeping their offices open to people.

In a follow-up question, they were asked which regular contacts they maintain with the public and how worthwhile they find such activities. Of the 70% who keep regular office hours, 77% found doing so very helpful in getting their job done. Of the 88% who make speeches and appearances on a regular basis, 68% found doing so very helpful. Of the 66% who attend weddings, funerals and social events, 34% found doing so very helpful. And of the 38% who send out newsletters on a regular basis, 51% found doing so very helpful.

The citizens' perspective on these same functions is markedly different.

Measuring public contact with elected Federal officials, we asked people whether or not they had ever received a mailing from their Congressman or Senator. 74% of the public said they had received a letter from the former, and 59% from the latter.

On the surface at least, these figures are fairly impressive. But they are misleading. While 83% of the college educated said they had received a mail-

ing from their Congressman, only 61% of those with an eighth grade education had. While 74% of those with an annual income of $15,000 or more had received a letter from their Senator, only 50% of those in the $5,000-10,000 income range had. While 72% of those the study designated as "active citizens" and 67% of those who said they voted in the 1972 election had received a mailing from their Senator, only 38% of those who did not vote had. And while 78% of whites had received a letter from their Congressman, only 42% of blacks had.

At the state level 37% of the officials reported keeping regular office hours, and 74% found this service very helpful in getting their job done. However, when the people were asked if they had ever visited a state legislator in their state capital, only 14% responded affirmatively. Among professional, college educated and active citizens, this percentage rose to over 20%. However, for blacks it was only eight percent; for those with an eighth grade education, five percent.

Among local officials, 27% volunteered that responding to their mail is an important way for them to keep in touch with their constituents. However, for the people they seek to serve correspondence is far less significant. Only 19% of the total sample said they had ever written a letter to a local government official. For the wealthier, the better educated and the "active citizen," this percentage rose substantially to 30% or better. For blacks, however, it sank to six percent, and for those who did not vote in 1972, to 11%.

I could cite more statistics from the study on this point, but the message is already clear. In almost every case, the means of communication elected officials use primarily reach those who are already best informed—the college educated, the upper income group, the active citizen. Likewise, in every case, the less educated, the poorer and *those who did not vote* do not participate in the communications process. While most of these figures relate to state and local officials only, I would guess that we in Congress are equally trapped in the same pattern of two-tiered communication.

IV.

On a related point, the Subcommittee study also reveals that those in our society who actually go to their government directly to get it to do something for them are the same well informed and active people. Moreover, they generally go to their government for a particularized, personal service rather than on broader policy issues of concern to the general community.

Only 24% of the general population reported ever having gone to their local government. Among the college educated the figure was 38%, 42% among professionals, and 39% among the active citizens. For blacks, the figure was only nine percent; for those who did not vote in 1972, 15%. And the same pattern holds for those who have ever gone to State or Federal Government, though the percentages of contact are much lower across the board.

The concerns that take people to their government are varied, but primarily personal. At the local level, traffic-related problems and zoning questions elicit the greatest public action. At the State level, the most motive for contact was financial assistance of one form or another, with scholarships aid often listed as a specific concern. Of those who contacted the Federal Government, the largest number said they sought help on such matters as citizenship, disability insurance payments, social security, and passports, followed by persons seeking Federal grants or research aid and individuals with military-related problems.

By and large we found that citizens do not go to their government to communicate with officials about broad policy questions, but rather to seek help on problems which involve only the mechanics of government. With the sole exception of the Federal Government, where 23% of those who said they had ever gone to the Federal Government to get it to do something had written to express an opinion on an issue, in no other instance did a substantial number of persons cite the expression of their viewpoint on a public issue as a reason for going to their government.

V.

The lengthy, detailed analysis I have presented of the communications gap between the government and the governed is only helpful as a diagnosis if we can go beyond it to prescribe some curative measures. I hope I am not mistaking the symptoms for the illness when I insist that relations between officials and the press are the key to restoring public contact and—ultimately—public confidence.

Television and the printed press are the megaphones which carry our thoughts outside this room. It will be months, I would imagine, before these hearings are printed, and even then, most of the records of your Committee's work will end up on library shelves. If we have a message to transmit, we must rely on journalists to amplify it for us—or find new means to go directly to the people.

The Subcommittee survey found, to no one's surprise, that Americans rely overwhelmingly on television and newspapers to inform them about public issues and the conduct of government. Yet, as I already observed, the public knows itself to be poorly informed.

The survey also found—in the wake of the journalistic enterprise that went into investigating the Watergate scandals—that television news and the press were the only major institutions with a higher standing among the public in 1973 than they had in 1966. These levels of confidence are less than awe-inspiring: 41% for television news and 30% for the press. Nevertheless, the public rating is at great variance with the view of state and local officials, 17% of whom accord television news a great deal of confidence and 19% of whom give the same respect to printed reporting.

Those figures define the problem. The men and women who know most and best what government is doing also trust least the only reliable means they have for communicating their knowledge, for eliciting a public judgment on their performance and, most importantly, for developing a public role in the work of government.

In passing, I might suggest some reasons for that lack of trust. It does not stem from the sensitivity of officials to criticism and exposure. We are all sensitive; we are all, in many respects, secretive. But no one who runs for office in a democracy now nearly two centuries old can be so naive or vain as to expect universal praise or think himself immune from probing inquiry.

VI.

Our problem with the press is not that it investigates too much, but that it reports too little. We all know that conflict makes news. But we also know that a televised shouting match usually concentrates more on the exchange of insults than the exchange of ideas. A Congressional investigation receives more attention when important voices—but not necessarily significant questions—are raised.

The opposite is true for the activities which constitute the bulk of our productive work in the Senate—the actual exercise of legislating. Until this Congress, of course, we did not permit public scrutiny of the committee mark-up process, the occasion when most legislation takes final shape, when disagreements are sharply drawn and frequently reconciled.

But I am confident that a poll of those committees which have opened their doors during mark-up sessions would reveal that private interests have been well represented in the audience—as lobbyists—while the public interests—in the form of journalists—has been noticeably absent. You and I know, Mr. Chairman, from our own experience how little publicity was given the recent mark-up sessions of the Senate Government Operations Committee which resolved difficult problems on executive privilege, on reforming Congressional budget procedures and on revising the government procurement practices which account for billions of dollars in annual outlays.

Now why are there dozens of reporters and three television network cameras covering testimony on government secrecy and none at the committee meetings where laws are written to deal with those problems? The answer, I suspect, is that a clash of opinion is innately more newsworthy than the resolution of those differences.

That judgment of what makes news is one we must live with while we do our best to alter it. To the extent that committee members—and even special committee staff—engage in a constant attempt to brief journalists in advance of a mark-up session, or a floor debate, on the issues involved, we may be able to increase the informative coverage our work merits. Such activities will take time from us and money from our committee budgets. We ought to give them a try.

In a column last May in the *Washington Post* David Broder intimated that responsible journalists recognize their profession's shortcomings. He suggested that newsmen should say "publicly what we know to be the case: that every day, we print a partial, incomplete version of certain selected things we have learned, some of them inevitably erroneous, all of them inevitably distorted by the need to abridge and by the force of our own preconceptions and prejudices. If we acknowledged that fact of journalistic life, perhaps we could act more quickly—and with less coyness—to correct yesterday's version with today's fresh evidence."

A second problem, however, is that one leak is often worth a thousand releases. A fact—or a prediction—that has been kept secret sets the adrenalin of editors pumping faster than an announcement made in broad daylight and delivered to their offices days ahead of their deadlines. Occasionally—if not seriously—I wonder if we might not get more attention if we stamped our material "Confidential" or "Eyes Only" and passed it out with whispers instead of with messengers to the press gallery.

VII.

In fact, however, our only proper course is to invite more publicity, not less, by exposing ourselves more to the public than ever. If a committee inquiry into the problems of federalism or environmental policy or health care cannot compete for attention against all the other news events in Washington, we should take the committee to the expert witnesses in the States, where the presence of a few Senators is more likely to arouse interest.

The financial differential between paying our fares out of the Capital and the expenses of the men and women we bring here to testify will not be great. And the added attention we can promote for an issue by taking the issue to those who must deal with it will often be worth the price.

When Lou Harris presented his findings in formal testimony to the Subcommittee on Intergovernmental Relations, I introduced him by saying, "The dialogue—in which the press is the essential intermediary—between the people and their leaders is being interrupted and distorted.

"To restore it will take a change of manners not laws, on both sides. The change will have to begin with a new acceptance by officials of the necessity of submitting their public conduct to continual scruitiny and a new willingness by journalists to conduct that scrutiny with an eye to information as much as sensation."

That is, I realize, a broad and imprecise prescription. While we are trying various means to fill it, I would only urge, in addition, that we explore the other option: that of finding new ways to inform the people directly, without intermediaries, of our activities. Obviously, television is the only medium that can carry such a message for us effectively.

Equally obviously, the use of television by Congress to present itself more fully to the public raises a number of questions. I cannot answer them, but I can and do urge that your committee give them thorough study.

From the practical point of view, we need to be able to estimate the cost of televising floor debates either continuously or optionally, according to the importance of the issues under discussion. We need to know what staff would be required for such an undertaking. We need to examine the cost—and value—of a Congressional service covering committee hearings and mark-up sessions, either to offer videotape footage to the commercial networks or for use in preparing programs the Congress itself sponsors as legislation comes to the House or Senate floor for decision.

I can imagine programs, properly supervised, which would give viewers the essential background on important bills, present excerpts of actual debates and even make the chief sponsors and opponents of such legislation available as a panel to answer telephoned questions from all over the country about the issues involved. I can conceive, even, of a public television network controlled by Congress offering nothing but views of Congress at work.

I cannot, however, begin to estimate the cost of such an undertaking. I can only wonder aloud what agreements between the majority and minority parties in each House—and between the Houses—would be necessary to control such programming. And I have to ask, quite frankly, what audience we might reach with daytime broadcasts of the proceedings on Capitol Hill.

I do not, however, put these questions forward as extravagant fantasies. If such broadcasts—such a network, perhaps—could perform a truly informational role, the considerable cost of establishing it should be weighed against the price we now pay for public ignorance.

I hope you will gives these questions serious study. It is time they were asked. I hope they can be answered.

[ATTACHMENT 2]

SPEECH BY SENATOR MUSKIE ON THE FLOOR OF THE SENATE, MARCH 20, 1974

Mr. MUSKIE. Mr. President, it should be clear in the record of this debate that the amendment proposed by the distinguished Senator from Florida was included in the budget reform bill reported by the Government Operations Committee. They did so in part for the reasons which have been stated by the distinguished Senator from Illinois (Mr. PERCY).

The distinguished Senator from West Virginia (Mr. ROBERT C. BYRD) makes a persuasive case which includes, I gather, the principal point that the effect of the amendment would be to discriminate against one committee.

Why then, did the Government Operations Committee undertake to include this requirement in the bill?

Speaking only for myself, because the committee has not taken a position on the amendment on the floor this afternoon, I think we did so first because, the Government Operations Committee has had exceptionally fine experience with open, markup sessions. I do not think we have had a closed session in the past year.

This rule has applied to our consideration of such legislative matters as the budget reform bill, executive privilege legislation, impoundment legislation and so forth.

It was of interest to me that, at the same time the Watergate Committee was taking testimony on the consequences which have flowed from our failure to deal with these problems, executive markup sessions on constructive legislation to correct fundamental policy got so little attention, even with the open markup sessions.

So, No. 1, because we have had excellent experience, we thought we would incorporate it in this charter for the new budget committee.

Second, this is a new committee. It is not an established committee with established rights and perquisites and feelings of autonomy. It is a new committee created to serve the Senate as a whole, and its counterpart on the House side to serve the House as a whole. This is not a standing committee in the

usual sense. It is a committee whose responsibilities spread like an umbrella over all committees. Hopefully, it will be a very visible committee. Hopefully, its work will contribute to the public interest, and the beneficient consequences of that will be highly visible.

So we saw this committee as a way to symbolize the importance of opening up the legislative process, without necessarily violating whatever prerogatives other standing committees of the Senate may feel they have. It was the way to open it up.

Today, Mr. President, I read an editorial on the back page of U.S. News & World Report. It is entitled "Dropout's Lament." The editorial refers to the fact that there appear to be an unusually high number of congressional dropouts this year. Members who are not going to run again. The writer of the editorial was interested in getting the reasons why. He talked to one, a Republican whom he does not identify, a Republican who could win easily, who has won several terms, and whose successor, as yet unidentified, probably will continue to win the seat for the Republican Party.

He asked this Republican Member of Congress—he does not identify the House.

Then why quit?

This was the answer in part:

A. Two things: the system and Washington.

By the system I mean Congress, the way it has to operate. It is frustrating.

I am serious about public life. There are things I want for this country—things that need to be done. I came to Congress determined to make it move. I know how my people feel I'm the guy to see to it. That's what Congress is all about.

But what am I really? I'm a pebble on a beach. I'm nothing. It's the system. I can't do anything unless I'm chairman of an important committee—and I could wait forever for that Seniority I've held my job 14 years and I'm a member of the minority. You can guess how long I'd have to be around to be a committee chairman.

Congress is run by a few veterans. The rest of us are just numbers. Oh, we can make a lot of noise, but who will hear us?

* * * * *

Q. What about Washington?

A. What is "Washington"? To most of my people it is some place out there that raises taxes and sets the speed limit on interstate highways. It is a world series every four years when we pick a President. The rest of the time it is blah!

You take the ordinary voter. Can he tell you the name of his Congressman, or how he stands on the minimum wage?

I am genuinely interested in people, in seeing to it that they are well served. I'd be more effective as a member of the city council in my hometown. When you talk about "of the people, by the people and for the people," that's where government is—right there where they live and work. To those people Washington—and everybody in it—is a big, overbearing, impersonal nothing.

That is one man's view. It is not mine, entirely. But it makes a point.

If we want to be relevant to the lives of our people—and believe me, they do not think we are at the moment—then we have to be seen by them; we have to be heard by them. They have to see the way in which we make policy. They have a right to see what results we achieve and where we stand at those places where the decisions are made that count.

I have watched debate on the floor of the Senate during the years I have been here—now 16—and the attendance declines with every passing year. The debate becomes less relevant to the policy that ultimately emerges from Congress with every passing year. All of us here know that increasingly the important decisions are made in the committee.

Look at this bill. This is an important fundamental reform, and it is going through here—with minor controversies and a few amendments. But, by and

large, the Senate is taking the judgment of two committees—the Government Operations Committee and the Rules Committee. Excellent work was done in these committees.

Incidentally, I should like to pay tribute to the outstanding work done by the distinguished Senator from West Virginia on this bill in the Rules Committee.

The decisions are made there. With the exceptions of those few committees which have begun to open up the process, the decisions are made behind closed doors. People outside do not know what the divisions were, what arguments were raised, who voted either way. This happens over and over again. So the decision-making process is out of sight.

Is it any wonder that the people do not see that what we do has anything to do with the problems they face or the way they live or the prospects for the future?

I am simply giving my personal interpretation of why the Government Operations Committee included in the bill the amendment now before the Senate.

We saw this as a major new policy-making arm of Congress, which we hoped to use to make the point that these new policy decisions are going to be made, to the fullest extent possible, in public view.

The argument that the distinguished Senator from West Virginia makes is a perfectly reasonable and rational argument. I do not quarrel with him, until he gets to his conclusion; and at that point we part company, for the reasons that he has stated so well and which I have undertaken to state in my own behalf.

Mr. CHILES. Mr. President, will the Senator yield?

Mr. MUSKIE. I yield.

Mr. CHILES. The Senator was responsible in the Subcommittee on Government Operations for pulling out the Harris poll on the attitudes of people toward Government. I think it was an outstanding poll. In that poll, as I recall, 74 percent of the people felt that excessive secrecy was one of the causes of Watergate, and I believe it said the same with respect to the other problems we are now facing in Government. Does the Senator recall that?

Mr. MUSKIE. Yes. That was a very striking finding of this poll. I believe the percentage is about, as the Senator has stated; 74 percent said that excessive secrecy was in large part responsible for the failure of government to serve their needs. The Senator is correct. I believe that most Members of the Senate have received copies of that survey, which is a very helpful analysis of the public attitude and really underscores the comments made by the unidentified Republican in this editorial.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., April 29, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW,
Washington, D.C.

DEAR MR. COHEN: Thank you for your letter on the open meetings rule.

I do not think that this is an entirely black and white issue and I do not suspect the motives of those who wish to hold meetings and markups in private. I strongly suspect that many of their misgivings are well founded and I have served long enough in the Congress to know that openness and honesty are not necessarily identical.

On balance, however, I think the argument for open hearings is the stronger. We are elected to do the business of the citizens of the several states whose tax money pays for the accomplishments of this business. In all fairness, the public should be able to scrutinize the manner in which this is done as well as the end result.

I therefore have supported and will continue to support legislation proposing open mark ups.

Sincerely,

JAMES A. MCCLURE.

U.S. SENATE,
Washington, D.C., May 6, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR MR. COHEN: This is in reply to your inquiry about my experience concerning markups in my committees.

Frankly, I was quite skeptical and reluctant to support open markup last year but on the basis of my experience in the Senate Banking, Housing and Urban Affairs Committee, my own attitudes have changed in favor of the additional openness in the Committee and I am now pursuaded that this is an appropriate and useful procedure.

My other major committee, the Armed Services Committee, of course, continues to be complicated by executive sessions because of the classified nature of much of its discussions.

Sincerely,

THOMAS J. MCINTYRE.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., May 7, 1974.

DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR MR. COHEN: Thank you for your recent inquiry in regard to the open mark-up sessions of the Senate Interior and Insular Affairs Committee.

Frankly, at times the presence of press and public has impeded the Committee's work. It takes more time in an open session to conduct business. Some issues on occasion have been resolved before the mark-up sessions. However, this is rare.

There has been some grandstanding in the open sessions. This can be expected in the political arena, especially from Presidential aspirants.

The attendance of special interest lobbyists does not make it impossible to legislate in behalf of the general public. The general public is well represented by the Congress.

Despite the problems with the openness rule, I feel that the public and press should be entitled to know how the Committee conducts its business. I would generally recommend it to other Committees.

Sincerely,

CLIFFORD P. HANSEN.

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., May 7, 1974.

Mr. DAVID COHN.
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR DAVID: I am pleased to respond to your letter asking for my views on having experienced open mark-up sessions in the Senate Government Operations Committee this past year.

You know, of course, of my own deep and personal commitment to openness legislation. After my experience in the Florida Legislature with a similar law, this past year held no real surprise for me. Committee meetings did not become shams. There was no unusual grand-standing. The impact of the openness rule, if anything, was quite positive. That is, the Committee members were, I believe, better prepared to discuss the business at hand, knowing there might be an audience to watch the proceedings.

Openness did not interfere with committee business. It did, in fact, facilitate it. As one of your own press releases put it, "Openness works!" I am convinced all we need now is more of it.

Sincerely,

LAWTON CHILES.

P.S. What about the study for my effort to open up appropriations?

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C., May 8, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR MR. COHEN: Thank you for your recent request concerning my assessment of the impact of conducting open mark-up sessions by the Senate Committee on Banking, Housing and Urban Affairs. As you know, I strongly supported open mark-up sessions because I believe the public has a basic right to know what is going on and I can see little justification for conducting these sessions in secret.

I believe the open mark-up sessions conducted by the Senate Committee on Banking, Housing and Urban Affairs have enabled the press and others to gain a greater appreciation of the legislative process. At the same time, I have detected no appreciable difference in the behavior of the Committee members during open mark-up's. It is my impression that our Committee members engage in the same free and open discussion in open sessions as they did previously during closed sessions. Moreover, none of the adverse consequences predicted by open mark-up opponents appear to have materialized. I have noticed no increase in "grandstanding" by Committee members, nor do I feel that open mark-up's have become shams to ratify decisions already made in private.

I trust these observations will be useful to you.

Sincerely,

WILLIAM PROXMIRE.

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C., May 13, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR DAVID: I am in receipt of your letter dated April 18, 1974, concerning the open markup sessions that the Senate Government Operations and Banking, Housing and Urban Affairs Committees have been holding.

I feel that these sessions have not been affected adversely by openness. In fact, I think that the Senators have performed as well as, if not better than, those private markup sessions I have been a part of.

In other words, openness has not interferred with Committee business.

I have taken a very strong stand for openness throughout the Congress and hopefully the full Senate will adopt an openness rule at the beginning of the next Congress. Your consistent stand on openness is very much appreciated.

Very truly yours,

BILL BROCK.

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C. May 15, 1974.

Mr. DAVID COHEN,
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR DAVID: A brief response to your letter of April 18th is that openness works in the Senate Government Operations Committee. As Ranking Republican member of the Committee I strongly supported opening all of our meetings to the public. My personal view, a view that I believe is shared by majority of members of the Committee, is that open meetings have improved our Committee's operation. I personally am proud of the quality of our Committee's discussions. I am pleased that the public has the opportunity to know that this Committee is a dedicated Committee of Senators committed to thorough, frank discussion of the issues in the legislation we report.

I strongly favor a requirement that meetings of every committee of the Congress be open to the public. In my view that is one major way in which to help give the public confidence in our legislative institutions.

Sincerely,

CHARLES H. PERCY.

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C., May 16, 1974.

Mr. DAVID COHN.
Director of Operations,
Common Cause,
2030 M Street NW.,
Washington, D.C.

DEAR MR. COHEN: Thank you very much for your letter on behalf of Common Cause with regard to open mark-up sessions of the Senate Interior and Insular Affairs and Banking, Housing and Urban Affairs Committees. Through my experience as a member of these committees, I have found that the openness has not interferred with our ability to conduct committee business. Indeed, I believe that the open sessions have worked very well, and I am hopeful that this practice will be adopted by other committees in the future.

With kindest regards,

Sincerely,

J. BENNETT JOHNSON.

APPENDIX II

OPEN MEETING REQUIREMENTS IN THE STATES

1. The "State Open Meetings Laws" chart was prepared on the basis of a survey of constitutions, statutes, and legislative rules as of mid-May, 1974. In many cases where these provisions were ambiguous, our interpretations were checked with officials in the states. Except where other provisions are cited, the information relates to the comprehensive statute cited.

2. Open Meetings Testimonials from Iowa and Pennsylvania Legislators.

STATE OPEN MEETINGS LAWS

	State and law				
	Alabama—Title 14, Chapter 70 § 393.	Alaska—§ 44.62.310	Arizona—§ 38-431	Arkansas—§ 12-2801	California—§ 11120 Gov. Code
Coverage:					
State	Yes	Yes	Yes	Yes	Yes.
Local	do	do	do	do	Yes (Title 5, Division 2, Chapter 9).
Executive branch	do	do	do	do	Yes.
State legislature	No	No	No (except house, but not its committees).	?	Note: Law opening legislative meetings subject to constitutional amendment on ballot in June 1974.
Advisory bodies	do	Yes	No	Yes (if supported in whole or in part by public funds).	No.
Exceptions	Discussion of character of individual.	(1) Affect finances; (2) Character of individual; (3) Matters required by law to be confidential; must first convene as public meeting.	(1) Where no legal action taken; (2) Employment or dismissal of employee; (3) Required by Federal regulation; requires majority vote.	Discuss individual public officer or employee.	(1) Employee: (2) prepare and grade licensing exams; (3) administrative adjudications; (4) national security; (5) parole; (6) tax returns (7) gifts and degrees; (8) collective bargaining (also, several specific exemptions for specific agencies).
Notice	No	Yes—"Reasonable public notice."	No	Yes	Yes.
Minutes	do	No	do	No	No.
Enforcement:					
Sanctions	Misdemeanor (not more than $500).	None	Misdemeanor (not more than $100 or 30 days or both).	Misdemeanor (not more than $200 or 30 days or both).	None.
Voidability	No	Void action	Void action	Not valid action	No.
Citizen standing			Yes	Yes	Yes.
Legislature:					
Floor	Constitution (Art. 4 § 57): Open unless house determines that secrecy is required.		May have executive session by majority vote on business that requires secrecy (by rule).	Constitution (Art. 5 § 13): Open unless business ought to be secret.	Constitution (Art. 4 § 7): Open unless business ought to be secret.

Committees	Open by practice with certain *important exceptions* (e.g., rules committees and work on appropriations bills).	Open by rule with same exceptions as in State law.	Open by practice (rules allow *executive sessions*).	Open by house rule; senate open by practice.	Open by rule unless majority vote.
Party caucuses	No party caucuses	Closed	House caucuses open for discussion of nonpolicy matters.	Seldom have party caucuses	Generally closed.

	Colorado—3-33-1	Connecticut—§ 1-21	Delaware—29 § 5109	Florida—§ 286.011	Georgia—§ 40-3301
Coverage:					
State	Yes	Yes	Yes	Yes	Yes.
Local	Yes (3-19-1)	do	Yes (boards and commissions)	do	Do.
Executive branch	Yes	do	Yes	do	Do.
State legislature	do	No	No	Yes (attorney general's opinion)	Yes (Harvey v. Maddox) (1974)
Advisory bodies	No	Yes	Yes	Yes (Sup. Ct.)	No.
Exceptions	As provided in constitution	Executive sessions upon majority vote.	Where no business is transacted	(1) as provided in constitution; (2) when official acts are not taken.	(1) where official action not taken; (2) investigations; (3) acquisition of real estate; (4) appointment, employment, etc. of public officer or employee; *(5) protect attorney-client privilege* (laws in conflict repealed)
Notice	Yes	Yes	No	No	No.
Minutes	do	do	do	Yes	Yes.
Enforcement:					
Sanctions	No	None	None	Misdemeanor (not more than $500 or 6 months or both).	Misdemeanor (not more than $100).
Voidability	Not valid action	No	No	Not binding action	Not binding action.
Citizen standing	Yes	do	do	Yes	Yes.
Legislature:					
Floor	Constitution (Art. 5 § 14): Open unless business ought to be secret.	Constitution (Art. 3 § 16): Open unless house determines secrecy is required.	Constitution (Art. 2 § 11): Open unless business is such as ought to be kept secret.	Constitution (Art. 3 § 4(b)): Open except senate sessions considering appointment to or removal from public office.	Open by State statute.
Committees	Open by statute	Open by practice	Open by rule unless chairman calls executive session at which no official action may be taken—open by practice.	Open by statute	Do.
Party caucuses	Open	Closed	Closed and important	Democrats open; Republicans generally open.	Generally closed.

STATE OPEN MEETINGS LAWS—Continued

	Hawaii—§ 92-1	Idaho—No	Illinois—Ch. 102, § 41	Indiana—§ 57-601	Iowa—Ch. 28A
Coverage:					
State	Yes	No	Yes	Yes	Yes.
Local	do	Open on final actions (§ 59-1024).	do	do	Do.
Executive branch	do	No	do	do	Do.
State legislature	do	do	No	No	No.
Advisory bodies	do	do	Yes (except consideration of professional ethics).	do	Yes.
Exceptions	Upon two-thirds recorded vote (except no final action may be taken in executive session).		(1) collective negotiation with public employees; (2) parole board; (3) acquisition of real property; (4) jury; (5) campus security; (6) discussion of employee: (7) discipline student, (8) fill vacancy.	Existing laws, rules, or regulations not repealed.	(1) reputation of an individual; (2) acquisition of real property; (3) other exceptional reason requires vote of ⅔ of members present).
Notice	No	No	Yes	No	Yes.
Minutes	Yes	do	No		Do.
Enforcement:					
Sanctions	None	do	Not more than $100 or 30 days or both.	Misdemeanor—not more than $500 plus 30 days.	Misdemeanor—not more than $100.
Voidability	No	do	No	Yes	No.
Citizen standing		do		do	Yes.
Legislature:					
Floor		Open by constitution (Art. III, § 12).	Open by constitution (Art. IV, § 5) unless ⅔ vote.	Constitution (Art. 4, § 13); open unless house determines that secrecy is required.	Constitution (Art. 3, § 13); unless house determines that secrecy is required.
Committees	House: Open by rule unless discussion could unfairly damage reputation of individual—Senate: Open by rule unless otherwise ordered by senate.	Senate rule: Executive session by majority vote, house rule: executive session by ⅔ vote but may not take official action.	do	Open by rule except conference committees.	Open by rule.
Party caucuses	Generally closed	Closed and important	Closed	Closed	Closed except that senate Democratic (minority) caucus i open.

	Kansas—§ 75-4317	Kentucky—HB 100 of 1974 session	Louisiana—Title 42, § 6 (Note: 1974 Constitution provides for open meetings except as established by law)	Maine—Title 1, Ch. 13, § 401	Maryland—Art. 41, § 14
Coverage:					
State	Yes	Yes	Yes	Yes	Yes.
Local	do	do	do	do	Yes (Art. 25, § 5 and Art. 23A, § 8).
Executive branch	do	do	do	do	Yes.
State legislature	do	do	No (specifically exempted by law).	do	No.
Advisory bodies	do	do	No	do	Yes.
Exceptions	Executive session upon majority vote (must state justification).	(1) parole board; (2) acquisition of real property; (3) litigation; (4) juries; (5) collective bargaining; (6) individual employee; (7) industrial prospects; (8) cabinet; (9) G.A. committees other than standing committee; (10) where secrecy required by law or constitution.	Executive session upon majority vote except for final action.	Executive session by majority vote except for final action.	Executive session except for final action.
Notice	Prior to adoption of rule or regulation (§ 77-421).	Yes	Yes	No	No.
Minutes	No	No	No	do	Do.
Enforcement:					
Sanctions	Class C misdemeanor	Not more than $100	Not more than $1,000 or 7 days	Not more than $500 or 1 year	Do.
Voidability	No	Voidable	No	No	Do.
Citizen standing	do	Yes	do	Yes	Do.
Legislature:					
Floor	Open by statute	Open by statute	Open by practice	Open by statute	Constitution (Art. 3, § 21): Open unless business is such as ought to be kept secret.
Committees	do	Standing committees open by statute.	Open by rule (except legislative personnel matters).	do	Open by practice.
Party caucuses	Closed and important	Closed	No party caucuses	Open	Closed.

STATE OPEN MEETINGS LAWS—Continued

	Massachusetts—Ch. 30A, § 11a	Michigan—4.1800	Minnesota—471.705	Mississippi—None	Missouri—610.010
Coverage:					
State	Yes	Yes	Yes		Yes.
Local	Yes (Ch. 39, § 23A)	Yes (78.23; 340.561)	do		Do.
Executive branch	Yes	Yes	do		Do.
State legislature	No	No	do		Do.
Advisory bodies	Yes	do	do		Do.
Exceptions	(1) Federal requirement; (2) reputation of individual; (3) public safety; (4) fiscal condition (majority vote required).	Required to be open only while voting; investigations exempted.	Quasi-judicial disciplinary proceeding.		(1) Litigation; (2) acquisition or disposal of real estate; (3) State militia; (4) individual health, scholastic, personnel; (5) as provided by other laws.
Notice	Yes	Yes	No		Yes.
Minutes	do	No	do		No.
Enforcement:					
Sanctions	No	do	Civil penalty of not more than $100.		Misdemeanor.
Voidability	Voidable	do	No		No.
Citizen standing	Yes	do	do		Do.
Legislature:					
Floor	Open by practice	Constitution—open unless public welfare requires secrecy.	Constitution—open unless house determines secrecy is required.	Open by practice	Open by statute.
Committees	Open by rule unless majority vote.	Open by practice	Open by statute	Generally closed by practice	Do.
Party caucuses	Closed	Closed	Closed	No party caucuses	Closed.

	Montana—Art. II, § 9 of 1972 constitution 82-3402	Nebraska—84-1401	Nevada—241.010	New Hamsphire—title VI, Ch. 91-A	New Jersey—10:4-1
Coverage:					
State	Yes	Yes	Yes	Yes	Yes.
Local	do	do	Yes (also 244.080; 268.305; 386.-335).	do	Do.
Executive branch	do	do	Yes	do	Do.
State legislature	do	No	No (attorney general, opinion)	do	No.
Advisory bodies	do	Yes	No	do	Do.
Exeptions	Demand of individual privacy clearly exceeds the merits of public disclosure (exceptions in present statute—82-3402—*appear to be unconstitutional*).	Executive session at majority vote.	(1) Individual public employee; (2) legislative investigation.	May hold executive sessions; hearings, and actions may be taken in closed session on: (1) Individual public employee; (2) reputation of Individual; (3) acquisition or dispossession of real property; (4) legislative committee if ⅗ vote.	(1) Other law; (2) Federal fund contingency; (3) confidential record; (4) procedure of meeting; (5) officer of government; (6) parole; (7) investment of public funds, litigation if materially prejudice official action.
Notice	No	Yes	No	Yes	No.
Minutes	Yes	do	do	do	Do.
Enforcement:					
Sanctions	None	Misdemeanor (not more than $25).	Misdemeanor	None	None.
Voidability	No	No	No	No	Voidable.
Citizen standing	do	do	do	Yes	No.
Legislature:					
Floor	Open by constitution	Constitution (Art. III, §11) open unless business is such as ought to be kept secret.	Constitution (Art. IV, § 15): Open except senate may hold exceutive sessi on.	Constitution (Pt. 2 Art 8th): Open except when welfare of State requires secrecy.	Open by practice. State requires secrecy.
Committees	do	Executive sessions open to press by rule.	Open by practice	Open by statute (conference committees meet in closed session.	House open by rule; senate at will of chairman.
Party caucuses	Closed	Nonpartisan legislature	Closed	Open	Closed.

STATE OPEN MEETINGS LAWS—Continued

	New Mexico—Ch. 91 of 1974 session	New York—No comprehensive law	North Carolina—143-318.1	North Dakota—44-04-19	Ohio—121.22
Coverage:					
State	Yes		Yes	Yes	Yes.
Local	do	New York town law § 267 zoning Board of appeals only.)	do	do	Do.
Executive branch	do		do	do	Do.
State legislature	do		do	do	No.
Advisory bodies	No		do	do	Yes.
Exceptions	(1) Adjudicatory; (2) personnel; (3) issuance, suspension, renewal, or revocation of license; (4) grand jury.		(1) Acquisition, lease, or alienation of property; (2) negotiations with employees; (3) individual medical records; (4) privileged relationships; (5) litigation (majority vote required also: employees, students, public disorder, decision in quasi-judicial proceedings license professional.	As otherwise specifically provided by law.	Parole.
Notice	Yes		No	No	No.
Minutes	do		do	do	Yes.
Enforcement:					
Sanctions	Misdemeanor (not more than $100).		None	None	No.
Voidability	No action valid		No	No	
Citizen standing	Yes		Yes	do	No.
Legislature:					
Floor	Open by statute	Open by practice	Open by statute	Constitution (Art. II, § 50): Open unless business is such as ought to be kept secret.	Constitution (Art. II, § 13): Open unless ⅔ of members believe secrecy is required.
Committees	Standing committees open by statute except: (1) personnel: (2) adjudicatory; (3) general appropriation bill.	Open by rule unless majority of committee or the chairman close it.	Statute allows executive sessions to prevent personal embarrassemnt or when in best interest of State; house open by rule.	Open by rule and statute	Open by rule unless ⅔ vote to close.
Party caucuses	Closed	Closed	Generally closed	Republicans closed; Democrats (minority) open.	Closed.

	Oklahoma—25 § 201	Oregon—Ch. 172 of 1973 session	Pennsylvania—No comprehensive law	Rhode Island—No comprehensive law	South Carolina—Art. 2.2, § 1-20
Coverage:					
State	Yes	Yes	No (State authorities are covered by 65 § 251.).	No	Yes.
Local	do	do	Yes (65 § 251; 16 § 460; 16 § 3460).	No (chapter 16-2-29 relates only to school committees.).	Do.
Executive branch	do	do	do	do	Do.
State legislature	No	do	do	do	Do.
Advisory bodies	Yes	do	do	do	Do.
Exemptions	Personnel (but action must be in public).	(1) Public employment or discipline; (2) medical cases; or upon ⅔ vote: (1) labor negotiations; (2) purchase real property; (3) confidential records; (4) preliminary trade negotiations (media may attend executive sessions); final actions must be public.			Discussion of: (1) employee, administration briefing, commission reports; (2) negotiations in regard to adversary (contractual plus legal) situations; (3) private matters presented by citizens; also: (1) prepare plus grade exams; (2) deliberate on evidence from public proceeding; (3) disclose matters otherwise confidential; (4) security; (5) accept gifts; (6) General Assembly by majority vote in commission; (7) General Assembly by constitution.
Notice	No	Yes			No.
Minutes	do	do			Do.
Enforcement:					
Sanctions	Misdemeanor (not more than $100 or 30 days or more).	None			None.
Voidability	Actions invalid	No			No.
Citizen standing	No	Yes			Yes.
Legislature:					
Floor	Generally open by practice	Open by statute	Constitution (Art. II, § 13): Open except when business is such as ought to be kept secret.		Constitution (Art. 3, § 23): Open unless opinion of house is that secrecy is required.
Committees	Senate may close by majority vote.	do	House committees open by rule; senate committees open by rule if chairman so designates; conference committees closed.	Closed	Open by statute unless majority vote.
Party caucuses	Closed	Closed	Closed plus important	Republican—open; Democrats—closed.	Closed.

STATE OPEN MEETINGS LAWS—Continued

	South Dakota—1-25-1	Tennessee—Ch. No. 442 of 1974 session	Texas—17 § 6252	Utah—52-4-1	Vermont—1 V.S.A. 312
Coverage:					
State	Yes	Yes	Yes	Yes	Yes.
Local	do	do	do	do	Do.
Executive branch	do	do	do	do	Do.
State legislature	do	do	do	do	Do.
Advisory bodies	do	do	do	do	Do.
Exceptions	(1) Otherwise provided by law; (2) discuss student, employee plus personnel (after majority vote).	None	(1) Discussion with counsel re litigation; (2) negotiations re real property purchase plus accept gifts; (3) employees; (4) discipline students; (5) security; (6) collective bargaining.	Executive session	(1) quasi-judicial capacity; 2/3 vote in public required if: (2) contracts; (3) real estate transaction; (4) employment; (5) disciplinary; (6) clear and imminent peril.
Notice	No	Yes	Yes	No	Yes.
Minutes	Yes	do	No	do	Do.
Enforcement:					
Sanctions	Misdemeanor	None	Misdemeanor (not more than $500 or 6 months or both).	Misdemeanor	Not more than $500.
Voidability	No	Action voided (unless affects public debt).	No	No	No.
Citizen standing	do	Yes	Yes	do	Do.
Legislature:					
Floor	Constitution Art. III, § 15): Open unless business is such as ought to be secret.	Constitution (Art. II, § 22): Open unless business is such as ought to be secret.	Constitution (Art. 3, § 16): Open except Senate when in executive session.	Constitution (Art. VI, § 15): Open except Senate when in executive session.	Constitution (Ch. II, § 8): Open unless welfare of State may require secrecy.
Committees	Open by statute; all senate meetings open by rule.	Open by statute	Open by statute	Open by practice	Open by statute.
Party caucuses	Closed	Open	No party caucuses	Closed	Open.

	Virginia—2.1-340	Washington—42.30.010	West Virginia—No comprehensive law	Wisconsin—SB 462 of 1974 session (not yet signed)	Wyoming—9-692.10
Coverage:					
State	Yes	Yes		Yes	Yes.
Local	do	do		do	Do.
Executive branch	do	do		do	Do.
State legislature	No	No		do	No.
Advisory bodies	Yes	Yes		do	Yes.
Exceptions	(1) As provided by law; upon affirmative vote; (2) acquisition or disposition of real property; (3) protect personal privacy; (4) discuss employees; (5) prospective business; (6) invest public funds; (7) discuss litigation.	(1) National security; (2) selection of site or purchase of real estate; (3) employees; (4) investigation; (5) decision on license, permit, certificate; (6) quasi-judicial between named parties; (7) administrative procedure act.		(1) Deliberation after judicial or quasi-judicial hearing; (2) discuss employee or licensee; (3) parole; (4) purchase public property, invest public funds, collective bargaining; (5) individual reputation; (6) discussion with attorney; (7) partisan caucus-legislation; (8) legislation where specific rule.	(1) Security; (2) employees; (3) litigation; (4) preparing and grading exams; (5) parole; (6) purchase real estate; (7) accept gifts; (8) classified info; (9) discipline students.
Notice	Yes	Yes		Yes	Yes.
Minutes	do			No	No.
Enforcement:					
Sanctions	None	Civil penalty of $100		Not more than $200	None.
Voidability	No action shall become effective.	No		Voidable	No.
Citizen standing	Yes	Yes		Yes	Do.
Legislature:					
Floor		*Constitution (Art. 2, § 2): Open* except when public welfare requires secrecy.		Constitution (Art. IV, § 10): Open except when public welfare requires secrecy.	Constitution (Art. 3, § 14): Open unless business is such as requires secrecy.
Committees	House rules allow executive session but final votes must be open; senate rules allow executive sessions upon recorded vote.	Open by rule: Conference committees closed.	House rule—closed for vote; senate rule—open unless majority vote.	Open by practice (new statute requires open meeting unless specific exception in rules).	Open by practice.
Party caucuses	Closed	Closed	Closed	Closed	Closed.

Iowa Open Meetings Testimonials

The following statements were collected by Iowa Common Cause members from Iowa state legislators. The Iowa legislative process is completely open—even one of the party caucuses (Senate Democrats) meets openly. These are verbatim statements that can be quoted.

Senator Luke DeKoster, Chairman of the Appropriations Committee:

"I was an early proponent of opening the committee meetings to the people. They have every right to know what their public servants are doing. At national meetings of public officials I have been appalled at the secrecy of activities in other legislatures. We have no problems with open meetings; we're willing to lay our ideas on the table. The pressures are out in the open. We're spending a billion and a half dollars of the people's money. They have a right to know how we do it."

Senator Earl Willits, member of Appropriations Committee:

"All of our deliberations and decisions have been open to the public since 1967. It's accepted practice in the Iowa legislature, and we encounter no problems with it. We get good public feedback as a result of the press coverage, and I feel that the conduct of the meetings and the quality of debate are both better when the press is there. After all, the people have a right to know what we're doing. It's their money. We don't conduct their business in secret."

Senator John Murray:

"As a freshman Senator I see no problems with open meetings. The Organization and Steering Committees seem to work without difficulty under public scrutiny despite some fears to the contrary. The press is always present and seems in no way to inhibit debate or the conduct of business. It's an excellent way to insure public education and information—the arguments and problems get out to the people, and the people are brought along as the legislation develops so that they understand why issues are decided as they are."

Senator George Milligan:

"Open meetings are essential to our form of government; an informed electorate is the final protection to our individual rights and liberties. Responsibility and accountability are the other necessary ingredients, and these too become easier to achieve in a system where all meetings of public bodies are open to the people. In my opinion however, we should go further and open up political party caucuses as well."

Speaker Andrew Varley, of the Iowa House of Representatives:

"Open meetings are a real advantage to any legislature. Open committee meetings are an absolute necessity if the public is to know what's going on. It helps to get the real issues in a controversy before the public. Our relationship with the press is excellent. When there is distrust, press speculation can be far more damaging than the actual facts. We're not afraid of the public knowing what the basic issues are. A lot of people in Iowa said open meetings wouldn't work. Now most of us would be very fearful of a system which permitted closed meetings."

Representative Charles Grassley, Chairman of Appropriations:

"I don't see any problem with open committee meetings. I've served in the legislature under both systems and don't see much difference whether the meetings are closed or open. Public pressure probably influences the meetings some. We spend about 1½ billion dollars of the public's money and don't see any disadvantages to having Appropriations Committee meetings open to the public."

Representative Stephen Rapp, member Ways and Means, Judiciary and County Government Committees:

"I can see a lot of advantages and no disadvantages to open committee meetings. They can function almost like a public hearing in terms of the feedback we get from citizen observers. They are very useful in increasing the responsibility of public representatives and in educating the people through press coverage. It has never seemed to me that they put any restraint on debate or on expression of opinion. The system works fine."

Representative Mary O'Hallorhan:

"Open meetings of committees were long overdue. They have significantly changed the manner of debate, especially in the early stages of legislative deliberation. Representatives become more responsible under public scrutiny."

Representative Joan Lipsky:

"I consider the open meetings law one of the most significant pieces of legislation on which I've been privileged to vote. We must always recognize the public stakes in whatever is being done by their official representatives. It's the public's business to know what we're doing and why we vote the way we do. Our activities should be open to public scrutiny at all times."

THE COUNCIL OF STATE GOVERNMENTS 1973 EASTERN REGIONAL CONFERENCE

OPEN LEGISLATIVE COMMITTEES: THE PENNSYLVANIA EXPERIENCE

(By Robert J. Butera, Majority Leader, Pennsylvania House of Representatives)

Early in the 19th Century, Thomas Jefferson suggested that legislators should "Enlighten the people generally, and tyranny and opression of body and mind will vanish like evil spirits at the dawn of day."

This principle of informing people was a basic principle in the creation of both the United States Congress and the state legislatures throughout the country.

Since then, Jefferson's motto has been too often followed in the breach rather than the execution. Secret meetings and complex parlimentary maneuvers designed to mislead the public have become an unwelcome part of the American legislative process.

Pennsylvania has been no exception. Although the House of Representatives and the Senate meet openly in the gracious legislative halls of our capitol, the art of politicing too often has been refined in the secret committee chambers and the private offices of our legislative leaders.

In particular, the committee system has, until this year, been a closed series of secret conferences dominated by a few powerful leaders. Before 1973, neither the press nor interested members of the general public had been allowed to listen in on the deliberations of the committee membership.

Consequently, the committee process was often a mockery of the democratic process. A bill could be brought out of committee at the whim of a chairman. Special interests, the Governor or powerful members of the House often determined whether a bill should be altered or even reported for a floor vote.

While keeping the committees closed may have served the interests of certain individuals or groups within the state, the practice in Pennsylvania was creating some serious problems which threatened the ability of the institution to perform in a meaningful manner.

For one thing, public mistrust and criticism of the legislature had grown to serious proportions. Time and again, my own mail as a legislator, was filled with letters from constituents who felt we were incapable of doing a good job. It was pointed out, with reason, that the 203 members of the House constituted an unwieldy body that did not know what it was doing. TV reports, editorial writers as well as irate voters were increasing their attacks on the legislature to the point where a continuance of the old policy had become untenable.

Much of this dissatisfaction arose from the fact that the committee system, by being closed, was not performing the necessary functions it was created for. A limited number of individuals were controlling the whole legislative process. The committee system had disintegrated to a point where the House had become a committee of the whole. Lacking a sub-structure, the institution was deserving much of the criticism leveled at it.

With this limited participation taking place in the scrutiny of bills in the committees, legislation arriving on the floor was often shoddy and incomplete. This means that serious debate would fall victim to an endless wrangling over details which should have been worked out by a committee meeting separately.

Like a Pandora's Box, there were debilitative effects on the institution. For example, the morale of individual legislators was constantly being lowered by their inability to participate in the creation of legislation. Attendance at committee meetings was naturally low. A large wasteland of talented and frustrated legislators existed as individuals felt their input into the process was negligible. This in turn was extremely disappointing to members of the leadership when they realized that the legislature as a whole was not equal to the sum of its parts.

By the time I became the Majority Leader in the House, the threat of open revolt against the traditional way of doing business was in the air. New legislators arriving in Harrisburg were no longer willing to sit back and wait for several years before taking part in the legislative process. Clearly, some kind of drastic change was needed.

Sensing this public disenchantment with the legislative process early in 1972, the then minority party of which I was a member, decided to base its fall campaign on the issue of secrecy. As the out party, we pledged to end the secrecy and open up the legislative process to the public.

This campaign strategy was powerful medicine. When the final votes were counted in the legislative districts, our party was once again in the majority. Thus, by last January the time had arrived to make good our promise.

This was done in the form of House Rule 45, adopted in January 1973, which reads as follows: ". . . All meetings at which formal action is taken by a standing committee or sub-committee shall be open to the public. . . ."

I am not prepared to claim today that after passage of the resolution, the Pennsylvania House of Representatives became a model of efficiency. However, a number of positive forces have been at work now that members of the press and interested members of the public may sit in on committee deliberations.

First, the kind of legislation which emerges from the committees is of noticeably higher calibre. The chances are now that 18 to 20 legislators have gone over a piece of legislation, line by line, before finally agreeing to send it to the floor. Since this is done under the possible scrutiny of reporters and interested individuals, legislators in the committees are taking the time to learn more about each bill before speaking up.

In previous years one of our most important House committees was run by six members who had built up years of seniority. In fact, of the 23 members, usually only those six even attended the committee meetings.

This year, attendance at this same committee is running over 89% and those original six can no longer exercise complete control over legislation coming from their sessions. In fact, records we have kept indicate that many of our committees are now receiving over 90% attendance, a dramatic increase over prior years.

The participation and influence of all members has picked up remarkably under the new system as they find their abilities and energies being used. Undoubtedly they have to work harder. This spring, for example, the House Committee on Consumer Protection considered one bill for six full days before reporting it to the House membership.

Members are also having to spend more time in Harrisburg, since committee meetings are now mostly scheduled when the full membership is not in session.

Another positive effect of the open committee system is the wider range of press coverage given to issues before the legislature. Under the old system, reporters knew little about legislation until it came up for floor debate. Now, each chairman and each committee member has a stake in getting his point of view before the press.

I might add that this added press coverage can be a great help to the image of the legislature as an institution.

Even dissemination of information among the members becomes facilitated. Previously, knowledge about pieces of legislation was often a well-guarded prerogative of the leadership. Thus, when a party caucus was held, the leader could spoon-feed information about particular bills as he desired with the result that the general membership could be misled and thus manipulated.

I remember one instance several years ago when a member from upstate Pennsylvania had promised his voters he would oppose legislative pension increases. When the bill to increase pensions appeared on the calendar, the leadership did not fully inform the caucus that it was buried in a particularly complicated bill. This member voted for the pension increase without ever knowing what he was doing.

Today, this kind of situation is less likely to happen. Too many members know about specific pieces of legislation because they have gone over it in committee. We have also noticed a far greater interest in the preparation of reports and letters for distribution to other legislators by committee members who have a stake in educating their colleagues about particular legislation.

Gone are the days when a powerful committee chairman can tell his subservient committee, "Okay, lets kill this bill and forget it." Now, a full and open

vote is needed on each piece of legislation. The chances of a Governor or a special interest bottling up legislation are more limited under this new system where each member must vote publically before action is taken.

However, while many benefits accrue to both the legislature itself and the public at large by having an open committee system, there are pitfalls. Certainly, the job of Majority Leader becomes a more delicate and potentially dangerous position.

By disseminating power among the members and bringing more legislators into the process of government, the possibility of dominant, one-man rule becomes almost an impossibility. Rather than dealing with a few friends, the leadership must now work constantly with dozens of legislators who are working hard and want help to get bills considered. Failure to help his members carry out the projects into which he has placed them would be a risky business for the leader.

While risky, the stakes are higher. With increased action and better legislation being produced, the leadership is also in the position of governing a positive force in the state rather than an inactive and despised institution.

As I stated earlier, opening the committee system is not a panacea for all the problems of running a good legislature.

There are approximately 15 states in the country where open committee meetings have been adopted by the legislature. In several of these states, reports indicate that the new procedure has created nothing new.

In Pennsylvania, we have often been disappointed with the few people from the general public who have attended committee meetings. At times, there are not enough reporters to attend all the sessions being held on one day.

Nor would it be fair to say that open committees eliminated the influence of pressure groups or lobbyists. The opportunity for partisan politics can be used at committee sessions much more effectively than in the past. Opportunity for grandstanding by individual members for home consumption is certainly greater now.

All of these hallmarks of the legislative process continue. Still, it is now just a little more difficult to practice deceit. The possibility of tying up important public matters through the use of closed committees is limited.

To those state legislatures and to the United States Congress now considering the possibility of opening committee sessions, I would say "be prepared."

It is not enough to simply open the committees. Both the individual members and the leadership must be prepared to take on a great deal more responsibility than before if the new system is to produce results.

In fact, the role of the legislative leader must undergo several changes. He must be prepared to engage in a vigorous follow-up of the work each committee is performing. One of his main jobs must be to help the committee chairmen obtain needed information, secure proper staffing and be supported by an intelligent selection of committee members.

Motivating people rather than controlling them becomes the leader's dominant role.

To merely open the committee to the public and do nothing more is likely to invite the deserved charges of making cosmetic changes. An alert press and public will soon discover whether the legislative institution is really doing a better job or dealing in gimmickery.

In the Pennsylvania House, our experiment with the open committee system has, I believe, developed a closer sense of cooperation and loyalty among our lgislators because they are involved and because they feel themselves to be an integral part of the group.

The old politics of secret, autocratic rule is being jeopardized by the positive energies of the legislative membership. While the statistical results of our experiment may still be hard to measure, this new atmosphere of excitement and optimism toward the very difficult tasks facing State government has made the institution a more hopeful place in which to solve the problems of our people.

Appendix III

Following are two essays on lobby disclosure prepared by Common Cause. The first deals mainly with the problems with the Federal Regulation of Lobbying Act of 1946, citing some examples of its ineffectiveness. The second

argues that lobbying of the Executive Branch should be covered by a comprehensive lobby disclosure law.

A Lobbying Security Act From 1946

There is a little known and often ignored statute on the books which dates back to 1946. It is called the Federal Regulation of Lobbying Act. The law is a potential bombshell, unable to explode. It is scoffed by the lobbyists it is supposed to regulate, incumbered by its own ambiguities, and almost totally unenforced. But if this law ever did what it was designed to do, there'd be some astounding changes in the existing political arrangements and processes in Washington, D.C. Congress would be less subject to manipulation by special interest groups and more accountable to the American people.

The intent of the law is to bring lobbying of Congress out in the open. This would enable Congressmen to properly evaluate the pressures brought to bear on them, and eliminate those blatant lobbying improprieties which could not survive public scrutiny. It would also enable the public to hold Congressmen accountable for their complicity in high-handed lobbying deals. The law purports to do this by requiring individuals and groups who lobby Congress to file statements regarding their activities, expenditures, and financial backing. But due to loopholes, ambiguities, and the absence of enforcement provisions, the law's intent remains an unfulfilled ideal.

Organizations which spend thousands of dollars lobbying Congress get away with not reporting anything at all for lobbying activities and expenses. Most lobbies which do file make a mockery of the law's disclosure requirements by grossly under-reporting how much they spend. Public scrutiny of lobbying practices and of Congressmen's dealings with lobbyists is virtually nonexistent. Secrecy florishes, and with it the immense power of organized pressure in the legislative process—power exercised through massive and often devious lobbying campaigns.

For example, in 1972 the American Bankers Association, the American Retail Federation, and the Charge Account Bankers Association effectively gutted the Fair Credit Billing Act through secretive and deceptive lobbying tactics. The bill was originally designed to eliminate many of the major headaches and injustices that result from the current billing practices of most credit companies. These organizations, and others that profited from the old billing system, worked behind the scenes to prevent passage of the original draft. They wrote testimony and brought in witnesses from the home areas of key legislators to deliver it. They indirectly furnished to the relevant Senate subcommittee legislative analyses upon which the subcommittee relied until columnist Jack Anderson revealed their source. They arranged for hometown bankers and large campaign contributors to contact key legislators. And they made false and misleading claims about the effect of the proposed legislation on consumers.

All this was done in the convenient absence of Congressional or public scrutiny. What these organizations did to weaken this bill and how much they spent doing it was never reported in the statements required by the present law. The ABA, the main lobbying arm of American banks, reported spending $17,456 for *all* lobbying activities during 1972. The American Retail Federation reported $6,350 for their lobbying in 1972. The Charge Account Bankers Association did not report any expenses whatsoever during this period. In no case was there an itemization of what the money was used for.

The little information we have about this lobbying effort was uncovered by diligent investigative reporters. The 1946 disclosure law disclosed none of it. The law works better as a lobbying secrecy act—giving the illusion that lobbying is under some form of public scrutiny, while in fact there is none.

BUSINESS' PRESSURE ON CONGRESS

The two main business lobbies in Washington—the National Association of Manufacturers and the U.S. Chamber of Commerce—also enjoy the secrecy provided by the present lobby law.

With member corporations and businesses numbering in the thousands and providing enormous budgets for research, mailings, and other lobbying

activities, the two organizations have specialized in mobilizing grass-roots pressure on Congress. This involves a country-wide communications network through which members are urged to contact their Congressmen on certain key issues. The research, planning, and targeting of Congressmen is done by the national headquarters and communicated through action newsletters sent from computerized mailing lists.

This technique has been used effectively over the last two years against welfare reform, minimum wage boosts, and a strong Consumer Protection Agency. It was recently employed to win favorable trade and tax provisions in the Trade Reform Act of 1973. William Pollert, NAM's Vice President for international affairs, mobilized several executives from member corporations to call personally on key Congressmen. Several officials were treated to lunch at the Republican Club by these executives. NAM also sent customized letters to all members requesting that they urge their Congressmen to oppose the taxation of foreign-based businesses. The Chamber also sent newsletters to member companies in an effort to focus pressure on key Congressmen.

Enter one of the most glaring loopholes in the 1947 lobby law; grass-roots lobbying is not covered. Consequently, the enormous amounts spent by the NAM and the Chamber for research, staff, printing, mailings, and other items involved in mobilizing lobbying campaigns is all secret information. Having read the law carefully and concluded that soliciting others to lobby Congress is not itself lobbying, they simply do not file statements regarding their activities and expenditures as an organization. Even the reports filed by the individual lobbyists they employ do not contain much significant information, and some of it is downright preposterous. For example, during the last two years the Chamber's chief lobbyist, R. Hilton Davis, has reported spending on lobbying a total of $14.25 and receiving for lobbying purposes $35. Another Chamber lobbyist, Francis M. Judge, has reported during the same period expenditures of $8.34 and no receipts. Although the NAM's lobbyists have made an effort to report expenditures and receipts, the reports are far from illuminating. The three full-time lobbyists of the NAM, for instance, reported during 1972 total receipts of $15,168 and total expenditures of $6,370. But there is no useful itemization of expenditures in these or any other reports.

MONEY, FAVORS, AND POLITICAL INFLUENCE

The political clout of business groups and other special interests rests heavily on the money and favors they provide to Congressmen. The money comes in a variety of forms. Rep. Paul McCloskey believes outright cash gifts are very common. "I was upset to find lobbyists," he had said, "leaving behind five or ten $100 bills in envelopes after visiting my office." A more indirect method is to arrange lucrative investment deals for favored Congressmen. House Banking Chairman Wright Patman, for example, has disclosed how banks often try to seduce members of his committee. "It takes the form of offering a Congressman bank stock either free or at a cost greatly under the market value," he said. Other avenues of special interest money include fattened lecture fees and excessive legal retainers.

But the campaign contribution is the most well-paved of all paths. Special interest groups pour millions into the campaign coffers of Congressional candidates, and with good reason. Our system of campaign finance makes politicians so dependent on big money that those who provide it gain enormous influence in the legislative process. As Senator Russell Long has remarked, this money can be viewed "as monetary bread cast upon the water, to be returned a thousandfold." The returns are collected primarily through lobbying. Can anyone still doubt the connections between special interest campaign gifts and the successful lobbying efforts of the dairy industry on milk price supports, of the oil industry or the Alaska pipeline, of business groups on foreign trade, and so on? As Rep. Chet Holifield has admitted, if they didn't help fill campaign purses, "the power of lobbyists would be practically nil."

As for favors, the candid admission of one Congressman tells the story. "How many of us," he asked rhetorically, "aren't guilty in some way of accepting favors from special interest groups?" His answer: "Damn few." The favors include free airplane tickets, free rides on corporate jets, all-expenses-

paid vacations, credit cards, expensive presents, free meals, entertainment expenses, office supplies, and special rates in buying or leasing cars. The list of temptations runs on and on, in dazzling and seductive variety.

Such money and favors give special lobbies an uncanny ability to get the kind of legislation they want. These gifts constitute their most important lobbying expenses. Yet these expenses are not covered by the 1946 lobby law. Rather than disclose, the law spreads a protective veil of secrecy over these activities. The campaign finance law effectively uncovers the source and amount of most contributions. But the special access and influence bought by large special interest campaign gifts are exercised secretly and with stunning effectiveness due to the absence of a good lobby disclosure law.

WHAT CAN BE DONE?

Most of the problems associated with lobbying—the influence peddling, the easy access of special interests, the manipulation of the political process, and the consequent erosion of public confidence—can be traced to the secrecy which hides the activities of lobbyists from public scrutiny. So the solution is not to prohibit lobbying activities, but to require full disclosure.

The root problem is secrecy. It enables lobbyists to offer lucrative favors and deals which border on outright bribery. It enables lobbying organizations to distort public sentiment by spending thousands to generate constituent mail to Congressmen on certain issues. It makes it easy for corporate executives and public officials to maintain cozy relationships beneficial to each. It facilitates deception of the public and government officials regarding the activities, aims, expenditures, and financial backing of lobbyists. It creates suspicion where suspicion is unwarranted, and erodes public confidence in the integrity of government. And perhaps worst of all, it makes it impossible for citizens to hold their elected representatives accountable for their part in the lobbying game.

The effect of secrecy is usually to undermine accountability, and no where is this as true as regarding the buying and selling of political influence. The absence of public scrutiny makes it easy for public officials to accept money and favors from special interests in exchange for favorable action on issues concerning them. Without the complicity of these officials, the undue access and influence of certain individuals and groups would evaporate over night.

Yet the 1946 lobby law perpetuates secrecy, and with it lobbying abuses, deception, and non-accountability. Common Cause is therefore proposing a new lobby disclosure law. It contains a broad definition of lobbying which covers most attempts to influence either legislation or executive actions. It lays down comprehensive disclosure requirements pertaining to the activities and finances of lobbyists, of those who employ lobbyists, and of those who solicit others to lobby. And it establishes a strong and independent commission to ensure compliance with these requirements.

To some reformers, eager to heap fire and brimstone on the heads of evildoers, this emphasis on disclosure may seem disappointingly mild. But there is nothing mild about disclosure. Common Cause has learned in the course of innumerable battles that the requirement of disclosure is a very powerful weapon. Political intrigue thrives on secrecy. Disclosure is its worst enemy.

LOBBYING THE EXECUTIVE BRANCH

In June 1971, the president of Mid American Dairies, one of the three largest dairy cooperatives in the country, wrote to one of the organization's members:

"The facts of life are that the economic welfare of dairymen does depend a great deal on political action. If dairymen are to receive their fair share of the governmental pie that we all pay for, we must have friends in government.

"We dairymen as a body can be a dominant group. On March 23, 1971, along with nine other dairy farmers, I sat in the cabinet room of the White House,

across the table from the President of the United States, and heard him compliment the dairymen on their marvelous work in consolidating and unifying our industry and our involvement in politics. He said, "You people are my friends, and I appreciate it."

"Two days later an order came from the U.S. Department of Agriculture increasing the support price of milk to 85% of parity, which added from $500 million to $700 million to dairy farmers' milk checks. We dairymen cannot afford to overlook this kind of benefit. Whether we like it or not, this is the way the system works."

The behind-the-scenes workings of "the system" are seldom portrayed so candidly. As this account indicates, it is a system in which special interest lobbies wield enormous influence on Executive Branch decisions. This influence is based largely on the campaign money and other favors they provide. For example, the dairy industry had pledged $2 million to the President's reelection campaign before the March 23rd meeting, and actually delivered $25,000 of it before the decision to increase the support price was announced.

It is also a system which hides the activities of special interest lobbyists from public scrutiny. How much they spend, what they do, who finances them, what decisions they try to influence, which Executive Branch officials they meet with, what they give to these officials in money or services—all this is conveniently hidden from public view. This secrecy facilitates the access and influence of special interests in the Executive Branch and perpetuates the kind of abuse seen in the milk deal.

THE PRESENT LOBBY LAW

The reason for the secrecy is the Federal Regulation of Lobbying Act of 1946. It is the only lobby disclosure law now on the books, and it totally ignores lobbying of the Executive Branch. Only those who seek to influence *legislation* are covered. This is a glaring inadequacy. Some of the most effective and secretive lobbying today involves personal contacts by corporate heads and special interest lobbyists with officials in executive departments and agencies. This type of lobbying is also highly subject to abuse.

Some stark illustrations of this have been exposed in recent years. For example:

In the summer of 1971 the Justice Department announced that it would not press an antitrust suit against ITT—a suit the Department was certain it could win. The announcement, which signalled a marked shift in government antitrust policy, came in the wake of massive behind-the-scenes lobbying by ITT officers, who argued their case personally before White House staff members and Cabinet officials. It appeared, however, that their success was based more on a pledge of $400,000 to help finance the Republican convention than on the merits of their argument. ITT by then was an old hand at lavish secret lobbying. In 1970 it secretly offered $1 million to influence the U.S. government's policy toward the Chilean government and to encourage clandestine CIA operations against that government.

Over the last three years, the Howard Hughes Medical Institute has been secretly lobbying the Treasury Department to change its status as a foundation to that of a charity. This would result in a tax break for the Institute of at least $36 million annually. Treasury's failure to rule on the matter during this period has already saved the Institute at least $108 million, in addition to allowing the profitable and highly suspicious "self-dealing" arrangements which exist between the Institute and Hughes Aircraft. These arrangements enable the aircraft corporation to siphon off its taxable income into the Institute. We know virtually nothing of Hughes' secret wheelings and dealings in this affair, except that he contributed $200,000 to the President's 1972 campaign.

No requirement of public disclosure exists to inhibit the corporate lobbyists and government officials who engage in these kinds of lobbying deals. Periodically the public receives a brief glimpse of what goes on behind the scenes. But the information disclosed usually comes from diligent investigative reporters who have gone to great lengths to dig it up. Otherwise secrecy prevails, and it's perfectly legal.

LOBBYING OF REGULATORY AGENCIES

The same situation exists in regulatory agencies. These commissions make decisions which affect all Americans in very specific ways, from the quality of television commercials to the price of gas and electricity. Yet there is almost no public scrutiny of how they are lobbied, and in many cases manipulated, by the industries they are supposed to regulate.

Take for example the Interstate Commerce Commission. The industries it regulates are virtually assured of favorable action by the agency. This is because, among other things, some commissioners were evidently cleared by industry executives before being officially nominated for the post. The industry has also awarded commissioners with lucrative positions after they leave the ICC, as well as supplied its own officers for high posts within the Commission. Industry money has also flowed into the campaigns of congressmen on ICC oversight committees.

All this makes the agency fertile grounds for effective industry lobbying, which has taken a variety of forms in recent years. Attorneys representing major railroads before the ICC belong to a Practitioners Association which maintains offices in the Commission's building. The opportunities for informal lobbying contacts with ICC officials are abundant. Executives of major shipping companies are also busy lobbying inside the Commission, as are the many trade associations representing the regulated industries. Convenient friendships have been known to develop between these lobbyists and ICC commissioners and hearing examiners which involve private luncheons, dinner parties, joint vacations, golf outings, and numerous other lobbyist-supplied. favors and services. In addition, sixteen industry groups rented desk space at the ICC in 1973 to keep track of hearing decisions, rate changes, and policy information.

Most of these practices are hidden from public view, which is why they are so widespread, effective, and subject to abuse.

A NEW LOBBY DISCLOSURE LAW

The secrecy which protects lobbying of the Executive Branch from public scrutiny need not continue. It should be eliminated because it makes it impossible for citizens to hold government officials accountable for their part in high-handed lobbying deals. This enables cozy relationships between these officials and corporate lobbyists to flourish, and perpetrates deceptive and abusive lobbying tactics. And it *can* be eliminated by enacting a strong and comprehensive lobby disclosure law.

The solution is not simply to amend the existing lobby law so that it covers lobbying of the Executive as well as Congress. This law should be totally replaced. It is poorly drawn, narrow in scope, full of loopholes and ambiguities, and impossible to enforce. The scant information which lobbyists do report under this law is often preposterous. Huge discrepancies exist between a lobby's elaborate activities to influence legislation and the expenditures actually reported. Some organizations which lobby extensively report no expenses at all. Some don't even bother to register. Anyone innocent enough to believe the official lobbying reports would form a bizarre and misleading impression of modern lobbying practices.

Common Cause is therefore proposing a new lobby disclosure law. It contains comprehensive disclosure requirements which apply to those who lobby *either* Congress or the Executive. These lobbyists would have to report, among other things, the source and amount of their income, itemized expenditures, the names of officials they have contacted, the actions they have tried to influence, and what they have given or loaned public officials in money, services, or other favors. It would cover those who lobby directly or who solicit or employ others to lobby. And it would establish a strong and independent commission to enforce the disclosure provisions.

This legislation would expose for the first time the secret world of lobbying in executive agencies and departments. It would accomplish this not only through reports filed by lobbyists, but by requiring Executive Branch officials to log all communications and written material from lobbyists in a public record. This kind of logging is essential, since in most cases a lobbyist's reports will not tell the full story of a lobbying campaign. These reports should be supplemented by summaries of the communications involved.

These requirements are designed to disclose, not to prohibit. Full disclosure will help end lobbying abuses and stem the propensity of some government officials to cooperate with corporate executives and special interest lobbies. Openness leads to accountability, and accountability is desperately needed to restore integrity and confidence in government affairs.

APPENDIX IV

Common Cause has proposed that the new Federal Energy Administration adopt a regulation on lobby disclosure. We have submitted a model regulation to Mr. John Sawhill, Acting Administrator of the Federal Energy Office. This regulation would prohibit FEA officials and employees from receiving communications from lobbyists unless those lobbyists, and the organization or company employing them, have filed disclosure reports with the FEA. The regulation would also require these FEA employees to log all communications and written material from lobbyists in a public record. The text of the regulation follows.

COMMON CAUSE,
Washington, D.C.,
John W. Gardner, Chairman.

FEA REGULATION ON LOBBYING

SECTION 1. DECLARATION OF PURPOSE

The Federal Energy Administration hereby declares that the responsible exercise of its duties requires that members of the public be given the fullest opportunity to express their views on matters pending before the Administration, and that, in order for its officials to distinguish between expressions of ordinary citizens and those of organized interests and to preserve the integrity of its decision-making processes, it is necessary that the identity, expenditures, and activities of such persons be publicly and regularly disclosed.

SECTION 2. DEFINITIONS

For purposes of this Regulation, the term—

(1) "Administration" means the Federal Energy Administration.

(2) "Administrator" means the Administrator of the Administration.

(3) "Office" means the Office of Private Grievances and Redress within the Administration.

(4) "Director" means the Director of the Office.

(5) "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(6) "income" means—

(A) any payment, gift, reimbursement, funds, loan, advance, services, or other thing of value received; and

(B) any contract, promise, or agreement, whether or not legally enforceable, to receive any item referred to in subparagraph (A).

(7) "expenditure" means—

(A) any purchase, payment, distribution, loan, funds advance, services, or other thing of value made, disbursed or furnished; and

(B) any contract, promise, or agreement, whether or not legally enforceable, to carry out any transaction of any kind referred to in subparagraph (A).

(8) "filing period" means, as applicable—

(A) the period beginning on January 1 and ending at the close of March 31 in any calendar year;

(B) the period beginning on April 1 and ending at the close of June 30 in any calendar year.

(C) the period beginning on July 1 and ending at the close of September 30 in any calendar year.

(D) the period beginning on October 1 and ending at the close of December 31 in any calendar year.

(9) "identification" means, if the person to be identified is an individual, his name, address, occupation, principle place of business, and position held in such business; and, if the person to be identified is an organization,

corporation, or other association, its name, address, objectives, and members of its Board of Directors.

(10) "lobbying" means all forms of communication with an official or employee of the Administration to influence any official decision or action on any matter proposed or pending before the Administration, with the exception of—

(A) any communication by means of an appearance before a public hearing conducted by the Administration pursuant to Section 121(b)(2) of the Federal Energy Emergency Administrative Act or by means of a written statement submitted for the public record of such hearing;

(B) any communication by any governmental official or governmental employee, acting in his official capacity;

(C) any communication through the publication, distribution, or dissemination, in the ordinary course of business, of news items, featured news stories, articles, columns, editorials, comments, books reviews, letters to the editor, advertising, and other matter, by—

(i) a newspaper, magazine, or other regularly published periodical which is distributed to the general public,

(ii) a licensed radio or television broadcasting station,

(iii) a book publisher engaged in the sale of distribution of books and publications, or

(iv) an owner, officer, editor, or employee of any of the foregoing.

(11) "lobbyist" means any person who engages in lobbying and who:

(A) receives income of $100 or more in a calendar quarter for lobbying, whether that income is solely for lobbying or the lobbying is merely incidental to that person's regular employment; or

(B) expends $100 or more in a calendar quarter for lobbying.

SECTION 3. STATEMENT OF POLICY ON COMMUNICATION FROM LOBBYISTS

No official or employee of the Administration who occupies a position on the General Schedule at grade 15 or higher, or who exercises responsibilities related to the formation of Administration policy, regulations, or administrative programs, shall receive any form of communication from any lobbyist who has not filed a notice of representation and all required amendments thereto and reports pursuant to Sections 4, 6, and 7 of this Regulation.

SECTION 4. FILING OF NOTICES OF REPRESENTATION

Each lobbyist shall, at least three days prior to his initial communication to influence Administration policy or activity, file a notice of representation with the Office. Each notice shall be in the form and detail as the Director shall prescribe and shall include, but not be limited to, the following information:

(1) an identification of the lobbyist filing such notice;

(2) an identification of each person, whether or not income is received from such person, on whose behalf such lobbyist is to perform services as a lobbyist; excluding, if such person is an organization of voluntary due-paying members, the members of such organization;

(3) an identification of each person by whom such lobbyist is retained;

(4) the financial terms and conditions (including any contingent fee arrangement) on which such lobbyist is retained; and

(5) each specific area of Administration policy or activity which such lobbyist seeks to influence, including relevant docket numbers if known.

SECTION 5. FILING OF NOTICES OF REPRESENTATION BY OTHER PERSONS

Each person identified under Section 4(2) of this Regulation shall, in order for the lobbyist identifying such person to be in full compliance with that Section, file a notice of representation with the Office. The notice shall be filed at least three days prior to the initial communication by such lobbyist to influence Administration policy or activity, and shall be in the form and detail as the Director shall prescribe and shall include, but not be limited to, the following information:

(1) an identification of the person filing such notice;

(2) an identification of each lobbyist who is to perform services as a lobbyist, whether or not income is provided for such lobbyist, in behalf of such person;

(3) the financial terms and conditions (including any contingent fee arrangement) on which each such lobbyist is retained;

(4) each specific area of Administration policy or activity which each such lobbyist seeks to influence; and

(5) a statement, if such person is an organization of voluntary due-paying members, of the aims of the organization as they pertain to the Administration, the number of members, and the methods by which such organization develops and makes decisions about positions on policy.

SECTION 6. AMENDMENTS TO NOTICES OF REPRESENTATION

If, at any time, the information contained in a notice of representation filed pursuant to Section 4 or 5 of this Regulation is not completely current, accurate, and up to date in all respects because of any change in circumstances or conditions with respect to the persons filing such notice (including termination of status as a lobbyist), such person shall file with the Office within five days after such change has occurred, such amendment or amendments to such notice as may be necessary to make the information contained in such notice completely current, accurate, and up to date in all respects.

SECTION 7. FILING OF REPORTS

Each lobbyist shall file with the Office a report covering each filing period during which such lobbyist engaged in lobbying. Each such report shall be filed not later than the close of the fifth day following the filing period covered by the report. Each report shall be in the form and detail as the Dierctor prescribes and include, but not be limited to, the following information:

(1) an identification of the lobbyist filing such report;

(2) an identification of each person, wether or not income was received from such person, on whose behalf such lobbyist performed services as a lobbyist during the filing period; excluding, if such person is an organization of voluntary due-paying members, the members of such organization;

(3) an identification of each person from whom such lobbyist received income during the filing period and the amount received from each, including—

(A) if such person is an organization of voluntary due-paying members, those members of such organization who contributed $100 or more to such organization during the filing period;

(B) the total amount of such income; and

(C) the amount of such income received to engage in lobbying, whether or not such income was received solely for lobbying or the lobbying was merely incidental to such lobbyist's regular employment;

(4) the total expenditures made related to lobbying activities by such lobbyist during the filing period, including an itemization by amount, purpose, and person on whose behalf made of any expenditure in excess of $50 in value;

(5) each honorarium, gift, loan, service, or anything of value transferred, directly or indirectly, to any official or employee of the Administration by such lobbyist during the filing period, and an identification of the name and position of such official or employee;

(6) an identification by name and position of each official or employee of the Administration to whom a communication was made by such lobbyist during the filing period to influence Administration policy or activity; and

(7) each specific Administration policy or activity which such lobbyist sought to influence during the filing period, including relevant docket members if known.

SECTION 8. FILING OF REPORTS BY OTHER PERSONS

Each person identified under Section 7(2) of this Regulation shall, in order for the lobbyist identifying such person to be in full compliance with that Section, file with the Office a report covering each filing period during which such lobbyist engaged in lobbying. Each such report shall be filed not later than the close of the fifth day following the filing period covered by the

report. Each report shall be in the form and detail as the Director prescribes and include, but not be limited to, the following information:

(1) an identification of the person filing such report;

(2) an identification of each lobbyist who performed services as a lobbyist on behalf of such person during the filing period, whether or not income was provided to such lobbyist;

(3) the total expenditures made during the filing period related to all activities to influence Administration policy or activity, including an itemization of expenditures made:

(A) to employ lobbyists, including the amount paid to each;

(B) to solicit other persons, including members of voluntary membership organizations, to engage in any activities to influence Administration policy or activity;

(C) for research, media, staff, offices, travel and other items necessary for affecting the activities of such lobbyists;

(4) each specific policy or activity which such person sought to influence during the filing period through each lobbyist identified in (2) above and through any solicitation made to other persons; and

(5) a copy of any publication or newsletter used during the filing period to solicit other persons to influence Administration policy or activity and an indication of numbers of persons who received such publication or newsletter.

SECTION 9. LOGGING OF COMMUNICATIONS FROM LOBBYISTS

Those officials or employees of the Administration specified in Section 3 of this Regulation shall place in a public record kept by the Office all written material, in its original form, received from lobbyists and memorandums stating the substance of all oral communications from lobbyists. Entries in the record shall be in the form and detail as the Director shall prescribe and shall include, in addition to the written material received from lobbyist or the substance of oral communications, the following information:

(1) the name and position of the official or employee submitting the entry;

(2) the date upon which such material or communication was received;

(3) an identification of the lobbyist from whom such material or communication was received and of the person on whose behalf such lobbyist was acting; and

(4) the subject matter of such material or communication and the specific Administration policy or activity it seeks to influence, including relevant docket numbers if known.

For purposes of this Section, "lobbyist" shall include governmental officials or employees acting in their official capacity.

SECTION 10. FUNCTIONS OF THE DIRECTOR

The Director shall be required—

(1) to develop forms for the filing of notices of representation, amendments thereto, and reports pursuant to Sections 4, 5, 6, 7 and 8 of this Regulation and to furnish such forms to lobbyists and other persons upon request;

(2) to develop forms for entries in the public record of the office pursuant to Section 9 of this Regulation and to make such forms available to all officials and employees of the Administration specified in Section 3 of this Regulation;

(3) to make such notices, reports and entries filed with the Office available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such notice, report, or entry by hand or by duplicating machine, as requested by any person, at the expense of such persons, provided that the charge does not exceed actual marginal costs;

(4) to preserve such notices, reports and entries for a period of five years from date of receipt;

(5) to compile and summarize the information contained in such notices and reports in a manner reflective of the disclosure intent of the Regulation

and in specific relation to the lobbying activities and expenditures related to specific matters before the Administration, including the identity of the lobbyists involved and of the persons in whose behalf they are acting;

(6) to have such information, as so compiled and summarized, published in the Federal Register within fifteen days after the close of each filing period;

(7) to have each notice of representation and amendment thereto published in the Federal Register within three days after such notice was received;

(8) to compile a comprehensive index by name of lobbyist, name of person in whose behalf a lobbyist acted, and subject matter of all entries in the record made during each filing period;

(9) to have such index, as so compiled, published in the Federal Register within fifteen days after the close of each filing period;

(10) to receive complaints from any person that a lobbyist or other person has failed to comply completely and accurately with the filing requirements of this Regulation and to thereupon determine, at his discretion pursuant to Section 11 of this Regulation, wether such failure has occurred; and

(11) to develop the administrative procedures necessary to effectuate the provisions of this Regulation.

SECTION 11. DETERMINATION OF NON-COMPLIANCE

The Director shall make a preliminary determination of whether notices of representation, amendments thereto, and reports filed with his Office are complete and accurate in all respects. In making such determination, he may request any lobbyist or other person to submit voluntarily any reports, documents, or answers to questions as he deems necessary. Upon refusal to comply satisfactorily with such requests, he may submit a preliminary determination to the Administrator that such lobbyist or other person is not in compliance wiht Sections 4, 5, 6, 7 or 8 of this Regulation. The Administrator shall then determine, after adjudicatory hearings, whether such non-compliance exists. Upon such determination, the prohibition against receipt of communications from the lobbyist in question pursuant to Section 3 of this Regulation shall apply.

SECTION 12. SANCTIONS

Any official or employee of the Administration who knowingly and willfully violates Section 3 or 7 of this Regulation shall, upon determination by the Director with the consent of the Administrator, be suspended from the Administration for not less than 30 days. Multiple violations shall result, as the Director deems appropriate, in extended suspension, demotion, or removal from the Administration. Any lobbyist or other person who is not in complete and accurate compliance with Section 4, 5, 6, 7 or 8 of this Regulation shall be prohibited from participating in any Administration deliberations or proceedings.

APPENDIX V

Included in this appendix are a Common Cause legal memorandum on the constitutionality of lobby disclosure, followed by examples of what Common Cause considers to be particularly good state statutes requiring lobby registration and expense disclosure. In order, these are:

TEXAS

Lobby registration and reporting law.
Quarterly report filed by Texas Common Cause, April 10, 1974.

WASHINGTON

Washington State Initiative, which, in addition to lobby registration and reporting, requires disclosure of campaign finances, public access to public records, personal financial disclosure by public officials, and the establishment of an enforcement agency.

37-490 O - 74 - 10

Monthly report filed by Washington State Common Cause, May 10, 1974.
Weekly report filed by Common Cause lobbyist Jolene Unsoeld, March 27, 1974.

MASSACHUSETTS

Lobby Disclosure Law.
Semi-annual report filed by Massachusetts Common Cause, May 15, 1974.

THE CONSTITUTIONALITY OF AN IMPROVED FEDERAL LOBBYIST REGISTRATION STATUTE

(Prepared by Kenneth J. Guido, Jr., Director of Litigation)

The proposals that have been made for improvement in the Federal Regulation of Lobbying Act of 1946 require the disclosure of the financing of activities of organizations and individuals who receive or expend substantial sums of money to influence legislative or executive action, either by direct communication or by solicitation of others to engage in such efforts. Since these proposals are limited to organizations and individuals who expend substantial sums of money and are restricted to traditional lobbying activity, they are constitutional.

The United States Supreme Court is careful to preserve the right to speak and petition one's government. Nevertheless, when there is a compelling interest in requiring disclosure of certain matters, as there is in the area of lobbying, the court will sustain the legislation even where it has an incidental deterrent effect on the protected activity.

I. THE CONSTITUTIONAL STANDARD

As Justice Brennan observed in *Garrison* v. *State of Louisiana*, 379 U.S. 69, 74–75 (1964), "speech concerning public affairs is more than self-expression; it is the essence of self-government." The First and Fourteenth Amendments embody the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). See also *Mills* v. *Alabama*, 384 U.S. 214, 217–218 (1966). Accordingly, the United States Supreme Court has been particularly protective of First Amendment freedoms, and has extended the protection to more than sheer verbal or printed expression. See e.g., *West Virginia Board of Education* v. *Barrette*, 319 U.S. 624 (1943) (right to refuse to salute flag); *NAACP* v. *Button*, 371 U.S. 415 (1963) (right to solicit legal business). It is still the case, however, that the constitutionality of regulations relating to First Amendment rights varies with their mode of expression, and that usually the non-verbal exercise of such rights, particularly when joined with acts which are not necessarily communicative, is more susceptible to regulation than is pure speech. See *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 173–174 (1967) (Douglas, J. dissenting, quoted *infra*); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965); *Cameron* v. *Johnson*, 390 U.S. 611, 617 (1968); *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968); *California* v. *LaRue*, —— U.S. ——, 93 S.Ct. 390, 396 (1972). As the United States Supreme Court stated in *Konigsburg* v. *State Bar of California*, 366 U.S. 36, 50–51 (1961):

". . . [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid government interests . . ."

In such cases, the United States Supreme Court has determined that "a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct." *Barenblatt* v. *United States*, 360 U.S. 109, 141–42 (1959) (Black, J. dissenting on other grounds). Accordingly, the United States Supreme Court has evolved a three-part test to determine

whether disclosure requirements which allegedly infringe upon First Amendment rights are unconstitutional:

First, it must be shown that disclosure will deter the class of persons to be protected from exercising their First Amendment rights. *NAACP* v. *Alabama*, 357 U.S. 449, 462–63 (1958); *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539, 546 (1963); *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972).

If it can be proven that disclosure has had a chilling effect on First Amendment freedoms, the United States Supreme Court then requires a determination of: (1) whether there is a substantial relation between the information sought and a subject of overriding and compelling state interest, *NAACP* v. *Alabama, supra*, at 462–63; *Gibson* v. *Florida Legislative Investigation Commission, supra* at 546; and (2) whether the means chosen to achieve the overriding and compelling interest are precise, have as narrow an impact as possible, are not vague, overbroad or indiscriminate in their sweep, and no less drastic means exist which might alternatively be used to implement the state interest. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512; *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *NAACP* v. *Button, supra*.

There is no hard evidence to suggest that lobbying disclosure statutes chill the exercise of First Amendment rights. Nevertheless, even if there were, the disclosure of the receipt and expenditure of substantial sums of money to influence governmental actions is substantially related to the overriding and compelling state interests in removing the corrupting influences of money in politics and restoring confidence in the integrity of the political process. Additionally, since the proposals under consideration only require disclosure by those organizations which receive or spend substantial sums of money to influence political decisions, they are not overly broad but are precisely drawn.

II. THERE IS A COMPELLING STATE INTEREST IN REQUIRING THE DISCLOSURE OF MONEY SPENT TO INFLUENCE PUBLIC DECISIONS

The underlying conditions which require improvement in the existing Federal lobbyist registration law have been created by the changes which have taken place in the political process in recent years. The primary change has been the growth of the importance of private money in the political process and the relationship between lobbyists and governmental actions.

The function of lobbyists has become such an important part of the process of setting public policy that the labels the "Third House" and the "Fifth Estate" have shifted from rhetoric to fact. Lobbying not only pushes and pulls public policy makers, but the complexity of modern society often makes lobbying useful to them. Lobbyists serve for legislators as lawyers do for courts—assembling information and presenting the merits of a certain interest.

". . . the lobbyist performs functions which are useful to the legislative process. His role in providing information to members of a legislature is especially important in this era of complex and technical legislation. The lobbyist advises the legislator regarding both the meaning and impact of proposed legislation. Equally important is his representative function. Lobbyists are the legislative spokesmen for special interests who would not otherwise be represented as a group. In this sense, lobbyist compliment geographically-based representation."

4 Columbia Journal of Law and Social Problems, 69 (1968).

In contemporary lawmaking by elective public bodies, lobbying creates risks to the public interest and to the integrity of the lawmaking process. In the judicial branch of government lobbying is commonly performed by representing a brief *amicus curiae*, a device which is not open and fair, but sometimes may make a constructive contribution to a judicial decision as well. The effectiveness of a brief depends on its own merits. But for lobbying the legislative and executive branches, four conditions tend toward governmental decisions against the interests of the electorate: (1) secrecy; (2) a widely differential impact—not correlated to the public interest—according to the

amount of money spent by a lobbyist employer organization on a lobbyist and on his expense account; (3) where much is at stake, the lobbying function tends to go beyond information assembly and advocacy; competition escalates the spending and diverts its flow to influence rather than to present a case; and (4)

". . . the private interests are well spoken for and have more incentive than the occasional 'public lobbyist.' With the arrival of new and complex problems such as water and air pollution, food additives and wonder drugs, it is increasingly important that this imbalance be rectified. The lobbyists perform a service for the legislators and their constituents, and they have a constitutional right to do so. The public, however, must have the opportunity to evaluate their government, and to do so they must be informed about the different ingredients which are part of the legislative process. A disclosure requirement does not infringe on the rights of the lobbyist, and effectively vindicates the right of the public and the legislators."

38 Fordham L. Rev. 524, 536 (1970).

The power of lobbyists creates a particular responsibility augmented by the above-mentioned risks. And this responsibility—almost a fiduciary relationship—when coupled with an ever-present potential conflict of interest with the beneficiaries of the lawmaking process, whom the lobbyists try to influence (i.e. lawmakers and voters), creates a duty to disclose. The basis for compelling this disclosure is not to satisfy some private interest, but is to satisfy a strong public need.

Where a lobbyist—or an employer organization acting directly—deals with a legislator or administrative rule maker, the matter is not private. The pending law or rule in question applies to all citizens.

Commensurate with the duty to disclose information is the right of others to receive that information. The lawmakers on whom the lobbyists press their attentions need the opportunity to receive pertinent information, and should have the right to receive it. Only in this manner may legislators make more knowledgeable decisions. As the Supreme Court stated:

". . . [F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."

U.S. v. *Harriss*, 347 U.S. 612, 625, 98 L.Ed. 989 (1954).

Disclosure may free a legislator to make effective decisions, since his mind will thereby have become a more discriminating instrument for pursuit of his ends Morover, lobbyist disclosure will make it easier for lawmakers to resist undue or unethical pressures directed towards potential legislation.

Likewise, the electorate is entitled to this information.

"The theory behind such regulation is that if vital information concerning lobbies is made a matter of public knowledge, the people will be able to evaluate the propriety of the pressures which are brought to bear upon government officers. In particular, it is hoped that legislators will thereby be able to resist pressures which in the past they have submitted to because of fear that public opinion would not support them if they stood their ground."

Carr and Bernstein, *American Democracy in Theory and Practice*, Essentials Edition (Holt, Rinehart & Winston, 1961), pp. 122–123.

See also, Comment, Disclosure Legislation, 76 Harv. L. Rev. 1273, 1292 (1963).

The need for the citizen to know about how the money is spent does not simply relate to the possibly corrupt relationship—a "gift" in return for a favor of public decision or policy. It is just as important, and of wider application, to know what are the principal sources of money support for success or defeat of a candidate, a pending bill or a measure to be voted on directly by the citizens. The recipient can usefully be measured by the financial company he or it keeps.

A business corporation employing a lobbyist may deduct from taxable income most of the lobbying expenses incurred, Int. Rev. Code of 1954

[hereinafter cited as Code], §162(e), even though only a part of the legislation which the corporation is trying to influence may affect the business interest of the corporation, Code §1.162-20(c)(2)(ii)(b)(1). With a 50% corporate tax rate, citizen-taxpayers, in effect, subsidize half of this lobbying outlay. Obviously, such citizen-taxpayers have legitimate concern about how their tax money is being spent on public policies affecting their livelihoods and lives.

Where money is expended, it becomes a form of expression. The proposals that have been made do not forbid such expression but simply require that where money changing hands concerns the public interest, it must not be secret. Where money talks, the citizen must be allowed to listen. The proposals that have been made provide that the flow of money, as it relates to political decision-making, must be made known to the average citizen; only then can the citizen effectively exercise his constitutional right and duty to judge the merits and performance of those in political office. The proposals that have been made undertake to expose money's influence on political decisions, and thereby establish true freedom of communication.

The causal chain between money and decision-making by elected public officials is apparent: substantial funds contributed to a candidate may influence his political decisions; in a like manner, money to finance lobbying of public officials may influence the officials' decisions.

Other and related social evils which can be remedied by disclosure include:

(1) The unfair or unwise decisions made under the pressures of secret money, whether they be caused by conflict of interest, by simple influence to forbear or to shade one's views, by fear, by hope, or by obligation to repay an implied debt.

(2) The unconscionable bargaining position accruing to those wielding secret money and applying it to the political process: many people may accept the right of a richer person to buy a more lavish life style, but few accept his right to buy government favors—favors bought at the public's expense.

(3) The loss of public confidence in the political process.

Since the impact of private money on public men affects the public interest, citizens and lawmakers should be allowed to know the facts so that they may drawn their own conclusions and pass their own judgments. This will inevitably lead to better informed decisions, and thereby freer decisions.

"Disclosure is like an antibiotic which can deal with ethical sicknesses in the field of public affairs. There was perhaps more general agreement upon this principle of disclosing full information to the public and upon its general effectiveness than upon any other proposal. It is hardly a sanction and certainly not a penalty. It avoids difficult conclusions as to what may be right or wrong. In this sense it is not even diagnostic; yet there is confidence that it will be helpful in dealing with questionable or improper practices. It would sharpen men's own judgments of right and wrong if they knew these acts would be challenged."

> *Ethical Standards in Government*, U.S. Senate Subcommittee Report on the Establishment of a Commission on Ethics in Government, 82nd Cong., 1st Sess. (1951), p. 37.

The significance of disclosed information is not only a moral or criminal matter. For example, if lobbyist disclosure revealed that a certain measure were supported by the commercial banks and opposed by the casualty insurance companies, neither position might necessarily have any moral connotation, but such knowledge might well enable some people to decide the course they might wish to take in relation to that measure. Disclosure, therefore, is not just to reveal malpractices. It is primarily to enhance *rational decision-making.*

"The difficulty here is that the ordinary operation of a disclosure statute cannot reasonably be expected to provide evidence of impropriety, unless this is narrowly defined as group expenditures or activities deemed excessive after the fact by an electoral consensus registered against candidates or

proposals publicly associated with them, and this kind of test would be difficult to apply in most situations. There is even less reason to assume that disclosure requirements can reveal violations of the less elusive juridical standards (bribery, fraud, intimidation, and the like) . . . The ultimate end of a disclosure law is to convey special facts to plain people. This does not necessarily involve the assumption that if "people are free and have access to the 'facts', they will all want the same thing in any given political situation." It assumes only that certain facts are relevant to public judgment, and that the public therefore should have them, reacting however their preferences or intellectual ingenuity may dictate."

Edgar Lane, *Lobbying and The Law*, pp. 184, 168.

III. CONSTITUTIONALITY OF DISCLOSURE STATUTES

The United States Supreme Court has had the opportunity to review the disclosure statutes dealing with money in politics and has found them to be constitutional.

In *Burroughs & Cannon* v. *U.S.*, 290 U.S. 534 (1934), the United States Supreme Court upheld the constitutionality of federal legislation requiring "public disclosure of political contributions, together with the names of contributors and other details." The Supreme Court, in upholding the constitutionality of the Act, stated:

"To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection."

Id. at 545.

Burroughs was applied to a First Amendment claim in *United States* v. *Harriss*, 347 U.S. 672, 625 (1954). The interest cited above in *Burroughs* was treated in *Harriss* as a compelling state interest which supported the Lobbying Act's disclosure requirements against a claim that the Act infringed First Amendment rights.

In 1960, the Fifth Circuit Court of Appeals declared that:

"The Congress is not prohibited by the First Amendment guaranty of the right to petition the Government for redress of grievances from exercising measures of self-protection in requiring disclosures of lobbying activities.

Wilkinson v. *U.S.*, 272 F.2d 783, 787 (5th Cir., 1960).

The federal act, declared constitutional in *United States* v. *Harriss, supra*, required disclosure of receipts and expenditures by lobbyists before Congress "who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Supra*, 25 625.

Through legislative experimentation and judicial testing it has been established that we may constitutionally require public disclosure of comprehensive information relating to the effect of money on the political process.

The *Harriss* holding has been reaffirmed in several recent cases, including *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961). In that case the Court said:

"In a number of situations in which secrecy or the concealment of associations has been regarded as a threat to public safety and to the effective free functioning of our national institutions Congress has met the threat by requiring registration or disclosure."

Supra, at 97.

The Court then proceeded to discuss several laws requiring such registration or disclosure. Among them was the Federal Regulation of Lobbying Act, which:

". . . [R]equires any person receiving any contributions or expending any money for the purposes of influencing the passage or defeat of legislation to file with the Clerk of the House quarterly statements which set out the name and address of each person who has made a contribution of $500 or more not mentioned in the preceding report. It also requires that any person who en-

gages himself for pay for the purpose of attempting to influence the passage or defeat of legislation, before doing anything in furtherance of that objective, register with the Clerk of the House and the Secretary of the Senate, and state in writing, *inter alia*, his name and address and the name and address of the person by whom he is employed, and in whose interest he works. These paid lobbyist must file quarterly reports of all money received and expended in carrying on their work, to whom paid, for what purposes, the names of publications in which they have caused any articles to be published, and the proposed legislation they are employed to support or oppose; this information is to be printed in the Congressional Record. In *United States* v. *Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989, we held that the First Amendment did not prohibit the prosecution of criminal informations charging violation of the registration and reporting provisions of the Act. We said:

"'Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depend to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.'

"Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much . . . *Id.*, 347 U.S. at page 625, 74 S.Ct. at page 816."

Supra, 1412–1413.

The Court added further:

"Certainly, as the *Burroughs* and *Harriss* cases abundantly recognize, secrecy of associations and organizations, even among groups concerned exclusively with political processes, may under some circumstances constitute a danger which legislatures do not lack constitutional power to curb."

Supra, 101.

Even Justice Douglas. in his dissent in the *Communist Party* case, *supra*, recognized the principle of *Harriss*:

"Picketing is free speech *plus* (citations omitted) and hence can be restricted in all instances and banned in some . . . Though the activities themselves are under the First Amendment, the manner of their exercise or their collateral aspects fall without it.

"Like reasons underlie our decisions which sustain laws that require various groups to register before engaging in specified activities. Thus, lobbyists who receive fees for attempting to influence the passage or defeat of legislation in Congress may be required to register. *United States* v. *Harriss*, 347 U.S. 612. Criminal sanctions for failure to report and to disclose all contributions made to political parties are permitted. *Burroughs* v. *United States*, 290 U.S. 534, . . . In short, the exercise of First Amendment rights often involves business or commercial implications which Congress in its wisdom may desire to be disclosed. . . ."

Supra, at 173–174.

In the leading case of *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449 (1958), the United States Supreme Court declared that an order requiring the association to produce records including names and addresses of all members and agents was unconstitutional because it imposed a substantial restraint upon members' exercise of their right to freedom of association. In so doing, the Court discussed with approval the First Amendment aspects of *Harriss*, *supra*:

"In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms

of governmental action. Thus in [*American Communications Ass'n* v.] *Douds*, [339 U.S. 382 (1950)] the Court stressed that the legislation to regulate labor unions and to secure stability in interstate commerce, would have the practical effect "of discouraging" the exercise of constitutionally protected political rights, 339 U.S. at page 393, 70 S.Ct. at page 681, and it *upheld* the statute *only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms.* Similar recognition of possible unconstitutional intimidaton of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to supress speech. *United States* v. *Rumely*, 345 U.S. 41, 46–47, 73 S.Ct. 543, 546, 97 L.Ed. 770; *United States* v. *Harriss*, 347 U.S. 612, 625–626, 74 S.Ct. 808, 815–816, 98 L.Ed. 989."

Supra, 1171.

In *Gibson* v. *Florida Legislative Investigation Commission*, 372 U.S. 539 (1963), the United States Supreme Court again applied the "subtsantial relation" test, *Supra* at 546. In *Gibson, supra*, unlike in *Harriss, supra*, the Court found no nexus between the NAACP Miami branch and Communist activities which was asserted in an attempt to justify an investigation into the local NAACP by a state legislative committee.

Likewise, in *Shelton* v. *Tucker*, 364 U.S. 479 (1960), the Court struck down as overly broad a state requirement that every teacher in a state-supported school or college file annually an affidavit listing without limitation every organization to which he had belonged or contributed during the previous five years. The fatal defect, unlike in *Harriss, supra*, was that the statute required disclosure of many associations that clearly bore no relations to the legitimate object of inquiry. *Supra*, 485.

In *CSC* v. *Letter Carriers*, 413 U.S. ——, 37 L.Ed.2d 796 (1973), the Supreme Court upheld the constitutionality, against a First Amendment challenge, of the Hatch Act provision forbidding federal employees "to take an active part in political management or in political campaigns." 5 U.S.C. sec. 7324(a)(2). More specifically, Congress was held to have the power to forbid federal employees from:

"holding a party office, working at the polls and acting as party paymaster for other party workers . . . organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; become a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for political office; initiating or circulating a nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention."

Supra at 804.

If it is not a violation of the First Amendment for a statute to prohibit a person to hold public employment and to take part as a citizen in shaping public policy through political activity, it surely is not a violation of the First Amendment for statutes such as those proposed to resolve lobbyists' potential conflict of interest by requiring disclosure of where the money comes from and where it goes.

It is evident from the foregoing that the principle that the First Amendment does not prohibit requirements that lobbyists disclose their finances, first enunciated by *Harriss, supra*, is still good law.

If an improved lobbyist registration act is precisely drawn to only include substantial lobbying activities, and there are no ambiguities concerning the reporting by organizations which receive or spend money to influence political decisions that cannot be clarified by administrative or judicial determination, it would regulate the precise area dealt with in *Harriss, supra*, and be constitutional.

LEGISLATION—PERSONS INFLUENCING—REGISTRATION AND REPORTING REQUIREMENTS

CHAPTER 422 [51]

H. B. No. 2

An Act relating to the activities, registration, and reporting requirements of persons engaging in activities designed to influence legislation; providing for enforcement of the Act; providing penalties; prohibiting certain acts; repealing Chapter 9, Acts of the 55th Legislature, 1st Called Session, 1957 (Article 183—1, Vernon's Texas Penal Code); and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Policy

Section 1. The legislature declares that the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to individual members of the legislature, to committees of the legislature, and to members of the executive branch, their opinions on legislation, on pending executive actions, and on current issues. To preserve and maintain the integrity of the legislative process, it is necessary that the identity, expenditures, and activities of certain persons who, by direct communication to such officers, engage in efforts to persuade members of the legislative branch or executive branch to take specific actions be publicly and regularly disclosed.

Definitions

Sec. 2. As used in this Act:

(1) "Person" means an individual, corporation, association, firm, partnership, committee, club, or other organization, or a group of persons who are voluntarily acting in concert.

(2) "Legislation" means a bill, resolution, amendment, nomination, or other matter pending in either house of the legislature; any other matter which may be the subject of action by either house, including the introduction, consideration, passage, defeat, approval, or veto of the matter; or any matter pending in or which may be the subject of action by a constitutional convention.

(3) "Legislative branch" means a member, member-elect, candidate for, or officer of the legislature or a legislative committee, or an employee of the legislature.

(4) "Executive branch" means an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of government.

(5) "Communicates directly with" means contact in person or by telephone, telegraph, or letter.

(6) "Compensation" means money, service, facility, or thing of value or financial benefit which is received or to be received in return for or in connection with services rendered or to be rendered.

51. Vernon's Ann.Civ.St. art. 6252—9c, §§ 1 to 17.

(7) "Expenditure" means a payment, distribution, loan, advance, reimbursement, deposit, or gift of money or any thing of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure.

(8) "Secretary" means the Secretary of State of the State of Texas.

Persons required to register

Sec. 3. (a) The following persons must register with the secretary as provided in Section 5 of this Act:

(1) a person who makes a total expenditure in excess of $200 in a calendar quarter, not including his own travel, food, or lodging expenses, or his own membership dues, for communicating directly with one or more members of the legislative or executive branch to influence legislation; and

(2) a person who receives compensation or reimbursement from another to communicate directly with a member of the legislative or executive branch to influence legislation.

(b) A person, other than a member of the judicial, legislative, or executive branch, who, as part of his regular employment, communicates directly with a member of the legislative or executive branch to influence legislation, whether or not any compensation in addition to the salary for that regular employment is received for the communication, must register under Subsection (a), Paragraph (2), of this section.

Exceptions

Sec. 4. The following persons are not required to register under the provisions of this Act:

(1) persons who own, publish, or are employed by a newspaper or other regularly published periodical, or a radio station, television station, wire service, or other bona fide news medium which in the ordinary course of business disseminates news, letters to the editors, editorial or other comment, or paid advertisements which directly or indirectly oppose or promote legislation, if such persons engage in no further or other activities and represent no other persons in connection with influencing legislation; and

(2) persons appearing before a legislative committee at the invitation of the committee and who receive no compensation for their appearance other than reimbursement from the state for expenses and engage in no further or other activities to influence legislation.

Registration

Sec. 5. (a) Every person required to register under Section 3 of this Act shall file a registration form with the secretary within five days after the first undertaking requiring registration except as otherwise provided herein.

(b) The registration shall be written, verified, and shall contain the following information:

(1) the registrant's full name and address;

(2) the registrant's normal business and business address;

(3) the full name and address of each person who made a contribution or paid a membership fee in excess of $500 during the preceding 12-month period to the registrant or to the person by whom the registrant is reimbursed, retained, or employed regardless of whether it was paid solely to influence legislation;

(4) the full name and address of each person:

(A) by whom the registrant is reimbursed, retained, or employed to directly communicate with a member of the legislative or executive branch to influence legislation; and

(B) on whose behalf the registrant is to communicate directly with a member of the legislative or executive branch to influence legislation; and

(5) a specific description of the matters on which the registrant expects to communicate directly with a member of the legislative or executive branch to influence legislation, including, if known, the bill numbers and whether the registrant supports or opposes each bill listed.

(c) If a registrant's activities are done on behalf of the members of a group other than a corporation, the registration form shall include a statement of the number of members of the group and a full description of the methods by which the registrant develops and makes decisions about positions on policy.

(d) A registrant shall file a supplemental registration indicating any change in the information contained in the registration within 10 days after the date of the change.

Activities report

Sec. 6. (a) Every person registered under Section 5 of this Act shall file with the secretary a report concerning the activities set out in Subsection (b) of this section. The report must be filed:

(1) between the 1st and 10th day of each month subsequent to a month in which the legislature is in session covering the activities during the previous month; and

(2) between the 1st and 10th day of each month immediately subsequent to the last month in a calendar quarter covering the activities during the previous quarter.

(b) The report shall be written, verified, and contain the following information:

(1) the total expenditures made by the registrant for directly communicating with a member of the legislative or executive branch to influence legislation, including expenditures made by others on behalf of the registrant for those direct communications if the expenditures were made with his express or implied consent or were ratified by him. Such report shall include a breakdown of expenditures into the following categories:

(A) postage and telegraph;

(B) publication and advertising;

(C) travel and fees;

(D) entertainment;

(E) gifts, loans, and political contributions; and

(F) other expenditures;

(2) a list of legislation supported or opposed by the registrant, by any person retained or employed by the registrant to appear on his behalf, or by any other person appearing on his behalf, together with a statement of the registrant's position for or against such legislation.

(c) Each person who made expenditures on behalf of a registrant that are required to be reported by Subsection (b) of this section or who has other information required to be reported by the registrant under this section or Section 5 shall provide a full, verified account of his expenditures to the registrant at least seven days before the registrant's report is due to be filed.

Termination notice

Sec. 7. (a) A person who ceases to engage in activities requiring him to register under Section 3 of this Act shall file a written, verified statement with the secretary acknowledging the termination of activities. The notice is effective immediately.

(b) A person who files a notice of termination under this section must file the reports required under Section 6 of this Act for any reporting period during which he was registered under this Act.

Maintenance of reports

Sec. 8. (a) All reports filed under this Act are public records and shall be made available for public inspection during regular business hours.

(b) The secretary shall design and provide appropriate forms, covering only the items required to be disclosed under this Act, to be used for the registration and reporting of information required by this Act, maintain registrations and reports in a separate, alphabetical file, purge the files of registrations and reports after five years from the date of filing, and maintain a deputy available to receive registrations and reports and make such registrations and reports available to the public for inspection.

Penalty

Sec. 9. (a) A person, as defined in this Act, who violates any provision of this Act other than Section 11 commits a Class A misdemeanor. A person, as defined in this Act, who violates Section 11 of this Act commits a felony of the third degree. Nothing in this Act relieves a person of criminal responsibility under the laws of this state relating to perjury.

(b) A person who receives compensation or reimbursement or makes an expenditure for engaging in direct communication to influence legislation and who fails to file the registration form or activities report required by this Act, in addition, shall pay to the state an amount equal to three times the compensation, reimbursement, or expenditure.

False communications

Sec. 10. No person, for the purpose of influencing legislation, may:

(1) knowingly or wilfully make any false statement or misrepresentation of the facts to a member of the legislative or executive branch; or

(2) knowing a document to contain a false statement, cause a copy of the document to be received by a member of the legislative or executive branch without notifying such member in writing of the truth.

Contingent fees

Sec. 11. No person may retain or employ another person to influence legislation for compensation contingent in whole or in part on the passage or defeat of any legislation, or the approval or veto of any legislation by the governor, and no person may accept any employment or render any service for compensation contingent on the passage or defeat of any legislation or the approval or veto of any legislation by the governor.

Admission to floors

Sec. 12. No person who is registered or required to be registered under the provisions of this Act may go on the floor of either house of the

legislature while that house is in session except on invitation of that house.

Enforcement

Sec. 13. (a) The provisions of this Act may be enforced by the attorney general or any county or district attorney.

(b) A district court in Travis County may issue an injunction to enforce the provisions of this Act on application by any citizen of this state.

Venue

Sec. 14. An offense under this Act, including perjury, may be prosecuted in Travis County or in any other county where it may be prosecuted under the Code of Criminal Procedure, 1965, as amended.

Repealer

Sec. 15. Chapter 9, Acts of the 55th Legislature, 1st Called Session, 1957 (Article 183—1, Vernon's Texas Penal Code) is repealed.[52]

Effective date

Sec. 16. This Act takes effect January 1, 1974.

Severability

Sec. 17. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Emergency

Sec. 18. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after January 1, 1974, and it is so enacted.

Passed by the House on February 8, 1973: Yeas 114, Nays 25; that the House refused to concur in Senate amendments to H. B. No. 2 on May 24, 1973: Yeas 106, Nays 37, and requested the appointment of a Conference Committee to consider the differences between the two Houses; and that the House adopted the Conference Committee Report on H. B. No. 2 on May 28, 1973: Yeas 145, Nays 1; passed by the Senate, with amendments, on May 22, 1973: Yeas 30, Nays 1; at the request of the House, the Senate appointed a Conference Committee to consider the differences between the two Houses; and that the Senate adopted the Conference Committee Report on H. B. No. 2, on May 28, 1973, by a viva-voce vote.

Approved June 14, 1973.

Effective Jan. 1, 1974.

52. Vernon's Ann.P.C. art. 183—1, repealed.

STATE OF TEXAS, OFFICE OF THE SECRETARY OF STATE, AUSTIN, TEXAS 78711—ACTIVITIES REPORT

Report of activities designed to influence legislation pursuant to Article 6252–9c, V.A.C.S., filed for the period of January 1, 1974 through March 31, 1974 by Milton Tobian and Randall B. Wood on behalf of Common Cause of Texas.[1]

I. EXPENDITURES

For purposes of this report, the word "expenditures" is defined by Article 6252–9c, V.A.C.S., as follows:

"a payment, distribution, loan, advance, reimbursement, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure."

1. Total expenditures made by registrant for directly communicating with a member of the legislative or executive branch to influence legislation, including expenditures made by others on behalf of myself for those direct communications if the expenditures were made with my express and/or implied consent or were ratified by me:

A. Postage and telegraph	$817.56
B. Publication and advertising	1326.46
C. Travel and fees	398.94
D. Entertainment	0
E. Gifts, loans, and political contributions	0
F. Other expenditures:	
1. Salaries	12,155.13
2. Rent and office supplies	2,217.27
3. Telephone	1,355.53
4. Membership building	1,298.71
5. Special projects	1,231.94
6. Other	96.52
7. "In Kind" service provided by the national Common Cause office benefiting Texas:	
Travel	152.86
Consultant	290.00
Subtotal	18,797.96
Total	21,340,92

II. LEGISLATION

For purposes of this report, the word "legislation" is defined by Article 6252–9c, V.A.C.S., as follows: "a bill, resolution, amendment, nomination, or other matter pending in either house of the legislature; any other matter which may be the subject of action by either house, including the introduction, consideration, passage, defeat, approval, or veto of the matter; or any matter pending in or which may be the subject of action by a constitutional convention."

1. List legislation supported or opposed by Registrant.

Same—( ) supported ( ) opposed.

2. List legislation supported or opposed by any person you, the registrant, have retained or employed to appear on your behalf, or by any other person appearing on your behalf, together with a statement of your position for or against such legislation.

[1] (The expenditures listed for registrants Milton Tobian and Randall B. Wood were made by Common Cause of Texas. No expenditures for lobbying purposes were made by those registrants except through Common Cause of Texas.)

Legislation:
Same—( ) supported ( ) opposed.
Statement of Registrant's Position:
Legislation:
——— ( ) supported ( ) opposed.

VERIFICATION

I do solemnly swear that the foregoing Activities Report, filed herewith is in all things true and correct, and fully shows all information required to be reported by me pursuant to Article 6252-93, V.A.C.S.

_____
Signature of Registrant

Sworn to and subscribed before me by ——— this is the — day of ——— 197–, to certify which, witness my hand and seal.

_____
Notary Public,
County, Texas

CHAPTER 1, LAWS OF 1973; INITIATIVE MEASURE NO. 276 TO THE PEOPLE

SEC. 2. DEFINITIONS

* * * * * * *

(15) "Legislation" means bills, resolutions, motions, amendments, nominations, and other matters pending or proposed in either house of the state legislature, and includes any other matter which may be the subject of action by either house, or any committee of the legislature and all bills and resolutions which having passed both houses, are pending approval by the Governor.

(16) "Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the State of Washington, or the adoption or rejection of any rule, standard, rate or other legislative enactment of any state agency under the state Administrative Procedure Acts, chap. 34.04 R.C.W. and chap. 28 B. 19 R.C.W.

(17) "Lobbyist" includes any person who shall lobby either in his own or another's behalf.

(18) "Lobbyist's employer" means the person or persons by whom a lobbyist is employed and all persons by whom he is compensated for acting as a lobbyist.

CHAPTER II. LOBBYIST REPORTING

SEC. 15. Registration of Lobbyists. (1) Before doing any lobbying, or within thirty days after being employed as a lobbyist, whichever occurs first, a lobbyist shall register by filing with the commission a lobbyist registration statement, in such detail as the commission shall prescribe, showing:

(a) His name, permanent business address, and any temporary residential and business addresses in Thurston County during the legislative session;

(b) The name, address and occupation or business of the lobbyist's employer;

(c) The duration of his employment;

(d) His compensation for lobbying; how much he is to be paid for expenses, and what expenses are to be reimbursed: and a full and particular description of any agreement, arrangement or understanding according to which his compensation, or any portion thereof, is or will be contingent upon the success of any attempt to influence legislation.

(e) Whether the person from who he receives said compensation employs him solely as a lobbyist or whether he is a regular employee performing services for his employer which include but are not limited to the influencing of legislation;

(f) The general subject or subjects of his legislative interest;

(g) A written authorization from each of the lobbyist's employers confirming such employment;

(h) The name and address of the person who will have custody of the accounts, bills, receipts, books, papers, and documents required to be kept under this act;

(i) If the lobbyist's employer is an entity (including, but not limited to, business and trade associations) whose members include, or which as a representative entity undertakes lobbying activities for, businesses, groups, associations or organizations, the name and address of each member of such entity or person represented by such entity whose fees, dues, payments or other consideration paid to such entity during either of the prior two years have exceeded five hundred dollars or who is obligated to or has agreed to pay fees, dues, payments or other consideration exceeding five hundred dollars to such entity during the current year.

(2) Any lobbyist who receives or is to receive compensation from more than one person for his services as a lobbyist shall file a separate notice of representation with respect to each such person; except that where a lobbyist whose fee for acting as such in respect to the same legislation or type of legislation is, or is to be, paid or contributed to by more than one person then such lobbyist may file a single statement, in which he shall detail the name, business address and occupation of each person so paying or contributing, and the amount of the respective payments or contributions made by each such person.

(3) Whenever a change, modification, or termination of the lobbyist's employment occurs, the lobbyist shall, within one week of such change, modification or termination, furnish full information regarding the same by filling with the commission an amended registration statement.

(4) Each lobbyist who has registered shall file a new registration statement, revised as appropriate, each January, and failure to do so shall terminate his registration.

SEC. 16. Exemption From Registration. The following persons and activities shall be exempt from registration and reporting under sections 15, 17, 19, and 20 of this act:

(1) Persons who limit their lobbying activities to appearance before public hearings of state agencies.

(2) News or feature reporting activities and editorial comment by working members of the press, radio, or television and the publication or dissemination thereof by a newspaper, book publisher, regularly published periodical, radio station, or television station.

(3) Lobbying without compensation or other consideration: *Provided*, such person makes no expenditure for or on behalf of any member of the legislature or elected official or public officer or employee of the State of Washington in connection with such lobbying. Any person exempt under this subsection (3) may at his option register and report under this act.

(4) The Governor.

(5) The Lieutenant Governor.

(6) Except as provided by section 19(1), members of the legislature.

(7) Except as provided by section 19(1), persons employed by the legislature for the purpose of aiding in the preparation and enactment of legislation.

(8) Except as provided by section 19 elected state officers, state officers appointed by the Governor subject to confirmation by the Senate, and employees of any state agency.

SEC. 17. Reporting by Lobbyists. (1) Any lobbyist registered under section 15 of this act and any person who lobbies shall file with the commission periodic reports of his activities signed by both the lobbyist and the lobbyist's employers. The report shall be made in the form and manner prescribed by the commission. They shall be due quarterly and shall be filed within thirty

days after the end of the calendar quarter covered by the report. In addition to the quarterly reports, while the legislature is in session, any lobbyist who lobbies with respect to any legislation shall file interim weekly periodic reports for each week that the legislature is in session, which reports need be signed only by the lobbyist and which shall be filed on each Tuesday for the activities of the week ending on the preceding Saturday.

(2) Each such quarterly and weekly periodic report shall contain:

(a) The totals of all expenditures made or incurred by such lobbyist or on behalf of such lobbyist by the lobbyist's employer during the period covered by the report, which totals shall be segregated according to financial category, including food and refreshments; living accommodations; advertising; travel; telephone; contributions; office expenses, including rent and the salaries and wages paid for staff and secretarial assistance, or the proportionate amount thereof, paid or incurred for lobbying activities; and other expenses or services: *Provided however*, that unreimbursed personal living and travel expenses of a lobbyist not incurred directly or indirectly for any lobbying purpose need not be reported: and *Provided further*, that the interim weekly reports of legislative lobbyists for the legislative session need show only the expenditures for food and refreshments: living accommodations; travel; contributions; and such other categories as the commission shall prescribe by rule. Each individual expenditure of more than fifteen dollars for entertainment shall be identified by date, place, amount, and the names of all persons in the group partaking in or of such entertainment including any portion thereof attributable to the lobbyist's participation therein but without allocating any portion of such expenditure to individual participants.

(b) In the case of a lobbyist employed by more than one employer. the proportionate amount of such expenditures in each category incurred on behalf of each of his employers.

(c) An itemized listing of each such expenditure in the nature of a contribution of money or of tangible or intangible personal property to any legislator, or for or on behalf of any legislator. All contributions made to, or for the benefit of any legislator shall be identified by date, amount, and the name of the legislator receiving, or to be benefited by each such contribution.

(d) The subject matter of proposed legislation or rulemaking; the proposed rules, standards, rates or other legislative enactments under chap. 34.04 R.C.W. and chap. 28B.19 R.C.W. (the state Administrative Procedure Acts) and the state agency considering the same; and the number of each senate or house bill, resolution, or other legislative activity which the lobbyist has been engaged in supporting or opposing during the reporting period; *Provided*, that in the case of appropriations bills the lobbyist shall enumerate the specific section or sections which he supported or opposed.

SEC. 18. Reports by Employers of Registered Lobbyists. Every employer of a lobbyist registered under this act shall file with the commission on or before January 31st of each year a statement disclosing for the preceding twelve months the following information:

(1) The name of each elected official, candidate, or any member of his immediate family to whom such employer has paid any compensation, the value of such compensation and the consideration given or performed in exchange for such compensation.

(2) The name of any corporation, partnership, joint venture, association, union or other entity of which any elected official, candidate, or any member of his immediate family is a member, officer, partner, director, associate or employee and to which the employer has paid compensation, the value of such compensation and the consideration given or performed in exchange for such compensation.

SEC. 19. Legislative Activities of State Agencies and Other Units of Government. (1) Every legislator and every committee of the Legislature shall file with the commission quarterly reports listing the names, addresses, and sal-

aries of all persons employed by the person or committee making the filing for the purpose of aiding in the preparation and enactment of legislation during the preceding quarter. The reports shall be made in the form and the manner prescribed by the commission and shall be filed between the first and tenth days of each calendar quarter.

(2) Unless expressly authorized by law, no state funds shall be used directly or indirectly for lobbying: *Provided*, this shall not prevent state officers or employees from communicating with a member of the legislature on the request of that member; or communicating to the legislature, through the proper official channels, requests for legislative action or appropriations which are deemed necesary for the efficient conduct of the public business or actually made in the proper performance of their official duties: *Provided further*, that this subsection shall not apply to the legislative branch.

(3) Each state agency which expends state funds for lobbying pursuant to an express authorization by law or whose officers or employees communicate to members of the legislature on request of any member or communicate to the legislature requests for legislation or appropriations shall file with the commission quarterly statements providing the following information for the quarter just completed:

(a) The name of the agency filing the statement;

(b) The name, title, and job description and salary of each employee engaged in such legislative activity, a general description of the nature of his legislative activities; and the proportionate amount of his time spent on such activities.

(c) In the case of any communications to a member of the legislature in response to a request from the member, the name of the member making the request and the nature and subject of the request.

The statements shall be in the form and the manner prescribed by the commission and shall be filed within thirty days after the end of the quarter covered by the report.

(4) The provisions of this section shall not relieve any state officer or any employee of a state agency from complying with other provisions of this act, if such officer or employee is not otherwise exempted.

SEC. 20. Grass Roots Lobbying Campaigns. (1) Any person who has made expenditures, not reported under other sections of this act, exceeding five hundred dollars in the aggregate within any three month period or exceeding two hundred dollars in the aggregate within any one month period in presenting a program addressed to the public, a substantial portion of which is intended, designed, or calculated primarily to influence legislation shall be required to register and report, as provided in subsection (2), as a sponsor of a grass roots lobbying campaign.

(2) Within thirty days after becoming a sponsor of a grass roots lobbying campaign, the sponsor shall register by filing with the commission a registration statement, in such detail as the commission shall prescribe, showing:

(a) The sponsor's name, address, and business or occupation, and, if the sponsor is not an individual, the names, addresses and titles of the controlling persons responsible for managing the sponsor's affairs.

(b) The names, addresses, and business or occupation of all persons organizing and managing the campaign, or hired to assist the campaign, including any public relations or advertising firms participating in the campaign, and the terms of compensation for all such persons.

(c) The names and addresses of all persons contributing to the campaign, and the amount contributed by each contributor.

(d) The purpose of the campaign, including the specific legislation, rules, rates, standards or proposals which are the subject matter of the campaign.

(e) The totals of all expenditures made or incurred to date on behalf of the campaign, which totals shall be segregated according to financial category, including but not limited to the following: advertising, segregated by media

and, in the case of large expenditures (as provided by rule of the commission), by outlet; contributions; entertainment, including food and refreshments; office expenses including rent and the salaries and wages paid for staff and secretarial assistance, or the proportionate amount thereof paid or incurred for lobbying campaign activities; consultants; and printing and mailing expenses.

(3) Every sponsor who has registered under this section shall file monthly with the commission, which shall be filed by the tenth day of the month for the activity during the preceding month. The reports shall update the information contained in the sponsor's registration statement and in prior reports and shall show contributions received and totals of expenditures made during the month, in the same manner as provided for in the registration statement.

(4) When the campaign has been terminated, the sponsor shall file a notice of termination with the final monthly report, which notice shall state the totals of all contributions and expenditures made on behalf of the campaign, in the same manner as provided for in the registration statement.

SEC. 21. Employment of Legislators, Attaches, or State Employees; Statement, Contents and Filing. If any person registered or required to be registered as a lobbyist under this act employs, or if any employer or any person registered or required to be registered as a lobbyist under this act, employs any member of the legislature, or any member of any state board or commission, or any employee of the legislature, or any full-time state employee, if such new employee shall remain in the partial employ of the State or any agency thereof, then the new employer shall file a statement under oath with the commission setting out the nature of the employment, the name of the person to be paid thereunder, and the amount of pay or consideration to be paid thereunder. The statement shall be filed within fifteen days after the commencement of such employment.

SEC. 22. Employment of Unregistered Persons. It shall be a violation of this act for any person to employ for pay or any consideration, or pay or agree to pay any consideration to, a person to lobby who is not registered under this act except upon condition that such person register as a lobbyist as provided by this act, and such person does in fact so register as soon as practicable.

SEC. 23. Duties of Lobbyists. A person required to register as a lobbyist under this act shall also have the following obligations, the violation of which shall constitute cause for revocation of his registration, and may subject such person's employer, if such employer aids, abets, ratifies or confirms any such act, to other civil liabilities, as provided by this act.

(1) Such persons shall obtain and preserve all accounts, bills, receipts, books, papers, and documents necessary to substantiate the financial reports required to be made under this act for a period of at least six years from the date of filing of the statement containing such items, which accounts, bills, receipts, books, papers and documents shall be made available for inspection by the commission at any time: *Provided*, that if a lobbyist is required under the terms of his employment contract to turn any records over to his employer, responsibility for the preservation of such records under this subsection shall rest with such employer.

(2) In addition, person required to register as a lobbyist shall not:

(a) Engage in any activity as a lobbyist before registering as such;

(b) Knowingly deceive or attempt to deceive any legislator as to any fact pertaining to any pending or proposed legislation;

(c) Cause or influence the introduction of any bill or amendment thereto for the purpose of thereafter being employed to secure its defeat;

(d) Knowingly represent an interest adverse to any of his employers without first obtaining such employer's written consent thereto after full disclosure to such employer of such adverse interest;

(e) Exercise any undue influence, extortion, or unlawful retaliation upon any legislator by reason of such legislator's position with respect to, or his vote upon, any pending or proposed legislation.

REGISTRATION STATEMENT AND MONTHLY REPORT

TO THE STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION
CHAP. 1, LAWS OF 1973

FILING FORM	TO BE FILED BY:
1-6	SPONSOR'S OF "GRASS ROOTS" LOBBYING CAMPAIGN (Sec. 20)

THIS SPACE FOR OFFICE USE

P.M. DATE	DATE RECVD.	ITEM NUMBER

See completion instructions at bottom of page.
(Type or print clearly)

SPONSOR'S NAME AND ADDRESS	SPONSOR'S BUSINESS OR OCCUPATION	DATE PREPARED	REPORT COVERS.
Common Cause in Washington 1622 N. 45th Seattle, WA 98103	Citizens' Lobby	4/4/74	☐ REGISTRATION (Initial Report) ☒ PERIOD ENDING Mo. Day Yr. 3 31 74 ☐ FINAL REPORT

ITEM 1 — IF SPONSOR IS NOT AN INDIVIDUAL IDENTIFY THE CONTROLLING PERSONS RESPONSIBLE FOR MANAGING THE SPONSOR'S AFFAIRS.

NAMES	ADDRESSES	TITLES
See Attachment 1		

ITEM 2 — PERSONS ORGANIZING AND MANAGING THE CAMPAIGN OR HIRED TO ASSIST THE CAMPAIGN, INCLUDING PUBLIC RELATIONS OR ADVERTISING FIRMS PARTICIPATING IN THE CAMPAIGN.

NAMES AND ADDRESSES	BUSINESS OR OCCUPATION	TERMS OF COMPENSATION
In addition to those listed on	Attachment 1:	
Don Gough	Executive Director	$500/mo.
1622 N. 45th	Washington PAC	
Seattle, WA 98103		
206/ME3-4001		

INSTRUCTIONS

WHO SHOULD FILE THIS FORM: Any sponsor, i.e., any person who has made expenditures, not reported under other sections of the Public Disclosure Act, exceeding $500 in the aggregate within any three month period or exceeding $200 in the aggregate within any one month period in presenting a program addressed to the public, a substantial portion of which is intended, designed, or calculated primarily to influence legislation.

FILING DEADLINE: Within 30 days after becoming a sponsor. Monthly reports required on the 10th of the following month. Termination statement to be filed with final monthly report.

FORM TO BE SUBMITTED TO: Registration and Reporting Section, Public Disclosure Commission, Office of Secretary of State - Olympia, Washington 98504

Section 20 of this Law is printed in full on the reverse side.

ITEM 3 — GENERAL SUBJECT(S) OF LEGISLATIVE INTEREST

ENTER CODE(S) FROM LEGISLATIVE SUBJECT IDENTIFICATION TABLE ON REVERSE. (List all applicable categories).

Same as Registration, Jan. 1974

ITEM 4	PERSONS CONTRIBUTING TO CAMPAIGN DURING PERIOD.		
	NAME	ADDRESS	AMOUNT CONTRIBUTED
	See Attachments - Item 4, Pages 1 - 9.		
	Total Contributions:	$1,673.31.	

☐ INFORMATION CONTINUED ON ATTACHED PAGE(S).

ITEM 5 THE PURPOSE OF THE CAMPAIGN, INCLUDING SPECIFIC LEGISLATION, RULES, RATES, STANDARDS OR PROPOSALS WHICH ARE THE SUBJECT MATTER OF THIS CAMPAIGN.

All matters relating to Initiative 276.

ITEM 6 TOTALS OF ALL EXPENDITURES MADE OR INCURRED TO DATE ON BEHALF OF CAMPAIGN.

ADVERTISING:	RADIO	$
	TV	
	NEWSPAPERS	
	PRINTED MATTER	
	OTHER	
	SUBTOTAL	$
CONTRIBUTIONS		
ENTERTAINMENT		
OFFICE EXPENSES		$273.55
CONSULTANTS		654.50
PRINTING AND MAILING		105.11
OTHER		798.86
		1,832.02
TOTAL		$

"EXCERPTS FROM PUBLIC DISCLOSURE LAW"

Section 20. GRASS ROOTS LOBBYING CAMPAIGNS. (1) Any person who has made expenditures, not reported under other sections of this act, exceeding five hundred dollars in the aggregate within any three month period or exceeding two hundred dollars in the aggregate within any one month period in presenting a program addressed to the public, a substantial portion of which is intended, designed, or calculated primarily to influence legislation shall be required to register and report, as provided in subsection (2), as a sponsor of a grass roots lobbying campaign.

(2) Within thirty days after becoming a sponsor of a grass roots lobbying campaign, the sponsor shall register by filing with the commission a registration statement, in such detail as the commission shall prescribe, showing:

(a) The sponsor's name, address, and business or occupation, and, if the sponsor is not an individual, the names, addresses and titles of the controlling persons responsible for managing the sponsor's affairs.

(b) The names, addresses, and business or occupation of all persons organizing and managing the campaign, or hired to assist the campaign, including any public relations or advertising firms participating in the campaign, and the terms of compensation for all such persons.

(c) The names and addresses of all persons contributing to the campaign, and the amount contributed by each contributor.

(d) The purpose of the campaign, including the specific legislation, rules, rates, standards or proposals which are the subject matter of the campaign.

(e) The totals of all expenditures made or incurred to date on behalf of the campaign, which totals shall be segregated according to financial category, including but not limited to the following: advertising, segregated by media and, in the case of large expenditures (as provided by rule of the commission), by outlet; contributions, entertainment, including food and refreshments; office expenses including rent and the salaries and wages paid for staff and secretarial assistance, or the proportionate amount thereof paid or incurred for lobbying campaign activities; consultants; and printing and mailing expenses.

(3) Every sponsor who has registered under this section shall file monthly reports with the commission, which shall be filed by the tenth day of the month for the activity during the preceding month. The reports shall update the information contained in the sponsor's registration statement and in prior reports and shall show contributions received and totals of expenditures made during the month, in the same manner as provided for in the registration statement.

(4) When the campaign has been terminated, the sponsor shall file a notice of termination with the final monthly report, which notice shall state the totals of all contributions and expenditures made on behalf of the campaign, in the same manner as provided for in the registration statement.

CERTIFICATION: I hereby certify that the above is a true, complete and correct statement in accordance with Section 20 of this Law.

SIGNATURE

TITLE DATE

LEGISLATIVE SUBJECT IDENTIFICATION

CODE	SUBJECT	CODE	SUBJECT
01	Agriculture, horticulture, farming, & livestock	17	Health services, medicine, drugs and controlled substances, health insurance, hospitals
02	Amusements, games, athletics and sports	18	Higher education
03	Banking, finance, credit and investments	19	Housing, construction, codes
04	Children, minors, youth, senior citizens	20	Insurance, (excluding Health Insurance)
05	Church and Religion	21	Labor, salaries and wages, collective bargaining
06	Consumer affairs	22	Law, enforcement, courts, judges, crimes, prisons
07	Ecology, environment, pollution, conservation, zoning, land and water use	23	Licenses, permits
08	Education	24	Liquor
09	Elections, campaigns, voting, political parties	25	Manufacturing, distribution and services
10	Equal rights, civil rights, minority affairs	26	Natural resources, forests and forest products, fisheries, mining and mineral products
11	Government, financing, taxation, revenue, budget, appropriations, bids, fees, funds	27	Public lands, parks, recreation
12	Government, county	28	Social insurance, unemployment insurance, public assistance, workmen's compensation
13	Government, federal	29	Transportation, highways, streets, and roads
14	Government, municipal	30	Utilities, communications, television, radio, newspapers, power, CATV, gas
15	Government, special districts	31	Other (please specify)_____
16	Government, state		

ATTACHMENT 1—COMMON CAUSE

Imogene Erickson (administrator), Apt. 101, 3424 25th Ave. W., Seattle, WA 98199	Washington program action committee chairman.
Ian MacGowan (administrator), 726 39th, Seattle, WA 98122	PAC member.
Jolene Unsoeld (citizen activist), Route 6, Box 543, Olympia, WA 98502.	Do.
Sam Reed (administrator), 2512 Angela St., SE, Lacey, WA 98503.	Do.
Don Anderson (newsman), 1611 Rucker, Everett, WA 98201.	Do.
John Kramer (veterinarian, N.W. 1415 Douglas, Pullman, WA 99163.	Do.
Denis Newman, 2816 Cascade, Bellingham, WA 98225.	Do.
David Sprague (insurance), 806 35th, Seattle, WA 98122.	Do.
Paul Bastine (attorney), South 4028 Ridgeview Dr., Spokane, WA 99206.	Do.
Elizabeth Burroughs, South 2220 Jefferson, Spokane, WA 99203.	Do.
Mike Hildt (administrator), 3441 Cascadie South, Seattle, WA 98144.	Do.
Dorli Rainey (citizen activist), 16709 S.E. 29th, Bellevue, WA 98008.	Do.
Gene Tuck (administrator), Rt. 2, Box 1800–110, Port Angeles, WA 98362.	Do.
Lyle Sorenson, 10510 E. 8th Ave., Spokane, WA 99206.	Alternate—Spokane.

NOTE.—None of the above receive compensation. Some expenses are reimbursed.

ITEM NO. 4

FOLLOWING CONTRIBUTIONS TO COMMON CAUSE WASHINGTON ARE IN-KIND EXPENDITURES INCURRED BY NATIONAL COMMON CAUSE IN SUPPORT OF CC/W'S LOBBYING EFFORTS. THESE AMOUNTS ARE ALSO INCLUDED IN THE EXPENDITURE REPORT OF ITEM 6.

Advertising:	
Radio	
TV	
Newspapers	
Printed matter	
Other	
Sub total	
Contributions	
Entertainment	
Office expenses	
Consultants	654.50
Printing and mailing	
Other	
Total	$654.50

COMMON CAUSE CONTRIBUTION AND MEMBERSHIP TRANSMITTAL

Contributor and address	National membership	Contribution	Total
TRANSMITTAL NO. 62			
Henry Redkey, Rt. 2, Box 69, Port Townsend, Wash		$10.00	
G. Richard Ohmes, Star Route 1, Box 408, Bremerton, Wash		5.00	
Geraldine Lamphere, 4647 NE., 201st Place, Seattle, Wash		10.00	
Harriet Geuger, 1915 SW., Cove Point, Rd., Seattle, Wash		15.00	
Willie Watson, 3247 21st Ave. W., Seattle, Wash		[1]10.00	
Fred L. O'Neil, P.O. Box 428, Humptulipa, Wash		10.00	
John N. Zimmerman, 5037 Harold Pl., Seattle, Wash		10.00	
John R. Stenger, 5328 Broadview Ave. NE., Tacoma, Wash		10.00	
Dr. Ronald F. DiGiacomo, 1729 NE., 56 St., Seattle, Wash		10.00	
David T. Stonington, 1922 15 Ave. E., Seattle, Wash		50.00	
Unknown contributions of $4 plus $2 from fund raiser mailing		[1]6.00	
Total		146.00	

COMMON CAUSE CONTRIBUTION AND MEMBERSHIP TRANSMITTAL—Continued

Contributor and address	National membership	Contribution	Total
TRANSMITTAL NO. 63			
Charles Bledsoe, Contribution "In Common Cause" book		[1] 1.00	
Contribution "In Common Cause" book		[1] 1.00	
David N. Rudo, 1001 Cobb Building, Seattle, Wash		10.00	
Agnes W. Britt, 600 W. Olympic Pl., Seattle, Wash		10.00	
Caroline E. Preston, 3405 E. John, Seattle, Wash		25.00	
M/M Randolph E. Schnabel, 2116 NE., 55th St., Seattle, Wash		10.00	
L. Wayne Ostlund, Rt. 2, Box 1502, Port Angeles, Wash		10.00	
Helen Matousek, 3711-27th Pl. W., Seattle, Wash		10.00	
George P. Beckett, Rt. 5 Box 191, Ellensburg, Wash		5.00	
Henry E. Perry, 1154 Federal Ave. E., Seattle, Wash		10.00	
Cecile B. Nevitt, 1227 Nevitt Rd., Burlington, Wash		10.00	
C. E. Thomason, 7512 44th Ave. SW., Seattle, Wash		10.00	
Peter M. Dickson, 201 S. Broadway, Apt. B, Tacoma, Wash		50.00	
Total		162.00	
TRANSMITTAL No. 66 IN-KIND CONTRIBUTIONS			
Joanne Fox, 16529 41st Ave. NE., Seattle, Wash.:			
Paper		1.28	
Folder covers		6.44	
Supplies		2.46	
Elizabeth Patton, 1630 39th Ave., Seattle, Wash.:			
2 waste baskets		3.62	
Pencil sharpener		4.95	
Desk chair		5.00	
Mike Frier, 11528 Lakeside: Bulletin board		.50	
Judy Camou, 16769 Shore Dr. NE., Seattle, Wash.: Notebook		.59	
Mr. Rumley, 748 11th E., Seattle, Wash.:			
Pencils, pens		1.50	
Arm chair		20.00	
Table		3.00	
Mr. Reese, 955 13th E., Seattle, Wash.: Table		5.00	
C. E. Roberts, Jr., 9801 NE., 24th, Bellevue, Wash.:			
Paper towels		.38	
Chairs		5.00	
C. W. Bledsoe, 2626 25th W., Seattle, Wash.:			
File cabinet		25.00	
2 desks		50.00	
R. J. Vanek, 7417 Sunnyside N., Seattle, Wash.:			
Lumber		3.00	
PPr. post office		1.00	
Mailbox		1.00	
Virginia Evans, 2626 E. Sammamish Rd., Redmond, Wash.:			
Notebook		1.00	
Dictionary		1.50	
Paper pads		95	
Leo H. Tomlinson, 3035 NE., 130 St., Seattle, Wash.: Chairs		10.00	
Max Allison, 1000 8th St., Seattle, Wash.: Paper clips		3.00	
Total		156.17	
TRANSMITTAL NO. 67			
Greg Coy, 16031 NE. 28th, Bellevue, Wash.:		10.00	
Wm. A. Whitman, 9815 21st Ave. NW., Seattle, Wash		10.00	
Mr.-Mrs. W. R. Uhte, 2580 W. Viewmont Way, N., Seattle, Wash		10.00	
Jacob L. Brown, 505 Boylston Ave. E., Seattle, Wash		10.00	
Alice Storaasli, 224 N. G. St., Tacoma, Wash		25.00	
Katharine M. Bullitt, 1125 Harvard Ave. E., Seattle, Wash		25.00	
Bill Cross, 519 SW. 3rd, Rm. 605, Portland, Oreg		1.00	
Total		91.00	
TRANSMITTAL NO. 68			
C. Arthur Elden, 18350 204th NE., Woodinville, Wash		25.00	
F. M. or Alice M. W. Dickie, 500 Birch Ave., Richland, Wash		10.00	
H. R. Redkey, Rte 2, Box 69, Port Townsend, Wash		10.00	
Clifton L./Arlene J. Peightal, 3140 11th Ave. W., Seattle, Wash		10.00	
Paul D./Helen L. Sutley, 13235 15th Ave. NE., Seattle, Wash		10.00	
D. James/Emily L. D. Baker, 11526 Riviera Pl., Seattle, Wash		5.00	
Robert J./Hazel T. Vanek, 7417 Sunnyside Ave. N., Seattle, Wash		100.00	
Miss Ruth M. Lawton, 6914 55th Ave. S., Seattle, Wash		15.00	
R. W. Carlson, 509 N 85th No. 3 Seattle, Wash	15.00	10.00	25.00
Don Peters, 15217 Densmore N., Seattle, Wash. (in common book)		1.00	
Total	15.00	196.00	211.00

COMMON CAUSE CONTRIBUTION AND MEMBERSHIP TRANSMITTAL—Continued

Contributor and address	National membership	Contribution	Total
TRANSMITTAL NO. 69			
David Cardigan Goff, Continental Plaza Motel, 42500 Aurora N., Seattle, Wash	15.00	10.00	25.00
Avilda Matheson, 7503 Sunnyside Ave. N., Seattle, Wash		5.00	
Frank C. Yeager, 4447 41st Ave. SW., Seattle, Wash		10.00	
Attilio Meneghetti, 4012 South L St., Tacoma, Wash		15.00	
Lovella Dahl, Rte 2—Box 92A, Twisp, Wash		10.00	
Inez/Melville O. Solie, Box 484, Ryderwood, Wash		10.00	
Gayle or Shirley Martinson, 1425 28th Ave., Longview, Wash	15.00		
John or Bette Marshall, 2309 N. 62d, Seattle, Wash		5.00	
Mr. & Mrs. Richard Orrie Gilbert, 1914 Harris Ave., Richland, Wash		25.00	
Zetta E. Bankert, 809 S. Greenwood, Columbia, Mo		10.00	
Molly Oberbillig, Star Rte 1, Box 51, Lilliwaup, Wash		5.00	
Total	30.00	105.00	135.00
TRANSMITTAL NO. 70			
Oscar/Pauline Sandall, Route 1, Bow, Wash		5.00	
Julie L. Murfin, Box 56, Seaview, Wash		10.00	
A. K. Larsson, Box 70214, Seattle, Wash		10.00	
George Anderson, 2645 W. Newton, Seattle, Wash	7.00	1.00	8.00
Tom O. Lear, W. 3216 Houston, Spokane, Wash		15.00	
Roy W. Sheldon, 1927 Stevens St., Shelton, Wash		10.00	
Total	7.00	51.00	58.00
TRANSMITTAL NO. 71 IN-KIND CONTRIBUTIONS			
Gerry Kelso, 2910-B Fuhrman, Seattle, Wash.: glue		.70	
R. J. Wanek, 7417 Sunnyside N., Seattle, Wash.:			
4 sets of shelves		40.00	
Cork bulletin board		7.00	
Backing for sign		2.00	
Judith Fine, 423 NW., 101st, Seattle, Wash.:			
Aspirin		.29	
Xerox paper		3.25	
Jeanne Fox, 16529 41st Ave. NE., Seattle, Wash.:			
Supplies		2.46	
Supplies		6.74	
Xeroxing		3.69	
Don Gough, 1622 N. 45th, Seattle, Wash.: Copying-monitoring		5.60	
M/M Blalock, 3202 W. Concord Way, Apt. 460, Seattle, Wash.: 2 chairs		30.00	
R. W. Carlson, 509 N 85th, Seattle, Wash.:			
Supplies		2.79	
Supplies		9.00	
Postage		.12	
Total		113.64	

[1] Cash.

LOBBYIST'S REPORT OF EXPENDITURES

TO THE STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION
CHAP. 1, LAWS OF 1973

FILING FORM	TO BE FILED BY:
L-2	LOBBYISTS (Sec. 17)

THIS SPACE FOR OFFICE USE

P.M. DATE	DATE RECVD.	ITEM NUMBER

See completion instructions at bottom of page.
(Type or print clearly)

LOBBYIST'S NAME AND PERMANENT BUSINESS ADDRESS	DATE PREPARED	PERIOD COVERED
Jolene Unsoeld Route 6, Box 543 Olympia, Washington 98502	March 27, 1974	☒ WEEK ENDING: ☐ QUARTER ENDING: (Mo.) 3 (Day) 23 (Yr.) 74

ITEM 1 TOTALS OF ALL REPORTABLE EXPENDITURES MADE OR INCURRED BY LOBBYIST OR BY LOBBYIST'S EMPLOYER ON BEHALF OF LOBBYIST'S EMPLOYER.

CATEGORY OF EXPENDITURE	TOTAL EXPENDITURE	PROPORTIONATE AMOUNTS CONTRIBUTED BY EACH EMPLOYER *(Identify employers, under Item 3, at bottom of page.)*			
		EMPLOYER NO. 1	EMPLOYER NO. 2	EMPLOYER NO. 3	EMPLOYER NO. 4
FOOD AND REFRESHMENT (1)	$	$	$	$	$
LIVING ACCOMMODATIONS					
ADVERTISING (2)					
TRAVEL					
TELEPHONE (2)					
CONTRIBUTIONS (3)					
OFFICE EXPENSES (2)					
OTHER EXPENSES OR SERVICES (2)					
TOTAL	$	$	$	$	$

FOOTNOTE: (1) Complete Item 2 below. (2) Quarterly report only. (3) Complete Item 4.

ITEM 2 INDIVIDUAL EXPENDITURES FOR ENTERTAINMENT EXCEEDING $15.

DATE	PLACE	AMOUNT	NAMES OF PERSONS IN GROUP

☐ CONTINUED ON ATTACHED PAGE(S)

INSTRUCTIONS

WHO SHOULD FILE THIS FORM: Any lobbyist registered under Section 15 and any person who lobbies.

FILING DEADLINE: Quarterly reports due within 30 days after end of each calendar quarter and weekly when legislature is in session. Weekly reports due each Tuesday for the week ending the previous Saturday.

FORM TO BE FILED WITH: Registration and Reporting Section, Public Disclosure Commission, Insurance Building - Olympia, Washington 98504.

Section 17 of this Law is printed in full on the reverse side.

ITEM 3 EMPLOYER(S) NAME(S) AND ADDRESS(ES)

NO. 1 Common Cause/Washington State
1622 N. 45, Seattle, WA 98103

NO. 2

NO. 3

NO. 4

ITEM 4	CONTRIBUTIONS OF MONEY OR OTHER TANGIBLE OR INTANGIBLE PERSONAL PROPERTY TO ANY LEGISLATOR OR FOR OR ON BEHALF OF ANY LEGISLATOR.		
	DATE	AMOUNT	NAME OF LEGISLATOR RECEIVING OR BENEFITED.

ITEM 5	SUBJECT MATTER OF PROPOSED LEGISLATION OR RULEMAKING, THE PROPOSED RULES, STANDARDS OR RATES OR OTHER LEGISLATIVE ENACTMENTS, THE NUMBER OF THE SENATE OR HOUSE BILL, RESOLUTION OR OTHER LEGISLATIVE ACTIVITY IN WHICH THE LOBBYIST WAS SUPPORTING OR OPPOSING.		
SUBJECT CODE (from table)	Bill, Resolution or Other Legislative Identifier No.	Appropriation Bill Number and Section Number	IN THE CASE OF REGULATIONS, THE STATE AGENCY CONSIDERING ADOPTION OF THE RULE.
31	All matters pertaining to Int. 276 and rules adopted by P.D.C.		

CERTIFICATION: I hereby certify that the above is a true, complete and correct statement in accordance with Section 17 of this Law.

LOBBYIST SIGNATURE DATE

EMPLOYER NO. 1 SIGNATURE	DATE	EMPLOYER NO. 3 SIGNATURE	DATE
EMPLOYER NO. 2 SIGNATURE	DATE	EMPLOYER NO. 4 SIGNATURE	DATE

EXCERPTS FROM PUBLIC DISCLOSURE LAW

Section 17. REPORTING BY LOBBYISTS. (1) Any lobbyist registered under section 15 of this act and any person who lobbies shall file with the commission periodic reports of his activities signed by both the lobbyist and the lobbyist's employers. The reports shall be made in the form and manner prescribed by the commission. They shall be due quarterly and shall be filed within thirty days after the end of the calendar quarter covered by the report. In addition to the quarterly reports, while the legislature is in session, any lobbyist who lobbies with respect to any legislation shall file interim weekly periodic reports for each week that the legislature is in session, which reports need be signed only by the lobbyist and which shall be filed on each Tuesday for the activities of the week ending on the preceding Saturday.

(2) Each such quarterly and weekly periodic report shall contain:

(a) The totals of all expenditures made or incurred by such lobbyist or on behalf of such lobbyist by the lobbyist's employer during the period covered by the report, which totals shall be segregated according to financial category, including food and refreshments; living accommodations; advertising; travel; telephone; contributions; office expenses, including rent and the salaries and wages paid for staff and secretarial assistance, or the proportionate amount thereof, paid or incurred for lobbying activities; and other expenses or services; PROVIDED HOWEVER, that unreimbursed personal living and travel expenses of a lobbyist not incurred directly or indirectly for any lobbying purpose need not be reported; and PROVIDED FURTHER, that the interim weekly reports of legislative lobbyists for the legislative session need show only the expenditures for food and refreshments; living accommodations; travel; contributions; and such other categories as the commission shall prescribe by rule. Each individual expenditure of more than fifteen dollars for entertainment shall be identified by date, place, amount, and the names of all persons in the group partaking in or of such entertainment including any portion thereof attributable to the lobbyist's participation therein but without allocating any portion of such expenditure to individual participants.

(b) In the case of a lobbyist employed by more than one employer, the proportionate amount of such expenditures in each category incurred on behalf of each of his employers.

(c) An itemized listing of each such expenditure in the nature of a contribution of money or of tangible or intangible personal property to any legislator, or for or on behalf of any legislator. All contributions made to, or for the benefit of, any legislator shall be identified by date, amount, and the name of the legislator receiving, or to be benefited by each such contribution.

(d) The subject matter of proposed legislation or rulemaking; the proposed rules, standards, rates or other legislative enactments under chap. 34.04 R.C.W. and chap. 28B.19 R.C.W. (the state Administrative Procedure Acts) and the state agency considering the same; and the number of each senate or house bill, resolution, or other legislative activity which the lobbyist has been engaged in supporting or opposing during the reporting period; PROVIDED, that in the case of appropriations bills the lobbyist shall enumerate the specific section or sections which he supported or opposed.

LEGISLATIVE SUBJECT IDENTIFICATION

CODE	SUBJECT
01	Agriculture, horticulture, farming, & livestock
02	Amusements, games, athletics and sports
03	Banking, finance, credit and investments
04	Children, minors, youth, senior citizens
05	Church and Religion
06	Consumer affairs
07	Ecology, environment, pollution, conservation, zoning, land and water use
08	Education
09	Elections, campaigns, voting, political parties
10	Equal rights, civil rights, minority affairs
11	Government, financing, taxation, revenue, budget, appropriations, bids, fees, funds
12	Government, county
13	Government, federal
14	Government, municipal
15	Government, special districts
16	Government, state
17	Health services, medicine, drugs and controlled substances, health insurance, hospitals
18	Higher education
19	Housing, construction, codes
20	Insurance, (excluding health insurance)
21	Labor, salaries and wages, collective bargaining
22	Law, enforcement, courts, judges, crimes, prisons
23	Licenses, permits
24	Liquor
25	Manufacturing, distribution and services
26	Natural resources, forests and forest products, fisheries, mining and mineral products
27	Public lands, parks, recreation
28	Social insurance, unemployment insurance, public assistance, workmen's compensation
29	Transportation, highways, streets, and roads
30	Utilities, communications, television, radio, newspapers, power, CATV, gas
31	Other (please specify) Int. 276

CHAPTER 981—THE COMMONWEALTH OF MASSACHUSETTS IN THE YEAR ONE THOUSAND NINE HUNDRED AND SEVENTY-THREE

AN ACT to regulate legislative representation, to require public disclosure of expenditures of legislative agents, employers of legislative agents, and certain other lobbying group and to preserve a citizen's constitutional right to communicate with members of the general court.

Whereas, The deferred operation of this act would tend to defeat its purpose which is, in part to immediately require the state secretary to prepare forms and books for the registration of legislative agents and their employers and groups participating in lobbying activity; therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. *Statement of intent.* The Great and General Court of the Commonwealth hereby declares that the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition the General Court for the redress of grievances and to express freely to individual members of the legislature and, to legislative committees, their opinions on legislation, on pending executive approval or veto thereof and on current issues. Since no comprehensive review of the so-called lobbying laws has occurred since nineteen hundred and eleven and that, to preserve and maintain the integrity of the legislative process, it is necessary that the identity, expenditures and activities of certain person who engage in reimbursed efforts, the so-called lobbyists, to persuade members of the General Court or the executive branch to take specific legislative actions, either by direct communication to such officials, or by solicitation of others to engage in such efforts, be publicly and regularly disclosed.

SECTION 2. Chapter 3 of the General Laws is hereby amended by striking out section 39, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:

"*Section 39.* 'Legislation,' all bills, resolutions, and all proposals of every kind, character or description considered by the general court, any committee thereof, or the governor.

" 'Legislative agency', any person who for compensation or reward does any act to promote, oppose, or influence legislation, or to promote, oppose, or influence the governor's approval or veto thereof or to influence the decision of any member of the Executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto. The term shall include who, as any part of their regular and usual employment and not simply incidental thereto, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services."

SECTION 3. Said chapter 3 is hereby further amended by striking out section 40, as so appearing, and inserting in place thereof the following section:

"*Section 40.* A person employing or agreeing to employ a legislative agent, shall, within one week after such employment or agreement, cause the name of such agent to be entered upon a docket as provided in section forty-one. The agent within ten days shall also enter his name upon such docket. The termination of such employment shall be entered opposite the name of such agent either by him or by his employer."

SECTION 4. Said chapter 3 is hereby further amended by striking out section 41, as so appearing, and inserting in place thereof the following section:

"*Section 41.* The state secretary shall keep a docket in which shall be entered the names of all who are employed as legislative agents. Such entries shall

include the name, business address, and the employer's business interests which may be affected by legislation; the name, business address and business interests which may be affected by legislation in whose behalf the legislative agent is retained or employed if said person is not the direct employer; the name and residence of the legislative agent; the date of the employment or agreement therefor; and the duration of the employment status, if ascertainable.

"The state secretary shall assess each legislative agent a reasonable filing fee upon the entering of said agent's name upon the docket. Said fee shall be determined by the costs of maintaining said docket. The state secretary shall apply said fee to the costs of maintaining said docket.

"Every legislative agent shall, within ten days after entering his name upon the docket, file with the state secretary a written authorization to act as such agent, signed by the employer on whose behalf the legislative agent assumes to act and shall provide two photographs of said agent to the state secretary.

"Upon receipt of said notification required in section forty from the employer of a legislative agent, the state secretary shall issue to each legislative agent a non-transferable identification card which shall include but not be limited to a photograph, the address and name of employer or employers of said legislative agent.

"All information required to be filed under the provisions of this section shall be compiled by the state secretary and shall be organized alphabetically according to the name of the persons whose name is entered upon the docket and such files shall be open and accesible for public inspection during normal business hours."

SECTION 5. Said chapter 3 is hereby further amended by striking out section 42, as so appearing, and inserting in place thereof the following section:

"*Section 42.* No person shall make any agreement whereby any compensation or thing of value is to be paid to any person contingent upon the passage or defeat of any legislation or the approval or veto of any legislation by the governor. No persons shall agree to undertake to promote, oppose or influence legislation or to communicate with members of the legislature, or to advocate approval or veto by the governor for consideration to be paid upon the contingency that any legislation is passed or is defeated."

SECTION 6. Said chapter 3 is hereby further amended by striking out section 43, as so appearing, and inserting in place thereof the following section:

"*Section 43.* On or before the fifteenth day of May and the fifteenth day of November of each year, every legislative agent appearing on the docket shall render to the state secretary an itemized statement, under oath, containing all expenditures, and the total amount thereof, incurred or paid during the reporting period in the course of his employment as a legislative agent, except that the legislative agent need not itemize the expenditures of any one day in which the amount incurred or paid did not total thirty-five dollars or more. Such itemized accounting shall include, but shall not be limited to specific expenditures for meals, gifts, transportation, entertainment, advertising, public relations, printing, mailing and telephone; and shall also include the names of the payees and the amount paid to each payee. Where such expenditure is for meals, entertainment, or transportation, said expenditure shall be identified by date, place, amount, and the names of all persons in the group partaking in or of such meal, entertainment or transportation. No expenditure shall be split or divided for the purpose of evading any provision of this section. The state secretary shall, within thirty days of the receipt of such accounting, notify, by registered mail, those legislators and those members of the Executive branch whose names appear therein as having received meals, transportation or entertainment, as to the nature of the expenditure claimed, the date and amount of such expenditure; and the person or persons who reported the same.

"The state secretary shall prescribe and make available the appropriate statement forms which shall be open and accessible for public inspection during normal business hours."

SECTION 7. Said chapter 3 is hereby further amended by striking out section 44, as so appearing, and inserting in place thereof the following section:

"*Section 44.* Any group or organization, however constituted, not employing a legislative agent which as part of an organized effort, expends in excess of two hundred and fifty dollars during any single calendar year to promote, oppose, or influence legislation, or the governor's veto or approval thereof, or to influence the decision of any member of the Executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto shall register on or before the fifteenth day of May and the fifteenth day of November with the state secretary by rendering a statement, under oath, containing the names and addresses of the principals of such group or organization; the purposes of the organization, the legislation which affects those purposes, the total amount of expenditures, incurred or paid during the reporting period in furtherance of the above stated objectives. Such itemized accounting shall include, but shall not be limited to, specific expenditures for meals, gifts, transportation, entertainment, advertising, public relations, printing, mailing and telephone and the name of the payees and the amount paid to each payee. Where such expenditure is for meals, entertainment, or transportation, said expenditure shall be identified by date, place, amount, and the names of all persons in the group partaking in, or of, such meal, entertainment, or transportation. The statement shall also include a listing of the names and addresses of every person, group or organization from whom fifteen dollars or more was contributed during the year for the objectives hereinabove stated. No expenditure or contribution shall be split or divided for the purpose of evading any provision of this section. The state secretary shall prescribe and make available the appropriate statement forms which after being completed and filed with the secretary shall be organized alphabetically according to the name of the group and such files shall be open and accessible for public inspection during normal business hours."

SECTION 8. Said chapter 3 is hereby further amended by striking out section 45, as so appearing, and inserting in place thereof the following section:

"*Section 45.* The state secretary may, upon cause shown therefor, disqualify a person from acting as a legislative agent. A person against whom proceedings for disqualification are brought shall be allowed a public hearing before the secretary or his designee. Such hearings shall be subject to the provisions of chapter thirty A. No person who has been so disqualified shall be employed as legislative agent until the termination of the third regular session of the general court after such disqualification."

SECTION 9. Said chapter 3 is hereby further amended by striking out section 46, as amended by section 4 of chapter 508 of the acts of 1939, and inserting in place thereof the following section:

"*Section 46.* The docket of legislative agents for each session shall be closed by the state secretary at the time of prorogation of the general court, and the docket for the ensuing session shall then be opened."

SECTION 10. Said chapter 3 is hereby further amended by striking out section 47, as amended by section 5 of said chapter 508, and inserting in place thereof the following section:

"*Section 47.* On or before the fifteenth day of May and the fifteenth day of November of each year every employer of a legislative agent whose name appears upon the docket shall render to the state secrtary a complete and detailed statement, on oath, containing the total amount of expenditures incurred or paid separately by such employer during the reporting period in connection with promoting, opposing or influencing legislation, or the governor's approval or veto thereof or to influence the decision of any member of the Executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto. Such statement shall also itemize every expenditure made in excess of fifty dollars. Such itemized accounting shall include, but shall not be limited to,

specific expenditures for meals, gifts, transportation, entertainment, advertising, public relations, printing, mailing, and telephone; and the names of the payees and the amount paid to each payee. Where such expenditure is for meals, entertainment, or transportation, said expenditure shall be identified by the date, place, amount, and names of all persons in the group partaking in, or of, such meal, entertainment, or transportation. When such compensation is included as part of a regular salary or retainer, the statement shall specify the amount of the agent's salary or retainer allocable to his legislative duties. If no such apportionment is possible, the statement shall indicate such impossibility and disclose the full salary or retainer. No expenditure shall be split or divided for the purpose of evading any provisions of this section.

"The state secretary shall prescribe and make available the appropriate statement forms which after being completed and filed with the secretary shall be organized alphabetically, according to the name of the employer and such files shall be open and accessible for public inspection during normal business hours."

SECTION 11. Said chapter 3 is hereby further amended by striking out section 48, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:

"*Section 48.* Violation of any provision of sections forty, forty-one, forty-two, forty-three and forty-four, or forty-seven shall be punished by a fine of not less than one hundred, nor more than five thousand dollars. Any person acting as legislative agent who has been found guilty of violating any provisions of said sections shall in addition to such fine, be disqualified from acting as legislative agent until the termination of the third regular session of the general court after the date of conviction of such offense. Upon investigation and when deemed appropriate the attorney general shall cause prosecutions to be instituted for violation of any provision of sections forty, forty-one and forty-two.

"The state secretary shall inspect all statements required by sections forty-three, forty-four and forty-seven filed with him. If it appears that any person has failed to file such statement as required by said sections, or if it appears to the state secretary that any such statement filed with him does not conform to law, the state secretary shall within a reasonable time notify the delinquent person, group or organization in wrting.

"Upon failure to file a statement within fourteen days after receiving notice under this section, or if any statement filed after receiving notice indicates any violation of sections forty-three, forty-four, or forty-seven, the state secretary shall within a reasonable time notify the attorney general thereof and shall furnish him with copies of all papers relating thereto. The attorney general shall examine every such case and upon investigation and when deemed appropriate shall cause prosecutions to be instituted in the name of the commonwealth or shall institute appropriate civil proceedings pursuant to section forty-nine or refer the case to the proper district attorney for such action as may be appropriate."

SECTION 12. Said chapter 3 is hereby further amended by striking out section 49, as amended by section 6 of chapter 508 of the acts of 1939, and inserting in place thereof the following section:

"*Section 49.* The supreme judicial court or superior court may compel any person, group, or organization failing to file a statement required by sections forty-three, forty-four or forty-seven, or filing a statement not conforming to the requirements of said sections in respect to its truth, sufficiently in detail, or otherwise to file a sufficient statement, upon the application of the attorney general. Proceedings under this section shall be advanced for speedy trial upon the request of either party."

SECTION 13. Nothing in sections thirty-nine to forty-nine, inclusive of chapter three of the General Laws shall be construed to deprive any citizen not

lobbying for hire of his constitutional right to communicate with members of the general court.

SECTION 13A. The provisions of this Act are severable and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

SECTION 14. So much of this act as requires the state secretary to prepare for the administration of this act shall take effect upon its passage. Such other sections of this act shall take effect on January first, nineteen hundred and seventy-four.

House of Representatives, October 17, 1973: Preamable adopted ——— ———, Speaker.

In Senate, October 17, 1973: Preamble adopted, ——— ———, President.

House of Representatives, October 18, 1973: Bill passed to be enacted ——— ———, Speaker.

In Senate, 1973: Bill passed to be enacted, ——— ———, President.

November 2, 1973. Approved, at 1 o'clock and 15 minutes, P.M.

——— ———,
Governor.

THE COMMONWEALTH OF MASSACHUSETTS REPORTING STATEMENT FOR EMPLOYERS OF LEGISLATIVE AGENTS

(General Laws, Chapter 3.)

(Sections 39–50 inclusive)

INSTRUCTIONS

Every employer of a legislative agent shall be required to file a statement with the Secretary of the Commonwealth on or before May 15th and November 15th of each year listing total expenditures for the reporting period incurred in connection with influencing the disposition of legislation, or influencing the decision of any member of the Executive Branch concerning disposition of any standard, rate, rule, or regulation. Those expenditures in excess of $50.00 in a reporting period shall be itemized. Any expenditures for meals, entertainment, or transportation shall be identified by date, place, amount, and the names of all persons in the group partaking in, or if, such meals, entertainment or transportation. If expenditures are included in agent's salary, the statement shall specify the amount of the salary allocable to agent's legislative duties. If no such apportionment is possible, the statement shall indicate same and disclose full salary or retainer. No expenditures shall be split for the purpose of evading any provision of this statute.

Reporting Period: From January 1, 1974 through April 30, 1974.
Name of Employer: Common Cause.
Name of Legislative Agent: Peter B. Keyes, Judith Epstein (was included on submitted report).

(Signed under the penalties of perjury)
——— ———, Chairman,
73 Tremont Street, Boston.

NOTE—When compensation of legislative agent is included as part of a regular salary or retainer, the statement shall specify the amount of the salary or retainer allocable to agent's legislative duties. In case such employment is without any such apportionment, then the total salary or retainer which included such services shall be stated.

NOTE—A reporting statement must be filed with the State Secretary whether or not any money or its equivalent was disbursed.

Date	To whom paid or due	If expenditure was for meals, entertainment, transportation, name all individuals present	Purpose	(Specify in Detail) 1. Legislation and/or number of each bill. 2. Agency within the executive branch contacted relative to any standard, rate, rule, or regulation.	Amount paid or due
Jan. 1, 1974–Mar. 15, 1974	Judith S. Epstein (10 percent allocable to legislative duties).		Salary	S1092, H4261 (H5422), S926	$312.50
Jan. 1, 1974–Apr. 30, 1974	Peter B. Keyes (100 percent allocable to legislative duties).		do	S499, S501, S541, S703, S791, S917, S920, S929, S925, S926, S1092, S1097, H230, H430, H808, H966, H1304, H1865, H2091, H2268, H2518, H2730, H2960, H3066, H3212, H3413, H3499, H3593, H3594, H4856, H4895, H4944, H4971, H4977, H5041, H5161, H5300, H5326, H5471, H5472, H5513.	4,000.00
	For all expenses listed below we estimated that 50 percent may be allocated to the legislative program unless otherwise stated				
Do	Postmaster/Boston		Postage		3,438.17
Do	Minot, DeBlois & Maddison		Rent		1,666.68
Do	New England Telephone Co		Telephones		1,423.85
Do	Spaulding Co. (3-M)		Rent/supplies—copier		502.59
Jan. 31, 1974	Boston Edison Co		Electric bill		66.70
Jan. 8, 1974	Daisy Associates		Fundraising		50.00
Jan. 31, 1974	Thomas Groom & Co		Office supplies		81.79
Feb. 8, 1974	Harwich Lithograph—printers		Fundraising—printing		708.00
Do	Northeastern Envelope Co		Fundraising—supplies		315.46
Feb. 25, 1974	Watson Mailing Service Inc		Fundraising—services		2,560.00
Mar. 26, 1974	Xerox Corp		Rent/supplies		329.74
Do	IBM Corp		do		54.45
Jan. 1, 1974–Apr. 30, 1974	Prudential Insurance		Health Insurance—Keyes		95.68
Jan. 1, 1974–Mar. 15, 1974	do		Health Insurance—Epstein		64.80
Total					15,670.41
Add total expenditures under $50 for reporting period not itemized above					793.25
Grand total					16,463.66

NOTE.—All expenses incurred by employer of a legislative agent in excess of $50 during the reporting period must be itemized and shall include, but shall not be limited to, spacific expenditures for salary or retainer paid to legislative agent, meals, gifts, transportation, entertainment, advertising, pulic relations, printing, mailing, and apportioned amount of telephone bill applicablh to duties as an agent.

Listed below is a further explanation regarding bills named on the attached report form.

Bills which CC/M favored, opposed, or commented upon.

Open Government	Favored: H2091, H3414, H3665, H4368, H4646, H5513.
Campaign financing	Favored: H3902, H4971, H5300 (modified) Commented Upon: H230, H430, H808, H1685, H3066, H3212, H4473, H4971. H4977, H5161, H5326, S917, S925, S501, S929.
Lobbying	Favored: H3988. Commented upon: H2268, H3593, H3594.
Conflict of interest	Favored: H3663, H3664, H3986, S499. Commented upon: S541, S1097, S902. H2960, H4895, H3499, H2730, H5041.
Election laws	Favored: S926, S1092, H4261 (H5472), H5471.
Budget reform	Favored: H1304, H2518, H3671, H4813, Commented Upon: S703.
Legislative pay raise	Favored: H966, H4944.
Highway trust fund	Favored: S791.

Senator CHILES. Our next witness is Mr. Lou Harris. Mr. Harris, we are very delighted to have you come and testify on this bill. As you know, we were very taken with the work that you did for this committee in a poll the results of which gave some justification for the strong feeling that many of us have had for a long time; that is, your specific reference to secrecy and the opinion of the American people as to the part secrecy had played in some of the problems we are now having in connection with Watergate and other crisis of confidence in our Government. For that reason I think it is very appropriate that we have your testimony on this particular bill.

Senator PERCY. Mr. Harris, may I explain, I must leave, unfortunately. I am meeting with members of the U.S.S.R. parliamentary delegation who are here in this room and they have only a very limited time this morning. So I must leave. But I do want to thank you very much for your testimony. I distinctly disagree with your disclaimer as to your expertise. I think you are one of the Nation's experts in this and your judgments are sound and valid and we deeply appreciate them.

I will leave the questions that I have either for the chairman to pose or to be sent to you for incorporation in the record. But I just wanted to come down to pay my respects to you and thank you very much for your expert testimony.

Mr. HARRIS. Thank you, Senator.

Shall I proceed, Mr. Chairman?

Senator CHILES. Yes.

TESTIMONY OF LOU HARRIS, HARRIS ASSOCIATES, NEW YORK, N.Y.

Mr. HARRIS. Mr. Chairman, let me say in response to your opening remarks that, judged by the results of that survey we did for the subcommittee of this Government Operations Committee, I think it must be said that the commissioning of that study was an act of

courage. I think it is one of the rare occasions that I have experienced—and perhaps the country has experienced—in which this institution, an august body such as the U.S. Senate or any other key instrument of Government, has had the guts, if you will, to take an unvarnished look at itself. Would that more of that would happen more often.

Senator CHILES. I hope that we are not only having the courage to get the survey, I hope that all of us are reading it. I have had occasion to ask for extra copies to send to a number of people that I know in State government, for example, and to try to talk about it continuously up here on the floor and other places to try to see that the Members are availing themselves of reading it because I think it is something that most of us know is important. We just have not wanted to really come face to face with it. But everything that you are reporting in it bears out so much of what I hear when I go to Florida, and when I attempt to listen to people rather than to talk, I just hear this over and over.

Mr. HARRIS. Mr. Chairman, I do have this morning some new results I would like to report on. May I proceed with my testimony?

Senator CHILES. Yes, sir.

Mr. HARRIS. It is a privilege indeed, to be invited here this morning to testify on S. 260 which, of course, is your bill to provide that meetings of Government agencies and congressional committees be open to the public. I think it is appropriately entitled the sunshine proposal.

THE PUBLIC IS WATCHING

Senator Percy notwithstanding, I will state on this that I do not feel that I am competent to comment on some of the specific exemptions or procedures which are provided in the act. What I would like to concentrate on is the central thrust of the legislation or proposed legislation. Because it seems to me that basic to what Congress can do, what the executive branch of Government can do or cannot do, fundamental to all of this, is that you have today as never before a public which is watching, a public which has never been more attentive, never been more interested.

I have read with interest the varying and often conflicting views of some of our outstanding authorities on disclosure rules and practices. As a layman, it seems to me that you have added to the new version of the bill a good many exemptions and protections to take care of most contingencies which might justify closed hearings at the Federal level. I should emphasize at the outset that one major fallout from the Watergate trauma in this country has been a newfound and profound respect for the rights and privacy of individuals and of groups to pursue their widely differing views and convictions. The right to be different, the right to be private, the right to be protected against undue Federal intrusion into the lives of the people has never burned as vigorously as it does today.

By the same token, the people of this country have an aching, yearning desire to see their Federal Government open up and wel-

come the participation of the public as perhaps never before in our history. The basic proposition, and this was out of our study that we did for the Senate: "a lot of problems connected with Government could be solved, if there were not so much secrecy on the part of Government officials," this meets with a thumping 71–19 percent agreement from the people themselves.

PUBLIC DEMAND IS ON OPENNESS

I note that many of the critics of this legislation believe that the fundamental—I think it is formulated by some of the constitutional lawyers and academic life that you sought, solicited opinions from, and maybe I am not formulating it correctly, but as I read the responses to your inquiry of last year to them, it seemed to be summed up this way. They would say, on the one hand, how much inefficiency can the Federal Establishment endure by opening up the decisionmaking process of Government versus the other alternatives? How much does the normally efficient running of a tightly confined Federal decisionmaking process have to be opened up to satisfy the public demand to know what is really going on? Well, I would suggest that the American people thoroughly disagree with this kind of formulation of the issue. At this point in our history, the people are roundly fed up with what they feel is incompetence, inefficiency, corruption, lack of real public interest, and just plain lack of decency in the governing circles of this country. I do not say that idly, Mr. Chairman. Most of all, people are firmly wedded to the notion that if the Federal Government were opened up, rather than gross inefficiencies and lack of candor resulting, to the contrary, an opening up of the Federal decisionmaking process would indeed lead to wiser, sounder, more creative, and better decisions.

THE PUBLIC IS AHEAD OF ITS LEADERS

As one who has spent the past 27 years of his life in the active pusuit of studying public attitudes and public behavior, I by no means subscribe to the notion that the people are always right either in their instincts, in their opinions, or in their assessment of any particular situation. But I would say that in the past few years, seemingly, almost without exception, the public has been leagues ahead of its leadership—far more astute, far more perceptive, and far more farsighted than most of the elective and appointive public officials at the Federal level.

Some basic and fundamental changes are taking place in our country and, if those vested with public responsibility do not begin to recognize those changes, then I can guarantee, Mr. Chairman, that the people themselves are going to make some wholesale changes in their selection of leaders.

Recently we surveyed a cross-section—1,600 people—of the American people nationwide and the results are well worth pondering, for they say much, I believe, about where the public is and what the problem of this subcommittee is this day. First, it will come

as no surprise to find out that, compared with 10 years ago, 60 percent of the public think that Government leadership at the Federal level in the country is worse now than it was then. Only a meager 8 percent think it is better now, and 28 percent feel it is about the same.

By a lopsided 76–18 percent, 3 in every 4 adults feel that "too many Government leaders are just out for their own personal and financial gain." There is a powerful suspicion, right or wrong, that people elected or appointed to high places in the Federal Establishment are using their power for their own rather than the country's benefit. This in turn leads most people to conclude that a substantial amount of monitoring by the citizenry of those vested with the responsibilities of running Government is very much in order these days. The people are willing to give pitifully little in the way of blank checks to their leaders. It can be automatically assumed that any effort to defend a lack of full disclosure to the public on the grounds of either elitism—and I will define that—that only people with superior knowledge, training, insight, and experience are fit to judge the major issues facing the country—or on the grounds of endangering the national security which all too often has turned out in the public's mind to be a coverup of ineptitude or chicanery or worse, or on the grounds that open disclosure will lock people into fixed positions which will prevent the art of informal interchange and compromise to work. All of these, Mr. Chairman, are likely to fall on very deaf public ears these days.

POLITICIANS' PROMISES

Another key finding from our recent survey shows that, by an overwhelming 78–17 percent—notice that all of these are massive agreements that people have on these propositions—most people agree with the statement that "the trouble with most Government leaders is that they think people will believe them when they make promises." This is worth analyzing further. The fact is that not only have people in this country but also in most of the Western World come to believe that most politicians make false promises, but, more important, that these promises are more likely than not to not be worth receiving, even if the public officials make good on them. This is particularly true in the case of special legislation designed to serve the special pleadings of different segments. Traditionally, and I know, I have been part of it for my adult life, our political process has been based on the assumption that if a man running for office can divide up the electorate into enough segments, enough splinters, find out how to appeal to each key segment in terms of what he can do for that segment, make all the segments add up to 51 percent on electorate day, he will have it made. He will win election and he will win reelection.

EASY PROMISE POLITICS IS VANISHING

I say to you today, Mr. Chairman, that this kind of easy promise politics is fading fast in American life. The people neither believe

the promises nor do they feel when the promises are fulfilled they are worth it. Rather, they are becoming increasingly convinced that they will have to pay for those promises four, five, or six times over even if they are delivered on. What it means is that there is a growing sense of community in this country, a sense that what benefits the community will suffice to benefit the individual, that there just is almost no way left through which any individual person or group can be made the beneficiary of Government services which all of the citizens do not share in.

This is partly reflected in the 76–14 percent majority nationwide which feel that "most Government leaders are most interested in playing smart politics rather than in sharing in the same genuine idealism the people have." Much has been said and written about the strain in the American people, or purported strain, not to pass up a good deal or a good chance to make it big, even if others do not make it in the process. Indeed, I find the American people have been libeled with such propositions. The recent outpouring of the public to restrain the consumption, their consumption, of gasoline and other forms of energy during the energy crunch is ample testimony to this sense of community. And, Mr. Chairman, I would be prepared if you like in the question period afterwards to document that. We have got it well documented, how the American people rose to this situation. And despite high skepticism, and that is putting it mildly, about the way Government and industry handled the energy situation, I might report that the people are still ready to respond with sacrifices and putting the public interest above individual gain if called upon by national leadership on the energy question again in the future. I should add national leadership that has some credibility.

THE PUBLIC IS MORE INFORMED

What irritates the public almost more than anything these days is found in the 72–18 percent majority who feels that "most Government leaders are afraid to treat the public as adult and tell them the hard truth about inflation, energy, and other subjects." The American people simply no longer have a 12-year-old mentality, if indeed they ever did, no longer want to be treated as children, no longer want papa to tell them papa knows best, no longer want to be told they will be taken care of, no longer want to be bought by the handout, no longer want to be treated as porkchoppers at the public trough, and no longer want to be taken for granted. They feel they are reasonably well-informed, more importantly, are capable of taking a full dose of bad news if need be, and are more willing to join in the process of solving their own problems. They simply will no longer trust the sweeping shibboleth, the glowing and uplifting promise, and no longer think there are easy answers to their problems or indeed, those of the world. Basically, by 89–6 percent, they agree with the late President Kennedy's exhortation that Government leaders "should ask people not what their country can do for them, but what they can do for their country."

Along with the era of the easy promise, so, too, the era of doting on the public's fears is coming to an end. The politics which so often have told people they can achieve heaven on earth or the politics which told them there was a mortal enemy from within or from without whom they were being protected from are rapidly passing from dominance in this country.

Let me give you some specifics on this. Only 36 percent and this comes out of our Senate study, only 36 percent of the public think "most public officials today are dedicated to helping the country rather than being out for themselves." However, a much larger 86 percent think it is entirely possible to have public officials who maintain just those standards. That is a gap of fully 50 percent of the public. Only 34 percent of the public think that "most public officials really care what happens to all the people," but a much larger 88 percent think that it is possible for the country to find such public officials—a gap of no less than 54 percent. Only 24 percent think that "in the Federal Government the good of the country is placed above special interests," a particularly damning one, but a much higher 85 percent think it possible to achieve such a condition—a gap of 61 points. Only 17 percent think that "the best people are attracted to public life," while 80 percent think it is still possible to do that—a gap of 63 points. Only 13 percent believe that "corruption and payoffs almost never take place in Federal Government," which 65 percent think it is possible to have a Federal Establishment free from such vagaries—a gap of no less than 52 points.

THE PUBLIC HAS NOT LOST FAITH

There are two lessons to be drawn from this evidence. First, the public is soldily convinced that the Federal Government has reached new lows in moral and effective operation. The second, and much the more important, is that people have not lost faith or become cynical about the governing process.

It is true that 86 percent of the people feel that "sometimes politics and government seem so complicated that a person can't really understand what's going on." Yet, by the same token, you cannot produce a majority to either of the following two propositions, which we tested in these projected ways. First, "in most cases, on important matters, high Government officials should decide what ought to be done, because they are the ones who really know what is going on," rejected by 47–42 percent; or second, "to make Government work better, the right men should be put in control and allowed to run things with the help of the best experts," also rejected by 48–40 percent.

To the contrary, by an overwhelming 86–8 percent, the people of this country believe that "people should take action through citizens groups to improve the quality of life in this country"—and that means action impacting on all levels of government, including the Federal Government. Mr. Chairman, to put it in the vernacular, in the plainest language I can command here this morning, the American people today desperately not only want to be cut into the

action of how to govern themselves, they have made up their minds to insist that this be the case. It is my prediction now, and normally I am very leery to make any predictions except once every 4 years when I must, in the latter part of the 1970's, you are going to see the most massive outpouring of citizen involvement this Nation or the entire world has ever seen before.

Those people running the Federal Establishment now have the chance either to anticipate this outpouring and to accommodate to it, or to try to outfox it, end-run around it—or to studiously avoid it, if you think that will work. My own judgment is that if you do not meet it, anticipate it, and welcome it then, then there will be a whole set of other people sitting up there in your seats of power before very long. It is no happenstance that less than a third of the American people can express any degree of high confidence in any branch of the Federal Government today.

Now, what has all this to do with the central issue you have invited me to testify here today? In my judgment, it has much to do with it. For certainly one threshold requirement is to throw open the doors of the Government decisionmaking process, let the people observe in fact how it operates, and, indeed to invite the people in to help make the decisions. And, as I understand it, that is what your sunshine proposal is all about.

Of course, the act of greater disclosure, a greater opening up by itself, is not necessarily going to solve the problems of how to achieve more responsive and more effective government. But, without such opening up, without making a determined effort to allow people to know really how the Federal Establishment is pondering its imminent decisions, I can assure you, Mr. Chairman, that there will be little this Government can do which will have the initial confidence of the people today. I am saying that the public has finally placed a precondition on the operating rules for the Federal Government in this country that it would not withhold the hard facts nor the uncertainties nor the differences which might exist at the top of Government over how to solve or how to attack problems.

VOTER APPEAL

It is my judgment that the public official who expresses a point of view at the outset of a hearing and then hears testimony, becomes more exposed to the facts and at the end changes his opinion, changes his opinion from his previously-stated one, will have enormous appeal to voters in the future. Perhaps the most fatal flaw in leadership, not only government but throughout our society, Mr. Chairman, according to the people themselves, is the inability of leaders to admit to mistakes. Infallability, Mr. Chairman, never has had such low currency as it does today, especially when that infallability is located in the highest of public places.

The minimum which can result from such an opening up is that the people might have a far greater understanding of just how tough some of these problems—such as inflation or energy, ecology or consumerism, Government spending or taxation, or a whole host

of other problems—are to solve. It is also just possible that the people themselves can add some new and creative dimensions to the solution of some of them. For it is entirely possible that suddenly public servants who have been trained to always believe that the people want to get something out of Government will wake up to realize that the people are willing to give the Government, to give the community something. This phenomenon is not confined to this country alone. In Britain, on the eve of the elections there, we found a majority of the people willing to raise taxes and willing to vote for the candidate who would say he wanted to raise their taxes and none did. But the reason was, and there their incomes are a lot harder pressed than ours, the reason was that this was a way of controlling inflation which they felt had gotten out of hand and this was a way to help the less fortunate, the elderly groups whose incomes were lagging.

Fundamental to your bill, it seems to me, Mr. Chairman, are two implicit assumptions, which ought to be kept clearly in mind throughout your considerations. First, that the people of this country are not as apathetic and uninterested as most leaders think they are. In turn, this means that people actively want to know what is going on, and will not be shocked to hear the facts nor the range of options open to this society to approach key problems of Government. Second, the people are now firmly wedded to the notion of a new pluralism, under which the tolerance for differing opinions has never been higher. Unless they are assured that Government believes in this pluralism, they are going to be suspicious that the Federal Establishment is conspiring to deprive them of their rights rather than to enhance them.

S. 260 IS A MOVE IN THE RIGHT DIRECTION

These two preconditions are the bedrock for any and all reasonable measures which will open up Government decisionmaking for all to see, hear, and to comprehend. So, Mr. Chairman, the business you are about is indeed very pertinent to the mood, the temper, and the urgent desires of the American people. As with them, I cannot say you have drafted the best bill, nor that you have put all the reasonable protections and exemptions into a rule of full disclosure. But the thrust is in the right direction, the purposes sound right. If you can move this Government measurably closer to the day when people at least feel that all of you here making decisions are genuinely honest and on the level, that the public good really mean something, that there is and can be a genuine community of interest in this country, then you will have made a major contribution toward restoring confidence in Government. And that, sir, would be a key singular achievement, indeed.

Thank you, Mr. Chairman.

Senator CHILES. Mr. Harris, I just want to tell you how much your testimony means to this hearing because I think you really add a dimension that we have only skirted around before. We have had some people testify on the technical aspects of the bill itself and the

good points and the bad points. I think that what you so concisely and clearly say here is that we are paying a price for secrecy and the price is just too high. We cannot afford to continue to pay it. If we are going to try to restore this confidence which for a number of reasons has slipped to the low ebb that it has, we are going to have to open up the process. Even if we make the right reform decisions or the right decisions otherwise, as you say so clearly here, the public will not have confidence in those results if they cannot see how we make those decisions and if there is not some light in the process of how we make them.

Mr. HARRIS. Mr. Chairman, as you spoke—well, actually, a couple of other results came to my mind. If I might respond by saying that times have really changed in this country. I think I can give it most dramatically by citing these results.

A 1970 SURVEY REVISITED

Back in 1970 we did a survey of a cross-section of the public and found the majority of the American people who felt that these types were harmful and dangerous to the country. I will just cite two who were felt to be harmful and dangerous to the country. Upwards of 65 percent thought they were. One were student protesters and the other were black civil rights protesters. Between 65 and 70 percent thought they were harmful and dangerous to the country.

Senator CHILES. What year?

Mr. HARRIS. 1970. We went back, actually the latter part of last year on this, and repeated exactly the same questions and we found we could not get over 35 percent who thought either of those two groups were harmful and dangerous to the country. Instead, there is a whole new set of people who are viewed as harmful and dangerous to the country and I will just cite three, if I might.

One, 81 percent of the American people feel that generals who conduct secret bombing raids and then try to cover them up are considered harmful and dangerous to the country. Second, 83 percent think that businessmen who make secret campaign contributions are harmful and dangerous to the country. And at the very top of the list, 89 percent, almost unanimous, of the American people feel that top Government officials who secretly use Government intelligence agencies such as the CIA, the FBI, the Secret Service, and they included the IRS, for personal or for political advantage are harmful and dangerous to the country.

SECRECY

The key to all of this is the secrecy. It is not confined just to Government, you see. It is surreptitious activity which they feel destroys the very fabric of this society, and people are playing for keeps on this, Mr. Chairman. I cannot emphasize anything stronger. We go out and talk to thousands of people each month and I tell you, this is what comes back. It is a message they have got for Washington.

Senator CHILES. While there certainly is much to be alarmed about if we do not make some changes, I think there is also so much to look and say thank goodness about. The people have confidence in the institution of government, they are just distrustful of the leaders, which I think is very different from the fact that at the time of the war many young people felt the institution itself did not have the fabric to respond. Now, they just seem to think they have got to get a new set of horses and that the institution is there and from all of the facts that you show, you can have honest officials, you can have efficient government, you can have these things. They believe they can and should have those things but that they are not getting them now. So the only people that really need to be alarmed are thousands of us who cannot recognize that and are going to continue to do business the way we have done it for 100, 150 years and fail to recognize that people are tired of the paternalism and every other way of doing things wherein they are not allowed to participate in the process.

AIRING IMPEACHMENT PROCEEDINGS

Mr. HARRIS. Mr. Chairman, may I respond in the sense both to what you are saying now and to what Senator Percy asked John Gardner about the televising of the Senate hearings. I mean, the House Judiciary hearings and presumably the House debates, and then if the House passed a bill of impeachment, the trial or Senate side of the impeachment proceeding.

I do not have—we are now in the process of polling this minute. I know people think they should be televised. But I would make this judgment which I think is critical and quite pertinent to this subject that you have asked me to come here on today.

If I had to say what I would judge from my experience, and quite a lot of contact with a lot of people here on the Hill and the executive branch on an ongoing basis, the prevailing wisdom along the banks of the Potomac here is that somehow the impeachment process will be a traumatic experience for the American people. From the literally hundreds and hundreds of questions we have asked the American people about impeachment, Mr. Chairman, let me assure you now that the impeachment process in no way would be a traumatic experience to the American people. In no way. As much as they respect the office of the Presidency, as much as it grieves them to see it come to all of this, the people will be far, far more proud, Mr. Chairman, at the prospect and indeed, the process of seeing the system work and no matter how the process ends, I think they will be all the better for it. And yet, I run into this feeling constantly on the part of the people in power in this city, how can you put the people through this torturous, this dramatic test, almost as though you must keep the bad news from the people. You must keep the hard facts from the people, the unpleasantness.

Senator CHILES. Do not let the children see what is going on.

Mr. HARRIS. This is, Mr. Chairman, in my judgment, the most patent nonsense that could exist and as long as you have that as a

predication of the thinking of people high in public office, those people in public office will be in the deepest kind of trouble.

Senator CHILES. Well, I again want to tell you how much I appreciate your testimony. Senator Percy has some questions. I will probably have some more and we would like to get the statistical backup that you said you could furnish on things like the people's efforts in gas conservation measures. We would be delighted to get that, too.

I hope that every Member of the Congress will read your testimony. I am going to see that it is placed into the record because I think it is so important that we get this message. I think you are giving us sort of a preview and if we wait awhile we are going to get the message in another way. I think the people are speaking so loudly and so clearly and the trend is so irrevocably set that nothing is going to change. But I think if we could heed your warning now, we could take some action and pass meaningful campaign reform and financial disclosure laws to try to update our processes so that we can deal with decisions on today's basis rather than trying to operate under our traditions of 100 or 150 years ago. We have to take steps—take them immediately—if we are going to keep up with the people. You are so correct that the people are ahead of their leaders and they are quickly leaving us behind and then they will get some new leaders. They will certainly have to if they continue to outdistance us in the way they are doing now.

Mr. HARRIS. Mr. Chairman, you remind me of the fact when our Founding Fathers decided what they would call this country of ours, they called it a republic and not a democracy and the reason goes back to the Greek word "demos" which means "mob" and the fact of the matter is they were in effect saying you cannot quite trust mob rule.

I would say that the American people have come along in their literacy from every measure we are able to obtain, and we do it on a continuing basis, to the point where I do not think the present leaders of our country have any fear to call this a democracy and there are great steps in making it that.

Senator CHILES. Thank you so much. The record will remain open for the questions submitted to you from Senator Percy.

Mr. HARRIS. Thank you, Mr. Chairman.

[The material referred to follows:]

RESPONSES TO SENATOR PERCY'S QUESTIONS SUBMITTED IN WRITING

Question 1. In your testimony you state that the public has been generally far more astute and farsighted than its leadership. What is the public saying right now that we in Government should be listening to, but are not? In other words, what new problems would we be anticipating now if we were properly gaging the public mood as we should be?

Answer. This question asks "What is the public saying right now that we in Government should be listening to, but are not?" On the line, the public is properly asking why the Government does not spell out the facts and pose the options and alternatives that the people might have in the course this nation might take. On inflation, the people sense accurately that there is no way any individual for long can beat high prices by himself. Thus, by 76–12%, a majority say they would be willing to accept "lower pay increases than the rise in the

cost of living if there were some assurance that inflation could be kept under control" rather than "pay increases higher than the cost of living increases without any assurance inflation could be brought under control."

This result and many others like to spell out clearly that most Americans are very much in a mood to hear it like it really is and are prepared to make their own contribution to keep inflation in check. People, in my judgment, would be entirely willing to use less paper, less products with steel in them, with plastics in them, with aluminum in them, with other components which may be in short supply. They will respond if the leadership in government will come forth with courage to ask them to do it.

Question 2. I agree with you that the public responded magnificently to the need for energy conservation during the embargo even though they distrusted their leaders. But don't you think the public is just as likely to quickly forget the need for energy conservation now that the immediate crisis has passed? In other words, do public attitudes change as quickly as the issues disappear from the front pages?

Answer. This question asks about the public's willingness to conserve its use of energy. He asks, "Don't you think the public is just as likely to quickly forget the need for energy conservation now that the immediate crisis has passed?" The answer on energy is a categorical and ringing "No" from the American people in our own surveys. Just this past summer, without any prompting, a majority of people cut down the use of their air conditioning in their automobiles, three in every four are using less electricity in the home, less gasoline in their cars, substantial numbers have reduced week-end trips in their cars, have put off long auto holidays, and have engaged in extensive conservation of energy. The same pattern has prevailed in consumption of beef—long after the meat shortage disappeared.

Why is the public making these gestures of conversation? Because most feel that high prices are caused by shortages and one way to cut shortages and ultimately reduce prices is to buy less of short supplies.

But where is the leadership to ask them to cut here and to cut there, to say here is where sacrifice will contribute to the national good? The people are ready. Is the leadership ready to ask them?

Senator CHILES. Our next witness is Mr. Ronald Plesser, the staff attorney for the Center for the Study of Responsive Law. Mr. Plesser, again we want to indicate at the outset our appreciation for your attendance at the study session on the bill, and we appreciate your comments and the work that you did. We are delighted to have you.

TESTIMONY OF RON PLESSER, STAFF ATTORNEY, CENTER FOR THE STUDY OF RESPONSIVE LAW, WASHINGTON, D.C.

Mr. PLESSER. It was an enjoyable and enlightening meeting to me and gave me a basis for some of the comments I have this afternoon.

I would like to submit my written testimony and summarize verbally some of what are the major points.

As I state in my testimony, I am a staff attorney with Ralph Nader's Center for the Study of Responsive Law and I have spent 100 percent of my time over the past 2 years concerned with public access to government information. At the center we have established the Freedom of Information Clearing House and myself and another attorney have litigated on behalf of members of the press, members of the public, and members of our related groups, over 25 cases in the Federal courts, both under the Advisory Committee Acts and the Freedom of Information Act. This gives us an idea of how openness works and what kinds of problems are presented in legislation.

Before I get into what I have prepared I must say that I too am very, very encouraged by what Mr. Harris just testified to, that the main cynicism that we usually expect to get when we talk about openness or talk about the kinds of comments Mr. Gardner made. When we state openness is the best policy and sunshine, cynics usually say, well, no one is really interested. The public will not attend. If you have open markup sessions in the Senate, the only people who will attend will be the lobbyists and the special interest groups. What Mr. Harris' testimony indicates clearly is that the public is interested and it will become more interested in what is going on in Government. What Mr. Harris has said to us is that what we are discussing this morning, and what we are discussing in terms of Freedom of Information Act and the other openness-related matters are not just academic exercises but are something that will be taken up by the people and will be used. I find a great deal of personal encouragement from that.

GOVERNMENT OPEN TO THE PUBLIC

We are very encouraged by your long-term commitment to openness in Government. We believe that the legislation set out in S. 260 is the very basis of participatory democracy. Government which purports to be by the people and for the people must also be seen by the people. It is indeed shocking that this Government does not protect the rights of the people to see and be a part of the decision-making process of Government.

CONGRESSIONAL OPEN MEETINGS

S. 260 is in basically three sections and I would like to talk first about the congressional aspects of it. What S. 260 attempts to do is make openness the rule and secrecy the exception. The key to this is public accountability of Members of Congress. At the Common Cause conference this is what you said and I agree with it, that the main advantages of S. 260 is that if someone wants to operate in secrecy, he has to put his name on the public register.

The one problem that we have with S. 260 is not a technical problem in terms of congressional meetings but I think it relates very closely to the accountability question. Under the current proposal there has to be notice of a meeting but the actual votes closing the meetings and the reasons under the act closing the meetings do not have to be made public or available until after the meeting.

It is critical as it is under the Federal Advisory Committee Act that meetings, to the extent possible, and we understand there are limitations, must be announced beforehand indicating whether or not they are open or closed. The individuals who vote for closing a meeting must be on the record beforehand with their reasons so that the public and individual citizens who are interested in the matter can then contact the individuals and can have an input into that very decision of whether or not there is an open meeting.

We think that before the fact accountability will do much more to bring about the intent of this legislation.

The House has opened up many of its meetings. About 80 percent of markup sessions in the House have been opened and our experi-

ence is that under the House rules, better law is developed from open meetings. The prospect of open markup sessions caused apprehension with most, if not all Congressmen. However, the House is still operating.

The Senate Government Operations Committee recently had an open markup session on the consumer protection agency bill, S. 707. Also, under the leadership of Senator Jackson and Representative Staggers the first open conference committee in the history of Congress was held on the emergency energy bill.

We strongly believe that the legislation in both cases was vastly improved by having that process open to light of day.

One comment that I will make in terms of the executive, and that is that with openness—not only do you have better decision-making and better governmental action but you will have more efficient Goevrnment. If people know what alternatives Government has to deal with, know the pressures, what the countervailing balances were in making a decision I think the public will be much more responsive to the final decision than when they see a committee meeting come out one way and they say why did you not consider that, because it was all done in secret. If in fact all the considerations were made I think the people can better assess what was going on and will tend to accept the legislation. The legislation will be more responsive to various interests, not just the special interests, and I think it is all in all a much more efficient way of operating.

I know the people in Florida strongly support this. The comments I have heard indicate that before the public wanted to know why the legislation did not consider this and why they did not consider that. The process of openness will create better government. As for S. 260, a couple of questions we have in terms of its application to Congress. I am not sure whether this is an oversight but the joint committees and the caucus committees should be covered. The Joint Committee on Atomic Energy is a legislative body. The Joint Economic Committee is not legislative but obviously has very important and very significant functions. It seems to me that that structure is not written in the bill and we just raise that as a point.

Senator CHILES. I am glad you raise it. I think that is a very helpful point. I think we should raise it.

Mr. PLESSER. And the Caucus Committee, as Mr. Gardner said, have very strong influence in what happens both procedurally and substantively and perhaps even though there are additional problems because caucuses are not formal committees of the Senate, that caucuses also should be subject.

The final comment on the particular legislation is the enforcement section. We have discussed the problem of judicial enforcement and we see that the Select Committee Enforcement plus voting on their resolution, is effective and perhaps better constitutionally than getting involved in having the Judiciary determine what the legslative body should be doing. But the problem we see with the select committee is if a meeting is closed and the select committee determines, submits a resolution that that was proper, that the closing was proper under the exemptions of the bill, it does not automatically come up to the floor of the Senate. It seems to me

that the floor of the Senate should have an opportunity to accept or reject the resolution of the select committee. If that problem has been taken care of, then I will proceed in my comments.

OPEN MEETINGS IN REGULATORY AGENCIES

In terms of the administrative agencies, any specific comments we would like to refer to Professor Davis. Once again, he seems to have covered the waterfront in the area of administrative law and we will not make any specific comments. We would just like to reaffirm, that is, we, Professor Davis, Mr. Gardner and many people, really encourage you to see if there is any possible way that the whole administrative process can be covered by open meetings and not just the multiagency members. If this battle is going to be fought, and it is going to be a considerable battle, it may as well attempt to get the Federal Housing Administration, EPA, National Highway Traffic Safety Administration and all the various other administrative agencies as well as the Federal Trade Commission and the other multimember agencies.

When the Freedom of Information Act was passed, every Federal administrative agency strenuously opposed it. The agencies felt that they should control what the public knew about Government and that they should have unchallenged decisionmaking in determining access. The 1966 act changed that and I can report to you that the Government did not come to its knees. To the extent that the Government has come to its knees, the cause has been secrecy, not openness, and I think your legislation will go a lot farther, as Mr. Harris again has indicated, to open up the process, to increase more responsive government.

The primary question presented is whether or not the public has a place in agency decisionmaking. As history makes clear the election of a Chief Executive once every 4 years is not enough. For democracy to work the public must know what decisions are being reached and what the basis of that decision was. The public needs this before, not after the decision is made. The agencies are certainly responsive to the interests that they regulate. They are not so responsive on a day-to-day basis to the interests of the public.

What happens is notices come out in the Federal Register after the fact and we have to step in in many situations after decisions are made, major decisions are made as in the case of the Atomic Energy on types of plants they want to license, how they want to encourage it, and the only input we as public interest groups or citizens can have is the very costly structure of AEC license challenges. If they would have had some public input at the initial levels of the decision of the Atomic Energy Commission maybe that whole slowdown process of licensing procedures could have been avoided.

EX PARTE COMMUNICATIONS

I would like to speak just for another few minutes on ex parte contacts and really, I think just point out an example that I have recently experienced in terms of the dangers and problems and how ex parte contacts work. This was not in a formal proceeding. This

was not in a situation of an on-the-record commission agency proceeding. This was a Freedom of Information Act request.

One of my clients, Mal Schechter, senior editor of Hospital Practice magazine, very active in the area of getting information from the Government, made a request in December of 1973 for hospital provider cost information under medicare. That is, if a hospital receives medicare payments they have got to give medicare—their balance sheets indicate what the costs were, what the profits, losses were—financial statements.

It was pretty clear in my opinion that this information is disclosable under the Freedom of Information Act and there never was a serious question of its availability. He made the request in December of 1973. Finally, on April 19th of this year Social Security Administration informed him that a decision had in fact been made to make this information available. We were all very encouraged by it but we were told we could not receive the information until May. The reason? The agency sent the hospitals who had submitted the information as well as the hospital trade association, the American Hospital Association, a telegram saying that these documents would be released in 10 days, on May 1, and you are hereby given notice to bring whatever action you want, leaving the door open to hospitals to bring injunctions or whatever legal remedy was available to them.

Well, we did not like that because it was a lengthy delay but we recognize the hospitals have an interest and it was not unreasonable to give them 10 day notice. We had no objection to that. Certainly they should have been informed of the decision.

But what happened? May 1 came and went and there were no documents. Finally, very late in the day we called up Social Security Administration and said, how come there are no documents? They said, well, at a very late meeting, long into the night, last night, April 30, with the hospitals, the Commissioner decided to give them another 10 days and to allow the hospitals to come in on May 8 and tell us all the other reasons why this information should not be made available. They want to create procedures. We only learned of this because we were persistent and because we called.

The meeting on May 8 was held between the hospitals and Social Security Administration to discuss Mr. Schechter's request. We knew about it again only because of persistence but there was no invitation for us to attend, no formal notice of the meeting. There was no indication that we should be present and as a result of meeting we did not find out what happened at that meeting or were informed of any of the proceedings.

Luckily Mr. Schechter received the documents on May 13 but I somewhat question if we would not have been as tenacious a member of the press, if he would not have had an attorney on the phone giving him assistance indicating the possibility of legislation, I question whether or not Social Security would have released those documents on May 13 or if they would have ever released those documents.

I think it is a clear example of where Social Security Administration and other agencies need ex parte regulation. I think you can

knock on any door in connection with ex parte contacts. They should be under these meetings, late into the night meetings, where regulated industry, influences, and changes, decisions—I think they should be on the public record. There should be notice of it and all parties interested should be given an opportunity, and I think that is the kind of issue we see in ex parte and the kind of issue that we would like to see resolved with some legislation.

I think I have gone on too long. I want to thank you very much for the opportunity to present these comments.

Senator CHILES. We appreciate again very much your testimony and we probably would like to submit some written questions to you. I think you have made some very helpful suggestions today as to the bill and as I say, we appreciate your work at our workshop before.

Mr. PLESSER. Thank you very much.

[Mr. Plesser's statement follows:]

STATEMENT OF RONALD L. PRLESSER, STAFF ATTORNEY, CENTER FOR STUDY OF RESPONSIVE LAW

Mr. Chairman, distinguished members of the Subcommittee on Reorganization, Research and International Organizations, thank you for inviting me to present my views on S. 260, the Federal Government in Sunshine Bill.

I am a staff attorney with Ralph Nader's Center for Study of Responsive Law and have spent 100% of my time over the past two years concerned with public access to government information. As a project of the Center, we have established the Freedom of Information Clearinghouse to deal exclusively with the problems of public access. Myself and another attorney, Mr. Larry P. Ellsworth, also associated with the Clearinghouse, have litigated over 25 cases under the Federal Freedom of Information Act, 5 U.S.C. 552 and the Federal Advisory Committee Act, 5 U.S.C. App. #1. We have also examined state public access laws and have developed a model state freedom of information act which to date has been introduced in four state legislatures.

In the course of these activities, we have become aware of the problems and some of the possible solutions to government secrecy. The Freedom of Information Act passed by Congress in 1966 is an attempt to open government documents and paperwork to public scrutiny. There is no general counterpart to the Freedom of Information Act in terms of non-documentary government information. The Federal Advisory Committee Act passed in 1972 is an attempt to open to public scrutiny the process by which the government obtains advise on proposed matters from the private sector. From that Act and its brief history some of the pitfalls of an open meeting law and an ex parte contact law can be identified.

We are very encouraged by your long term commitment to openness in government and believe that the legislation set out in S. 260 is the very basis of participatory democracy. Government which purports to be by the people and for the people must also be seen by the people. It is indeed shocking that this Government does not protect the rights of the people to see and be a part of the decision making process of government.

CONGRESSIONAL OPEN MEETINGS

Unlike past anti-secrecy legislation enacted by Congress, this legislation attempts to resolve problems of legislative secrecy. S. 260 attempts to establish in Congress rules that would make openness the rule and secrecy the exception. In order for committee meetings to be closed, members of Congress must affirmatively vote on the public record to do the public's business behind closed doors. As you are well aware, the House of Representatives has recently followed this rule with success. The key to this rule is to place on the public record those members who vote against open meetings and the reasons upon which they relied.

Section 101 of the bill on page 5 states that where meetings are closed, the committee shall make available within one day of such meeting a written

explanation for the closing of the meeting and the votes closing portions of a meeting must be recorded and published. The bill then goes on and in a separate section states that public announcement of a meeting, whether open or closed, must be made seven days prior to the meeting unless the Committee members vote that committee business requires an earlier meeting. In such cases, the notice is made at the earliest practicable opportunity. The problem here is that prior to meeting there is no public notice of who voted to close the meeting and what reasons under the bill were relied upon. Also, under the bill only notice of the meetings and the votes are to be published, the specific reasons for closing the meetings must be made publicly available one day after the meetings, but never needs to be published.

These points are not merely technical; they go to the heart of what must be the primary purpose of this legislation—public accountability. After-the-fact accountability as proposed by this bill, while better than no accountability at all, is not as good as it could and should be. There should be mechanisms by which meetings would be announced, the votes closing portions thereof and the specific reasons closing the meeting published prior to the meeting. This would have the obvious advantage of citizen input and comment in the political decisions of whether or not a meeting is opened or closed. Under the Federal Advisory Committee Act we have often found that where the reasons for closing the meetings are set forth and the name of the responsible official is given prior to the meeting, discussion and correspondence with such official can change his or her determination closing the meeting. Obviously, in Congress the need for public input is even more appropriate.

In connection with the reasons presented to allow meetings to be closed, the legislation should make it clear that a meeting or portion thereof can be closed only if the reasons for closing the meeting fall clearly within one of the enumerated exemptions. This is how the courts have interpreted the Freedom of Information Act.[1] Unless this is made clear, meetings may be closed simply on partisan lines. Also, the reasons given for closing the meetings should be specific, relating the facts to be discussed with the particular exemptions.[2]

One major question raised by S. 260 is why joint committees were seemingly excluded from its purview. The Joint Economic Committee and the Joint Committee on Atomic Energy are very important committees of Congress and should not be excluded from such important legislation. The Joint Committee on Atomic Energy should clearly be covered because it, unlike other joint committees, has legislative functions. Also, caucus meetings determine to a large extent the rules under which Congress operates, as well as substantive policy decisions which bind members of the caucus, and they too should be public.

The select committee approach to enforcement seems to be acceptable, with one major exception. The floor of the body to which the select committee reports should vote to accept or reject the resolution of the select committee. If the select committee votes to uphold the committee's decision to close the meeting, then the floor should be given the opportunity to override that resolution. This is another instance where there is a need for increased accountability.

Finally, the transcript requirement for closed meetings is very good. However, it is also necessary that transcripts and records of votes be taken and made publicly available for open meetings as well as closed. The citizen who does not reside in Washington or have the time or money to come to Washington doesn't really care if a meeting is opened or closed if copies of the transcripts of open meetings are not available.

The experience of public interest groups under the House rules indicates that better law is developed from open meetings. The prospect of open mark up sessions caused apprehension with most, if not all, congressmen. However, the House is still operating. The Senate Government Operations Committee recently had an open mark up session on the Consumer Protection Agency bill, S. 707. Also, under the leadership of Senator Jackson and Representative Staggers, the first open conference committee in the history of Congress was held on the Emergency Energy bill. The legislation in both instances, we think, was improved by having the meetings open to the light of day.

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[1] *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971).
[2] See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

OPEN MEETINGS IN REGULATORY AGENCIES

Title II of S. 260 relates to agency procedures. In the responses to Subcommittee Questionnaire on the Administrative Agency section of S. 260, Professor Kenneth Culp Davis very accurately analyzes the good and not so good parts of S. 260. His main objection and ours is that S. 260 applies only to multi-headed agencies. If the F.T.C. is covered, then why not the National Highway Traffic Administration or the E.P.A.? I refer to Professor Davis' letter for specific comments on S. 260 and will briefly describe why we see the need for this legislation.

When the Freedom of Information Act was passed, every federal administrative agency strenously opposed it. The agencies felt that they should control what the public knew about government and that they should have unchallengable discretion in determining access. The 1966 Act changed that and I can report to you that the government did not come to its knees. To the extent that the government has come to its knees, the cause has been secrecy, not openness.

Far too often a decision is made without the benefit of public comment and disclosure. The Atomic Energy Commission decides major issues of general policy to be implemented by their regulatory division. Those policies cannot be challenged until they are applied on a case-by-case basis. These challenges in the AEC have primarily taken place in the context of intervenor challenges to the granting of a license to power companies to build nuclear reactors. This is a very costly and time consuming process. If the public could be present when the decisions of the AEC were being made, then perhaps those decisions would more accurately reflect a position acceptable to more people. There should be public disclosure and input before a decision is made. After it is made, it is very difficult to effect a change in policy or practice.

The primary question presented is whether or not the public has a place in agency decision making. As current history makes clear, the election of a chief executive once every four years is not enough. For democracy to work the public must know what decisions are being reached and what the true basis of that decision was. The public needs this before, not after, the decision is made. The agencies are certainly responsive to interests that they regulate. The general counsel of the Food and Drug Administration in prior private practice represented many of those drug companies regulated by the F.D.A. A former general counsel of the Federal Power Commission worked both before and after his tenure as general counsel for a major Texas law firm that represents many oil interests. The list is endless. Certainly, through staff and member connections like this, the influence of the regulated interests is great.

The balance must be equalized. This is not done solely by after-the-fact court challenges of particular decisions or by a presidential election once every four years. The public must be able to participate on a day to day basis. In order to do so, the public must be contemporaneously informed of what the agencies are considering.

Public access to government meetings would not only result in good government, it would result in efficient government. The agencies could resolve many issues and difficulties that do not now become apparent until a particular policy or action is put into effect.

However, it must be recognized that what we are talking about today is not a technical change in the Administrative Procedure Act; it is a sweeping and in some respects a revolutionary concept. We urge you not to shy away from the difficulties of this problem by having the legislation apply only to multi-member agenies. The government decision making process must be reevaluated and public access to government meetings is a proper beginning.

CONTROL OF EX PARTE COMMUNICATIONS IN AGENCY PROCEEDINGS

The final section of S. 260 relates to the ex parte communication in agency proceedings and is limited to on the record proceedings where the contact is made with the member of the agency. The public must be considered as a party in any regulatory proceeding. A system where private individuals consult secretly with agencies concerning that agency's activities is the basis of a system where private interests outweigh public concern. The government should have the benefit of input from special interests in what policy to develop or

what action to take. However, as is the practice with advisory committees, that process should be opened to the public.

S. 260 relates primarily to formal adjudicatory type proceedings where there are interested parties. There is a danger of ex parte contact in those circumstances and we support the attempts to control it. However, of almost greater significance is ex parte contact in the determination of policy or procedure on an informal basis.

An example is a situation that I experienced very recently. One of my clients, Mal Schechter, Senior Editor of Hospital Practice Magazine, had requested access under the Freedom of Information Act to Medicare provided (hospital) cost reports in December of 1973. Mr. Schechter was denied access initially, and he appealed that denial to the Commissioner of Social Security Administration. On April 19, 1974 he was informed that the Commissioner of SSA had decided that the reports would be released to him. The SSA, however, delayed release of the documents for an additional period of ten days to permit notice to the hospital whose documents had been requested and to the American Hospital Association. This seemed unnecessary because of the already lengthy delay, but it was not totally unreasonable that the hospitals be given some notice that these particular documents would be released.

On May 1, 1974, the date scheduled for release, there was still no public release of the documents. Representatives of SSA informed me that on April 30, 1974, representatives of the hospitals had a long meeting with the Commissioner of SSA and convinced him to delay the release of the documents for an additional period until May 13, 1974. A meeting was scheduled on May 8, 1974 between the SSA and the hospitals to discuss various alternatives that the hospitals were proposing concerning the manner of release of the cost reports. This meeting was held without Mr. Schechter present and no attempt was made to inform him of what transpired or of the outcome of the meeting.

Mr. Schechter finally received the documents on May 13, 1974. However, the industry had successfully delayed the release of the documents and unsuccessfully attempted to limit or stop the release altogether. This was an informal proceeding and the hospitals were free to argue with SSA in secret almost without limitation, to the detriment of Mr. Schechter. Mr. Schechter came out ahead, but what would have been the result if he had not been a very tenacious member of the press with the services of a public interest attorney available to him?

In order for the public to be aware of decision making, all contacts between the government and the parties they regulate must be at a minimum on the public record. We hope that these comments will be helpful in your very important work in the area of government in sunshine.

Mr. Chairman, I thank you for the opportunity to present this testimony.

Senator CHILES. Our next witness is Jeanne Malchon. She is the last witness, but that is only because she is going to be our cleanup witness today, not because of her absence of interest in this subject. She has been one of the champions of the open government process.

Jeanne, I again want to express our appreciation to you for your attendance at our workshop meeting and to you and the league for their interest in this subject. I can tell you that I have seen a marked increase in the interest in this bill since the league has taken it up as one of their causes.

If you would just wait a minute before you start your testimony, I am going to have to make one quick phone call.

[A recess was taken.]

TESTIMONY OF MRS. JEANNE MALCHON, FORMER STATE PRESIDENT OF LEAGUE OF WOMEN VOTERS OF FLORIDA

Mrs. MALCHON. Mr. Chairman, I thank you very much for the opportunity of appearing here today. Because of the lateness of the

hour and the diminished audience, because probably any dialogue between you and me would be somewhat repetitious, and because much of what I had planned to say would only repeat what has already been said here, I too will summarize or try to digest my remarks.

Senator CHILES. Your statement in full will be included in the record.

Mrs. MALCHON. While I have just completed a term as a member of the board of the League of Women Voters of the United States and in that capacity served as chairperson of representative government, the league item dealing with congressional reform, and chairperson of the election system project, I am not speaking today for the League of Women Voters. As you may know, the league just had its biennial convention in San Francisco a little over a week ago and there was a change in officers and board members. That, with the mechanics of running a convention for 1,500 delegates, all the way across the continent, has occupied our staff as well, so that there has not been time to prepare an official league statement. That will be presented at a later date for the record.

Senator CHILES. All right.

[The prepared statement of the League of Women Voters follows:]

STATEMENT BY THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

The League of Women Voters of the United States is a volunteer citizens' organizations of 1340 Leagues with approximately 155,000 members in 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. We are pleased to have this opportunity to submit a statement in support of a bill which would further one of our primary goals—an open governmental system that is representative and responsive. In particular, we address this legislation not so much on its technical aspects, but from the vantage point of an organization with some experience—both good and bad—in ferreting out the information necessary to help our members and the public make their opinions heard in an effective and timely way.

S 260, the "Government in the Sunshine Act," is a timely, and obviously necessary, response to the malaise citizens feel toward their government. The misuses of executive privileges, a government frequently operating in secrecy and a Congress criticizing secrecy in the Executive when Congressional committees make decisions behind closed doors—these factors influence the affective orientation of the public toward political institutions. Fortunately, the people of this country have a strong tradition of pride in their political system in spite of some of its defects. But history has shown us enough tragic examples of what can happen when citizens become alienated because their government is remote and inaccessible; when citizens do not feel they can influence decisions which affect them or can hold decision-makers accountable.

For over 50 years the League has worked to educate voters so that they can exercise their rights in matters of public policy. We have no doubt that informed citizens are the linchpin of a democratic system because they can communicate their demands to their leaders and then cirtically evaluate whether those demands have been satisfied. They can also help shape the decisions which affect them by articulating their interests as individuals or through interest groups.

To fulfill their civic role properly, however, people must have access to information both substantive and procedure; i.e. they must be able to find out what is being discussed and when. And, they must feel that the *processes* of deliberation and decision-making are predictable. The structures and processes of government in the second half of the 20th century are so complex that even the most concerned and politically sophisticated individual has difficulty determining what the entry points are to shaping decisions. Some committee meetings are open, others are not; some give ample notice and solicit public

input, others do not. It is apparently not enough for people to understand the issues, they must also carry the burden of surmounting the obstacles to participating in the processes by which those issues are decided. To the extent that decisions are not made "in the sunshine," citizens and interest groups must become sleuths, ferreting out information about when hearings will be held, who will testify, what is decided when a committee goes into executive session to mark up a bill or meets as a conference committee to resolve differences in legislation between the two Houses.

The difficulties in gaining access to decision-making processes in Congress are multiplied in the Executive Branch where constantly proliferating agencies, manned by bureaucrats with whom the public is unfamiliar, operate under regulations which are as varied as the subjects they cover. The added obstacle presented by secrecy in government creates strong disincentives to public participation. It also undermines the credibility of the decision-makers and the legitimacy of the decision. On the other hand, openness can foster confidence and inspire participation.

S 260 would establish a basic norm of open meetings by all Congressional committees and multi-member federal agencies unless a majority of members vote to close meetings. We are familiar with the argument which says that openness would inhibit the work of committees and agencies; that the price for openness would be a loss of efficiency and that we cannot afford for Congress to become less efficient when it is fighting to regain power vis-a-vis the Executive. The League does not think openness and efficiency is an either-or proposition. The two concepts, when reasonably interpreted, modify each other: Openness is a safeguard that efficiency does not become an ultimate good to which substantive values are sacrificed. At the same time the demands of efficiency impose on the concept of openness a requirement that it not be so extreme as to inhibit consideration of sensitive issues. The provisions in S 260 for exemptions afford enough flexibility for members to close meetings if they think it is necessary.

The "Government in the Sunshine Act" would establish by law a practice which should be the norm in a democracy. First, it would place the burden of proof on those who want to close meetings. Second, it would give the public access to information which lobbyists who have time, money and contacts already have. Sunshine procedures would aid citizens burdened by the present system by basing access to information on a right to know, not on who you know. In this connection, we particularly support the provisions in Title II for opening "all meetings . . . at which official action is considered" and for prohibiting *ex parte* communications. Finally, the bill would give legal recourse to citizens if officials violate the law. These are moderate sensible proposals. The question now is not whether S 260 should be enacted, but how soon!

We commend this Committee for its consideration of a bill which would serve the public interest. We urge you to press forward with S 260 and offer our support in this effort.

Mrs. MALCHON. But I was asked to express the league's official interest in this and let you know that there will be a league statement.

One result of that convention, I might add, even though our audience is diminished, is that I can most cordially and sincerely invite you and others who are interested to become full voting members by joining your local league.

Senator CHILES. We are delighted to see that the league is practicing what it preaches, opening up the system, by opening up their own membership now to men.

Mrs. MALCHON. I might add that some of us are feeling a good deal more comfortable about it.

I am appearing today as a card-carrying unpaid lobbyist for a citizens' lobby with some 15 years' experience principally with the Florida Legislature, both before and after Florida's sunshine laws were adopted.

VOTER LOSS OF CONFIDENCE IN GOVERNMENT

There are two principal points I wish to stress. First, and most obvious, of course, is the concern that we all share for the very well-documented loss of confidence and the subsequent apathy of citizens toward their Government today. After a tremendous effort to register newly enfranchised 18 to 21 year olds as a result of the constitutional amendment, other special groups and the populace in general, we were very disturbed to see only 55 percent of the eligible voters voting in the last Presidential election. This is the second lowest percentage ever voted. This was in spite of the fact that there had been tremendous efforts made to remove both the administrative and statutory obstacles to voting and registration, by league members and many other groups throughout the country, as a result of our election system project.

There is no real reason to labor this point any further. Several people have alluded to it. But it does indicate that we must take whatever positive steps needed to restore public confidence. This is so self-evident that, as I say, I will not labor the point.

I would like to say that recent events have resulted in, what I am discerning in my travels around the country and in speaking with other groups, a rising tide of citizen interest which, as the saying goes, is lifting all boats. I think there is going to be a reentry of many concerned citizens into the political process and it is imperative that this renewed interest be encouraged and sustained.

CITIZEN LOBBYISTS

The second point to which I want to speak is the need to facilitate the efforts of citizen lobbyists. My own experience has been principally with the Florida Legislature, but with all levels of government and with other agencies of government. It has convinced me that the overwhelming majority of public officials, both policy making and administrative, are conscientious, dedicated individuals and, therefore, they are not only receptive but indeed, they seek opinions and information from responsible and knowledgeable citizen interests.

However, if these interests are to be knowledgeable and the opinions meaningful and reliable, citizens must have complete access to all of the relevant information and processes.

In dealing with the Congress and Federal agencies, most access to information and the process is achieved in spite of the system and not because of it. This certainly places citizens groups with limited financial and other resources at a distinct disadvantage and it greatly curtails the effectiveness of the role they play in our system.

This was certainly true until many changes were instituted in the State of Florida in the mid to late sixties, not the least of which was the sunshine law. Prior to that time citizen lobbyists were up against government in the attic. I am sure you, Senator Chiles, remember those meeting rooms up under the eaves that you had to wend your way back around the air conditioners to find, and meetings which

were either hurriedly scheduled or canceled at the last minute, held at irregular and sometimes ungodly hours, or as Governor Askew pointed out in his testimony, were held by the chairman walking down the hall with six or eight proxies in his pocket.

Most frustrating of all was the condition that the citizen lobbyist found himself or herself in after playing bloodhound, private detective, or whatever, and tracking a bill to its passage in both Houses, only to have it come out of a closed conference committee in unrecognizable form, having been either seriously gutted, or amended to the distinct advantage of certain vested interests, without having any knowledge as to how this took place or why or any access or information as to whom to hold responsible for it.

However, after reapportionment, it was a whole new ballgame in Florida. Just as one example of how the process changed—I will speak to this because it is an area with which I have greater familiarity than perhaps some other things—was the process of drafting and passing a new State constitution. All of the hearings of the commission, all of its meetings and deliberations, were open to the public. All of the materials that were provided for the commission, all of the drafts, all of the amendments, were made available to representatives of the public, considerably adding to the solid waste problem, I fear. Nonetheless, this procedure repeated by the legislature, made it possible for citizens groups and representatives of these groups to have complete and total information not only of the final document but the process and everything that went into it.

I think it was this very thing that in a climate of failing attempts around the country to get new State constitutions passed, helped us to get it passed in Florida. Florida's new constitution was adopted by the voters in spite of the fact that, in addition to the expected groups, there was opposition from very respected academicians who, I think, incorrectly interpreted some of the constitution. But because we, citizen proponents, had this access we were able to explain away and refute some of the arguments that were offered, wherever on a misinformed or misunderstood basis, against the constitution.

While I could mention many more, that is certainly one good example of an open system aiding true citizen participation on an informed basis.

As Governor Askew, Representative Fascell, and others have already pointed out, the parade of horribles which are usually brought forth by the opponents of open meetings and open government have been thoroughly disproved in Florida.

S. 260 provides what I think is a workable and practical mechanism for closing meetings when it is essential that they be closed.

We could discuss, as we did at the workshop with Common Cause, definitions which are more precise—my own opinion is that the requirement of a vote on record of those who are voting to go into a closed meeting is going to make those people think very, very long and hard and have very good reasons for voting closed meetings regardless of what the precise definitions are. Again, I think, just as we have with a diligent press in Florida, as we have in the Nation's

capital, this will be a means for preventing abuse of the provision for closed meetings.

I would concur with the former speaker that some mechanism for having the vote on whether the meeting is to be closed or not, be before the fact so that citizens can have some input into that.

CITIZEN PARTICIPATION

I would just like to close with what has been expressed by several speakers here today, and that is this growing climate of interest which I think is emerging from the present situation. Nonetheless, we do have that very low ebb right now. Fifty-five percent, or rather, 60 some percent of 55 percent of the vote of the citizenry supporting and electing the present administration is a pretty low level of citizen involvement. I think we are all committed to the principle that our Government derives its power from the consent of the governed. That level of consent is pretty scary to me. I think that if we are going to have a sufficient consent of the governed to maintain our present form of government, we certainly must make sure that we are not mistaking disenchantment for apathy and certainly we dare not interpret apathy as consent. We must do something to open up the process, to make it more accessible to all of those who already are or are increasingly becoming concerned and participating citizens.

I would like to commend you just as everyone else has for your leadership in this. I am very optimistic about achieving results, principally because I think it is an idea whose time has come.

Thank you very much.

Senator CHILES. Thank you very much. We are delighted, as I say, to have your testimony and we will look forward to a formal position from the league and we are going to count on your continued support and the league's support in this endeavor.

Thank you very much.

Mrs. MALCHON. Thank you.

Senator CHILES. We will recess our hearings until a later call. The record will remain open for other statements and questions to some of the witnesses which will be submitted.

[Whereupon, at 12:32 p.m., the hearings were adjourned, subject to the call of the Chair.]

GOVERNMENT IN THE SUNSHINE

TUESDAY OCTOBER 15, 1974

U.S. SENATE,
SUBCOMMITTEE ON REORGANIZATION, RESEARCH,
AND INTERNATIONAL ORGANIZATIONS,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:07 a.m., in room 3302, Dirksen Senate Office Building.

Present: Senators Ribicoff and Chiles.

Also present: Richard A. Wegman, staff director and general counsel; Paul Hoff, legislative counsel; Marilyn Harris, chief clerk; George Patten, legislative assistant to Senator Chiles; Pam Weller, staff intern; and Richard B. Stewart, consultant.

HEARINGS RESUMED

Senator RIBICOFF. Last May, the Reorganization Subcommittee began hearings on S. 260, "Government in the Sunshine Act." The testimony presented at these hearings pointed out the public's dissatisfaction with too much secrecy in the Government. Debate, deliberation, and compromise are the essence of democracy. Covering them with a veil of secrecy diminishes the people's trust in Government and inhibits public participation in the process of government.

I welcome the third day of hearings on this legislation. I have asked Senator Chiles to chair these hearings as he is the chief sponsor of this legislation.

It is my hope that the testimony presented here today will add further constructive comment to this important legislation.

OPENING REMARKS OF SENATOR CHILES

Senator CHILES (presiding). During the last few months, the American people have witnessed an extraordinary revolution in Government. They have seen a President resign and watched while numerous Government officials were implicated in an ever widening circle of scandal and misuse of office. After all of this, if the public is not distrustful of the officials they have elected and, perhaps more so, of those they have not elected, it can only be because the people do not pay attention to the workings of Government. But we know that this is not true. The public is very much aware of how their Government works and they are distrustful of it, and rightfully so.

The American people have learned that the legislative and executive branches of Government can hide a multitude of secret plans and schemes. They are more aware now, than possibly at any other time in the history of our Nation, that the Government cannot and must not operate at the whims of a few officials whose motives and desires are hidden from the people.

Openness in Government may sound to some like an unattainable ideal that should occasionally be given lip service and then quickly forgotten. But the people will not forget the lessons of the last year; and neither will those of us who serve the people and must answer to the people for our actions.

Until the people are given the right to view the decisionmaking processes of their Government and can satisfy themselves that their interests are being safeguarded, every Government action will be suspect. S. 260, the Federal Government in the Sunshine Act, takes a major step toward giving the people the access to the inner workings of government that they are now demanding, and which is needed to restore their faith in their country.

The origins of this bill extend back beyond the Watergate crisis. A number of States, including my own State of Florida, had the foresight a number of years ago to pass legislation requiring open meetings in their State legislatures and agencies. The experience in those States has proven that opening up the government process to public scrutiny is not an unworkable dream, but is a necessary check on the excesses of government. It is a check which gives the people confidence in their elected and appointed officials.

I introduced the forerunner of S. 260 in August 1972. When the bill was reintroduced in January 1973, it had undergone extensive revision. Since that time we have had a joint conference with Common Cause, 2 days of hearings last May, and have received the advice of numerous experts on how to make the Government in the Sunshine Act more effective. A number of changes have been made in the bill because of the suggestions we received. I expect that more changes will be made as a result of the hearings today.

Because of the importance of S. 260, I have sought the broadest possible reaction to its provisions. We are not afraid to change the bill if the changes will make the bill stronger.

We must act carefully and thoughtfully on S. 260, but we must also be alert to the public's need for prompt action. I am hopeful for a markup on this bill in the session after the recess. In any event Senator Ribicoff has assured me that the Government in the Sunshine Act will be of highest priority next year.

WITNESSES

Today we hear from several members of Federal agencies—the Chairman of the Interstate Commerce Commission, Mr. George Stafford; the Vice Chairman of the Civil Aeronautics Board, Mr. Whitney Gillilland, and accompanying Mr. Gillilland is Mr. Thomas Heye, the CAB's general counsel. We also have the Chairman of the Securities and Exchange Commission, Mr. Ray Garrett, and the former general counsel of the Federal Communications Commis-

sion, Mr. Henry Geller. And with him, we also have Mr. Richard Berg, Executive Secretary of the Administrative Conference, and he is accompanied by Mr. Preble Stolz, the research director of the Conference. Also testifying are Mr. Douglas Wickham, professor of law at the University of Tennessee Law School; the director of the Washington office of the Radio-TV News Directors Association, Mr. Theodore Koop, who is accompanied by the manager of the Washington office, Mr. Alexander Chadwick; and the dean of the University of North Carolina Journalism School, Mr. John Adams.

We are delighted to have each of you here today and we will conduct our meeting in several panels. We have copies of your prepared statements and we will be delighted to have them submitted in full in the record. When you can, if you can paraphrase from those statements, maybe we will have a better discussion from our panelists.

Our first panel will be from the agencies. Mr. Stafford, why don't we start with you as the leadoff man.

TESTIMONY OF GEORGE M. STAFFORD, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, ACCOMPANIED BY FRITZ KAHN, GENERAL COUNSEL; WHITNEY GILLILLAND, VICE CHAIRMAN, CIVIL AERONAUTICS BOARD, ACCOMPANIED BY THOMAS HEYE, GENERAL COUNSEL; RAY GARRETT, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION, AND HENRY GELLER, FORMER GENERAL COUNSEL

Mr. STAFFORD. Thank you. You mentioned the other general counsels here. I happen to have my general counsel, Fritz Kahn.

Senator CHILES. Delighted to have him.

Mr. STAFFORD. We welcome the opportunity to be here this morning to present the views of the Interstate Commerce Commission on S. 260, the "Government in the Sunshine Act." The bill provides for open meetings of congressional committees and Government agencies, with certain specified exceptions. Since the provisions of title I of the legislation do not affect the functions of this Commission, I will confine my remarks to title II as it relates to agency procedures.

The purpose of title II is to insure further public representation in agency deliberations and to preclude alleged off-the-record influence in governmental decisions by special interest groups. This laudable goal is to be accomplished by guaranteeing that certain meetings of agencies be open to the public, providing for advance notice to the public that such meetings are to be held, requiring that transcripts of agency deliberations be furnished to the public, and prohibiting ex parte communications in agency deliberations.

The Commission wholeheartedly endorses the purpose of this legislation. We strongly feel that the public should be actively involved in the process of conducting their business. However, we question the effectiveness of the bill as currently drafted in achieving that purpose. For this reason, we would like to bring to your attention problem areas we foresee in the bill in its present form.

MEETINGS

Initially, we see certain problems resulting from the vagueness of the language of the bill itself. It provides that all meetings of an agency shall be open to the public, with certain enumerated exceptions. This provision is a central feature of the proposal, but nowhere is the term "meeting" defined. While it could be interpreted as applying only to formal meetings of an entire agency or unit, it could just as easily be construed as applying to casual meetings or discussions such as those which occur between employees or members of the Commission who are constantly in communication with one another concerning work in progress. The adoption of the latter interpretation would seriously interfere with our Commission's ability to move promptly. Perhaps clarifying amendments or including carefully constructed definitions could reduce the problem.

INTERESTED PERSON

Other provisions present similar problems. For example, the requirement for open meetings could be construed to permit public participation and live television or radio coverage in agency deliberations. The term "interested person" is also ill-defined, since it does not relate to a person who has an interest in the outcome of an agency proceeding, but rather to any person who merely communicates with an agency employee about a proceeding, including another agency employee. The net effect of such a provision could be to stifle agency employees from candidly communicating among themselves concerning ideas which, although not completely developed, would eventually evolve into a course of action which would be in the public interest. Here again more precise definition or clarification could narrow the problem area.

Implementation of certain provisions of the bill would be costly. The requirement that transcripts of all meetings be kept and made available to the public would necessitate hiring reporters to produce an enormous volume of material which would have to be filed and preserved. Whether this cost is justified at this time is, of course, a matter of congressional judgment.

PUBLIC NOTICE

Another provision of the bill would require that there be public notice of meetings a week in advance, unless it is determined by a majority vote that it is necessary to hold a meeting at an earlier date. In such a case, notice must be given at the earliest practicable opportunity. The intent of the bill to open the deliberative processes of the Federal Government to more public view and increased participation, of course, has our support. But, S. 260 as now drafted could hamper the exercise of our emergency powers, which, by their very nature, require quick action to protect the public interest. Commission action pursuant to its emergency powers does not require an adjudicatory type proceeding; therefore, the open meeting provision could apply. Examples of actions executed pursuant to

our emergency powers include the issuance of rail car service orders and emergency temporary motor carrier operating licenses. I wish to emphasize the emergency nature of these actions and that delays could have disastrous effects in providing fuel, food, clothing, housing, etc., to those who need it immediately. At this time I would like to submit for the record some representative orders that show emergency actions taken by us over the last several years.

Senator CHILES. Without objection, so ordered.[1]

[The documents referred to follow:]

INTERSTATE COMMERCE COMMISSION,
Washington, D.C.

REROUTING TRAFFIC

I.C.C. ORDER NO. 97 UNDER REVISED SERVICE ORDER NO. 994

To all railroads

In the opinion of R. D. Pfahler, Agent, the Chicago, Rock Island and Pacific Railroad Company is unable to transport traffic to or from connections or to or from shippers located at Keokuk, Iowa, because of flooding.

It is ordered, That:

(a) The Chicago, Rock Island and Pacific Railroad Company being unable to transport traffic to or from connections or to or from shippers located at Keokuk, Iowa, because of flooding, that carrier and its connections are hereby authorized to reroute or divert such traffic via any available route to expedite the movement. The billing covering all such cars rerouted shall carry a reference to this order as authority for the rerouting.

(b) *Concurrence of receiving roads to be obtained.* The railroad desiring to divert or reroute traffic under this order shall receive the concurrence of other railroads to which such traffic is to be diverted or rerouted, before the rerouting or diversion is ordered.

(c) *Notification to shippers.* Each carrier rerouting cars in accordance with this order shall notify each shipper at the time each car is rerouted or diverted and shall furnish to such shipper the new routing provided under this order.

(d) Inasmuch as the diversion or rerouting of traffic is deemed to be due to carrier disability, the rates applicable to traffic diverted or rerouted by said Agent shall be the rates which were applicable at the time of shipment on the shipments as originally routed.

(e) In executing the directions of the Commission and of such Agent provided for in this order, the common carriers involved shall proceed even though no contracts, agreements, or arrangements now exist between them with reference to the divisions of the rates of transportation applicable to said traffic. Divisions shall be, during the time this order remains in force, those voluntarily agreed upon by and between said carriers; or upon failure of the carriers to so agree, said divisions shall be those hereafter fixed by the Commission in accordance with pertinent authority conferred upon it by the Interstate Commerce Act.

(f) *Effective date.* This order shall become effective at 10:00 a.m., May 14, 1973.

(g) *Expiration date.* This order shall expire at 11:59 p.m., May 26, 1973, unless otherwise modified, changed, or supsended.

It is further ordered, That this order shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that it be filed with the Director, Office of the Federal Register.

Issued at Washington, D.C., May 14, 1973.

R. D. PFAHLER,
Agent

[1] Additional examples retained in subcommittee files.

TITLE 49—TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 1033—Car Service

Revised Service Order No. 1171—Regulations for Return of Hopper Cars

At a Session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 3rd day of June 1974.

It appearing, That an acute shortage of hopper cars exists in certain sections of the country; that shippers are being deprived of hopper cars required for loading coal, resulting in an emergency, forcing curtailment of their operaitons, and thus creating great economic loss and reduced employment of their personnel; that coal stockpiles of several utility companies are being depleted; that hopper cars, after being unloaded, are being appropriated and being retained in services for which they have not been designated by the car owners; that present regulations and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of hopper cars are ineffective. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1171 Regulations for return of hopper cars

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) Exclude from all loading and return to owner empty, either via the reverse of the service route or direct, as agreed to by the owner, all hopper cars owned by the following railroads:

Illinois Central Gulf Railroad Company—Reporting marks: GM&O, IC, ICG.
St. Louis-San Francisco Railway Company [1]—Reporting marks: SLSF.
Southern Railway System [1]—Reporting marks: CG, INT, NS, SOU.

(2) Carriers named in paragraph (1) above are prohibited from loading all hopper cars foreign to their lines and must return such cars to the owner, either via the reverse of the service route or direct, as agreed to by the owner.

(b) For the purpose of improving car utilization and the efficiency of railroad operations, or alleviating inequities or hardships, modifications may be authorized by the Chief Transportation Officer of the car owner, or by R. D. Pfahler, Director, Bureau of Operations, Interstate Commerce Commission. Modifications authorized by the car owner must be confirmed in writing to W. H. Van Slyke, Chairman, Car Service Division, Association of American Railroads, Washington, D.C., for submission to, and approval by, R. D. Pfahler.

(c) No common carrier by railroad subject to the Interstate Commerce Act shall accept from shipper any loaded hopper car, described in this order, contrary to the provisions of the order.

(d) The term hopper cars, as used in this order, means all freight cars assigned one of the mechanical designations described in the section "Class 'H'—Hopper Car type," under the heading "General Service Freight Equipment" published on pages 1119 to 1121, inclusive, of the Official Railway Equipment Register, ICC RER No. 391, issued by W. J. Trezise, or successive issues thereof, including cars bearing mechanical designations modified in the manner described in Notes 1, 2 or 3 of that section, and listed elsewhere in that tariff under the name of a railroad named in paragraph (1) of section (a).

(e) *Application.* The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(f) *Effective date.* This order shall become effective at 12:01 a.m., June 10, 1974.

[1] Addition.

(g) *Expiration date.* The provisions of this order shall expire at 11:59 p.m., October 31, 1974, unless otherwise modified, changed or suspended by order of this Commission.

(Secs. 1, 12, 15 and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15 and 17(2). Interprets or applies Secs. 1(10–17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10–17), 15(4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

ROBERT L. OSWALD,
Secretary.

TITLE 49—TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 1033—Car Service

Service Order No. 1178—Distribution of Covered Hopper Cars

At a Session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 15th day of March, 1974.

It appearing, That an acute shortage of covered hopper cars for transporting shipments of fertilizer exists in the state of Florida; that the railroads serving the fertilizer producing areas of that state are unable to furnish additional system cars for the movement of this traffic; that entire areas of the country are unable to receive adequate supplies of this fertilizer because of these shortages of freight cars; that the United States Department of Agriculture has certified that there is an immediate need for increased shipments of fertilizer into these areas in order to maximize the production of feed grains and other agricultural crops; that a substantial portion of this fertilizer will be routed via, or terminate on the lines named herein; that existing regulations and practices with respect to the use, supply, control and distribution of freight cars are insufficient to secure an adequate supply of covered hopper cars for shipments of fertilizer from Florida origins; that it is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1178 Distribution of Covered Hopper Cars

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(b) *Assignment of cars to fertilizer traffic.* The carriers named herein shall each withdraw from grain service and forward to the Seaboard Coast Line Railroad Company (SCL) prior to April 1, 1974, one hundred (100) covered hopper cars listed in the Official Railway Equipment Register RER No. 390, issued by W. J. Trezise, as bearing reporting marks assigned to it, having mechanical designation "LO", and having cubic capacity not greater than 4,000 cubic feet and weight carrying capacity not less than 140,000 pounds.

Burlington Northern System, comprising cars of: Burlington Northern Inc., The Colorado and Southern Railway Company, and Fort Worth and Denver Railway Company.

Chessie System, comprising cars of: The Baltimore and Ohio Railroad Company and The Chesapeake and Ohio Railroad Company.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Chicago and North Western Transportation Company.

Chicago, Rock Island and Pacific Railroad Company.

Louisville and Nashville Railroad Company.

Missouri Pacific System, comprising cars of: Chicago & Eastern Illinois Railroad Company, Missouri-Illinois Railroad Company, Missouri Pacific Railroad Company, and The Texas and Pacific Railway Company.

Norfolk and Western Railway Company.

Penn Central Transportation Company, George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees.

St. Louis-San Francisco Railway Company.

Such cars may be used by the SCL only for transporting shipments of fertilizer originating in Florida and routed via the lines of the car owner.

(c) *Delivery of empty cars.* Empty covered hoppers described in paragraph (a) herein, maybe sent by the car owner to the SCL at any junction. Cars owned by railroads which do not have a direct connection with the SCL shall be sent to the SCL via the Louisville and Nashville Railroad Company without charge to either the car owner or the SCL. Cars owned by the Penn Central Transportation Company (PC) which are located east of Pittsburgh, Pennsylvania, may be forwarded to the SCL via the Richmond, Fredericksburg and Potomac Railroad Company without charge to either the PC or the SCL or may be delivered to the SCL direct at Norfolk, Virginia.

(d) *Reports required.* Each car owner named in paragraph (a) herein, shall report to R. D. Pfahler, Director, Bureau of Operations, Interstate Commerce Commission, Washington, D.C., 20423 the initial and number of each covered hopper furnished to the SCL for fertilizer service, and the date forwarded to the SCL. The SCL shall report to Director Pfahler the initial, number and date received of each covered hopper received by it under the requirements of this order. No additional reports are required for cars previously reported and returned to the SCL for additional empty movements.

(e) *Retention of cars in service.* Empty covered hoppers sent by the owner to the SCL as required herein shall be returned empty to the SCL via reverse of loaded route for subsequent shipments of fertilizer originating at origins in Florida, until their removal is authorized by this Commission or until this order expires or is vacated. Cars which must be removed from active service because of mechanical defects must be replaced by the car owner in the manner provided in paragraph (c) for delivery of cars to the SCL. The car owner must notify both this Commission and the transportation officer of the SCL the initial and number of the car removed because of mechanical defects and the initial and number of the replacement car, together with the dates of removal and replacement.

(f) *Rules and regulations suspended.* The operation of all tariff provisions and of all other rules and regulations, insofar as they conflict with the provisions of this order, is hereby suspended.

(g) *Application.* The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(h) *Effective date.* This order shall become effective at 11:599 p.m., March 18, 1974.

(i) *Expiration date.* The provisions of this order shall expire at 11:59 p.m., May 31, 1974, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15 and 17(2). Interprets or applies Secs. 1(10–17) 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10–17), 15(4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

ROBERT L. OSWALD,
Secretary.

TITLE 49—TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Part 1033—Car Service

Service Order No. 1185—Minimum Loading of Refrigerator Cars

At a Session of the Interstate Commerce Commission, Railroad Service Board held in Washington, D.C. on the sixth day of June 1974.

It appearing, That an acute shortage of mechanical refrigerator cars exists in the primary fruit and vegetable growing and shipping areas of the country; that shippers of these and other products requiring protection from heat or cold are being deprived of adequate supplies of such cars, creating great economic loss; that mechanical refrigerator cars are not being used to their full capacities; that present rules, regulations, and practices with respect to the loading and use of such mechanical refrigerator cars are ineffective; that it is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commissioin finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1185 Minimum Loading of Refrigerator Cars

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service.

(1) Application

(i) The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(ii) This order shall apply to all mechanical refrigerator cars listed in the Official Railway Equipment Register, I.C.C. R.E.R. No. 391 issued by W. J. Trezise, or reissues thereof as having mechanical designation "RP", "RPB" "RPL", "RPM" or "RLO."

(2) Minimum Loading Requirements

Mechanical refrigerator cars must be:

(i) Loaded to the marked weight carrying capacity of the car, or;

(ii) Loaded throughout its entire length, including the doorway area to at least eighty percent (80%) of its inside height as measured from the floor to the roof at the side wall of the car, whichever is the lesser.

(iii) *General Exception.* Exceptions to this order may be authorized to carriers by R. D. Pfahler, Chairman, Railroad Service Board, Interstate Commerce Commission, Washington, D.C. 20423, upon receipt of written or telegraphic request from the car owner. All such requests must state the origin, destination, commodity, and full route of the proposed traffic and the reason for the requested exception.

(b) *Acceptance from shipper prohibited.* No common carrier by railroad subject to the Interstate Commerce Act shall accept from shipper any loaded car for shipment that is contrary to items (i), (ii), or (iii) of Section (a), Paragraph (2).

(c) *Rules and Regulations Suspended.* The operation of tariffs or other rules and regulations, insofar as they conflict with the provisions of this order, is hereby suspended.

(d) *Effective date.* This order shall become effective at 12:01 a.m., June 10, 1974.

(e) *Expiration date.* This order shall expire at 11:59 p.m., July 15, 1974, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10–17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10–17), 15(4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement, under the

terms of that agreement; and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

ROBERT L. OSWALD,
Secretary.

Mr. STAFFORD. We believe this provision would preclude the expeditious action by our standing boards or the formation of ad hoc committees to formulate or to implement any emergency action which we might wish or be required to take under existing law in the public interest. We feel that this bill will, in fact, have a negative effect upon provisions such as section 1 (15)-(17) of the Interstate Commerce Act (49 U.S.C. 1 (15)-(17)) which give us emergency powers responsive to the dynamic nature of the transportation industry.

EX PARTE COMMUNICATIONS

Section 202 of title II amends section 557 of title 5 of the United States Code to prohibit ex parte communications in agency proceedings. As pointed out earlier, the use of the term "interested person" in this section would prohibit communication among Commission staff on pending business. Additionally, the requirement in new section 577(b)(3) is vague because any agency member, administrative law judge, or employee who is, or who may be involved in a particular proceeding or receives an ex parte communication must place it in the public record.

Aside from these problems, enactment of this legislation is largely unnecessary insofar as the activities of this Commission are concerned. We believe that our present procedures with respect to hearings, public notice, transcripts and ex parte communications, coupled with the provisions of the Freedom of Information Act and availability of judicial review of Commission safeguard the public interest and give the public ample opportunity to be informed and participate in Commission proceedings.

The Commission's mandate is to act in the public interest in transportation matters. In order to carry out this mandate, we exert every effort to keep the public informed of our activities. Hearings are open to the public. Notice is served on interested parties in advance of the hearing date. Transcripts of hearings are maintained for public inspection at the Commission. A docket of all the material submitted for consideration by the Commission is maintained in a public file room. Encouragement is given to the public to participate in our proceedings to assist in developing a complete record so as to allow us to reach a decision in the public interest.

The provisions relating to ex parte communications are largely duplicative of regulations already in force. A copy of the portion of the Commission's rules of practice relating to ex parte communications which we believe are more precise than those contained in section 202 of the bill is hereby submitted for the record.

Senator CHILES. Without objection, so ordered.

[The document referred to follows:]

Appendix C—Ex Parte Communications

1. *Ex parte communications.* (a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating in the decision in such proceeding shall invite or knowingly entertian any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

2. The prohibition of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to the decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether in public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to knew may advance or adversely affect the interest of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communications shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which he is interested.

(3) Any communication by means of any news medium which in the ordinary course of business of the publisher is intended to inform course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of the Commission, members of an employee review board appointed pursuant to Public Law 87-247 (1961) to whom the proceeding may be referred for decision, employees of the Commission Bureau (e.g., Operating Rights, Finance, Rates and Practices) whose responsibilities correspond to the nature of the proceeding, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, employee of the Commission, or member of a joint board, participating in the decision who personally receives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a written summary of the substance of an oral communication promptly to the Chairman of the Commission together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself. If the Chairman concludes that the communication is prohibited, or that the dictates of fairness require that it be made public, he shall instruct the Secretary to place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under all of the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully makes or solicits the making of a prohibited communication.

7. The Commission may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violates the foregoing prohibitions or requirements.

GOALS OF LEGISLATION

Mr. STAFFORD. In conclusion, I would like to emphasize the Commission's support for the goals of this legislation; namely, of keeping the public informed of governmental activity and of assuring the protection of the public interest and their participation in all government actions. In performing our functions, we have sought and will continue to seek to achieve those same goals within the framework of existing laws and procedures. For instance, we maintain a 24-hour telephone service in which recorded announcements provide information on scheduled hearings and agency actions of special significance. In the area of household goods transportation, we have prepared easy-to-read publications which are required to be provided to the shipper advising him of his rights. We also provide a postage-paid questionnaire by which the shipper can report his views on the manner in which regulated carriers meet their obligations to move household goods. These are just a few examples of what we have been doing under existing law to keep the public informed and obtain their views on needed improvements in our ongoing efforts to protect the public interest.

The Commission's mandate is to resolve matters arising under our jurisdiction in the public interest. In making these determinations we must balance a number of conflicting considerations. This balancing is the essence of all government activities. The benefits of each proposed course of action must be weighed against its detriments. Enactment of the bill should produce some benefits to the public. However, there is no doubt that a tremendous price will have to be paid in terms of cost of implementation, diminution of the free exchange of ideas within agencies, and delays in rendering governmental decisions. Whether the possible benefits outweight this cost, is a matter of policy which must be determined by the Congress.

Thank you for the opportunity of testifying on this legislation. I will be happy to answer any questions which you may have. Thank you very much.

Senator CHILES. Thank you very much for your statement, Mr. Stafford. I really want to hold my questions until we finish our panel. I am interested in your comments, though, that you are in favor of the general goal or purpose of this bill.

Mr. STAFFORD. We believe as much as possible in line with good management to see that anybody and everybody is aware of everything we are doing. And many of our cases—for instance, cases that come before our Commission, conferences, these are all subject to review in the courts. We make an effort to see that as much as possible is there.

SUNSHINE LEGISLATION IN FLORIDA

Senator CHILES. I appreciate that. We have legislation like this in Florida and we have been operating under it for a number of

years now in the State of Florida. It is interesting. It took some 6 years to pass that legislation. In that 6 years I never found anybody that was ever against the legislation. They were always for the goals but there was always something else that needed to be done on this, or this would handicap us. I was one of those people that started off against the legislation. Being in the legislature I didn't feel we could operate with all of our meetings, conferences, completely open. I felt it would handicap us. But I was educated as that went along after having operated in the legislature in secrecy, and operating the other way in openness, and watching State government, where there are some similar regulatory things other than national defense. Most of your other policies are sort of similar in State government. We have commerce commissions and we have others. Seeing the benefits of having the public be able to view what goes on in those meetings has convinced me of the necessity for this kind of legislation.

POLL OF PUBLIC OFFICIALS

Yes, we will pay a cost for it, but I wonder about the cost we are paying today, when the polls show that 70 percent of the people in this country feel that the public officials and other people of government are more interested in themselves and special interests than they are in the people. That is the price that we are paying today for operating a closed society and operating closed meetings and I think that is one of the things that we have got to try to change.

Mr. Stafford, we have some questions to be submitted in writing.

[The material follows:]

ANSWERS TO QUESTIONS SUBMITTED IN WRITING

You have asked for an estimate of the portion of this agency's "activities" which "involve hearings open to the public."

The broad range of activities of this agency, under the numerous statutory authorities and directives governing such activities, makes answering this question quite difficult—at least on the quantification basis of your question. The full gamut of our activities, the methods employed in carrying them out, and complete statistical studies of them required by Section 21 of the Interstate Commerce Act, 49 U.S.C. 21. The most recent such report, our 87th, was submitted to Congress on December 31, 1973. I commend it to your Subcommittee for a complete picture of our activities in addition to the succinct answer to the major thrust of your question in this letter.

As our last annual report shows, the basic activities of this Commission for fiscal year 1973 can be statistically quantified as follows:

8,831 formal cases, principally involving rates, operating rights, and finance proceedings.

13,953 informal cases, acted on under public observation but without the need for oral hearing.

300 challenges in the federal court system.

329,215 tariffs requiring agency review, with an average of 3,850 pages of tariff material received each working day.

972 examinations of accounting systems of regulated carriers.

268 service orders designed to reduce shortages and build-ups of railroad freight cars and attain more equitable distribution of the Nation's car fleet.

569 prosecutions of violators of the Interstate Commerce Act or Commission orders.

12 appearances before Congressional Committees.

2,221 hearing days before some 70 administrative law judges assigned to the Commission.

As the foregoing indicates, the bulk of our activity lies in decision of cases—a total of 22,784 in 1973. All, whether formal in the sense of requiring oral hearing prior to disposition, or informal in the sense that the case can be decided upon the pleadings of the parties and without resort to oral hearing, are decided upon a public record. Actual notice (service on interested parties) or constructive notice (Federal Register Publication), or both, is given in each such case, and frequently a press release is also issued. In addition, the news media, trade publications, such as "Traffic World," and various "watching services" widely and expeditiously disseminate our notices of the institution or pendency of cases to the public.

To the extent that our other activities listed above, such as tariff review, service orders, etc., lead to the necessity to make decisions, they may become formal or informal cases. Only in those limited instances where Congress has given this Commission authority to act in an emergency, without notice or hearing, such as in section 1(15), (16) and 210a of the Act (49 U.S.C. 1(15), (16) and 210a), would an initial decision of the Commission, by specific statutory authority, be made without notice and hearing. Of course, in those limited instances, procedures are available, both before the Commission and the courts, for the public to be heard on any asserted adverse effects of such initial emergency actions, and in this respect these, too, are open to the public.

It is for the foregoing reasons that I stated the proposed open hearing requirements are "largely unnecessary" as applied to this Commission. Our criticism of the proposed legislation, as I stated, runs narrowly to its adverse effects upon the collegial decision-making process by which this Commission acts ultimately on the approximately 23,000 matters coming before it each year. I am deeply concerned that the requirement of the bill, as presently framed would seriously jeopardize our ability to keep current with the huge volume of matters requiring our action and adversely affect the quality of our disposition of such matters.

You have also asked for my opinion as to whether "certain communications from persons outside the agency should be exempt from the prohibition against ex parte communications," or whether I would merely "exempt communications from other employees of the deciding agency."

In my view, the latter course seems preferable.

Senator CHILES. Mr. Garrett, we are delighted to hear from you.

Mr. GARRETT. Thank you.

Senator CHILES. As I say, if we can paraphrase our statements where we have them completely for the record I think we can just promote our discussion. Your prepared statement will be inserted in the record at the end of your remarks.

Mr. GARRETT. I have done a little of that. I will try to do more as I go along.

Mr. Chairman, I appreciate this opportunity to present the views of the Securities and Exchange Commission concerning committee print No. 3 of S. 260, the so-called Government in the Sunshine Act.

As you know, a primary task of our agency is to insure appropriate disclosure by those persons to whom the public has entrusted its capital. Accordingly, we are sympathetic to the stated objective of this bill; that is, to require appropriate disclosure by those persons to whom the public has entrusted its Government. Nevertheless, for reasons I will explain, we believe that the enactment of this bill—specifically, the provisions of title II—would very seriously, and needlessly, interfere with the effective operation of our agency.

Section 201 of title II provides generally that "all meetings" of collegial agencies of the Government, or any subdivision thereof authorized to take action on behalf of the agency, "shall be open to the public" and that complete verbatim transcripts of all meetings

be made and preserved. While the bill grants a rather limited and cumbersome exemption for certain enumerated matters, since many matters we consider could, if prematurely published in the press, have serious effects on our securities markets, the bill would require our Commission to consider rather frequently whether to open the discussion of various matters to the public or to disclose the transcripts of various discussions; and would require the agency formally to adopt an explanation for each matter the agency decides it may, and should, withhold.

The procedures proposed in this legislation would tend to destroy the flexibility which is the essence of the administrative process; impede effective communication among Commission members and between the Commission and its staff, resulting in less well-considered judgments; cause wholly unjustifiable administrative delays; and create a cloud of uncertainty over agency rules and orders otherwise valid, if the agency should err in determining that a particular meeting may be closed.

We fail to see any substantial public benefit that would result from the enactment of this bill. As Professor Gellhorn has noted in his letter of July 18, 1973, to you, Mr. Chairman, not "every conversation behind closed doors is a threat to public safety and good morals * * *"

CLOSED MEETINGS CREATES SUSPICION

Senator CHILES. It sure isn't and I just want to comment on one thing there. I served on the Agriculture Committee for 2 years before I got moved to the Appropriations Committee and every markup session of that committee was closed and I often wondered to myself, what in the world are we doing with that door closed? We never did anything in that committee that I thought was contrary to the public's interest. But I think when we closed that door, the idea was—there was the suspicion of what we were doing in there—and so I agree very much with what the professor says and I agree very much that most public officials, be they elected or otherwise, are going to try to do the right thing. But I think again the suspicion that we place around it when we close everything is the price that we are paying.

Mr. GARRETT. Well, I understand, Senator.

It seems to us that S. 260 may rest upon certain assumptions concerning what agencies do and how they do it, that are not accurate, at least as applied to us. Section 201 of the bill applies only to an agency of the Government which "consists of two or more members." This may rest upon the assumption that multimember agencies in the executive branch, or those constituted as independent agencies, are closely analogous to the committees of Congress, since the procedures specified in the bill for committees of the Congress are largely carried over to section 201. While we do have some quasi-legislative functions, however, most of what we do is quite different.

The bill may also implicitly assume that multiheaded agencies are entirely different, and have entirely different functions, from single-member agencies. This is simply not so. For example, the Commission's enforcement responsibilities are essentially the same

as those performed by the Attorney General, an Assistant Attorney General or a U.S. attorney, particularly where the question is whether or not a case should be brought in court. And regulatory functions similar to those performed by the Commission are also performed by single-member agencies. National banks, for example, are regulated by the comptroller of the currency, who has much the same powers as any other regulatory agency.

The bill, however, would have no application to these single-member agencies notwithstanding the fact that their decisions will often be reached by much the same processes as those of the Commission—the head of the agency will sit down with his deputies, associates and staff and they will have the same type of discussion among themselves as the members of the Commission have. Yet, there is no thought that the bill should be applicable to them.

ADMINISTRATIVE RESPONSIBILITIES

In order to clarify why we feel so strongly that this proposed legislation should not be adopted, let me emphasize what our agency does and how we do it. The Securities and Exchange Commission is entrusted with broad administrative, regulatory and enforcement responsibilities under the six statutes that comprise the Federal securities laws. To fulfill these responsibilities, the Commission will sometimes meet formally, perhaps to hear the presentation of oral arguments in a quasi-judicial administrative proceeding, or to hear testimony and question witnesses in a quasi-legislative investigative or rulemaking proceeding. Meetings of these types are normally public, and a verbatim transcript is usually made and preserved. Accordingly, if matters of this kind comprised substantially all of our work, S. 260 would have little adverse effect upon our activities.

COMMISSION MEETINGS

But, the overwhelming majority of Commission meetings are of a far less formal nature. They are held at least 3 days a week—sometimes 4 or 5—lasting for many hours at a time—often requiring both morning and afternoon sessions. Sometimes they are planned in advance; others are held on very short notice when circumstances require it. At these meetings, the Commission consults directly with its staff and decides a broad range of administrative, regulatory, and enforcement questions.

In the course of a typical week, the Commission will almost certainly be required to consider whether to suspend trading in the securities of a dozen or more corporations for a 10-day period; whether to grant authority to its staff to issue subpenas to investigate apparent violations of law on the part of both individuals and corporate or other business entities; whether, based upon the results of completed investigations, to institute lawsuits or administrative proceedings or refer matters to the Attorney General for criminal prosecution; whether to accept offers of settlement in pending proceedings and actions or to appeal adverse decisions in court actions we have lost; and whether to particpate as amicus curiae in private actions brought to enforce duties imposed by the Federal securities laws.

SUSPENSIONS

During the Commission's fiscal year 1973, the Commission suspended trading in the securities of 1974 companies; primarily to alert the public to the lack of adequate, accurate and current information about those issuers. During that same year, a total of 472 investigations were opened; 178 injunctive actions were brought; at least 198 administrative proceedings were instituted; and 49 potential criminal cases were referred to the Department of Justice.

REGULATORY REVIEW

In addition to enforcement and related matters, the Commission in a typical week considers a wide variety of regulatory questions concerning, for example, the necessity for new or amended Commission rules prohibiting fraudulent activities or regulating the conduct of national securities exchanges, broker-dealers, investment companies or investment advisers. Or the Commission may have an occasion to review the adequacy of rules that the exchanges or the National Association of Securities Dealers have adopted pursuant to their statutory self-regulatory responsibilities. Often the Commission is given information concerning entities we regulate which, if disclosed before the facts are generally made public, could have an adverse impact on our securities markets.

Interpretative questions are constantly presented concerning even so basic a question as what constitutes a security. And the Commission must consider diverse applications for rules or orders seeking exemptions from various statutory provisions, which the Commission is directed to permit when found to be consistent with statutory aims. This enumeration is by no means exhaustive. There are numerous other matters that we frequently must consider. In this connection, the Federal securities acts make over 300 separate provisions for adjudicatory or rulemaking proceedings of one sort or another for which the Commission must take responsibility.

Finally, the members of the Commission may simply sit down together informally to discuss a problem or matter for the purpose of exploring it, determining whether the Commission should or should not address itself to the matter and, if it should, how. This might include, for example, whether a staff study or inquiry on a particular matter should be made, whether a rule should be drafted and considered, whether a policy statement should be made, or even whether a Commissioner should mention the matter in a speech. We assume that such discussions would not constitute a meeting within the meaning of the bill, but that is not entirely clear since the term "meeting" is nowhere defined.

The exemptive provisions contained in committee print No. 3 of S. 260 reflect an attempt to recognize that enforcement-related matters may be sufficiently sensitive so as to warrant their nondisclosure. But the attempt falls far short of the mark.

ENFORCEMENT

For one thing, the specific exemptive provision—section 201(b)(3)—involves enforcement matters pertaining only to individuals,

and excludes corporate, or other business, entities, equally entitled to protection from premature disclosure of charges that could prove erroneous. Moreover, it is not apparent that, under this bill, the Commission could consider the suspension of trading in a security in a nonpublic meeting, although there might be strong market reaction with possibly harmful effects upon investors if it were publicly known that the Commission was considering suspension before a suspension should in fact be ordered. Indeed, there is a risk that persons sitting in on our meetings might attempt to utilize market sensitive information for their own securities transactions.

In addition, the ability of the Commission to rely upon an exemption as to even the limited matters within the purview of section 201(b)(3) is severely handicapped by the requirement that we first obtain, in writing and in advance of closing any meeting to the public, an opinion from the Attorney General's Office of Legal Counsel that it is appropriate to keep the meeting closed. All the while, important matters affecting the public might have to be held up.

JUDICIAL REVIEW

And, under the judicial review provisions of S. 260, if the Commission thinks it necessary to act nonpublicly as to a matter that a court later concludes should have been open, there is a substantial risk that important determinations might be nullified, even though not the slightest hint of impropriety is suggested in connection with our judgment. For this reason also, where the statute is not clear, the Commission would normally have to assume that the exemption from public procedures will not apply, resulting in an unfortunate slowdown of our work in those areas.

In this context, I might add, the traditional presumption of regularity for agency actions would be overturned by the bill, and the burden of proof put on the Government to sustain its determination to close a meeting.

One of the major basic deficiencies of this bill, is that the exemptive provisions focus solely upon protection of interests outside the Government, and reflect no appreciation of the need to protect the integrity of the governmental process itself. The great advantage that is gained through the creation of independent regulatory agencies is that they can successfully deal with important public issues informally and by use of flexible procedures. This bill, if enacted, would go a long way toward nullifying those advantages.

Perhaps our agency is fortunate in that our five members have a great respect for each other's judgment. The present Commission works as a team, and each of us is normally aware of the types of considerations the others deem most important on numerous types of issues. This, in many instances, permits a half-dozen words to take the place of a thousand in our internal communications. Were our discussions required to be public, Commission members necessarily would be required to speak for the "record"—for the benefit of the public audience—rather than for the persuasive impact that stronger or more succinct words might have upon their colleagues. Moreover, were the Commission's discussions public, there

would be many situations where it would be most difficult to spell out in our discussions certain pertinent arguments because they are premised on facts that might have adverse effects upon the securities markets if those facts were publicly disclosed at that time. In addition, since the bill requires an advance announcement of the subjects to be discussed at its meetings, lobbying pressures upon members of the Commission and its staff would be encouraged.

MEMORANDA

Of course, the Commission receives written memoranda from its staff on nearly all matters that the Commission considers, and we do not understand this bill to compel disclosure of those memoranda. But, it is our Commission's practice to discuss many matters thoroughly with those staff members concerned before attempting to reach a consensus. With some frequency, matters that seem relatively simple to resolve on the basis of written memoranda are shown to have subtle complexities when they are discussed. Our agency has capable staff members who do not hesitate to urge further consideration when they believe that my fellow Commissioners and I do not fully understand a problem, and let us know when they believe we are wrong. As conscientious as these staff members are, however, and as willing as they may be in private to point out the error of our ways, I doubt that very many staff members would wish to make members of the Commission look foolish in a public forum. And, we might not appreciate it if they did. This would leave much unsaid, which might well be the difference in many situations between a good decision on our part, and a bad one.

It may be difficult to explain to those not familiar with the way a commission like ours functions that internal debate and argument are a necessary way of life. Yet, if this proposal is enacted, the press would make principal use of the ability to attend our meetings. Not familiar with our proceedures, and sometimes anxious to make "news," internal disputes and arguments likely would be played up and exaggerated, with the concomitant result that staff and Commission differences of view would be intensified, and dissension and competition between our staff units would be engendered. Such a result, in our view, would be deleterious to the public and investors.

These are the types of considerations which protect memoranda written by the staff from public disclosure under the Freedom of Information Act. As the members of the committee no doubt are aware, the fifth exemption from the disclosure requirements of the Freedom of Information Act protects interagency and intra-agency memoranda and letters for that reason.

MISINTERPRETATION

At the very least, both Commissioners and staff members will be more circumscribed in what they say, and how they say it, if their words are available for public scrutiny, not because of any self-interest or neglect of duties, but merely because of the possibility

of misinterpretation, including possible misinterpretation by the press. In our meetings as they are now conducted, one may feel free to take a position for the sake of argument; to explore various possibilities, however unlikely some might seem; or to exaggerate to make a point.

Public attendance at these meetings would deter any such argumentative techniques for fear of being misunderstood. To the contrary, in place of the rapid give and take among experts who need not articulate fundamentals among themselves, we would likely see drawn-out articulation of the most rudimentary matters merely to assure that the speaker would be fully understood by his audience and by those who might read quotations from the discussion. We do not believe that the public interest would be served by substituting so much hot air for what is now effective governmental operation. On the other hand, fear of misinterpretation might lead to fewer meetings and more informal conversations.

Accordingly, I strongly urge that this bill not be enacted. If Congress believes that consideration of certain types of matters should in all respects be public, I suggest that legislation carefully limit these matters and spell them out with specificity.

Thank you.

OPEN COMMITTEE MEETINGS

Senator CHILES. Thank you for the statement, Mr. Garrett. I wish you could have been present in this very room when we made the motion to open up the meetings of the Government Operations Committee. You would have heard most of the arguments and maybe some more that you made here today, that if you open up those meetings, there is no way that you are going to have a free and full and frank discussion. Everyone is going to have to grandstand for the press. Everyone is going to be open for lobbying pressure and the lobbyists will sit like hawks on the rail looking at everything you do. Each of those arguments was made, and sincerely so, by members of the committee that felt that that was going to—that would be the case.

The motion prevailed and the meetings were opened up and the Government Operations Committee has operated during this session of the Congress completely in the open. We handled the impoundment legislation. We handled the new Budget Committee legislation. We handled the energy legislation having to do with energy research of $20 billion, plus all of the other emergency legislation, and I don't think you will find today any member on that committee that feels that he was not able to speak his piece, that he was pressured by the lobbyists who sat on the rail.

We handled Consumer Protection Agency legislation. All of that went through the committee. All of those fears that were there, and legitimately so, as again the fears that I saw raised in Florida by the same kind of committees, just don't seem to materialize and the press comes to the meetings, perhaps understands a little bit better what we are doing. The press was operating on leaks before and the only problem about leaks is the leakor always makes sure that the leak is the most favorable to his light and I venture to say there are some leaks from the Commission process and again

those can be slanted. Where once you have the press there and they are educated, because they have to learn a little bit more about your procedure, then I think their reporting can be more proper.

I would like to get into this discussion a little further as we get our testimony here. Again I just want to say that I have read all the statements. Your prepared statement, Mr. Garrett, will be inserted in the record at this point.

[Prepared statement and responses to questions submitted in writing follow:]

PREPARED STATEMENT OF RAY GARRETT, JR., CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION

Mr. Chairman, Members of the Committee:

I appreciate this opportunity to present the views of the Securities and Exchange Commisssion concerning Committee Print Number 3 of S. 260, the so-called "Government in the Sunshine Act."

As you know, a primary task of our agency is to insure appropriate disclosure by those persons to whom the public has entrusted its capital. Accordingly, we are sympathetic to the stated objective of this bill—that is, to require appropriate disclosure by those persons to whom the public has entrusted its government. Nevertheless, for reasons I will explain, we believe that the enactment of this bill—specifically, the provisions of Title II—would very seriously, and needlessly, interfere with the effective operation of our agency.

Section 201 of Title II provides generally that "all meetings" of collegial agencies of the government, or any subdivision thereof authorized to take action on behalf of the agency, "shall be open to the public" and that complete verbatim transcripts of all meetings be made and preserved. While the bill grants a rather limited and cumbersome exemption for certain enumerated matters, since many matters we consider could, if prematurely published in the press, have serious effects on our securities markets, the bill would require our Commission to consider rather frequently whether to open the discussion of various matters to the public or to disclose the transcripts of various discussions; and would require the agency formally to adopt an explanation for each matter the agency decides it may, and should, withhold.

The procedures proposed in this legislation would, contrary to the public interest, and in a manner detrimental to the interest of investors, tend to destroy the flexibility which is the essence of the administrative process; impede effective communication among Commission members and between the Commission and its staff, resulting in less well-considered judgments; cause wholly unjustifiable administrative delays; and create a cloud of uncertainty over agency rules and orders otherwise valid, if the agency should err in determining that a particular meeting may be closed.

We fail to see any substantial public benefit that would result from the enactment of this bill. As Professor Gelhorn has noted in his letter of July 18, 1973, to Senator Chiles, not "every conversation behind closed doors is a threat to public safety and good morals. . . . [T]he risk of inhibiting discussion outweights the risk of improper discussion."

In this connection, I should emphasize that we are proud of our agency and of the work that we do and have done; we are not reluctant to have our judgments reviewed by the court or our conduct reviewed by the Congress. And, where no substantial adverse effect upon our work is likely to result, we do not hesitate to invite the public to observe the Commission at work. But, we think that there are relatively few categories of matters that are considered or discussed at the meetings of our agency that should not require that discussion, for one reason or another, to be exempt from disclosure.

It seems to us that S. 260 may rest upon certain assumptions concerning what agencies do and how they do it that are not correct. Section 201 of the bill applies only to an agency of the government which "consists of two or more members." This may rest upon the assumption that multi-member agencies in the Executive Branch, or constituted as an independent agency, are closely analogous to the committees of Congress, since the procedures specified in

the bill for committees of the Congress are largely carried over to Section 201. While we do have some quasi-legislative functions, however, most of what we do is quite different.

The bill may also implicitly assume that multi-headed agencies are entirely different, and have entirely different functions, from single-member agencies. This is simply not so, as I will point out shortly. For example, the Commission's enforcement responsibilities are essentially the same as those performed by the Attorney General, an Assistant Attorney General or a United States Attorney, particularly where the question is whether or not a case should be brought in court. And regulartory functions similar to those performed by the Commisssion are also performed by single-member agencies. National banks, for example, are regulated by the Comptroller of the Currency, who has much the same powers as any other regulatory agency.

The bill, however, would have no application to these single-member agencies notwithstanding the fact that their decisions will often be reached by much the same processes as those of the Commission—the head of the agency will sit down with his deputies, associates and staff and they will have the same type of discussion among themselves as the members of the Commission have. Yet, there is no thought that the bill should be applicable to them. It is hardly conceivable that the President, or the Secretary of the Treasury could not discuss something with members of their staff except in a public meeting.

In order to clarify why we feel so strongly that this proposed legislation should not be adopted, let me emphasize what our agency does and how we do it. The Securities and Exchange Commission is entrusted with broad administrative, regulatory and enforcement responsibilities under the Six statutes that comprise the federal securities laws.[1] To fulfill these responsibilities, the Commission will sometimes meet formally, perhaps to hear the presentation of oral arguments in a quasi-judicial administrative proceeding, or to hear testimony and question witnesses in a quasi-legislative investigative proceeding. Meetings of these types are normally public, and a verbatim transcript is usually made and preserved. Accordingly, if matters of this kind comprised substantially all of our work, S. 260 would have little adverse impact upon our activities.

But, the overwhelming majority of Commission meetings are of a far less formal nature. They are held at least three days a week—sometimes four or five—lasting for many hours at a time—often requiring both morning and afternoon sessions. Sometimes they are planned in advance, others are held on very short notice when circumstances require it. At these meetings, the Commission consults directly with its staff and decides a broad range of administrative, regulatory and enforcement questions.

In the course of a typical week, the Commission will almost certainly be required to consider whether to suspend trading in the securities of a dozen or more corporations for a ten-day period;[2] whether to grant authority to its staff to issue subpoenas to investigate apparent violations of law on the part of both individuals and corporate or other business entities;[3] whether, based upon the results of completed investigations, to institute lawsuits[4] or administrative proceedings[5] or refer matters to the Attorney General for criminal prosecution;[6] whether to accept offers of settlement in pending proceedings and actions or to appeal adverse decisions in court actions we have lost; and whether to participate as *amicus curiae* in private actions brought to enforce duties imposed by the Federal securities laws.

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[1] The Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. In addition the Commission functions as an advisor to the court in reorganization proceedings under Chapter X of the Bankruptcy Act.

[2] See Sections 15(c)(5) and 19(a)(4) of the Securities Exchange Act.

[3] See, *e.g.*, Section 19(b) of the Securities Act, Section 21(b) of the Securities Exchange Act and Section 42(b) of the Investment Company Act.

[4] See, *e.g.*, Section 20(b) of the Securities Act, Section 21(e) of the Securities Exchange Act and Section 42(e) of the Investment Company Act.

[5] See, *e.g.*, Sections 8 (b) and (d) of the Securities Act (refusal or suspension of effectiveness of registration statement), Section 15(b)(5) of the Securities Exchange Act (proceedings against broker-dealers) and Section 8(e) of the Investment Company Act (proceedings against investment companies).

[6] See, *e.g.*, Section 20(b) of the Securities Act, Section 21(e) of the Securities Exchange Act, and Section 42(e) of the Investmnt Company Act.

During the Commission's fiscal year 1973, the Commission suspended trading in the securities of 174 companies—primarily to alert the public to the lack of adequate, accurate and current information about those issuers.[7] During that same year, a total of 472 investigations were opened; 178 injunctive actions were brought; at least 198 administrative proceedings were instituted; and 49 potential criminal cases were referred to the Department of Justice.

In addition to enforcement and related matters, the Commission in a typical week considers a wide variety of regulatory questions concerning, for example, the necesssity for new or amended Commission rules prohibiting fraudulent activities or regulating the conduct of national securities exchanges, broker-dealers, investment companies or investment advisers. Or the Commission may have an occasion to review the adequacy of rules that the exchanges or the National Association of Securities Dealers have adopted pursuant to their statutory self-regulatory responsibilities. Often the Commission is given information concerning entities we regulate which, if disclosed before the facts are generally made public, could have an adverse impact on our securities markets.

Interpretative questions are constantly presented concerning even so basic a question as what constitutes a security. And the Commission must consider diverse applications for rules or orders seeking exemptions from various statutory provisions, which the Commission is directed to permit when found to be consistent with statutory aims. This enumeration is by no means exhaustive. There are numerous other matters that we frequently must consider. In this connection, the federal securities acts make over 300 separate provisions for adjudicatory or rulemaking proceedings of one sort or another for which the Commission must take responsibility.[8]

Finally, the members of the Commission may simply sit down together informally to discuss a problem or matter for the purpose of exploring it, determining whether the Commission should or should not address itself to the matter and, if it should, how. This might include, for example, whether a staff study or inquiry on a particular matter should be made, whether a rule should be drafted and considered, whether a policy statement should be made, or even whether a Commissioner should mention the matter in a speech. We assume that such discussions would not constitute a "meeting" within the meaning of the bill, but that is not entirely clear since the term "meeting" is nowhere defined.

The exemptive provisions contained in Committee Print 3 of S. 260 reflect an attempt to recognize that enforcement-related matters may be sufficiently sensitive so as to warrant their nondisclosure. Unfortunately, this attempt fails short of the mark.

For one thing, the specific exemptive provision—Section 201(b)(3)—involves enforcement matters pertaining only to *individuals*, and excludes corporate, or other business, entities, equally entitled to protection from premature disclosure of changes that could prove erroneous. Moreover, it is not apparent that, under this bill, the Commission could consider the suspension of trading in a security in a non-public meeting, although there might be strong market reaction with possibly harmful effects upon investors if it were publicly known that the Commission was considering suspension before a suspension should in fact be ordered. Indeed, there is a risk that persons sitting in on our meetings might attempt to utilize market sensitive information for their own securities transactions.

In addition, the ability of the Commission to rely upon an exemption as to even the limited matters within the purview of Section 201(B)(3) is severely handicapped by the requirement that we first obtain, in writing and in advance of closing any meeting to the public, an opinion from the Attorney General's Office of Legal Counsel that it is appropriate to keep the meeting closed. All the while, important matters affecting the public might have to grind to a halt.

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[7] Because the Commission may suspend trading for only ten days at a time, the Commission usually must reconsider each suspension on a number of occasions until appropriate information is available in the marketplace.

[8] These were set forth in the Commission's response in 1957 to the Executive and Legislative Reorganization Subcommittee of the House Government Operations Committee. See 11D *Survey of Study of Administrative Procedure and Practice in the Federal Agencies*, 85th Cong., 1st Sess. (1957), pp. 1906–1933. While there have been some statutory changes since then, this is a reasonably complete catalog of the types of the Commission's formal determinations.

And, under the judicial-review provisions of S. 260, if the Commission thinks it necessary to act non-publicly as to a matter that a court later concludes should have been open, there is a substantial risk that important determinations might be nullified, even though not the slightest hint of impropriety is suggested in connection with our judgment. For this reason also, where the statute is not clear, the Commission would normally have to assume that the exemption from public procedures will not apply, resulting in an unfortunate slow-down of our work in those areas.

In this context, I might add, the traditional presumption of regularity for agency actions would be overturned by the bill, and the burden of proof put on the government to sustain its determination to close a meeting. This will encourage frivolous suits by persons who might not even be affected by our action, since *any* person desirous of hamstringing otherwise lawful agency action can sue under this provision and require the agency to meet its "burden" of proof, while agency rules and orders might be stayed pending the result.

One of the major basic deficiencies of this bill, is that the exemptive provisions focus solely upon protection of interests outside the government, and reflect no appreciation of the need to protect the integrity of the governmental process itself. The great advantage that is gained through the creation of independent regulatory agencies is that they can successfully deal with important public issues informally and by use of flexible procedures. This bill, if enacted, would go a long way toward nullifying those advantages, since it would compel public disclosure of all legal and policy discussions, effectively preventing a full and frank exchange of opinions among the Commissioners and with the staff, unless, quite fortuitously, the subject of a particular discussion has been exempted from disclosure.

Perhaps our agency is fortunate in that our five members have a great respect for each other's judgment. The present Commission works as a team, and each of us is normally aware of the types of considerations the others deem most important on numerous types of issues. This, in many instances, permits a half-dozen words to take the place of a thousand in our internal communications. Were our discussions required to be public, Commission members necessarily would be required to speak for the "record"—for the benefit of the public audience—rather than for the persuasive impact that stronger or more succinct words might have upon their colleagues. Moreover, were the Commission's discussions public, there would be many situations where it would be most difficult to spell out in our discussions certain pertinent arguments because they are premised on facts that might have adverse effects upon the securities markets if those facts were publicly disclosed at that time. In addition, since the bill requires an advance announcement of the subjects to be discussed at its meetings, lobbying pressures upon members of the Commission and its staff would be encouraged.

Of course, the Commission receives written memoranda from its staff on nearly all matters that the Commission considers, and we do not understand this bill to compel disclosure of those memoranda. But, it is our Commission's practice to discuss many matters thoroughly with those staff members concerned before attempting to reach a consensus. With some frequency, matters that seem relatively simple to resolve on the basis of written memoranda are shown to have subtle complexities when they are discussed. Our agency has capable staff members who do not hesitate to urge further consideration when they believe that my fellow Commissioners and I do not fully understand a problem, and let us know when they believe we are wrong. As conscientious as these staff members are, however, and as willing as they may be in private to point out the error of our ways, I doubt that very many staff members would wish to make members of the Commission look foolish in a public forum. And, we might not appreciate it if they did. This would leave much unsaid, which might well be the difference in many situations between a good decision on our part, and a bad one.

It may be difficult to explain to those not familiar with the way a commission like ours functions that internal debate and argument are a necessary way of life. Yet, if this proposal is enacted, the press would make principal use of the ability to attend our meeetings. Not familiar with our procedures, and anxious to make "news," internal disputes and arguments likely would be played up and exaggerated, with the concomitant result that staff and Commission differences of view would be intensified, and dissension and com-

petition between our staff units would be engendered. Such a result, in our view, would be deleterious to the public and investors.

These are the types of considerations which protect memoranda written by the staff from public disclosure under the Freedom of Information Act. As the members of the Committee no doubt are aware, the fifth exemption from the disclosure requirements of the Freedom of Information Act protects inter-agency and intra-agency memoranda and letters.[9] The legislative history of this provision is unambiguous that Congress intended to assure that the free-flow of ideas would be preserved in written documents that discuss policy matters; and it was recognized that necessary candor would not long survive within government if memoranda containing policy discussions were publicly disclosed. As the Court of Appeals for the District of Columbia Circuit aptly observed in discussing this exemption:

"In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal." [10]

At the very least, both Commissioners and staff members will be more circumscribed in what they say, and how they say it, if their words are available for public scrutiny, not because of any self-interest or neglect of duties, but merely because of the possibility of misinterpretation, including possible misinterpretation by the press. In our meetings as they are now conducted, one may feel free to take a position for the sake of argument; to explore various possibilities, however unlikely some might seem; or to exaggerate to make a point.

Public attendance at these meetings would deter any such argumentative techniques for fear of being misunderstood. To the contrary, in place of the rapid give and take among experts who need not articulate fundamentals among themselves, we would likely see drawn-out articulation of the most rudimentary matters merely to assure that the speaker would be fully understood by his audience and by those who might read quotations from the discussion. We do not believe that the public interest would be served by substituting so much hot air for what is now effective governmenttal operation. On the other hand, fear of misinterpretation might lead to fewer meetings and more informal conversations.

Accordingly, I strongly urge that this bill not be enacted. If Congress believes that consideration of certain types of matters should in all respects be public, I suggest that legislation carefully limit these matters and spell them out with specificity.

QUESTIONS SUBMITTED IN WRITING TO RAY GARRETT AND THE RESPONSES RECEIVED FOR THE RECORD

Question No. 1. S. 260 provides that courts, "having due regard for orderly administration and the public interest," may set aside agency action taken at an agency meeting improperly closed to the public. Why do you believe that the courts would exercise this authority to nullify "important determinations. . . . even though not the slightest hint of impropriety is suggested in connection with our judgment"?

What alternative sanctions for non-compliance with the open meeting requirement would you prefer? Would a short "statute of limitations" on suits challenging closed agency proceedings alleviate your concern?

Question No. 2. One of your objections to the narrowness of the exceptions to the open meeting rule was the use of the word "individual" in section 201(c)(3).

If that word were changed to "person" as defined in the bill, would that remove some of your problems with that section?

What other specific exemptions would you suggest to deal with the asserted problem of sensitive market information involved in Commission decisions?

Question No. 3. Why isn't the court's power to award the costs of litigation to either party in a suit challenging closed agency proceedings an adequate deterrent to frivolous suits?

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[9] 5 U.S.C. 552(b)(5).
[10] *Ackerly* v. *Ley*, 420 F.2d 1336, 1341 (C.A. D.C., 1969).

Question No. 4. Your testimony does not deal with the provisions of the bill dealing with exparte communications. Could you please comment on these provisions and the manner in which they would affect (if at all) the Commission's current regulations on ex parte communications?

The questions posed apparently are designed to elicit our suggestions for modifications in S. 260 to make it less cumbersome than it presently appears to us to be. Before responding to each of your questions, two preliminary points seem wosth discussing.

First, we wish to reiterate our general opposition to S. 260. Although we support the concept underlying the proposal of S. 260, we think the bill is cumbersome, will be productive of less efficiency and dispatch in the vital work of this agency, and, on the whole, will prove counterproductive. These points are set forth in some detail in our testimony, and need not be repeated here. For this reason, we do not believe S. 260 can or should be modified; we believe the bill is fatally defective and strongly urge that it not be approved.

Second, and perhaps most important, we believe that S. 260 fails to reflect the special characteristics that distinguish the work of this Commission not only from the work of the Congress but from the work of other agencies as well. We recognize that there is a natural inclination to view with some skepticism claims by government agencies that they should not be compelled to conduct their deliberations in public. But this Commission does have unique functions (involving market-sensitive information) which warrant special consideration by this Committee in deciding whether or not to approve S. 260. While the second question you pose asks about market-sensitive matters, this is so important a matter, I believe it should be discussed at the outset.

One of the basic mandates of this Commission is "to insure the maintenance of fair and honest markets . . ." for transactions in securities.[1] The integrity, fairness and honesty of the securities markets will be compromised if some market participants unfairly have access to information material to investment decisions, while other market participants lack the same, or comparable, access to such information.[2] The type of information to which I refer can relate either to the intrinsic merits of a particular company and be information generated within the company (often referred to as "inside" corporate information) or can be information relating to the *markets* for the stock of a company or class of companies (often referred to as "market" information).

In its daily work, the Commission makes numerous decisions, and engages in numerous discussions, which generate, or could generate, material information, which should not selectively or prematurely be made available to persons outside this agency. For example, the Commission each week will discuss, at its meetings, important regulatory matters, such as (1) whether to permit its staff to *commence* an investigation which might, or might not, ultimately lead to the institution of an enforcement action; (2) trading suspensions for securities, usually where the issuer of those securities has failed to make complete and timely reports of the results of its operations; (3) requests by corporate issuers and others for informal advice concerning the possible application of the federal securities laws to their proposed conduct; and, (4) regulatory reports on the financial status of certain brokerage firms or the operations of self-regulatory agencies (the national securities exchanges and the National Association of Securities Dealers, Inc.).

Often, the information available is preliminary in nature. If our meetings were open to the public when matters of this nature are discussed, adverse effects on the integrity and honesty of the marketplace would follow. Thus, in the case of staff requests to commence an investigation, or for trading suspensions, or requests for informal interpretative advice, public observers at our meetings could attempt to use that information to their personal advantage.

For example, if the staff were to request authorization to commence an investigation into ABC Company, a company whose shares are publicly-held, the discussion at the Commission table would certainly elicit information, perhaps unfounded and certainly incomplete, about the activities of ABC Company and the fact that an enforcement action might, at some time in the future, be brought. Sophisticated investors attending that meeting might sell short the securities to the company.

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[1] *See* Section 2 of the Securities Exchange Act of 1934, 15 U.S.C. 78b.

[2] *See, e.g., Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.,* 401 F. 2d 833 (C.A. 2, 1968) *(en banc), certiorari denied,* 394 U.S. 976 (1969).

Similarly, XYZ Company, considering whether to enter into a certain transaction, might request informal advice from this Commission concerning the possible application of the federal securities laws. In discussing this request with the staff, the Commission might elicit material, nonpublic information which sophisticated investors might be able to use in deciding whether to buy or sell securities.

Even more troublesome, atempts to uncover *potential* financial or operational trouble spots in brokerage firms or other regulated entities, as part of our mandate to maintain continued surveillance over the marketplace for securities and the participants in it, might result in premature disclosure of "suspected," but unconfirmed (and, perhaps, what ultimately might prove to be ill-founded) information. Premature disclosure of this information could erode investor confidence in our securities markets and securities professionals.

Naturally, where the Commission concludes that serious financial or operational difficulties in fact do exist, we then take prompt, effective and, generally, *public*, steps to alert investors of their rights and to correct any violations of the law.

We believe S. 260 fails adequately to take into account this concept of "market-sensitive" information and that, as a result, the bill could have consequences never intended, and certainly not desired, by its sponsors and supporters.

In the event the Committee is not disposed to reject S. 260, as we have urged, we respectfully suggest that, at a minimum, the following provision be added to S. 260 to deal with our concern about market-sensitive information:

> Add to Section 201, a new subparagraph "(k)," to follow existing paragraph "(j)," as follows:
>
> "(k) The requirements and provisions of this section shall not apply to the meetings of any agency where information likely to be discussed at such meetings, if prematurely disclosed, might, in the view of the agency involved, have an adverse effect on the markets in which securities are traded or on the professional participants in and self-regulators of the securities markets."

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With this background in mind, set forth below are this Commission's responses to the questions you have posed.

Your first question states:

> S. 260 provides that courts, "having due regard for orderly administration and the public interest," may set aside agency action taken at an agency meeting improperly closed to the public. Why do you believe that the courts would exercise this authority to nullify "important determinations . . . even though not the slightest hint of impropriety is suggested in connection with our judgment"?
>
> What alternative sanctions for non-compliance with the open meeting requirement would you prefer? Would a short "statute of limitations" on suits challenging closed agency proceedings alleviate your concern?

The bill would permit courts to set aside agency action for reasons wholly unrelated to the merits of that action. While we hope that, under such a provision, the courts would show restraint, the fact that the authority exists will invite its exercise, particularly since courts may not be sufficiently sensitive to the importance of a specific agency decision or the consequence of setting it aside. Even an occasional error of judgment could have significant effects adverse to the interests of public investors or the integrity of the securities markets; and the damage could be substantial, even if the decision were later reversed on appeal.

The question of alternative sanctions presents us with a Hobson's choice. Because the Commission strongly opposes this bill, we do not, of course, support any sanction for noncompliance. But, if some sanction is to be provided, perhaps the least inappropriate would be an injunction against further violations by persons within an agency who have consistently failed to obey the Act's requirements. I think it should be made clear that this should be imposed rarely, and only when there appears to have been willful, deliberate noncompliance and no possible public-interest justification. Persons who persist in violating in the light of such an injunction could be held in contempt.

Should there be any sanction permitting a court under any circumstances to set aside agency action, the shorter the statute of limitations, the better.

Your second question states:

> One of your objections to the narrowness of the exceptions to the open meeting rule was the use of the word "individual" in section 201(c)(3).

If that word were changed to "person" as defined in the bill, would that remove some of your problems with that section?

What other specific exemptions would you suggest to deal with the asserted problem of sensitive market information involved in Commission decisions?

If the word "person," as now defined in the bill, were substituted for the word "individual" in Section 201(c)(3), this would tend to alleviate some aspects of the problem I referred to in my testimony relating to the protection of business entities, as well as of individuals, from premature disclosure of charges that could prove erroneous.

This change would not, however, make clear that matters relating to the commencement of investigations or trading suspensions or other market-sensitive information were encompassed within the scope of the exemptions from this bill. To prevent problems with these matters, we urge, at a minimum, that the Committee adopt the language suggested above, at page four.

Your third question states:

Why isn't the court's power to award the costs of litigation to either party in a suit challenging closed agency proceedings an adequate deterrent to frivolous suits?

This would, of course, have some deterrent effect on frivolous suits; but, even in a normal civil suit, a court is empowered to award costs to the successful party and yet frivolous suits still continue to be brought. The fact that lawyers' fees could be awarded might help, but probably only to a limited degree. Frivolous suits are often brought *pro se*, by a plaintiff who has no idea what the law is really about. Wholly apart from the fact that such a plaintiff is normally confident of winning, he might not be aware of his potential liability for costs and, accordingly, would not be deterred. Moreover, possible liability for costs would presumably have no effect on a plaintiff who is judgment-proof and represents himself in the action.

Your fourth and last question states:

Your testimony does not deal with the provisions of the bill dealing with ex parte communications. Could you please comment on these provisions and the manner in which they would affect (if at all) the Commission's current regulations on ex parte communications?

With respect to ex parte communications between persons outside the Commission and the Commission's decisional employees, the Commission has regulations for on-the-record proceedings,[3] which, in some respects, are more comprehensive than those the bill would require.

One important conflict between these provisions and the Commission's regulations is that the Commission makes allowance for a number of exceptions where it is felt that the ex parte communication does no harm. These exceptions generally allow such communications:

(1) where the "Commission member or decisional employee is authorized by law to dispose of [the matter] on an ex parte basis";

(2) where the communication is a "request for information solely with respect to the status of a proceeding";

(3) where the communication "is authorized by statute or Commission rule, or [is one] which all the participants to the proceeding agree, or which the Commission or hearing officer formally rules, may be made on an ex parte basis";

(4) where an oral communication is "made openly or on the record at a scheduled hearing session in a particular proceeding, regardless of whether all the participants are present";

(5) where the communication is "of facts or contentions which have general significance for an industry subject to regulation and the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive or procedural issue in a pending proceeding."[4]

There are also two other exceptions which would clearly fit under this Act. I think you will agree that these five exclusions are reasonable in that they are clearly not the types of communications sought to be regulated. Yet, with the possible exceptions of (4) and (5), I do not understand them to be exempted by the provisions of this bill. There should be some provision in the bill for allowing exceptions along these lines.

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[3] 17 CFR 200.110–200.114.
[4] 17 CFR 200.111(g).

The Commission's ex parte rules were adopted in 1963 in response to a recommendation of the Administrative Conference of the United States, which was the predecessor of the present Administrative Conference. The Conference recommendation did not deal with ex parte communications between an agency and its staff. These are generally dealt with by the separation-of-functions requirements of the Administrative Procedure Act, now codified as 5 U.S.C. 554(d).

The greatest dangers from ex parte communications would normally be in the area covered by our rules. Members of the staff have no direct or indirect financial interest in the outcome of administrative proceedings, unlike outsiders who might be seeking an exemption or attempting to avoid sanctions. Accordingly, the general requirement of due process and the provisions of the Administrative Procedure Act that prevent a decisional employee from consulting any person or party on a fact in issue in an ex parte manner, that prevent a deciding employee from being subject to the supervision or direction of staff members engaged in the performance of investigative or prosecuting functions for the agency, and that prevent the latter from participating or advising in a decision [5] seem to us to provide ample protection.

In this connection we emphasize that our proceedings are not necessarily prosecutory in character, as, for example, applications for exemptions from otherwise applicable statutory requirements. Sometimes, even in cases of an accusatory nature, there are no substantial issues of fact turning upon the credibility of witnesses. Accordingly, without violating due process, the Commission in many instances, and particularly in rulemaking, should be permitted to draw upon the diverse experience and expert qualifications of members of its staff without conforming to essentially arbitrary ex parte requirements, since there would be no violation of due process.

In this regard, when we originally examined Committee Print No. 3, we thought that it had remedied a serious difficulty of the bill as originally introduced—its applicability to informal rulemaking proceedings of an agency, which involve no prosecutory or adjudicatory element whatsoever. Closer examination of Committee Print No. 3, however, leads us to conclude that it might be argued that even informal rulemaking might still be subject to the Act's provisions, since "on-the-record agency proceeding" is defined to include "any proceedings . . . where the agency action is required by law . . . to be based . . . on public comments."

Even as to formal rulemaking, it should be noted that the Congress that enacted the Administrative Procedure Act defined the term "rule" to include a "prescription for the future . . . of corporate or financial structures . . .," as well as certain other matters that had normally been considered to be adjudications, in order to prevent the application of separation of functions to certain proceedings under some of the statutes this Commission administers where the Commission had pointed out that these procedures would serve no useful function but would cause extensive delay.[6]

The present bill would create numerous other problems by reason of the Commission's diverse responsibilities.

Even when it is a decisionmaker in a particular proceeding, the Commission may be faced with various administrative and regulatory problems which involve the same legal, policy or factual considerations as those involved in the proceeding. For example, the very facts that give rise to a proceeding may suggest the necessity for a rule which should be promptly adopted in order to protect investors, even though the administrative proceeding is still in progress.

Moreover, there are sometimes situations where it is necessary for the staff to consult with the Commission on the very subject of a matter pending before the Commission to which the staff is a party, as where the staff proposes that the Commission recommend the institution of criminal proceedings by the Department of Justice, or where the continuation of practices that are the subject of an administrative proceeding requires the Commission to seek immediate injunctive relief in the courts. Similarly, where a party seeks to settle an admin-

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[5] 5 U.S.C. 554(d).

[6] *Compare* Section 2(c) of the draft Administrative Procedure Act contained in the Appendix to Senate Report No. 752 of the Committee on the Judiciary on S. 7, 79th Cong., 1st Sess. (1945) p. 32, *with* Section 2(c) of that Act as adopted, now codified at 5 U.S.C. 551(4); and *see* Appendix to Comments of the Securities and Exchange Commission, dated July 25, 1945, on Specific Provisions of S. 7, Revised Text, Committee Print, May —, 1945, submitted to the Senate and House Committees on the Judiciary, pp. 11–15.

istrative proceeding, the Commission acts partly in its prosecutory function and should be able to consult ex parte with the staff members who are conducting the proceeding.

The foregoing examples illustrate why restrictions should not be imposed upon those communications between an agency and its staff which do not violate fundamental principles of fairness and thus are entirely consistent with due process.

Senator CHILES. Next, we will call on Mr. Henry Geller, the former general counsel of the Federal Communications Commission.

Mr. GELLER. I will testify in my capacity as an individual. I don't think, for example, that the FCC would agree with what I shall say here, because I do support the basic principles of the bill.

My reason for this support is, however, based upon FCC experience; that experience may be peculiar, and I will get to it in a moment.

I think open processes are now rather unique. Only the Consumer Product Safety Commission to my knowledge engages in them to a great extent. I believe that they would make a sound contribution. They would lead to a better informed public and greater public confidence in the agency, as you mentioned, Mr. Chairman.

PUBLIC'S BUSINESS

I think it is a sound principle that the public's business ought generally to be conducted in the public's view. The arguments against the open proceeding have been made here this morning. You have summarized them on the basis of experience with the open markup situations—that the open proceeding will lead to grandstanding; that the presence of industry representatives will inhibit compromise and negotiation that is the basis for resolving a lot of these complex matters; and that all this will result in delay.

GRANDSTANDING

So far as grandstanding is concerned, I think there probably will be some increase in the beginning. It seems to me the FCC Commissioners engaged in greater posturing when they were in a meeting with the public or with a large number of staff people present than when they were just in the Chairman's office with a very few people. But I think that as the open nature is accepted, grandstanding will diminish.

Right now there is an inordinate delay, at least in the FCC's resolution of pending matters. It seems to me the open proceeding may help on this score, because FCC members will come to the meeting better prepared. They won't drift, sometimes aimlessly.

SURVEYS

Significantly, as you mentioned, Common Cause held surveys of what happened in the open markup sessions on the Hill, and those surveys indicate that there has been no impeding of legislative activity—that it has been beneficial.

The most serious objection is that openness will inhibit full and frank discussions between the agency members and the staff mem-

bers. I think that careful study is needed here. I can visualize, for example, a situation where the general counsel of the agency might want to argue that some course of action is very sound as a matter of policy but is kind of 50–50 a matter of law. And he may not want to talk frankly about this issue of the agency's jurisdiction because he may find that he is then haunted by it in court if the agency decides to act; that is, that his frank arguments come back to hurt him.

I think this could be handled by a memorandum to the Commission which isn't discussed openly but that is kind of an anomaly. Indeed, there is an anomaly here between the freedom of information law, which would not make the underlying staff memorandum available, and the open discussion that I think will have to be handled eventually by Congress. But overall I would agree with you that you gain more by having an open proceeding—that it leads to the public really being aware of what the agency has done. I believe it facilitates criticism and I think it will improve the quality of the agency work.

Again, I am impressed by the fact that the surveys of the open markup sessions indicate that it has not impeded full and frank discussion. Perhaps it should have somewhat but the surveys indicate that it has not.

The other argument is that the open proceeding will just be a sham, that the real business of an agency will be done somewhere else. As I read it, the law is not applicable now to meetings of two Commissioners. I don't think that there is anyway you can stop Commissioners discussing problems of the agency when they go to lunch or when they are on their way to inspect a facility or together for some other purpose. The fact that there can be these discussions, however, doesn't mean that the open proceeding won't still be very useful. It will reveal with all the members present and discussing their votes the actual process of decision. Again the experience has been that the open markup sessions have not been a sham, with the true business conducted elsewhere. In any event I don't see why the bill has to be 100-percent effective in opening the agency's decisional process. It is enough if it is a very significant step forward, and this bill obviously is that.

LEAKS

I said my views are based on FCC experience which may be peculiar: That is the leaks, which you, Mr. Chairman, mentioned earlier. The FCC is just a torrent of leaks. It will meet on some important matter in a nonpublic session, and then on Monday one can read in the trade press what happened, including the instructions to the staff to prepare the report.

I have given you examples in my statement.

There is one in today's New York Times. The children's television proceeding, a very important one, is reported in full there in a story that notes the number of pages of the staff document, the appendices, the reasoning of the Commission, the instruction. The whole thing is laid out.

Senator CHILES. Are the leaks always accurate?

Mr. GELLER. Yes. They are fairly accurate. The reporters for the trade journals are excellent and they don't accept bad leaks. They won't return to a faulty source. The leak stories are thus very good.

There are two types of leaks. One type is meant to "lock in" the Commission. You saw this in the pending *Alabama Educational TV* case. The Commission had voted to take away the licenses. I think that the leak was meant to lock in the Commission to that decision.

Sometimes the leaks are intended to stir the industry to greater efforts. The message leaked is: "Here is what the majority is going to do; for goodness sakes, get in there and fight."

I am stressing that there are leaks on virtually every proceeding.

Another example I gave is the recent newspapers–TV cross-ownership meeting where the chairman went to great lengths to instruct everybody that he wanted no leaks. Yet on the following Monday the meeting was accurately described in the trade journal. I think that is a very poor process. As I say, maybe it is peculiar to the FCC, not to the CAB, ICC or the others. But it is clear the industry representatives have immediate notification of what is going on at the FCC. The public can learn through the trade journals but it is sometimes a truncated version and that can be confusing to those that are not "in the know."

The Commission has tried to stem this torrent of leaks. The FCC chairman has at times called in the FBI. The first chairman I worked for, Wayne Coy, said that——

Senator CHILES. What was the basis for calling in the FBI?

Mr. GELLER. In order to find out where the leaks are. The FBI laughed and said that the Commission has a distribution process that goes among so many people that it would be impossible for the FBI to pinpoint the leaks. The FBI suggested that the FCC first revise its processes.

One chairman, Wayne Coy, said that if the leaks continued—this was in the late forties—he would vote to open all the proceedings. I think that was an excellent suggestion. It is long overdue. I would open them. As I say, the Commission has been operating in a quasi-open procedure here. It is kind of a poor and odd way to do it, but they are operating in the open through this system of leaks.

TRANSCRIPTS

I made several suggestions for revisions of the bill in my statement. I would let the agency exempt by rule all adjudacatory cases where there has been a field investigation of misconduct. I also question the need for transcripts. I understand its purpose is to maintain a record, but it seems to me that a lot of agency meetings don't warrant a transcript and that you will get a mountain of paper.

ADVANCED CONSENT

I also question the need for getting the advance consent of the Assistant Attorney General of the Office of Legal Counsel. Again, I can appreciate why. You want uniformity of decision. You want a check on arbitrary action. You want the Justice Department in on the "take-off" rather than just at the "crash" in the courts. But

it seems to me that while the agencies ought to be encouraged to consult with legal counsel on my close matter, they really should be trusted to make the routine judgments.

I also wouldn't use the device of a fine for wilfull violation of the law. If agency members are wilfully violating the law in this respect I don't think they can be trusted to make important policy decisions.

I am not sure that the agencies shouldn't be entrusted with more discretion in this field. The APA allows for exemptions where the agency need not issue a notice of proposed rulemaking or an initial decision where the agency finds on the record that the public interest clearly or compellingly requires a course of action. I don't know why you shouldn't trust the agency in this field also to make such a finding and state in on the record—instead of having just the five categories delineated in the bill.

EX PARTE PROVISIONS

Let me turn now briefly—I don't want to take up too much time—to the ex parte provisions. Again I fully support the principle of the bill. As I understand it, it is applicable to the on-the-record proceeding, one that has to be decided solely on the record. I take it from the legislative history of the bill that it is no longer applicable to the informal rulemaking proceeding where the agency has to give notice, must consider the comments filed by interested persons, but does not have to proceed solely on the record. I think that is a very wise way to proceed.

I reach this conclusion from the fact that a previous version did make the ex parte restriction applicable to proceedings where the agency must afford public notice and opportunity to participate; that language has now been eliminated.

Unlike in the open proceeding area, the FCC here has done an excellent job. It has very detailed ex parte regulations, tailored to the agency's process. I think that these rules fully protect the public interest. They go beyond the minimal requirements of the bill.

The law here is also well settled. I have cited in my statement case law establishing that the agency must proceed upon the basis of the record, where so required by statute, that where somebody goes beyond the record and makes an improper ex parte presentation, the *Root* and *KWAT* cases, establish that he is fortunate if he just loses the privilege he is seeking, since he has become a corrupter of the government. And there is a very important case, *Sangamon Valley*, in the FCC field. Incidentally, I am sorry we pioneered so much in this field. We got into so much trouble in the late fifties that we made a lot of law here. *Sangamon Valley* establishes the agency must follow its own regulations and regardless of the label, adjudication or rulemaking, the basic concepts of due process and fair play must be followed with respect to interested parties. They must proceed solely on the record where there are involved matters of conflicting private claims to a valuable privilege.

In short, the law is well established and therefore I don't know that there is any need for legislation of this nature. Maybe some of the other agencies are lagging in this area. If they are—as I say, I

am not an expert on that—what you might do is establish a general principle prohibiting the ex parte presentation in the proceeding which must be decided on the basis of the record and then requiring the agency to adopt rules to flesh out that requirement within 6 months, rules that will be tailored to its specific process. You might require the rules be coordinated with and receive the approval of the Chairman of the Administrative Conference. I think in that way you will be proceeding in a manner that fully protects the public interest, with assurance that the rules are tailored to the particular agency, and would avoid ambiguities in the detailed legislative approach that you use here. I have given you some examples of such ambiguities in my statement. For example, the definition of "interested person."

I believe that there is no need to resort to the district court in a proceeding on an ex parte controversy. You can get full review in the court of appeals. As I say, unfortunately, the FCC has established this in a series of cases, KWAT and WHDH—that is the Boston channel 5 proceeding—and so I would recommend the approach of review in the court of appeals.

I have no real quarrel with the main provisions, however, and certainly endorse the ex parte proscription generally.

Senator CHILES. Thank you, sir.

[Prepared statement and responses to questions submitted in writing follow:]

PREPARED STATEMENT OF HENRY GELLER

In response to your invitation of October 2, 1974, I submit these individual views on S. 260.[1] Because of my background as former General Counsel of the Federal Communications Commission, I shall focus on Title II of the bill—agency procedures. There are two main subjects—open proceedings and ex parte presentations.

OPEN PROCEEDINGS

I support the concept of open proceedings for the agencies, because it leads to a better informed public and greater public confidence concerning agency activities. It is a sound principle that the public's business should be done in plain view of the public. I can perhaps best state my position by discussing some of the claimed disadvantages of open proceedings:

Claim: *It will promote grandstanding.* Agency members often have constituencies, and with open sessions there will be a tendency to "play" to these groups, who will probably have representatives in attendance. Along the same lines, open proceedings will impede the process of negotiation and compromise that is so often necessary for final resolution. There will thus be undue delay.

Open meetings might well lead in the beginning to some grandstanding. I have found, for example, greater posturing at an agency meeting attended by many members of the staff than one held in the Chairman's office with only a few in attendance. But gradually the open nature would be accepted, and the grandstanding would diminish. As for delay, there is *now* inordinate delay. The open meeting might well shorten the process, because the agency members would be better prepared and less prone to drift aimlessly when confronted with a hard decision. The process of legitimate negotiation and compromise would still go forward. Significantly, the surveys by Common Cause of the experience of Congress with open mark-up sessions support the conclusion that open proceedings do not impede legislative activities and are beneficial.[2]

[1] The views thus are not filed on behalf of the Rand Corporation or any sponsoring organization. They are rather submitted as a technical witness who hopes to be of assistance to the Subcommittee on the general subject matter in the bill, because of his extensive background with administrative agencies.

[2] See Common Cause surveys of January 1974; May 22, 1974; April 1974.

Claim: *The open meeting will inhibit frank and full discussion between the agency members and the staff.*

Again, it is possible that some presentations will be inhibited by the open meeting. Suppose, for example, that the General Counsel thought that a particular course of action, while desirable policy, represented at best a 50/50 proposition as to lawfulness (i.e., coming within the agency's authority). He might be inhibited from frankly discussing the counter arguments to assertion of jurisdiction for fear of their being used against the agency in the event of an appeal from the agency's decision to assert jurisdiction. But in the event, such matters arise most infrequently and can be presented to the agency by memorandum. What is crucial is that the important issues be discussed openly. This will facilitate knowledge and criticism of what the agency has done, and will improve the quality of its work. Again, the surveys indicate that open mark-up sessions have had the same free and frank discussion as in previously closed sessions.

Claim: *The open meetings will be largely shams, with the real business of the agency done elsewhere.* The bill covers only meeetings of ". . . agencies or a subdivision thereof authorized to take action on behalf of the agency . . .", and this presumably does not include a meeting of two members at lunch, etc.

There is no way to preclude two members of the agency discussing agency problems at lunch or, for example, enroute to inspect some facility or to participate in some meeting. But this does not mean that the *open* agency meeting with all members presenting their views does not serve a useful purpose. It will cover and reveal to a large extent the actual process of decision. The experience with open mark-up Congressional sessions indicate that meetings did not become shams. In any event, the bill does not have to be 100% effective in opening decision making to the public. It is enough that it represents a very substantial step forward.

In the FCC's case, there is one further consideration militating for open FCC proceedings wherever appropriate—namely, the pervasive "leaks" that normally accompany Commission meetings on important matters. It is customary for the trade press to report the essence of the meeting, including instructions for preparation of the report. To give two recent examples, the FCC's non-public meetings on Docket No. 18110 (co-located cross-ownership of TV and newspaper) and Docket No. 19142 (children's TV programming) were reported in the trade press, with considerable detail as to the direction that the Commission was moving.[3] This obviously is poor process: Why should only the industry representatives know of tentative Commission decisions during the period before trade press publication? And even after such publication, why should the public be dependent on the truncated version set out in the trade journals, which might be confusing to those not "in the know"?

This pattern of "leaks" to the regulated industries and the trade press has persisted since the late forties when I first joined the FCC. Indeed, the Chairman at that time—Wayne Coy—became so distressed that he threatened to open the Commission proceedings; other Chairmen have called in the FBI in a vain attempt to halt the leaks. I think that the time to open the agency meeting, whenever appropriate, is long past due.

I have some suggestions as to details of the bill. First, I would permit the agency to exempt by rule all adjudicatory cases where there has been a field investigation of misconduct. It has been argued that the initiation of agency adjudication is like criminal grand jury proceedings and should be kept private in fairness to the party not yet charged with wrongdoing. I believe that such an exemption would be too broad—that many adjudicatory cases involve charges of failure to meet statutory or agency policies rather than "crime or misconduct". The bill does properly exempt the latter situation but it requires a vote each time. I suggest that it would be better procedure to allow the agency to exempt such situations by rule, and to list such meetings in the annual report to the Congress.

I am also dubious of the need for a transcript of the meetings. I recognize the purpose—to allow those not present to read the record. But it seems to me that most agency meetings do not warrant a transcript. There are hundreds of such meetings at each agency, so a large amount of paper will accumulate—at some considerable expense. It may be enough that the meetings are open.

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[3] See Broadcasting Magazine, Sept. 16, 1974, p. 22; Oct. 7, 1974, pp. 15–16; Television Digest, Sept. 16, 1974, p. 3; Oct. 7, 1974, pp. 1–2.

As to the closed meetings, I am somewhat puzzled by the provision requiring the release of those portions of the transcript not covered by the exemption. For, it was my understanding that only those portions coming within the exemption could be closed (Section 201(c)). Presumably, the agency would simply schedule discussion of the non-public portion or portions at an appropriate time.

I am also dubious about the requirement of obtaining the consent "in writing in advance . . . of the Assistant Attorney General Office of Legal Counsel", to close a meeting or portion thereof. I recognize the advantage of this approach—a check on arbitrary agency action; uniformity among the agencies; involving the Justice Department which will have to defend in any suit, at the "take-off" rather than the "crash". But it seems to me that while the agencies should of course be encouraged to consult with Legal Counsel on any close issues in view of the latter's broad expertise in this field, they should be trusted to make the routine judgment.

And finally, I doubt the wisdom of the process whereby the agency member can be fined for willful violation of the open session requirements. If agency members are willfully violating the law, the remedy should not be a small fine, but their prompt replacement. An agency member who is willfully not law abiding should not be trusted to make important policy judgments affecting the public interest.

EX PARTE PRESENTATIONS

The approach in the bill appears most sound. The ex parte presentation is forbidden as to the on-the-record proceeding. The informal rule making proceeding where interested persons may submit written comments which must be considered, would wisely not be included in the section's proscription.

Unlike the case of the open proceeding, the WCC's policies and procedures here are excellent. The Commisssion has adopted detailed ex parte rules.[4] These rules are tailored to the Commission's processes, and go well beyond the proscriptions of the bill. For example, they forbid ex parte presentations by interested persons in the case of a petition to deny an application, and specify that interested persons are not, directly or indirectly, to solicit ex parte status inquiries. The latter is aimed at ending the practice of soliciting Congressmen to inquire about the "status" of an application in a restricted proceeding.

The administrative and judicial case law is well established in this field. There are cases establishing the need to decide solely upon the record.[5] Other cases establish the principle in Section 557(b)(4) of the bill that ". . . from the moment [the applicant] ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, he becomes a corrupter of the Government itself and is fortunate if he loses no more than the rights he seeks to obtain."[6] And finally the agency's need to observe its own rules and follow basic concepts of fair play in *all* proceedings (adjudicatory or rule making) involving the "resolution of conflicting private claims to a valuable privilege" is established in *Sengamon Valley Television Corp.* v. *U.S.*[7]

Based on FCC experience, I believe that there is no need for the ex parte provisions of the bill. It is my understanding that several major agencies also have detailed ex parte rules. I am not, however, familiar with other agency practice. If it is believed desirable to have new legislation in the ex parte field because some agencies are lagging in this respect, my suggestion would be to adopt a general provision calling for protection of the integrity of on-the-record agency process, requiring the adoption by the agencies of detailed rules fleshing out the provision, and specifying that such rules must be coordinated with and approved by the Chairman of the Administrative Conference.

In this way, rules tailored to the particular agency could be formulated, with assurance that the public interest was fully protected.[8] It will also avoid

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[4] See 47 C.F.R. 1.1201–1.1251.

[5] E.G., Ohio *Bell Telephone Co.* v. *P.U.C.*, 301 U.S. 292 (304); *WKAT, Inc.* v. *FCC*, 296 F.2d 375 (D.C. Cir. 1961), certiorari denied, 368 U.S. 841.

[6] *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514, 541 (3rd Cor.); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238.

[7] 269 F.2d 221 (D.C. Cir. 1959).

[8] This is the procedure that was followed in the case of standards of ethical conduct for Government offices and employees. There was first a general Executive Order (May 15, 1965) setting forth the basic principles and requiring each agency to issue regulations, coordinated and approved by the Civil Service Commission. See, e.g., 47 C.F.R. 19.735–202 (FCC); 18 C.F.R. 3.735 (FPC); 14 C.R.R. 370.735 (CAB).

any ambiguities raised by a specific legislative approach. For example, the FCC rules define "interested persons" as "any person having a direct or indirect interest in the outcome of a restricted proceeding" and then proceeds to list some (i.e., parties to the proceeding; persons whom might be aggrieved or adversely affected by the outcome of the proceeding; or their agents such as attorneys or consulting lawyers).[9] The bill defines "interested persons" most broadly to include any person who communicates with an agency member or staff with respect to any on-the-record proceeding.[10] But this means that members of the public who often write to the agency Chairman or other agency members concerning restricted proceedings will have violated the law. There is no way to stop such letters, which are routinely handled by a screening process that cuts them off from decision-making persons and places them in a public file. I suggest that the FCC's manner of handling this problem is appropriate, and detailed legislation is unnecessary. Another example ambiguity is the last sentence of Section 557(c), which seems to raise the possibility of making the section's prohibitions applicable to communications with persons after the filing of *any* application, petition, or request; clearly, however, the prohibitions should apply only to the case of the on-the-record proceeding.

However, I do not mean to indicate that the bill is defective on the ex parte score. While some minor revisions may be appropriate, the bill's approach is sound and in accord with established law. Indeed, precisely because that is so, the question is whether it is needed.

Responses to Questions Submitted in Writing to Henry Geller

Question No. 1. How would you define a statutory exemption for the initiation of adjudicatory cases where there has been "a field investigation of misconduct"? What precisely is a "Field investigation of misconduct"?

Answer. I would permit the agency, by rule, to exempt the consideration of any adjudicatory case where the agency itself has investigated misconduct. This could be accomplished by a proviso to the sentence in Section 201(c) requiring a separate vote (e.g., ". . . provided further that the agency may, by rule, close to the public an agency meeting, or portion thereof, that considers an investigation conducted by the agency to determine where a crime or misconduct has occurred . . .").

The bill now exempts meetings which ". . . will tend to charge with crime or misconduct, or to disgrace any individual . . ." (201(c)(3)), upon the basis of a separate vote for each such meeting. This seems to me inefficient, as the agency will rarely, if ever, want to have an open meeting when it is considering and evaluating the raw investigation of misconduct—a process which is akin to the grand jury in the criminal area. I would therefore let the agency proceed by rule in this area, with a report made as to all these closed meetings (201(j)).

I would restrict this exemption to the case where the agency itself has made an investigation. Often the agency is confronted with public charges of misconduct in a petition to deny some application, with public refutation of these charges. Since all these charges and responses are public, I see no reason why generally the agency's consideration of the matter should not also be public; there is not involved any evaluation of raw, non-public investigation material gathered by the agency.

Question No. 2. Do you think that the definition of agency "meetings" to which the openness requirement applies should be further defined in the statute or left to the process of refinement through agency regulation and court decision?

Answer. The latter course would be a mistake, in my judgment. There is an obvious issue here: Does "meeting" include a conference between two agency members to discuss a pending matter or is it confined only to meetings of the agency where action can be taken? The agencies will undoubtedly opt for the latter construction, if it is left open, and eventually there will be litigation. There is no reason why the courts should be left adrift on this obvious and fundamental issue: It should be settled by the Congress.

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[9] 47 C.F.R. 1.1201(e).
[10] Section 201(a)(2).

The prior version of S. 260 made the open requirement applicable to ". . . all meetings . . . of such agencies at which official action is considered or discussed . . .". The present bill is even more ambiguous: ". . . all meetings . . . of such agencies or a subdivision thereof authorized to take action on behalf on the agency . . .". I would make the latter requirement for a subdivision the controlling criterion for all meetings—namely, a meeting authorized to take action. I recognize that one agency member could then confer with a colleague in his office prior to the "action" meetings—to compromise some issue, arrange strategy, etc. But as I said in my testimony, there is no way to preclude two members of the agency discussing problems at lunch or, for example, enroute to inspect some facility or to participate in some meeting. The *open* agency meeting where action can be taken will still serve a most useful purpose: With members presenting their views, it will cover and reveal to a large extent the actual process of decision. Finally, one must, and should be able to, rely on the good faith of agency members in this respect. Presidential appointees, confirmed by the Senate, should be responsible persons dedicated to carrying out the basic purpose of a Congressional enactment—not seeking to subvert that purpose.

Senator CHILES. Now we will hear from Mr. Whitney Gillilland, Vice Chairman of the Civil Aeronautics Board.

Mr. GILLILLAND. Mr. Chairman, I am accompanied by Mr. Thomas Heye, general counsel of the Civil Aeronautics Board, who may be a little closer, certainly is a little closer to the day-to-day operations of the Board's workload than I am, and perhaps when we come to questioning, he will be better equipped to respond to some of the questions than I.

The Board has a prepared statement which we are offering for the record.

Senator CHILES. We will certainly accept that for the record.

[The statement and responses to questions submitted in writing follow:]

PREPARED STATEMENT OF THE CIVIL AERONAUTICS BOARD

INTRODUCTION

This statement is submitted by the Civil Aeronautics Board in response to the Committee's request for the Board's views on S. 260, a bill "To provide that meetings of Government agencies and of Congressional committees shall be open to the public, and for other purposes."

S. 260 would, with certain specified exceptions, require that all meetings of Congressional committees and of government agencies and subdivisions thereof authorized to take action on behalf of the agency be open to the public. With respect to the provisions affecting Federal agencies such meetings could be closed to the public only if an agency determined by a majority of its entire membership that the matters to be discussed: (1) affected the national security or the conduct of foreign relations; (2) related solely to individual agency personnel or the internal management of the agency; (3) tended to charge an individual with crime or misconduct, except government officers or employees with respect to their official duties or employment; (4) would disclose the existence of information required to be kept secret in the essential interests of effective law enforcement; (5) related to the trade secrets of a person or (6) related to the conduct or disposition of certain adjudicatory proceedings required to be determined on the record after opportunity for a hearing. In addition, prior to the closing of a meeting to the public a written determination authorizing such action must be received by the agency from the Assistant Attorney General Office, of Legal Counsel. S. 260 would also require that advance public notice of all meetings be given and that transcripts of all meetings be made available for public inspection, except those portions relating to matters falling within the specified exceptions. Furthermore, the agency would be required to promulgate regulations to implement the provisions of the bill, with United States District Courts designated as the forums for

enforcement of these regulations, and if the court should determine that any agency member engaged in a willful violation of the regulations, each such member could be assessed a civil fine.

In addition, the bill would amend the Administrative Procedure Act (5 U.S.C. 551, *et. seq.*) so as to prohibit *ex parte* communications in connection with any "on-the-record" agency proceeding. Any person alleging a violation of the *ex parte* communication prohibition could bring suit in a United States District Court, with the court having the jurisdiction, among other things, to set aside any agency action taken in a proceeding with respect to which the violation occurred.

In the Board's view, the importance of openness in government decision-making is very great. On the other hand, as this statement discusses below, requiring that all but relatively limited categories of agency deliberative meetings be opened to the public does carry with it certain penalties. In the Board's judgment, those penalties are sufficiently weighty so that the public interest on balance would best be served by not requiring that deliberative meetings be opened to the public. In the last analysis, however, the balancing of the benefits of near total openness, on the one hand, with the various drawbacks to such openness, on the other, is a matter with respect to which the Congress is itself in the best position to decide. In the pages below, we discuss what we perceive would be the impact of S. 260 on the Board's processes, for the Congress's use in making that decision.[1]

SECTION 201 OF THE BILL

Under section 1001 of the Federal Aviation Act of 1958 (49 U.S.C. 1481), "every vote and official act" of tthe Board is required to be entered of record, and administrative proceedings, other than deliberative meetings of the Board, are required to be open to the public upon request of any interested party unless it is determined that secrecy is requisite on grounds of national defense. Pursuant to this section, board regulations require that notice be published in the Federal Register of (1) a prehearing conference before an Administrative Law Judge; (2) a formal hearing before such a judge; and (3) an oral argument before the Board. Copies of Prehearing Conference Reports of Administrative Law Judges are available to the public, and transcripts of hearings before such judges, and of oral arguments before the Board, are maintained for public inspection. Also, approved Minutes of the Board on matters that are not pending are available for public inspection.

The Board follows similar procedures with respect to meetings with various groups, including air carriers, aviation manufacturers, legislators, representatives of civic groups and local and foreign governments, for the purpose of discussing matters of mutual interest which are not involved in proceedings before the Board. These meetings are called at the request of the group concerned and are generally intended to brief the Board informally on current developments affecting air transportation. Although these meetings are primarily for the information of the Board, notices regarding them are published in the Federal Register, and transcripts of the meetings are kept and are available to the public.[2]

The Board's meetings are not, however, open to the public when the Board is deliberating upon and deciding matters.

The Board holds deliberative meetings in the following circumstances:

1. *Adjudicatory decisions in hearing cases.*—After the adjudicatory process has been completed in cases in which a hearing has been held, the Board will meet to discuss the case and to determine its outcome.

2. *Decisions in nonhearing cases.*—Most Board decisions in cases that have proceeded without a hearing are resolved by the Board Members without a meeting amongst themselves. As discussed in the Appendix I, in nonhearing cases Board Members will generally vote based on written recommendations made by the Board's staff.[3] However, where any Board Member believes that

[1] Our comments relate wholly to Title II of the bill ("Agency Procedures"), since the Board defers to the Congress in respect to the provisions of Title I ("Congressional Procedures").

[2] For more complete discussion of these meetings, see Appendix I.

[3] It is, of course, entirely appropriate for Board Members to act without a meeting based on written materials provided to them by the Board's staff: *e.g.*, Braniff Airways, Inc. v. C.A.B., 126 U.S. App. D.C. 399, 379 F.2d 453 (1967).

a meeting is warranted, a meeting of the Board Members is held whether the issue is one in an adjudicatory case or a rule making proceeding.

3. *Action relating to the initiation or conduct of cases.*—On matters pertaining to whether a case should be initiated or to procedural issues in an on-going proceeding, the staff makes written recommendations to the Board. Here too the Board generally acts without a meeting of the Board Members whatever the nature of the proceeding (adjudicatory proceedings with or without a hearing, or rulemaking proceeding); but again, any Member can request a meeting of Board Members on any proposed Board action.

With this background, we turn to the various provisions of S. 260 relating to administrative action.

SECTION 201(C)

Section 201(c) excludes from the requirement of open agency meetings matters that relate to the conduct or disposition of a case of adjudication governed by the provisions of the first paragraph of 5 U.S.C. 554(a). We agree with that exclusion. An independent agency like the Board is required by law to take action only after opportunity for deliberation and debate among the Members. In the Board's view, this function is far more effectively discharged in a setting in which there can be free and uninhibited exchanges of opinions, ideas and points of view between the Board's Members. And we believe it clear that privacy is a necessary element of that kind of setting. The Courts agree and have held that the integrity of the administrative process, like that of the judicial process, is best protected by precluding inquiry into the agency's deliberations: *Kaiser Aluminum & Chemical Corp.* v. *U.S.*, 141 Ct. Cl. 38, 48 (1958) (citing *Morgan* v. *United States, 313 U.S.* 409 (1941)).

Although S. 260 does comport with the philosophy of *Kaiser* in respect to cases subject to hearing requirements, it does not do so in other kinds of cases. We believe that that is a matter of concern. A great deal of adjudication arises under the provisions of the Federal Aviation Act that does not require hearing (see Appendix I, *infra.*) The rationale for permitting non-public meetings in adjudicatory cases in which a hearing has been held is equally applicable to adjudicatory proceedings arising under statutes not requiring a hearing.

In deciding whether to adopt S. 260, we believe that the Congress should also take into consideration the following further aspects of 201(c).

First, we have referred to the fact that Board decisions are often made without meetings, and that in many situations a Board Member will call for a meeting only where the Member believes that the issues raised by the pleadings in the case and/or the recommendations of the staff warrant discussion among the Board Members. The requirement of S. 260 that practically all non-hearing cases be open to the public (with attendant requirements of notice, transcripts, etc.) might well tend to discourage agency Members from requesting hearings, thereby further inhibiting the free flow of ideas.

Second, some Board decisions unavoidably must be made very quickly—that is within a day or two, or sometimes within a matter of hours.[4] The various procedures required by S. 260 would make Board meetings in such cases almost wholly impossible. Here too, in other words, S. 260 would have the effect of precluding discussion among Board Members with the possible result of less effective Board decisions than would otherwise be the case.

Third, the Congress should be aware that notwithstanding continued encouragement by the Board to participate in Board proceedings, members of the traveling and shipping public rarely play an active role as participants in Board proceedings. We have no reason to believe that the consumers' interest in attending deliberative meetings of the Board would be greater. The consequence is that in all likelihood Board meetings would be attended almost exclusively by air carrier representatives. Thus, to whatever extent the fact of public attendance at deliberative meetings of the Board could result in decisions different from what they would have been had the meetings been closed, there is little reason to suppose that such difference would necessarily favor the public at large, as opposed to the aviation industry.

As a last technical matter, the Board from time to time orders that a hearing be held on a matter in which a hearing is not statutorily required.[5] Such

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[4] See Appendix I.

[5] See, *e.g.*, *National Air Carrier Ass'n* v. *C.A.B.*, 141 U.S. App. D.C. 31, 436 F.2d 185 (1970); Express Service Investigation, Order 73-12-36; Capacity Reduction Agreement Case, Order 73-7-147.

cases proceed in all respect like cases arising under sections of the Federal Aviation Act that do require hearings. We can conceive of no reason why Board deliberative meetings in cases in which the Board has a matter of discretion followed the requirements of section 554 should be treated differently in respect to being open or closed to the public from Board deliberative meetings in cases arising under a section that by law brings section 554 into play. We do not think that the drafters of S. 260 intended to make such a distinction.

SECTIONS 201(e) AND 201(f)

The discussion above refers to the importance of the free flow of ideas at Board meetings, and to the possible impact of S. 260 in providing for open deliberative meetings, in discouraging Board Members from speaking freely at meetings and from calling meetings. We believe that the requirement in section 201(e) that a transcript be kept of all meetings would tend to have a comparable effect. Even as to those meetings in which transcript deletions are authorized under section 201(f), the very fact that a transcript must be made of all discussion at each meeting of the Board would inevitably affect that discussion deleteriously and could lessen the likelihood that Board meetings would be held in the many circumstances in which meetings of Board Members are held only if a Member requests one.

SECTION 202

Section 202 of S. 260 relates to *ex parte* communications in "on-the- record" (as defined) agency proceedings.

By way of introduction to the Board's views on section 202, we note that the Board has long had rules covering *ex parte* communications. The Board's rules governing the conduct of parties, and the relationships between the Board, its staff, and all other persons in Board proceedings and matters are set forth in Part 300 of the Board's Procedural Regulations (14 CFR 300).[6] Section 300.2, which is applicable to adjudicatory cases to be determined by the Board after notice and hearing and upon a formal record, and to any other cases which may be designated by the Board, prohibits *ex parte* off-the-record oral or written communications on any substantive or procedural issue in such a case.

SCOPE OF EX PARTE RULES

Our initial difficulty with section 202 stems from possible ambiguities in its scope. Section 202 applies only to "on-the-record" proceedings, which are defined as proceedings required "to be based on the record of an agency hearing or on public comments" (section 201(a)(3)). The language is clear as to adjudicatory cases in which the Federal Aviation Act requires a hearing. It is less so in other situations.

First, as discussed above, the Board from time to time determines by order that an adjudicatory hearing be held in a particular proceeding even though neither the Act nor any Board rule so requires. As we read sections 201(a)(3) and 202, the *ex parte* rules of S. 260 would not apply in such circumstances (although the Board's *ex parte* rules do apply in these cases). The matter, however, is not entirely free from ambiguity.

Second, as the Committee is aware, absent specific legislation to the contrary, agencies do not have to "base" rule-making decisions on public comments: see *California Citizens Band Association* v. *F.C.C.*, 375 F.2d 43 (9th Cir. 1967). Indeed, agencies are ordinarily free to adopt a new rule notwithstanding the disagreement expressed in all of the public comments made on the proposed rule. Accordingly, as we understand section 202, Board rulemaking proceedings would not be within its scope, and that the "based . . . on public comments" provision is intended to be applicable only to those agencies whose rulemaking powers are limited in that manner.[7]

The Board agrees with S. 260's apparent limitation on the scope of its *ex parte* requirements. In fact the Board has in the past had occasion to

[6] The Board's rules covering *ex parte* communications are set out in Appendix II.

[7] In sum, insofar as the Board is concerned, section 202 would only apply to those proceedings arising under sections of the Federal Aviation Act that expressly call for notice and hearing.

consider whether its *ex parte* rules should be extended to rulemaking proceedings and other nonhearing proceedings. The Board concluded (1) such an expansion would seriously hamper the Board in carrying out its duties and responsibilities and would result in delays in the Board's work; and (2) that in addition to its statutory responsibilities of a quasi-judicial nature, the Board has certain quasi-legislative functions as well as the responsibility for the promotion, encouragement, and development of civil aeronautics, and that in performing these functions the Board and its staff should not be restricted to the same extent as in formal quasi-judicial proceedings.

If the Committee determines to approve S. 260, we would urge only, in respect to this aspect of the bill, that the Committee make clear, by discussion in the legislative history of the bill, or by amendment, that the scope of section 202 as discussed above is as intended by the Committee.

PROPOSED SECTIONS 557(b) AND 557(b)(2)

Sections 557(b)(1) and (2) can be read as subjecting to the bill's *ex parte* rules discussions among Board Members at a meeting called to decide a case, or discussions between two staff members each of whom is involved in the "decisional process" in the same proceeding. We cannot conceive that the Committee intends the bill to be read in that manner. Rather, we understand proposed section 557(b) to provide that no person who is not involved in the decisional process in a case may make any *ex parte* communications to any person who is involved in the decisional process, but that the bill is *not* intended to prohibit discussions between persons involved in the decisional process of a proceeding.

PROPOSED SECTION 557(b)(3)(B)

Like S. 260's proposed section 557(b)(3), section 300.2 of the Board's Regulations requires that any prohibited communications in writing shall be made public. However, unlike the bill, section 300.2 does not require that memoranda of prohibited oral communications be prepared. The Board has heretofore considered and rejected proposals like section 557(b)(3)(B). In adopting certain clarifying amendments to Part 300 on December 1, 1960 (Regulation PR–43, 25 F.R. 12430), the Board rejected a suggestion that improper oral communications be reduced to writing and served upon all parties. The Board pointed out that not only would it be difficult for a Member or employee to delineate between matters which would be covered by such a provision and those that would not, but the Member or employee might find himself in the position where he could not readily reduce such oral presentation to writing. Furthermore, the Board noted that if the person making the oral presentation contended that the memorandum did not properly reflect the oral conversation, fair play would require that he be given an opportunity to correct since he would not have seen the memorandum prior to its circulation to the other parties. In conclusion, the Board stated that this would serve to further delay disposition of the Board's proceeding.

PROPOSED SECTION 557(f)

Under section 1006 of the Federal Aviation Act (49 U.S.C. 1486), except with respect to orders subject to Presidential review under section 801, any person disclosing a substantial interest may petition for review of the Board order in accordance with the normal principles of review of agency action under administrative law. However, review jurisdiction under section 1006 lies in the United States Courts of Appeals, as distinct from the District Court forum provided for in S. 260. Accordingly, it may be questioned whether it would be appropriate, insofar as the proposed review action is applicable to the Board, to provide for such action in a forum different from that provided under the Federal Aviation Act, particularly since proposed section 557(f) authorizes the setting aside of agency action.

CONCLUSION

In summary, the Board supports the intent of S. 260 to foster open decision-making by federal agencies. And there is no doubt that enactment of S. 260 would open to the public some agency processes that are now conducted in

private. In doing so, however, it would carry with it, insofar as Board activities are concerned, the penalties of: (1) inhibiting to at least some extent the free flow of ideas and information among the Board Members; (2) delaying some proceedings; and (3) precluding informal public participation in those nonhearing cases in which it has been generally considered that such opportunity for informal comment is of value. Whether the benefits flowing from the additional openness would outweigh the foregoing difficulties is, of course, a matter for the Congress to judge. We would urge, however, that, in the event the Congress does determine to enact S. 260 into law, or to adopt comparable legislation, the Congress take steps to cure the possible ambiguities inherent in the present language of S. 260.

Appendix I

The purpose of this Appendix is to describe the decisional processes in various types of Board proceedings.

A. THE DECISIONAL PROCESS IN BOARD PROCEEDINGS BASED ON FORMAL RECORD

A variety of sections of the Federal Aviation Act provide for hearings.[1] In addition, the Board may order a hearing in cases arising under other provisions of the Act, such as proceedings to consider certain inter-carrier agreements. Unless a case of this nature is shortened because of an extraordinary need for expedition, absence of disputed issues of fact, and so on, the decisional process is generally as follows:

1. One or more of the elements of the Board's staff submit a recommendation to the Board that a proceeding be instituted on a specified subject. The recommendation typically takes the form of a memorandum to the Board accompanied by a draft order instituting the case. (Such memorandums and draft orders are not made public: See 5 U.S.C. 552(b)(5)). Generally the Board Members vote on the recommendation without meeting together, although a Board meeting will be held if any Board Member requests one. As is the case with all Board deliberative meetings, it may be attended only by Board Members (if the Members so order), or by the Members and, in addition, those staff personnel with an interest in the proceeding. There is often discussion between various Board Members and key staff personnel.

2. If the instituting order is issued (and such orders are published in the Federal Register), the Chief Administrative Law Judge selects the administrative law judge to handle the case and sets the case for prehearing conference. Parties exchange (on the record with notice to all other parties) views about the specific issues encompassed within the proceeding and what evidence and other information should be supplied by the various parties. One of the Board's Bureaus generally becomes a party.

A prehearing conference (open to the public) is held, and the Administrative Law Judge issues his report of the conference. Information and written evidence is exchanged.

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[1] These include: Issuance of certificate of public convenience and necessity (49 U.S.C. 1371(d)); amendment, modification, suspension or revocation of certificate (49 U.S.C. 1371(g)); abandonment of any route or part thereof (49 U.S.C. 1371(j)); issuance of foreign air carrier permit (49 U.S.C. 1372(b)); alteration, modification, amendment, suspension, cancellation, or revocation of foreign air carrier permit (49 U.S.C. 1372(f)); approval or disapproval of mergers or acquisitions of control between air carriers, between air carriers and surface carriers, and between air carriers and persons engaged in any other "phase of aeronautics" (49 U.S.C. 1378(b)); fixing compensatory and/or subsidy mail rates (49 U.S.C. 1376); prescription of reasonable and/or nondiscriminatory commercial rates and practices for air carriers engaged in interstate and overseas air transportation (49 U.S.C. 1482(d)); removal of discriminatory rates and practices in foreign air transportation (49 U.S.C. 1482(f)); prescription of divisions of rates between air carriers (49 U.S.C. 1482(h)); establishment of through rates and services (49 U.S.C. 1482)(i)); rejection or cancellation of new rates in foreign air transportation which are unjust or discriminatory (49 U.S.C. 1482(j)(1)); cancellation of existing rates in foreign air transportation which are unjust or discriminatory (49 U.S.C. 1482(j)(2)); establishment by joint board (ICC and CAB) of joint rates (49 U.S.C. 1483(d)); revocation, modification or suspension of certificates of supplemental air carriers (49 U.S.C. 1371(n)(3) and (n) (4)); determination of violations of provisions governing certain interrelationship between air carriers, between air carriers and surface carriers, and between air carriers and persons engaged in any other phase of aeronautiess (49 U.S.C. 1378(e)); determination and prohibition of unfair methods of competition (49 U.S.C. 1381); and orders requiring compliance with the Federal Aviation Act (49 U.S.C. 1482(c)).

4. The hearing is held (open to the public unless national security issues are involved—an extremely rare occurrence). The Administrative Law Judge issues his decision.

5. Parties dissatisfied with the Administrative Law Judge's action petition the Board to review the ALJ's decision. If the Board determines to take review, parties file briefs. A date for oral argument, if any, is fixed.

6. Oral argument is heard. The Board Members meet, perhaps several times, to decide the case. The Board gives its instructions to the Office of General Counsel, which then embodies the Board's decision in a draft written opinion and order. The draft opinion and order are submitted to the Board which may ask for changes (as a result of further meetings of the Members). Further drafts are submitted until the Board Members are satisfied. The Board's opinion and order issue.

7. Parties (including the Bureau that is a party) may seek reconsideration. If they do, the Office of General Counsel submits a recommendation, including a draft order, to the Board on the matter. Again, the Board may or may not meet. A final order issues.[2]

B. THE DECISIONAL PROCESS IN NONHEARING ADJUDICATORY PROCEEDINGS

Numerous sections of the Act and the Board's Regulations authorize Board action in adjudicatory cases without a hearing.[3] The decisional process in cases of this kind is generally as follows (unless the Board's Regulations permit action under delegated authority by a staff component of the Board):

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[2] The procedural steps in an enforcement proceeding are somewhat different from those described above. We note, however, that cease and desist orders can be issued only after notice and hearing (49 U.S.C. 1482(c)).

[3] Exemption of indirect air carriers (*e.g.*, air freight forwarders) from the economic regulatory provisions of the Act (49 U.S.C. 1301). In the exercise of this power the Board authorizes indirect air transportation services; authorization of temporary suspension of service by an airline; (49 U.S.C. 1371(j)); temporary suspension of certificates of public convenience and necessity of supplemental air carriers (49 U.S.C. 1371(n)(5)); grant of permission to make tariff changes on less than 30 days notice (49 U.S.C. 1373(c)); review of Postmaster General's orders fixing mail schedules and loads (49 U.S.C. 1375 (b) and (c)); exercise of right to inspect records and facilities of air carriers (49 U.S.C. 1377); special exemptions involving acquisitions of control of a noncertificated air carrier pursuant to the proviso of section 408(a)(5) of the Federal Aviation Act (49 U.S.C. 1378(a)(5)); approval of transactions involving acquisitions of control of persons rather than direct air carriers under the "third proviso" of section 408(b) of the Act (49 U.S.C. 1378(b)); approval or disapproval of interlocking relationships (49 U.S.C. 1379); approval or disapproval of Government loans and financial aid to air carriers (49 U.S.C. 1380); approval or disapproval of various types of intercarrier agreements (49 U.S.C. 1382); exemption of direct air carriers from economic regulatory provisions of the Act (49 U.S.C. 1386). As in the case of exemptions for indirect air carriers, this function may involve authorization of new or improved air transportation services; grant of special operating authorizations to supplemental air carriers to engage in individually-ticketed services to meet temporary service needs not being met by scheduled airlines (49 U.S.C. 1387); compromise of civil penalties for violations of the Act (49 U.S.C. 1471(a)(2); determinations whether to institute investigations or enforcement proceedings either upon the Board's own initiative or upon formal complaint of a third party (49 U.S.C. 1482(b)); determinations whether to investigate rates, fares, practices, etc., included in new tariffs for interstate or overseas air transportation and whether to suspend such tariffs pending investigation (49 U.S.C. 1482(g)); determinations whether to investigate rates, fares, practices, etc., included in new tariffs for foreign air transportation and whether to suspend such tariffs pending investigation (49 U.S.C. 1482(j)(1)); determinations whether to investigate rates, fares, and practices, etc., included in tariffs for foreign air transportation and whether to suspend such tariffs pending investigation (49 U.S.C. 1482(j)(2)); determinations whether to suspend an existing tariff of a foreign air carrier providing service between the United States and a foreign country where the Board finds that the Government of the foreign country has refused to permit the changing of rates contained in a tariff filed by an air carrier for foreign air transportation to such foreign country (49 U.S.C. 1482(j)(3); determinations whether to grant objections to public disclosure of information contained in documents filed with the Board or otherwise obtained by it (49 U.S.C. 1504); grant, modification, suspension or revocation of permits authorizing navigation (but not common carriage) by foreign aircraft in the United States (48 U.S.C. 1508); authorization of air carriers to change airports through which service to a point has theretofore been provided (14 C.F.R. 202.3 and 203.5); authorization of change in service patterns of air carriers (14 C.F.R. 202.4 and 203.2); authorization to delay inauguration of newly certificated service (14 C.F.R. 205.2); authorization to provide special services (14 C.F.R. 207.8); waiver of regulations establishing terms, conditions, and limitations of supplemental air carriers (14 C.F.R. 212.6); waiver of regulations establishing terms, conditions, and limitations of foreign air carrier permits authorizing charter transportation only (14 air carrier certificates (14 C.F.R. 208.3a); authorization of off-route charters by foreign C.F.R. 214.3); grant or denial of permission to file tariffs establishing air cargo pickup and delivery zones (14 C.F.R. 222.3); and waiver of special regulations governing inclusive tour charters (14 C.F.R. 378.30).

1. A request is submitted, generally by an air carrier, in the form of an application or petition. Interested persons file answers supporting or opposing the initial pleadings.

2. A unit of the Board's staff review the pleadings, and analyzes them and other data it considers relevant. The staff unit prepares a memorandum to the Board discussing the request for Board action and the position presented by the various pleadings, and recommends the action that staff unit believes the Board ought to adopt. A draft order is attached. Other units of the staff review the recommendation. Disagreements within the staff are spelled out in the original memorandum or in separate papers accompanying it.

3. The Board Members consider the staff recommendation(s) and the pleadings in the case. The Members may act by written vote without a Board meeting, or any Board Member may call for a meeting. As a result of the vote (whether with or without a meeting) an order may issue in the form proposed by the originating staff unit, or that unit may be called upon to redraft the order in whole or in part prior to its issuance.

In some circumstances the above process has to be abbreviated. Thus, a carrier may ask for authority, on an emergency basis, to carry a group of travelers over a route it does not have certificate authority for. The request sometimes cannot be made until a few days, or even hours, before flight time, in which case the request is often made by telegram, cable, or even telephone. In these circumstances the staff unit involved will telephone other persons it believes may have an interest in the request and then informs each of the Board Members (either by telephone or in a quickly prepared memorandum) about the request and the reaction of other interested persons. Again, the Board Members can act without a meeting or may hold a meeting on extremely short notice. The carrier is then advised of the Board's decision by telephone with a written order following shortly.

C. MEETING WITH GROUPS

In an effort to keep itself continuously informed on current developments affecting air transportation, the Board will from time to time schedule open meetings and presentations with various groups, including air carriers, aviation manufacturers, legislators, representatives of various trade associations and civic groups and local and foreign governments. These meetings are generally requested by the group concerned and presentations are made to the Board and staff personnel. Although these meetings are primarily for the information of the Board, notices regarding them are published in the Federal Register, and transcripts of the meetings are kept and are available to the public. These meetings are open to the public.

During the past two-year period, the Board has scheduled 33 such presentations.

APPENDIX II

CIVIL AERONAUTICS BOARD—PROCEDURAL REGULATIONS

PART 300—RULES OF CONDUCT IN BOARD PROCEEDINGS [1]

(Issued as PR-10 effective Mar. 30, 1951, as amended by PR-43, PR-48, PR-75, and PR-115)

Sec.

300.0 Applicability.
300.1 Judicial standards of practice.
300.2 Hearing cases; improper influence.
300.3 Conciseness of presentation.
300.4 Attorney-client relationship.
300.5-300.9 [Reserved]
300.10 Gifts and unusual hospitality.
300.11 Disqualification of Government officers and employees.
300.12 Practice of Special Government employees permitted.
300.13 Permanent disqualification of former Board members and employees in matters in which they personally participated.
300.14 Temporary disqualification of former Board members and employees in matters formerly under their official responsibility.

[1] PR-75 effective Mar. 15, 1963.

300.15 [Reserved]
300.16 Waiver of §§ 300.13 and 300.14.
300.17 Disqualification of partners of Board members and employees.
300.18 [Reserved]
300.19 Use of confidential information.
300.20 Violations.

§ *300.00 Applicability*

The rules of conduct set forth in this part shall govern the conduct of parties and their representatives, and the relationships between the Board, its staff, and all other persons in all Board proceedings and matters, except as otherwise provided in any Board regulation.

[PR-75 effective Mar. 15, 1963]

§ *300.1 Judicial standards of practice*

In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of property that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

§ *300.2 Hearing cases; improper influence*

It is essential in cases to be determined after notice and hearing and upon a record, or any other cases which the Board by order may designate, that the Board's judicial character be recognized and protected. Therefore, from the time of filing of an application or petition which can be granted by the Board only after notice and hearing, or, in case of other matters, from the time of notice by the Board that such matters shall be determined after notice and hearing and upon a record or that its Rules of Conduct shall be applicable thereto:

(a) A written or oral communication on any substantive or procedural issue in the case to a Member of the Board or its staff, or to the examiner in the case other than in compliance with the Board's Rules of Practice by any person, either in private or public life, shall be deemed a private communication on the merits. Such communications, unless otherwise provided for by law or published rule are hereby prohibited: *Provided*, That this prohibition shall not be deemed to apply to informal complaints filed with the Board or to communications with staff members of the Board who are in the course of preparing a case, or for the purpose of determining whether a complaint shall be docketed, or to the usual informal communications between counsel, including discussions to effectuate a stipulation, or to settlement discussion between parties and the Board's enforcement staff, or investigative activities, or to other communications which are deemed proper in proceedings in the Federal courts. Communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits. Any prohibited communication in writing received by the Board or its staff or the examiner in the case, shall be made public by placing it in the correspondence file of the case which is available for inspection and copying during business hours in the Board's Docket Section, but will not be considered by the Board or the examiner as part of the record for decision.

(b) Requests for expeditious treatment of a pending application will be considered communications on the merits. If made by a party or applicant for intervention, such a request shall be made by motion (§ 302.18). If made by any other interested person, such a request shall be made in accordance with the requirements in § 302.14. A request which is not made in accordance with the Board's rules shall be placed in the public correspondence file and will not be considered by the Board.

(c) It is improper that there be any private communication on the merits of any substantive or procedural issue in the case to a Member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(d) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the Members of the Board, its staff or the examiner in the case, or that such person or any member of the Board's staff or an examiner, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

(e) It is improper that any person solicit communications to the Board or any of its members or its staff or to the examiner in the case other than proper communications by parties or non-parties permitted under Rules 14 and 15 of the Board's rules of practice. Anybody soliciting the support of another person shall call such person's attention to the provisions of Rules 14 and 15.

[PR-43 effective Dec. 6, 1960, as amended by PR-48 effective May 17, 1961, and PR-75 effective Mar. 15, 1963]

RESPONSES TO QUESTIONS SUBMITTED IN WRITING TO WHITNEY GILLILLAND

Question. Why shouldn't Board meetings to formulate legislative type policy be open to the public?

Answer. As the Board stated in its testimony, in addition to its statutory responsibilities of a quasi-judicial nature, the Board has certain quasi-legislative functions as well as the responsibility for the promotion, encouragement and development of civil aeronautics. The Board pointed out that in rule making and other non-hearing proceedings, most Board decisions were resolved by Board Members without a meeting amongst themselves unless a Member believed that such a meeting was warranted. A requirement that Board meetings relating to the formulation of legislative-type policy (such as rule making) be open to the public (with attendant requirements of notice, transcripts, etc.) might tend to discourage agency members from requesting hearings, thereby further inhibiting the free flow of ideas. Moreover, the nature of a Board meeting called to consider a rule making proposal tends to be much the same as in the case of a Board meeting called to pass upon an adjudicatory matter. Thus the problems inherent in public attendance at the latter kind of meeting would largely be also applicable to meetings on rule making subjects.

Finally, exemption of all adjudicatory cases from the open meeting requirement of S.260 would not meet the Board's objections to certain other provisions of the bill. The Board continues to believe that requiring that improper oral communications be reduced to writing and placed in the records of proceedings would serve to delay disposition of the proceedings. Also, the Board continues to question whether it would be appropriate, insofar as the Board is concerned, to provide that a District Court shall have jurisdiction to review an agency action for violation of the *ex parte* communication prohibition.

Question. On page 12 of your statement you argue that agency members or employees should not be required to reduce oral *ex parte* communications to writing, in part because the member "might find himself in a position where he could not readily reduce such oral presentation to writing." What exactly do you mean by this?

Answer. This statement is intended to point out that a Member or employee might find it difficult, if not impossible, to prepare memoranda which would properly reflect oral presentations because the exact words of the presentation were forgotten, or because stating the words of the presentation without stating the various circumstances making up the context of the presentation could result in an inaccurate account.

Question. Where decisions are not based on a record, effective judicial review may often not be available. In such cases, may not public decision-making be justified as an alternative means of subjecting agency decisions to public scrutiny and review? Just how would a requirement of open meetings impede the Board's disposition of cases that do not have to be *based* on any hearing record?

Answer. Whether or not a Board decisions is based on a hearing record bears no relationship to the availability of effective judicial review. Under section 1006 of the Federal Aviation Act, except with respect to orders subject to Presidential review under section 801, any person disclosing a substantial interest may petition for review of the Board order in accordance with the normal principles of review of agency action under administrative law. In this regard it should be emphasized that the courts are careful to require that agency orders

articulate the grounds for an agency's actions precisely in order that there may be effective judicial review. See, *e.g.*, *Continental Air Lines*, Inc., v. *C.A.B.*, 143 U.S. App. D.C. 330, 443 F.2d 745 (1971); *City of Lawrence Massachusetts* v. *C.A.B.*, 343 F.2d 583 (C.A.1, 1965); *Northeast Airlines, Inc.* v. *C.A.B.*, 331 F.2d 579 (C.A.1, 1964). Furthermore, the Board's Procedural Regulations provide that Board orders will include statements of the Board's reasons for its findings and conclusions with respect to the issues disposed of by Board decisions. In sum, Board decisions, whether or not based on a record, spell out the factual and policy grounds upon which they are founded, as they must under court standards and the Board's own regulations, and accordingly the Board's decisions are presently subject to public scrutiny and review. Thus public attendance at deliberative meetings of the Board is not necessary to insure scrutiny or review.

Moreover, as the Board pointed out in its testimony, an open meeting requirement with respect to non-hearing cases could impede the Board's disposition of such cases. Board decisions are often made without meetings, and in many situations a Board Member might call for a meeting only where the Member believed that the issues raised by the pleadings in the case and/or staff recommendations warranted discussion among the Members. However, a requirement that nonhearing cases be open to the public (with attendant requirements of notice, transcripts, etc.) might well tend to discourage agency Members from requesting hearings, and thereby further inhibit the free flow of ideas. In addition, as also pointed out in the Board's testimony, some Board decisions must be made very quickly—that is within a day or two, or sometimes within a matter of hours. Open meetings in such cases would be almost impossible because of the various procedures that would be required in connection with them. Thus, discussion among Board Members would be precluded, with the possible result of less effective Board decisions than would otherwise be the case.

Mr. GILLILLAND. Thank you. Subject to that, I would like to summarize a bit and touch on a couple of points that I think are particularly important.

First, the bill makes a major distinction between agency meetings that are called to decide a case that has gone through a hearing and agency meetings on cases that haven't gone through a hearing. S. 260 wouldn't require us to open our deliberative sessions in the first kind of case but it would in the second.

I agree that meetings to decide cases that have gone through formal hearings ought to be held in private. But Board meetings to decide nonhearing cases are entitled to the same kind of privacy as well. The fact of the matter is that there is often no difference of any substance between the two kinds of cases insofar as the litigants are concerned and insofar as the nature of the Board meeting is concerned. Board meetings can be just as stormy in nonhearing cases as in hearing cases. I don't mean to say that the five of us ever put on boxing gloves but we come close and I can assure you that as a result of sessions in which the five Board members argue back and forth about the issues in the case, a better understanding of that case is reached and the positions of the members often change.

It may be that the same kind of exchange would take place with the public sitting there in the room and with the stenographer clicking away on one of those shorthand machines, but I doubt it very seriously.

Second, we must remember that Board orders often involve new services for the traveling public and while we certainly want to protect the integrity of an agency's process, we must never forget that in the last analysis the most important part of our job is to insure good air transport service for this Nation. As a result,

procedural misconduct by applicants is only one of several factors which the Board and eventually a court has to consider in reaching any final determination.

As I see it, there may be times when the needs of the public would be best served by making an award to a particular carrier, even if that carrier has violated established standards of conduct. In such circumstances, I for one would make the award to that carrier and choose some alternate form of sanction as a means of protecting the integrity of the Board's process. In my view the courts of Appeal are better suited to review this balancing task than would be a district court judge.

Now, there is one other point that I would like to make. I realize, of course, that the scope of the responsibilities of the Congress is enormously greater than that of any other unit in Government, and that among the different departments and agencies, the Civil Aeronautics Board is certainly not one of the larger ones. Nevertheless, its workload, if compared to the capacity of any one man, is enormous and beyond the capability and capacity of anyone to fully comprehend or follow.

One of the unsatisfactory things about the job I have, maybe about the only one, too, but one that has harassed me ever since I have been there, has been my inability to keep abreast and to completely follow all of the tasks that I am charged to perform and with regard to which I must exercise responsibility. At one time I served as a trial court judge in my home State and, by way of comparison, at that time I was able to reach what I regarded as an approximation of mastery of the problems I had to deal with. I could work on them and study them until I had my head around them and then decide, not always wisely, I am sure, but then I at least had self-satisfaction. This I can't do at the Civil Aeronautics Board. What I do is a constant compromise between mastery, or an effort to master problems that come along, and time, and reliance on other people's judgment. That is, of course, the reason we have a staff.

Nevertheless, the five of us there are charged under the law, charged by you, the Congress, to perform the task, and we have a duty I think to try to understand it and comprehend it and deal with it as accurately as we can. Anything at all that renders our processes more cumbersome is one which causes and demands a further compromise from us and lowers the standard of the product you will eventually receive from our work.

Thank you.

Senator CHILES. Thank you, sir.

MEETING

In going through title II of the bill I notice that some of you had trouble with the ambiguities in the wording. One word which a number of you pointed to was the term "meeting." Chairman Stafford, you in particular stressed the importance of clarifying the term. One of our witnesses later in the morning has offered in his testimony a more precise definition of the term but I wonder if you have any thoughts as to how we could define it so as to make clear what is covered.

Mr. GELLER. May I ask you something? There has been a change from the prior version, which included a meeting wherever official action was going to be considered or discussed to the present bill which refers to actions of agencies or subdivisions that are authorized to take actions on behalf of the agency. I took that to mean that you were confining it solely to situations where official action could be taken either by a quorum, the full Commission, or by a panel authorized to act. It seemed to me that was not a bad way to proceed. Previously it was wherever action could be considered or discussed, and that could be any meeting, but now it has to be either a quorum or a subdivision that had been authorized by the full commission to take action. If that is not so, then you do get the problems I referred to earlier this morning.

Senator CHILES. One, we are not trying to reach informal discussions and I think what our purpose was, was to leave the term broad so that the agencies could define a meeting by their regulations and ultimately if necessary the courts can interpret it again. That is what the statute did in Florida and left the matter broad, and so the agencies themselves could set their regulations and then the courts were free to interpret from there.

My suggestion would be to take this to mean official meetings where the agency or panel is meeting to take official action and to leave out what was previously in the prior version of the bill—just where there is going to be consideration, where two members may meet and consider and discuss. But that is an ambiguity that the legislative history of the bill could resolve.

ACTIONS

Mr. GARRETT. The ambiguity, at least with respect to our practice, extends to Commission actions as well as to meetings. I don't know what analogs this has in other governmental agencies, but many Commission orders are issued by the heads of our divisions pursuant to delegated authority. For example, the authority to declare effective an ordinary registration statement under the Securities Act, to issue a so-called acceleration order, has been delegated, for some years, to the Director of the Division of Corporation Finance. The Commission sees these matters only when the Director has some peculiar policy question he wishes to discuss with us. While action by a division director pursuant to delegated authority may not involve a meeting which would be required to be open to the public, since the director hardly can be said to be meeting with himself, he does sign a document that has the same legal effect as if it were done at a formal Commission meeting. Thus, the Commission could and, perhaps under this bill would, extend further our delegations of authority to the Commission's staff. We have not delegated, for example, authority to suspend trading in securities, although, we could delegate this authority, I suppose, to the Director of our Division of Enforcement. We believe that such decisions ought to be made by the Commission. But, these types of decisions often involve real emergencies which necessitate that our meetings be extremely informal and held on very short notice.

If this bill is enacted, however, we may find it necessary increasingly to delegate authority to individual staff members, in order

to preserve our ability to act promptly, particularly in emergency situations. But, as I indicated above, we would be loathe to do so with respect to matters which we deem to be of such importance as to require consideration by the Commission itself.

Senator CHILES. Mr. Garrett, in your testimony you pointed out, I think, that while we had provided an exemption where you were dealing with prosecution of an individual, that you did not think that exemption would cover many of your activities in dealing with corporations. I wonder if you and your staff would detail for us this and some other areas that you feel are particularly sensitive to your operation and should be exempt from the provisions of the act.

Mr. GARRETT. I will be glad to, sir.

Senator CHILES. I wonder if it has been—if any of you can tell me of your experience in an agency decision to hold a particular meeting in public, whether it has encouraged the Commissioners to attend the meeting, to be well prepared and to take an active part.

Mr. STAFFORD. Whenever we have a conference we have got them all there unless they just have to be away. There is no laxity in attending meetings. We notify them.

WORKLOAD

Part of our problem is that we handle a tremendous workload. Just on applications alone, for authority, it may run into between 8,000 and 10,000 cases a year just on that alone. People come in and ask for emergency authority and this requires us to put up—give a 7-day notice for someone to come in, sit down, and listen to us make that decision. Another 7 days probably to get into the publishing of it. In other words, they are generally about that far behind.

Senator CHILES. Why do you find that, when there are provisions of the bill that allow you by majority vote to waive any of that in an emergency? Doesn't that take care of any emergency situation that you have?

Mr. KAHN. I don't believe so, Senator, because of the requirement that the authorization of the Assistant Attorney General be required.

Senator CHILES. You think that would handicap you in this situation?

Mr. STAFFORD. Very much. I think he wouldn't like it a bit, the amount of work that he would—the paperwork he would have to do. I think, for instance—well, take a case down in your State. We have all kinds of car problems all over the country that happen. In the fertilizer industry, for instance, suddenly the farms, they have got a very short period of time in which they need the fertilizer. We suddenly find out that Seaboard can't handle the business. I have to put out or the Commission or one of my staff people prepares an order ordering all the grain lines to turn over a hundred hopper cars, each, right in the middle of grain harvest. It makes a very tough decision for me to say you grain farmers are going to have to wait until we move out all the fertilizer from Florida.

Senator CHILES. So the main problem as you see it with that is getting——

TIMELAG

Mr. STAFFORD. It is timelag. We get 14 days under your proposed bill before we could take an action. The law prohibits us from anticipating a problem. We have tried to anticipate a problem in putting out orders and we have been taken to court and denied that right. We have to wait until the problem has hit us and we are in trouble before we can move on an order, just like that. So you are just adding another layer of——

Senator CHILES. All of this argument, though, is premised on the fact that you would have to close this meeting. In this kind of circumstance, what is so wrong about having an open meeting?

Mr. STAFFORD. After 14 days?

Senator CHILES. No, sir. Just——

Mr. STAFFORD. How are we going to——

Senator CHILES. You are talking about notice. Your whole problem is notice and not the open-meeting requirement.

Mr. STAFFORD. Our whole problem is the notice. Actually, there is no——

Senator CHILES. You can waive this notice by just a majority vote. You don't have to have the permission of the Attorney General to waive the notice. That is only in closing the meeting. I can tell you that we in Florida would be delighted to have you have an open meeting on our problems, when you are dealing with our fertilizer situation. And your majority vote can waive that.

Mr. KAHN. The problem with that, Senator, is the bill provides that the waiver be by majority vote of the members of the agency, whereas the bulk of the great volume of the ICC business is done by divisions of the Commission or by employee review boards or by employee boards. And those boards would not be empowered, as we read the bill, to grant that kind of waiver.

Senator CHILES. I thought Mr. Stafford just told me that you had no problem getting a majority, that you always have—your people are always present and are available.

Mr. STAFFORD. You are talking about 8,000 or 10,000 cases just on one type of case alone. That is applications. I was just picking out an item when I spoke on that one. If we have to go to the full Commission every time we have to take special quick action, I already am wearing them out on conferences now on some of the problems of today.

Mr. KAHN. Chairman Stafford, I think, was responding, Senator, to the ability of his to obtain the attendance of the 11 Commissioners for an entire Commission matter, and the percentage of the entire Commission matters is very small. I would guess that not more than about 5 percent of the Commission's caseload receives entire Commission consideration.

Senator CHILES. You have raised a real point. That is why we are delighted to get this kind of information because we don't want to handicap the work.

PUBLIC NOTICE

Mr. Gillilland, you state that your agency already has a rule requiring that public notice be given of meetings between the

Board and industry representatives to discuss matters not involved in proceedings before the Board. I understand transcripts are also made and they are made available to the public.

Have you found that this procedure destroys the effectiveness of the meeting or prevented the frank exchange of views?

Mr. GILLILLAND. Well, I am going to turn the mike over to Mr. Heye after a moment, but I would say that in a meeting, such meetings as I have attended with industry in the past, I can think maybe of one or two exceptions where we would give the industry some pretty blunt talk but in general there hasn't been any particular exchange of views.

These have been briefings, where they have been held, and where we perhaps listened to an analysis, an economic analysis of the recent experience of a particular carrier, briefing on that sort of thing. Very little said on our part other than to ask questions and follow it through, just as we might have a written report filed with us that we could read instead of listening. There is a transcript made and the transcript is made available to the public so that anybody can find out precisely what was said and what took place in that kind of an occurrence. I think maybe, Mr. Heye, I would like to have you supplement that.

Mr. HEYE. The only thing I would add is the fact that these are not decisional meetings, not meetings at which the Board is sitting to make some sort of decision. They are merely briefings of the Board. Most common are by the Air Transport Association and the NACA carriers, supplemental carriers. They do this at least once a year. Chase Manhattan Bank did this several years ago with regard to the energy problem.

These things take place on the average I would say once every month, once every 2 months, and somebody will request the managing director for such a meeting and the notice is published in the Federal Register and they are open to the public, but again I would——

Senator CHILES. Are the meetings themselves open to the public?

Mr. HEYE. Yes, they are.

Senator CHILES. You find this—then you find this to be a worthwhile process or procedure when you are taking communications from the sector that you are regulating, that the meetings be open to the public.

Mr. HEYE. This has been helpful. And you don't raise any question then of anybody making any ex parte communications on any matter and, of course, all these meetings begin with a warning that no matters pending before the Board are allowed to be discussed by anybody.

Senator CHILES. I think that it is a very good procedure because I think not only as you say, no matter if they are not discussed, but the public knows they are not discussed because you have the transcripts and you have the open meeting procedure.

OPEN DOOR POLICY

Mr. GILLILLAND. So there won't be any misunderstanding about it, I want to say that it has always been my policy in any position that I have held to have my door open to anybody who comes along

and anyone who comes along, if I am not otherwise occupied, can come in and say to me the things he wishes to.

I don't—I wouldn't permit the person who did that to undertake to discuss a matter that was pending before the Board of an adjudicatory nature, but I would think it would be a mistake to deprive the public generally or folks who were concerned with the operation of the Board to have access to its members or its staff as it may be reasonable to do so without prostituting the processing of the work processes that the Board or its members have in front of them.

Senator CHILES. In the testimony that we have from Mr. Geller and Mr. Garrett, there seems to be a difference of opinion on the effect that open meetings would have on frankness and efficiency. Mr. Geller doesn't see this as a serious problem. Mr. Garrett, you find it is a very serious problem. I wonder, is this different conclusion as a result of the different nature of the agencies or is it just one of——

PROBLEMS

Mr. GARRETT. It might possibly be. If you exclude emergency problems, which you invited us to comment on further, delegated authority problems, and market sensitive information problems (particularly suspensions where premature leaks before we have made our final decision, could have particularly severe adverse consequences), we get down to the question of free communication with our staff—as much with the staff and among the staff as with ourselves. I don't know the extent to which the FCC has the same—I shouldn't say problem because it is a very healthy thing, but the same situation, that is, its staff coming up with different views on a common problem. This is very normal with us, with various divisions. For example, our division of investment management regulation may take one view, the division of market regulation another, and the division of enforcement still another. These are reflected in written memoranda, but they also are reflected in debates. It is no secret that there is often no unanimity among our staff.

On the other hand, we are very reluctant to see anything that overemphasizes disagreements that do arise, so that you would begin to get press reports that say the division of investment management won three and lost two this week, better luck next week. I am not joking when I say that this kind of thing can occur within our own staff.

As far as arguments among the Commissioners are concerned, that doesn't trouble us. I don't mean to sound too sinister but these could be controlled to a degree. At the meetings we have with the staff, we do have very frank arguments, and I think it would be quite detrimental to expose those to the public. The Commissioners also have discusssion sessions, where initially, we don't reach final decisions and actually vote, but rather informally debate or discuss issues among ourselves, without any staff members present.

Senator CHILES. You get into what Mr. Geller again was talking about. There are ways, there have been ways in Florida that people could get around the legislation, if they set their mind to do so. I think what you are attempting to do with legislation, though, you

are attempting to change a standard of operating of everything being in closed session to one of the things generally being in the open, unless there is some reason, a valid reason to close it. In our society we really don't operate for our convenience and it is much more convenient for us in the Congress or for us in the State legislature in Florida many times to operate closed. But I think the one thing we have to continue to consider when we look at what is happening now to the public confidence, is that we don't operate for our convenience. We have to determine how best can we serve them.

PAYING HIGH PRICE FOR SECRECY

Now, the price that we are now paying for secrecy I think is too high. I don't think that we can continue to afford to pay that price because we govern with the consent of the governed and when we lose that consent—and I am afraid we will get into a situation where we can be in that kind of danger—then all of our work is for naught. So—and the other thing I think is that we continue to operate so that the public can't understand what are our problems. What are your problems that you pointed out in the multitudinous decisions that you are trying to reach without trying to be able to understand all that? The public needs to understand that a little better. The Congress needs to understand if the CAB is having that kind of problem, and the fact that we created it with five members and under a process many years ago. Maybe that needs to be changed. Maybe we have to look at that or we have to change some way of doing that. But when we continue to feel like we just have to operate with the doors closed, then I think we never get a chance to do that. I think too often we are protecting the public, or feel that we are, by not sharing some of the problems that we have.

I appreciate very much your testimony today. I think it has been very helpful to us.

Mr. Geller?

Mr. GELLER. I just want to state that there may be differences between the SEC and FCC, that the FCC may proceed a great deal by rulemaking, more perhaps than the SEC does. Incidentally, there are also staff differences at the FCC: For example, the Cable Bureau takes one position, the Broadcast Bureau another.

The SEC may be more a "who dunit" agency ferreting out misconduct and not going into these broad rulemaking decisions. The most important task of the FCC is in the rulemaking area and thus you run into the consideration that if Congress can open up the markup sessions on the broadcast renewal license bill, why can't the FCC open up its broad rulemaking sessions on the same subject, broadcast renewal licensing; it is difficult to argue that it should not, particularly when there are the leaks I spoke of. But there may be differences in the importance of rulemaking in the two agencies. I am just not that familiar with the SEC's processes.

Senator CHILES. That is helpful because, of course, the bill does attempt to exempt the adjudicatory procedure and we are attempting to try to get the legislative type decisions so that they will be in the open, that the public will be——

Mr. GARRETT. The analogy to the open markup sessions leaves out one thing, and that is the staff. I am having difficulty getting across the point that it is important to us to have reached agreement when we finally settle upon something. We don't want differences magnified. When you have an open markup session, you don't have the staff arguing with the committee.

Senator CHILES. I am not sure I see what is wrong with differences being magnified. There are sure to be differences in the markup of a bill.

Mr. GARRETT. Sure. But differences between committee members are like differences among our Commissioners. I don't mind exposing these, but we need the benefit of the candid views of our staff, which we will not be able to obtain in a public forum.

Senator CHILES. Well, I will have to tell you that the staff certainly participates very strongly around here and we can't participate without staff and certainly we have to hear from our staff. We have found, though, that the markup sessions mean that the members are better prepared when they come to that markup session and it isn't the staff that sits down to mark up the bill as perhaps it was in the past. They have to brief their Senators a little bit better in advance and see that they are better prepared when they come to it.

Mr. GARRETT. I still submit that the analogy is not sound because a congressional committee is not an administrative body.

Senator CHILES. I am sure we have differences. I am not trying to make them exactly the same. I am trying to understand your differences.

Thank you very much for your testimony.

We will have some additional written questions that we would like to submit to you, if we can. We are not going to try to—if you can help us by getting the answers back by the first of November, we are going to try to have this written up by that time. The answers to the questions can be inserted in the record following your prepared statements.

Mr. GARRETT. Thank you very much.

Senator CHILES. Our next panel is composed of Mr. Richard Berg, executive secretary, Administrative Conference, accompanied by Mr. Preble Stolz, research director of the Administrative Conference; and Mr. Douglas Wickham, professor of law at the University of Tennessee Law School.

Mr. Berg, we will start with you. As we were saying before, we have the benefit of the copies of your statement that can be inserted in the record at the end of your testimony.

TESTIMONY OF RICHARD BERG, EXECUTIVE SECRETARY, ADMINISTRATIVE CONFERENCE, ACCOMPANIED BY PREBLE STOLZ, RESEARCH DIRECTOR; AND DOUGLAS Q. WICKHAM, PROFESSOR OF LAW, UNIVERSITY OF TENNESSEE LAW SCHOOL

Mr. BERG. Good. I will try to run through the major points.

Mr. Chairman, members of the subcommittee, I am grateful for the opportunity to testify today on government in the sunshine. I am

Richard Berg, executive secretary of the Administrative Conference of the United States. I would like to take this opportunity to present my colleague, Professor Preble Stolz, the research director of the Administrative Conference, who is on leave from the law faculty at the University of California at Berkeley.

Senator CHILES. Delighted to have you, Professor Stolz.

OBLIGATION OF THE ADMINISTRATIVE CONFERENCE

Mr. BERG. The Administrative Conference of the United States is a permanent, independent Federal agency. Our mission is the improvement of the administrative procedures of all Federal departments and agencies. Our purpose is to assist the agencies and the Congress in the development of procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of the agencies' goals, and lower costs to taxpayers. The members and staff of the Conference have special expertise on questions of administrative law and procedure.

I want to make an additional statement. The Conference is a deliberative body of some 90 members both within and without the Government. Its formal recommendations and statements are adopted only at its semiannual plenary sessions. The Conference as such has not taken a position on the subject matter of this legislation except to the extent that I will indicate in the course of my testimony. On all other matters, particularly the open meeting provisions in title II of the bill, my testimony represents the views of the office of the chairman of the Conference and not necessarily those of the Conference as a whole.

TITLE I OF S. 260

The bill has two titles but three parts. The first title, title I, deals exclusively with the procedures of the committees of Congress. Respecting the internal operations of Congress, the Conference possesses no particular expertise and I would not presume to advise Congress how to structure its procedures. I must confess, though, that in considering the sunshine provisions from the point of view of the departments and agencies, my reaction is something like that of the bather at the seashore on a somewhat cool day who tells his companion: "You go in first and tell me what the water is like."

TITLE II OF S. 260

Title II of the bill is addressed to the executive departments and agencies. The first part is, of course, the sunshine provision, which imposes substantially the same open meeting requirements on the agencies that title I imposes on committees of Congress.

This creates some problems that I would like to touch upon. But first a general observation.

The majority of the members of the Administrative Conference are representatives of Government agencies. Most of these agencies would be affected by an open meeting statute, either at the highest level of the agency or with respect to one or more subagencies. The Conference has never considered the subject but I should suppose that many if not most agencies would find a statute mandating open meetings somewhat troublesome. The fears expressed by the agency

witnesses today seem to me to represent legitimate concerns. They may or may not be accurate predictions of what would in fact happen if meetings were open to public view.

I might note that there is at present a sunshine provision in effect for Federal advisory committees under the Federal Advisory Committee Act, which was passed 2 years ago. Perhaps agency experience under the Advisory Committee Act will soon provide some guidance as to whether the fears expressed earlier today are well founded.

Senator CHILES. What has that experience been?

Mr. BERG. Well, I can only speak very tentatively, Senator. We have applied it with respect to our work in subcommittees. Our plenary sessions have always been open to the public. There has not been any dramatic difference. The difficulties experienced so far are largely in terms of the logistics, touching all the bases, getting out the notices in time, which we never seem to be able to do, but when people sit in, it hasn't changed.

Senator CHILES. The water has been all right.

Mr. BERG. That water has been all right. That I am afraid, though, so far has been a wading pool compared to what the agencies' line of business is.

But I think that if the experience from the broad variety of agencies, broad variety of advisory committees, is consulted it would probably be useful in ascertaining the extent of some of the real difficulties in this area.

Whatever rules and procedures may be legislated to assure public access to meetings, they should be simple, cheap and easy to comply with. Federal agencies do an enormous number of things. Some of these things are very important to vast numbers of people. But no agency operates at the cosmic level all of the time and the work of certain agencies, particularly those that adjudicate particular claims against the Government, focuses so narrowly on particular matters that in the nature of things the interest of the public in attending any particular meeting will inevitably be extremely limited. The burden and expenses of any open meeting procedures should be kept in proportion to the benefit to the public which can reasonably be expected from such openness.

It seems to me the idea of imposing on the agencies precisely the same requirements as placed on the committees of Congress breaks down when we consider the numerous differences between agencies and congressional committees. For example, at a very simple level the meetings of congressional committees are customarily recorded and a transcript prepared. That is not true of agencies and to require, as this bill does, that a stenographic transcript be prepared for all meetings, open or closed, would simply be a bonanza to the stenographic reporting industry.

POSSIBLE IMPACT OF AN OPEN MEETING

More important, some of the actions some agencies take must be decided in secret if they are to work at all. Consider, for example, the impact of publishing the agenda of a meeting of the Federal Reserve Board at which a change in the rediscount rate is to be decided. This kind of action must be made effective immediately and

even the fact that it is under consideration cannot be telegraphed in advance.

Chairman Garrett cited some similar examples from the SEC's experience.

If we are to have an open meeting law for Government agencies a statute must be drafted with the problems of the agencies in mind.

SUGGESTED IMPROVEMENTS FOR S. 260

Let me suggest some particular areas where I think the present bill needs improvement. First, there must be an exemption to take account of the problem illustrated by the Federal Reserve Board example I cited and the SEC example Chairman Garrett cited. Section 553 of the Administrative Procedure Act provides that public notice and opportunity for comments with respect to so-called informal rulemaking may be dispensed with when "contrary to the public interest." This is intended to cover the situation in which advance notice of the agency action would tend to defeat its purpose. A similar exemption must be contained in any open meeting law.

I do not read any such exemption in the existing text, so it is not merely a question of invoking the exemption procedures because I don't think any of those exemptions cover that kind of situation.

Second, more thought must be given to the basic coverage of the open meeting provision. Section 201(b) applies to any agency as defined in the Administrative Procedure Act, where the body comprising the agency consists of two or more members. This provision would apply not only to at least a score of collegial bodies which are agencies in the ordinary sense, but also, in view of the rather special definition of "agency" in the APA, to an indeterminate number of subordinate collegial bodies empowered to act on behalf of parent agencies in specialized areas. I cite several examples, the Board of Immigration Appeals, the Parole Board in the Department of Justice, the Board of Land Appeals, the Board of Indian Appeals in the Department of the Interior, any one of a dozen contract appeal boards in various agencies, and so forth.

The meetings of some, but not all, of these bodies would be eligible for exemption under section 201(c)(6), formal adjudicative proceedings of the bill, but that would not eliminate the need for public notice, an opinion from the Department of Justice, and the maintenance of a transcript. Does the limited public interest in the proceedings of such bodies really justify the burdens which this bill would impose on them?

EXEMPTION PROVISIONS

Finally, the procedure for invoking an exemption must be simplified. The other witnesses have gone into the difficulties there. It seems to me, and I speak, incidentally, as an alumnus of the Office of Legal Counsel, that that office is presently not geared up to generate this kind of opinion on a volume basis, in addition to which the time frame from the agencies' point of view simply makes it unrealistic to decide to close the meeting, to refer to the Department of Justice, to wait for the answer back and then to hold the meeting.

An agency should be authorized to invoke the exemption on its own authority subject to whatever judicial review seems desirable.

EX PARTE COMMUNICATIONS

The second subject area of title II is ex parte communications. Certain agency determinations are required, whether by the Constitution, the statutes, or agency regulation, to be arrived at "on the record after opportunity for hearing." That is to say, the agency is required to base its determination exclusively on the factual materials in the administrative record. In such a proceeding the parties participate on equal terms, essentially, in the development of the record with the right to present evidence and argument and to challenge and rebut the evidence and arguments of their adversaries. The right of a party to participate in this matter is essential to our notion of due process and is a valuable element in the process by which the agency makes its determinations. The agency is able to make a better decision when information on which it is acting has been tested in the fire of formal adversary proceedings. At least, that is the theory of requiring that a particular determination be made on the record. In order to preserve the integrity of this kind of decisionmaking, ex parte communications between interested parties and agency personnel are prohibited by the regulations of most, if not all, agencies which conduct such proceedings. Such prohibitions are to some extent inferable from constitutional considerations of due process and from the provisions of the Administrative Procedure Act.

There is, however, legitimate ground for dispute as to exactly what communications ought to be prohibited. The Administrative Procedure Act, as I have stated, contains explicit but partial prohibitions in section 554(d), and a broader but inferential provision in the requirement that the record constitutes the sole basis for agency determination. Principal reliance has, however, been placed on agency regulations.

Proposals for uniform treatment of the ex parte problems have been made from time to time. In 1962 they were considered by our predecessor conference, the temporary Administrative Conference, which indicated its preference for agency action rather than legislation and issued its recommendation 16, which I have included as an appendix to my testimony and which sets forth the certain basic principles which ought to govern an agency ex parte rule.

In the period since 1962, there has not been any great renewal of interest in the problem of ex parte communications. However, in one of its dozen recommendations for amending the Administrative Procedure Act, the American Bar Association has proposed an across-the-board prohibition and the text of that prohibition as worked out by the administrative law section of the ABA, I see, has been drawn on for the language of S. 260.

The reluctance of the Conference—and I might say that we considered the ABA proposals in 1973, and adopted a position with respect to the ABA resolution, which I must say was neither for nor against the principle of legislation; we thought that it warranted further consideration. For that reason I am rather hesitant to be too strong on one side or the other side. Our reluctance to endorse the

legislative approach stems from the difficulty in drafting a generally satisfactory across-the-board prohibition. There is the question of whether it ought to be limited to communications regarding facts in issue as our statement suggested and as the ABA resolution proposed, or communications relevant to the merits of the issue, a somewhat broader test which the administrative law section draft proposes or the still broader test of relevance to the proceeding, which is the language used in S. 260.

These distinctions do not involve quibbles, because the most difficult area in fashioning an effective prohibition with respect to ex parte communications is how you handle these more general questions of fact and policy which an agency is constantly considering in and out of formal proceedings, constantly exchanging ideas with interested people in the industries, and whatever groups are interested in the agencies' activities. How you permit, in other words, sufficient communication back and forth between the agency and the affected body while excluding improper ex parte communication.

Senator CHILES. Well, isn't one of the ways of doing that to require that there be a record?

LEGISLATIVE RECORDKEEPING ISSUE

Mr. BERG. Well, not entirely. That wouldn't solve the problem entirely because an agency is constantly engaged in interchange with the industry not only at agency meetings. It will take the form, for example, of, let's say, a power bar luncheon in which the official speaker is a member of the Federal Power Commission. I just pick an example out of the air. There are a number of people there who are largely interestd in the same range of questions. You have an agency which handles a fairly limited number of formal proceedings and certain recurring issues. These issues are going to be argued in the proceedings. They are also going to be discussed at any meeting presumably at which the common factor is people who are interested in what is going on in the Federal Power Commission.

Senator CHILES. Well, it seems to me that you would be in favor of some minimum standards established by statute, would you not, and then from that you could work on it from there. The courts have the same kind of problem and generally speaking you handle it as much through the ethics of the matter as anything else, and it seems to me the chairman or a member of that Commission could well say at that luncheon it is not proper for you to talk to me about this subject. If you wish to make a communication or if you wish to call me, then we will go on the record of this. And if you have some minimum standard or you had some standard then everybody would know how to handle it and both parties would then know. The people would know it would be improper for them to try to voice their opinion on it at a luncheon or some informal meeting and the other side, the chairman or member of the Commission would know at the same time it is improper, too.

Mr. BERG. Well, you have standards now. You have regulations, ex parte prohibitions in most, if not all, of the agencies with on-the-record proceedings. The question is what useful can be done by legislation. I might say that the way that the conference considered this

proposal essentially was whether to go on record for the principle of legislation or to go on record against the principle of legislation. The realistic alternatives are legislation or agency regulation or a combination of the two.

I think that—I might say the principle of legislation lost fairly narrowly, but if it had been endorsed I am not sure where we would have been because we hadn't—we didn't have before us a particular legislative prohibition. As I say, the tough question is is there anything useful that you can say by across-the-board legislation that will be a step beyond what the agencies have currently done by their regulations? I am not sure. If somebody can point to something useful, I think probably it would command broad support, because nobody is really arguing that this sort of communication with respect to on-the-record proceedings is proper or ought to be untrammeled. Precisely where do you draw the line in this very difficult situation involving agencies like the FPC and the CAB which have a fairly circumscribed regulated community which they deal with and communicate with and must communicate with, because that is the basis for the agencies' assumed expertise, the constant exposure to the problems of the industry? So that is a fairly difficult problem.

I might say this sort of goes to the question of whether you talk about facts in issue, which is a somewhat more manageable concept because what it suggests is that you are talking about ex parte communications relevant to the factual record, or, in other words, you are trying to get into the decisionmaker's mind some facts which should be brought out in the formal process of presenting evidence.

Relevance, of course, relevance to the merits, you are talking about—on general matters you are talking about arguments of law and policy of which the agency to a certain extent can take administrative notice anyway.

Finally, the bill's test of relevance to the proceeding seems rather vague. It appears to pick up communications which may be harmless and trivial. On the other hand, it does have this virtue, that it deals with the problem of status requests from persons in influential positions which on their face don't impart any harmful information but do suggest that the person is interested in the proceeding, and the harm is there.

TROUBLES WITH S. 260

I would like to point out—I do in my testimony, I do in the written testimony—some difficulties that we see with the particular provisions of the bill. The first difficulty, of course, is the question of its applicability to informal rulemaking.

Now, Henry Geller said it was his understanding you were taking that out of the bill. It still seems to be in in our reading of the version of the bill that we have in front of us because you talk about—you define an on-the-record proceeding in a rather special way, to include proceedings where the determination is required to be based on public comment.

I don't really know of any proceeding where the agency is required to base its determination on public comments and I assume that the reference to public comments is a reference to section 533, so-called informal rulemaking, and I point out in my testimony that that in-

formal rulemaking does not involve the requirement that the agency base its determination exclusively on the record of public comments. It would be extremely harmful to the administrative process if ex parte rules were to apply to that kind of proceeding.

Our second major point is that the concept of interested person in the bill is too broad. As we read it, it would prevent the agencies' own decisionmaking people from discussing the decision amongst themselves. This in turn seems inconsistent with the exemption which you have in the sunshine provision for certain kinds of—for agency meetings that deal with certain sorts of adjudications. That is where the exchanges take place. They would be literally forbidden as ex parte communications.

Finally, there is the question of judicial review and there I would simply join some of the preceding witnesses in objecting to the present form of the bill, which provides essentially that anybody in the country can go into district court at any time after an ex parte communication has been made and seek judicial relief.

One sound generalization that can be made, I think, about on-the-record proceedings is that the determination will be judicially reviewable at the instance of a party affected by the outcome. This being so, the safest, and I think the most appropriate, thing would be to leave it to the adversary party who has been directly injured by the communication and presumably is in a position to defend his own interests to challenge the agency action permitting the communication in the same way that any other error in the proceeding is challenged, in the context of a judicial review proceeding challenging the final agency action. That would be the most orderly way to handle it.

I want to express again my thanks to the committee for the opportunity to testify and I am open for whatever questions you care to ask me or my colleague.

Senator CHILES. Thank you, sir.

[Prepared statement follows:]

PREPARED STATEMENT BY RICHARD K. BERG, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. Chairman and Members of the Subcommittee:

I am extremely grateful to you for the opportunity to testify today on S. 260, the Government in the Sunshine Bill. I am Executive Secretary of the Administrative Conference of the United States.

The Administrative Conference of the United States is a permanent, independent Federal agency. Our mission is the improvement of the administrative procedures of all Federal departments and agencies. Our purpose is to assist the agencies and the Congress in the development of procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of the agencies' goals, and lower costs to taxpayers. The members and staff of the Conference have special expertise on questions of administrative law and procedure.

I ask your indulgence for one other prefatory note. The Conference is, of course, a deliberative body of some 90 members. Its formal recommendations and statements are adopted only at its semiannual plenary sessions. The Conference, as such, has not taken a position on the subject matter of this legislation. There are exceptions that I shall specifically indicate in my testimony, but on all other matters, and particularly on the open-meeting provisions in Title II of the bill, my testimony represents the views of the Office of the Chairman of the Conference, and not necessarily those of the Conference as a whole.

I

S. 260 has two titles but three parts. The first, Title I, would amend the Legislative Reorganization Act to require, in general, that committees of Congress meet in public, except under certain specified circumstances. Title I is addressed exclusively to Congress. Respecting the internal operations of Congress the Conference possesses no particular expertise, and it would be presumptuous of me to express a view as to how Congress should write its own rules of procedure. I must confess, however, that considering the bill's sunshine provisions as a whole, from the viewpoint of the agencies, my reaction is akin to that of the bather at the seashore on a cool day, who tells his companion, "You go in first, and tell me how you like it."

II

Title II of the bill is addressed to the Executive departments and agencies. The first part of Title II imposes on them substantially the same requirement for open meetings as Title I imposes on the committees of Congress, in large part with the same words. That creates some problems to be discussed in a moment, but I should like to start with a few more general observations.

A majority of the members of the Administrative Conference are representatives of government agencies. Most of these agencies would be affected by an open-meeting statute either at the highest level of the agency or with respect to one or more sub-agencies. The Conference has never considered the subject, but I should suppose that many if not most agencies would find a statute mandating open meetings troublesome. That attitude is not just a wooden, bureaucratic resistance to change. There would be fear about the chilling effect the presence of the public (and especially the media) might have on agency deliberations; concern that open and candid collegial discussion would be inhibited. There might also be some worry that some agency members would grandstand for the publicity and that this would get in the way of compromise because members might become unduly committed to their own rhetoric. These are legitimate concerns. They may or may not be accurate predictions of what would in fact happen if meetings of agencies were opened to public view.

There is at present a sunshine provision in effect for Federal advisory committees. Perhaps agency experience under the Advisory Committee Act will soon provide some guidance as to whether the fears expressed above are well founded.

Whatever rules and procedures may be legislated to assure public access to meetings, they ought to be designed to be easily, and, especially, cheaply, complied with. Federal administrative agencies do an enormous number of things. Some of those things are very important to vast numbers of people, but no agency operates at the cosmic level all of the time. Indeed, the work of some agencies unfolds so slowly or focuses so narrowly in its day-to-day operation that, in the nature of things, the interest of the public in attending any particular meeting will inevitably be extremely limited. The burden and expenses of any open-meeting procedures should be kept in proportion to the benefits realistically to be anticipated.

There is a certain superficial plausibility about imposing on the agencies the same requirements as are placed on the committees of Congress. But the idea breaks down when we begin to consider the numerous differences between the agencies and congressional committees. For example, at a very simple level, the meetings of congressional committees are customarily recorded and a transcript prepared. That is not true of agencies, and to require, as this bill does, that a stenographic transcript be preparel of all meetings, open or closed, would be a bonanza to the stenographic reporting industry of unparalleled dimensions. I suspect that the operations of some agencies would come to a halt for lack of trained reporters. Perhaps more important, some of the things some agencies do must be done in secret if they are to work at all. Consider, for example, the impact of publishing the agenda of a meeting of the Federal Reserve Board at which a change in the rediscount rate is to be decided. This kind of agency action must be made effective immeliately, and even the fact that it is under consideration cannot be "telegraphed" in advance. Actions of congressional committees, by contrast, rarely take effect without further action elsewhere.

My point is this. If we are to have an open-meeting law for government agencies, the statute must be drafted with the problems of the agencies in mind. It

will not do simply to borrow language applicable to the Congress. Let me suggest several areas where the open-meeting provisions of Title II do not deal realistically with the agency situation:

First, there must be an exemption to take account of the problem illustrated by the Federal Reserve Board example cited above. Section 553 of the Administrative Procedure Act provides that public notice and opportunity for comment may be dispensed with when "contrary to the public interest." This is intended to cover the situation in which advance notice of the agency action would tend to defeat its purpose. A similar exemption must be contained in any open-meeting law.

Second, it seems to me that more thought must be given to the basic coverage of the open-meeting provision. Section 201 (b) applies to any agency, as defined in the Administrative Procedure Act, where the body comprising the agency consists of two or more members. This provision would apply not only to at least a score of collegial bodies which are agencies in the ordinary sense, but also, in view of the rather special definition of "agency" in the APA, to an indeterminate number of subordinate collegial bodies empowered to act on behalf of parent agencies in specialized areas. For example, section 201 (b) would apply to the Board of Parole and the Board of Immigration Appeals in the Department of Justice, the Board of Land Appeals and the Board of Indian Appeals in the Department of the Interior, the contract appeals boards of approximately a dozen agencies, and so forth. The meetings of some, but not all, of these bodies would be eligible for exemption under section 201 (c) (6) of the bill, but that would not eliminate the need for public notice, an opinion from the Department of Justice, and the maintenance of a transcript. Does the limited public interest in the proceedings of such bodies really justify the burdens which this bill would impose on them?

Finally, the procedure for invoking an exemption must be simplified. Section 201 apparently contemplates an opinion from the Department of Justice as well as a vote of the agency members each time a meeting is to be closed. (One might ask how can the agency meet to vote on closing a meeting without in turn noticing *that* meeting and going through the same procedure.) Given the unavoidable volume of requests for opinions, and the agencies' frequent need to meet and act promptly, this provision for advance clearance by Justice seems wholly unworkable. An agency should be authorized to invoke the exemption on its own authority subject to whatever judicial review seems desirable.

III

The second subject area dealt with in Title II of S.260 is ex parte communications. Certain agency determinations are required, whether by the Constitution, the statutes, or agency regulation, to be arrived at "on the record after opportunity for hearing." That is to say, the agency is required to base its determination exclusively on the factual materials in the administrative record and, though this last is subject to some qualification, on those considerations of law and policy which were urged before it by the interested parties. In such a proceeding the parties participate on essentially equal terms in the development of the administrative record, with the right not only to present evidence and argument but to challenge and rebut the evidence and arguments of their adversaries. The right of an interested party to participate in this manner in the development of the record is not only essential to our notions of fairness and due process, but is also a valuable element in the process by which the agency makes its determination. In other words, the agency is able to make a better decision when the information on which it is acting has been tested in the fire of the formal adversary proceeding. At least, this is the theory behind requiring that a determination be made on-the-record. It is, therefore, inherent in the concept of an on-the-record agency proceeding that the agency will exclude from its consideration material which is communicated off-the-record. In order to preserve the integrity of this decision-making process, ex parte communications between interested parties or their representatives and agency personnel involved in the decision-making are prohibited by the regulations of most, if not all, agencies which conduct on-the-record proceedings, and such prohibitions are to some extent inferable from constitutional considerations of due process and the requirement in section 556(e) of the Administrative Procedure Act that the testimony and other papers filed in the proceeding constitute "the exclusive record for decision." In additional, section 554(d)(1) of the Adminis-

trative Procedure Act prohibits presiding officers in certain formal adjudicative proceedings from consulting any person (whether or not "interested") on a fact in issue unless on notice to the parties.

It would be hard to find anyone prepared to defend ex parte communications in on-the-record proceedings. It would be rather like finding an advocate for sin. But there is legitimate ground for dispute over exactly what communications ought to be prohibited, under what circumstances, and whether it should be done by statute or by agency regulation. The Administrative Procedure Act, as I have stated, contains explicit but partial prohibitions in section 554(d) and a broader but inferential prohibition in section 556(e). Principal reliance has, however, been placed on agency regulations. Proposals for uniform statutory treatment of the problem have been made from time to time, but in 1962 the Temporary Administrative Conference, our predecessor, indicated its preference for agency action, and in its Recommendation 16, which I submit as an Appendix to this testimony, it set forth the elements that an agency ex parte rule should contain. The Conference committee which prepared the recommendation concluded that while there were some advantages in a legislative approach, they were outweighed by the risk that legislation would rigidify the prohibitions and make change more difficult. In addition, the committee felt that there was an advantage in having the agencies put their own houses in order.

In the period since 1962 there has not been any great renewal of concern over the problem of ex parte communications. This indicates, I believe, that the agencies have been successful in improving their procedures and in avoiding the kind of unfortunate incidents which came to light in the late '50's. Nevertheless, the American Bar Association has included as one of a series of proposals for amending the Administrative Procedure Act, a proposal to prohibit ex parte communications in connection with formal adjudicatory or rulemaking proceedings. Indeed I see that the prohibition contained in section 202 of this bill is based on the language prepared by the ABA's Administrative Law Section to implement the Association's proposal.

The Administrative Conference has studied the ABA proposals, and in June, 1973 we adopted a formal statement which dealt with them *seriatim*. I must admit, however, that our response to the ex parte proposal was ambivalent. We said:

"The Conference approves the purpose of Resolution No. 4, which seeks the prohibition of ex parte communications between agency members and parties or other interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§556 and 557. We leave open for further consideration by the Council and cognizant committees whether this objective can most effectively be sought by legislation or by agency rules."

Our reluctance to endorse the legislative approach stems, I believe, from the difficulty of drafting a generally satisfactory across-the-board prohibition. Part of the problem is defining what is prohibited. You will note that our statement quoted above refers to communications on "any fact in issue," and the ABA's resolution used the same language. The ABA draft legislation went somewhat further and used the standard "relevant to the merits of the proceeding." Title II of S.260 goes still further in that it defines an ex parte communication as a communication "relevant to an on-the-record agency proceeding" (§201(a)(1). These differences of language involve more than a lawyers' quibble. There is general agreement that agency decision makers should not be exposed to information about facts in issue—at least the specific facts about the actions and circumstances of the parties to the preceeding—except through the record developed in the proceeding. Issues of policy and issues of more general "fact," such as facts about an industry, though relevant to the merits of a proceeding, present a more difficult question. If they are to be wise in their judgments, agency members must be free to discuss such matters not only with each other and with their staff, but with people in the industry and elsewhere. In confiding significant areas of decision-making to an administrative agency, Congress assumes that that agency will possess and exercise a specially informed judgment, and acquisition of a capacity for such judgment requires continual and frequently informal contact with persons and organizations affected by the agency's activities. Such persons and organizations are often "interested" in pending proceedings, particularly where, as in the FPC and the CAB, the agency conducts a relatively few but broadly significant proceedings. I do not suggest that there is never anything wrong with ex parte communications relating to

issues of policy or general fact—merely that they present some special problems, and that there is danger that an unconditional across-the-board prohibition of such communications may purchase only a modest increase in agency objectivity, real or apparent, at the cost of a significant loss in agency expertise.[1] Finally, the bill's test, relevance to the proceeding, seems to go too far. Its meaning is uncertain, and it appears to pick up communications which are harmless and trivial. On the other hand, it may have some virture in including the kind of status request to an agency from an influential person which is harmful not so much for what it says as for what it implies.

Thus far I have discussed only the relatively narrow area of difference between the ABA and the Administrative Conference on the appropriate scope of a prohibition of ex parte communications. The bill before you goes well beyond the ABA proposal in a number of very significant respects. First, the notion of an ex parte communication assumes a proceeding which is otherwise confined to the record. The bill's definition of ex parte communication (section 201(a)(1)) does indeed refer to a communication relevant to an on-the-record proceeding, but the definition of "on-the-record" proceeding (section 201(a)(3)) includes agency rules required "to be based * * * on public comments." This definition appears to misconceive the nature of the so-called notice-and-comment rulemaking required by section 553 of the Administrative Procedure Act. The purpose of notice and opportunity for public comment is to permit the interested public to add to the information otherwise possessed by the agency. There is no requirement in section 553, however, that the agency's action be based *exclusively* on the public comments received in the rulemaking proceeding, and in fact it rarely, if ever, is so based. To prohibit ex parte communications in connection with so-called informal rulemaking would revolutionize the practice of most agencies and destroy much that is most useful about the administrative process. Informal rule-making is a very large part of government; it assumes a well-informed agency staff capable of following developments and proposing ideas, agency heads who have long range policy concepts that are constantly being influenced by emerging technology, and a constant flow of communication between the agency and those whom it regulates, protects, or otherwise affects.

An example may illustrate what I am discussing. Recently the Civil Aeronautics Board filed a notice of a proposed amendment to its existing rules relating to the way the air lines file their schedules with the CAB. (39 F.R. 35676 (Oct. 3, 1974)). Someone had observed that most of the air carriers had automated reservation systems and that this information was both current and much more easily manipulated than the old "hard copy" air line schedules. The thought was that it would be a good deal more efficient if the schedules could be filed with the CAB on magnetic tape for computers. But the CAB could not possibly have drafted the regulation to that end in the quiet of its chambers. What has to be done is to send someone to talk with the people at the air lines, find out what they are doing and how the information could be most easily translated into a form usable by the CAB. With industry help the CAB staff drafted a tentative regulation, and the CAB published it in the Federal Register so that all could see and comment. Ultimately the CAB will revise the regulation in the light of the comments received. But critical to the whole process is the capacity of the agency staff to go out and speak to the industry in order to figure out how best to draft the regulation.

There is, perhaps, room for argument over whether particular agency proceedings should be required to be conducted on the record or informally. It is fair to say that the Administrative Conference fears that the rulemaking process is becoming overformalized, and we have, in particular, criticized legislation which requires on-the-record proceedings for making agency rules of general applicability. This is not the appropriate forum for that debate. But if this bill is to retain a prohibition of ex parte communications, the prohibition should be limited to the only area where it is meaningful, proceedings where the agency determination is required by law or regulation to be made on the record after opportunity for hearing.

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[1] The Temporary Conference's Recommendation attempted to deal with this problem by permitting ex parte communication "of facts or contentions which have general significant * * * if the communicator cannot reasonably be expected to know that the facts or contentions are material * * * in a pending on-the-record proceeding in which he is interested." Para. 1(d)(4). There are undoubtedly other possible approaches to this problem.

In another respect the bill departs from the usual concept of a forbidden ex parte communication. Ordinarily, ex parte communications are prohibited when they are between a person who is engaged in the agency's decision-making process and a person who has an interest in the proceeding, that is to say, one who is a party or related to or attempting to further the interest of a party to the proceeding. Of course, communications between decision-making personnel and uninterested persons outside the agency may nonetheless be improper or at least undesirable, particularly when they relate to factual matters outside the record, but such communications present a less serious practical threat to the integrity of the administrative process. The bill appears to retain the concept of "interested person" but in effect destroys it by defining the term to include anyone, even an agency employee, who communicates with another employee about the case. That definition would play havoc with the decisional process of every agency by preventing necessary consultation between decision makers and their staff. It would prohibit, for example, an FCC Commissioner discussing technical problems with the engineering staff of the FCC. It would prohibit a member of the National Labor Relations Board from discussing a case awaiting decision with his law clerk or indeed even with his fellow board members. All this results from defining "interested person" in terms of being interested enough to talk about a case rather than interested in the sense of having some financial or other stake in the outcome of the case.

For the most part the other sections of the bill relating to ex parte communications follow the suggestions of the 1962 Temporary Conference. Both prohibit ex parte communication *to* decision makers and *by* decision makers, both call for putting into the record any ex parte communications received and both deal with the problem of defining when a proceeding has started for purposes, of triggering the prohibition on ex parte communications. The bill suggests, I think quite helpfully, that the notice of the initiation of a proceeding contain a reference to the prohibition on ex parte communications, a point that is especially important if the prohibittion will reach out beyond the typical party in interest and adjudicatory proceeding.

The bill omits, however, a necessary provision contained in the ABA draft and the present Administrative Procedure Act permitting ex parte communications "to the extent required for the disposition of ex parte matters as authorized by law." Even in on-the-record proceedings certain matters, generally of a procedural nature, are customarily handled ex parte, for example, the issuance of a subpoena or an order for the taking of a deposition. I assume there was no intent to interfere with this well recognized practice.

Finally, I must criticize strongly the provision (section 557 (f)) for district court jurisdiction to enforce the ex parte prohibition at the instance of any citizen or resident of the United States, whether or not he is a party to or otherwise interested in the agency proceeding. Agency determinations in on-the-record proceedings are in substantially every case judicially reviewable at the instance of aggrieved parties. Such review may be obtained, generally, at the termination of the proceeding. Sometimes the forum for review is the district court, frequently, the court of appeals. There is no doubt that in such a review proceeding a showing of improper ex parte communications could be grounds for invalidating the agency action. The bill would superimpose on this scheme for orderly review a procedure for litigating the ex parte communication issue while the case is still before the agency or perhaps on review in another court and at the suit of one who has no interest in the outcome of the agency proceeding. This would certainly be an invitation to litigation on collateral issues by plaintiffs concerned less with the purity of the administrative process than with delaying or frustrating its effect.

I want to express my thanks to the Committee for the opportunity to testify today. I understand that the Committee contemplates further work on this legislation, and that is good. The principles embodied in this bill merit the serious consideration of Congress, the agencies, and interested private citizens I hope that these hearings can shed light on the problem areas and thus contribute to the development of more workable legislation. The Chairman and the staff of the Administrative Conference are available to assist you in this undertaking.

I should like to have inserted as an appendix to my testimony copies of the various Conference actions I have referred to, specifically (1) Recommendation 16 of the 1962 Temporary Administrative Conference, (2) Staff Report on ABA Proposal No. 4 (May 24, 1973) and (3) Administrative Conference Statement on ABA Proposal No. 4 (adopted June 7G8, 1973).

Appendix A

Ex Parte Recommendation of the 1962 Temporary Administrative Conference

RECOMMENDATION NO. 16

Whereas the Administrative Conference deems it essential that the administrative process should be protected from improper influences and that the agencies should take certain action to help achieve these objectives,

It is Recommended That—

Each agency promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.

The Conference recognizes that it may be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find it advisable to add to the recommended prohibitions and requirements, while others may find it inadvisable to accept all the recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it.

1. The agency code should prohibit any person who is a party to, or an agent of a party to, or who intercedes in an on-the-record proceeding in any agency, from making an unauthorized ex parte communications about the proceeding to any agency member, hearing officer, or agency employee participating in the decision in the proceeding.

a. The term "on the record proceeding" should be defined as any proceeding required by statute or constitution or by the agency in a published rule or in an order in the particular case to be decided solely on the basis of an agency hearing, and any other proceeding which the agency designates by published rule or by order in the particular case as subject to these prohibitions.

By published rule or order in the particular case, each agency should specify which of its proceedings will be governed by the prohibitions against ex parte communications.

b. The prohibitions should apply from the time the agency notices an on-the-record proceeding for hearing or from such earlier time as the agency may fix by published rule, or order in the particular case.

c. Except as provided in d. below, the "ex parte communications" prohibited should include:

(1) Any written communication of any kind about an on-the-record proceeding, if copies thereof are not served by the communicator upon all the parties to the proceeding in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of service.

(2) Any oral communication of any kind about an on-the-record proceeding (i) if advance notice that it will be made is not given by the communicator to all the parties to the proceeding, or (ii) if its contents are not disclosed by the communicator to all the parties at the time of its presentation or promptly thereafter, in accordance with agency rules. Each agency should promulgate rules specifying the manner and time of disclosure.

d. The following classes of "ex parte communications" should not be prohibited.

(1) Any oral or written communication which relates solely to matters which the hearing officer, agency member, or agency employee is authorized by law to dispose of on an ex parte basis.

(2) Any oral or written request for information solely with respect to the status of a proceeding.

(3) Any oral or written communication which all the parties to the proceeding agree, or which the agency or hearing officer formally rules, may be made on an ex parte basis.

(4) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive or procedural issue in a pending on-the-record proceeding in which he is interested.

(5) Any oral or written communication made pursuant to an agency practice which is generally known and under which the content of the communica-

tion (by way of transcript or otherwise) is promptly available to any person who is a party to a pending on-the-record proceeding which involves any substantive or procedural issue to which the communication may be relevant or who can otherwise show an interest in the communication.

e. The "person who is a party" to whom the prohibitions apply should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, who is named or admitted as a party or who seeks admission as a party.

f. The "person who intercedes in" the proceeding, to whom the prohibitions apply, should include any individual outside the agency conducting the proceeding (whether in public or private life), partnership, corporation, association, or other agency, other than a party, or an agent of a party, who volunteers a communication, which he may be expected to know may advance or adversely affect the interests of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

g. The "agency employee participating in the decision" should include all employees of the agency who themselves make or recommend decisions or who are specifically designated by the agency to assist agency members, hearing officers, or other employees in making or recommending decisions.

Each agency should identify the employees, or classes of employees, who will so participate in the decision in a rule or order published at or before the time when the prohibitions against unauthorized ex parte communications begin to apply to a particular proceeding or class of proceeding or with respect to a particular employee or class of employees.

2. The agency code should prohibit any agency member, hearing officer, or agency employee participating in the decision in an on-the-record proceeding in any agency from (a) requesting or entertaining any unauthorized ex parte communication; and (b) making an unauthorized ex parte communication about the proceeding to any party to the proceeding, and agent of any party, or any other person who he has reason to know may transmit the communication to a party or a party's agent.

3. The agency code should prohibit any person from soliciting any other person to make an ex parte communication which the solicitor has reason to know is unauthorized.

4. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives a written communication which he knows is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to transmit the communication promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made, if they are not apparent from the communication itself. The Secretary should be required promptly to place the communication and the statement in the public file of the agency, to send copies of the communication to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that (a) the communications are either so voluminous or of such borderline relevance to the issues in the proceeding, or (b) the parties to the proceeding are so numerous, that it would be too burdensome to send copies of the communications to all the parties, the Secretary may, instead, notify the parties that the communications have been received and placed in the public file where they are available for examination by the parties.

5. The agency code should require an agency member, hearing officer, or employee participating in the decision, who receives an oral communication which he knows, at the time it is received, is unauthorized, or which he concludes should, in fairness, be brought to the attention of all parties to the proceeding, to put the substance of the communication in writing and transmit the writing promptly to the Secretary of the agency, together with a written statement of the circumstances under which it was made. The Secretary should be required promptly to place the writing and the statement in the public file of the agency, to send copies of the writing to all parties to the proceeding with respect to which it was made, and to notify the communicator of the agency code and any other applicable rules or principles of practice.

If the communications are from persons other than parties to the proceeding or their agents and the recipient determines that (a) the communications are either so voluminous or of such borderline relevance to the issues in the proceeding, or (b) the parties to the proceeding are so numerous, that it would be too burdensome to send copies of the writings containing the substance of the communications to all the parties, the Secretary may, instead, notify the parties that the communications have been received and writings containing their substance placed in the public file where they are available for examination by the parties.

6. The agency code should permit all parties to an on-the-record proceeding to request an opportunity to rebut, on the record, any facts or contentions contained in an unauthorized ex parte communication or in any other ex parte communication which the agency official receiving the communication brought to the attention of all the parties in accordance with Recommendation 4 or Recommendation 5 above. The code should provide that the agency will grant such a request whenever it determines that the dictates of fairness so require.

7. The agency code should provide that an agency may censure, or suspend or revoke the privilege to practice before the agency, of any person who makes or solicits the making of, an unauthorized ex parte communication.

8. To the extent permitted by applicable law, the agency code should provide that any relief, benefit or license sought by a party to a proceeding may be denied if the party, or an agent of the party, makes, or solicits the making of, an unauthorized ex parte communication.

9. The agency code should provide that an agency may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal, of any agency employee who violates the prohibitions or requirements of the code.

Appendix B

Administrative Conference Report on ABA Proposals to Amend the Administrative Procedure Act

RESOLUTION NO. 4 [1]

The ABA's Resolution No. 4 proposes amendment of the Administrative Procedure Act for the purpose of "[p]rohibiting *ex parte* communications between agency members and parties or other interested persons outside the agency on any 'fact in issue' in the decision of an adjudicatory or formal rulemaking proceeding." In implementation of this Resolution, the Administrative Law Section of the ABA has prepared and revised draft legislation setting forth in some detail the terms of such a prohibition and the consequences of violation.

The subject of *ex parte* contacts first gained widespread attention in the 1950's when several well publicized cases involving licenses led to demands for reform. The 1961–62 temporary Administrative Conference considered the problem in detail, and in its Recommendation No. 16 proposed that each agency promulgate *ex parte* rules in accord with general principles endorsed by the Conference:

Whereas the Administrative Conference deems it essential that administrative process should be protected from improper influences and that the agencies should take certain action to help achieve these objectives, It is Recommended That—

Each agency promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.

The Conference recognizes that it may not be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find

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[1] The proposed Statement on Resolution No. 4, as presented to the Assembly by the Council and by the Committee on Agency Organization and Personnel, was as follows:

"The Conference approves in principle Resolution No. 4, which calls for prohibiting *ex parte* communications between agency members and interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§ 556 and 557."

The discussion in text is addressed to the above proposal, which was significantly amended on the floor of the Assembly.

it advisable to add to the recommended prohibitions and requirements, while others may find it inadvisable to accept all the recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it.

The Recommendation went on to state in nine numbered paragraphs the recommended contents of such an agency code.

Conceptually, there are several distinguishable policy factors affecting *ex parte* rules, which may lead to the imposition of different sanctions for violation and, to a lesser degree, to differing scope of the rules. The first approach is concerned with the integrity of the decision-making process: all facts and arguments relating to the decision should be available on the public record so that the bases on which the agency is acting are discernible to affected parties and to the courts, the Congress, and the Executive in their oversight functions. Under this rationale, a proper remedy is insertion of *ex parte* communications into the public record. Similar policies are securing the rights of affected parties to participate in the decision-making process, and enhancing the accuracy of decision by insuring that all relevant data and argument will be subject to adversary testing; to satisfy these objectives, the proper remedy is not merely disclosure, but also an opportunity to rebut the *ex parte* information.

Somewhat different considerations become operative when the *ex parte* communication involves information that is not, in the legal sense, relevant to the issues to be decided—in short, when a powerful "outsider" brings political or personal pressure to bear on the agency decision-maker. In this situation, while disclosure and an opportunity to rebut may deter future misconduct, they would be of little utility in curing the violation, since permitting other parties to respond in the same fashion would convert the proceeding from a process of deciding specific issues on the merits into a political contest. About all that can be done, once the violation has occurred, is to try to remove from the decisional process those who have been the recipients of impermissible contacts. In aggravated circumstances where the *ex parte* contact verges on bribery, professsional misconduct or abuse of a public trust. there may also be sufficient ethical and moral grounds to conclude that punishment, discipline or denial of a benefit for the violator is necessary.

A final situation with distinguishable policy overtones is communication from agency decision-making personnel to persons outside the agency. The principal concern in this area is avoidance of actual or apparent prejudgment, and the traditional remedy is disqualification of the decisional personnel in question. It is appropriate to note, however, that here, unlike in the preceding situation discussed, it is not the communication itself so much as the state of mind it evidences which represents the real threat to the decision-making process. Consequently, rigid enforcement of rules as to what may or may not be communicated can mistake the shadow for the substance of the problem.

Beyond the logic of the various remedies for each policy factor, deterrence of future violations is a useful general approach. Thus it may be thought necessary to provide punishment for merely negligent or attempted violations, or for situations where it seems logically inappropriate, in order to prevent others from stepping over the line in the future. In light of this range of policy factors affecting *ex parte* communications, it is not surprising that existing agency *ex parte* rules encompass a variety of approaches, and that the draft legislation contemplates a number of different sanctions.

The basic question presented by the ABA Resolution is whether there is a need for any additional legislative treatment of the problem in the Administrative Procedure Act. The Act is not now entirely silent on the subject. Section 554(d) provides that the presiding officer at a hearing shall not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." But Section 554(d) is applicable only to formal adjudications, and is subject to the additional significant exceptions set forth in clauses (A), (B) and (C) of the subsection, which exclude initial licensing, all ratemaking and communications with agency members themselves. Basically, therefore, the present prohibition of *ex parte* communications in initial licensing, ratemaking and formal rulemaking depend on constitutional considerations of due process, see *Sangamon Valley Television Corp.* v. *United States*, 269

F.2d 221 (D.C. Cir. 1959); *Pillsbury Co.* v. *FTC*, 354 F.2d 952, 964 (5th Cir. 1966), on inference from the principle set forth in Section 556(e) that the transcript, exhibits and other papers filed in the proceeding constitute "the exclusive record for decision," and on agency rules.

In supporting individual agency rulemaking as against legislation, the 1962 Administrative Conference report advanced two main arguments: legislation would tend to rigidify the prohibitions, thereby making change and improvement difficult; moreover, allowing the agencies to take the initiative would create the impression that the agencies were "setting their own houses in order," thereby improving public confidence in the administrative process. In addition, it could be argued that the tremendous variety in agency procedures, traditions, and affected interests would make uniform proscriptions inappropriate, particularly in light of the broad scope of the proposed legislation discussed below; no matter how carefully the legislation was drafted, there would likely be many instances in which the statute would either permit improper *ex parte* contacts, or impair the quality of decision by deterring useful communications. It has also been suggested that imposing upon the executive departments a rule requiring disclosure of improper *ex parte* contacts may raise questions of executive privilege. Finally, it might be asked whether legislation is warranted, since there have been few recent cases in which courts have found that *ex parte* contacts have tainted an on-the-record proceeding.

On the other hand, there are certain obvious advantages to uniformity in *ex parte* rules, particularly for those who do not confine their participation in administrative proceedings to one or two agencies. Moreover, in the absence of a statute the failure of an agency to promulgate rules dealing with a particular situation may lead a reviewing court to reverse on constitutional grounds, and this could undoubtedly impose more of a "strait jacket" on administrative procedure than a statute.

The Conference's Committee on Agency Organization and Personnel considered the ABA Resolution with the assistance of a report prepared by Barry Boyer, of the Conference staff. The Committee concluded that specific legislative treatment in the APA of the problem of *ex parte* communications would be desirable, and it recommended that the Conference endorse Resolution No. 4 in principle.

The proposed endorsement is not intended to commit the Conference at this time on the questions raised by the text of the ABA Recommendation, including whether the APA should contain a detailed prohibition or a general prohibition to be amplified by agency rules, how the statute should deal with communications of data of general significance to an industry which may be relevant to the merits of a pending on-the-record proceeding (see 1962 Conference's Recommendation No. 16, para. 1(d)(4)), or how the agencies should remedy or penalize violations of the prohibition.

Appendix C

Administrative Conference Statement on ABA Proposals to Amend the Administrative Procedure Act

RESOLUTION NO. 4

The Conference approves the purpose of Resolution No. 4, which seeks the prohibition of *ex parte* communications between agency members and parties or other interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§ 556 and 557. We leave open for further consideration by the Council and cognizant committees whether this objective can most effectively be sought by legislative or by agency rules.

Senator Chiles. We will get the testimony of Mr. Wickham and then we will get back to your testimony.

Mr. Wickham, I am going to take about a 2-minute recess at this point.

[Recess.]

Senator CHILES. Mr. Wickham.

Mr. WICKHAM. Senator Chiles, I am Douglas Wickham, a member of the law faculty of the University of Tennessee.

I appreciate this opportuntity to testify on behalf of effective sunshine legislation. We have recently passed such a bill in Tennessee and you have a similar bill in Florida. These are coming to be very common at the State level, and my contribution to these hearings, if any, can be based upon the fact that this particular legislation has been a research interest of mine for several years. I have attempted to study and form some conclusions about the experience with sunshine laws at the State level. While obviously, this doesn't translate directly into solutions to all the Federal agency problems that the agency people were speaking about today I would like to offer whatever I can in that direction.

Senator CHILES. Thank you, sir. And I think that on the experience of the States—you are right. While it doesn't solve all of the particular problems of Federal legislation, as to many of the sorts of fears I think the experiences could be common.

Mr. WICKHAM. I would first simply like to outline what seem to me to be the basic conflicting policies and then talk a bit about some lessons I think can be learned from State experience.

Senator CHILES. Fine.

THE RIGHT TO BE INFORMED

Mr. WICKHAM. The interest in openness, the interest in access, really goes beyond simply a right to know what was done, what has been done by the Congress or by an agency. The citizen's interest in being informed really includes knowing what was considered during the process of making a particular decision, who was listened to, what alternatives were considered and rejected; we cannot evaluate the effectiveness of our Government unless we know something about the background of the decisionmaking. This is what an effective sunshine law has got to take us into.

THE RIGHT TO PARTICIPATE

At the same time, in addition to what I conceive of as a right to be informed, we have a right to participate—this particularly translates into agency proceedings—to have our views known in making particular decisions; and this again requires access to the proceedings if we are to effectively participate.

On the other hand, there are interests which I would describe as privacy interests rather than secrecy interests on the part of Government agencies and congressional committees. They tend to translate into legislation protecting consideration of particularly sensitive matters, and a number of these have been described here today. Some such matters which commonly arise at the State or local level might involve particular bargaining or negotiation sessions with groups of employees, matters which might involve possible defamation or invasion of privacy of the person who is the subject matter of a particular proceeding, conduct of official investigations. Beyond that list of sensitive matters which manifest themselves as lists of exceptions such as you have in Senate 260, or such as most sunshine laws have, is an interest which is harder to describe but I think which

everyone can understand—an interest in protecting some sort of initial zone of privacy for full and free institutional debate and thinking over of a particular matter.

The essential difference between an individual and an institution attempting to initially confront a problem is this: If you want to think something over, you can do it in private and no one can disturb that privacy; but if a group is going to engage in the same sort of reflective process and come up with informed decisions, then it would be helpful to protect them at some point in their initial deliberations. This policy does not translate into legislation so easily, as I am sure you are aware.

STATE LAWS

Many State laws restrict their coverage of meetings, open meetings, to either final action or voting sessions. It is fairly clear that the experience with such laws at the State level tends to yield what I might call a rerun, where you get together and thrash it out in advance. Then the board or whatever meets, they vote, and a good part of the discussion which is an integral part of the decisionmaking process somehow doesn't find its way into the open meeting; certainly the controversial parts don't, and that is the end of the matter. If you key your legislation to the final decisionmaking part of the lawmaking process, and S. 260 is essentially keyed to this, that is a first step; but this type of legislation runs a severe risk, based on State experience, of simply encouraging more business at the lunch table and more rerun public sessions.

Some State laws evidence a tremendously expanded list of exceptions which appears to be the result of a process in which a series of agencies or interests approaching the legislature prior to passage of the bill or seeking an amendment saying, "Look, we don't want to operate under this law, why don't you exempt us." While it may be true there are certain types of decisions that each agency might make which might better be made in private proceedings, the result is a broad exception for the agency. This type of political backscratching process is something that definitely has to be guarded against in the course of passing an effective open meeting law. I might cite two State statutes as examples here. In California, the act covering State administration agencies, bears evidence of such a process and the recent statute passed in North Carolina is about one-fourth coverage and three-fourths exceptions.

Enforcement of these laws has proven very difficult because the offense, if any, is really political; and so you find in State statutes that the most common enforcement provision is a minor misdemeanor-level criminal penalty. Yet it definitely runs against the grain of our system of government to fine and jail people for essentially political offenses. Consequently, these sanctions remain almost completely unused.

In the course of researching the matter I have not seen one reported case interpreting a State open meeting law which arises from a criminal enforcement proceeding; and there are hundreds of cases. I have heard that there have been prosecutions. Someone told me not too long ago that there had been some prosecutions in Florida.

Senator CHILES. A number of them?

Mr. WICKHAM. This is an unusual phenomenon, to say the least, and I think you can appreciate the difficulty again of using a criminal process to enforce what is essentially a political type of violation. The sanction is at least inappropriate and seems out of place.

Title I, addressed to the workings of the Congress, is entirely self-enforcing; and while there appear to be a couple of small loopholes in terms of its enforcement processes, I really don't feel competent to try and present alternatives. I would simply observe that, where the Members of the Congress are concerned, there is, after all, an electoral sanction which can back up any self-enforcement proceeding. If it is the law that you will operate openly and it turns out that Congress does not operate openly under the law, the people have some redress every 2 or 6 years.

This sort of electoral redress is not present in situations where you are talking about agency decisionmaking. Therefore, I think some sort of citizen enforcement, civil enforcement, is essential if an open meeting or sunshine law is going to be effective.

I think you have a well drawn civil enforcement section in title II. There are a number of specifics in that particular section which strengthen the hand of the individual who wants to contest the agency's decisionmaking process and I think on the whole that these are necessary and should be left in. The proposition concerning costs, the calendar advancement because timely enforcement is essential. Delay is often the equivalent of defeat.

I have suggested in my prepared testimony two possible means of strengthening the enforcement. One is, and Tennessee's sunshine law has a section which does this, to give the court a continuing jurisdiction, supervisory responsibility, so that there is a contempt of court sanction available if a particular member of an agency or group in an agency continues to violate the law. There is no need to bring another action. The contempt process is there.

POLITICAL OFFENSE

Another idea has occurred to me as I have studied this legislation—and I realize that this is a difficult one to legislate, and maybe a little scary—but it seems to me if the offense is political, then the most appropriate remedy to fit the crime, if you will, or fit the offense, might very well be to remove the repeated offenders from office. After all, a Member of Congress or a member of an agency has a certain amount of public trust which accompanies the office and continued violation of that public trust would seem to be a proper occasion for removal.

Where elected officials are concerned, that can become a political issue and the matter can be taken care of without legislation. Independent members of agencies have a status which doesn't really permit that type of enforcement sanction. Maybe it is impossible there. But I would at least suggest that repeated violation of a law such as this might become under proper controls cause for removal of a given civil servant. There are important decisions made on a somewhat lower bureaucratic level in which this type of sanction might become appropriate. The matter would require further study and I am really not an expert on civil service. But these are the major findings and conclusions that I have reached in the course of studying these laws at the State level which might be helpful to

you—I hope will be helpful to you—in the course of drafting an effective sunshine law.

PUBLIC CONFIDENCE

I think a point you were making earlier bears repeating, that our system of government requires the confidence of the governed. Right now there is no accepted standard of access to governmental proceedings and I think this legislation can at least set up the standard, as you say. While enforcement of particular violations may become difficult, may even be unmanageable, nonetheless, if the standard is there and there is a sufficient electoral sanction backing up that standard, then I think the confidence that the people will have in the working of their Government will increase. I think that is a tremendously important thing to accomplish at this time.

Senator CHILES. Thank you very much. Again I want to note that your written statement will be included in the record.

[Prepared statement follows:]

PREPARED STATEMENT OF DOUGLAS Q. WICKHAM, ASSOCIATE PROFESSOR OF LAW, UNIVERITY OF TENNESSEE

Enacting an effective Sunshine law is a deceptively difficult task. Open-government rhetoric has permeated our political writings and orations since the birth of the republic, and one can hardly take a stand against citizen access to the government in a democratic society. Yet careful consideration of a bill such as Senate 260 reveals a conflict among fundamental policy values on which there is anything but consensus. I should like first to identify these conflicting values more specifically and to discuss some of the difficulties state legislatures have had in seeking their resolution. I shall then comment directly on what appear to be the particular strengths and weaknesses of the Sunshsine bill presently before you.

I. CONFLICTING POLICY VALUES

Open access to governmental proceedings at all levels is absolutely essential if we, the citizens and voters, are to become informed about the workings of our government. It is not enough for us to learn after the fact what decisions were made and, perhaps, who voted which way; for it is impossible to evaluate those decisions unless we can also know something of what went into them—what information was received and what alternatives were considered and rejected. Informed citizens also have the right to participate in the making of particular decisions, but cannot do so if they are not permitted timely access to the proceedings in which those decisions are made. Our abstract right to participate in the workings of a democratically governed society can take a giant step toward becoming a reality if we, the governed, are given an enforceable statutory right to attend the proceedings of the Congress, its committees, and the executive and administrative agencies.

Let me offer an example: For some time now, the general concept of "tax-reform" has been bandied about. I make an effort to stay reasonably well informed on this subject (out of personal rather than professional interest) but I really have no firm idea about what is being discussed by those members of the Congress who make a difference, nor about what is being said to them by those seeking to influence their thinking. Rightly or wrongly, I have an uneasy feeling that much is going on that I can never find out about. If Senate 260 were law and if its "self-enforcement" mechanism were to work effectively, I would feel much more confident that I could come to know the "whys" behind the eventual outcome.

Just as the people have legitimate interests in this matter, so do their representatives in government. Everyone's interest in rational and informed decisionmaking by the government requires that those involved in collective processes of thinking out and solving problems retain an initial zone of privacy in which internal differences can be freely discussed and debated.

If an individual wants to "think over" a matter, he can do so privately and no one can disturb that privacy. If a group wishes to engage in that same reflective process, an "exceptionless" open meeting law can prevent it. It is fair to say that those in subordinate positions would feel freer to criticize within the group if they may do so in private. It is certainly more difficult to change one's mind after taking a public position on a particular matter; and so it would seem counterproductive to require all "first thoughts" to occur in public.

The art of legislating the necessary access to ongoing governmental processes while preserving for the decisionmakers an equally necessary zone of reflective privacy has proven exceeding difficult.[1] A successful resolution of the value conflict we have described requires both effectively drawn legislation and a measure of good faith in its implementation. I would submit that only a Sunshine law which fairly considers both interests can create a climate in which the necessary good faith will be forthcoming.

II. PROBLEM AREAS OBSERVED IN STATE OPEN MEETING LAWS

It is fair to conclude from our description of policy values that most governmental meetings ought to be open, but some are better conducted in private. Attempts by more than 40 state legislatures[2] to find this happy medium have resulted in a multitude of statutes with few discernible patterns; and this, I think, underscores the difficulty of the problem. Several common errors can, I believe, be deduced from these state laws; and then should be avoided in any federal Sunshine law.

The "obvious" way to define a "meeting" which must be open is in terms of voting or taking final action.[3] This inadequate definition will render a Sunshine law completely ineffective. I am sure that many members of this body have taken part in a dinner conversation or weekend work session which preceded an "open meeting." The meeting iself becomes nothing more or less than a re-run for the record without half of the discussion which was an integral part of the real decisionmaking process. Some courts have been able to expose and nullify such re-run decisions, but they have been able to do so only where the state legislature has clearly stated that more than an open final vote is required.[4] No other clear definitional line stands out in this gray area between final vote and initial reflection, but an effective Sunshine law must somehow indicate this broader coverage.[5]

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[1] For fuller discussions of conflicting policy values and general treatments of state open meeting legislation see Wickham, "Let the Sun Shine! Open Meeting Laws Can Be Our Key to Closed Doors in State and Local Government," 68 Northwestern Law Journal 480 (1973); Note, "Open Meeting Statutes: The Press Fights for the Right to Know," 75 Harvard Law Review 1199 (1962).

[2] The most recent "count" of state open meetings laws is contained in a paper by Dr. John B. Adams, Dean of the University of North Carolina School of Journalism entitled "State Open Meeting Laws: An Overview." This is a 1974 publication of the Freedom of Information Foundation, Columbia, Missouri.

[3] *E.g.* Mich. Stat. Ann. § 4.1800(1), (2) (1969): "'Public meeting' means that part of any meeting of a board during which it votes . . ."

[4] California's history is instructive. In *Adler v. City Council,* 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (1960) the court held that coverage of its open-meeting law was limited to "formal actions taken by the entire body." The California legislature responded by broadening the concept of "actions taken" (Cal. Govt. Code Ann. § 54952.6, added by 1961 Stats. c. 1671, p. 3637, § 3). A California appellate court then ordered the Sacramento County Board of Supervisors to permit press attendance at "business lunches" held at the Elks Club. (Sacramento Newspaper Guild v. Board, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968).

Compare the Illinois case of Goldman v. Zimmer, 64 Ill. App. 2d 277, 212 N.E. 2d 132 (1969), in which the court held that a vote to condemn plaintiff's property taken in an open meeting after trial of the case cured the defect in the earlier decision taken at an illegally closed meeting.

[5] Virginia's "'Freedom of Information Act" contains a good example of such an attempt:

§ 2.1–341. Definitions.

(a) "Meeting or meetings" means the meetings, when sitting as a body or entity, or as an informal assemblage of the constituent membership, with or without minutes being taken, whether or not votes are cast, of any authority, board, bureau commission, district or agency of the State or of any political subdivision of the State, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissionss; and other organizationss, corporations or agencies in the State, supported wholly or principally by public funds. Nothing in this chapter shall be construed as to define a meeting as a chance meeting of two or more members of a public body, or as an informal assemblage of the constituent membership at which matters relating to the exercise of official functions are not discussed."

Nearly every state has attempted to identify those types of decisions which simply cannot be made in public proceedings and has appended a list of exceptions to the coverage of its open meeting law. When one observes the mass of state open meeting legislation, the conclusion is inescapable that some of these lists of exceptions are the product of a process in which the standard argument is, "everyone but us ought to be covered." The end result reflects only the vocal intensity and political strength of the pressure groups seeking recognition at the time of passage or amendment.[6] A hard look at this situation must be taken and some exceptions should probably be made, but it is very difficult to limit this process once it is begun. There is some consensus here. Situations which are commonly excepted from coverage of state open meeting laws include: internal administration and personnel management, conduct of official investigations, consideration of real property acquisition, and protection of individual privacy.[7]

Of paramount importance is the matter of how precisely these laws are to be enforced; yet state open meeting laws are replete with blanket exceptions which make enforcement impossible[8] or with enforcement mechanisms which are so inappropriate that they remain completely unused. (One-fifth of them don't even mention enforcement!) For example, the most common enforcement provision is a misdemeanor-level criminal penalty.[9] The offense here is political, and it runs against the grain to fine or jail people for purely political transgressions. Not one of the numerous reported cases involving interpretation of a Sunshine law arises from a criminal enforcement proceeding. Civil relief, after the fact, is of little help because the decision has been made; all that can be done is to try to prevent future violations. If we would "frame the punishment to fit the crime," it might be most appropriate to have repeated offenders removed from office; yet only one state legislature has had the temerity to adopt such a remedy.[10]

III. THE POSITION OF THE ORGANIZED PRESS

One more observation is necessary in order to complete the context in which open meeting legislation must be evaluated. I have described the values and difficulties involving in terms of "citizen vs. government." The skeptic would remark that few citizens really care that much about being informed, and that this really is a matter of the press asserting its desire to more easily cover governmental affairs. I would respond that most citizens want and need their press to be able to cover governmental affairs effectively, and I underscore effectively.

The organized press is very active in promoting open meeting legislation, but they often promote a position with which I must take issue. They assert that there are no governmental meetings which should remain closed. You have such a statute in Florida,[11] and we have adopted something similar in Tennessee.[12] I believe such a one-sided statute tends to undermine the spirit of good faith which is essential to the effective functioning of an open meeting act. Our experience this year in Tennessee seems to bear this out and we already observe preparation for an adversary session in the next legislature in which competing amendments will be offered. The Tennessee Press Association and the Tennessee Municipal League each gathers its forces to do battle; and the people, whose true interest lies somewhere in between, will lose if either of these organizations has its way.

It may be in the nature of things that the organized press would adopt such an intractible position and that lawyers would disagree with it. Bayless Manning, president of the Counsel on Foreign Relations, aptly described this

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[6] *E.g.* Cal. Govt. Code Ann. § 11126 covering state agencies. The list of exceptions grows each legislative session.

[7] *See* Wickham, *supra,* n. 1, at pp. 483–7.

[8] *E.g.* Georgia Code Ann. § 23–802 (1971): "(P)rovided, however, that before or after said public meetings, said bodies may hold executive sessions privately . . ."

[9] The range of maximum fines runs from $25 (Pa.) to $500 (Vt.), and a $100 and/or 30 days provision seems to be the norm.

[10] Minnesota Stat. Ann. § 471.705 (as amended by Laws, 1973, c. 680 §§ 1, 3.

[11] Fla. Stats. § 286.011:

"(1) All meetings of any board . . . except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times . . ."

[12] Tenn. Public Acts, 1974, ch. 442:

"Section 2. Open Meetings: All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution."

psychological difference btween our profssions in a January, 1974, speech before the Chicago Bar Asssociation:

"Men and women of the media are in the business of turning on floodlights; the lawyer, the negotiator, and the diplomat . . . believe that many of the most constructive activities in human life require intimacy, low lights, and a quiet voice . . . The major item in the diet of the press is controversy and confrontation. Lawyers are usually working to compose and accommodate differences. The press must work to simplify that which is complex and to suppress factual detail in favor of the emotional jugular. The lawyers pull exactly the same way." [13]

This description of our differences suffers the weakness of all generalizations, but I agree with Professor Manning in its essential validity.

IV. THREE CRITERIA BY WHICH TO MEASURE S. 260

I am a lawyer, and I am firmly convinced that there is a crying present need to open up governmental processes at all levels. Based on several years study of state open meeting legislation I would submit for your consideration three characteristics which an effective Sunshine law must have: (1) There must be a clear statement of policy which indicates a presumption in favor of access to governmental meetings, and the act as a whole must be consistent with that statement. (2) There must be sound definitions of important terms (bodies covered, what constitutes a meeting, national security, commercial privilege). (3) There must be well-drawn, realistic enforcement procedures. Measured by these three criteria, the bill before you, Senate 260 as amended, has both strengths and weaknesses. I would like now to point out and commend the strengths and would like to suggest means of improving on the weaknesses.

Senate 260 contains admirable statements of policy, and it does not contain any obvious loopholes such as a blanket permisssion to hold executive sessions or an over-narrow definition of covered meetings.[14] It would appear to comply with my first suggested criterion until viewed in the broader context of the lawmaking process. Clearly, only the most formal aspects of lawmaking are included within the framework of the bill. Gatherings of members of Congress who do not form an officially designated committee or subcommittee do not appear to be within the scope of the bill's enforcement mechanism. There is no legislated definition of "meeting," but only those formal proceedings for which a transcript is preserved are within the effective realm of the remedies provided for in Title I, and only formally called meetings of agencies and on the record proceedings fall within the scope of the remedial provisions in Title II. My criticism is not of the bill's draftsmanship so much as of its limited scope of coverage. I am afraid that limiting this law's coverage to formal proceedings will only encourage "business at the lunch table" to an even greater extent than now occurs.

Because courts are not drawn into the enforcement of Title I, any attempt to broaden the definition of covered "meetings" to include some informal gatherings would require a rethinking of the bill's enforcement provisions. Title I's sole remedy is putting an account of illegally closed proceedings back onto the record, and this obviously won't work when no record has been made of the gathering which violated the act. Some state legislatures have attempted to meet this problem by providing that actions taken in illegally closed meetings can be voided upon proper judicial findings. This remedy casts a major shadow on local financial commitments and has resulted in a very uneven pattern of judicial enforcement.[15] I would think it completely infeasible in the

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[13] 55 Chicago Bar Record, Special Centennial Issue at pp. 49–50 (1974).

[14] *See* examples in notes 8 and 3, *supra*.

[15] The Iowa Supreme Court divided sharply in the case of Dobrovolny v. Reinhardt, 173 N.W. 2d 837 (Iowa, 1969). The majority refused to nullify a school board decision involving consolidation of school districts because it was apparently sound on the merits. The dissenters were disturbed because the decision could create a climate of disregard for the recently enacted Iowa open meeting law. There are a good many cases in accord with the majority:: Elmer v. Board of Zoning Adjustment, 343 Mass. 24, 176 N.E. 2d 16 (1961); Dion v. Board of Appeals, 344 Mass. 547, 183 N.E. 2d 479 (1962); Reilly v. Framingham, 345 Mass. 363, 187 N.E. 2d 838 (1963); Goldman v. Zimmer, 64 Ill. App. 2d 277, 212 N.E. 2d 132 (1969); Szilagyi v. State, 249 Ind. 400, 231 N.E. 2d 221 (1967) (consolidation of school districts); State ex rel. Humphrey v. Adkins, 18 Ohio App. 2d 101., 247 N.E. 2d 330 (1969) (student expelled from high school where school board took testimony from principal and teacher in private); Thomas v. Board of Trustees, 5 Ohio App. 2d 265, 215 N.E. 2d 434 (1966) (in an action for back pay by a constable fired at an informal meeting, it was held that the action otherwise lawful would stand); In re Seattle Housing Authority, 62 Wash. 2d 492, 383 P. 2d 295 (1963) (condemnation of property for public housing).

context of self-enforced Congressional rules. I frankly do not know enough about the workings of the Congress to be able to suggest an effective means of extending the coverage of Title I while preserving the self-enforcement mechanism here proposed. It is probably best to take this first step and then see if the remedy is sufficient to prevent formal proceedings from becoming mere re-runs of actions decided on informally. There is always an electoral "remedy" available if self-enforcement proves ineffective.

Title II is importantly different, in that it does provide for citizen enforcement of its provisions through action in the courts. This mode of enforcement remains useful even when the act's requirement of openness extends to the less formal aspects of agency lawmaking. Given the bureaucratic nature of most agency decisionmaking and the fact that agency members are not subject to an electoral sanction, it is essential that there be open access to their deliberations prior to the formal proceedings which only serve to record their final decisions, I would, therefore, recommend that the scope of Title II coverage be extended by adding this definition of (open) "meetings."

Section 201(a): "(4) Meeting means two or more members or employees of an agency as defined in section 551(1) of Title 5, United States Code gathered electronically or in person to conduct official agency business. Chance encounters of two or more members whose major purpose is other than the discussion or transaction of official business shall not constitute a meeting for purposes of Title II of this act."

It seems to me that this definition of meeting extended beyond the formal proceeding is necessary if we are to have an effective federal Sunshine law. The courts are capable of exercising sound discretion in resolving disputes arising under an open meeting law if they are given some guidance concerning the value framework within which they must act.[16] It seems clear that an open meeting law directed only at formal agency lawmaking proceedings will not provide effective citizen access to critical parts of the overall process. Unless the scope of this statute's concept of meeting is expanded, it does not evidence a true legislative purpose to open up the agency lawmaking process.

The list of exceptions in Senate 260 permitting executive sessions appears carefully drawn, and it is apparent that a good deal of thought has been given to the creation of a list which will meet the particular needs of the federal government. I have no real background in these federal matters, but I can say that the proposed list contains no obvious deviations from exceptions generally sanctioned in state legislation. I reiterate my hope that the existence of such a list of exceptions will not provide the opening through which a number of self-interested "pleas for privacy" will become part of the law. I do commend the fact that you have required a specific decision to be made for holding each executive session and that you require justification for each such decision. This feature is found in the better recent state open meeting laws.[17]

It also appears that a good deal of thought has gone into the enforcement provisions of this bill. Title I, concerning proceedings in the Congress is internally consistent and coherent. There are three matters, however, which need attention and possible strengthening. While illegal votes to close meetings and deletions from transcripts have specific remedies provided for in the act, there is no apparent sanction for failure to announce the list of who voted and supporting reasons within one day, and there is no apparent sanction for failure to properly announce a meeting. In addition, the schedule of enforcement proceeding is not accelerated at the end of a session. The fact that the select committee always has five legislative days in which to report means that meetings could be illegally closed with no possibility of timely redress.

Title II concerning agency proceedings has several strong points in Sections 201(h) and 202(f) on judicial relief which should remain in the bill. Shifting the burden of proof to the agency is in keeping with the essential intent of the bill that all meetings are to be open unless specifically excepted. Court actions need expeditious disposition because it is so difficult to provide effective relief

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[16] The New Jersey courts provide the best example of sensible judicial treatment: Wolf v. Park Ridge, 79 N.J. Super. 546, 192 A.2d 305 (1963); Kramer v. Sea-Girth, 80 N.J. Super. 454, 194 A.2d 26 (1963); Scott v. Bloomfield, 94 N.J. Super. 592, 229 A.2d 667 (1967); Shults v. Teaneck Bd. of Ed., 86 N.J. Super. 29, 205 A.2d 762 (1964). These cases are fully discussed in Wickham, *supra*, n. 1, at 494–5.

[17] *E.g.* Hawaii Rev. Stat. § 92–3 (1968): "No board may meet in executive session . . . except by a two-thirds recorded vote of its membership."

after a meeting and decision have taken place. Delay in this situation is usually the equivalent of defeat. Court publication of illegally deleted material and provision for civil fines in cases of willful violation are appropriate sanctions and should be retained.

The most difficult enforcement problem is presented by an action already decided upon at an illegally closed meeting. The remedy of automatic avoidance places a heavy cloud on decisions otherwise soundly taken. The drafters of S. 260 were aware of this because they provide clearly that the power of a court to set aside an agency decision for violation of the Sunshine law is discretionary. I believe this is appropriate, but I would like to suggest two means of strengthening this aspect of Title II enforcement.

Continuing supervision by a court of its injunction with the possibility of punishment for contempt if there are future violations would measurably strengthen the hand of a citizen-enforcer. We have such a provision in Tennessee's Sunshine law[18] and I would recommend its adoption in any federal act which utilizes court enforcement.

Judicial remedies should be directed at the offenders rather than at their decisions in nearly all cases, and it is also fair to say that repeated offenders are not worthy of the public trust evidenced by their continuation in office. It would therefore be logical to consider legislating some sort of removal procedure. The independent nature of many federal agency positions may prevent blanket enactment of this sort of remedy; but it would appear that repeated, willful violation of an open meeting law could be designated as a cause for removal of a civil servant. I am not sufficiently familiar with the workings of Civil Service to provide a detailed recommendation, but I believe this idea worthy of further exploration. This remedy is the direct parallel of the electoral sanction which implicitly supports the enforcement of Title I.

I thank you for this opportunity to express my views on this important piece of legislation. I believe that passage and enforcement of an effective Sunshine law can play a significant part in restoring our confidence in the federal government. You must take actions such as this, or forever lose your ability to convince the electorate that you do govern in our interest.

Senator CHILES. Mr. Berg, does the Administrative Conference have any information on the adequacy of current agency regulations dealing with the problem of ex parte communication?

Mr. BERG. We did a survey of the regulations of selected agencies in connection with our study of the ABA proposal, but it was really basically just to determine whether there was a——

Senator CHILES. If you have such a study we would like to have a copy of it for our records.

Mr. BERG. That would be possible. It is essentially in the nature of a checklist with the citation to the regulation.

[See appendix, p. 362.]

STATUTORY EXEMPTION

Senator CHILES. How do you think we should write in a statutory exemption to deal with the Federal Reserve Board problem?

Mr. BERG. I would suggest something along the lines of the section 553 test of "contrary to the public interest." It is a similar kind of

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[18] Tenn. Public Acts, 1974, ch. 442:

"Section 6. Penalties and Court Jurisdiction:

"(a) The Circuit Courts, Chancery Courts, and other courts which have equity jurisdiction, shall have jurisdiction to issue injunctions, impose penalties, and otherwise enforce the purposes of this Act upon application of any citizen of this state.

"(b) In each suit brought under the Act, the court shall file a written Findings of Fact and Conclusion of Law and final judgments, which shall also be recorded in the minutes of the body involved.

"(c) The Court shall permanently enjoin any person adjudged by it in violation of this Act from further violation of the Act. Each separate occurrence of such meetings not held in accordance with this Act shall constitute a separate violation.

"(d) The final judgment or decree in each suit shall state that the court retain jurisdiction over the parties and subject matter for a period of one year from date of entry and the court shall order the defendants to report in writing semi-annually to the Court of their compliance with this Act."

agency determination. Of course, there is a different result riding on it because the——

Senator CHILES. Would it be preferable to have implementing regulations worked out by various agencies with the cooperation of the Administrative Conference and subject to clearance by the Congress?

Mr. BERG. Well, the question of clearance gets into a different organization area. Right now the Administrative Conference is wholly an advisory body. Anything that had to be undertaken as an ongoing operation couldn't really be done by a 90-member consultative body. It would have to be the office of the Chairman. And I think we might have the expertise but I am not sure that we have got really the stature, let us say, to tell another agency that its regulation is not acceptable. I am really not sure what our reaction would be but I know that with respect to certain other proposals for giving the Administrative Conference authority to make something stick, it is not something that we are seeking, frankly.

EX PARTE COMMUNICATIONS

Senator CHILES. Agencies already have provisions governing ex parte communications. The problem in many cases has been enforcing the regulations. Ex parte communications are hard to stop because by their very nature they are not known to the people who would challenge them before a court or an agency.

Is there any additional way you can think of to solve the enforcement problem such as permitting the court to fine an agency employee who willingly engages in oral ex parte communications?

Mr. BERG. I think the basic problem, of course, is finding out. I might say that at last, judging from the general impression in the legal community, the problem is not nearly so bad, has been not nearly so bad since, say, the early sixties as it was in the late fifties, where there were some bad instances, and you may recall I think it was Congressman Harris' committee in the House which had an investigation of certain agencies.

There has not been, I think, much in the way of publicly known abuse of ex parte communications in recent years.

As to what the sanction should be, I think when it is discovered, the sanction now tends to be, for practical purposes, effective. It is a question of finding it out and making it public. And how one does find out, one has to admit it is not always easy. I don't know.

Requiring the Civil Service Commission, say, to take action against a subordinate employee would be a possibility. I would think with respect to an administrative law judge, there is such a possibility now. With respect to the agency heads, which is where it occurred at times in the fifties, I don't think the Civil Service Commission would have authority. I would really come to the kind of thing Professor Wickham is talking about, congressional action. Or Presidential action.

Senator CHILES. You suggest that Congress should itself experiment with an open meeting requirement before imposing it on agencies. In fact, you know, the House and a number of the Senate committees, three or four of them, have adopted such a requirement. Have you considered their experience with the open meeting principle in preparing your——

Mr. BERG. I confess that the Administrative Conference has not developed any background or knowledge on how open meeting provisions have worked either on the Hill or at the State level. Professor Stolz has had some experience with the California law, but speaking of the Conference as an institution, no, we don't have any.

Senator CHILES. Professor, do you want to share with us some of your experiences with the California law?

OPEN MEETINGS IN CALIFORNIA

Mr. STOLZ. Only very informally. I happen to have been in the attorney general's office of California at the time that the California statute went into effect. I argued against them in my role as counsel for various State agencies and when they were enacted, I tried to counsel my clients how to comply with them.

In my testimony against the adoption of the statutes, I made all the arguments that you have heard this morning. I share your sense that at least with respect to the agencies that I had had occasion to advise, it made very little difference. The chilling effect simply did not occur.

Senator CHILES. They were able to carry on their business?

Mr. STOLZ. They were able to carry on their business.

It is also true the agencies I was concerned with, mostly in the Department of Labor, were not for the most part engaged in very sensitive kinds of deliberations, so I am not sure that experience is very good.

I can also say I don't think it made much difference. I don't think the public confidence was very much enlarged.

Senator CHILES. How far does the California law go? I am not very familiar with it.

Mr. STOLZ. It has been a long time since I looked at it. The California statutes are called the Brown Acts. It is not Governor Brown. It was Ralph Brown, the speaker, for whom they were named. There are dozens of Brown Acts with respect to local government agencies. I think they are pretty comprehensive with respect to local government other than chartered cities.

There is also a statewide Brown Act applicable to State agencies which is quite extensive. There were very few exceptions in the law as it was originally enacted. I think the only exception that I can remember was for personnel matters. The attorney general's office invented one, in quotes, out of the attorney-client privilege for matters under litigation so that an agency could consult with its lawyer with respect to pending litigation in executive session.

There may very well since then have been some additional amendments to the act for other kinds of exemptions. We construed the statute quite broadly. I remember counseling with one of my clients not to go to lunch together. That was its principal impact as far as I was concerned, we no longer had those nice luncheons.

There also were problems that I recall with respect to legislation which was at least proposed and I think vetoed by Governor Brown—it may have been passed since then—providing for voiding of any action taken at a meeting in violation of the Brown Act. That struck me as being a very unwise provision. It invited delay. It was partic-

ularly troublesome with agencies that had the power to issue bonds because the potentiality for delaying the issuance of the bond was enormous.

It seems to me that it is enough to provide for a duty to have the meetings in public, and the power in the court to enjoin future violations rather than to void action that was taken at the meeting in violation.

Senator CHILES. Mr. Wickham, you refer on page 5 or 6 of your written testimony to the problems of the new open meeting law in Tennessee. What exactly have been those problems?

OPEN MEETINGS IN TENNESSEE

Mr. WICKHAM. Well, it is a law which has received a very mixed response. On the one hand, this fall, as different types of boards, utility districts and school boards, began to have their meetings, the Knoxville News Sentinel would have a short story that this board or that agency is now "going public." The board of trustees of the University of Tennessee is now having public sessions. It never did before. They seem to be able to comply or be willing to comply.

On the other hand, the law went into effect on the 1st of May and was met with a lawsuit originating in Memphis which attempted to establish the proposition that the Tennessee sunshine law was unconstitutionally vague. They particularly focused on the notice provision of the law. It requires "adequate public notice" and the Chancellor there ruled, "Yes, this law is unconstitutional." So that worked its way up to the Tennessee Supreme Court which looked at the law and, while it may have had some reservations about its draftsmanship—I have some, too—said unanimously, no, this is not unconstitutional and void. So back down it goes and the latest I hear is that the city attorney in Memphis is consulting with the Shelby County attorney to see if there are any other ways of attacking the law.

Frankly. I think it is rather clear from the opinion of the court that the initial attempt to hold the law up borders on the specious. I was amazed when I heard of the chancellor's decision, and I read it and I am still amazed.

The law in Tennessee is rather like your State law in Florida in that it does not provide for any exceptions. According to its letter, there are no situations in which a governing body can do anything except in public. Occasions do arise, such as the matter mentioned by Professor Stolz concerning a conference with an attorney about matters in litigation, which cannot be public. The city attorney in Chattanooga has issued an opinion to the effect that there is a constitutional right of a client to confer with an attorney, and he has advised agencies that they can confer with their attorneys and I don't believe that will be tested.

On the other hand, school boards are being called down, lawsuits have been filed attempting to enforce the open meeting law against them. Its real effect in Tennessee, I think, is still a matter to be determined. To say the least, it has been controversial and I think one of the things that makes it so controversial is that it looks on its face quite scary to a Government official who even wants to comply with its spirit, because it seems to be and is in fact a very one-sided bill.

It was drafted by the Tennessee Press Association and sailed through the legislature with very few amendments. But the press association is getting ready for the next session and so is the Tennessee Municipal League and there may be some interesting attempts to amend or do away with the bill. Who knows?

FLORIDA SUNSHINE

Senator CHILES. Thank you. In Florida, of course, in passing our law, it was not without controversy. It was tested by a school board. It was tested by societies. Normally, I think most of those tests were really brought by citizens, though, and school boards started moving to breakfast meetings or started moving to night meetings at a member's house and some of these other ways, and the court, I think universally in Florida, has upheld the law and required the open meeting requirements.

I think again in matters involving litigation, those matters have been allowed to be discussed on the basis of the constitution.

Mr. WICKHAM. A certain amount of good faith on both sides is necessary, I think.

Senator CHILES. Right.

Mr. WICKHAM. Because reiterating one thing I said, if you legislate only to the extent of final action you get reruns. If you attempt to legislate farther into the decisionmaking process there is no obvious line that you can capture in a set of words. You have to legislate a reasonable principle and set of enforcement regulations, and entrust the press and Government agencies essentially to give it the sort of treatment it deserves.

RESPONSIVE GOVERNMENT

Senator CHILES. You discussed in your statement that the ultimate aim of legislation is not only informing the public but for the Government to be more responsive to the public. So in addition to the open meetings, the public should also be assured of an opportunity to respond, to submit views or make the agency consider these views.

Do you all think that the requirements in the bill for prior public notice and open meetings will assure this or should we attempt to establish further procedures to assure some kind of successful public participation in addition to that already provided?

Mr. BERG. I think the problem of public participation is rather different. The Administrative Procedure Act deals with that in section 553 with respect to rulemaking. Certain regulatory statutes, indeed, most regulatory statutes in recent years have provided something additional in the way of rights of participation in the rulemaking process.

The question of sitting in at the agency meeting, it seems to me the merits pro and con have got to be weighed with respect to that particular question, because even if the public sits in, I don't envision that they are going to be participating. That I think would tend to be chaotic. An agency after all has got to be able to control its own flow of discussion.

So the forum for participation I think is distinct from the forum in which the decision is actually made. Even when you have a formal hearing, presumably the body, if it is a collegial body, or even if it is a single individual, is going to retire and get the record and consider all the arguments and come to some conclusion. It doesn't generally decide from the bench at the close of the hearing.

Mr. WICKHAM. I think there are some situations at the State and local level which really are not exactly like the situation, at least as I understand it, on the Federal level. There are boards, individual boards and operating bodies at the local level who simply will not listen to anybody, absolutely closed shop operations.

Now, step 1 of this sunshine legislation is to open them up and let people, including the press, watch them so that the people can find out what they have done and why they are doing it. I think that is a very important interest. Beyond that the matter of participating, as Mr. Berg suggested, may create its own particular problems. So I would respond to your question by saying that I really don't know—I really don't know whether the participation side of the Federal agency lawmaking processes is in need of the kind of drastic change which might be affected by a sunshine law. It may simply need adjustment rather than wholesale change, but that is just a guess rather than an informed opinion.

Senator CHILES. Well, perhaps it can be also that once the people are able to see what goes on in the decisionmaking process and how that is made, their demand for response or to be able to respond or participate will make itself heard and, therefore, require broadening of the——

Mr. WICKHAM. That is possible, and again there are some avenues by which interested parties can participate at the Federal level. They may be difficult but they are there, and in some State and local situations the avenues themselves really aren't even there. It is more of a roadbuilding than improvement process, to use an analogy.

Senator CHILES. There is basically no reason why agencies headed by a single individual should not be open for agency deliberations to the public just as agencies headed by more than one person. The problem, of course, is that a single Administrator only meets with himself in deciding whether to adopt a rule. On the other hand, agency officials do meet among themselves in the process of drafting and reviewing proposed rules.

AGENCY OPEN MEETINGS

Do you have any suggestion how we might extend the principle of open meeting contained in section 201 to agencies headed by a single Administrator, especially when agency officials are discussing the final content of a proposed rule?

Mr. BERG. I think first you have got to decide where the workable line is between the informal discussion and the action taking meeting, because when you have a collegial body, then you have got an action-taking meeting of some kind. When you have an agency headed by an individual, then all your discussion can reasonably be interpreted as informal because the decision is his and his alone.

Now, he may make it in the course of the discussion, or he may make it later. He may not know when he opens a discussion whether it is going to lead to a prompt decision or to a decision later. So I would think that you would have first to define more narrowly in terms of collegial bodies what you are going to cover and what you are going to leave out and then if a workable test can be developed, then maybe it can be applied to the single-headed agency.

Senator CHILES. Often after an on-the-record—do you have any comments on that?

Mr. WICKHAM. Yes. I might point to an attempt to legislate into the area beyond final actions which is found in the Texas Revised Civil Statutes. It keys meeting, public meeting, to any deliberation between a quorum of members, and so forth, at which public bills are discussed or considered, or at which informal action is taken; and then it goes on to define the term "deliberation" in terms of a verbal exchange between a quorum of members "attempting to arrive at a decision on any public business." Granted, this is—it is not obvious in a given instance when this attempt is really being made, but to have some sort of definition like this might be worthwhile.

One can define meeting in those terms and then indicate the countervailing situation as I have suggested in my testimony in which chance encounters of two or more members whose major purpose is other than discussion or transaction of official business shall not constitute a meeting. We can't stop all informal discussion but we really have to open up a sufficient amount to effect the purpose.

EXEMPTIONS

Senator CHILES. Often after an on-the-record proceeding is commenced, a party may try to settle the case with the agency. Obviously, parties to such discussions would like to keep these conversations confidential. Do you think that such communication should be exempted from ex parte regulations and, if so, how? For instance, should the hearing examiner be permitted to grant exemptions from the requirements in his discretion?

Mr. BERG. If you are in a formal proceeding with a hearing examiner, I don't really see how you can discuss settlement, let's say, ex parte with the hearing examiner. I don't think that would be appropriate.

Now, of course, the prohibition is going to apply, by definition, only to communications with decisionmaking people at one end. So that if, say, you have a settlement negotiation between the agency's prosecuting staff and the respondent, that presents no problem at all. That is not even within the definition of an ex parte communication.

But assuming that you have triggered a formal proceeding and you do have parties, adverse parties, then I would think that, at least off hand, subject to correction, I can't see a situation in which you would want to encourage ex parte settlement discussion.

Mr. STOLZ. I can't either.

Senator CHILES. Well, thank you, and I appreciate your testimony. We probably would like to submit some written question to you all for your answers.

Mr. BERG. Fine.

[The material follows:]

RESPONSES TO QUESTIONS SUBMITTED IN WRITING TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Question 1. The bill requires the agency to record in a memo all ex parte communications with interested parties, including general members of the public.

Mr. Berg suggests on pp. 13–14 of his statement that communcations from members of the public without a direct and immediate interest in the proceedings pose a less serious threat to the integrity of the administrative process.

How do you think an agency should handle oral communications from such people so as to encourage such participation by the public, while not creating undue administrative burdens on the agency, or giving members of the general public an unfair opportunity to influence secretly the agency's decision?

Answer. I will assume for purposes of this question that we are considering a prohibition of ex parte communication in connection with agency determinations required to be made "on the record." As I indicated in my testimony, it would be a contradiction in terms to extend such a prohibition to proceedings which the agency is not required to conduct on the record.

In such formal on-the-record proceedings the decision maker is required to base his decision on the public record. The policy of encouraging participation by the public in such proceedings is tempered and sometimes counterbalanced by the need to limit participation in the interest of keeping the proceeding manageable. The Conference has addressed some of the considerations governing public participation in on-the-record proceedings in its Recommendation 71–6, 1 C.F.R. §305.71–6, a copy of which I enclose. Where participation by the general public or by those who seek to represent the interest of the public is appropriate, it can be handled by permitting formal intervention or participation through the filing of documents in the nature of *amicus curiae* briefs. Some agencies recognize a form of limited intervention. See, *e.g.*, 14 C.F.R. §302.14, §302.214 (CAB); 10 C.F.R. 2.715 (AEC). Whatever the form of participation, however, the participants would be regarded as interested persons for purposes of a rule on ex parte communications.

Informal, oral communications from "uninterested" members of the public should never be encouraged, but they do not, to my mind, represent a very serious problem. I suppose that they are most often casual and inadvertent, in that the speaker was not aware that the decision maker had a matter pending before him, or innocent in the sense that the speaker did not know the communication was improper. In any event the conversation would be unlikely to affect the result in the case. Most such communications can probably be ignored, but if the decision maker is troubled by such a conversation, the remedy is to report the substance of the conversation on the record and give the parties an opportunity to comment or rebut. This is the approach taken in Paragraph 5 of Recommendation 16 of the Temporary Administrative Conference.

Question 2. The bill now provides that any person who files with an agency any application for agency action, must observe the requirements of the bill governing ex parte communications. How inclusive is the term "agency action"?

Should the requirement apply to petitions for agency action whether or not it will lead to a decision that must be made on the record after an opportunity for a hearing? If the subsection is confined to such on-the-record proceedings, would it always be possible for an agency to tell, when a petition for agency action is filed with it, whether or not the type of agency action requested will eventually involve an on-the-record proceedings?

Answer. "Agency action" is defined in the Administrative Procedure Act to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §551(13). That, obviously, includes informal rule making and informal adjudication. As I have indicated, I do not believe the ban on ex parte communications should be extended to other than formal, on-the-record proceedings. The docketing of formal proceedings is usually an easily ascertained event, but whether a given petition will result in a formal proceeding may depend on whether objections are raised by the agency staff or private parties. (See the answer to Question No. 4).

Question 3. Section 201 is designed to assure that agency decisions are based solely on the record, and not on facts or arguments only one side has seen or

heard. Accordingly, the bill makes a communication ex parte, and, therefore illegal, whenever "reasonable notice" is not given of the communication to all interested parties.

What exactly do you think should constitute "reasonable notice?" Do you think it should be spelled out in more detail in the statute, or left to each agency to spell out in the regulations?

Answer. Section 554(d)(1) of the Administrative Procedure Act contains a comparable provision: "Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate . . ." On-the-record proceedings are almost invariably governed by agency regulations specifying what notice must be given and how. Since what is reasonable notice may depend on the nature of the proceeding, the number of interested parties, etc., I think it would be undesirable to define the term in the statute.

Question 4. In any provision governing ex parte communications it is necessary to fix a point in the proceedings when the regulations first become effective. In the current bill it is set no later than the point that the proceeding is first noticed for a hearing. To what extent are important decisions about an on-the-record proceeding made by an agency even before the first notice of hearings is issued?

Answer. Important decisions, in the sense of important to the participants, are often taken before formal proceedings are initiated. The decision whether to prosecute is a familiar example. But in such cases an interested person's communications are generally not with the decision makers but rather with the prosecuting officials, who may have authority to settle cases but not to decide contested matters.

Question 5. Section 133(c) requires that the committee or subcommittee maintain a complete copy of the transcript of each meeting for a minimum of one year after the meeting. Section 201(f) requires that government agencies maintain transcripts for a period of at least two years.

Do you feel that transcripts of meetings should remain in Committee, Subcommittee and agency files for a longer period of time, given the fact that agency proceedings might take longer than two years and that destruction of information can also lead to unresolved answers?

What would be your suggested time period for retention of transcripts?

Answer. Respecting the practices of congresssional committees I am unable to comment. I think the proposal for taking a transcript of meetings of agencies wholly impractical. I doubt that it is the general practice anywhere now. It would be quite expensive and produce no obvious benefits. Since I am not sure what purpose is to be served by maintaining the transcript, I cannot comment on the appropriate retention period.

Question 6. Do you believe that enforcement of the restriction on ex parte communications can safely be left entirely to the parties to proceedings to which these restrictions apply? Particularly if all the parties to a proceeding have violated these restrictions, may they not be reluctant to raise the issue? Wouldn't a provision for a "public" enforcement action in such cases be useful?

Question 7. Your testimony expresses concern about the breadth of the section of the bill giving District Courts jurisdiction to enforce the prohibitions against ex parte communications. You suggest the District Court should not be able to act while the case is still before the agency.

One argument against postponing review until the end of the proceedings, of course, is that a court may be reluctant to overturn an entire proceeding just because of a violation of the ex parte rules. Postponing review of ex parte issues thus encourages continued, minor violations of the rules.

Do you see this as a real concern?

Answer. Contrary to what seems implicit in these questions, I do not believe that in formal, on-the-record proceedings there are very many improper communications from interested persons on disputed issues of fact. I rely primarily on the lack of reported cases in which such a claim is made, much less sustained. It is clear that a violation of the existing ex parte rules is ground for setting aside agency action, and one would suppose that, if there were widespread violations, parties would assert violation as a basis for upsetting agency decisions. That such claims, at least in recent years, have been quite rare seems to suggest that the problem, although serious whenever it occurs, is not frequently encountered.

In short, I do not believe there is any reason to suppose that party enforcement of the rules is inadequate, and I have no reason to believe that reviewing courts are reluctant to set aside agency action for violation of the ex parte rules.

The argument you cite against postponing review would seem equally applicable to all sorts of assertions of procedural errors in the course of an agency proceeding. To permit such immediate review either generally or only with respect to violation of rules against ex parte communications would conflict with "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). This rule is sound, in my view. It is based on the judgment that the danger of an agency's making a procedural error which is beyond the effective reach of a court on review of the final order is less than the cost of delay and disruption to the administrative process which interlocutory appeals to the courts entail. See *Thermal Ecology Must Be Preserved* v. *Atomic Energy Commission*, 433 F.2d 524, 526 (D.C. Cir. 1970)

Question 8. Why shouldn't ex parte presentations on questions of "policy" or "legislative facts" in cases of adjudication be placed in the record so that parties will have an opportunity to know of and meet such presentations?

Didn't the ex parte communications condemned in Sangamon consist in part of such matters?

Answer. I have no disagreement with the proposition that, in general, ex parte communications from interested persons to agency decision makers regarding questions of legislative facts or policy relevant to the merits of a pending on-the-record proceeding ought to be avoided and that such communications, if made, should be placed on the record with opportunity for rebuttal. On the other hand, an agency acquires and maintains its expertise through continued exposure to information about the subject matter it regulates and through exchange of ideas with the regulated community and other interested groups. It is important to realize that communication between the agency and interested outsiders comprises a broad spectrum of situations, from the sort of "button holing" of individual commissioners which took place in *Sangamon Valley Television Corp.* v. *United States*, at one extreme, to a commissioner's reading an editorial in a trade journal, at the other. I suggest no solution to this problem other than that agencies be permitted some flexibility in fashioning rules suited to the realities of their situations.

Question 9. You state fears that agency rule making is becoming "overformalized." Where the agency acts through informal consultation leading to rule making, what can be done to ensure that all affected interests are adequately consulted, as opposed to consultations with industry representatives only, a practice condemned in Court decisions such as *Moss* v. *CAB?*

Answer. Section 553 of the APA requires, in general, that before an agency issues a substantive rule, it must publish a proposed rule and invite and consider comments from the interested public. By and large this procedure has worked well, although there are undoubtedly situations in which the agency has discussed the proposed rule informally with the affected industry, and enters the notice-and-comment stage of rule making with certain strong preconceptions in favor of the rule. There is no simple solution to assuring broad public input at this earliest stage. The question is primarily one of agency attitude. I doubt, however, that formalizing the process by requiring that the rules be made "on the record" offers any help in this regard. The problem of ex parte consultation leading up to the formulation of proposed rules remains, and, in addition, the demands of formal proceedings are likely to favor the industry representatives. Roger C. Cramton, former Chairman of the Administrative Conference, wrote:

"In all probability public interest groups can make a greater contribution in informal rule making proceedings than in adjudicative and formal rule making proceedings for at least two reasons: First, they are probably better equipped to speak to general propositions than to engage in trial-type proceedings; second, in the quasi-legislative (hence, political) process the group's view point becomes a relevant datum simply because the group holds it. * * * It is not merely that trial-type hearings can be used to delay agency action—which is true—but they can also be used to obscure general principles in a mass of factual data, the compilation and presentation of which the industry is better prepared to accomplish than either public interest groups or agency

staff. * * * "Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 Geo. L. J. 525, 535—36 (1972), reprinted in 2 ACUS Repts. 422, 432–33 (1973).

Senator CHILES. Our last panel will be Mr. Theodore Koop, director of the Washington office of the Radio TV News Directors Association. He is accompanied by Mr. Alexander Chadwick, the manager of the Washington office; and Mr. John B. Adams, dean of the University of North Carolina Journalism School.

TESTIMONY OF THEODORE KOOP, DIRECTOR OF THE WASHINGTON OFFICE, RADIO TV NEWS DIRECTORS ASSOCIATION, ACCOMPANIED BY ALEXANDER CHADWICK, MANAGER, WASHINGTON OFFICE; AND JOHN B. ADAMS, DEAN, UNIVERSITY OF NORTH CAROLINA JOURNALISM SCHOOL

Senator CHILES. Mr. Koop, we will lead off with you.

Mr. KOOP. Thank you, Mr. Chairman.

With me, as you noted, is Alexander Chadwick, who is manager of our Washington office for our organization, which has a national membership of over 1,000 broadcast news executives and other broadcast journalists.

We are here to give enthusiastic support to S. 260. Listening to previous witnesses this morning, I was struck by the fact that this basically is a question of philosophy. Either you believe in open governmnet or you don't. I think it comes down to that simple a problem.

By open government I mean not only disclosure of decisions but disclosure of the decisionmaking process.

In preparing for these hearings, we asked a few of our Florida members to send us an appraisal of how the Sunshine Act has worked out in your home State. Some of these are still in the mail but if you wish, we would be glad to submit them.

Senator CHILES. We would like very much to have them for insertion in the record.

Mr. KOOP. Let me read only one sentence from a letter from Harold Baker, news director of WTLV in Jacksonville, and past president of RTNDA. He says, "We are convinced that government in the sunshine has given added credibility to all levels of government in Florida."

CONFERENCE COMMITTEE MEETINGS

We are encouraged to note that your bill would cover not only regular congressional committee meetings, but conference committee meetings as well. It is the latter that the final thrust of a particular piece of legislation is so often decided, and hence the inclusion of conference committee meetings lends extra meaning and significance. It is also important that there be some mechanism to check the possible abuse of the exception section of the act, and we think the proposed select committee on meetings wisely fills this need.

We also support that portion of the Sunshine Act which applies to opening meetings of multimember Federal agencies.

This morning's Wall Street Journal carries a headline, "Federal Commissions are Masters of Delay on Cases Before Them." I think it is not too much to hope, Mr. Chairman, that experience with an open meeting law might in due time force these regulatory commissions to speed up their process as the public gets more and more opportunity to watch what they are doing.

EX PARTE COMMUNICATIONS

As journalists we hold reservations about the ex parte section of S. 260. We are worried that the section might be interpreted as forbidding agency personnel to talk with reporters about pending agency matters. Hypothetically, would a reporter for the Washington Post be hindered in exploring with an FCC Commissioner the circumstances surrounding the challenge to the licenses of two Florida television stations owned by the Post? Would any reporter be barred from discussing pending action with Federal agency personnel on the drafting of this legislation?

At the very least, I would suggest the record of the legislative history of these committee hearings and the report raises this problem.

Additionally, we think the interests of the people might best be served if ex parte communications by interested persons were required to be reported in other branches of Government as well as in the regulatory agencies.

Senator CHILES. I would feel for the record that that would strictly be—as to the nature of that conversation, if a reporter was seeking information, I don't think that that would be the kind of ex parte communication that you are concerned about under the act. By its very nature, an ex parte communication is someone attempting to influence the decision or to impart information that is not—that the public is not going to be made aware of as being a part of it. I don't think that would cover any reporter's questions at all. I think, on the other hand, if it was a member of a newspaper or television station or someone who was attempting to influence a decision, then it certainly should be covered.

Mr. KOOP. I certainly agree with you, Mr. Chairman, and I hope that would be the general interpretation, but Washington is always open to myriad interpretations as you know.

Let me close by saying our organization wishes to commend you and your subcommittee for bringing this legislation before the Senate. We applaud your stand in favor of more open government.

Senator CHILES. Thank you, sir.

[Prepared statement and editorials follow:]

PREPARED STATEMENT BY THEODORE F. KOOP, DIRECTOR, WASHINGTON OFFICE, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

Mr. Chairman, my name is Theodore F. Koop. I am the director of the Washington office of the Radio Television News Directors Association, a national organization of more than a thousand news executives and other broadcast journalists. Appearing with me is Alexander Chadwick, manager of our Washington office. We are here to represent RTNDA in testifying on S. 260, the Government in the Sunshine Act, which would provide for open meetings in Congress and multi-member federal agencies.

In preparing for these hearings, Mr. Chairman, I asked a few of our Florida members to send me an appraisal of how the Sunshine Act has worked out in your home state. I would like to read part of the response from Harold Baker, news director of WTLV in Jacksonville.

Mr. Baker, a past president of RTNDA, says: "Public officials have found that government in the sunshsine has helped lessen the traditional adversary stance of the media and elected officials and create better understanding between the official and the reporter. It has caused more accurate, in-depth news coverage, and we consider that to be a distinct asset for government, the media and the public.

"We believe most public officials are honest and honorable," he continues, "and are equally convinced that the Sunshine Law provides a better opportunity for them to so project themselves before the electorate. Not only has it caused Florida citizens to be better informed, but it has eliminated many areas which create public suspicion and misunderstanding. Far less often are public officials called upon to defend methods of decision-making, as well as the decisions themselves.

"Let us use zoning as an example. In local government it is often highly suspect because of the comparative ease of influence or graft. Before the Sunshine Law, closed-door decision-making in many cities was considered normal practice. Today, the debate and deliberations are open, and seldom do we hear accusations of hanky-panky or exertion of undue influence or pressure.

"Frankly, we feel that, overall, Florida has better, cleaner government because of the Sunshine Law; that it has created increased public confidence in government and, to our satisfaction, greater confidence in media reports on governmental affairs. People apparently feel that they are now part of decision-making, and surveys conducted for this station show far greater interest in government in Jacksonville than in most other areas of the nation.

Finally, Mr. Baker says, "We are convinced that government in the sunshine has given added credibility to all levels of government in Florida."

Mr. Chairman, I have quoted this letter at length because I think it is useful to look at the experience of those who have worked with such a law, and because that experience is so clear. At least on the state level, the Sunshine Act has worked well. In an era when citizen confidence in major institutions has been on the wane, here is one effort that has brought about some restoration of that confidence.

Specifically, we are encouraged to note that your bill would cover not only regular Congressional Committee meetings, but conference committee meetings as well. It is in the latter that the final thrust of a particular piece of legislation is so often decided, and hence the inclusion of conference committee meetings lends extra meaning and significance. It is also important that there be some mechanism to check the possible abuse of the exception section of the act, and we think the proposed Select Committee on Meetings wisely fills this need.

We also support that portion of the Sunshine Act which applies to opening meetings of multi-member federal agencies. The conduct of the public's business in private can only engender suspicion in the public mind, whether or not there is basis for that suspicion. The argument is frequently heard that open meetings might hinder the ability of agencies to conduct business that sometimes involves delicate negotiations. But voluminous testimony from those who have opened their meetings to the public indicates otherwise. Indeed, Mr. Chairman, in your remarks at the start of the current hearings, you pointed out that you experienced similar concerns when Florida first enacted open meetings legislation. And you went on to note that your concerns have proved to be groundless.

I must add that as journalists we hold reservations about the ex parte section of S. 260. We are worried that the section might be interpreted as forbidding agency personnel to talk with reporters about pending agency matters. Hypothetically, would a reporter for the Washington Post be hindered in exploring with an FCC Commisssioner the circumstances surrounding the challenge to the licenses of two Florida television stations owned by the Post? Would any reporter be barred from discussing pending action with federal agency personnel? We doubt that this is the intent of S. 260, and we are sure that it would not serve the interest of greater public awareness of the functions of government. We urge you to consider this reservation in

any redrafting of your legislation. Additionally, we think the interests of the people might best be served if ex parte communications by interested persons were required to be reported in other branches of government as well as in the regulatory agencies.

In closing, let me say that RTNDA wishes to commend you and this Subcommittee for bringing this legislation before the Senate. We applaud your stand in favor of more open government.

Thank you, Mr. Chairman, and Mr. Chadwick and I will be happy to answer any questions you may have about our testimony.

WJXT, JACKSONVILLE, FLA., EDITORIALS ON GOVERNMENT IN THE SUNSHINE—JUNE 14, 1968–MAY 13, 1974

Televised June 14, 1968

Florida's government-in-the-sunshine law may need some further action from the legislature or the courts in order to pin down more precisely its intended scope, but the closed-door policy of the Duval County Commisssion on zoning matters looks like a cut-and-dried violation of the statutes.

The law, adopted in 1967, provides that "all meetings of any board or commission of any state agency or authority . . . at which official acts are to be taken are declared to be public meetings open to the public at all times . . ."

The monthly meetings of the Duval County Zoning Board—comprised of the five commissioners—customarily have been divided into two episodes. The morning sessions are wide open and usually feature spirited participation by groups of citizens in support of or in opposition to various zoning changes. Those attending have been told routinely that final decisions on the petition would be rendered later.

The "latter" has been an afternoon session on the same day—attended by the press but generally understood for some time by court house observers to be barred to the public. During these official gatherings, the commissioners vote to affirm or deny individual petitions, and the interested parties subsequently are notified of the action taken.

At the most recent afternoon meeting, on June 11, two ladies who were sitting in the commission room when zoning questions were about to be considered were told by the presiding officer, Fletcher Morgan, to leave the room so the members could hold what he termed a "semi-executive" session. The commissioners then proceeded—after the two had departed—to record their votes on numerous petitions.

The "sunshine" law has two other interesting provisions. One says that "no . . . formal action shall be considered binding . . ." when taken at a closed meeting, a stipulation which conceivably could put a lot of past zoning decisions in jeopardy. Another section spells out a fine up to $500 or a jail term up to six months, or both, for any member of a board or commission who attends a closed meeting in violation of the statute.

In an astounding defense of the practice, Commissioner Morgan told WJXT News that every vote taken in the closed sessions is recorded and that the public "can check it later".

In spite of Mr. Morgan's feeling that the "sunshine" law is a ridiculous enactment, it happens to be a valid instrument which the commission has no power to bend to suit its own desire.

The circumstances are quite clear, and the state attorney of the grand jury should take appropriate action to insure that the law is upheld and that the public's rights of access to public business is secured.

This was a WJXT editorial.

Televised December 23 and 24, 1968

The essential facts have been admitted by too many parties for there to be doubt about what happened at Tallahassee Thursday.

Governor Kirk and a majority of the cabinet met at the Governor's Mansion for secret talks concerning the next state budget.

They met in their official capacity as the state budget commission, a public agency legally responsible for recommending a budget to the legislature.

A reporter who uncovered the meeting was thrown out.

These circumstances amount to a clear violation of the government-in-the-sunshine law.

One cabinet aide offered the limpid excuse that it was only "a planning session . . . sort of a custom or tradition."

But those words were uttered by an assistant attorney general whose own boss has branded just such meetings as patent violations of the sunshine law.

In fact, Attorney General Earl Faircloth himself participated in Thursday's secret cabinet meeting.

Last January, however—and several times since—Faircloth has held officially that the sunshine law prohibits secret meetings of even informal nature.

To hold otherwise, he said, would be to make the sunshine law meaningless, since—and these are his words—"boards could conduct all their deliberations behind closed doors only to emerge in public for the final ritual of a show of hands."

The Attorney General said many meetings where no votes result are "vitally concerned," as he put it, "with official business and taxpayers dollars.

"Debate in the legislature," he concluded, "indicated a strong feeling that citizens have a right to follow these deliberations and see what is being proposed and considered before the final axe of ultimate decision falls."

By participating in Thursday's stealthy cabinet session, Faircloth showed an astonishing disregard for his own published opinions.

No less responsible are the other cabinet members who attended.

Laws are made to be obeyed by the high and the mighty as well as by the common man. And that means all laws—government in the sunshine included.

This was a WJXT editorial.

Televised March 12 and 13, 1969

Secret meetings are against the law. Public officials who meet secretly risk a penalty of $500 or up to six months in jail.

Yet secret meetings and closed-door sessions go on, eroding the public's confidence in government.

Florida's government-in-the-sunshine law, enacted two years ago to outlaw secret meetings, has failed repeatedly.

Some politicians found the inevitable loophole and took advantage of it to slam the door in the public's face. They argued that the law only requires open meetings when official acts are taken. So they stayed behind closed doors for all of the real debate and decision-making, emerging only for a meaningless show of hands.

State Attorney General Earl Faircloth interpreted the law to apply to any meeting, regardless of whether official action is taken, but Faircloth's opinion didn't open the closed doors.

Legislation to plug the loophole was proposed by Senator Robert Chevin. Last week a state senate subcommittee rejected one proposed bill. Voting to axe the proposal were Senators Mallory Horne, William Barrow, Welborn Daniel and Dick Fincher.

Another attempt to plug the loophole, sponsored by the Florida Press Association and introduced by Senator Richard Stone, probably faces the same unfortunate fate.

The bill would make all meetings at which a quorum is present public meetings, even if the meeting is just for general discussion. There would be no exceptions, no loopholes in other words.

Unless it is approved, politicians will be able to continue holding secret meetings, using a loophole to render tthe government-in-the-sunshine law meaningless.

What the politician says when he cloaks his action in secrecy is, it's none of your business. They couldn't be more wrong.

People deserve an open government, because, contrary to the warped ideas of a few politicians, government is the people's business. And it's time all politicians recognized that as a fact of public life.

This was a WJXT editorial.

Televised March 31 and April 1, 1969

Florida's often-abused, often-ignored, and seldom-enforced government-in-the-sunshine law has won a major victory in the courtroom.

A Dade County circuit court judge last week issued a permanent injunction against the City of Miami Beach, its mayor and its six councilmen, prohibiting closed meetings.

Every politician in Florida should heed Judge Lawrence King's ruling and every Floridian should applaud it as a milestone toward good government. In his ruling the judge held that "the purpose of the open meeting law would be frustrated if the entire deliberative process could be held behind closed doors only to emerge in public for a show of hands."

The judge said the Florida legislature "has mandated that the public has the right to know—without exception—when, how and why its business is being conducted."

Judge King zeroed in on the loophole politicians have used to systematically avoid the sunshine law. The statute says meetings at which "official acts" are taken must be open. Politicians insist that allows them to hold their closed-door, pre-meeting conferences.

But the judge ruled that "deliberations, sessions, conferences, briefings, expressions, discussions, proposals, recommendations, actions, reports, etc. must be open and public, for those are as much 'official acts' as the final vote itself."

Unless the state law is revised in accord with the open meeting concept expressed in that court decision, government-in-the-sunshine will continue to be one of Florida's most abused and ignored laws.

A state senate subcommittee has rejected proposals to plug the loophole in the sunshine law. That decision will prevail unless people demand that their lawmakers protect the people's right to know what is going on.

Nothing is more vital to good government.

This was a WJXT editorial.

Televised October 29 and 30, 1969

The Florida League of Municipalities is trying to gouge some loopholes in the government-in-the-sunshine law.

Apparently the open-door statute is putting a crimp in the way some city hall politicos like to do business. They just can't seem to adjust to the idea that public business should be transacted in public.

What the cities' organization wants to do is change the sunshine law to allow preliminary closed-door discussion of property acquisition and matters that may involve litigation.

There are plenty of examples to prove that secret discussion of property condemnation is never really secret. Word always seems to get out to a favored few. Beyond that, the real danger is that once closed-door meetings are allowed for any reason, politicians can render the sunshine law meaningless.

What is proposed may sound innocent enough and may even be well intended. But loopholes or exceptions to an open-door government can only lead to abuses.

Florida is far ahead of most other states with its open meeting law. Even a partial eclipse of the government-in-the-sunshine law which would permit politicians to discuss the public's business in secret is not in the best interest of Floridians.

Hopefully all politicians, from city hall to the state capitol, will soon accept sunshine as a proper principle of public service.

This was a WJXT editorial.

Televised February 11 and 12, 1970

The Florida Supreme Court should restate its magnificent ruling on the state sunshine law. That should, once and for all, end any lingering confusion and establish government in the sunsshine as the policy for all levels of goverment in Florida.

The confusion arises from a decision of the First District Court of Appeals in Tallahassee. That court ruled the sunshine law does not affect quasi-judicial meetings. In other words, government councils, commissions and boards could meet behind closed doors when sitting in a quasi-judicial capacity, just as a court or a jury does when reaching a verdict.

That is the kind of loophole the state supreme court struck down in its ruling last year. We hope that court will issue another order reminding everyone, politicians as well as lower courts, that sunshine is the law of Florida.

For politicians, who hope the sunshine law will be weakened to permit them to revert to closed-door government, we quote a portion of what the supreme court said in its decision last year:

"One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made."

Politicians must understand that the people want their government conducted openly, in the sunshine. A reminder from the state supreme court would be altogether appropriate.

Televised July 14, 1970

The U.S. House of Representatives conducts much of its work under a cloak of secrecy. There are numerous closed-door committee sessions and many votes are taken where the numbers are recorded, but not the names. The average citizen probably doesn't realize just how much of his government is conducted in secrecy.

We're glad to see three of Florida's congressmen—Charles Bennett, Sam Gibbons and Claude Pepper—among the sponsors of a move to end some of this secrecy. Their proposal would make it possible for a portion of the House membership to demand a recorded vote, thus piercing the veil of secrecy that makes it possible for congressmen to hide from the voters.

In Congress they have a time-saving device known as the teller vote. On a teller vote the representatives simply file past counters who record yes or no votes, but names are not recorded.

Teller votes and other devices of governmental secrecy make it difficult, if not impossible, to keep track of how a congressman is performing. We hope Florida's other members of the U.S. House will join Congressmen Bennett, Gibbons and Pepper in their attack on governmental secrecy.

In Florida we have the government-in-the-sunshine law and it has been a good thing for state government, despite the protests of some public officials who still think the public's business should be conducted in private.

But on the national level, where the issues are as big as war and peace, government is shrouded in secrecy.

We think secrecy erodes public confidence in government. The U.S. House can take a step toward renewing public confidence by lifting the veil of secrecy.

And we certainly hope the vote on the secret voting rule will not be a secret vote.

This was a WJXT editorial.

Televised July 15 and 16, 1970

In a real travesty of good government the U.S. House of Representatives has voted to continue the practice of secret voting.

And would you believe it? The vote on secret voting was a secret vote.

It's really a shame a majority of the representatives prefers government in the shadows to government in the sunshine. From everything we hear the reputation of Congress could stand a little improvement and putting an end to secrecy could have helped considerably.

Important issues are being decided in Congress and the voters should know how their elected representatives are voting. But all too often it is impossible to find out because of unrecorded voice votes, stand-up votes and other votes where numbers are recorded, but not names.

We believe the votes of congressmen should be recorded by name and made public. Otherwise how are the voters to know how well their representatives are representing them? Secret voting allows a congressman to promise the voters anything and then, protected by secret voting, go to Washington and do as he pleases.

Three Florida representatives—Charles Bennett, Sam Gibbons, and Claude Pepper—were among the sponsors of a rules change to end some of this secret voting.

The rules change was defeated by a vote of 132 to 112. Unfortunately we can't tell you how anyone voted to end secret voting because it was a secret vote.

If Congress has a bad reputation, votes like that only convince us that it is richly deserved.

This was a WJXT editorial.

Televised February 12 and 15, 1971

One of the things wrong with Congress is too much secrecy. Too much secrecy keeps the voters in the dark about how their representatives are representing them.

Certain hearings and meetings must necessarily be closed. These might involve confidential material, matters of national security.

But a survey by Congressional Quarterly shows that 41 percent of all Congressional committee meetings were closed to the public. It's hard to believe so much secrecy is necessary.

In Florida, government is in the sunshine. There's a law that says local and state government must transact the public's business in public.

In Washington it hasn't been so sunny. But there should be less secrecy this year. Among other things, the 1970 Legislative Reorganization Act requires open meetings unless a committee majority votes for a secret session.

When a committee votes to meet in secret, that vote should be recorded. That way the public can know who's for secrecy and who's against it. A secret vote to hold a secret meeting is really too much.

Jacksonville's Representative Charles Bennett was a leader in last year's attack on secrecy. No doubt Lawton Chiles, Florida's new senator, will be another believer in conducting the public's business in public.

Bennett, Chiles and all of the Sunshine State a delegation should do all they can to let more sun shine on Congress this year.

This was a WJXT editorial.

Televised February 17 and 18, 1971

Members of the Jacksonville Port Authority should know that in Florida, government must be in the sunshine. It's the law.

It's really quite simple—public business must be conducted in public.

When Port Authority Chairman William Mills telephones other authority members and they vote by phone it is definitely not government in the sunshine.

Mills said he phoned other members and they decided to hire Dave Rawls as a consultant. Rawls recently resigned the position of managing director of the port authority. It's hard to understand why such a decision could not be made at a public meeting.

Decisions by telephone keep the people from seeing what their government is doing. It's a totally improper way to run government.

The trouble is, in most Florida counties prosecutors have been reluctant to crack down on violators of the sunshine law.

Let's hope it will be different in Jacksonville. State Attorney Ed Austin should adopt a tough attitude toward enforcing the sunshine law.

No doubt government in the sunshine is sometimes less efficient. But there's something called public confidence. Secrecy in government destroys public confidence.

We look to the state attorney to keep public business public.

This was a WJXT editorial.

Televised March 25 and 26, 1971

Government business is public business. All of us have a right to know what our government is doing. State laws say so.

It's about time the Jacksonville Port Authority accepted that as a fact of life.

A few weeks ago Authority Chairman William Mills conducted Port business by telephone, making it impossible for the public to know what was going on. Florida law says government must be in the sunshine.

This week it was the public records law. Chairman Mills refused to allow an examination of public records. So did Bob Peace, acting managing director of the Port Authority. State law says public records must be public.

In both cases the public's right to know was ignored.

State Attorney Ed Austin should crack down on officials who think government business is none of the public's business.

All of us have a right to know what our government is doing. And the laws that say so must be enforced.

This was a WJXT editorial.

Televised April 27 and 28, 1971

Some legislators still want to pull Florida's government in the sunshine back into the shadows.

In what must be the 1971 session's worst bit of legislative skullduggery, the House Committee on Government Organization and Efficiency approved a bill gutting the sunshine law. It wasn't scheduled on the committee calendar. Newsmen didn't know about it. There was no public hearing.

The bill would allow government bodies to meet behind closed doors to discuss land acquisition or site selection, personnel, legal matters with an attorney, quasi-judicial disciplinary action against an employee, and national security.

Should the public body go into executive session, the bill requires the entire discussion be recorded and transcribed by a court reporter. But that transcription would become public only by a majority vote of the public body or by court order.

All of us can think of situations where public discussion might be awkward or burdensome.

But the bill, approved by an 8-7 committee vote, would riddle the sunshine law with loopholes.

Almost anything a government body might want to discuss could be stretched through one of the loopholes proposed by the committee.

Jacksonville has four lawmakers on that committee. Representative Joe Kennelly voted for shunshine. Representative Carl Ogden was absent—he said he wasn't given notice that the sunshine law was to be discussed. And Representatives Hugh Grainger and J. Wertz Nease voted for loopholes in the sunshine law.

Florida's government in the sunshine is good government. But the sunshine law won't work if it's gouged full of loopholes.

This was a WJXT editorial.

Televised January 29 and 30, 1972

You ought to know how your elected representatives vote.

But you can't always find out how they vote in the U.S. House of Representatives. And there's a move afoot to make it even more difficult to find out how congressmen vote.

Before 1971, members of the house just walked down the aisle and were counted—but not listed by name. Then a new rule was adopted, providing for publication of the vote by name, together with the names of those not voting, in the *Congressional Record.*

The new rule resulted in doubling the attendance when key proposals were voted on. But there were complaints that a few members were forcing frequent recorded votes on minor issues.

As it is now 20 members can demand a recorded vote in the U.S. House, but there are proposals to increase that number to 40 or 50 members.

The very idea of our representatives voting anonymously is incredible. It makes it possible for a congressman to vote one way in Washington and then come home and take the opposite position in an election campaign.

The use of off-the-record votes permits a congressman to cripple a bill with amendments and then turn around on final passage and vote for it, posing as a champion of something he had anonymously voted against.

Legislative bodies should vote in the sunshine like the Florida Legislature. We wouldn't permit anonymous voting in Tallahassee and we shouldn't stand for it in Washington, either.

When the proposal for more off-the-record voting comes up, congressmen from this area—Charles Bennett, Don Fuqua and Bill Chappell of Florida and Bill Stuckey and Elliott Hagen of Georgia—should vote to let the people know how they're voting.

And let's hope the vote on off-the-record voting isn't off the record.

This was a WJXT editorial.

Televised February 12 and 13, 1972

At last the U.S. House of Representatives is coming into the 20th century. Congressmen are having an electronic voting system installed in the house, at a cost of almost a million dollars.

That's a lot of money for a voting machine, but it could be the best million dollars ever spent in Washington if it helps promote more government in the sunshine in Congress.

You'll be able to find out how your representatives vote because electronic voting will be on the record. Too many votes now are unrecorded so it's impossible to know how anyone voted.

Now that the U.S. House is taking a step toward government in the sunshine, Florida's Charles Bennett, Don Fuqua and Bill Chappell and Georgia's Bill Stuckey and Elliott Hagen should do everything they can do to provide more sunshine.

Wherever public business is conducted, whenever public decisions are made, you have a right to know what is going on.

It isn't that way in Washington now. But it ought to be.

This was a WJXT editorial.

Televised May 24 and 25, 1972

Florida's sunshine law says that wherever public business is conducted, whenever public decisions are made, you have a right to know what is going on.

It's too bad the state supreme court poked a loophole into that law last week. The court ruled that the government in the sunshine law was not violated when the Dade School Board met in private to tell its labor negotiator how much it was willing to pay teachers.

It was argued that collective bargaining would be destroyed if full publicity were given at each step of the negotiations. But the taxpayer is an interested party in negotiations concerning salaries to be paid public employees and he should know what's going on.

Besides that, the trouble with allowing any public business to be conducted in secret is that it makes it too easy to conduct all public business in secret.

With the loophole supplied by the Florida Supreme Court, the members of a school board could claim they are going into secret session to talk about how to negotiate with their employees. Then, once they're behind closed doors, they could discuss any public business. And since there would be no witnesses, no one would ever know.

Even a partial eclipse of the government in the sunshine law is alarming because it could too easily become a total eclipse.

This was a WJXT editorial.

Televised August 5 and 6, 1972

For years newsmen in Georgia have complained that public agencies conducted the public's business behind closed doors.

Now Georgia has a sunshine law which is supposed to bring government into the sunshine. Signed by Governor Jimmy Carter last March, the new law went into effect last month.

But unfortunately Georgia's sunshine law has too many loopholes. It may not produce as much government in the sunshine as the public has a right to expect.

Georgia's sunshine law permits public agencies to hold closed-door meetings for the discussion of real estate, law enforcement and personnel problems.

No doubt arguments can be made for discussing some matter privately. But the trouble is a government agency or board can claim it is going into secret session to discuss real estate, law enforcement or a personnel problem and once behind closed doors they can discuss any public business they want to. How would the public ever know?

A good sunshine law should not even be partially eclipsed because that makes it too easy for it to become totally eclipsed.

Governor Carter should not be satisfied with a sunshine law so easily evaded. The Georgia governor should propose legislation to plug the loopholes.

A good sunshine law would mean that wherever public business is conducted, whenever public decisions are made, the public has a right to know what's going on. After all, it is the public's business, isn't it?

This was a WJXT editorial.

Televised August 15 and 16, 1972

Shocked by the way the federal government conducts business behind closed doors and disturbed by the attitude of secrecy in Washington, U.S. Senator Lawton Chiles has introduced a federal government-in-the-sunshine bill.

Chiles was a member of the state legislature when the Florida Sunshine Law was enacted and he's convinced that conducting the public's business in public can help restore public confidence in government.

Chiles' bill would open all government meetings except for meetings that relate to national security or defense, obviously. But also meetings that:

Deal with matters required by other laws to be kept confidential.

Relate solely to an agency's internal management.

Are disciplinary in nature and could adversely affect an individual's reputation.

With so many loopholes Chiles' bill may be just a hunk of Swiss cheese.

It may open some of those closed doors in Washington, but less Swiss cheese would produce more government in the sunshine.

This was a WJXT editorial.

Televised January 17 and 18, 1973

With the exception of some matters of national security, public business should be open to the public. And since state and local governments in Florida are not concerned with national security, there is no reason for secrecy.

To protect our right to know what our government is doing, Florida has open government laws—one requiring open meetings and one saying public records must be open to the public.

Of course there are times when it becomes difficult to conduct government in the sunshine.

The Duval County School Board, seeking a new school superintendent, is having legislation drafted that would provide an exemption from the open meeting and open records laws. The board wants to interview superintendent candidates behind closed doors and keep applications in a closed file.

Some say this exemption is necessary because many qualified people might not apply if their names were made public because it might jeopardize their present positions.

But the trouble with providing even a tiny loophole is that it would be too easily abused. A school board could claim it was meeting behind closed doors to interview a candidate for superintendent, but while the doors were closed anything could be discussed. How would the public ever know?

A little bit of secrecy is like a little bit of cancer.

The selection of a new superintendent may be the most important decision the Duval School Board will ever make. The people ought to be in on it instead of guessing about what is going on behind the closed doors.

This was a WJXT editorial.

Televised February 10 and 11, 1973

The closed doors in Washington must be opened. To accomplish that, U.S. Senator Lawton Chiles has again introduced a government in the sunshine bill.

The Florida senator introduced a sunshine bill last year, but it contained too many loopholes.

This year Chiles has a better bill, more clearly limiting the circumstances under which closed-door meetings may be held. It would require congressional committees and federal agencies to hold open meetings except in matters of national security, internal management, possible defamation, sensitive law enforcement matters and trade secrets.

Of course there's still a danger of those exceptions being abused, but Chiles has tried to build in some checks against a committee or agency turning a legitimate exception into a loophole. The law would be enforceable by court action by any person and a special committee would ride herd on secrecy in Congress.

In short, Chiles has a bill this year that could help restore some lost credibility.

In introducing this year's bill, Chiles was joined by a number of other senators, including Florida's Edward Gurney. Both Chiles and Gurney sit on the government operations committee, which will hold hearings on the proposal.

Opening those closed doors is important. Legislation is made and unmade in secrecy in congressional committees. It is too easy for our elected officials to go behind closed doors and work for a special interest, emerging to proclaim the public interest.

That kind of Dr. Jekyll and Mr. Hyde act erodes public confidence. Congress should act this year to left the curtain of secrecy that often drops between the people and their elected representatives.

This was a WJXT editorial.

Televised April 11 and 12, 1973

By closing a major loophole the Florida Supreme Court has strengthened the state's government-in-the-sunshine law.

The court said all meetings of county school boards and other administrative boards must be open to the public. The 4-3 decision specifically ordered school boards to make their "quasi-judicial" hearings on disciplinary matters open to the public.

The ruling should open some heretofore closed meetings of the Board of Regents and the Board of Business Regulation.

As to the inconvenience this may create for some governmental boards, the court said "the benefit to the public far outweighs the inconvenience of the board."

The sunshine law has been a good thing for government in Florida. In closing a major loophole the state supreme court has made it a stronger law. The state legislature should leave it that way.

This was a WJXT editorial.

Televised May 14 and 15, 1973

Government in the sunshine may be a long time coming to Washington.

So many of the doors of Congress have been closed for so long it is going to be hard to get them opened.

For example, no one can remember a conference committee ever holding an open meeting. Conference committees are special panels appointed to resolve differences between a house bill and a senate bill.

Right now there's a conference committee meeting in Washington on highway legislation. Basically the senate bill places greater emphasis on mass transportation and the house bill emphasizes highway construction.

It was hoped that this conference committee would set a precedent by opening its doors.

But it is meeting behind closed doors, just like every other conference committee anyone can remember.

Opening those closed doors is absolutely essential. Secrecy allows an elected representative to serve the special interests behind closed doors, emerging to proclaim his support for the public interest.

Open-door government would put an end to that kind of Dr. Jekyll and Mr. Hyde act.

Florida's Senator Lawton Chiles and others interested in restoring public confidence in Congress are trying to pass a sunshine law.

Only when the public's business is conducted in public can Congress hope to regain the confidence of the people.

This was a WJXT editorial.

Televised June 25 and 26, 1973

Four members of the Duvall County School Board—Bill Carter, Bill Mathias, Gene Miller and Hugh Schulman—held a closed-door meeting last week.

We're told it was to discuss teacher negotiations, that a court decision exempts collective bargaining from the government-in-the-sunshine law.

But since we don't really have collective bargaining for teachers in Duval County, it's hard to see how that court ruling could apply here.

And even if a court decision does open a loophole in the sunshine law, the school board doesn't have to jump through it.

The trouble with even one loophole in the sunshine law is that it is too easily abused.

The school board could say a closed-door meeting was to discuss collective bargaining, but while the doors are closed anything could be discussed. How would anyone ever know? Would a school board member admit breaking the law?

Instead of jumping through every loophole they can find, the school board ought to decide to conduct the public's business—all of it—in public.

This was a WJXT editorial.

Televised September 27 and 28, 1973

There should be less secrecy in the way we select and discipline judges in Florida.

Nominating commissions, which recommend names to the governor to fill judicial vacancies, should announce their recommendations.

The Judicial Qualifications Commission, which is responsible for investigating complaints against judges, should eliminate much of the secrecy in its proceedings.

There is so much secrecy now that the qualifications commission cannot disclose that a complaint is pending or even that a charge has been disproved.

The proposals to let more sunshine into the choosing and disciplining of judges come from Chesterfield Smith, the Florida attorney who is president of the American Bar Association.

Less secrecy should mean more public confidence in our court system.

This was a WJXT editorial.

Televised November 23 and 26, 1973

It's too bad State Attorney Don Nichols has such a narrow view of the government-in-the-sunshine law.

Nichols said there was no violation of the sunshine law when city officials held an unannounced meeting at a local motel.

The sunshine law says public business must be conducted in public. You don't comply with that by bringing along a reporter, as they did at the motel meeting. The sunshine law is for the public, not the news media.

And the public must have advance notice of meetings. You can't have a public meeting if the public has no way of knowing about it.

Nichols might as well tear the sunshine law out of his statute books. It doesn't look like he'll be using it very much.

This was a WJXT editorial.

Televised February 7 and 8, 1974

In Washington the House of Representatives has been letting a lot more sunshine into its committee meetings.

According to Common Cause, the citizen lobby, about 80 per cent of all house committees and subcommittees opened their bill-drafting meetings to the public in 1973.

Those committee mark-up sessions are often the most important part of congressional action on a bill.

The house rule requires all of those sessions to be open to the public unless a majority of a committee's members vote, in open meeting, to close the session. The senate has refused to adopt such a rule.

The Common Cause survey shows only two congressmen from this area on closed-door committees.

Rep. Charles Bennett sits on the armed services committee, which closed half of its meetings. But that committee can often justify secrecy on the basis of national security.

Rep. Bill Chappell sits on the appropriations committee, which is among the most secretive in congress. Of 19 reported meetings, only one was open.

Although some committees are still cloaked in secrecy, the house is letting more sunshine in. And the senate could do the same by adopting an anti-secrecy rule.

Meanwhile Florida's Senator Lawton Chiles should continue to work for the best way to open the doors in Washington—a national government-in-the-sunshine law.

This was a WJXT editorial.

Televised May 2 and 3, 1974

Florida's sunshine law says public business must be conducted in public.

Unfortunately a 1972 ruling of the State Supreme Court seems to allow closed-door meetings on collective bargaining.

Members of Duval's school board held a closed-door meeting this week to instruct their negotiator on collective bargaining with teachers. To hold such a discussion in the sunshine, it was argued, would prematurely reveal the board's bargaining position.

But it is very interesting to know that collective bargaining has been going on for several years in Jacksonville's city government and the city council has never found it necessary to hold such a closed-door meeting.

The trouble with allowing even one loophole in the sunshine law is that it's too easily abused.

School board members can say they're going behind closed doors to talk about collective bargaining. But there's no way for the public to know that is all they're talking about.

City government has managed to have collective bargaining without the city council resorting to closed-door sessions. Surely the school board can do it too.

This was a WJXT editorial.

Televised May 10 and 13, 1974

In Tallahassee the state has passed a bill on collective bargaining for public employees that punches a hole in Florida's government-in-the-sunshine law.

Senator Jim Glisson tried to amend the bill to plug that loophole, but his amendment was defeated.

The house bill differs on sunshine and some other points so a conference committee will try to resolve differences between the two houses.

Bargaining ought to be in the sunshine. When representatives of a school board and a teacher organization negotiate, tax dollars and school policy may be involved. People need to know what's going on.

People will have a lot more confidence in a collective bargaining agreement if they've had the opportunity to follow the entire process, instead of suddenly being handed an agreement worked out behind closed doors.

The legislature should not perforate the sunshine law with even one loophole.

If the sunshine law conflicts with the constitutional right of collective bargaining, then the constitution should be amended.

With so much distrust of government these days it would be a mistake to weaken the sunshine law. People cannot have confidence in government unless they can know what is going on.

This was a WJXT editorial.

Senator CHILES. Mr. Adams.

Mr. ADAMS. Thank you, Mr. Chairman. The formal statement has been forwarded to you. I will summarize it.

Senator CHILES. Your formal statement will certainly be included in full at the end of your remarks and we will appreciate your summarizing it.

Mr. ADAMS. Thank you, Senator.

I completed about 3 months ago a research project on State level open meetings laws that resulted in a paper, a copy of which the committee also has.

Senator CHILES. Thank you. We will include that in our record a the end of your prepared statement.

Mr. ADAMS. That work, and a general interest in sunshine laws I have had in connection with my teaching in the field of press

law, has led me to some conclusions about what such laws should include.

Clearly, there are some differences in what would be apppropriate in the States and what would be appropriate in Federal sunshine legislation. But there are some factors which seem appropriate regardless of level.

My statement deals principally with the factors which seem to be missing from the bill presently being considered. I hope the somewhat negative emphasis here does not blur the fact that the introducers of S. 260 are to be commended for their efforts to insure that public business is conducted publicly.

RECOMMENDED CHANGES FOR S. 260

My suggestions are few, and they are based solely on my own analysis of needs.

(1) The statement of public policy is presently ambiguous in that it does not, specifically, provide for open meetings. Rewording would help establish the principle of public access which, presumably, is the point of such a law.

(2) I assume that there exist, somewhere, rules of law relating to the openness of meetings of the full Senate and House.

Inclusion of such rules, if any, in S. 260 would, at least, be tidier.

(3) Reference to agencies as those defined in section 551(1) of title V, United States Code is succinct, but misleadingly simple, since 551(1) refers to an impressive number of other parts of the United States Code. An interested citizen would have difficulty discovering exactly which agencies are to be covered. A solution could be to be less succincts and more inclusive in S. 260.

(4) Perhaps the most difficult aspect of S. 260 is the system of redress in response to alleged violation of the law by committees and subcommittees of the Senate and House, separately or combined. The system is complicated, and it provides a path for redress only to members of the groups involved. No other member of the parent bodies, and no member of the general public, has a mechanism for redress. I feel the limitations here are faulty and should be rectified.

(5) Finally, the effects of a successful protest—presently limited to public release of previously secret portions of the transcripts of improperly closed meetings—should be brought more in line with the extensive array of remedies provided in cases involving the agencies.

I realize the difficulties involved in broadening the range of types allowed to seek remedial relief; I realize, too, that providing, for example, for fines to be paid by members of the Senate or House would be extremely difficult. Still, the basic point of the law is to open government acts to public view—where appropriate—and those who will fully interfere with that principle should, in fact, be called to account.

Again, the fact that a sunshine bill is under discussion is commendable and clearly in line with what is an obvious trend in the States toward more openness. My objections are not easy to implement, but at least some seem to me to represent basic ingredients in a bill designed for the noble purpose of providing citizens with more opportunity to participate in their government. At the moment, I think the weather forecast is not exactly sunshine, it might better be called partly cloudy.

Senator CHILES. Thank you very much. We are delighted to hear your comments, contrasting to what we have been listening to all day, that we should go further in our legislation. And I am also aware that you recognize the practicalities concerned in trying to pass a sunshine bill through the Congress that has been operating under the standard of closed meetings and secrecy for over 100 years.

RULEMAKING

I would just briefly comment on a couple of the points that you have raised. One is to the rulemaking provisions, or the rules of the House and Senate. We have a problem there in that the Constitution provides that each House can set its own rules. So regardless of what we put into the statute, it really would only govern us until either body decided they wanted to change their rules because constitutionally they have been given that power. We are hoping that this being an expression of the Congress and being passed in a recorded vote is going to be the kind of expression that the Congress will make binding upon itself, but we have a constitutional prohibition against it. Only by amending the Constitution could we pour those rules into concrete. So I think the practical and political effect of the passing of this bill would be to bind the rulemaking provisions and we have attempted to try to set that but we do run into constitutional provisions.

STANDARD OF OPENNESS

The other thing, and I think it was brought out by Mr. Wickham, is what we hope this bill would do. This bill won't stop anyone and everyone that wants to cheat, that wants to carry their decisions to some backroom or someplace else, but it will change the standard and it will provide for the first time that the standard is to be one of openness rather than the old standard of one of being closed. And then those people who wish to conduct themselves properly will have a standard upon which to repair and also I think the press and the public has a standard of measurements certainly to measure elected officials as to whether they have complied or not and also to take to task appointed officials as to whether they are complying or not.

Again, in trying to steer the course and in listening to some of our testimony today, no one is against the goals of this bill but everybody can find something wrong in how it is drafted and some

exceptions that should apply to us or something else. And so in trying to steer a course so that you don't get your bill lost by the nitpicking, you did try to recognize some of the exceptions which are different, as you have already said, in the Federal Government—national security those things that you must recognize where Florida can pass a bill that just says you are going to have open meetings, and leave it up to the court to interpret any kind of open session, you can't quite do that in the Congress or in the Federal Government. So that has been the kind of course we are attempting to steer.

PUBLIC NOTICE OF MEETINGS

The bill requires prior public announcement of each committee or agency meeting to give the public a chance to attend the meetings. Do any of you have any ideas how the public announcement might best be made to assure as wide dissemination of information as possible? Do you think that notice in the Congressional Record or the Federal Register would suffice or should the bill require something more?

Mr. ADAMS. Again you are dealing with a considerably different problem from the State and local agencies where all they need to do is call up their local newspapers in some instances and that will take care of public notice. We have here a country to cover. It is a considerably more complex problem. The time element in the bill seems to be appropriate. The precise mechanism I suppose would be public release to the news media and publication in the appropriate documents, Federal Register, et cetera. As broad notice as possible with sufficient time, which seems to be there, should do it.

Certainly those who are interested in the subject matter to be discussed will find out about it. Whether the general public will in time is another matter.

Senator CHILES. Mr. Koop, do you have any comments on that?

Mr. KOOP. Every morning I look in the Washington Post for a list of congressional committee hearings to see whether there might be anything of interest in the news field. It seems to me that a similar notice, not a notice, an announcement of open sessions of the regulatory agencies would take up not more than 2 or 3 inches of additional space and could well serve as a public notice. It is about these congressional hearings that is the only real notice the public as a whole does get and I think this could be comfortable for the agencies.

MEDIA COVERAGE OF MEETINGS

Senator CHILES. To what extent, do you know, have the practices of opening congressional committee meetings affected media coverage of these meetings?

Mr. KOOP. I think they have improved the situation certainly for the media and I am confident, too, for the Members of Congress. We used to hear that opening committee sessions in Congress would turn them into a circus. We still hear that argument for the regular

sessions of the House and Senate which are not yet open but certainly that has not proved to be the case. We found them to be very workmanlike. Our ability to cover has greatly improved just as it would for the regulatory agencies.

We don't have to depend on leaks and secondhand information but can show the American people what their legislators actually are doing. I think it improves the situation all around.

LEAKS FROM CLOSED MEETINGS

Senator CHILES. Has it been your experience that even when congressional meetings are closed that information concerning them usually becomes available to the press in some form?

Mr. KOOP. I think no one in Washington would deny that it does.

Senator CHILES. How extensive are the leaks of information when agencies are holding private meetings or are in closed sessions?

Mr. KOOP. Well, for the last several years before I retired from CBS I had a certain amount of interest in FCC matters and I would endorse what Mr. Geller said this morning, that anyone who is half a reporter can find out within an hour what the Commission has been doing in private. I can't speak so well for the other agencies but I have no doubt that the same situation applies to some degree.

Senator CHILES. The Joint Committee on Congresssional Operations, you know, is experimenting with a proposal for live coverage of both House and Senate on some occasions. Do you think that would be beneficial?

Mr. KOOP. Well, naturally, we are very strongly in favor of that because here again we are not seeking it for us as an industry but seeking it for the American people and I think we have to go back no further than the sessions of the House Judiciary Committee to show what this did bring before the American people and what could be done on other occasions.

Senator CHILES. Well, I am delighted to have your comments from the source of the industry. We found some reluctance on the part of the national press in trying to build a constituency up here. I think certain of the national press are quite comfortable with their sources and their leaks and perhaps would have to change some of their methods of operation if Congress in fact opened up—not only Congress but some of the executive agencies. The reason I make these comments is that the bill only passed in Florida because it had the strong backing of the press behind it and then it took 6 years to pass it. It reached the point where every time a meeting was closed, the press took the names of the people who went in that meeting and usually your picture going in or coming out. Oftentimes reporters had to be ejected or carried from a closed meeting and they kept it constantly in the public's eyes. It reached a point that if you were seeking public office in Florida, the question that you were most often asked by the public was how do you stand on the sunshine bill, because the public decided that they wanted to know and they wanted open meetings. But they did that because, as I say, of the strong effort of the press.

I hear Professor Wickham talk about the Press Association of Tennessee drafting the law of Tennessee, which became their sunshine law. We don't have that kind of a constituency and haven't had that kind of constituency at all on the Federal sunshine law and I think that is one reason that we don't have the attention of the public. We have had more help from the League of Women Voters and Common Cause than we have had from the press to date.

I hope that maybe from our hearings we can generate some further support and we are delighted to have your thoughts and support of this legislation.

Thank you very much for your testimony. Again, we may have some further questions we would like to submit. The record will remain open until November 1.

[Prepared statement of Mr. Adams follows:]

PREPARED STATEMENT OF JOHN B. ADAMS, DEAN, UNIVERSITY OF NORTH CAROLINA JOURNALISM SCHOOL

Legislative action in the field of Open Meetings has been extensive in recent years, with more than half the states enacting or amending such laws in the 1970s. In each instance, action taken has been with the intent to broaden the concept of openness.

A summary of the state laws was published in July, 1974, by the Freedom of Information Foundation, with support for the American Newspaper Publishers Association. A copy of the report is attached.

I did the research for that paper, and in the process of reading laws and discussing Open Meetings with many people, certain basics seemed to recur—basics which provide a starting point for reaction to the provisions of S. 260.

1. The principle of Open Meetings fits perfectly in the framework of democratic government. Without belaboring the obvious, let me simply say that most people strongly support openness in government—many individuals, many interest groups, many public officials support the idea that the public's business should be conducted openly. Many would add a qualifier providing for some exceptions to the general rule, but this does not detract from agreement on the principle.

About half the states express this general feeling for openness in statements of public policy, but no state approaches the policy statement in quite the phrasing found in S. 260, which says; "It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government."

There are, of course, several possible interpretations of the policy statement, one being that while the public should be able to learn about what transpires in meetings, it is not the policy that the public is entitled to *observe* the meetings in action. Technically, the policy deals with an implicit requirement that thorough *records* be kept—records which should be made available to the public to the fullest practicable extent.

Whether or not that interpretation of the statement of policy is sound, my personal preference would be to have a clearer statement providing for public access to meetings—not simply to the *records* of such meetings.

2. The use of the words "Federal Government" in the policy statement implies what is clearly not the intent of the bill—that is, that all agencies and bodies of all branches are involved.

The problem of the extent of coverage is one on which the states disagree. All states with Open Meetings laws provide for open meeting of the state's administrative agencies and bodies, but only about half provide for open Legislatures; a few more open the committees of the Legislature.

S. 260 provides for open Senate, House and Joint committees and subcommittees, and for agencies defined in Sec. 551(1) of Title 5, U.S. Code. I have

not had an opportunity to track down subsidiary references in an effort to determine exactly what agencies are involved. The point here, however, is that the full Senate and House are not included in the bill, presumably because some sorts of rules are already in effect. It might have been tidier to include provisions for open meetings of the full Senate and House, with exceptions or not, in S. 260.

3. Exceptions to openness, despite the notion that *ideally* there should be none, are in effect in virtually all of the states, and S. 260 is specific about the sorts of subject matter which would appropriately be discussed in a closed meeting.

Few persons have totally persuasive arguments against the sorts of exceptions in S. 260. They are logical, and, if and only if they are not abused, such exceptions provide the atmosphere conducive to frank and open discussion which would be dampened if the discussions were to be public.

4. If the principle of openness *is* abused, then remedial action is mandatory. Since the whole point of open meetings is to provide for public access to governmental processes, it would seem appropriate for members of the public to protest if there appears to be improper closing of meetings.

Insofar as the agencies are concerned, S.260 is forthright and clear: Any resident of the United States may seek redress through the courts, which, under S.260, have the power to issue injunctions prohibiting such closings, to declare actions taken in such meetings to be null and void, and to fine those whose willful acts produced the wrong.

But the remedial process for the committees, while detailed and clearly designed for quick action, takes the extraordinary position that only members of the group which voted to close a meeting—and 25% of the members at that—can begin the process of seeking redress. I understand that a system under which *any* individual has a right of protest has the potential of creating continuing hassle. It might be awkward, then to provide exactly the same system of redress for the committees as is provided for the agencies, but if the principle of public redress is considered as important as it appears to be for the agencies then a broader range of possible options for the committees would seem to have merit. It does seem odd to me that there is no provision even for a member of the Senate or House who is not a member of an allegedly offending committee to question the situation, nor, of course, can any other individual pursue the question of whether a meeting was properly closed or not.

5. Beyond the extraordinary limitations on who may challenge the closing of a committee meeting, there is a further problem which is emphasized by the extent and kind of remedial action possible against an agency. As S.260 reads, the only result of a point of order by 25% of a committee's members, if the Select Committee on Meetings' resolution were phrased so, and if the full body approved, would be that deleted portions of the transcript would be made public. There is no provision for any system of enjoining such improper closing in the future; no voiding of actions taken in the improper meeting; no punishment whether the improper meeting was called with willful intent or not.

Claiming no talent in providing the proper phrasing, I still feel that the principle of recourse so clearly and so broadly provided for the agencies should somehow be adapted to the sections dealing with committees.

Briefly, then, this citizen feels that some portions of S. 260 need attention. Specifically there should be:

a. Rephrasing of the statement of public policy to clear up the ambiguity of what, exactly, is supposed to be public—the records, the meetings, or preferably, both.

b. Inclusion in S.260 of the present rules, if any, regarding the openness of meetings of the full Senate and House.

c. More precise specification of which agencies are, in fact, covered by the bill, in an effort to remove the complexity in tracking such agencies down through Sec. 551(1), Title 5 and its spinoffs.

d. Provision for remedial relief by others than members of a committee alleged to have closed a meeting improperly. The provision for a right of protest should certainly be extended to other members of the Senate and House

and, if the principle were to be adequately supported, to members of the general public as well.

e. Provision for injunctive relief, negations of actions taken in improperly closed meetings, some penalty for willful disregard of the law in the committees and subcommittees sections as well as in those dealing with the agencies.

Regardless of whether these suggestions find their way into the bill, the idea of the bill is commendable and I hope the Senators will continue efforts to let the sunshine, and the people, in.

STATE OPEN MEETINGS LAWS: AN OVERVIEW

(By Dr. John B. Adams, Dean, School of Journalism, University of North Carolina; this is an independent and objective paper made possible by a Grant from the American Newspaper Publishers Association Foundation)

INTRODUCTION

The "Freedom to Attend Governmental Meetings," like all other freedoms, has certain limitations. However, openness appears to be more common today than ever before, even though very few people vigorously support the notion that all meetings of all bodies at all levels of government should be conducted before citizen or media spectators. One method of providing at least some assurance of more openness (when appropriate) is through enactment (and enforcement) of state "Open Meetings" laws.

This paper looks at state laws on Open Meetings. What follows must be read with two major caveats in mind:

(1) The status of state law today is blurred by an impressive amount of activity, in legislatures and out, resulting in frequent and extensive change.[1]

(2) Open Meetings statutes (as is the case in all laws) are written in a style which inevitably requires interpretation.

For these reasons, readers should approach the data with the expectation that some changes could have occurred since this writing, and that interpretations are those of the writer and may not coincide with others' interpretations.

It is not the intent here to provide a set of comprehensive guidelines for reporters or public in individual states. The responsibility for verification and clarification must rest with those whose need to know is specific or in a given state. What follows is an overview, with some discussion of principles and examples from states' laws to illustrate the points.

The centerfold presents a table summarizing the principal characteristics of states' laws on Open Meetings as they were known or inferred to be at the time of writing. There are almost certainly errors in the table. Readers who detect such errors would help future writers in this field if they would inform the writer or publisher and provide clarifying documentation.

I. THE METHOD

Two questionnaires were used to gather the basic data:

(1) A request was sent to state legislative reference services in the 50 states asking for copies of current Open Meetings laws, reports of any test cases involving journalists, and reports of pending legislation on Open Meetings.

(2) A request was sent to editorial officials on newspapers in the capital cities of the 50 states, asking for information about the functioning of Open

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[1] For example, since this paper was completed, New York enacted an Open Meetings law (May 29, 1974); at this writing the details of the law are not available: Arizona and Idaho revised their laws. The Idaho revision changed that state's "score" from 4 to 7. (See p. 4).

Meetings laws, reports of test cases involving journalists, and expressions of attitudes toward the concept of Open Meetings.

Response from the state legislative reference services was good: 48 of 50 responded. Material from the Freedom of Information Center and Common Cause filled the gaps.

Responses were received from 33 of the 50 editors.

Once the data were in, the laws were analyzed in terms of:

(1) Provisions for openness in various categories of governmental bodies.

(2) Provisions for closed executive sessions.

(3) Provisions for penalties for violation of the law.

(4) Provisions for a mechanism (mandamus, injunction, etc.) to enforce compliance.

The data are accumulated in the centerfold.

II. CHARACTERISTICS OF A COMPREHENSIVE LAW

At the time of writing, all but three of the 50 states had some law—specific or general—on Open Meetings. Mississippi and West Virginia apparently had no provisions at all. in law. constitution or rules. New York. with no law as such, did have rules of the House and Senate providing for open meetings of legislative committees.

There is no guarantee that presence of a state law will guarantee open government. But it is assumed that the chances of open government are improved if a state has a broad Open Meetings law with teeth.

In order to rank the states' laws along a "maximum openness"-"minimum openness" scale, we have isolated the characteristics that seem to assure "maximum openness." The "ideal" law, then, would:

(1) Include a statement of public policy in support of openness.

(2) Provide for an open legislature.

(3) Provide for open legislative committees.

(4) Provide for open meetings of state agencies of bodies.

(5) Provide for open meetings of agencies and bodies of the political subdivisions of the state.

(6) Provide for open County Boards.

(7) Provide for open City Councils (or their equivalent).

(8) Forbid closed executive sessions.

(9) Provide legal recourse to halt secrecy.

(10) Declare actions taken in meetings which violate the law to be null and void.

(11) Provide for penalties for those who violate the law.

Based on these characteristics, a state with an "ideal" law could score a maximum of 11 points (one point for each criterion) and a state with no law would score zero.

One state scored 11 points—Tennessee, with a new law effective May 1, 1974.[2] Rhode Island and Maryland, with sketchy laws covering only state administrative agencies, scored one point each.

Substantial differences might exist between two states with the same score since some characteristics have more value for openness than others. However, no attempt was made in this paper to weight the various criteria.

For example, Colorado and Arizona both score 10. There is a difference, perhaps substantive, in that Colorado forbids executive sessions but provides for no penalties, while Arizona provides for penalties but allows executive sessions. The scoring technique blurs the possible conclusion that one or the other is a "stronger" law.

Similarly, Minnesota, Kansas, and Maine all score 9, but again the missed points are for different factors.

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[2] On May 6, 1974, a Chancery Court in Shelby County ruled that the law was "constitutionally invalid for vagueness." The ruling has been appealed to the Tennessee Supreme Court.

"COMPREHENSIVENESS" OF STATE OPEN MEETINGS LAWS

State:	Score	State—Continued	Score
Tennessee	11	Texas	7
Arizona	10	Washington	7
Kentucky	10	Wisconsin	7
Colorado	10	Iowa	6
Kansas	9	Nevada	6
Maine	9	New Jersey	6
Minnesota	9	Oklahoma	6
Alaska	8	South Dakota	6
Arkansas	8	Wyoming	6
Florida	8	Alabama	5
New Mexico	8	North Dakota	5
North Carolina	8	Louisiana	5
Oregon	8	Massachusetts	5
South Carolina	8	Ohio	5
Utah	8	Pennsylvania	5
Vermont	8	Virginia	5
New Hampshire	7	Connecticut	4
California	7	Delaware	4
Georgia	7	Hawaii	4
Illinois	7	Idaho	4
Michigan	7	Indiana	4
Missouri	7	Maryland	1
Montana	7	Rhode Island	1
Nebraska	7		

It might be noted that of the seven states scoring 4 or 1, Connecticut, Indiana and Rhode Island have taken recent action in terms of enacting or amending their laws. For the others with these scores, the range of dates for the latest action is from 1953 to 1962. All of the states scoring 9, 10, or 11 took their latest action in the 1970's.

If scores of 9 and 10 are percieved as "most comprehensive," 8 as above average, 6 and 7 as average, 5 below average, and 4 or below as "least acceptable," then it would seem that most states' laws might be appropriately remedied to provide for more openness or more enforcement potential.

III. EXPLANATION OF IDEAL CHARACTERISTICS

What follows is a series of short discussions of the 11 factors defined here as necessary for a comprehensive state Open Meetings law.

1. Statement of Public Policy

It would seem appropriate and helpful for state legislatures to include (or amend to include) in their Open Meetings laws some statement establishing openness as public policy, and 22 states have done so. If nothing else, such a statement would provide the assumption that openness was the preferred status, shifting to those who close a meeting the burden of proving the need for closure.

California's phrasing, also used by other states, is quite detailed:

Declaration of public policy. In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. (5:2 54950)

South Carolina's law provides another version of an inclusive statement:

Public policy.—Whereas the commissions, committees, boards, councils and other governing and governmental bodies which administer the legislative and executive functions of this State and its political subdivisions exist solely to conduct the people's business, it is the public policy of this State that the hearings, deliberations and actions of said bodies be conducted openly. (143–318.1)

Wyoming, however, is rather off-hand about it:

The various agencies of Wyoming exist to conduct public business. (159:9-692.10)

Regardless of the phrasing, the advantage of such a statement is that the legislature puts on permanent record its commitment to openness.

2. Open Legislatures

It is assumed that most general meetings of most legislatures in the nation are open, regardless of whether there is specific provision in law. Proponents of openness, however, feel more comfortable when such sessions are open by law rather than by custom. Of the 47 states with Open Meetings laws, 22 provide, specifically or by implication, for open legislatures.

Alaska, for example, provides as follows:

All meetings of a legislative body . . . of the state or any of its political subdivisions . . . are open to the public. . . . (312: 44.62.301)

The legislatures of some states, Ohio for example, are open under a constitutional provision; some others are open by custom. More than half the states would seem to need some action to tidy up their laws and codify what is probably customary behavior anyway—that is, that the legislatures are open.

3. Open Legislative Committees

If it is true that the bulk of the work of a legislature is carried out in its committees, openness would seem to be appropriate here as with the parent body.

Slightly more states open their legislative committees (23) than open the legislature (22). In some cases rules of the House and Senate supplement the Open Meetings law or, as in the case of New York, which has no law, such rules provide the only support for openness in the state.

It is still the case, however, that fewer than half the states provide for open legislative committees by law.

4, 5, 6, and 7. Openness of Various Bodies

The state legislatures and their committees were mentioned in sections 2 and 3 above. The remainder of the types of governmental bodies are lumped together here since there is openness in practically all the states, with 44 states providing for open meetings of non-legislative agencies at the county and city level, county boards, and city councils. Furthermore, all 47 states with Open Meetings laws open state-level non-legislative bodies.

There are exceptions throughout, especially in terms of judicial and quasi-judicial bodies, parole boards, and the like. But generally speaking the laws appear to provide ammunition for reporters and others seeking access to state administrative bodies and county and local meetings.

In summary, most of the states with Open Meetings laws provide for access to non-legislative, non-judicial meetings; they provide enforcement procedures and penalties as often as not (though only six of the states include all three enforcement types in their laws); half have adopted statements of public policy in support of openness; few invalidate actions taken in violation of the law; and very few open executive sessions.

Tennessee's law might have become a model law, but court action recently blurred that situation.

8. Open Executive Sessions

Florida, Minnesota, North Dakota (inferred), Tennessee, and (on the state level only) Colorado provide for open executive sessions.

The Colorado situation arises from the fact that two Open Meetings laws are in operation there, a basic 1962 law and a 1972 amendment. The basic law, which permits closed executive sessions for specific purposes, has been interpreted by the State Attorney General to apply to local bodies. The amendment, which forbids closed executive sessions, has been interpreted to apply to state-level bodies (including the legislature and its committees.)

Minnesota's new law, effective May 1, 1974, says:

"Except as otherwise expressly provided by statute, all meetings, including executive sessions . . . shall be open. . . ." (471.705 MS)

Colorado (at the state level) and Minnesota are relatively clear, but the other three states are included in this category because their statutes would appear to imply that closed meetings of any kind are illegal. For example, Tennessee's new law, also effective May 1, 1974, says:

All meetings of any governing body are declared to be public meetings. . . .

"Meeting" is defined as:

The convening of a governing body of a public body for which a quorum is required to make a decision or to deliberate toward a decision on any matter. (From House Bill 1486)

And North Dakota's law says:

"All meetings of two or more members of any . . . committee (etc.) . . . are declared to be public meetings open to the public at all times. . . ." (1973-13.1)

Florida's inclusion here is based on an interpretation. It may not be appropriately listed here.

All other states allow closed executive sessions, some for restricted purposes, some in general. It should be noted, however, that 15 of the states' laws provide that no *final* action may be taken in closed sessions.

Alabama's law, unamended since 1915, appear to have the longevity record. It is specific in *forbidding* executive sessions by a variety of agencies, then adds: . . . except that executive or secret sessions may be held by any of the above named boards or commissions when the character or good name of a woman or man is involved. (393. 5254)

One respondent noted that boards and commissions have found the exception to be a useful device for circumventing the spirit of the law.

Alaska's law specifies that:

The following excepted subjects may be discussed in an executive session: 1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit; 2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion; 3) matters which by law, municipal charter, or ordnance are required to be confidential. (44.62.301 (c) 1-3)

Arizona's law allows three sorts of closed executive sessions (state Senate and committees and subcommittees of the legislature; bodies considering employment or dismissal of employees; and bodies required by federal regulation to meet in executive session), but Arizona also sets limits by adding:

1. . . . such sessions shall not be used to defeat the purposes of the provisions of this article.

2. . . . (no) official action shall be finally approved at such executive session.

3. . . . executive sessions may be called only by a majority vote of such bodies or agencies. (38-431.02 A. 1-3)

Journalists might find appropriate the phrasing in Oregon's law, which provides for a broad range of executive sessions, but adds:

Representatives of the news media shall be allowed to attend executive sessions under such conditions governing the disclosure of information as may be agreed to by the governing body and the representatives of the news media prior to such executive sessions. (1933:172.6 (4))

9. Legal Recourse to Halt Secrecy

It is implicit in all law that some recourse is available to counteract violations. In the case of open meetings, the principal purpose of the mechanism would be to force illegally closed meetings to be opened.

Of the 47 states with laws, 21 provide redress procedures. Of these, seven provide for a general "appeal to the court." The rest specifically suggest a request for a writ of mandamus, an injunction, or both. There still remain 26 states with laws with no specific recommendation for enforcement, but in some of these, at least, test cases have occurred, which would support the notion that judicial relief is possible even if the procedure is not spelled out in a state's law. For our purposes, specific mention is considerably more reassuring than a theoretical possibility.

10. Actions Taken Contrary to Law to be Null and Void

This factor and two others (penalties for noncompliance and enforcement mechanisms) provide the teeth to give meaning to the Open Meetings laws. The phrasing varies, but 14 states declare actions taken contrary to the laws to be null and void in one way or another.

Georgia, for example, says:

"No resolution, rule, regulation or formal action shall be binding except as taken or made at (public) meetings." (23-802, 23-9912 GCA, Ga L 1972, p. 576)

SUMMARY OF OPEN MEETINGS LAWS

	Date of latest action	Includes statement of public policy	Provides for open legislature	Provides for open legislative committees	Open State agencies	Opens county boards	Opens city councils	Forbids closed exec. sessions	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violations	"Score"
Alabama	1915				Yes	Yes	Yes				Yes	5
Alaska	1972	Yes	Yes	Yes	Yes	Yes	Yes			Yes		8
Arizona	1974	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes	10
Arkansas	1967	Yes			Yes	Yes	Yes		Yes	Yes	Yes	8
California	1974	Yes			Yes	Yes	Yes		Yes	Yes	Yes	7
Colorado	1974	Yes	Yes	Yes	Yes	Yes	Yes	Yes [a]	Yes	Yes		10
Connecticut	1971				Yes	Yes	Yes					4
Delaware	1955				Yes	Yes	Yes					4
Florida	1967				Yes	Yes	Yes	Yes	Yes	Yes	Yes	8
Georgia	1972		Yes [o]	Yes [o]	Yes	Yes	Yes		Yes	Yes	Yes	9
Hawaii	1959				Yes	Yes	Yes					4
Idaho	1961				Yes	Yes	Yes					4
Illinois	1973	Yes			Yes	Yes	Yes		Yes		Yes	7
Indiana	1971	Yes			Yes						Yes	4
Iowa	1967				Yes	Yes	Yes		Yes		Yes	6
Kansas	1972	Yes	Yes	Yes	Yes	Yes	Yes			Yes	Yes	9
Kentucky	1974	Yes	Yes [d]	Yes [h]	Yes	Yes	Yes		Yes	Yes [p]	Yes	10
Louisiana	1972				Yes	Yes	Yes				Yes	5
Maine	1973	Yes	Yes	Yes	Yes	Yes	Yes	(b)	Yes		Yes	9
Maryland	1954				Yes							1
Massachusetts	1970				Yes	Yes	Yes		Yes			5
Michigan	1968		Yes [c]	Yes [d]	Yes	Yes	Yes		Yes			7
Minnesota	[e] 1973		Yes [d]	Yes [d]	Yes	Yes	Yes	Yes	Yes [d]		Yes	9
Mississippi	No law											No law
Missouri	1973		Yes	Yes	Yes	Yes	Yes		Yes			7
Montana	1963	Yes	Yes	Yes	Yes	Yes	Yes					7
Nebraska	1972	Yes			Yes	Yes	Yes			Yes	Yes	7
Nevada	1960	Yes			Yes	Yes	Yes				Yes	6
New Hampshire	1973		Yes	Yes	Yes	Yes	Yes				Yes	7
New Jersey	[f] 1974	Yes		Yes [g]	Yes	Yes [d]	Yes [d]			Yes		6
New Mexico	1974			Yes [h]	Yes	Yes	Yes		Yes	Yes	Yes	8
New York	No law			(i)								No law
North Carolina	1971	Yes	Yes	Yes	Yes	Yes	Yes		Yes			8
North Dakota	[j] 1957		(d)	(d)	Yes	Yes	Yes	Yes [d]				5
Ohio	1961		Yes [c]		Yes	Yes	Yes					5
Oklahoma	1959				Yes	Yes	Yes			Yes	Yes	6
Oregon	1973	Yes	Yes	Yes	Yes	Yes	Yes		Yes			8
Pennsylvania	[k] 1958				Yes	Yes	Yes				Yes	5
Rhode Island	[l] 1974				Yes							1
South Carolina	1972	Yes	Yes	Yes	Yes	Yes	Yes		Yes			8

SUMMARY OF OPEN MEETINGS LAWS—Continued

	Date of latest action	Includes statement of public policy	Provides for open legislature	Provides for open legislative committees	Open State agencies	Opens county boards	Opens city councils	Forbids closed exec. sessions	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violations	"Score"
South Dakota	1965		Yes [d]	Yes [m]	Yes	Yes	Yes				([n])	6
Tennessee	[q] 1974	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	11
Texas	[n] 1973		Yes	Yes	Yes	Yes	Yes				Yes	7
Utah	1953	Yes	Yes	Yes	Yes	Yes	Yes				Yes	7
Vermont	1973	Yes	Yes	Yes	Yes	Yes	Yes				Yes	8
Virginia	1974				Yes	Yes	Yes		Yes			5
Washington	1973	Yes			Yes	Yes	Yes		Yes		Yes	7
West Virginia	No law											No law
Wisconsin	1959		Yes	Yes	Yes	Yes	Yes				Yes	7
Wyoming	1973	Yes			Yes	Yes	Yes			Yes		6

[a] State level only; executive sessions are allowed at the political subdivision under the first of Colorado's two open meetings laws.
[b] Section of the law which allows executive sessions specifically excludes legislative committees.
[c] Constitutional provision.
[d] Inferred.
[e] Effective May 1, 1974.
[f] Based on inadequate data—neither the legislative reference service nor the newspaper person responded.
[g] Opened by a rule passed Jan. 31, 1974.
[h] Standing committees only.
[i] Rules open committees of the House and Senate to news media and the public, though there is no law as such.
[j] Not totally clear from available data. A referendum is scheduled for September 1974, which should clarify. At present all data are inferred from sketchy law.
[k] Seven bills were being considered by the legislature. At the time of writing no formal action was known to have been taken.
[l] There is law dealing with "administrative procedures," but no open meetings law as such
[m] Under House Joint Rules.
[n] Effective Jan. 1, 1974.
[o] A test case apparently opened the legislature and its committees following a judge's interpretation of the State's law. Documentation not available at time of writing.
[p] Law is phrased: "Any rule, resolution, regulation, ordinance, or other formal action of a public agency without substantial compliance of the requirements of sections 2, 3, 4, and 5 of this act shall be voidable by a court of competent jurisdiction. A certificate by the clerk or secretary of said public agency at said meeting that the requirements of sections 2, 3, 4, and 5 of this act were complied with shall be prima facie and admissive in any court of competent jurisdiction." From House bill 100. (61: 6KRS.)
[q] A ruling of the Chancery Court of Shelby County, Tenn., on May 6, 1974, held the Tennessee open meetings law to be "constitutionally invalid for vagueness" (No. 78995-2R.D., May 6, 1974. An appeal is pending.
[r] It is understood that a recent amendment to the law provides a penalty for noncompliance, but it is not verified at this time and hence is not included.

New Mexico's 1974 law provides that no actions shall be valid unless taken at a public meeting, but adds a sentence noting that:

Every (such action) of any board, commission, committee or other policy-making body shall be presumed to have been taken or made at a public meeting. . . . (Ch. 91 at 296)

Whether the latter section is designed to shift the burden of proof to those who claim actions were taken in secret or whether some other interpretation is to be made is not clear.

Wyoming's law, however, is clear:

Action taken at a meeting not in conformity with this act is null and void. (159:9-692.12 (a))

11. Penalties for Noncompliance

The third of the three procedures for enforcement of Open Meetings laws is inclusion of specific penalties to be imposed on those who fail to comply. Here 26 states have more or less specific penalties as part of their laws. The least precise is that in Tennessee's new law, which combines an enforcement procedure and a penalty reference:

The Circuit Courts, Chancery Courts and other courts which have equity jurisdiction, shall have jurisdiction to issue injunctions, *impose penalties*, and otherwise enforce the purposes of this act upon application of any citizen of this state. (Emphasis added.) (House Bill 1468–6 (a))[2]

New Hampshire's 1973 amendment provides that any body or agency which fails to comply with the Open Meetings law "shall be liable for reasonable attorney's fees and costs incurred in making the information available or the proceedings open to the public. . . ." (RSA 91–A:8)

Twenty-four other states provide either that violation will be treated as a misdemeanor or spell out fine and/or imprisonment limits.

No consistent pattern is found among the states' laws. For example, Alabama's range on fines is from $10 to $500; Indiana's is from $50 to $500; Nebraska's fine is "not more than $25"; and Pennsylvania smacks the wrist with a range from $10 to $25 and costs.

On imprisonment, the general phrase is "not more than 30 days," but Maine's maximum is one year and Texas' is from one to six months.

Minnesota further provides for dismissal of an offending official after a third violation.

In about half the states, no penalty is mentioned and this sort of incentive to openness is therefore unavailable.

IV. TWO "MODEL LAWS"

Common Cause and the Society of Professional Journalists, Sigma Delta Chi, are two national bodies active in support of Open Meetings laws. Both have developed "model" laws, but neither has been enacted in its entirety in any state.

Of the two, that of Common Cause is the stronger (scoring 10 on our 11-point scale, the factor missing being open executive sessions).

The SPJ, SDX "model" law scores 5 by not providing for any of the three enforcement mechanisms, allowing closed legislatures and legislative committees, and by not providing for a statement of public policy. It should be noted that the SPJ SDX model law is not intended to be inclusive, but rather that organization expects the model law to be used solely as a starting point, recognizing the inevitability of changes in the legislative process.

Copies of the two model laws, used with permission, may be found in the Appendix.

(A useful Common Cause book on a variety of matters, including Open Meetings laws, is *Money and Secrecy*, by Lawrence Gilson (New York: Praeger Publishers, 1972, 293 pp., paperback, $2.95). Among other things, the book provides a state-by-state look at Open Meetings laws. Though published in 1972 it is, because of the extensive action in this field, somewhat out of date, but still useful.)

V. THE EDITORS' RESPONSES

It was noted earlier that 33 of 50 editorial officials, in 33 state capital cities, replied.

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[2] See note on unconstitutionality on p. 4.

Of the 33, all but two favored Open Meetings laws. The two negative responses were from editors who felt that laws create loopholes and things are therefore better without law.

The prevailing view, however, was favorable, but 13 of the editors favoring legislation agreed that "certain" exceptions were probably desirable. The rest favored strong laws and preferred no exceptions.

Two of the editors were not aware that their states had Open Meetings laws, and one other was not aware that there had been test cases involving journalists in his state, cases which the state legislative reference service reported.

Conversely, four editors documented test cases involving journalists in states where the legislative reference service reported that there had been no such cases.

Perhaps more significant than actual test cases is the effectiveness of the *threat* of court action, reported by 13 of the editors. As an aid to reporters, the North Carolina Press Association, for example, provides a wallet-size card on which the state's Open Meetings law is printed. Arkansas' Little Rock Professional Chapter of SPJ, SDX, prepared an explanatory booklet on their law for journalists. Groups in South Carolina and Virginia, among others, have done the same sort of thing. These sorts of documents have given reporters a useful weapon to open illegally closed meetings without the necessity for court involvement. Cases have occurred, however. Editors and/or state legislative services in eight states reported cases, all of which were successful in opening meetings (and all of which occurred in states whose laws spell out the enforcement procedure).

VI. CONCLUSIONS

The writer has approached the subject of Open Meetings under the assumptions that:

1. Openness is desirable in a democracy.
2. The greater the openness provided by law the greater the chances of open government actually occurring.
3. The best law is weakened if it has no enforcement procedures.

With this in mind, eleven "desirable" characteristics of a state's Open Meetings laws were proposed and the laws of the 47 states with such laws were examined and points were given for each characteristic represented.

Subjectively, it must be concluded that the status of Open Meetings laws in most states is marginal. Very few states, by law at least, go beyond minimal provisions for openness and three have no laws at all.

There is, however, extensive action going on. Twenty-six states have taken some legislative action in the 1970's and there are many reports of other action ahead. Journalists, as surrogates for the public, would seem to be sufficiently involved in the need for openness to act, and join others in acting, for improved legislative support of new or amended Open Meetings laws. The rewards, for press *and* public, would be worth the effort.

APPENDIX

The model laws of Common Cause and the Society of Professional Journalists, Sigma Delta Chi, follow:

Society of Professional Journalists, Sigma Delta Chi

A BILL to be entitled

AN ACT requiring all meetings of the governing bodies of municipalities, counties, boards of public instruction, boards of county commissioners, and other boards, bureaus, commissions or organizations, except grand juries, supported in whole or in part by public funds or expending public funds; to be public meetings

Be it enacted by the Legisture of the State of——————.

Section 1. All meetings of the governing body of all municipalities located within the State of ——————, Boards of County Commissioners of the counties in the State of ——————, Boards of Public Instruction of the counties in the State of ——————, and all other boards, bureaus, commissions or organizations in the State of ——————, excepting grand juries, supported wholly or in part by public funds or expending public funds shall be public meetings.

Section 2. Any person or persons violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished

by a fine not exceeding ——— Dollars or by imprisonment in the county jail for a period not exceeding ———, or by both such fine and imprisonment.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. If any provision of this act or its application to any person, board, bureau, commission or organization shall be held unconstitutional, such decision shall not affect the constitutionality of any other portions of the act or its application to any other municipality, board, bureau, commission or organization.

Section 5. This act shall become law upon its passage and approval by the governor or become a law without such approval.

Common Cause

AN ACT requiring open meetings of public bodies

Section 1. Public policy. It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy. Toward this end, this act shall be construed liberally.

Section. 2. Definitions. As used in this act:

(a) "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

(b) "Public body" means any administrative, advisory, executive, or legislative body of the state or local political subdivision of the state, or any other entity created by law, that expends or disburses or is supported in whole or in part by tax revenue or that advises or makes recommendations to any entity that expends or disburses or is supported in whole or in part by tax revenue, including but not limited to any board, commission, committee, subcommittee, or other subsidiary thereof.

(c) "Quorum," unless otherwise defined by applicable law, means a simple majority of the constituent membership of a public body.

Section 3. Open meetings. Every meeting of all public bodies shall be open to the public unless closed pursuant to sections 4 and 5 of this act.

Section 4. Closed meetings. A public body may hold a meeting closed to the public upon an affirmative vote, taken at an open meeting for which notice has been given pursuant to section 6 of this act, of two thirds of its constituent members. A meeting closed to the public shall be limited to matters allowed to be exempted from discussion at open meetings by section 5 of this act. The vote of each member on the question of holding a meeting closed to the public and the reason for holding such a meeting, by a citation to a subsection of section 5 of this act, shall be recorded and entered into the minutes of the meeting. Nothing in this section or section 5 of this act, shall be construed to require that any meeting be closed to the public.

Section 5. Exceptions. (a) A public body may hold a meeting closed to the public pursuant to section 4 of this act for one or more of the following purposes:

(1) discussion of the character, as opposed to the professional competence, or physical or mental health of a single individual provided that such individual may require that such discussion be held at an open meeting; and provided that nothing in this subsection shall permit a meeting closed to the public for discussion of the appointment of a person to a public body;

(2) strategy sessions with respect to collective bargaining or litigation, when an open meeting would have a detrimental effect on the bargaining or litigating position of the public body;

(3) discussion regarding the deployment of security personnel or devices; and

(4) investigative proceedings regarding allegations of criminal misconduct.

(b) This act shall not apply to any chance meeting, or a social meeting at which matters relating to official business are not discussed. No chance meeting, social meeting, or electronic communication shall be used in circumvention of the spirit or requirements of this act to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

(c) This act shall not apply to judicial proceedings, but shall apply to a court or other judicial body while exercising rule-making authority or while deliberating or deciding upon the issuance of administrative orders.

(d) This act shall not prohibit the removal of any person or persons who willfully disrupt a meeting to the extent that orderly conduct of the meeting is seriously compromised.

SECTION 6. Notice. (a) All public bodies shall give written public notice of their regular meetings at the beginning of each calendar year. The notice shall include the dates, times, and places of such meetings. (b) All public bodies shall give supplemental written public notice of any regular, special, or rescheduled meeting no later than 72 hours before the meeting. The notice shall include the agenda, date, time, and place of the meeting.

(c) Written public notice shall include, but need not be limited to:

(1) posting a copy of the notice at the principal office of the public body holding the meeting, or if no such office exists, at the building in which the meeting is to be held, and in at least three other prominent places within the governmental unit; and

(2) mailing a copy of the notice to any person who requests notice of such meetings; any such person shall be given notice of all special or rescheduled meetings in the same manner as is given to members of the public body.

SECTION 7. Minutes. (a) All public bodies shall keep written minutes of all their meetings. Such meetings shall include, but need not be limited to:

(1) the date, time and place of the meeting;

(2) the members of the public body recorded as either present or absent;

(3) the substance of all matters proposed, discussed, or decided, and, at the request of any member, a record, by individual member, of any votes taken; and

(4) any other information that any member of the public body requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within a reasonable time after the meeting except where such disclosure would be inconsistent with sections 4 and 5 of this act.

(c) All or any part of a meeting of a public body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction except when a meeting is closed pursuant to sections 4 and 5 of this act; provided that in so recording there is no active interference with the conduct of the meeting.

SECTION 8. Voidability. Any final action taken in violation of sections 3 and 6 of this act shall be voidable by a court of competent jurisdiction. A suit to void any final action must be commenced within 90 days of the action.

SECTION 9. Enforcement. (a) The Attorney General and the public prosecutors of competent jurisdiction shall enforce the provisions of this act.

(b) Any person denied the rights conferred by this act may commence a suit in a court of competent jurisdiction for the county or city in which the public body ordinarily meets or in which the plaintiff resides for the purpose of requiring compliance with or preventing violations of this act or to determine the applicability of this act to discussions or decisions of the public body. The court may order payment of reasonable attorney fees and court costs to a successful plaintiff in a suit brought under this section.

SECTION 10. Penalties. Any person knowingly violating any provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or imprisoned not more than six months, or be both fined and imprisoned.

SECTION 11. Conflict of Law. If the provisions of this act conflict with any other statute, ordinance, regulation, or rule, the provisions of this act shall control.

SECTION 12. Severability. If any provision of this act, or the application of this act to any particular meeting or type of meeting is held invalid or unconstitutional, such decision shall not affect the validity of the remaining provisions or the other applications of this act.

SECTION 13. Effective date. This act shall take effect 30 days after enactment into law.

Senator CHILES. We will recess at this time.

[Whereupon, at 1 p.m., the subcommittee was adjourned.]

APPENDIX

93D CONGRESS
1ST SESSION

S. 260

IN THE SENATE OF THE UNITED STATES

JANUARY 9, 1973

Mr. CHILES (for himself, Mr. CLARK, Mr. COOK, Mr. CRANSTON, Mr. GURNEY, Mr. HART, Mr. HATFIELD, Mr. HUMPHREY, Mr. MATHIAS, Mr. METCALF, Mr. MONDALE, Mr. NELSON, Mr. PACKWOOD, Mr. PROXMIRE, Mr. ROTH, Mr. STAFFORD, Mr. STEVENSON, Mr. TUNNEY, and Mr. WEICKER) introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To provide that meetings of Government agencies and of congressional committees shall be open to the public, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. SHORT TITLE.—This Act may be cited as
4 the "Government in the Sunshine Act".
5 SEC. 2. DECLARATION OF POLICY.—It is hereby
6 declared to be the policy of the United States that the public
7 is entitled to the fullest practicable information regarding
8 the decisionmaking processes of the Federal Government.

1 SEC. 3. DEFINITIONS.—For purposes of this Act—

2 (1) "National security" means—

3 (A) the protection of the United States against

4 actual or potential attack or other hostile acts of a foreign

5 power;

6 (B) the obtaining of foreign intelligence information

7 deemed essential to the security of the United States;

8 (C) the protection of national security information

9 against foreign intelligence activities; or

10 (D) the protection, to the extent deemed necessary

11 by the President of the United States against the over-

12 throw of the Government by force; and

13 (2) "Person" includes an individual, partnership, cor-

14 poration, associated governmental authority, or public or

15 private organization.

16 TITLE I—CONGRESSIONAL PROCEDURES

17 SEC. 101. SENATE COMMITTEE HEARING PRO-

18 CEDURE.—(a) The Legislative Reorganization Act of 1946

19 is amended—

20 (1) by striking out the third sentence of section

21 133 (b);

22 (2) by striking out subsections (a), (b), and (f)

23 of section 133A;

24 (3) by adding after section 133B the following:

1 "OPEN SENATE COMMITTEE MEETINGS

2 "SEC. 133C. (a) Each meeting of each standing, select,
3 or special committee or subcommittee of the Senate, in-
4 cluding meetings to conduct hearings, shall be open to the
5 public: *Provided,* That a portion or portions of such meet-
6 ings may be closed to the public if the committee or sub-
7 committee, as the case may be, determines by vote of a
8 majority of the members of the committee present that the
9 matters to be discussed or the testimony to be taken at such
10 portion or portions—

11 "(1) will disclose matters necessary to be kept
12 secret in the interests of national security or the confiden-
13 tial conduct of the foreign relations of the United States;

14 "(2) will relate solely to matters of committee staff
15 personnel or internal staff management or procedure;

16 "(3) will tend to charge with crime or misconduct,
17 or to disgrace, injure the professional standing or other-
18 wise expose to public contempt or obloquy any indi-
19 vidual, or will represent a clearly unwarranted invasion
20 of the privacy of any individual: *Provided,* That this
21 subsection shall not apply to any government officer or
22 employee with respect to his official duties or employ-
23 ment: *And provided further,* That as applied to a wit-
24 ness at a meeting to conduct a hearing, this subsection

1 shall not apply unless the witness requests in writing
2 that the hearing be closed to the public;
3 "(4) will disclose the identity of any informer or
4 law enforcement agent or of any information relating
5 to the investigation or prosecution of a criminal offense
6 that is required to be kept secret in the interests of
7 effective law enforcement; or
8 "(5) will disclose information relating to the trade
9 secrets or financial or commercial information pertain-
10 ing specifically to a given person where—
11 "(A) the information has been obtained by the
12 Federal Government on a confidential basis other
13 than through an application by such person for
14 a specific government financial or other benefit;
15 and
16 "(B) Federal statute requires the information
17 to be kept confidential by Government officers and
18 employees; and
19 "(C) the information is required to be kept
20 secret in order to prevent undue injury to the com-
21 petitive position of such person.
22 A separate vote of the committee shall be taken with re-
23 spect to each committee or subcommittee meeting that is
24 closed to the public pursuant to this subsection, and the
25 committee shall make available within one day of such

1 meeting, a written explanation of its action. The vote of
2 each committee member participating in each such vote
3 shall be recorded and published and no proxies shall be
4 allowed.

5 "(b) Each standing, select, or special committee or sub-
6 committee of the Senate shall make public announcement of
7 the date, place, and subject matter of each meeting (whether
8 open or closed to the public) at least one week before such
9 meeting unless the committee or subcommittee determines by
10 a vote of the majority of its members that committee business
11 requires that such meeting be called at an earlier date, in
12 which case the committee shall make public announcement
13 of the date, place and subject matter of such meeting at the
14 earliest practicable opportunity.

15 "(c) A complete transcript, including a list of all per-
16 sons attending and their affiliation, shall be made of each
17 meeting of each standing, select, or special committee or sub-
18 committee (whether open or closed to the public). Except as
19 provided in subsection (d) of this section, a copy of each such
20 transcript shall be made available for public inspection within
21 seven days of each such meeting, and additional copies of any
22 transcript shall be furnished to any person at the actual cost
23 of duplication.

24 "(d) In the case of meetings closed to the public pur-
25 suant to subsection (a) of this section, the committee or sub-

1 committee may delete from the copies of transcripts that are
2 required to be made available or furnished to the public pur-
3 suant to subsection (c) of this section, those portions which
4 it determines by vote of the majority of the committee or
5 subcommittee consist of materials specified in paragraph
6 (1), (2), (3), (4), or (5) of subsection (a) of this sec-
7 tion. A separate vote of the committee or subcommittee shall
8 be taken with respect to each such transcript. The vote of
9 each committee or subcommittee member participating in
10 each such vote shall be recorded and published, and no
11 proxies shall be allowed. In place of each portion deleted
12 from copies of the transcript made available to the public,
13 the committee or subcommittee shall supply a written expla-
14 nation of why such portion was deleted, and a summary of the
15 substance of the deleted portion that does not itself disclose
16 information specified in paragraphs (1), (2), (3), (4),
17 (5) of subsection (a). The committee or subcommittee shall
18 maintain a complete copy of the transcript of each meeting
19 (including those portions deleted from copies made avail-
20 able to the public), for a period of at least one year after such
21 meeting.

22 "(e) A point of order may be raised in the Senate
23 against any committee vote to close a meeting to the public
24 pursuant to subsection (a) of this section, or against any
25 committee or subcommittee vote to delete from the publicly

1 available copy a portion of a meeting transcript pursuant
2 to subsection (d) of this section, by committee or subcom-
3 mittee members comprising one-fourth or more of the total
4 membership of the entire committee or subcommittee, as
5 the case may be. Any such point of order shall be raised
6 in the Senate within five legislative days after the vote
7 against which the point of order is raised, and such point
8 of order shall be a matter of highest personal privilege.
9 Each such point of order shall immediately be referred to
10 a Select Committee on Meetings consisting of the Presi-
11 dent pro tempore, the leader of the majority party, and
12 the leader of the minority party. The select committee
13 shall examine the complete verbatim transcript of the
14 meeting in question and shall rule whether the vote to close
15 the meeting was in accordance with subsection (a) of this
16 section, or whether the vote to delete a portion or portions
17 from publicly available copies of the meeting transcript
18 was in accordance with subsection (d) of this section, as the
19 case may be. The select committee should report to the
20 Senate within five calendar days (excluding days where
21 the Senate is not in session) a resolution containing its find-
22 ings. If the Senate adopts a resolution finding that the
23 committee vote in question was not in accordance with the
24 relevant subsection, it shall direct that there be made pub-
25 licly available the entire transcript of the meeting improp-

1 erly closed to the public or the portion or portions of any
2 meeting transcript improperly deleted from the publicly
3 available copy, as the case may be.
4 "(f) The Select Committee on Meetings shall not be
5 subject to the provisions of subsection (a), (b), (c), or (d)
6 of this section."
7 (b) Subsection (a) of subsection 242 of the Legislative
8 Reorganization Act of 1970 is repealed.
9 (c) Title I of the table of contents of the Legislative Re-
10 organization Act of 1946 is amended by inserting immedi-
11 ately below item 133B the following:

"133C. Open senate committee meetings.".

12 SEC. 102. Clause 27 (f) (2) of rule XI of the Rules of
13 the House of Representatives is amended to read as follows:
14 "(2) (A) Each meeting of each standing, select, or spe-
15 cial committee or subcommittee, including meetings to con-
16 duct hearings, shall be open to the public: *Provided*, That a
17 portion or portions of such meetings may be closed to the
18 public if the committee or subcommittee, as the case may be,
19 determines by vote of a majority of the members committee
20 or subcommittee present that the matters to be discussed or
21 the testimony to be taken at such portion or portions—
22 "(i) will probably disclose matters necessary to be
23 kept secret in the interests of national security or the con-

1 fidential conduct of the foreign relations of the United
2 States;
3 "(ii) will relate solely to matters of committee staff
4 personnel or internal staff management or procedure;
5 "(iii) will tend to charge with crime or misconduct,
6 or to disgrace, injure the professional standing or other-
7 wise expose to public contempt of obloquy any individ-
8 ual, or will represent a clearly unwarranted invasion of
9 the privacy of any individual: *Provided*, That this sub-
10 section shall not apply to any government or officer or
11 employee with respect to his official duties or employ-
12 ment: *And provided further*, That as applied to a wit-
13 ness at a meeting to conduct a hearing, this subsection
14 shall not apply unless the witness requests in writing
15 that the hearing be closed to the public;
16 "(iv) will probably disclose the identity of any in-
17 former or law enforcement agent or of any information
18 relating to the investigation or presecution of a criminal
19 offense that is required to be kept secret in the interests
20 of effective law enforcement; or
21 "(v) will disclose information relating to the trade
22 secrets of financial or commercial information pertain-
23 ing specifically to a given person where—
24 "(I) the information has been obtained by the

1 Federal Government on a confidential basis other
2 than through an application by such person for a
3 specific government financial or other benefit;
4 "(II) Federal statute requires the information
5 to be kept confidential by Government officers and
6 employees, and;
7 "(III) the information is required to be kept
8 secret in order to prevent undue injury to the com-
9 petitive position of such persons.
10 A separate vote of the committee shall be taken with respect
11 to each committee or subcommittee meeting that is closed
12 to the public pursuant to this subsection, and the committee
13 shall make available within one day of such meeting, a
14 written explanation of its action. The vote of each commit-
15 tee member participating in each such vote shall be re-
16 corded and published and no proxies shall be allowed.
17 "(B) Each standing, select, or special committee or
18 subcommittee shall make public announcement of the date,
19 place, and subject matter of each meeting (whether open
20 or closed to the public) at least one week before such
21 meeting unless the committee or subcommittee determines
22 that committee business requires that such meeting be called
23 at an earlier date, in which case the committee shall make
24 public announcement of the date, place, and subject matter
25 of such meeting at the earliest practicable opportunity.

1 "(C) A complete transcript, including a list of all per-
2 sons attending and their affiliation, shall be made of each
3 meeting of each standing, select, or special committee or
4 subcommittee meeting (whether open or closed to the pub-
5 lic). Except as provided in paragraph (D), a copy of each
6 such transcript shall be made available for public inspection
7 within seven days of each such meeting, and additional copies
8 of any transcript shall be furnished to any person at the actual
9 cost of duplication.

10 "(D) In the case of meetings closed to the public pur-
11 suant to subparagraph (A), the committee or subcommittee
12 may delete from the copies of transcripts that are required
13 to be made available or furnished to the public pursuant to
14 subparagraph (C), portions which it determines by vote of
15 the majority of the committee or subcommittee consist
16 of material specified in clauses (i), (ii), (iii), (iv), or (v)
17 of subparagraph (A). A separate vote of the committee
18 or subcommittee shall be taken with respect to each tran-
19 script. The vote of each committee or subcommittee mem-
20 ber participating in each such vote shall be recorded and
21 published, and no proxies shall be allowed. In place of each
22 portion deleted from copies of the transcript made available
23 to the public, the committee shall supply a written ex-
24 planation of why such portion was deleted and a summary of
25 the substance of the deleted portion that does not itself dis-

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1 close information specified in subsection (i), (ii), (iii),
2 (iv), or (v) of subsection (a). The committee or sub-
3 committee shall maintain a complete copy of the transcript of
4 each meeting (including those portions deleted from copies
5 made available to the public), for a period of at least one
6 year after such meetings.

7 "(E) A point of order may be raised against any com-
8 mittee or subcommittee vote to close a meeting to the public
9 pursuant to subparagraph (A), or against any committee
10 or subcommittee vote to delete from the publicly available
11 copy a portion of a meeting transcript and pursuant to sub-
12 paragraph (D), by committee or subcommittee members
13 comprising one-fourth or more of the total membership of
14 the entire committee or subcommittee. Any such point of
15 order must be raised before the entire House within five
16 legislative days after the vote against which the point of
17 order is raised, and such point of order shall be a matter of
18 highest privilege. Each such point of order shall immediately
19 be referred to a Select Committee on Meetings consisting
20 of the Speaker of the House of Representatives, the major-
21 ity leader, and the minority leader. The select committee
22 shall report to the House within five calendar days (exclud-
23 ing days where the House is not in session) a resolution
24 containing its findings. If the House adopts a resolution
25 finding that the committee vote in question was not in accord-

1 ance with the relevant subsection, it shall direct that there
2 be made publicly available the entire transcript of the meet-
3 ing improperly closed to the public or the portion or por-
4 tions of any meeting transcript improperly deleted from
5 the publicly available copy.

6 "(F) The Select Committee on Meetings shall not be
7 subject to the provisions of subparagraph (A), (B), (C),
8 or (D)."

9 SEC. 103. CONFERENCE COMMITTEES.—The Legisla-
10 tive Reorganization Act of 1946 is amended by inserting
11 after section 133(c), as added by section 101(3) of this
12 Act the following new section:

13 "OPEN CONFERENCE COMMITTEE MEETINGS

14 "SEC. 133D. (a) Each meeting of a committee of con-
15 ference shall be open to the public: *Provided,* That a portion
16 or portions of such meetings may be closed to the public if
17 the committee determines by vote of a majority of the mem-
18 bers of the committee present that the matters to be discussed
19 or the testimony to be taken at such portion or portions—

20 "(1) will disclose matters necessary to be kept secret
21 in the interests of national security or the confidential
22 conduct of the foreign relations of the United States;

23 "(2) will relate solely to matters of committee staff
24 personnel or internal staff management or procedure;

25 "(3) will tend to charge with crime or misconduct,

1 or to disgrace, injure the professional standing or other-
2 wise expose to public contempt or obloquy any individ-
3 ual, or will represent a clearly unwarranted invasion of
4 the privacy of any individual: *Provided,* That this sub-
5 section shall not apply to any government or officer or
6 employee with respect to his official duties or employ-
7 ment: *And, provided further,* That as applied to a wit-
8 ness at a meeting to conduct a hearing, this subsection
9 shall not apply unless the witness requests in writing that
10 the hearing be closed to the public;

11 "(4) will disclose the identity of any informer or
12 law enforcement agent or of any information relating to
13 the investigation or prosecution of a criminal offense
14 that is required to be kept secret in the interests of
15 effective law enforcement; or

16 "(5) will disclose information relating to the trade
17 secrets or financial or commercial information pertain-
18 ing specifically to a given person where—

19 "(A) the information has been obtained by the
20 Federal Government on a confidential basis other
21 than through an application by such person for a
22 specific government financial or other benefit;

23 "(B) Federal statute requires the information
24 to be kept confidential by Government officers and
25 employees; and

1 "(C) the information is required to be kept
2 secret in order to prevent undue injury to the com-
3 petitive position of such persons.
4 A separate vote of the committee shall be taken with respect
5 to each meeting that is closed to the public pursuant to this
6 subsection, and the committee shall make available within
7 one day of such meeting, a written explanation of its action.
8 The vote of each committee member participating in each
9 such vote shall be recorded and published and no proxies
10 shall be allowed.
11 "(b) Each committee of conference shall make public
12 announcement of the date, place, and subject matter of such
13 meeting at the earliest practicable opportunity.
14 "(c) A complete transcript, including a list of all per-
15 sons attending and their affiliation, shall be made of each
16 meeting of each committee of conference (whether open or
17 closed to the public). Except as provided in subsection (d)
18 of this section, a copy of each such transcript shall be made
19 available for public inspection within seven days of each such
20 meeting, and additional copies of any transcript shall be
21 furnished to any person at the actual cost of duplication.
22 "(d) In the case of meetings closed to the public pur-
23 suant to subsection (a) of this section, the committee of
24 conference may delete from the copies of transcripts that are
25 required to be made available or furnished to the public pur-

1 suant to subsection (c) of this section, those portions which
2 it determines by vote of the majority of the committee con-
3 sist of materials specified in paragraph (1), (2), (3), (4),
4 or (5) of subsection (a) of this section. A separate vote
5 of the committee shall be taken with respect to each such
6 transcript. The vote of each committee member participating
7 in each such vote shall be recorded and published, and no
8 proxies shall be allowed. In place of each portion deleted from
9 copies of the transcript made available to the public, the com-
10 mittee shall supply a written explanation of why such por-
11 tion was deleted, and a summary of the substance of the
12 deleted portion that does not itself disclose information speci-
13 fied in paragraph (1), (2), (3), (4), or (5) of subsection
14 (a) of this section. The committee shall maintain a complete
15 copy of the transcript of each meeting (including those por-
16 tions deleted from copies made available to the public), for
17 a period of at least one year after such meeting.

18 "(e) A point of order may be raised against any com-
19 mittee vote of a committee of conference to close a meeting
20 to the public pursuant to subsection (a) of this section or
21 any committee vote to delete from the publicly available
22 copy a portion of a meeting transcript pursuant to subsec-
23 tion (d) of this section by committee members comprising
24 one-fourth or more of the total membership of the entire
25 committee. Any such point of order shall be raised in

1 either House within five legislative days after the vote
2 against which the point of order is raised, and such point
3 of order shall be a matter of highest personal privilege. Each
4 such point of order shall immediately be referred to a Select
5 Conference Committee on Meetings consisting of the Presi-
6 dent pro tempore of the Senate, the Speaker of the House
7 of Representatives, and the majority and minority leaders
8 from each House. The select committee shall examine the
9 complete verbatim transcript of the meeting in question
10 and shall rule whether the vote to close the meeting was
11 in accordance with subsection (a) of this section or whether
12 the vote to delete a portion or portions from publicly avail-
13 able copies of the meeting transcript was in accordance with
14 subsection (d) of this section, as the case may be. The
15 select committee reports to both Houses a concurrent re-
16 solution within five calendar days (excluding days where
17 either House is not in session) a resolution containing its
18 findings. If both Houses adopt such a resolution finding
19 that the committee vote in question was not in accordance
20 with the relevant subsection, they shall direct that there be
21 made publicly available the entire transcript of the meeting
22 improperly closed to the public or the portion or portions
23 of any meeting transcript improperly deleted from the pub-
24 licly available copy, as the case may be.
25 "(f) The Select Conference Committee on Meetings

1 shall not be subject to the provisions of subsection (a), (b),
2 (c), or (d) of this section."
3 (b) Title I of the table of contents of the Legislative Re-
4 organization Act of 1946 is amended by inserting immedi-
5 ately below item 133C, as added by section 101 (c) of this
6 Act, the following:

"133D. Open conference committee meetings.".

7 TITLE II—AGENCY PROCEDURES

8 SEC. 201. (a) This section applies, according to the
9 provisions thereof, to any agency, as defined in section
10 551 (1) of title 5, United States Code, where the body com-
11 prising the agency consists of two or more members. Except
12 as provided in subsection (b), all meetings (including meet-
13 ings to conduct hearings) of such agencies at which official
14 action is considered or discussed shall be open to the public.
15 (b) Subsection (a) shall not apply to any portion or
16 portions of an agency meeting where the agency determines
17 by vote of a majority of its entire membership—
18 (1) will probably disclose matters necessary to be
19 kept secret in the interests of national security or the
20 confidential conduct of the foreign relations of the United
21 States;
22 (2) will relate solely to individual agency personnel
23 or to internal agency office management and procedures
24 or financial auditing;

1 (3) will tend to charge with crime or misconduct,
2 or to disgrace, injure the professional standing or other-
3 wise expose to public contempt of obloquy any individ-
4 ual, or will represent a clearly unwarranted invasion of
5 the privacy of any individual: *Provided,* That this sub-
6 section shall not apply to any government or officer or
7 employee with respect to his official duties or employ-
8 ment: *And provided further,* That as applied to a wit-
9 ness at a meeting to conduct a hearing, this subsection
10 shall not apply unless the witness requests in writing that
11 the hearing be closed to the public;
12 (4) will probably disclose the identity of any in-
13 former or law enforcement agent or of any information
14 relating to the investigation or prosecution of a criminal
15 offense that is required to be kept secret in the interests
16 of effective law enforcement;
17 (5) will disclose information relating to the trade
18 secrets or financial or commercial information pertaining
19 specifically to a given person where—
20 (A) the information has been obtained by the
21 Federal Government on a confidential basis other
22 than through an application by such person for a
23 specific government financial or other benefit; and
24 (B) Federal statute requires the information to

1 be kept confidential by government officers and em-
2 ployees, and
3 (C) the information is required to be kept secret
4 in order to prevent undue injury to the competitive
5 position of such persons;
6 (6) will relate to the conduct or disposition (but
7 not the initiation of a case of adjudication governed by
8 the provisions of the first paragraph of section 554 (a)
9 of title 5, United States Code, or of subsection (1),
10 (2), (4), (5), or (6) thereof.
11 A separate vote of the agency members shall be taken with
12 respect to each agency meeting that is closed to the public
13 pursuant to this subsection. The vote of each agency mem-
14 ber participating in such vote shall be recorded and published
15 and no proxies shall be allowed. In the case of any closing of
16 portions of a meeting to the public pursuant to this subsection,
17 the agency shall promptly publish an explanation of its
18 action.
19 (c) Each agency shall make public announcement of
20 the date, place, and subject matter of each meeting at which
21 official action is considered or discussed (whether open or
22 closed to the public) at least one week before each meeting
23 unless the agency determines by a vote of the majority of
24 its members that agency business requires that such meetings
25 be called at an earlier date, in which case the agency shall

1 make public announcement of the date, place, and sub-
2 ject matter of such meeting at the earliest practicable
3 opportunity.

4 (d) A complete transcript, including a list of all per-
5 sons attending and their affiliations, shall be made of each
6 meeting of each agency at which official action is considered
7 or discussed (whether open or closed to the public). Ex-
8 cept as provided in subsection (e) of this section a copy of
9 each such meeting shall be made available to the public
10 for inspection, and additional copies of any transcript shall
11 be furnished to any person at the actual cost of duplication.

12 (e) In the case of meetings closed to the public pur-
13 suant to subsection (b) of this section, the agency may delete
14 from the copies of transcripts made available or furnished to
15 the public pursuant to subsection (d) of this section those
16 portions, which the agency determines by vote of a majority
17 of its membership consists of materials specified in paragraph
18 (1), (2), (3), (4), or (5) of subsection (b) of this
19 section. A separate vote of the agency shall be taken with
20 respect to each transcript. The vote of each agency mem-
21 ber participating in such vote shall be recorded and pub-
22 lished, and no proxies shall be allowed. In place of each
23 portion deleted from copies of the meeting transcript made
24 available to the public, the agency shall supply a written
25 explanation of why such portion was deleted and a summary

1 of the substance of the deleted portion that does not itself
2 disclose information specified in paragraph (1), (2), (3),
3 (4), or (5) of subsection (a). The agency shall maintain
4 a complete verbatim copy of the transcript of each meeting
5 (including those portions deleted from copies made available
6 to the public) for a period of at least two years after such
7 meeting.

8 (f) Each agency subject to the requirements of this
9 section shall, within one hundred and eighty days after the
10 enactment of this Act, following published notice in the
11 Federal Register of at least thirty days and opportunity
12 for written comment by interested persons, promulgate regu-
13 lations to implement the requirements of subsections (a)
14 through (e) inclusive of this section. Any citizen or person
15 resident in the United States may bring a proceeding in
16 the United States Court of Appeals for the District of Co-
17 lumbia Circuit—

18 (1) to require an agency to promulgate such regu-
19 lations if such agency has not promulgated such regu-
20 lations within the time period specified herein; or

21 (2) to set aside agency regulations issued pursu-
22 ant to this subsection that are not in accord with the
23 requirements of subsections (a) through (e) of this
24 section inclusive, and to require the promulgation of
25 regulations that are in accord with such subsections.

1 (g) The district courts of the United States shall have
2 jurisdiction to enforce the requirements of subsections (a)
3 through (e) inclusive of this section by declaratory judg-
4 ment, injunctive relief, or otherwise. Such actions may
5 be brought by any citizen or person resident in the United
6 States. Such actions shall be brought in the district wherein
7 the plaintiff resides, or has his principal place of business,
8 or where the agency in question has its headquarters. In
9 deciding such cases the court may examine any portion of
10 a meeting transcript that was deleted from the publicly
11 available copy. Among other forms of equitable relief, the
12 court may require that any portion of a meeting transcript
13 improperly deleted from the publicly available copy be made
14 publicly available for inspection and copying, and, having
15 due regard for orderly administration and the public interest,
16 may set aside any agency action taken or discussed at an
17 agency meeting improperly closed to the public.

18 (h) In any action brought pursuant to subsection (f)
19 or (g) of this section, costs of litigation (including reason-
20 able attorney's and expert witness fees) may be apportioned
21 to the original parties or their successors in interest when-
22 ever the court determines such award is appropriate.

23 (i) The agencies subject to the requirements of this
24 section shall annually report to Congress regarding their
25 compliance with such requirements, including a tabulation

1 of the total number of agency meetings open to the public,
2 the total number of meetings closed to the public, the reasons
3 for closing such meetings, and a description of any litigation
4 brought against the agency under this section.

5 SEC. 202. (a) Title 5 of the United States Code is
6 amended by adding after section 557 the following:

7 "EX PARTE COMMUNICATIONS IN AGENCY PROCEEDING

8 "SEC. 557. (a) This section applies, according to the
9 provisions thereof, to the following proceedings:

10 "(1) any proceeding to which section 557 (a) of
11 this title applies;

12 "(2) any rulemaking proceeding with respect to
13 which an agency is required by section 553 of this title
14 to afford public notice and opportunity for participation
15 by interested persons: *Provided,* That for purposes of
16 this section the exemption from such requirements in
17 section 553 (a) (2) of matters relating to public prop-
18 erty, loans, grants, benefits, or contracts shall not be
19 effective; or

20 "(3) any proceeding to prepare an environmental
21 impact statement required by section 102 (2) (c) of
22 the National Environmental Policy Act.

23 "(b) In any agency proceeding which is subject to
24 subsection (a) of this section, except to the extent required

1 for the disposition of ex parte matters as authorized by
2 law—
3 "(1) no interested person (including members or
4 employees of other government agencies) shall make or
5 cause to be made to any member of the agency in ques-
6 tion, hearing examiner, or employee who is or may be
7 involved in the decisional process of said proceeding, an
8 ex parte communication relevant to the events of the
9 proceeding;
10 "(2) no member of the agency in question, hearing
11 examiner, or employee who is or may be involved in the
12 decisional process of such proceeding, shall make or
13 cause to be made to an interested person an ex parte
14 communication relevant to the merits of the proceeding;
15 "(3) a member of the agency in question, hearing
16 examiner, or employee who is or may be involved in the
17 decisional process of said proceeding, who receives a
18 communication in violation of this subsection shall place
19 in the public record of the proceeding—
20 "(A) written material submitted in violation of
21 this subsection; or
22 "(B) memorandums stating the substance of
23 all oral communications submitted in violation of
24 this subsection; or

1 "(C) responses to the materials described in
2 subparagraphs (A) and (B) of this subsection;
3 "(4) upon receipt of a communication in violation
4 of this subsection from a party to any proceeding to
5 which this section applies, the hearing examiner or em-
6 ployee presiding at the hearings may, to the extent
7 consistent with the interests of justice and the policy
8 of the underlying statutes, require the persons or party to
9 show cause why his claim or interest in the proceeding
10 should not be discussed, denied, disregarded, or other-
11 wise adversely affected by virtue of such violation; and
12 "(5) the prohibitions of this subsection shall apply
13 at such time as the agency shall designate, having due
14 regard for the public interest in open decisionmaking
15 by agencies, but in no case shall they apply later than
16 the time at which a proceeding is noticed for hearing
17 or opportunity for participation by interested persons
18 unless the person is responsible for the communication
19 has knowledge that it will be noticed, in which case
20 said prohibition shall apply at the time of his acquisition
21 of such knowledge.
22 "(c) Each agency subject to the requirements of this
23 section shall, within one hundred and eighty days after the
24 enactment of this section, following published notice in
25 the Federal Register of at least thirty days and opportu-

1 nity for written comment by interested persons, promul-
2 gate regulations to implement the requirements of subsection
3 (b) of this section. Any citizen or person resident in the
4 United States may bring a proceeding in the United States
5 Court of Appeals for the District of Columbia Circuit—
6 "(1) to require any agency to promulgate such
7 regulations if such agency has not promulgated such
8 regulations within the time period specified herein;
9 "(2) to set aside agency regulations issued pursuant
10 to this subsection that are not in accord with the require-
11 ments of subsection (b) of this section; and to require
12 the promulgation of regulations that are in accord with
13 such subsection.
14 "(d) The district courts of the United States shall have
15 jurisdiction to enforce the requirements of subsection (b) of
16 this section by declaratory judgment, injunctive relief, or
17 otherwise. Such action may be brought by any citizen of or
18 person resident in the United States. Such actions shall be
19 brought in the district wherein the plaintiff resides or has his
20 principal place of business or where the agency in question
21 has its headquarters. Where a person other than an agency,
22 agency member, hearing examiner, or employee is alleged
23 to have participated in a violation of the requirements of sub-
24 section (b) of this section such person may, but need not
25 be joined with the agency as a party defendant; for purposes

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1 of joining such person as a party defendant, service may be
2 had on such person in any district. Among other forms of
3 equitable relief, the court may require that any ex parte com-
4 munication made or received in violation of the requirements
5 of subsection (b) of this section be published, and, having
6 due regard for orderly administration and the public interest,
7 may set aside any agency action taken in a proceeding with
8 respect to which the violation occurred.

9 "(e) In any action brought pursuant to subsection (c)
10 or (d) of this subsection, cost of litigation (including
11 reasonable attorney's and expert witness fees) may be ap-
12 portioned to the original parties or their successors in interest
13 whenever the court determines such award is appropriate."

14 SEC. 203. This title and the amendments made by this
15 title do not authorize withholding of information or limit the
16 availability of records to the public except as provided in this
17 title. This title is not to be construed as authority to withhold
18 information from Congress.

JOHN M. ELLIOTT, ESQ.,
Philadelphia, Pa., June 5, 1974.

Hon. LAWTON CHILES,
U.S. Senate Subcommittee on Reorganization, Research and International Organizations, Committee on Government Operations, U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: As Pennsylvania Auditor General Robert P. Casey's representative on the Delaware River Port Authority ("DRPA") I congratulate your sponsorship of S. 260 the "Sunshine Bill" which would require that all meetings of federal agencies and Congressional Committees be open to the public within limited and defined exceptions. I appreciate this opportunity to support this vitally needed legislation. This vast bi-state agency with a multi-million dollar annual budget and over 500 employees still persists in holding its Committee meetings behind closed doors. Ironically, at this vital time when public input could be most helpful and could be most heeded, the DRPA, like most bureaucracies plays its cards close. Only later at the DRPA's annual monthly meetings, are decisions duly trotted before the public session to be ratified. Public concern and input is then too often relegated to the second class status of reaction and negativism.

I personally feel that constructive criticism can best be articulated and received if committee meetings (i.e.—Finance, Operations and Maintenance. Projects and others) are open to meaningful public participation. S. 260 must be amended to clearly embrace the DRPA and other similar agencies (such as the Delaware Valley Regional Planning Commission) which exist pursuant on Congressional authorization of Interstate Compacts, and which daily make decisions which affect the lives of all our citizens. Some time ago, Mr. Justice Brandeis wisely remarked that "daylight is the best disinfectant." In July 1973, I unavailingly made the resolution that all DRPA committee meetings be open to the press and public with limited exceptions for land acquisition, personnel or other confidential matters. I proposed that this limited exception only be triggered by a majority vote of the Commissioners.

These closed committee meetings often involve the use and/or applications for federal funds. S. 260 could enhance its scope and meaning if it clearly embraced the vast power of bi-state agencies such as the DRPA, which touch directly and indirectly the lives of thousands of our citizens. Public participation must be elevated beyond rhetoric and integrated into our daily decision making process.

JOHN M. ELLIOTT,
Member,
Delaware River Port Authority.

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LET THE SUN SHINE IN!

Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government.

*Douglas Q. Wickham**

An apprehensive group of homeowners sought a court order preventing the Allentown, Pennsylvania, Housing Authority from building a proposed low-income project. Their case was dismissed for failure to state a claim—the judge "emphasiz[ing] the fact that the complaint failed to aver what action the Authority took on October 21, 1964, or at any other time."[1] Plaintiffs were totally unable to improve their pleading because no member of the public had ever been permitted to observe any of the Authority's deliberations; yet they were able to succeed on appeal.

Pennsylvania is one of thirty-five states which have "open-meeting" laws permitting the public to observe firsthand the deliberations of state and local governmental bodies.[2] The Pennsylvania Supreme Court vacated the dismissal order and directed the court

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1 Bogert v. Allentown Housing Authority, 426 Pa. 151, 231 A.2d 147 (1967).

2 Each act is cited by present code section and year of enactment. The strong pattern of recent activity is shown more clearly by this method of citation. ALA. CODE tit. 14, §§ 393-94 (1915); ARIZ. REV. STAT. ANN. §§ 38-431 to -431.06 (1962); ARK. STAT. ANN. §§ 12-2801 to -2807 (1967); CAL. GOV'T CODE §§ 11120-31 (1967) and §§ 54951.1-61 (1972); COLO. REV. STAT. ANN. §§ 3-19-1 & -2 (1963); CONN. GEN. STAT. REV. §§ 1-19 to 21A (1957); DEL. CODE ANN. tit. 29, § 5109 (1955); FLA. STAT. § 286.011 (1967); GA. CODE ANN. § 23-802 (1965); HAWAII REV. STAT. §§ 92-1 to -6 (1959); IDAHO CODE § 59-1024 (1961); ILL. REV. STAT. ch. 102, §§ 41-44 (1957); IND. ANN. STAT. §§ 57-601 to -609 (1953); IOWA CODE §§ 28A.1 to .8 (1967); LA. REV. STAT. §§ 42-5 to -8 (1952); ME. REV. STAT. ANN. tit. 1, §§ 402-06 (1959); MD. ANN. CODE art. 23A, § 8 (1945), art. 25, § 5 (1954), art. 41, § 14 (1954); MASS. GEN. LAWS ch. 39, §§ 23A to -C (1958); MICH. COMP. LAWS §§ 4.1800(1) to (3) (1968); MINN. STAT. §§ 10.41, 471.705 (1957); NEB. REV. STAT. §§ 84-1401 to -1405 (1967); NEV. REV. STAT. §§ 241.010 to -.040 (1960); N.H. REV. STAT. ANN. §§ 91A:1 to -:7 (1967); N.J. REV. STAT. §§ 10:4-1 to -5 (1960); N.M. STAT. ANN. § 5-6-17 (1959); N.D. CENT. CODE § 44-04-19 (1943); OHIO REV. CODE § 121.22 (1954); OKLA. STAT. tit. 25, § 201 (1959); PA. STAT. tit. 65, §§ 251-54 (1957); S.D. COMPILED LAWS ANN. §§ 1-25-1 to -4 (1965); UTAH CODE ANN. §§ 52-4-1 to -4 (1955); VT. STAT. ANN. tit. 5, §§ 311-14 (1957); VA. CODE ANN. §§ 2.1-340 to -346 (1968); WASH. REV. CODE §§ 42.32.010 to .030 (1953); WIS. STAT. § 66.77 (1959).

below to allow the plaintiffs to amend their complaint by incorporating any information which they received once given access to the Housing Authority's records and proceedings. As the court explained:[3]

> [T]he Authority would not permit the plaintiffs or their counsel to ascertain what the Authority had done, what it was doing or what it contemplated doing in the future. . . . It is clear beyond question that plaintiff's failure to set forth a cause of action . . . arose from the refusal of the Authority to afford them and their counsel an opportunity to ascertain and know what the Authority had been doing and what it contemplated doing in connection with the proposed housing project.

The *Allentown* case provides a striking example of the potential value of open-meeting legislation to citizens who want to know what is going on behind the closed doors of state or local government. Although there is a great deal of this legislation on the books, it often remains obscure and unused. There exists very little uniformity in structure or draftsmanship because the purpose to be served by such legislation raises fundamental questions upon which there is no broad consensus. Although many states have sought a common ground, no particular statute stands apart as a successful resolution of the conflict in basic values.

Our society firmly believes, on the one hand, that the right to participate in our democracy includes the right to be informed. The people can have no real power without factual knowledge of what their government is doing to and for them.[4] To be well-informed, the public should have some access to the ongoing process of decision making; not only to what is done, but also to why it is done and what alternatives are considered and rejected. A truly democratic electorate vitally needs to know this information.

We must concede, however, that there are limits to "Government in the Sunshine."[5] Especially in the early stages of working out a particular problem, it makes a good deal of sense for any governmental body to retain a zone of privacy within which its members can air internal disagreements. A position, once publicly taken, is not easily changed; and it seems undesirable to encourage the adop-

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[3] 426 Pa. at 156-57, 231 A.2d at 150.

[4] "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or perhaps both." 9 WRITINGS OF JAMES MADISON 103 (Hunt. ed. 1910), quoted at 75 HARV. L. REV. 1199, 1200 n.10, (1962).

[5] The title is that of Florida's 1967 act. *See* text accompanying notes 63-72 *infra* for fuller discussion.

tion of "first thoughts" by requiring that all collective governmental thinking be done in public. Few subordinates would feel free to offer constructive ideas for fear of appearing to be in opposition to the eventual decision of the final authority.[6] The value competing against "a right to know" then is not a "right to secrecy," but an assurance of some insulation from the intense heat of public pressure. Priorities must be determined, decisions made, and programs implemented. Absolute openness will detract from the overall public interest in informed and rational governmental decisions.[7]

This article surveys existing open-meeting legislation, focusing particularly on the issues of coverage and enforcement. It offers suggestions concerning the principles which should guide draftsmen in formulating open-meeting laws, and concludes with a draft bill consistent with those principles.[8]

EXISTING LEGISLATION

Public Access Required

Open-meeting acts run the entire spectrum, from those which on their face provide public access to governmental meetings almost without exception,[9] to those which grudgingly permit access to only the final actions taken by a few specifically designated agencies.[10] They vary from a few terse sentences[11] to several pages of fine print.[12] Two techniques are used to determine the governmental agencies covered by the act. Generally, a listing by title or function of the governmental bodies is included within the scope of the act as is a definition of "meeting" which demarcates the line between open and closed proceedings.

Some statutes simply list by type the governmental bodies whose meetings are open.[13] Others focus on the type of govern-

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[6] PICKERELL & FEDER, OPEN PUBLIC MEETINGS OF LEGISLATIVE BODIES—CALIFORNIA'S BROWN ACT 26 (1957); *see also* tenBroek, *Welfare in the 1957 Legislature*, 46 CALIF. L. REV. 331, 355-61 (1958). The author discusses the inhibiting effect of an open-meeting law on the openness of discussion within the agency and on debate among Board members.

[7] E. COSTIKYAN, BEHIND CLOSED DOORS 282-84 (1966).

[8] For clarity, the draft bill will appear in the conclusion, *infra*.

[9] *E.g.*, FLA. STAT. § 286.011 (Supp. 1972).

[10] *E.g.*, PA. STAT. ANN. tit. 65, § 251 (1968).

[11] *E.g.*, GA. CODE ANN. § 23-802 (1971).

[12] *E.g.*, CAL. GOV'T CODE §§ 11120-31 (Supp. 1973).

[13] *E.g.*, IOWA CODE ANN. § 28A.1 (Supp. 1973):

All meetings of the following public agencies shall be public meetings . . .
1. Any board, council, or commission created or authorized by the laws of

mental power exercised by an agency as the criterion for establishing coverage by the act.[14] Finally, many recent acts define coverage in broad catchall terminology based on public funding.[15] The trend, however, is toward some combination of these three devices to insure sufficient breadth of initial coverage.

A much more difficult task has confronted draftsmen with respect to ascertaining a line of demarcation between open proceedings and private proceedings. An attempt is made in many statutes to select a definition of "meeting" which will insure effective public access without unduly hampering the ability of government to function. In making this decision, the draftsman has at his disposal a whole spectrum of activity, ranging from the formal vote of an entire assembly, to the chance social encounter of several members who then happen to discuss "official" problems. A majority of these legislative decisions focus on voting[16] or on the passing of ordinances, resolutions, and the like.[17] Some have recognized that this "final action" type of definition severely weakens an open-meeting act and have sought to define "meeting" in a much more inclusive manner.[18] At present, however, there appears to be no agreed definitional resting point in the gray area between formal votes and social encounters.

Exceptions

Reflecting both the realization that some closed meetings are desirable and the fact that political realities make passage of this

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this state. 2. Any board, council, commission, trustees, or governing body of any county, city, town, township, school corporation, political subdivision, or tax supported district in this state. . . .

[14] *E.g.*, ME. REV. STAT. ANN. tit. 1, § 402 (1964):

The term "public proceedings" . . . shall mean the transaction . . . by any administrative or legislative body of the State, or of any of its counties or municipalities. . . .

[15] *E.g.*, OKLA. STAT. tit. 25, § 201 (Supp. 1972):

All meetings of the governing bodies of any state or local department . . . supported in whole or in part by public funds, or entrusted with the expending of public funds, or administering public properties. . . .

[16] *E.g.*, MICH. STAT. ANN. § 4.1800(1), (2) (1969): "'Public meeting' means that part of any meeting of a board during which it votes. . . ."

[17] *E.g.*, HAWAII REV. STAT. § 92-3 (1968): "[N]o ordinance [etc.] shall be finally acted upon at any executive session."

[18] *E.g.*, VA. CODE ANN. § 2.1-341(a) (1973); Meeting or meetings:

"*Meeting or meetings*" means the meetings, when sitting as a body or entity, or as an informal assemblage of the constituent membership, with or without minutes being taken, whether or not votes are cast. . . . Nothing in this chapter shall be construed as to define a meeting as a chance meeting of two or more members. . . .

legislation quite difficult,[19] all open-meeting acts contain textual exceptions. Most acts contain an "except as otherwise" clause which generally provides that existing authority for private meetings, found elsewhere in a state's constitution and laws, will continue in force.[20] The immediate effect of such a clause is to compound the problem for any citizen who wants to know whether he is legally entitled to observe the proceedings of a given governmental body. He must survey other statutes, ordinances and regulations to determine the location and extent of any pertinent exceptions. Two things can be done here to facilitate his search. First, an act's "except" clause should be drafted so as to specify the other "kinds" of laws in which effective exceptions may be found;[21] and second, the legislature should review existing state statutes with an eye toward repealing inconsistent exceptions and identifying those exceptions which are to remain in effect.[22]

Many open-meeting acts expressly grant covered agencies permission to hold executive sessions. Some even contain blanket permission for all bodies supposedly covered to operate in private.[23] This type of open-meeting act is of little value to the average citizen because the governmental body to whose meetings he desires access has complete legal discretion to exclude him. For this reason the better drawn acts permit executive session only upon formal vote and with reasons stated in the record.[24]

Frequently, exceptions from coverage by a particular open-meeting act are stated in terms of the specific subject matter to be discussed at the meeting. Concrete evidence of specific value choices emerges when the patterns of express exceptions in present legislation are examined. A comprehensive catalog here would

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[19] Comment, *Government in the Sunshine: Promise or Placebo*, 23 U. FLA. L. REV. 361 (1971); Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1200 n.8 (1962) [hereinafter cited as *Harvard Note*].

[20] *E.g.*, VA. CODE ANN. § 2.1-343 (1973): "Except as otherwise specifically provided by law and except as provided in this act . . . ."

[21] *E.g.*, NEB. REV. STAT. § 84-1401 (Supp. 1972): "Except as otherwise expressly provided by the Constitution or the statutes of Nebraska. . . ."

[22] *Cf.* FLA. STAT. ANN. § 119.07 (2)(b) (Supp. 1972), which is a list of other Florida statutes which purport to prevent public inspection of specific records. No comparable provision appears in any open-meeting act.

[23] *E.g.*, GA. CODE ANN. § 23-802 (1971): "[P]rovided, however, that before or after said public meetings, said bodies may hold executive sessions privately . . . ."

[24] *E.g.*, HAWAII REV. STAT. § 92-3 (1968): "No board may meet in executive session. . . except by a two-thirds recorded vote of its membership."

prove tedious, but a representative canvass of the major patterns will identify those situations upon which there is some consensus that absolute openness is undesirable.

Perhaps the most common exception pattern is the exclusion of proceedings related to personnel management.[25] Actual exceptions here may range from specific hiring and firing decisions[26] to a blanket exemption for all housekeeping matters.[27] Where an individual's case is concerned, of course, respect for personal privacy is an important factor. But the main motivation behind these exclusions appears to be a feeling that government will operate far more efficiently if it is permitted to organize and staff itself in private.[28] It is unrealistic to expect officials to be candid about prospective personnel in public because any criticism can take on an unintended personal tone. The interested citizen's "need to know" here is not so critical. He will have ample opportunity to judge the performance of his public officials, as long as he has adequate access to their official proceedings and actions.

A second major area in which private proceedings are permitted is in the conduct of official investigations.[29] It is generally felt that investigative bodies would be ineffective if their activities were of general public knowledge. Those who were aware that they were under investigation could conceal their actions or simply leave the jurisdiction. Furthermore, some witnesses might have good reason to be reluctant to testify in public.[30] There is also a persistent fear that reputations can be unfairly maligned during a public investigation.[31] Although a citizen may strongly desire access to this initial phase of the governmental process, it is quite realistic to say that he retains an ample opportunity to inform himself about governmental activities in spite of his exclusion at this point.

Proceedings during which acquisitions of real property are to

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25 *Harvard Note*, *supra* note 19, at 1208.

26 *E.g.*, ARIZ. REV. STAT. ANN. § 38-431.02(B)(2) (Supp. 1972).

27 *E.g.*, CAL. GOV'T CODE § 11126 (Supp. 1973).

28 Peterson, *The Legislatures and the Press*, 27 State Gov't 223, 224 (1954). Collective bargaining with public employees might be considered as housekeeping, but it is recommended that a specific exception be included to insure private negotiations, *e.g.* ILL. REV. STAT. ch. 102, § 42 (1971).

29 *E.g.*, MICH. STAT. ANN. § 4.1800(1)(2) (1969).

30 *See* Lovell, *Scope of Legislative Investigational Power and Redress for its Abuse*, 8 HAST. L.J. 276, 284 (1957).

31 *See, e.g.*, Logan's Super Markets v. McCalla, 208 Tenn. 68, 343 S.W.2d 892 (1961) (Allegedly false and malicious statements made before an investigative committee on the legislature held absolutely privileged).

be discussed are regularly excepted from open-meeting requirements.[32] It is thought that public discussion would invite speculators to enter the picture and drive up the eventual price paid by the government. The interested citizen is also the taxpayer who foots this additional cost, and his interests seem better served by permitting the government to make its preliminary moves here in confidence. This appears to be a special situation in which past experience may justify a blanket pre-judgment of all the cases.[33]

There are often specific exceptions from coverage for Parole Boards,[34] Juvenile Correction Agencies,[35] Prison Commissions[36] and the like. Respect for individual privacy provides a strong argument for these exceptions. Because the judgments made by these agencies are highly sensitive, their effectiveness is thought to depend on the fact that they can proceed in confidence.[37] A combination of these values is felt by many legislatures to offset any interest the general public may have in observing their proceedings.

Closely related are a number of generally drawn exceptions which permit any proceeding to be held in private where an individual reputation may be damaged.[38] Better drafting limits this exception to the reputation of one who is not a member of the acting body, so that it does not become a shelter for officials to avoid criticism of the way in which they carry out their public mandate.[39] Although it cuts across all functional lines, this class of cases is capable of precise definition and seems clearly worthy of protection.

A variety of other agency proceedings are entirely exempted from open-meeting legislation, including University Boards of Trustees[40] and Pollution Control Boards.[41] Insulation from public pressure might be justifiable at an early stage of deliberation, but any need to operate in privacy diminishes and then completely disappears as the agencies approach the formulation of final decisions. It

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32 *E.g.*, IOWA CODE ANN. § 28A.3 (Supp. 1973).

33 *Harvard Note, supra* note 19, at 1209.

34 *E.g.*, N.J. STAT. ANN. § 10:4-4(f) (Supp. 1973).

35 *E.g.*, MINN. STAT. ANN. § 10:41 (1967).

36 *E.g.*, ILL. REV. STAT. ch. 102, § 42 (1971).

37 *See* Hyser v. Reed, 318 F.2d 225, (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

38 *E.g.*, WIS. STAT. ANN. § 66.77(3)(e) (Supp. 1973).

39 N.H. REV. STAT. ANN. § 91-A:3 (II)(C) (Supp. 1972).

40 *E.g.*, VA. CODE ANN. § 2.1-345 (1973).

41 *E.g.*, CAL. GOV'T CODE ANN. § 11126 (Supp. 1973).

is not hard to discern the hand of a "special interest" lobby at work during the legislative process, capitalizing on political sensitivity, when this sort of exception is part of the end product. Blanket special exceptions clearly frustrate the effect of this type of legislation whose purpose is to permit the general public to observe governmental decision-making and at least some of the deliberations which precede it. The personal privacy factor is absent here, and political sensitivity is a criterion which cuts both ways. It is just such matters which members of the public are likely to have the strongest need and desire to observe.

Enforcement

A variety of sanctions can be found in current open-meeting laws. Most common appears to be the minor criminal penalty[42] with the range of maximum fines running from $25[43] to $500,[44] and a $100 and/or 30 days provision being the norm. No existing legislation provides for liability in terms of civil fines. A number of acts simply prohibit final action or votes in closed session and *imply* that any action taken in violation of the statute will be considered void.[45] Some statutes go on to provide *expressly* that the prohibited actions will be void,[46] while others state that violation will not nullify any action taken.[47] Some authorize enforcement by civil action with relief usually patterned after mandamus or injunction.[48]

The common law did not recognize the right of a member of the public to observe governmental activities, so there are no judicially developed remedies to which we can turn in enforcing an open-meeting act.[49] It is quite surprising then that there are seven acts which contain no sanction or enforcement provisions at all.[50] It is apparent that little or no thought has attended the problem of effectively enforcing public rights of access granted in existing open-meeting legislation.

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42 This type of sanction is found in Alabama, Arkansas, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Maine, Nebraska, Nevada, New Mexico, Oklahoma, Pennsylvania, Utah and Vermont.

43 PA. STAT. ANN. tit. 65, § 254 (1968).

44 VT. STAT. ANN. tit. 1, § 314 (1972).

45 *E.g.*, OHIO REV. CODE § 121.22 (1969).

46 *E.g.*, NEB. REV. STAT. § 84-1405 (Supp. 1972).

47 *E.g.*, MASS. GEN. LAWS. ANN. ch. 39, § 23C (1973).

48 *E.g.*, IOWA CODE ANN. § 28A.7 (Supp. 1973).

49 *See generally* CROSS, THE PEOPLE'S RIGHT TO KNOW 180-82 (1953).

50 Connecticut, Michigan, Minnesota, North Dakota, South Dakota, Washington, Wisconsin. *See* code citations at note 2 *supra*.

THREE GUIDELINES FOR EFFECTIVE OPEN-MEETING LEGISLATION

From our examination of existing legislation and past judicial experience, we conclude that, three guiding principles should govern the drafting of any open-meeting act. A discussion of these principles and of the reasons why they stand out as guideposts follows.

There Must Be a Clear Statement of Purpose Contained In the Draft Legislation Itself, and the Preferred Purpose Is Presumptive Access to All Meetings.

The most important single principle is that the legislation as a whole should evidence a clear presumptive purpose of public access to governmental action and deliberation. All open-meeting legislation must be viewed against a background of official control over observation of governmental activity.[51] It seems that once a member of the public becomes a public official, he automatically assumes that such control follows by the nature of things. Vital interests of the public in a democratic society require the positive protection of a clear legislative mandate of openness.

Any member of a democratic electorate must at a minimum be sufficiently well-informed to exercise an educated choice among the candidates for public office. There are, of course, official channels through which a citizen can obtain such information. For example, much information concerning the workings of government is directly released through the press. It is, however, abundantly clear that news from official sources can be managed; it is therefore unlikely that a citizen will find governmental information through the media sufficient to make informed choices.[52] Generally, he will want to observe the workings of his government directly to learn both what is decided and why. The citizen will want to check the record when he has a question instead of being forced to rely on rumor and speculation.[53]

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[51] *See generally, Harvard Note, supra* note 19; Comment, *Access to Governmental Information in California,* 54 CALIF. L. REV. 1650 (1966) [hereinafter cited as *California Comment*]; *Problem of Communication in a Pluralistic Society,* 40 MARQ. L. REV. 1 (1956). One may sadly point to the "cover-up effort" which has come to light during the recent Watergate investigation as an example of this instinctive secrecy.

[52] *See* J. MCGINNISS, THE SELLING OF A PRESIDENT 1968 (1969); F. ROURKE, SECRECY AND PUBLICITY 183-208 (1961). The recent controversy over the CBS-TV documentary "The Selling of the Pentagon" may be offered as a further example.

[53] Note, *Access to Official Information: A Neglected Constitutional Right,* 27 IND. L.J. 209-11 (1952).

The public also has an interest in seeing that its tax money is distributed efficiently and impartially in the conduct of public business. Any scandal involving payoffs and favoritism can serve as an example of the importance of open government.[54] The press is occasionally able to reconstruct the picture of thousands of dollars in government largesse being given to recipients of dubious character, but this is usually well after the fact. If decisions must be made "in public," spending patterns of this type cannot go long unnoticed.

A citizen may want to go a step further and participate directly in a particular area of decision-making such as the operation of his local school system. Unless the typical professionalized and civil-service-protected school administration operates through procedures which permit it to gauge the variety and intensity of citizen opinion within its jurisdiction, it can neither make informed decisions nor persuade the students and parents affected by its decisions to accept them.[55] Opening the decision-making process increases the chances that the particular governmental unit will make fully informed decisions. Should one of these decisions be viewed as unfavorable by an individual, that individual is more likely to accept the result without open conflict if he has had real access to the decision-making process. Moreover, stability is encouraged by the fact that accessibility makes it unnecessary for the governed to turn to more destructive methods simply to be heard. The values of public participation then not only prevent governmental wastefulness, but also contribute toward real improvement in the quality and stability of governmental operations.

This purpose of openness can be conveyed both in the statement of intent and in the statement of basic coverage. An analysis of existing legislation reveals quite a mixture of patterns. Some signal to administrators and courts that only "this much" is to be opened to the public,[56] while others convey the impression that everything is to be open except that which is expressly permitted to be

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[54] The recent Watergate revelations provide several examples. On the local level, see "Spotlight on Sommerville," Boston Globe, Feb. 11, 12, 15, 17, 18, 20 and April 4, 1971.

[55] Mass. Advisory Council on Education, *Organizing an Urban School System for Diversity* (1970).

[56] *E.g.*, PA. STAT. ANN. tit. 65, § 251 (1968), where the definition of "Board" is used to designate several named types of governmental body and the definition of "Public Meeting" is used to include only the votes of "boards."

closed.[57] There are, however, many acts which convey a very unclear message of coverage.[58] It is important that the purpose of openness be clearly stated if only because of the impossibility of providing advance answers to all the cases which can arise. An open-meeting act will necessarily be elaborated and applied by courts and administrators; and if its purpose is unclear, its application will be erratic and ineffective.[59]

Perhaps the clearest and most effective way of expressing the preferred legislative directive is by a statement of intent substantially like that seen in California's Brown Act.[60] Unless it is contradicted elsewhere by a restrictive definition of "meeting," or by a blanket permssion to hold executive sessions,[61] such a statement of intent will show quite clearly that openness is the policy guideline for the solution of individual controversies.

Absolute Openness Would Prove Unworkable; Yet It Is Unreasonable to Expect a Legislature to Draw the Line Between Public and Private Meetings for All Cases.

The above capsule states the crux of the problem. There are some kinds of government meetings which can safely be excepted from the broad requirements of openness. Matters of internal housekeeping, collective bargaining, conduct of official investigations, cases involving possible invasions of personal privacy, property acquisition—all of these exceptions are based on perceptions that proceeding in public will run counter to identifiable, substantial values.[62] It is more difficult to legislate in other areas where the value choices become more complex.

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[57] *E.g.*, FLA. STAT. ANN. § 286.011 (Supp. 1972). The only textual exception is the Florida Constitution.

[58] *E.g.*, ME. REV. STAT. ANN. tit. 1, §§ 401-04 (1964). After broadly declaring public policy and defining public proceedings, the Maine legislature goes on to say that nothing shall prevent executive session subject to minimal conditions.

[59] *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 1410-17 (Tentative ed. 1958).

[60] CAL. GOV'T CODE ANN. § 11120 (Supp. 1973):

> It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed. In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

See also ILL. REV. STAT. ch. 102, § 41 (1971); UTAH CODE ANN. § 52-4-1 (1970), for examples of similar statements of purpose.

[61] *See* notes 16 and 23 *supra*.

[62] *See* text accompanying notes 23-41 *supra*.

Florida's Attempt at Total "Sunshine."

Despite the surface allure of simply legislating everything into the open, only one state appears to have chosen this legislative path. Florida has had the closest brush with total "government in sunshine,"[63] but the Florida Supreme Court has recently had to allow some exceptions.

Florida had had an open-meeting act for many years, but the courts had deprived it of any practical value by requiring that only "final actions" be taken in public.[64] It had become common practice to conduct "re-run" public voting sessions whenever the need to comply with the statute was required, and therefore no need existed to conduct any real deliberations in public.

From 1957 to 1967, the Florida legislature wrestled with bills designed to open up the activities of state and local government. Finally, the Senate passed a "Government in Sunshine" law which declared a policy of openness subject only to any exceptions found in the Florida Constitution. During the House debates, there were several attempts to write exceptions into the bill, but none succeeded.[65] The resulting law is on its face the strongest statement to date in the field of open-meeting legislation.[66]

The Florida Supreme Court initially indicated that it would refuse to recognize any exceptions not expressly stated in the Act. In its first case under the "Sunshine Law," the court held illegal a school board meeting at which a budget was voted through by line number and letter without any discussion at all.[67] All the crucial decisions had been made at an earlier private session. The *Broward County* case itself presented a clear violation; the court, however, took pains to point out that, "Florida Statute § 286.011 contains no exception!"[68] This position differed from the judgment below

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[63] FLA. STAT. ANN. § 286.011 (Supp. 1972) (which was entitled the "Government in Sunshine Law").

[64] FLA. STAT. ANN. § 165.22 (1941), *construed in* Turk v. Richard, 47 So. 2d 543 (Fla. 1950).

[65] *See* Comment, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361 (1971).

[66] FLA. STAT. ANN. § 286.011(1) (Supp. 1972): "All meetings . . . except as otherwise provided in the constitution . . . are declared to be public meetings open to the public at all times . . . ."

[67] Board of Pub. Instr. v. Doran, 224 So. 2d 693 (Fla. 1969).

[68] 224 So. 2d at 700.

which intimated that private discussions of privileged matters between the School Board and its attorney would be permitted.[69]

In another case, the Miami Beach City Council asserted its need to discuss proposed property condemnation proceedings, personnel matters and pending litigation in private sessions. The Council had excluded press observers and had them prosecuted for disorderly conduct. The court enjoined the prosecutions and reaffirmed its position of no exceptions.[70]

In its most recent case, however,[71] the Florida court was obliged to retreat from this hard-line position. The main question was whether collective bargaining sessions with a teacher's union would have to be conducted in public. Recognizing that public bargaining is impossible, the court somehow concluded that the Florida constitution governed,[72] and that an exception to the Sunshine Act was therefore authorized. They also upheld a unanimous voice-vote choice of a chairman without requiring a prior 4-3 straw vote to be spread upon the record. These departures from precedent drew a sharp dissent, but the decision on the collective bargaining issue reflects a realistic approach in construing a well-intentioned but inadequately drawn piece of legislation.

"Final Action" and "Re-run" Voting Sessions

Many attempts have been made to legislate a middle ground by defining public access in terms of final actions or votes, but this approach makes it much too easy to conduct mere "re-run" votes after all the vital issues have been resolved in private sessions. A number of recent cases serve to illustrate the basic inadequacy of this approach to the problem.

In California, the decision in *Adler v. City Council*[73] had limited the coverage of an open-meeting act to "formal actions taken by the entire body." First the legislature in amending the law,[74]

[69] *Id. See also* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968) (City council cannot confer with attorney in secret where there is no such exception in the act).

[70] Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971).

[71] Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972).

[72] FLA. CONST. art. I, § 6 states that "[t]he right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." Expert testimony had been offered to prove that public collective bargaining is impossible. The court agreed and held that the constitution therefore mandated an exception to the Sunshine Law.

[73] 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (1960).

[74] [1961] Cal. Stats. ch. 1671, p. 3637; *see California Comment, supra* note 51, at 1653-57.

and then the California appellate court in deciding *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors,*[75] recognized the inadequacy of this approach. At issue in *Sacramento* was the right of the press and public to be represented at "business lunches" held by the Board at the local Elks club. The court correctly recognized that realistic enforcement of a policy of openness required such presence, in light of the fact that the city had not offered any special reasons for privacy at these "meetings."

In *Selkowe v. Bean*[76] a newspaperman was excluded from a Keene, New Hampshire, city council committee meeting called for the purpose of reviewing and discussing the proposed annual budget. Several non-members gave their views to the committee during the session. An action by the newspaperman to require that this be done in public was unsuccessful. The New Hampshire Supreme Court construed the newly passed open-meeting act[77] to permit executive sessions as long as no "decisions" were made, and the court found no evidence of a decision in the record. How a plaintiff can be expected to introduce evidence that decisions were made at a meeting from which he has been excluded escapes the comprehension of this writer. The judicially imposed requirement rendered the act hopelessly ineffective, and the New Hampshire legislature registered agreement by amending it to prohibit the receiving of any information from non-members in executive session.[78]

The controversy in *Goldman v. Zimmer*[79] arose when a property owner sought to resist condemnation of his land by the Springfield, Illinois, school board. He was successful at trial because the condemnation had not been authorized at an open board meeting. Although the appellate court agreed with the decision at trial that there had been a violation, they reversed because of a distinctly boiler-plate resolution voted through at a board meeting held after the trial. "Final action" in public was held to cure the original defect. In contrast to the actions in California and New Hampshire, the Illinois legislature has acquiesced in this decision; and mere reruns are apparently quite lawful in that state.

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[75] 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968).

[76] 109 N.H. 247, 249 A.2d 35 (1968).

[77] [1967] N.H. Laws ch. 251.

[78] N.H. Rev. Stat. Ann. § 91-A:3 (Supp. 1972), *amending* [1967] N.H. Laws ch. 251, provides:

> Nothing . . . shall . . . prevent . . . bodies or agencies from holding executive sessions for conducting deliberations, but . . . all sessions at which information, evidence or testimony in any form is received shall be open to the public.

[79] 64 Ill. App. 2d 277, 212 N.E.2d 132 (1969).

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Sound Judicial Discretion is an Essential Ingredient to a Satisfactory Solution

Where legislation has clearly stated a policy of presumptive access to governmental proceedings and has reinforced the statement by broadly defining the public "meeting," the courts are then faced with the task of preventing "re-run" meetings without unfairly restricting legitimate preliminary discussion of difficult problems. The New Jersey courts, in a series of four well reasoned decisions, provide concrete evidence of judicial ability to perform successfully this task.

The first two cases involved zoning adjustments. In *Wolf v. Park Ridge*,[80] the New Jersey Supreme Court set down guidelines for cases in which a violation of the open-meeting act was alleged. In the court's view, the proper exercise of judicial discretion required a voiding of the action unless the government demonstrated a compelling counter-interest in private deliberation.[81] The court held further that mere absence of bad faith on the part of the government was not enough to meet the test of compelling counter-interest. It did recognize, however, that a closed conference where no "official action" is taken might in some circumstances be permitted.

Kramer v. Sea-Girth[82] involved a controversial zoning variance which had been the subject of public hearings. The board subsequently conducted its deliberations and its effective vote in executive session. Four months later there was a "re-run" vote after proper notice to the press and public. The court struck down the variance stating that the spirit of the legislation required that members of a board stand and be counted while an issue is current.

A closer case was presented in *Scott v. Bloomfield*.[83] There a proposed lease of city property was discussed during a council meeting. The members then retired to discuss the matter, and one returned to the chamber to announce tentative approval. After carefully balancing the opposing interests, the court enjoined the

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[80] 79 N.J. Super. 546, 192 A.2d 305 (1963).

[81] The textual basis in the legislation for the court's position is hardly compelling:

> The legislature finds and declares it to be the public policy of this State to insure the right of . . . citizens . . . to attend meetings of public bodies, with certain exceptions, for the protection of the public interest.

N.J. STAT. ANN. § 10:4-1 (Supp. 1973).

[82] 80 N.J. Super. 454, 194 A.2d 26 (1963).

[83] 94 N.J. Super. 592, 229 A.2d 667, *aff'd on other grounds*, 98 N.J. Super. 321, 237 A.2d 297 (1967).

lease, stating that the public was entitled to hear the council discussion and votes on this matter.

The line was finally crossed in *Shults v. Teaneck Board of Education.*[84] The suit had been brought to enjoin the implementation of a controversial school desegregation plan. Among other things it was alleged that the Board had fully discussed the plan in a closed session the day before the public hearing and vote. It was held that under the circumstances this private discussion was not sufficient ground for avoidance. Testimony from dissenting board members established that no real attempt to reach a final decision in the private session had been made, and that the real decision had in fact been made in the open.

There Is a Dire Need for Well-Drawn, Realistic Enforcement Provisions

It must be conceded that as a practical matter legislative action alone is insufficient to prevent determined officials from operating behind closed doors. One difficulty in prescribing an appropriate sanction for a meeting wrongfully kept closed is that this is not the sort of conduct for which harsh criminal penalties are a realistic possibility. Further, once the closed discussion and deliberation have occurred, no injunctive relief can fully cure the damage that has been done. Legislation can be helpful though, when it is backed up by citizens ready to take up a direct political challenge against officials who consistently evade the spirit of an open-meeting act.[85]

It is also fair to observe that the citizen who sincerely seeks to become informed is, in reality, a member of a distinct minority.[86] To advocate a principle as difficult to enforce as openness, to satisfy the interest of so few, might seem unworthy of the effort. Even in the age of one-person-one-vote, however, the assertion still appears correct that legislative policy ought to be the product both of numbers of individuals and of the intensity of their feelings.[87] Further, if the few concerned with openness are members of the press, they will be in a position to report to the many. Despite the scarcity of truly concerned citizens, I feel that there must be a workable sanc-

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[84] 86 N.J. Super. 29, 205 A.2d 762 (1964), *aff'd on other grounds,* 45 N.J. 2, 210 A.2d 762 (1965).

[85] See ROURKE, *supra* note 52 at 218-19; J. WIGGINS, FREEDOM OR SECRECY 18 (1956).

[86] R. DAHL, WHO GOVERNS? 276-86 (1965).

[87] E. BANFIELD, POLITICAL INFLUENCE 307-23 (1961).

tion connected with any open-meeting legislation so that the public can have some confidence that it will be effective.

It is neither a novel nor an astounding observation that strong symptoms of discontent with government at all levels currently exist among the citizenry, and a good part of that discontent appears related to the lack of access which has been so characteristic of all governmental operations. Knowing that a channel of access exists may be just as important to the citizen as any actual observation of proceedings. An open channel will hopefully begin to dissipate some of the political frustrations presently ascertainable among the public at large. Unfortunately, most of the current enforcement and sanction provisions in open-meeting acts do not reflect any clear and purposeful principle. Much of what is in them is neither useful nor relevant. It is important, however, that the sanction procedures provided be simple and clear and that they be to the point.

Criminal Sanctions

The minor criminal penalty is both the most common and the least useful sanction found in current legislation.[88] Extensive research has failed to uncover a single open-meeting case involving criminal prosecution, and I would predict that a survey of prosecuting attorneys would yield a similar result. Even if they were occasionally invoked, the amount of the typically authorized fine is not enough to deter an official who truly wishes to avoid public scrutiny. Conducting the business of government behind closed doors is just not considered sufficiently criminal to merit even a short jail sentence. In addition, after-the-fact criminal sanctions are a totally inappropriate means of enforcing open-meeting acts.

Nullification

One's first thought is that it is appropriate to nullify any action taken in an illegally closed proceeding, yet the dilemma posed by this remedy is well illustrated by the sharp division of the Iowa Supreme Court in the case of *Dobrovolny v. Reinhardt*.[89] Plaintiffs sought an injunction forbidding implementation of a school board decision which split the district and consolidated the fragments into two other districts. The school board's decision had been made at

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[88] *See* text accompanying notes 42-44 *supra*.

[89] 173 N.W.2d 837 (Iowa 1969). The case is noted at 53 IOWA L. REV. 210 (1972).

a meeting for which no public notice had been given despite an express command in the recently enacted Iowa open-meeting act.[90] The board, however, had to act swiftly because of a legislative deadline for the consolidation of all school districts in the state. A majority of the court conceded a violation, but construed that act as providing no remedy for the case. Mandamus was improper because there was no prior demand for performance. No injunction would issue because "[r]ights already lost and wrongs already committed are not subject to injunctive relief . . . when there is no showing the wrong will be repeated."[91] A criminal penalty was not sought and no other remedy was expressly provided for in the Act. The case was therefore dismissed.

The dissenters, in a well-reasoned opinion, argued:[92]

> This case is important because it sets the tone of enforcement of a new statute which articulates an important legislative policy. . . . The majority says . . . that because the meeting is over and done with the courts are powerless to (or will not) interfere. . . . This will always be the case. By the very nature of the problem relief cannot be sought until after the meeting has been held.

The dissenters would have nullified the original action even though they recognized that a second decision would quite probably be the same. The result in the case is arguably correct. It does appear that the board's decision was made under some pressure and that the plaintiffs could not have mounted a very substantial attack against the merits of the decision. Nullification is a very drastic sanction—here out of proportion to the evil seen in the violation. The majority in *Dobrovolny* was obviously torn between an inappropriate sanction and a futile gesture, and apparently chose the lesser of two evils.

Recognizing the severity of nullification, the Massachusetts legislature has expressly provided that action otherwise valid will remain so in spite of a violation of its open-meeting act.[93] Shortly after this provision was enacted, the Massachusetts Supreme Court

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90 IOWA CODE ANN. § 28A.4 (Supp. 1973):

> Each public agency shall give advance public notice of the time and place of each meeting, by notifying the communications media or in some other way which gives a reasonable notice to the public . . . .

91 173 N.W.2d at 841.

92 *Id.* at 842.

93 MASS. GEN. LAWS ANN. ch. 39, § 23C (1973), which provides in part: "[B]ut action otherwise duly taken at any meeting shall not be invalidated by the failure. . . ."

reversed a trial court which had annulled a zoning variance because the decision had been made in private.[94] The court repeated its performance in each of the two succeeding terms to reinforce the point.[95] Cases from other jurisdictions further evidence a pattern of extreme judicial reluctance to nullify otherwise sensible action taken in a proceeding which only technically violates open-meeting legislation.[96]

Civil Relief

Because of the absence of a common law remedy, authority for a civil action would seem essential if a member of the public wishes to enforce an open-meeting act. In any case where an action is brought before the closed meeting is held, a prompt civil order on the merits would provide an effective remedy.[97] More often, however, the violation will already have occurred and a civil remedy will then lose much of its practical worth. It is nonetheless important to authorize this avenue of relief for the member of the press or public who can move for it in time.[98]

Removal From Office

Because all presently authorized modes of relief are ineffective to rectify the effects of past closed-door actions, something new must be tried. The concerned citizen, of course, has the ability to call the culprits to task during the next election; but with legislative help he need not wait so long. Although an injunction against violation

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[94] *See* Elmer v. Board of Zoning Adjustment, 343 Mass. 24, 176 N.E.2d 16 (1961).

[95] *See* Dion v. Board of Appeals, 344 Mass. 547, 183 N.E.2d 479 (1962); Reilly v. Framingham, 345 Mass. 363, 187 N.E.2d 838 (1963).

[96] Goldman v. Zimmer, 64 Ill. App. 2d 277, 212 N.E.2d 132 (1969); Szilagyi v. State, 249 Ind. 400, 231 N.E.2d 221 (1967) (consolidation of school districts); State *ex rel.* Humphrey v. Adkins, 18 Ohio App. 2d 101, 247 N.E.2d 330 (1969) (student expelled from high school where school board took testimony from principal and teacher in private); Thomas v. Board of Trustees, 5 Ohio App. 2d 265, 215 N.E.2d 434 (1966) (in an action for back pay by a constable fired at an informal meeting, it was held that the action otherwise lawful would stand); *In re* Seattle Housing Authority, 62 Wash. 2d 492, 383 P.2d 295 (1963) (condemnation of property for public housing).

[97] Sacramento Newspaper Guild v. Board of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968). *See also* Raton Public Service Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966) (declaratory judgement action by plaintiff to contest an issue of coverage).

[98] Ten states currently authorize civil relief: Arizona, Arkansas, California, Florida, Illinois, Iowa, Maine, Massachusetts, New Hampshire and Virginia. Code citations may be found at note 2 *supra*.

may do little to correct past injury, such an order can be the starting point for effective enforcement. It is recommended that open-meeting legislation provide that an official found in repeated violation of the act be subject to removal from office. This is a serious sanction, but it is certainly more closely related to the spirit of the offense involved. This provision is all the more necessary in the case of the many state and local officials who are not subject to the direct sanction of the ballot box. With regard to officials with civil service status, they should not be able to retain their position under proven charges of misconduct in office. By limiting removal to repeating violators and by giving them a right to a jury trial in any action, I feel there would be sufficient safeguards for officials who act in good faith. The jury trial is still a sufficient counterbalance to a politically motivated removal action. I believe that the possibility of removal has a greater chance to influence the conduct of officials who are covered by open-meeting legislation. I recommend it as the only major sanction which has any chance at all of success.[99]

CONCLUSION

Rather than stating my conclusions in a summary, I offer this draft open-meeting act as a concrete model which embodies those conclusions.

A Model Bill Requiring State and Local Governmental Bodies to Open Their Meetings to the Public

SECTION 1. Statement of Policy

It is vital in a democratic society that public business be performed in an open and public manner so that citizens can be advised of the performance of their public officials and of the decisions they reach in making public policy. It is the intent of this legislation that the public be entitled to the fullest access to the deliberations and proceedings of public bodies compatible with the effective transaction of public business.

SECTION 2. Definitions

A) "Meeting" means the activity of two or more members of a public body gathered to conduct any executive, legislative, or

[99] Only four states have authorized removal from office for officials who refuse to obey open-records laws. FLA. STAT. § 119.02 (1960); KAN. STAT. ANN. § 45-203 (1964); VERNON'S ANN. MO. STATS. § 109.180 (1966); NEB. REV. STATS. § 84-712.03 (1966).

administrative business which affects any citizen of this state. A meeting takes place whether formal or informal and whether or not votes are cast. Chance encounters of two or more members whose major purpose is other than the discussion or transaction of official business shall not constitute a meeting for the purposes of this act.

B) "Public Body" means any group of two or more persons officially designated to conduct or aid in the conduct of the public business of this state or any of its political subdivisions and supported wholly or in substantial part by public funds.

SECTION 3. Meetings to be Public

A) Except as expressly provided in the (state) constitution, in this act, or in any future act of this legislature which specifically declares an exception, all meetings of all public bodies shall be open to the public. Any public body may make and enforce reasonable regulations for attendance at its meetings in situations where there is not room enough for all members of the public who wish to attend.

B) A public body may exclude the public when it is considering or acting upon the following matters:

1. The hiring of any person as a public employee.
2. The dismissal, discipline, promotion or compensation of any public employee unless the employee affected requests an open meeting.
3. Matters which if discussed in public would be likely to affect adversely the reputation of any person other than a member of the public body itself.
4. The conduct of any official investigation.
5. Consideration of the acquisition, sale or lease of land by the public body.
6. Negotiations of collective bargaining agreements.

C) Meetings of parole boards and juvenile correction agencies are not required to be held in public.

D) (List of specific references to other state statutes expressly providing that governmental meetings may be held in private.)

SECTION 4. Notice

A) Information concerning the time and place for a meeting of any public body shall be given to anyone who requests it.

B) In the event of an emergency or special meeting, the person calling such meeting shall notify representatives of the news

media located in the county in which the public body normally meets. Such notification shall give the time and place of the meeting and shall be given at least two hours before the meeting takes place in order that the public may have representatives at the meeting.

SECTION 5. Permission for Executive Session

Any public body may hold a closed meeting by an affirmative vote of (2/3) two-thirds of its members present when required by some exceptional reason so compelling as to override the general public policy in favor of public meetings. Such reason(s) and the votes of the members shall be matters of public record. No regular or general practice or pattern of holding closed meetings shall be permitted.

SECTION 6. Enforcement

A) Civil Action

Any person aggrieved by a violation of this act may bring an action to enforce its provisions in any court of record located in the county where the violation has taken or will take place. Relief in the nature of mandamus or injunction may be given or the court may fashion any other remedy deemed appropriate under all the circumstances. Calendar priority shall be given to all such actions to the end that timely relief may be given whenever possible.

B) Removal from Office

Any member of a public body adjudged twice or more in violation of this act shall be subject to removal from his office or position. Any citizen of this state may bring an action for his removal in any court of record located in the county of the member's residence. The member sought to be removed shall have the right to trial by jury upon timely request. Any civil relief granted under Section 6(A) of this act shall create a rebuttable presumption of its violation by any member of a public body named in the order granting relief.

AN ANALYSIS OF THE ABA LEGISLATIVE PROPOSAL ON EX PARTE CONTACTS

(A tentative staff report to the Chairman of the Administrative Conference of the United States, by Barry B. Boyer, staff attorney, revised August 2, 1972)

I. BACKGROUND

In August of 1970 the American Bar Association's House of Delegates passed Resolution No. 4, which supports amendment of the Administrative Procedure Act for the purpose of "[p]rohibiting *ex parte* communications between agency members and parties or other interested persons outside the agency on any 'fact in issue' in the decision of an adjudicatory or formal rulemaking proceeding." In implementation of this resolution, the Administrative Law Section's Special Committee on Revision of the Administrative Procedure Act has prepared and revised draft legislation which is set forth in full in Appendix A and discussed in detail in the following sections of this memorandum. At the same time, a complementary resolution and draft legislation were prepared dealing with separation of functions between agency personnel engaged in reaching a decision in an on-the-record proceeding, and those who are prosecuting or litigating the matter; these provisions are discussed in a separate memorandum prepared by the staff of the Administrative Conference.

The subject of ex parte contacts first gained widespread attention in the 1950's when several well publicized cases involving use of improper influence in connection with the grant of broadcast licenses led to demands for reform. The 1961-62 temporary Administrative Conference considered the problem in detail, and recommended that each agency promulgate ex parte rules in accord with general principles endorsed by the Conference.[1] The Conference recommendation is set forth in full in Appendix B. Many agencies implemented this recommendation and how have some form of ex parte rule. A tabular summary of ex parte rules of selected agencies is provided in Appendix C.

Conceptually, there are several distinguishable policy factors affecting ex parte rules, which may lead to the imposition of different sanctions for violation and, to a lesser degree, to differing scope of the rules. The first approach is concerned with the integrity of the decision-making process: All facts and arguments relating to the decision should be available on the public record so that the bases on which the agency is acting are discernible to affected parties and to the courts, the Congress, and the Executive in their oversight functions. Under this rationale, a proper remedy is insertion of ex parte communications into the public record. Similar policies are securing the rights of affected parties to participate in the decision-making process, and enhancing the accuraacy of decision by insuring that all relevant data and argument will be subject to adversary testing; to satisfy these objectives, the proper remedy is not merely disclosure, but also an opportunity to rebut the ex parte information.

Somewhat different considerations become operative when the ex parte communication involves information that is not, in the legal sense, relevant to the issues to be decided—in short, when a powerful "outsider" brings political or personal pressure to bear on the agency decision-maker. In this situation, while disclosure and an opportunity to rebut may deter future misconduct, they would be of little utility in curing the violation, since permitting other parties to respond in the same fashion would convert the proceeding from a process of deciding specific issues on the merits into a political contest. About all that can be done, once the violation has occurred, is to try to remove from the decisional process those who have been the recipients of impermissible contacts. In aggravated circumstances where the ex parte contact verges on bribery, professional misconduct or abuse of a public trust, there may also be sufficient ethical and moral grounds to conclude that punishment, discipline or denial of a benefit for the violator is necessary.

A final situation with distinguishable policy overtones is communication from agency decision-making personnel to persons outside the agency. The principal concern in this area is avoidance of actual or apparent pre-

[1] Selected Reports of the Administrative Conference of the United States, S. Doc. No. 24, 88th Cong., 1st Sess. 173 (1963) (Recommendation No. 16) [hereinafter cited as "1962 ACUS"].

judgment, and the traditional remedy is disqualification of the decisional personnel in question. It is appropriate to note, however, that here, unlike in the preceding situations discussed, it is not the communication itself so much as the state of mind it evidences which represents the real threat to the decision-making process. Consequently, rigid enforcement of rules as to what may or may not be communicated can mistake the shadow for the substance of the problem.

Beyond the logic of the various remedies for each policy factor, deterrence of future violations is a useful general approach. Thus it may be thought necessary to provide punishment for merely negligent or attempted violations, or for situations where it seems logically inappropriate, in order to prevent others from stepping over the line in the future. In light of this range of policy factors affecting ex parte communications, it is not surprising that existing agency ex parte rules encompass a variety of approaches, and that the draft legislation contemplates a number of different sanctions.

This memorandum attempts to set forth in systematic fashion the various questions which must be answered in designing legislation to govern ex parte contacts, together with comparative material drawn from agency rules, court cases and scholarly commentaries. In addition, an attempt has been made to summarize the major arguments bearing on various facets of the ex parte problem.

II. TOPICAL ANALYSIS OF DRAFT LEGISLATION

A. Need for Legislation

A threshold question is whether uniform legislation prohibiting ex parte contracts is preferable to allowing each agency to promulgate rules for its own proceedings. In supporting individual agency rulemaking, the 1962 Administrative Conference report advanced two main arguments: legislation would tend to rigidify the prohibitions, thereby making change and improvement difficult; moreover, allowing the agencies to take the initiative would create the impression that the agencies were "setting their own houses in order," thereby improving public confidence in the administrative process.[2] In addition, it could be argued that the tremendous variety in agency procedures, traditions, and affected interests would make uniform proscription inappropriate, particularly in light of the broad scope of the proposed legislation discussed below; no matter how carefully the legislation was drafted, there would likely be many instances in which the statute would either permit improper ex parte contacts, or impair the quality of decision by determining useful communications. It has also been suggested that imposing upon the executive departments a rule requiring disclosure of improper ex parte contacts may raise questions of executive privilege. Finally, it might be asked whether legislation is warranted, since there have been few recent cases in which courts have found that ex parte contacts have tainted an on-the-record proceeding.

On the other hand, there are certain obvious advantages to uniformity in ex parte rules, particularly for those who do not confine their participation in administrative proceedings to one or two agencies. Moreover, in the absence of a statute the failure of an agency to promulgate rules dealing with a particular situation may lead a reviewing court to reverse on constitutional grounds, and this could undoubtedly impose more of a "strait jacket" on administrative procedure than a statute.

No firm conclusions either for or against a uniform statutory prohibition can be developed from the survey of agency ex parte rules compiled in Appendix C. For example, the fact that some agencies do not have ex parte rules could be interpreted either as an agency judgment that prohibitions would be inappropriate in certain areas, or as an indication that the agency-by-agency approach will leave unsatisfactory gaps in the applicability of the rules. However, the survey and the differences among agency ex parte rules discussed below do suggest that there is considerable variety in the kinds of agency proceedings which would be subject to the rule. Thus, it may be useful for the Committee to undertake a broad-based survey of the agencies seeking to determine (a) what kinds of proceedings in each agency would be subject to the amendment and (b) what specific problems this would cause in particular agencies.

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[2] *Id.* at 174.

B. Kinds of Proceedings Included

The ABA draft legislation would be applicable to proceedings which are subject to subsection (a) of 5 U.S.C. section 557; that provision, in turn, is applicable "when a hearing is required to be conducted in accordance with section 556" of Title 5. Section 556 is applicable to proceedings which are required by section 553 or 554 to be conducted under that provision; and those sections provide that section 556 is applicable to rules "required by statute to be made on the record after opportunity for agency hearing" and to adjudications.

In this connection, it should be noted that the draft amendments implementing ABA Resolution No. 1 would change the APA definition of rulemaking to delete the reference to "particular applicability" so that ratemaking, for example, would generally be subject to the ex parte provision. (*See* Johnston memorandum on Resolution 3 and 8, at 2–3.) The House of Delegates approved a comment acknowledging that "agencies regulating utility and carrier rates and practices receive and are required to evaluate a constant stream of data regarding companies subject to regulation, and it is not the intention of this Resolution to cut members of such agencies off from information necessary for the more or less constant surveillance of regulated entities contemplated by law." To deal with this potential inconsistency, the House of Delegates' comment took the approach of focusing on the kind of communication in issue, stating: "It is not the intent of the Resolution to insulate the [agency] member from data of a more general nature, even though pertinent to the subject matter of such an adjudicatory proceeding, so long as the member does not engage in direct discussions regarding the 'facts in issue' in the proceeding." [3]

The drafters' comments to the January, 1972 proposed bill concluded that it would be impossible to deal with this distinction adequately through statutory language, and recommended that it be emphasized in the legislative history. The present legislation may be somewhat clearer than its predecessor, since it covers communications "relevant to *the merits of*" an on-the-record proceeding. The revised drafters' comments explain that the prohibition "does not extend to communications with respect to data of a general nature, even though pertinent to the subject-matter of a proceeding to which the prohibition applies, so long as the agency member or other covered person does not engage in direct discussions or other communications which are relevant to the merits of the proceeding." The problem of what kinds of communications should be covered by ex parte provisions is discussed in the following subsection.

In existing agency rules, the most common approach seems to be a provision that ex parte contracts are prohibited in "on-the-record proceedings," and examples or enumerations are frequently provided.[4] Alternatively, the provisions may refer to the APA definition of adjudications,[5] or be limited to "*contested* on-the-record proceedings."[6] The recommendation of the 1962 Administrative Conference was more precise than many of the agency rules, being confined to "any proceeding required by statute or constitution or by the agency in a published rule or in an order in the particular case to be decided solely on the basis of an agency hearing." [7]

The need to delineate those kinds of proceedings, beyond "pure adjudication," for which prohibitions on ex parte contacts are appropriate has been called "the principal problem with respect to regulation of ex parte communications." [8] As a constitutional matter, the distinction between rulemaking and ajudication seems insufficient; one of the leading cases in the area, *Sangamon Valley*,[9] dealt with rulemaking proceedings, and the court concluded that ex parte

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[3] Report to the Council of the Administrative Law Section from the Special Committee on Revision of the Administrative Procedure Act 40–41 (1972).

[4] *E.g.*, 17 C.F.R. § 200.111 (SEC).

[5] *E.g.*, 47 U.S.C. § 409(c) (FCC—applies to adjudication as defined in the APA which has been designated for hearing, as well as to initial licensing); *cf.* 47 C.F.R. § 1.1203, which enumerates "restricted ajudicative proceedings" for purposes of the FCC ex parte rules.

[6] *E.g.*, 18 C.F.R. § 1.4(d)(1) (FPC).

[7] 1962 ACUS at 169.

[8] Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies* 76 Harv. L. Rev. 233, 239 (1962).

[9] Sangamon Valley Television Corp. v. United States, 269 F. 2d 221, 223 (D.C. Cir. 1959).

contacts were ground for reversal, since the proceeding involved "resolution of conflicting claims to a valuable privilege." Of similar effect is the second *Morgan* case,[10] which held that post-hearing consultations between staff and decision-maker were impermissible where "[t]he proceeding had all the essential elements of contested litigation, with the Government and its counsel on one side and the appellants and their counsel on the other." Recent development of doctrines governing standing to intervene in and seek review of administrative proceedings obviously creates some difficulties with respect to determining when a particular proceeding involves "resolution of conflicting claims to a valuable privilege" or has "all the essential elements of contested litigation." For example, if the Sierra Club asserts that its members and others may be denied the recreational use of certain public lands by a rulemaking proceeding concerning private development of natural resources on the lands, are the *Sangamon* and *Morgan* tests satisfied?

A further complication is the growing support for use of adjudicative techniques within the context of a notice-and-comment rulemaking proceeding. Thus, the D.C. Circuit has suggested that during the course of an informal rulemaking proceeding it may sometimes be necessary to provide trial-type procedures for controverted "adjudicative facts."[11] In accord with this suggestion, commentators have urged that hybrid procedures involving a blend of adjudicative and rulemaking techniques be adopted for a variety of licensing and regulatory functions,[12] and the Administrative Conference recently considered and referred back to committee a recommendation which would recognize four basic models for rulemaking procedure, all involving differing degrees of formality and participatory rights for affected interests.[13] In short, there may be a trend emerging toward use of proceedings which are part on the record and part off, with considerable variety in the nature and timing of the portions which are on the record.

A related question is whether, and how far, ex parte rules should extend into the area of informal administrative action. While exercise of agency prosecutorial and investigatory power is not the type of "on the record" proceeding to which ex parte rules have traditionally been applied, Professor Davis has pointed out that the harm done in these discretionary functions can easily be as great as that inflicted by ex parte contacts in formal proceedings:

What if a powerful presidential assistant, on behalf of a friend, asks the chairman of a regulatory agency to withhold a prosecution or investigation of the friend? What if a chairman of an appropriations committee makes a similar request? . . . [T]he prevailing ethical standards that govern current conduct do not seem to be unclear: Off-the-record persuasion concerning such questions as whether to investigate or not, whether to prosecute or not,

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[10] *Morgan* v. *United States*, 304 U.S. 1, 20 (1936).

[11] American Airlines, Inc. v. CAB, 359 F. 2d 624, 632 (D.C. Cir. *en banc*, 1966) (emphasis added):

[I]n the present case the CAB did not limit itself to minimum [informal rulemaking] procedures, but rather gave the arties a significantly greater opportunity to persuade and enlighten the Board. It provided not merely for written comment, but in addition for oral argument. . . .

If additional procedural safeguards are to be imposed as a requirement it would be more salutary to incorporate them into a rule making procedure than to adopt a blanket requirement of an adjudicatory procedure. A rule making setting would better permit confinement of oral hearings to the kind of factual issues which can best be determined in the light of oral hearings, without . . . sacrifice of the expedition and flexibility available in rule making. *It would also permit the hearing examiner to confer with experts and the Board concerning "legislative facts" and policy questions.*

[12] *E.g.*, Claggett, *Informal Action—Adjudication—Rule making: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51; Boyer, *A Re-Evaluation of Administrative Trial-Type Hearings for Resolving Complex Scientific and Economic Issues*. (A Staff Report to the Chairman of the Administrative Conference of the United States, Dec. 1, 1971); Murphy, *The National Environmental Policy Act and the Licensing Process: Magna Carta or Coup De Grace*, (first draft report prepared for the Committee on Licenses and Authorizations of the Administrative Conference of the United States, April 7, 1972).

[13] Recommendation —, Procedures for Adoption of Rules of General Applicability (considered by the Administrative Conference June 8–9, 1972). The fourth procedural model included in this draft recommendation, "Modified Rulemaking-on-a-Record," would provide, *inter alia*, for written comment and legislative-type hearings; if the agency concluded that there were factual issues "as to which further consideration is desirable," it would have the option of either providing a trial-type hearing for those issues, or create an advisory committee to resolve them.

and whether to grant or deny a petition for a declaratory order violates no statute, no case law, and no authoritatively-stated ethical standards. A statute or formal rule which would make such persuasion illegal or unethical would make an abrupt change. Even so, the time will come when the question whether such a change should be made will deserve serious consideration.[14]

One might ask, in light of the recent controversy surrounding the ITT antitrust case, whether the time envisioned by Professor Davis has not arrived; however, it may also be asked how a statute could obviate these kinds of problems without seriously disrupting agency functions.

While it seems difficult, if not impossible, to deal adequately with the ex parte problems posed by these emerging doctrines through statutory prohibitions, one possible approach would be to have the legislation apply to proceedings which are required by the constitution, statute, or agency rule to be conducted on the record, and then urge the agencies (perhaps through a Conference recommendation) to specify through general rules or individual orders those proceedings or portions of proceedings which will be deemed "on the record" for ex parte purposes. Alternatively, it may be preferable simply to require the agencies to specify which kinds of proceedings, in addition to adjudications conducted pursuant to section 554, should be subject to ex parte prohibitions.

C. Kinds of Communications Covered

Another area in which there is considerable divergence of opinion and variance among agency rules is the definition of "ex parte communication." The ABA draft legislation would encompass any "oral or written communication not on the record with respect to which reasonable prior notice to all parties is not given." In addition to this definition, which would be included in 5 U.S.C. § 551, there are other defining elements scattered through the proposed new subsection (d) of section 557. The introductory sentence to this section creates an exception for "disposition of ex parte matters as authorized by law." This is a standard and necessary exception to the general prohibition, but in the interests of precision it may be desirable to expand it along the lines of the SEC's rule, which provides an exception for "[a]ny oral or written communication which is authorized by statute or Commission rule, or which all the participants to the proceeding agree, or which the Commission or hearing officer formally rules, may be made on an ex parte basis."[15]

Another element in the definition of ex parte communication is set forth in subsections (d)(1) and (d)(2) of the present ABA draft: it must be "relevant to the merits of the proceeding" in question. As previously noted, the prior draft had merely provided that the communication must be "relevant to the proceeding." In this respect, the current ABA draft resembles the 1962 Conference recommendation, which stated that ex parte prohibitions would not apply to "[a]ny oral or written request for information solely with respect to the status of the proceeding." Several of the existing agency rules have adopted this Conference suggestion.[16] The basic problem with status inquiries is, of course, the communication from a powerful political figure which takes the form of a status inquiry, but is intended and understood as pressure toward reaching a particular result. As ground for prohibiting such inquiries, it has been pointed out that information regarding the status of pending matters can be readily obtained from agency personnel who are not involved in the decision-making process, such as the Secretary of a Commission. On the other hand, it may be argued that Congressmen and other political figures have an obligation to represent their constituents by keeping apprised of the status of important developments affecting them, and cutting bureaucratic "red tape" wherever possible; also, it may be

[14] K. Davis, Administrative Law Treatise 468 (1970 Supp.). However, Davis also states that "Informality does and should mean ex parte contacts. Parties must be free to persuade agency members and staff members, and persuasion includes influence and pressure," *Id.* at 467.

[15] 17 CFR § 200.111(g)(3). The report of the 1962 Conference stated: "The Committee has used the phrase 'authorized by law' and not 'authorized by statute or agency rule' in this context because the former is the broader phraseology and we recommend the broader exception in order to enable the agency to handle, on an ex parte basis, such matters as requests for adjournments, continuances, the filing of papers and requests for subpoenas, even though statute or agency rule is silent on the matter."

[16] *E.g.*, 14 CFR § 300.2(a) (CAB—"Communications which merely make inquiry as to the status of a proceeding without discussing issues are not considered communications on the merits."). However, the CAB rules also provide that "[r]equests for expeditious treatment of a pending application will be considered communications on the merits." *Id.* at § 300.2(b).

argued that day-by-day oversight of this type will tend to keep the agencies generally "on their toes," to the benefit of all who deal with them. Finally, it is possible to argue that the impact of status inquiries will be de minimis in any event: every Washington agency has a very good idea which members of Congress and the Administration are important to the agency, and what their views are on significant matters pending before that agency; in essence, the status inquiries are primarily for the satisfaction of the constituent.

The *Pillsbury* case[17] suggests that, regardless of the form which political pressure takes and the governmental justification for providing such political oversight, excessive political pressure on an agency to reach a particular result is impermissible. *Pillsbury* dealt with a situation in which FTC decisional personnel were sharply questioned during congressional hearings with regard to the Commission's interlocutory ruling on an issue of law in a case then pending before the agency. Even though the FTC Chairman, who was the prime Commission witness during these hearings, disqualified himself from subsequent participation in the case, the court concluded that "common justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the United States Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach."[18] How far this case extends beyond its rather unusual facts remains unclear, but it does indicate that some forms of status inquiry or other political pressure may be grounds for due process attack.

Another exception contained in the 1962 Administrative Conference recommendation dealt with "[a]ny oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive or procedural issue in a pending on-the-record proceeding in which he is interested." This approach was adopted as a compromise version of a legislative proposal, which would have permitted ex parte communications of "general significance." In the Committee's view this would have been too lenient, but on the other hand a flat ban might serve to "foreclose the agency from sources of necessary information." The language from the Conference recommendation quoted above was designed to reach situations in which the communicator evidenced an "attempted pattern of influence."[19] In the present ABA draft, the existence and scope of such an exception would essentially turn on the interpretation of the requirement that ex parte communications be "relevant to the merits" of the proceeding. As the discussion in part II B above indicates, the drafters have expressed the intent to create a broad exception for "general" information. On the other hand, the comments to the January draft also indicate that the relevance requirement "is intended to cover a broader range of communications than 'fact in issue' . . . *e.g.*, legal issues going to the merit[s] of the proceeding." It may be argued that more precision in the text of the legislation would be desirable in this area. Several agencies now provide an exception for "general information" explicitly in their rules;[20] conversely, some make the ex parte prohibitions applicable not only to communications relevant to the particular proceeding, but also to those involving "a factually related proceeding."[21]

Among the agencies currently prohibiting ex parte contacts, there is a substantial divergence with respect to whether the prohibitions apply only to "substantive issues"[22] or "the merits"[23] of a proceeding, or should also encompass "procedural" matters.[24] The basic argument for exempting communications relating to procedural points is their de minimis impact; however, the line between substance and procedure is often quite thin, and procedural decisions can easily be outcome-determinative.

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[17] Pillsbury Co. v. FTC, 354 F. 2d 952 (5th Cir. 1966).
[18] *Id.*, at 963.
[19] 1962 ACUS at 181.
[20] *E.g.*, 17 CFR § 200.11(g)(5) (SEC); 10 CFR § 2.780(d)(2) (AEC); 49 CFR, Part 1100, App. C, § 3(c)(2) (ICC).
[21] *E.g.*, 16 CFR § 4.7(a) (FTC).
[22] *E.g.*, 10 CFR § 2.780(a) (AEC—"any substantive matter at issue").
[23] *E.g.*, 16 CFR § 4.7(a) (FTC).
[24] *E.g.*, 39 CFR § 102.126 (NLRB—communications "concerning the disposition on the merits of the substantive and procedural issues in the proceeding").

In addition to the major categories of exceptions to the ex parte provisions described above, existing agency rules also exempt a variety of miscellaneous communications:

(1) "Any communication made by or to the General Counsel or his staff concerning judicial review of any matter which has been decided by the Commission." [FCC—47 CFR § 1.1227(c)]

(2) "Any communication from an agency of the Federal Government involving classified security information." [FCC—47 CFR § 1.1227(d)]

(3) "Oral or written communications proposing settlement or an agreement for disposition of any or all issues in the proceeding." [NLRB—29 CFR § 102.130(d)]

(4) Ex parte prohibition not applicable "to the usual informal communications between counsel, including discussions to effectuate a stipulation, or to settlement discussion between parties and the Board's enforcement staff, or investigative activities, or to other communications which are deemed proper in proceedings in the Federal courts." [CAB—14 CFR § 300.2(a)]

(5) "Any oral communication made openly or on the record at a scheduled hearing session in a particular proceeding, regardless of whether all the participants are present." [SEC—17 CFR § 200.111(g)(4)]

(6) "[Co]mmunications requested by the Commission concerning . . . [i]ts proprietary functions. . . ." [AEC—10 CFR § 2.780(d)]

Obviously, some of these exceptions deal with communications that are not normally considered ex parte contracts, while others arise from a particular agency function and thus would not be generally applicable.

In addition to proscribing the making of ex parte communications, the 1962 Conference recommendation urged agencies to "prohibit any person from soliciting any other person to make an ex parte communication which the solicitor has reason to know is unauthorized." The ABA proposal does provide that no interested person shall "cause to be made" a prohibited ex parte communication, but the Conference recommendation seems broader insofar as it appears to encompass an unsuccessful attempt to induce a third party to violate the rule.

Another form of indirect communication which is dealt with in a few agencies' rules is the mass media propagandizing effort. The ICC's ex parte rules specifically except from the general prohibition "[a]ny communication by means of any news medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings" [49 CFR Part 1100, App. C, § 3(c)(3)]. In contrast, the CAB's rules provide:

It is improper that . . . [any interested] person or any member of the Board's staff or an examiner, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case. [14 CFR § 300.2(d).]

Obviously, the latter approach can create a number of First Amendment problems, and it would seem inadvisable to include it in general legislation.

D. Communicators Subject to the Prohibition

The ABA proposal would apply to "interested persons" in agency proceedings. According to the drafters' comments, this phrase "should be broadly construed to include not only parties, but competitors, public officials and others who may have an interest greater than that of the general public in the proceeding." The 1962 Administrative Conference recommendation was more detailed in this respect, providing that agency rules "should prohibit any person who is a party to, or an agent of a party to, or who intercedes in" on-the-record proceedings from making ex parte contacts. "Parties" were defined to include not only persons or organizations named in the proceeding, but also those who were seeking admission as a party. "Interceders" included any non-party outsider or organization "who volunteers a communication which he may be expected to know may advance or adversely affect the interests of a particular party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent."

The intent of this latter prohibition is described as follows in the supporting report:

[E]x parte communications would not be prohibited if they came from public-spirited citizens and organizations seeking to make known their position on some substantive issue and without any reason to know which party to the proceeding would be helped or hurt by their efforts. . . .

Congressmen, state and local government officials and government personnel in other agencies would ordinarily be in the class of interceders.[25]

Recent developments in standing and public interest intervention may have undermined the validity of this distinction somewhat; it seems fair to conclude that some of the larger environmental and consumer groups will be as aware of the implications of an ex parte contact, and as able to exert political leverage, as other "interceders."

Most of the major regulatory agencies seem to have followed the Administrative Conference recommendation by prohibiting ex parte contacts from parties, agents or interceders.[26] A few agencies have broader prohibitions; for example, the FCC defines "interested person" to include not only parties, but also "any other person who might be aggrieved or adversely affected by the outcome" of the proceeding, and their agents.[27] "Interested persons" are prohibited from making or attempting to make written ex parte presentations, and all persons outside the Commission are prohibited from making oral ex parte contacts.[28] On the other hand, the Atomic Energy Commission seems to have a narrower rule: it applies only to "any applicant for or holder of an AEC license or permit, or any officer, employee, representative or other person directly or indirectly acting in behalf thereof,"[29] and thus might be construed to permit ex parte contacts by parties opposing the grant of a license.[30]

Judicial decisions in this area are rare, but one case, *Jacksonville Broadcasting Corp v. FCC*,[31] provides some illumination. There, an FCC broadcast license proceeding had been tainted by ex parte representations on behalf of two competing applicants. The Commission found that the principals of Applicant A were responsible for the ex parte contacts on its behalf, but that the principals of Applicant B had not been responsible for the ex parte communications favoring it; accordingly, the Commission disqualified Applicant A, but not Applicant B. This conclusion was upheld by the Court of Appeals, over a strong dissent by Judge (now Chief Justice) Burger which forcefully argues the difficulties of implementing a standard based on the principals' intent to influence the decision.

E. Agency Personnel and Conduct Covered

The ABA draft legislation, the 1962 Conference recommendation, and existing agency rules are in substantial accord on the proposition that the agency personnel who should be shielded from ex parte contacts include the agency heads, their personal staffs, hearing examiners, and all agency personnel who may be involved in the decision-making process for a given proceeding. Many agencies' rules describe the "decisional personnel" in detail, either through general rules[32] or for distinct types of proceedings.[33]

There is more variation with respect to rules governing ex parte communications from agency personnel to outsiders. The ABA draft legislation provides that no decisional employee "shall make or cause to be made to an interested person an ex parte communication relevant to the proceeding." The 1962 Conference recommendation is similar, but also prohibits decisional personnel from making ex parte communications to "any other person who he has reason to know may transmit the communication to a party or a party's agent," which may go somewhat further than the "cause to be made" language in the ABA proposal. In addition, the Conference recommendation prevents agency decision-makers from "requesting or entertaining any unauthorized ex parte communication." Some agency rules are silent on the point;[34] others deal only with decisional personnel who "request or entertain" ex parte communications;[35] and a few expressly prohibit decisional personnel from communicating ex parte.[36] In the interests of evenhandedness and maintaining the appearance

[25] 1962 ACUS at 185.

[26] *E.g.*, 18 CFR § 1.4(d)(1) (FPC); 46 CFR § 502.170(b)(1) (FMC); 29 CFR § 102.127 (NLRB); 17 CFR § 200.111(g)(6) (SEC).

[27] 47 CFR § 1.1201(e).

[28] 47 CFR § 1.1221. *Cf.* 16 CFR § 4.7(a) (FTC): "In an adjudicative proceeding, no person not employed by the Commission . . . shall communicate ex parte. . . ."

[29] 10 CFR § 2.780(a).

[30] However, the same section provides that AEC decisional personnel will not "request or entertain" ex parte communications, and this provision may be broad enough to encompass the problem mentioned in the text.

[31] 348 F. 2d 75 (D.C. Cir. 1965), *cert. denied*, 86 S. Ct. 186.

[32] *E.g.*, 47 CFR § 1.1205 (FCC).

[33] *E.g.*, 29 CFR § 102.128 (NLRB).

[34] *E.g.*, 18 CFR §§ 1.1201–1.1251 (FCC).

[35] *E.g.*, 18 CFR § 1.4(d)(1) (FPC).

[36] *E.g.*, 16 CFR § 4.7(b) (FTC).

of fairness, it would seem desirable to make the prohibitions equally applicable to agency personnel. On the other hand, it might be argued that doctrines concerning bias and prejudgment are sufficient to deal with this problem.

F. Time Prohibition Attaches

Both the ABA legislation and the 1962 Conference recommendation take the general approach that the ex parte rules should be in effect at the time a notice of hearing issues, and that agencies should retain discretion to prescribe an earlier time at which the prohibitions will attach. Some agency rules do go further; for example, the CAB prohibits ex parte contacts "from the time of filing an application or petition which can be granted by the Board only after notice and hearing or, in [the] case of other matters, from the time of notice by the Board that such matters shall be determined after notice and hearing and upon a record." [37] To prevent this provision from restricting the flow of information too severely; the Board's rules also state that ex parte contacts do not include "informal complaints filed with the Board or . . . communications with staff members of the Board who are in the course of preparing a case, or for the purpose of determining whether a complaint shall be docketed . . . ." [38]

It is conceivable that a flat rule making the ex parte provisions applicable at the time notice of hearing issues could cause difficulties in some protracted proceedings. For example, in AEC reactor licensing the notice of hearing does not serve primarily as a means for scheduling the hearing, but rather marks the initiation of formal proceedings and the first opportunity for interested parties to seek leave to intervene and undertake discovery. Under present AEC practice, this notice of hearing will issue several months before hearings actually commence, and well before the staff's review of a license application is completed. Recent proposals would cause this stage of the proceeding to begin even earlier, so that a notice of hearing would issue shortly after the filing of a license application; thus, the ex parte provisions could be in force for a period of years. In the AEC context, this would probably cause few problems, since the decisional personnel are already separated from the reviewing staff, and the Commission's ex parte rules are already applicable from the time a notice of hearing is issued.[39] It is, of course, possible that the requirement would be more onerous in the context of other agency proceedings, and the drafters' comments on the ABA proposal indicate that some members favored a provision which would leave the timing problem wholly to agency resolution.

G. Sanctions and Remedies for Prohibited Ex Parte Communications

One of the more difficult problems in designing rules to govern ex parte communications is providing appropriate sanctions and remedies for violations. Commentaries and agency practices vary considerably in their approaches to this question.

1. Disclosure

One common remedial device is a provision requiring that improper ex parte communications be placed on the public record. The ABA draft legislation takes this approach for both written and oral ex parte communications, requiring with respect to oral ex parte contacts that the decisional employee receiving unauthorized information prepare a memorandum "stating the substance" of the communication. The 1962 Conference recommendation also provided for disclosure of oral ex parte communications, but the supporting report noted two arguments against such a requirement: "(1) there is risk of misquotation in the act of putting into writing what was said orally; and (2) the requirement will impose an intolerable burden upon agency members and other decision-making personnel." [40] The report found the first argument insubstantial, and responded to the second by framing the recommendation so that it applied only to oral communications which the recipient knew to be improper. The ABA draft legislation does not contain such a scienter requirement. The Conference recommendation also had a provision, not included in the draft legislation, under which agency personnel receiving communications which did not technically violate the ex parte rules could place them in the public record if they felt that this would serve the interests of fairness. However, this seems a more appropriate subject for agency rulemaking than for legislation.

[37] 14 CFR § 300.2.
[38] 14 CFR § 300.2(a).
[39] 10 CFR § 2.780(a).
[40] 1962 ACUS at 190.

The ABA proposal would also allow parties to the proceeding to place on the public record responses to material contained in ex parte communications. The Conference recommendation was similar, allowing parties "an opportunity to rebut, on the record, any facts or contentions contained in an unauthorized ex parte communication," and a number of agencies explicitly provide for this kind of relief in their rules.[41]

Another remedial disclosure measure contained in the 1962 Conference Recommendation but not in the ABA proposal is a requirement that the Secretary of an agency forward copies of unauthorized ex parte communications to the parties in the proceeding to which they relate. This rule was qualified by an exception for certain ex parte communications from non-parties: if the material received was voluminous, or only marginally relevant, or the parties were so numerous that supplying copies would be burdensome, the Secretary could simply give notice that the communication had been received. Some agencies have copied this aspect of the Conference recommendation in its entirety;[42] others provide that the communication must be served on all parties.[43] In addition, a few agency ex parte rules specifically provide that even though ex parte communications are placed in the public record, they will not be considered in the agency's decisional process.[44] The drafters' comments in the ABA proposal indicate some doubt on this point, and suggest that "[t]he Council may wish to provide for actual notice to all parties at the expense of the violator."

2. Disbarment or Discipline

The 1962 Conference recommendation urged agencies to include in their ex parte rules provisions allowing the agency to "censure, or suspend or revoke the privilege to practice before the agency" of any person who makes or solicits an unauthorized ex parte communication, and to "censure, suspend or dismiss" or otherwise discipline agency employees who violated the rules. Most agencies have either specific ex parte rules along these lines,[45] or general rules governing practice before the agency and employee conduct which would be broad enough to deal with the problem.[46]

3. Denial of a Benefit

The Administrative Conference recommendation concluded that, "[t]o the extent permitted by applicable law, the agency code should provide that any relief, benefit or license sought by a party to a proceeding may be denied if the party, or an agent of the party, makes, or solicits the making of, an unauthorized ex parte communication." The January draft of the ABA proposal would have conferred upon the agencies broad authority to "require the person committing the violation to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected by virtue of such violation." The present draft legislation limits that authority so that the sanction may be invoked only "to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency." The current drafters' comments suggest the kind of interest-balancing that is contemplated under this standard by offering an example: "a claimant for an old age benefit might not have his claim denied for making a prohibited ex parte communication if the agency should determine that the public policy in making such a benefit available outweighed the wrong committed by the making of such a communication." The comments also note that where such countervailing policy considerations are absent, "the American Bar Association is strongly of the opinion that sanctions should be available. . . ."

4. Criminal Sanctions

The drafters of the ABA legislation provided no criminal penalties for violation since it was thought that such penalties would be used so rarely that they might prove an ineffective deterrent. In addition, it was believed that disclosure is the most effective remedy for ex parte communications, and that the possibility of a criminal prosecution against the communicator might deter agency personnel from revealing that they had received a prohibited com-

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[41] *E.g.*, 17 CFR § 200.113 (SEC).
[42] *E.g.* 17 CFR § 200.112 (SEC).
[43] *E.g.*, 10 CFR § 2.780(c) (AEC).
[44] *E.g.*, 14 CFR § 300.2(b) (CAB); 46 CFR § 502.170(b)(4) (FMC).
[45] *E.g.*, 49 CFR § 1100, App. A, Canon 4; App. C, §§ 5, 7 (ICC).
[46] *E.g.*, 7 CFR § 1.26(b) (Dept. of Agric.).

munication. However, as one commentator has noted, "legislative proposals have frequently attempted to provide the incentive for the government employee by providing that failure to give the requisite publicity constitutes a crime of equal magnitude" as making the illicit communication.[47]

Two further arguments can be made against criminal penalties: provisions for agency disbarment and employee discipline will generally be sufficient punishment to deal with instances in which the communicator is grossly culpable; and the difficulty of defining prohibited ex parte contacts suggests that the statute may be vulnerable to challenge on vagueness grounds.

5. *New Hearings*

Neither the ABA statute nor the Administrative Conference recommendation deals with the question of whether new hearings must be held if ex parte violations are discovered after the close of proceedings. The court decisions seem to indicate that the proceedings must be held *de novo* in some circumstances. For example, in *Jacksonville Broadcasting*, the court rejected the FCC's attempt to award the license to the non-violating applicant by adopting its original decision *nunc pro tunc*, reasoning that "[t]he original grant . . . was invalid by reason of these [ex parte] influences."[48] Similarly, when the *Sangamon Valley* case returned to the Court of Appeals after Commission consideration of the ex parte problems, the D.C. Circuit held that the Commission had erred by making its decision on the basis of the original record which, although "somewhat supplemented," had been compiled four years previously; instead, the court concluded that a "fresh start" was necessary, and remanded for further proceedings.[49] On the other hand, the same court has upheld an agency determination the ex parte communications affecting a prior decision were non-prejudicial.[50] Thus, there are no very clear benchmarks in the case law for determining when new hearings are necessary; rather, the answer seems to turn on the facts and circumstances of the particular case.

III. CONCLUSIONS

Once it is determined that the APA should be amended to prohibit ex parte communications, the problems which remain generally raise the question of how far the legislation should go in prescribing details of the scope and operation of the prohibitions. If the ex parte statute were applicable only to the independent regulatory agencies, it would be easier to prescribe the details with confidence; however, it seems likely that unforeseen problems will occur if detailed uniform rules are established for the more diverse—and often more "politicized"—proceedings conducted by the executive departments. This suggests that it may be preferable to phrase the statute in broad terms so that the individual agencies will have substantial discretion to adapt the statute to their own needs. It also suggests that the Conference may have a role to play, beyond commenting on the legislation, in providing updated guidelines for the agencies to use in exercising the discretion remaining to them in this area.

Enclosures.

Appendix A

ABA Resolution and Draft Legislation on Ex Parte Contacts

RESOLUTION NO. 4

Prohibiting *ex parte* communications between agency members and parties or other interested persons outside the agency on any "fact in issue" in the decision of an adjudicatory or formal rulemaking proceeding.

[Note: The following draft incorporates changes made subsequent to issuance of the Report of the Special Committee on Revision of the APA in January 1972, and is current as of August 1, 1972. Material deleted from the prior draft is bracketed, and new material is underlined.]

* * * * * * *

[1. Section 557 of 5 U.S.C. is amended by adding a new subsection designated (d) to read as follows:] *ABA Recommendation: Amend 5 U.S.C. 557 to add a new subsection as follows:*

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[47] Peck, supra note 8, at 271.

[48] Jacksonville Broadcasting Corp. v. FCC, 348 F. 2d 78, 80 (D.C. Cir. 1965), *cert. denied*, 86 S. Ct. 186.

[49] Sangamon Valley Television Corp. v. FCC, 294 R. 2d 742, 743 (D.C. Cir. 1961).

[50] United Airlines, Inc. v. CAB, 309 F. 2d 238 (D.C. Cir. 1962).

(d) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law,

(1) No interested person shall make or cause to be made to any member of the body comprising the agency, hearing examiner, or employee who is or may be involved in the decisional process of said proceeding, an ex parte communication relevant to *the merits* of the proceeding.

(2) No member of the body comprising the agency, hearing examiner, or employee who is or may be involved in the decisional process of said proceeding, shall make or cause to be made to an interested person an ex parte communication relevant to *the merits of* the proceeding.

(3) A member of the body comprising the agency, hearing examiner or employee [presiding at the hearing] *who is or may be involved in the decisional process of said proceeding* who receives a communication in violation of this subsection, shall place on the public record of the proceeding:

(A) Written information submitted in violation of this subsection;

(B) Memoranda stating the substance of all oral communications submitted in violation of this subsection;

(C) Responses submitted to the materials described in subparagraphs (A) and (B) of this subsection.

(4) Upon receipt of a communication in violation of this subsection *from a party or which was caused to be made by a party,* the agency, hearing examiner or employee presiding at the hearing may, [in its discretion,] *to the extent consistent with the interests of justice and the policy of the underlying statutes,* require the person *or party* [committing the violation] to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected by virtue of such violation.

(5) The prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they apply later than the time at which a proceeding is [publicly] noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case said prohibitions shall apply at the time of his acquisition of such knowledge.

[2. Section 554 of 5 U.S.C. is amended by deleting from subsection (d) the following:] *In addition, the following related amendments to: 5 U.S.C. 554(d), by deleting clause (1) which provides:*

"(1) Consult with a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or (2)"

* * * * * * *

[(C) to the agency or a member or members of the body comprising the agency."[1]]

[3. Section 551, 5 U.S.C. is amended by adding the following subsection:] *5 U.S.C. 551, by adding the following subsection:*

(14) "Ex parte communication" means an oral or written communication not on the record [about] *with respect to* which reasonable prior notice to all parties is not given.

[4. Subsection (d) of Section 556 of 5 U.S.C. is amended as follows:] *5 U.S.C. 556(d), which would be amended to read as follows:*

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, [in its discretion,] *to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency,* consider a violation of Section 557(d) of this title sufficient grounds for a decision adverse to a party [making or causing to be made the violation.] *who has committed such violation or caused such violation to occur.* A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced

[1] These deletions are redundant if the proposed amendment pertaining to Resolution No. 3 is adopted.

thereby, adopt procedures for the submission of all or part of the evidence in written form.

EDITOR'S NOTE.—Appendix B is printed on p. 255.)

Appendix C

GUIDE TO EX PARTE RULES OF SELECTED AGENCIES

INTRODUCTORY NOTE

In conducting this study, the regulations governing operations of 16 agencies and departments were quickly surveyed in order to obtain some indication of the incidence and content of rules governing ex parte contacts. Because ex parte rules appear under a number of different headings and in varying locations among other agency rules, it may be that some relevant rules were overlooked. In addition, the following compilation does not include general provisions prescribing "judicial standards of practice" or "ethical standards applicable in the courts of the United States," which could be interpreted as banning ex parte contacts.

The following abbreviations are used in this Appendix:
XPC—ex parte contact.
CE—Code or Canon of Ethics.
X-ref—cross-reference.

* * * * * * *

Agency	Citation	Description
1. ICC	49 CFR § 1100.4(e)	Prohibits XPC.
	49 CFR, Part 1100, App. A, Canons 4, 8.	CE providing that XPC is unethical.
	49 CFR, Part 100, App. C	Defines XPC and prescribes penalties.
2. FCC	47 U.S.C. § 409(c)-(d)	Prohibits XPC, supersedes APA.
	47 CFR §§ 1.1201-1.1251	Defines XPC and prescribes penalties.
3. FTC	16 CFR § 4.7	Prohibits XPC.
4. PFC	18 CFR § 1.4(d)	Do.
5. FMC	46 CFR § 502.170	Do.
6. NLRB	29 CFR §§ 102.126-102.134	Do.
7. CAB	14 CFR § 300.2	Do.
8. AEC	10 CFR § 0.735-48	X-ref to separation of functions and XPC rules.
	10 CFR § 2.780	Prohibits XPC.
9. SEC	17 CFR § 200.59	CE on relationship with persons subject to regulation.
	17 CFR § 200.62	CE providing that XPC is unethical in adjudications.
	17 CFR § 200.110-200.114	Prohibits XPC.
10. Department of Agriculture:		
A. Proceedings regarding discrimination under the Civil Rights Act of 1964.	7 CFR § 15.68(a)	Do.
B. Proceedings under Perishable Agricultural Commodities Act.	7 CFR § 47.15(d)(3)(i)	Examiner may bar counsel from proceeding for unethical conduct.
C. Rules of Practice for Proceedings to Formulate a Marketing Agreement or Order.	7 CFR § 900.16	Prohibits XPC.
	7 CFR § 900.8(b)(2)	Examiner may bar counsel from proceeding for unethical conduct.
11. Railroad Retirement Board	20 CFR Pt. 250	No rule found.
12. Department of Interior—Bureau of Land Management.	43 CFR §§ 1812.1-2, 1840.0-9(c), 1850.0-9.	Prohibit ex parte inquiries to Bureau employees on pending matters.
13. DOD—Armed Services Board of Contract Appeals.	32 CFR § 30.1	No rule found.
14. HEW—Social Security Administration disability determinations.	20 CFR § 404.917-404.959	Do.
15. Civil Service Commission employee adverse action determinations.	5 CFR Parts 752, 771, 772	Do.
16. Patent Office	37 CFR § 1.133(a)	Interviews with patent examiners must be held only in their offices during office hours.
	37 CFR § 1.212	On declaration of an interference, ex parte prosecution of application suspended.
	37 CFR § 1.247	All papers filed in interference proceedings must be served on other parties, with exceptions.

Administrative Conference Recommendation 71-6; Public Participation in Administrative Hearings

(Adopted Dec. 7, 1971)

Individuals and citizen organizations, often representing those without a direct economic or personal stake in the outcome, are increasingly seeking to participate in administrative hearings. Their concern is to protect interests and present views not otherwise adequately represented in the proceedings. Agencies are exposed to the views of their staffs, whose positions necessarily blend a number of interests, and to the views of those whose immediate stake is so great that they are willing to undertake the cost of vigorous presentation of their private interests. The opportunity of citizen groups to intervene as parties in trial-type proceedings where their views are unrepresented, formerly challenged on doctrinal grounds that they lacked a sufficient interest to have "standing," has been greatly broadened by statutes, administrative actions, and judicial decisions. Agency decisionmaking benefits from the additional perspectives provided by informed public participation. However, the scope and manner of public participation desirable in agency hearings has not been delineated. In order that agencies may effectively exercise their powers and duties in the public interest, public participation in agency proceedings should neither frustrate an agency's control of the allocation of its resources nor unduly complicate and delay its proceedings. Consequently, each agency has a prime responsibility to reexamine its rules and practices to make public participation meaningful and effective without impairing the agency's performance of its statutory obligations.

Recommendation

In connection with agency proceedings where the agency's decision is preceded by notice and an opportunity to be heard or otherwise to participate—namely, notice-and-comment rulemaking, on-the-record rulemaking and adjudication—each agency should, to the fullest extent appropriate in the light of its capabilities and responsibilities, apply the following criteria in determining the scope of public participation and adopt the following methods for facilitating that participation:

A. INTERVENTION OR OTHER PARTICIPATION

Agency rules should clearly indicate that persons whose interests or views are relevant and are not otherwise represented should be allowed to participate in agency proceedings whether or not they have a direct economic or personal interest. Whatever the form of the proceeding, reasonable limits should be imposed on who may participate in order *(a)* to limit the presentation of redundant evidence, *(b)* to impose reasonable restrictions on interrogation and argument, and *(c)* to prevent avoidable delay. In every determination of whether participation is appropriate, the agency should also determine whether the prospective participant's interests and views are otherwise represented and the effect of participation on the interests of existing parties.

1. *Notice-and-comment rulemaking proceedings.*—Agencies engaging in notice-and-comment rulemaking should, to the extent feasible: *(a)* make available documents, materials and public submissions upon which the proposed rule is based; *(b)* invite the presentation of all views so that the agency may be apprised of any relevant consideration before formulating policy; *(c)* develop effective means of providing notice to the affected public and to groups likely to possess useful information; and *(d)* if there is a hearing, allocate time fairly among all participants.

2. *On-the-record rulemaking and adjudicative hearings.*—Public participation should be freely allowed in trial-type proceedings where the agency action is likely to affect the interests asserted by the participants. Intervention or other participation in enforcement or license revocation proceedings should be permitted when a significant objective of the adjudication is to develop and test a new policy or remedy in a precise factual setting or when the prospective intervener is a de facto charging party. Public participation in enforcement proceedings, license revocations or other adjudications where the issue is whether the charged respondent has violated a settled law or policy should be permitted only after close scrutiny of the effect of intervention or other participation on existing parties.

B. SELECTION OF INTERVENERS

Intervention by a particular group or person as a party in a trial-type proceeding should depend upon a balancing of several factors, including:

(a) The nature of the contested issues;

(b) The prospective intervener's precise interest in the subject matter or possible outcome of the proceeding;

(c) The adequacy of representation provided by the existing parties to the proceeding, including whether these other parties will represent the prospective intervener's interest and present its views, and the availability of other means (*e.g.*, presentation of views or argument as an *amicus curiae*) to protect its interest;

(d) The ability of the prospective intervener to present relevant evidence and argument; and

(e) The effect of intervention on the agency's implementation of its statutory mandate.

C. SCOPE OF PARTICIPATION

The scope of an intervener's participation in a trial-type proceeding must assure it a fair opportunity to present pertinent information and to provide the agency a sound basis for decision, without rendering the hearing unmanageable. The nature of the issues, the intervener's interests, its ability to present relevant evidence and argument, and the number, interests and capacities of the other parties should determine the dimensions of that participation. In general, a public intervener should not be allowed to determine the broad outline of the proceeding, such as the scope or compass of the issues. A public intervener generally should be allowed all the rights of any other party including the right to be represented by counsel, participate in pre-hearing conferences, obtain discovery, stipulate facts, present and cross-examine witnesses, make oral and written argument, and participate in settlement negotiations. Where the intervenor focuses on only one aspect of the proceeding or does not seek to controvert adjudicative facts, consideration should be given to limiting its participation to particular issues, written evidence, argument or the like. Agencies should be cautious in advance of actual experience in anticipating that intervention will cause undue delays.

D. COST OF PARTICIPATION

The cost of participation in trial-type proceedings can render the opportunity to participate meaningless. Agencies have an obligation to minimize transcript charges, to avoid unnecessary filing requirements; and to provide assistance in making information available; and they should experiment with allowing access to their staff experts as advisers and witnesses in appropriate cases.

1. *Filing and distribution requirements.*—Filing and distribution requirements (*e.g.*, multiple copy rules) should be avoided except as necessary and provision should be made for a waiver where the requirement is burdensome. Existing filing and distribution requirements should be re-examined. Agencies should make every effort to provide duplication facilities at a minimum cost.

2. *Transcripts.* The cost of recording formal proceedings should be borne by the agencies, not by the parties or other participants to the proceeding (except to the extent that a person requests expedited delivery). Existing contracts and arrangements should be revised to provide for the availability, either through a reporting service or the agency itself, of transcripts at a minimum charge reflecting only the cost of reproducting copies of the agency's transcript. Transcripts should be available without charge to indigent participants to the extent necessary for the effective representation of their interests. Where the aggregate of these transcript costs imposes a significant financial burden on the agency, the agency should seek and Congress should provide the necessary additional appropriation.

3. *Availability of information and experts.*—An agency should provide assistance to participants in proceedings before it or other agency, provided that the agency's resources will not be seriously burdened or its operations impaired. Assistance should include advise and help in obtaining information from the agency's files. Each agency should experiment with allowing access to agency experts and making available experts whose testimony would be helpful in another agency's proceeding.

E. NOTICE

Each agency should utilize such methods as may be feasible, in addition to the Federal Register's official public notice, to inform the public and citizen groups about proceedings (including significant applications and petitions) where their participation is appropriate. Among the techniques which should be considered are factual press releases written in lay language, public service announcements on radio and television, direct mailings and advertisements where the affected public is located, and express invitations to groups which are likely to be interested in and able to represent otherwise unrepresented interests and views. The initial notice should be as far in advance of hearing as possble in order to allow affected groups an opportunity to prepare. Each agency should consider publication of a monthly bulletin,[3] listing:

(a) The name and docket number or other identification of any scheduled proceeding in which public intervention may be appropriate;

(b) A brief summary of the purpose of the proceeding;

(c) The date, time and place of the hearing; and

(d) The name of the agency, and the name and address of the person to contact if participation or further information is sought.

Statement of Max D. Paglin, Chairman of the Committee on Agency Organization and Procedure; joined by Arthur B. Focke, George A. Graham, and Henry N. Williams, Committee Members, and by John A. Buggs, Arthur E. Hess, and David F. Sive

The Conference has taken constructive action to assist agencies in the enhancement of their decisionmaking process through this Recommendation, which is designed to assure meaningful and effective participation in such process by citizens and public intervener groups.

The one area of the recommendation, as put before the Conference by the Committee on Agency Organization and Procedure, which was not adopted was the subsection dealing with litigation expenses in section D entitled "Cost of Participation". It was the Committee's view, and still is our view that, unless aided by other resources, the costs of meeting necessary legal expenses in trial-type proceedings could constitute insuperable barriers to effective participation by citizens and public intervener groups. The committee recommendations was framed in terms of encouraging agencies to experiment, in appropriate cases and when authorized by law, in the use of various suggested alternative techniques (recognized in other administrative and judicial proceedings, as well as in pending consumer legislation). At the same time, the recommendation's language recognized the need for, and urged the agencies to seek, necessary legislation and/or additional appropriations where required to accomplish the objectives set forth in the recommendation.

This is a critical problem which will have to be resolved if public participation is to be an aid and not a hinderance to agency performance, and if, in the words of the then Circuit Judge Warran Burger in the second *United Church of Christ* case, 425 F. 2d 543, 548-549 (D.C. Cir., 1969), the selected "Public Intervenors who were performing a public service" are to be accorded the status of "an ally" and not "an opponent" by the agencies. As experience is gained in the future in the area of broadened public participation, we urge that further attention be given by the Conference, the agencies and the Congress to implementing such assistance by appropriate means and methods.

Statement of John A. Buggs

I deeply regret that subsection 4 or part D or the recommendation concerning public participation in administrative hearings was rejected by the Administrative Conference. It is unfortunate that the Conference did not recognize that this section was the most meaningful part of Recommendation 28. Agency proceedings are often protracted and expensive for participants. Private interests, such as businesses, are able to afford costs of participation far better than consumers or other public interest groups, which cannot pass on the costs of participation. Having recognized the right of these groups to take part in administrative proceedings, it is unfair to place a means test upon their effective participation. It is unrealistic to believe that public interest groups can regularly participate in administrative proceedings without financial assistance. Subsection 4 suggested reasonable ways for agencies to provide,

[3] This recommendation does not supersede Recommendation 4, Consumer Bulletin.

on an experimental basis, such assistance. The Conference should have accepted the fact that changes in governmental practice to increase fairness may require expenditure of public funds.

Statement of Kenneth Culp Davis

Recommendation 28, by its terms, is limited at many points to adjudication and rulemaking, and it is for the most part further limited to on-the-record hearing and notice-and-comment rulemaking. My opinion is that the agencies in implementing Recommendation 28 should often go beyond these limitations in allowing citizen groups to exert their influence on administrative action (or inaction).

For instance, intervention by citizen groups probably should often be permitted in investigatory hearings, such as those of the Civil Rights Commission considered in *Hannah* v. *Larche*, 363 U.S. 420 (1960). And such groups should often be allowed to intervene in abridged adjudicative hearings that are not deemed "on-the-record," as well as in conference-type and speech-making hearings, whether or not adjudicative.

I think the role of citizen groups should neither be confined to adjudication and rulemaking nor be confined to "hearings" and "proceedings." The vital interests of such groups extend to all kinds of administrative action (or inaction), including determinations of whether or not to investigate, to initiate, to prosecute, to contract, to advise, to threaten, to conceal, to publicize, and to supervise. Such provisions of Recommendation 28 as those about notice, availability of information, and access to agency experts may be especially important for informal action (or inaction) involving neither adjudication nor rulemaking.

Statement of Malcolm S. Mason

The Conference has adopted a modest and conservative recommendation encouraging intervention and other forms of participation by citizen groups in administrative proceedings with a due balancing of factors of convenience. One of these balancing factors stressed by the recommendation is whether prior parties provide adequate representation of the prospective intervener's interests and views. This will push in the direction of limiting intervention to a single representative of a particular interest, and thus will appear to give credentials to that group as "the" representative of the poor or the consumer or the public or other citizen interest however characterized. This danger was pointed out on the floor of the Conference by Professor Auerbach. It was part of my objection to the concept of "a" people's counsel for the poor, because the poor are many and different and must be able to speak with many voices, as I noted in my separate statement with respect to Recommendation No. 5 on representation of the poor (1968). I believe that the recommendation should have explicitly taken account of this danger.

Apart from this, I think it unfortunate that the Conference has failed to urge active exploration and experiment with available methods for assisting groups in meeting the necessary expenses of citizen participation in trial type proceedings. These methods need not be costly. Until we have experimented with them we will not know what the costs are and will not be able to balance rationally costs against benefits. In some instances it will prove more costly not to assist such groups than to assist them, for the presence of representative groups may save the agency from serious substantive error and from serious delay. No agency, however conscientious, has a monopoly of wisdom. The wisest agencies are those that encourage others to inform them and do not pretend to speak for the public interest with the only qualified voice.

Statement of Harold L. Russell joined by Walter Gelhorn

Paragraph D–3 of Recommendation 28 was adopted by a 27–24 vote of the members of the Conference. Being one of the 24, I wish the record to reflect my views. The basic purpose of Recommendation 28 is to encourage greater participation in agency proceedings by intervenors. Paragraph D–3 would subvert that purpose. Instead of encouraging the development of evidence which the intervenor may be uniquely able to develop, it would turn the intervenor to the agency's files and experts and to experts in other agencies for the development of evidence already available to the agency. Moreover, it is not believed that agencies are staffed, or should be staffed, to undertake such work for intervenors.

CENTER FOR GOVERNMENTAL RESPONSIBILITY,
UNIVERSITY OF FLORIDA,
Gainesville, Fla., October 30, 1974.

Hon. LAWTON CHILES,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR CHILES: Enclosed is a preliminary summary of a project our Center has begun on the effectiveness of the Florida sunshine law. Our final report will be completed in January. Since some of the findings of the study demonstrate the problems and successes of open meeting legislation, we thought the information might be of use to the Committee in considering S. 260.

As you know, we have been involved in a larger, non-partisan study of the issue of open government for over a year and plan to continue our investigations in the area. We are looking forward to the results of these hearings, which I know will be helpful in continuing to clarify the issues.

Best wishes,

JON L. MILLS,
Executive Director.

DESCRIPTION OF THE "SUNSHINE" PROJECT

The Center for Governmental Responsibility has been conducting an ongoing study of the Freedom of Information Act, open meetings acts and executive privilege. As part of that study, a survey of the operation of Florida's open meeting laws has been made. During September, a three-student task force, consisting of Anne Conway, David Holbrook, and George McClure, traveled to various parts of the state including Miami, Tampa, Jacksonville, Orlando and Tallahassee, interviewing state and local officials and members of the press who have operated under Florida's sunshine law since 1967.

The preliminary finds revealed difficulties in the statute, pinpointed misconception, and demonstrated strengths and weaknesses. A final report of the results of the study will be completed in January.

OVERVIEW OF OPEN MEETING LEGISLATION

"Open meeting" laws permit the public to observe first hand the deliberations of state and local governmental bodies. The legislation is based on the principle that the people have the "right to know." *H. Cross, The People's Right to Know*, 180-82 (1952).

The rationale for open meetings is that public knowledge of the considerations upon which governmental action is based is essential to the democratic process. "The right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right." 6 WRITINGS OF JAMES MADISON 398 (1906).

At present 35 states have open meeting laws applicable to a broad range of state, county and city governmental bodies both elective and appointive. The variety of the character of the statutes in both drafted language and judicial interpretation makes it difficult to prepare an overall evaluation of open meeting legislation. However, all the statutes can be compared in terms of four structural components:

1. Exceptions to Openness
2. Definition of "Meetings"
3. Notice Provisions
4. Enforcement Provisions

The same issues are raised by current federal sunshine legislation.

THE PASSAGE OF FLORIDA'S "GOVERNMENT IN THE SUNSHINE" LAW

In 1967 the Florida Legislature enacted the "Government in the Sunshine" Law, which has resulted in continued statewide debate and national attention.

The reason for interest in the Florida statute is primarily a result of the absence of enumerated exceptions in the law. The Senate rejected all proposed House of Representative amendments, refusing to concur in any restriction to its original proposal providing for no specific exceptions. *See* FLA. S. JOUR. 6.9 (June 1967); FLA. H.R. JOUR. 959 (June 1967). Because the legislature

specifically rejected any exceptions, the Florida Supreme Court has steadfastly maintained that the legislature intended a broad application of the statute. Board of Public Instruction v. Doran, 224 S. 2d 693 (Fla. 1969).

The media's active participation in endorsement of an open meeting law had convinced the legislators of the need and popular acceptance of such a measure and proved significant impetus for passage of the sunshine law. Note, *Government in the Sunshine: Promise or placebo?* 23 U. FLA. L.REV. 361.

STRUCTURAL COMPONENTS OF OPEN MEETING LEGISLATION

1. Exceptions to Openness

It has been suggested that some closed meetings are desirable to protect the public interest and governmental efficiency. These factors, coupled with the political realities making passage of open meeting legislation difficult, have often resulted in textual exceptions in other states.

The apparent danger of enumerated exceptions to the statute is that they may be read broadly, thereby allowing some closed meetings not contemplated by the open government philosophy. However, by virtue of the complex nature of federal open meeting legislation and Florida experience, some exceptions are necessary.

As previously stated the Florida sunshine law as written contains no exceptions. Judicially, only collective bargaining has been allowed to be held "in secret". This exception came about due to a provision in the law which provides that all meetings should be open . . . "except as otherwise provided in the constitution". Since public employees are constitutionally guaranteed the right to collective bargaining, the Florida Supreme Court in *Bassett v. Braddock* held that this right would be hampered if teacher's representatives and School Board negotiators were not allowed to meet privately with the labor negotiator without violating the sunshine law. The basic reasoning of the court was that the representative of the public should be placed in a position equal to that of his opponent. This was held to be permissible since the labor negotiator's actions were not binding on the School Board and full consideration of his recommendations was had in a public meeting prior to voting—which was also held publicly.

Justice Atkins strongly dissented on the grounds that Florida, while guaranteeing the right to bargain collectively, prohibits strikes by public employees. "The Constitution contemplates open collective bargaining in good faith without secrecy and without strikes."

This case signifies judicial retreat from the broad construction previously given the Florida sunshine law. The Florida Legislature, however, in keeping with its policy of advocating government in the sunshine, narrowed considerably the scope of *Bassett v. Braddock*. The Legislature in 1974 passed a collective bargaining statute which exempt from the sunshine law discussions between the "chief executive officer and a bargaining agent are not exempt from the law. This action shows that the Florida Legislature intends the sunshine law to be strictly construed.

Since Florida has only this one narrow exception, critics of the law frequently suggest that other exceptions, especially for land acquisition and personnel management, are needed.

In the course of the interviews the subjects were asked whether or not they would approve of an exception for land acquisition. Responses were split, with a slight majority seeming to favor the exception. The most frequent argument on behalf of an exception was that executive sessions would minimize profiteering by people attempting to anticipate the final choice of what land would be purchased. Proponents of an exemption further alleged that openness leads to a great drain on the public fund by placing the land owner in an advantageous bargaining position. The weight of this argument would depend upon the governmental unit's condemnation powers. In some places a price ceiling is imposed which, when reached in negotiation, must be accepted by the landowners. Other governmental units may suffer by not having the power of condemnation. For example, the Florida Director of Natural Resources expressed concern with the possibility of exorbitant prices for park land and endangered lands since the division cannot use condemnation proceedings. Aside from the basic policy consideration of openness, some feel applications of the sunshine law to land acquisitions would allow all potential landowners equal access to information on purchases rather than only a select few who may have had access in the past.

City and county officials in Florida have mixed feeling as to whether an exception for personnel matters should be implemented. As a city commissioner in Metropolitan Miami stated recently, "the danger of discretion in closed meetings is that discretion is so often abused." Therefore, in a situation which may involve the reputation of the person in question, a vote among the deliberating body before the meeting is convened could provide an effective shield against unwarranted allegations.

A second suggestion has been proposed that the person being evaluated may opt for a closed or open meeting depending on his or her personal discretion. This has been forwarded in order to insure that persons of high caliber will apply for governmental positions.

Florida's experience, first with no exceptions permitted and then with the narrow exception described above, shows that, even in situations where secrecy was traditionally considered essential, public business can be held openly.

A major distinction between the Florida sunshine law and S. 260 is that S. 260 embodies five specific exemptions to its mandate of openness. These exemptions allow closure of a meeting when matters discussed deal with (1) national security; (2) personnel management; (3) crime or misconduct by, or personal privacy of, any individual except with regard to the official duties of a government officer or employee; (4) the identity of an informer or an investigator that must be kept secret in the interests of effective law enforcement; or (5) trade secrets or commercial or financial information. With the exception of the national security exemption, which will not be discussed, the policies behind the exemptions would seem equally applicable to the state level.

The second exemption of S. 260 allows executive session when the matters to be discussed will relate solely to staff personnel or internal staff management or administration. Many of the public officials interviewed expressed a desire for a similar exception to the Florida act. The most frequently cited example justifying the need for such an exception was in the hiring of personnel. For example, the University of Florida's governing body, the Board of Regents, recently conducted a search for a new president of the university. It was noted that many felt the search was hampered by the fact that the screening and selection of applicants was necessarily done in the sunshine. It was felt by some that many qualified applicants did not even submit their applications because they felt that the publicity attendant to such meetings would create ill will with their present employers. This same sentiment was echoed by various city commissioners around the state who felt that qualified applicants for the position of city manager were not applying because if they were rejected, their continued working relationships in their present job would be hampered. There is no direct evidence that individuals did not apply but at least some would consider an exemption in the area wise.

A similar complaint that was voiced falls somewhere between the exemption for personnel matters and that for invasions of personal privacy, and demonstrates a possible conflict between these two. Several public officials, most notably school superintendents, raised the hypothetical situations of a teacher charged with professional misconduct by a parent. Under S. 260, this type of investigation by the school board might be closed under the personnel matters exemption, and yet if the charge is misconduct, or criminal action, openness would seem mandated under the provisions of the third exemption, since it is an investigation into a government employee's pursuance of his official duties.

A possible problem with exempting such investigations of personnel is exemplified by a recent occurrence in Miami. Two police officers allegedly assaulted a third, black, undercover officer and severely beat him before he had a chance to identify himself. Several of the subjects of our interviews, all close to city affairs, believed that the police department would have successfully buried the incident had it not been for media insistence upon attending the meetings held to investigate the beating.

Therefore, frequently cited Florida experiences with the sunshine law demonstrate that, if not by legislative intent, at least by plain meaning, the second and third exemptions in S. 260 may possibly conflict.

To date, our interviews and questionnaires on the Florida sunshine law's impact on effective law enforcement are incomplete and an opinion on the significance and effect of the fourth exemption of S. 260 will not be ventured.

The Florida sunshine law has had little effect on the availability of trade secrets or commercial or financial information. A major reason is that few have recognized the utility of the law as a mode of access to such information.

Various city and county officials, when asked whether absence of a trade secret exemption was problematic, expressed a lack of concern, stating that they really had not considered the issue. Don L. Spicer, Secretary of the Department of Commerce, stated that he had had this type of problem with reference to the Florida Public Records Act [Fla. Stat. §119.01 *et seq.*], but since his agency is, in effect, a single-member agency he has not encountered a similar problem with the sunshine law. However, the problem may arise, and arise soon, especially with respect to regulatory boards such as the Florida Citrus Commission, which is charged with control of the most significant agricultural industry in Florida.

Florida, therefore, has not experienced intolerable difficulties with the lack of exceptions to its mandate. The greater complexity of issues the federal government must face perhaps militates for certain specific exceptions.

2. Definition of "Meetings"

An inherent difficulty with open meeting statutes is defining "meeting." Most open meeting legislation lists either by title or function those governmental bodies whose meetings are to be open to the public. The statutory definition of what is to be a public meeting can easily fall prey to ambiguties if careful wording is not provided. The better definitions of a public meeting delineate specifically the boundary between open and closed proceedings of the affected governmental bodies.

S. 260 at Section 133C(a) describes a Senate Committee meeting as a gathering of "members representing a quorum." At section 201(a) of Title II a multi-member agency meeting is also defined by "a quorum of the members."

The Florida "Government in the Sunshine" law contains no specification of what constitutes a public meeting. The act states that meetings "at which official acts are to be taken are to be declared public meetings open to the public at all times." The Florida Supreme Court has construed this section to include "any gathering of the members where the members deal with some matter on which *forseeable action* will be taken by the board." Board of Public Instruction v. Doran, 224 So. 2nd 693 (Fla. 1969).

This rather broad interpretation of a public meeting is one cause for misconceptions of when meetings occur. In addition, this study has found that much misunderstanding of the law seems to result from a range of legal interpretations by city attorneys—some subject to question. Misconceptions range from considering unlawful the chance social gathering of several members who happen to discuss "official" business to considering as lawful the gathering of members who discuss official business privately in the mistaken belief a quorum is necessary to constitute a public meeting.

3. Notice Provisions

Although the Florida sunshine law contains no express notice provisions, as are included in S. 260, it is generally agreed that a "reasonable and ample period of notice" is required. In *Board of Public Instruction v. Doran*, the Florida Supreme Court held that the right to be present and to be heard is meaningless unless it is accompanied by notice informing the public that certain matters are going to be discussed, thereby giving the public an opportunity to attend and participate in the meeting.

Many city and county charters include provisions establishing what type of notice is required for special as well as regular meetings. In the absence of such a provision, "the serving of notice and the promulgation of the notice must be given in a reasonable manner calculated to timely inform the public." *See Op. Fla. Atty Gen.* 071–346, Oct. 21, 1971. What is considered to be reasonable notice depends on the particular circumstances of the case. Several factors can be taken into consideration in a determination of reasonableness. These factors are: the purpose behind the requirement of notice, the events about which notice is given, and the nature of the right affected.

Although it is preferable to have the notice requirements delineated in the statute, as they are in S. 260, the spirit of the law does not seem to be circumvented in Florida by the lack of it. Public officials, at least in the areas covered by this study, have been making bona fide efforts to inform the public of meetings.

An example of what is reasonable notice comes from the Florida Public Service Commission, in a case concerning Southern Bell rate increases. Every

subscriber of telephone service in Florida, even those serviced by companies other than Southern Bell, received written notice of a rate hearing enclosed with their monthly bill. Even so, the Public Service Commission noted that the turn out of citizens at these hearings, which were held strategically throughout the state, was very poor.

The proposed federal statute requires notice one week prior to the meeting which in most circumstances would seem a reasonable standard, imposing no great burden on the agency or committee, and providing adequate time for the public to inform itself of the scheduled meeting. Furthermore, a provision for abbreviated notice in special circumstances appears to allow adequate flexibility to contend with unforeseen contingencies.

The federal requirement of one week would easily meet the Florida standard of reasonableness, since Florida governmental units often give notice only a few days prior to a meeting. Yet this seems adequate both judicially and practically, based on general awareness of the press of upcoming meetings. Publication of notice at the federal level may often be only a procedural nicety because of the large number of meetings, most of which will likely be attended by few. Presumably at the state level there are not nearly the number of meetings as the federal government conducts, and yet many still go unattended. However, almost all meetings of significance are attended, even if only by the press, and notice of all meetings would allow the public to decide what constitutes a significant meeting.

4. Enforcement Provisions

One of the most significant problems arising under all sunshine legislation is in drafting enforcement provisions. Although Florida provides both criminal and civil remedies, each method has produced problems.

For example, Florida's civil remedies contain no provision for giving court costs and attorneys fees to a citizen who substantially prevails in the action. Since prohibitive costs make most citizens reluctant to get involved in actions against public officials, the effectiveness of civil remedies might be enhanced by such a provision. The Assistant Attorney General of Florida, who is primarily responsible for giving opinions on the Florida sunshine law, has suggested that treble damages such as are assessed in anti-trust cases, might provide citizens with greater incentive to go to courts.

Criminal penalties carry with them many problems due not only to the general reluctance of citizens to prosecute their public officials but also to the hesitancy of prosecutors who are themselves public officials to file information necessary for a criminal penalty. The policy in Dade County and other areas of the state is to never prosecute a public official without a grand jury indictment. The Chief Assistant State Attorney in Dade County stated that the essential element of intent for a criminal case is very hard to prove. Normally, if a secret meeting is held, only the public officials involved are in attendance. Since each is able to claim a fifth amendment privilege against self-incrimination, there is no one left to testify as to exactly what transpired at the alleged "secret" meeting. In one particular case, however, a former city councilman and his wife were present at the "secret" meeting. Even though they testified before the Grand Jury and the prosecution thought it had a perfect case, the Grand Jury refused to indict since "everyone violates the sunshine law."

While there are some extreme difficulties with criminal sanctions, there is no doubt they compel officials to consider the consequences of closed meetings. Although the proposed federal statute does not have a provision for criminal penalties, it does provide for the assessment of a civil fine when the court determines that the agency member committed a willful violation. It should also be noted that while Florida law provides sanctions against officials of both legislative and executive branches, the Federal statute is only addressed to agency members and not to Congress.

CONCLUSION

While our report will not be completed until January, our study thus far has shown that both officials and the press feel that the Florida sunshine law has provided a beneficial increase in openness in government with no serious impairment of governmental efficiency. Efforts to draft federal legislation on open meetings will hopefully profit by the Florida experience.

AMERICAN SOCIETY FOR PUBLIC ADMINISTRATION,
Washington, D.C., October 31, 1974.

HON. ABRAHAM RIBICOFF,
Subcommittee on Reorganization, Research, and International Organizations, U.S. Senate,
Washington, D.C.

DEAR CHAIRMAN RIBICOFF: The American Society for Public Administration (ASPA) appreciates this opportunity to present for the record comments regarding S. 260, "Government in the Sunshine." As we earlier expressed to members of your staff, the statement hereby presented represents the analyses and views of the ASPA Committee on Public Policy Affecting Public Administration. In view of the timing involved, our National Council did not have an opportunity to take a position on this issue. The following statement reflects the views and opinions of the ASPA Committee on Public Policy Affecting Public Administration:

During the course of the 93rd Congress, the American Society for Public Administration has maintained a continuous and enthusiastic interest in the concept of "Government in the Sunshine" as reflected in S. 260. Commenting upon the general framework from which this legislation derives its importance and significance, the Society, in a letter of almost a year ago to this Subcommittee, observed:

"Within the American experience, the realization of democratic practice springs from the recognition that government derives its authority from, and places its trust in, the people comprising its citizens. As the people are sovereign, so are they empowered to obtain information regarding the operations and activities of their government. In the event that elected public servants fail to respond to requests for information regarding matters of state, then the electorate may attempt to replace them. Those seeking documentary materials from the Federal bureaucracy may petition for them under the Freedom of Information Act (5 U.S.C' 552). Enacted in 1966, this statute provides requesters with both an administrative procedure and court redress to obtain particular items from Executive Branch files.

"Documentary accounts of governmental action are, however, secondary sources of information for the citizenry. They constitute a record of what has transpired and, while a statement of proceedings may be available to the public, the actual meeting might very well have been closed to all except those participating in the deliberations. To the end that more meetings of the Executive Branch offices and congressional committees might be open to public observation, the provisions of S. 260, the 'Government in the Sunshine' Act, are desirable.

"The presumption of such a law is in direct accordance with the principles of democratic practice inherent to our system of government: policy-making meetings should be open to scrutiny unless the governmental unit in question determines, with proper justification, otherwise. Precedent for such a condition in affairs of state may be found in the Freedom of Information Act (P.L. 90–23), the Federal Advisory Committee Act (P.L. 92–463), and Rule 11 (S. 734 of the House of Representatives for the 93rd Congress).[1]

"We remain in support of the principles underlying this legislation."

Our detailed comments of last year were directed toward S. 260 as introduced. Efforts by the Subcommittee in improving and refining the bill have, we recognize, resulted in a much differing version of the measure (as found in Committee print no. 3 of September 30, 1974). Accordingly, we have again examined the bill and now offer additional views with regard to its current provisions. Our commentary confines itself to Title II as our professional interest lies with Executive Branch activities and operations.

A general problem which is found in the revised version of S. 260 is the lack of a definition of the type of meeting to which the bill applies. Not only is this an operational difficulty for those required to comply with such a law, but there is the possibility that this type of vagueness might render the measure unconstitutional.[2] We, therefore, urge a clear and precise definition

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[1] U.S. Congress. Senate. Committee on Government Operations. *Government in the Sunshine: Responses to Subcommittee Questionnaire.* Committee print, 93rd Congress, 1st session. Washington, U.S. Govt. Print. Off., 1974, p. 63.

[2] See *Lanzetta* v. *New Jersey,* 306 U.S. 45 (1939) with regard to the so-called "vagueness doctrine;" here the Supreme Court ruled that a statute be precise enough to give fairwarning to actors that contemplated conduct is criminal and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts.

of the term "meeting" be included in the resulting statute and suggest, as well, that the legislative history of the proposal reflect the understanding of the author(s) of the bill with regard to this referent.

Second, we question the necessity of utilizing the term "national security" in the bill. In terms of legislative development, the term has virtually no precise meaning and case law provides little or no guidance either. We strongly, and respectfully, suggest that the term "national defense" be utilized in lieu of "national security." In addition, if the Freedom of Information Act experience is to be of any assistance on this point, we suggest that the term "foreign policy" be substituted for "foreign relations." These differences in terminology have been carefully considered and evaluated in the context of government information policy.[3] We believe these assessments have a direct bearing upon S. 260.

Third, we question the necessity of having an Assistant Attorney General, Office of Legal Counsel, certify the closing of a meeting. As structured within the bill, this provision may prove impractical with regard to general operations and may impose a requirement which present staff numbers and expertise cannot meet. A more effective practice may be to encourage consultation and advice by an agency with the Justice Department with regard to the closing of meetings. A model for this type of relationship has been established with regard to the administration of the Freedom of Information Act and we invite your attention to that arrangement.[4]

Fourth, the application of the provisions of the bill to a single head agency has ponderous aspects. It is difficult to comment upon this aspect of the bill other than to ask to what extent the requirements of the proposal are, by design, suppose to apply to a single head agency. Again, this is a matter which the legislative history of the measure should greet both for reasons of Executive Branch guidance and subsequent court interpretation.

Finally, though we are restricted, in terms of expertise, in commenting upon the ex parte communications clause of the bill, we note that, as drafted, references to "interested persons" could well include agency staff and we question if this is the actual intent of those designing the legislation and, further, if such is their intent, we question the propriety of this inclusion.

Apart from these considerations, we reassert our initial recommendations to the extent they are still applicable, and we again invite your attention to those suggestions.

If you or your staff are interested in any additional information or assistance in this matter, we will be most pleased to be of assistance.

Sincerely,

SEYMOUR S. BERLIN,
Executive Director.

THE GOVERNMENT IN THE SUNSHINE LAW

(By Henry George White)

After numerous unsuccessful attempts the Florida Legislature, in 1967, followed the lead of several other states and enacted the Government in the Sunshine Law.[1] This statute, sometimes called the "Open Meetings Law," reads as follows:

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizens of this state.

[3] See U.S. Congress. House. Committee on Government Operations. *Executive Classification of Information—Security Classification Problems Involving Exemption,* (b)(1) of the Freedom of Information Act (5 U.S.C. 552). H. Rept. 93–221. Washington, U.S. Govt. Print. Off., 1973, pp. 61–67.

[4] See: Robert L. Saloschin. The Work of the Freedom of Information Committee of the Department of Justice, *Administrative Law Review,* v. 23, March, 1971, pp. 147–153.

[1] Section 286.011, Florida Statutes.

(3) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation or any political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions thereof is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

While it cannot be disputed that the Sunshine Law has a salutary purpose, the language of the statute finally adopted by the legislature left several problems unresolved. It will be noted, for example, that the statute does not define "meetings" nor does it prescribe notice requirements for meetings. Furthermore, in the years immediately following enactment of the statute there were many doubts concerning what stages of the deliberative process leading up to "official" or "formal" action were covered by the law. Some of these doubts have since been resolved by opinions of the Florida Supreme Court and the Attorney General.

The first case involving the Sunshine Law to reach the Florida Supreme Court was *Board of Public Instruction of Broward County* v. *Doran.*[2] In that case the court rejected the argument that the law was unconstitutionally vague because its language required men of ordinary intelligence to guess as to its meaning. The court held that the provisions of the statute were sufficiently clear to withstand this attack. The court also clarified some of the confusion concerning the applicability of the law to informal meetings by declaring that it was intended to cover "any gathering of the members where the members deal with some matter on which foreseeable action will be taken. . . ."[3]

This broad and liberal interpretation of the statute was reiterated in the case of *City of Miami Beach* v. *Berns*[4] wherein the Supreme Court noted that the legislature intended to extend the application oft he statute to every "'board or commission' of the state, or of any county or political subdivision over which it has dominion or control."[5] The court also emphasized that the right of public scrutiny extends to all stages of a proceeding leading up to final and formal action. Thus, the court approved an appellate court's earlier decision that the Sunshine Law applies to the "entire decision making process" of a public body.[6]

The Supreme Court has consistenly resisted requests that it judicially carve out exceptions to the Sunshine Law. In doing so, the court has observed that policy judgments as to which matters should and which should not be open to public scrutiny are for the legislature and not the courts. This attitude by the court is clearly exemplified by its most recent decision concerning the Sunshine Law. In *Canney* v. *Board of Public Instruction of Alachua County,*[7] the court reversed itself by ruling on rehearing that school boards are subject to the provisions of the Sunshine Law even when they meet to consider matters in a quasi-judicial capacity. This case acknowledges the authority of the legislature to prescribe the manner in which public bodies must conduct their business.

By its own terms, the Sunshine Law does not apply to situations which are excepted by some provision of the constitution.[8] The only case in which such a constitutional exception has been applied is *Bassett* v. *Braddock.*[9] In that case the court held that a school board's labor representative could negotiate in private with the teachers' representative in preliminary contract negotiations without violating the Sunshine Law. The court concluded that Article I, Section 6 of the Florida Constitution, which grants public employees the right to organize and bargain collectively, was one of the constitutional exceptions contemplated by the drafters of the Sunshine Law. The court also held that a school board could meet in private for the purpose of consulting with or instructing its labor negotiator concerning matters which were subject to collective bargaining with teachers' representatives. As the

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[2] 224 So. 2d 693 (Fla. 1969).
[3] *Ibid.*, page 698.
[4] 245 So. 2d 38 (Fla. 1971).
[5] *Ibid.*, page 40.
[6] *Times Publishing Company* v. *Williams,* 222 So. 2d 470 (2d D.C.A. Fla. 1969).
[7] Supreme Court Case Numbers 3473 and 3474, Opinion on Rehearing filed April 6, 1973.
[8] Section 286.011(1), Florida Statutes.
[9] 262 So. 2d 425 (Fla. 1972).

court noted, such private meetings are necessary in order to fully implement the constitutional rights involved.

It is appropriate to conclude the foregoing survey by quoting from the first case in which the Supreme Court considered the Sunsine Law.

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.[10]

Although the court opinions discussed above have helped to clarify some of the earlier doubts which existed with respect to the applicability of the Sunshine Law and have generally established the proposition that the provisions of the statute are all-inclusive, no court has yet addressed itself to the question of the law's notice requirements. However, the Attorney General has ruled that any meeting which is covered by the provisions of the Sunshine Law must be preceded by:

. . . a reasonable and ample period of notice (to) the public and representatives of the press so that they may attend . . . the meeting if they wish. [Both] the period of notice of the meeting and the method of promulgating the notice to the public must be performed in strict accordance with legislative requirements when these requirements exist; where there is no legislative prescription, then the serving of notice and the promulgation of the notice must be given in a reasonable manner calculated to timely inform the public.[11]

In *City of Miami Beach* v. *Berns*[12] the court stated that:

"A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public. When at such meetings officials . . . transact or agree to transact public business at a future time in a certain manner they violate the government in the sunshine law, regardless of whether the meeting is formal or informal."

It is clear, therefore that the members of a public body have a responsibility to both the public and the press with respect to notice of their meetings. The failure of public officials to assure that proper and adequate notice of meetings has been given might give rise to a claim that such officials are meeting in secret.

Digest of Sunshine Law Cases and Opinions

Times Publishing Company v. *Williams*, (1969)—Sunshine law held applicable to formal or informal school board meetings.

Board of Public Instruction of Broward County v. *Doral*, (1969)—Constitutionality of sunshine law upheld. Law held to cover any meeting where there is a discussion of a subject on which "foreseeable action" will be taken.

Canney v. *Board of Public Instruction of Alachua County*, (1973—No quasi-judicial exception in the laws as written.

Shaughnessy v. *Metropolitan Dade County*, (1970)—A matter may be continued over and disposed of at a later meeting without the necessity of repeating notice of the meeting or repeating public hearings.

City of Miami Beach v. *Berns*, (1969)—Sunshine law supercedes old law governing city meetings; also, less than a quorum can violate the law. All government susceptible of regulation is covered.

Bassett v. *Braddock*, (1972)—Labor negotiators employed by a school board in a preliminary or tentative teacher contract negotiations can negotiate and consult with the school board in private.

Op. Att'y Gen. (1971)—Secret ballot cannot be used even if later ratified by an open vote. Also, public has right to listen in on phone conversations between public officials.

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[10] *Board of Public Instruction of Broward County* v. *Doran*, 224 So. 2d 693 (Fla. 1969).

[11] Attorney General's Opinion 071-32.

[12] 245 So. 2d 38 (Fla. 1971).

Op. Att'y Gen. (1971)—School Board can vote for superintendant by code numbers rather than by name provided all facts available to the board were also available to the public. Illegal actions may be corrected by subsequent re-enactment nunc pro tunc.

Op. Att'y Gen. (1971)—Sunshine law does not apply to Federal agencies.

Op. Att'y Gen. (1971)—Notice of an official meeting should be given though less than a quorum will meet.

Op Att'y Gen. (1971)—Members of a public body may jointly inspect the physical characteristics of a matter upon which they are to take subsequent official action. Failure to invite the public does not make a meeting secret.

Op. Att'y Gen. (1971)—A purely advisory body is not covered by the law.

Op Att'y Gen. (1972)—Two legislators may not meet secretly concerning action on legislative matters.

Op. Att'y Gen. (1971)—A social gathering preceding an official meeting of an agency or board, from which the public and press are effectively excluded, may constitute a "secret meeting" in violation of the Sunshine Law.

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., October 11, 1974.

Hon. LAWTON CHILES,
Subcommittee on Executive Reorganization, Government Operations Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR CHILES: This is in response to your September 23, 1974 request for my testimony on S. 260, the Federal Government in the Sunshine bill. I regret that my previously scheduled speaking engagement in California conflicts with the hearings on S. 260 to be held October 15. Thank you for the opportunity you gave me to discuss the bill with you briefly Wednesday and to submit my comments in writing at this time.

It is my understanding that Committee Print No. 2 should still be considered open to amendment and these comments were formed with that in mind. I also understand that you are interested in my comments with respect to both Title I and Title II of the bill.

First a general comment. It is my conviction that all of us, whether in government or in private life, tend to function better when we know we have a competitor or when we know that our actions are subject to public review. We may not like the threat, but the pressure improves our performance. Simply put, that is a principle virture of this legislation. Furthermore, government business is the people's business and taxpayers have the right to know what their government is doing. Any restraints on public exposure for government actions should be minimal and should err in favor of exposure even at the cost of some efficiency.

TITLE I

Section 133C(a)(3) [p. 30 of the Committee Print No. 2] I believe that the proviso excepting "any government officer or employee with respect to his official duties or employment" from the protection against personal conduct discussion at open meetings or hearings might be tightened to make it more clear that the proviso goes only to his official acts or conduct in the course of his employment. The objective of this provision is laudable to the extent that it requires accountability for governmental conduct. My concern is that the rights of government employees to protection against public airing of unproven charges relating solely to their private lives should be preserved insofar as possible. The bill does attempt to accomplish this objective now, but I would go further to protect alleged conduct only marginally related to an employee's governmental activities.

Section 133C(a)(4) [p. 31 of the Print] This provision may not be sufficiently broad to protect an informer or law enforcement agent or information which should be protected under the Interstate Commerce Act. I think this could be cured by changing "of a criminal offense" to "of an alleged violation of law".

TITLE II

Section 201(b) [p. 47 of the Print] All meetings. Does this include constructive session? What are meetings to conduct hearings? Is an employee

decisional board a "subdivision thereof authorized to take action on behalf of the agency"? As in Title I, a clarifying definition of meetings and these other terms is very important.

Section 201(c)(3) [p. 48 of the Print] The same problem of protecting the privacy of a government officer or employee that was raised with respect to Title I would apply here.

Section 201(c)(4) [p. 48] As in Title I, I would suggest substituting "of an alleged violation of law" for "of a criminal offense".

Section 201(d) [p. 49] The one week notice provision could impair statutorily authorized emergency actions of the agency, particularly where authority to act has been subdelegated on a continuing basis to meet emergencies. Also it could result in massive release of notices which could tend to obscure the more important procedures. Perhaps agencies could be required to submit their notice procedure to GAO for annual review to achieve more flexibility to meet the needs of the public and achieve the purposes of the government under the Government in the Sunshine Act.

I would like to make the following additional general comments.

Some major agency cases involve situations where a premature disclosure might upset the market in stocks. I do not see any protections against this in the bill. It may be that this danger has traditionally been more feared than necessary, but it would appear to be a possible result of the bill. The Subcommittee might want to consider the implications of such open disclosure. But any such consideration should be weighed in light of the possibility that insider information could be generated by "leaks" which, though guarded against, sometimes occur. It may be fairer to all concerned to make everyone aware of the process rather than "select" recipients of "leaked" information.

The bill does not appear to reach some possibilities for more open agency action—for example showing an agency orders how each member voted. Nor does it require publication of dissents or separate expressions through agency channels. As mentioned before, without clarification, it is not certain that "meetings" as used in the bill reach constructive sessions involving an exchange of written votes but no face-to-face exchanges among members. Such a clarification, broadening the scope of "meetings", might obviate the need for statutory direction as to the showing of votes or the printing of separate expressions. But it would still seem important for those who have access only to orders or reports (and not actual transcripts) to know something about the diversity of views that were a part of the decision-making process.

There are parts of the bill which I am studying further. In Section 202, for example, there is reference to "not on-the-record" proceedings and I am not sure there would be any such proceeding remaining if the bill is adopted as printed. Also, it is not clear to me yet whether the right of individual members of the public to communicate with the government (for instance in any way with respect to pending cases) will be limited or, if so, whether that would be a step forward. How would public discussion be affected?

I am satisfied that the goals of the bill are good and that they can be implemented. Yet some of the problems probably deserve a little more study to be sure that with respect to each new requirement we do not sacrifice other important objectives of government now serving the interests of the public. This, of course, is one of the purposes that will be served by your hearings. The goal of the legislation is clearly worth striving for and I would regard none of the problems which I have raised to be insoluble.

I am attaching a copy of recent remarks of mine entitled "Open Government—Public Access to Internal Debate" which may prove helpful to the Subcommittee in considering S. 260.

If I can be of any further assistance to you or the Committee, please let me know.

Sincerely yours,

A. DANIEL O'NEAL,
Commissioner.

OPEN GOVERNMENT—PUBLIC ACCESS TO INTERNAL DEBATE

(Remarks of A. Daniel O'Neal, Commissioner, Interstate Commerce Commission, before Seventh Annual Transportation Law Institute of the University of Denver College of Law and Motor Carrier Lawyers Association, University of Denver Law Center, Denver, Colorado, August 22, 1974)

The new President of the United States made some highly significant remarks concerning his attitude about government in his very first statement

after being sworn in on Friday, August 9. One of his principal themes was the need for, and his commitment to, openness in government. He said:

"I believe that truth is the glue that holds Government together, not only our Government, but civilization itself. . . .

"In all my public and private acts as your President, I expect to follow my instincts of openness and candor with full confidence that honesty is always the best policy in the end."

In his first meeting with the cabinet, the President immediately followed up on that commitment by directing that a more open posture be adopted by the executive departments forthwith. In his first message to Congress, he again stressed the need for communication and reiterated his intention to keep his office door open to Congressmen representing every view and persuasion.

Today, perhaps more than at any other time in the nation's history, the President's reaffirmation of his support for openness in government has special meaning to the American people. The whole Watergate fiasco brought home the danger of isolation and the need for open interchange of views. Recent history at the White House has reminded us that the public interest is best served when government affairs are open to the fullest extent possible. It is clear that the new President wants to render "stonewalling" an inoperative technique in his Administration.

I find in the President's statements and actions much more than a desire to negate the past. He seems firmly committed for the future.

The independence of regulatory agencies from the Executive Branch should not prevent them from taking notice of the President's message. We need no Presidential directive to recognize the truth of what he has said. The very fibre of our form of government depends upon the free flowing exchange of views and ideas—the right of the people to be informed not only of government action but also how government decisions are reached, sets us apart from totalitarian governments.

Senator Sam Ervin noted in support of the Freedom of Information Act:[1]

"Access to information about the activities of Government is crucial to the citizen's ability to cope with the bigness and complexity of Government today. His grasp of the facts about those government activities which affect not only the general welfare, but his particular interest as well, is the counterweight which tips the scale in his favor."[2]

In 1965 the U.S. Chamber of Commerce spokesman testified in the Senate:

"A free flow of information from and concerning all branches of government at all levels is a right of the public and is essential to our democratic society. The freedom of the Nation depends on an electorate well informed by a free press, as guaranteed by the Constitution. It is a responsibility of Government to protect and preserve this constitutional guarantee by a policy of full disclosure of information. Except for matters clearly affecting national security or otherwise covered by statute, all business of Government should be fully disclosed to the public and the burden of proof must rest with the Government in every instance to justify withholding any information."[3]

It is interesting that the spokesman for the Chamber at that time was Dale Hardin, now of course a member of the Interstate Commerce Commission.

A democratic society requires an informed electorate. The right to choose is predicated upon the right to know the alternatives. The fact that members of regulatory agencies, are appointed rather than directly elected makes it even more imperative that accountability through public awareness of the agency action be encouraged.

In 1966, Congress passed the Freedom of Information Act as the keystone to its efforts to reform administrative procedure. The Act was designed to turn around Section 3 of The Administrative Procedures Act of 1946 which many government agencies had misconstrued as authority for withholding information. The Freedom of Information Act is a positive law that encourages the dissemination of information and requires the withholding of information to be the exception instead of the rule.

Being Lawyers, many of you are well aware of the spirit with which the courts have interpreted the Freedom of Information Act. Judge Bazelon of the Court of Appeals of the District of Columbia wrote:

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[1] Public Law 89–487; 80 Stat. 250.

[2] U.S. Congress. Senate Committee on the Judiciary Subcommittee on Administrative Practice and Procedure. *Administrative Procedure Act.* 89th Cong., 1st Sess. (1965), p. 4.

[3] Ibid., p. 313.

"Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information and that government institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly." [4]

In another Federal court decision Judge William E. Miller ruled:

"Generally, anonymity is not the privilege of individuals charged with transacting the business of government . . . That knowledge on the part of the public of the names and activities of public officials may influence their conduct is precisely the reason that we have deemed the possibility of public exposure to be so important." [5]

It is obvious that the Freedom of Information Act was designed to foster accountability an dto create an atmosphere conducive to a full public hearing of all the issues in important matters before each government agency.

The spirit of the Freedom of Information Act and President Ford's policy of open government should be of special interest to everyone who must deal with a government agency in a professional capacity. As Motor Carrier Lawyers representing your client's position before the Interstate Commerce Commission, you know that the availability of information vitally affects the quality of your participation in our proceedings. The quality of your participation in our decision-making process, in turn, helps determine the quality of our decisions. A full and effective hearing of all pertinent information encourages the development of sound policy and the thorough testing of all regulatory policies.

Examining the need for the Freedom of Information Act, the House Government Operations Committee discovered that:

"Historically, Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy. A recurring example is the refusal by regulatory boards and commissions which are composed of more than one member to make public their views on issues or to publicize the views of dissenting members." [6]

One of the reasons for the Freedom of Information Act is to promote better policy by requiring government to function under the hard light of public scrutiny. The actions of regulatory agencies should constantly be measured in public against every alternative at each stage in their development and application.

In approving the Act, the Congress had among its objectives the publishing of regulatory agency members' votes. This objective is achieved to a substantial extent. For example, at the ICC, Commissioners can, and do, include dissents and separate concurring statements with ICC *reports*. The publishing of separate expressions with orders has been viewed as a different matter principally, I think, for administrative convenience reasons.

Current Commission policy maintains that since the votes of members are internal memorandum they should not be released. They are seen by some to be subject to a subsection of the Freedom of Information Act which excepts "interagency memorandums or letters which would not be available by law to a private party in litigation with the agency." [7]

Congress included this exemption to avoid the very real danger that disclosures of internal staff memorandum might destroy the candor essential to complete consideration of the issues. President Johnson noted when he signed the Freedom of Information Act on July 4, 1966:

"Officials within government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions." [8]

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[4] *Soucie* v. *David*, U.S.A.D.C., 1971, 448 F. 2d 1067, 1080.

[5] *Tennessean Newspapers, Inc.* v. *Federal Housing Administration*, C.A. Tenn. 1972. 464 F. 2d 657.

[6] U.S. Congress. House. *House Report No. 1497*. May 9, 1966.

[7] 5 U.S.C. 552(e)(5).

[8] Statement of President Johnson upon signing P.L. 89–487 on July 4, 1966.

Clearly, there is a need to balance legitimate needs for confidentiality and the principal of full freedom of information. President Ford's reaffirmation of the need for open government makes this an opportune time for all of us in government to reconsider policies affecting the dissemination of information.

In my view the tendency now is to weigh the need for confidentiality or administrative convenience far too heavily to the detriment of a traditional preference that has existed at ICC for complete disclosure of information to the public. A Commissioner's inherent right to advise the parties and the public of his position and the public's fundamental right of access to government records often outweighs many other considerations. And in my mind this inherent right cannot be abridged. What we are really concerned with is whether there should not be an orderly, agency sanctioned, systemized procedure for making such views known. Otherwise an individual member may be less inclined to take independent steps to assert his different conclusions and thus the lack of an official procedure could be destructive of the public's overriding right to know what the issues are and what difference of views exist with respect to those issues.

When the Freedom of Information Act was first considered in 1963 Congress discussed the provision which requires agencies having more than one member to make public a record of the final votes of every member in every agency proceeding.[9] One Senator explained:

"It was added in the belief that the people are entitled to be informed as to how these highly placed persons discharge their obligations to the public . . . Public access to agency votes is especially important on close issues. An agency speaking in one voice does not demonstrate the autonomous nature of its membership nor does it present for airing what members believe to be both sides of the issue." [10]

The public should have access to the knowledge and expertise of every regulatory Commissioner rather than just the opinions of those Commissioners who join in the majority order. The Act would seem to include information about individual votes and separate expressions, but it seems doubtful that it would require publishing the internal arguments supporting member's votes since that might tend to derogate from the full and frank discussion of which President Johnson spoke.

Senator Sam Ervin specifically addressed the question of separate expressions to orders during hearings on the Freedom of Information Act. He said:

"Not only orders, but dissenting opinions as well must be made available for public inspection and published. The public therefore, can be apprised of the decision-making process as well as the actual decisions made. People thus will know what officials are responsible for what decisions and can act on this information accordingly." [11]

The clear message from Senator Ervin's remarks and others is that Congress hoped to encourage the dissemination of differing views concerning agency actions.

The Freedom of Information Act was also meant to facilitate a discussion of the rationale for all agency decisions. In one test of the Freedom of Information Act, a United States District Court noted:

"What the Court considers a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrence thereto.

"* * * A clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available." [12]

As the Court discovered, bureaucracies have a tendency to explain their decisions by a general statement that the proposed action is in the public interest. But the public and practitioners before a government agency have a right to more specific statements of facts and reasons. It should also be kept in mind as one court put it:

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[9] 5 U.S.C. § 552(4).

[10] U.S. Congress. Senate Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. *Freedom of Information,* 88th Congress, 1st Sess. (1936), p. 6.

[11] Ibid., p. 36.

[12] *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board.* District Court for D.C., 1971: 325 F. 2d 1146.

"The Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest." [13]

Of course this places agencies such as the ICC in an especially difficult position. The Congress regularly chastises the Commission for delay in its decision making process, for a lack of efficiency; and the usual and appropriate agency response is that the requirements of due process place a significant burden on the agency which tends to reduce efficiency but is nonetheless a mandatory as well as desirable consideration. The balancing which takes place becomes even more complicated as greater stress is placed upon making more information public.

The Courts and Congress have made it clear that the Freedom of Information Act calls for an attitude of open government. It is encumbent upon us to embrace that philosophy. The fact that nearly every major Federal regulatory agency does have a procedure for publishing and releasing separate expressions which Commissioners or Board Members wish to include with any official agency action demonstrates that the practice is not incompatible with an agency's capacity to function.

There should be a regular procedure for releasing and publishing separate expressions to any kind of Commission action. *Reports, which already allow separate expressions, are used only with respect to a small part of the Commission's workload. The vast number of undramatic decisions without reports lie at the heart of the regulatory process.* Although the reasons for a divided vote in many instances are obvious, this is not always true. Furthermore, many of the Commission's most important achievements represent the culmination of a large number of daily decisions. Since much policy evolves on a case-by-case basis, it is desirable that sufficient information be made available to support those decisions and that the votes and separate views of members be routinely issued with or without a majority report. It is often not enough to inform the public and those involved in the cases of little more than a count of "ayes" and "nays."

It is especially important to air differing opinions because America's transportation needs change continuously. The Commission's decisions must be understood. Far from threatening an agency's roles, individual views can show the ICC to be dynamic by indicating to the public the fact that debate and discussion has taken place.

Supreme Court Justice Charles Evans Hughes said:

"A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." [14]

And indeed, some of the Supreme Court's most important rulings have reversed earlier decisions made by different judges in different times.[15] How much more important it is to air dissenting views within a decisional body such as the ICC which may not only later reverse its decision but which reaches decisions which are ultimately subject to policy review by the Congress and judicial review in the Courts.

This is not to say that every agency dissent is of great importance or that dissents even usually foreshadow a needed change in regulatory policy or application of the law. Every dissenting member must recognize that he very well could be wrong in his approach to the particular decision before him. Nonetheless, he often has the responsibility to enunciate his differences—particularly in those instances where there is more at issue than the weight to be given to competing facts.

If the majority opinion is correct, full disclosure of opposing opinions should make that obvious. If, on the other hand, there are valid reasons for disagreement the bright light of public scrutiny may help produce a better solution in the future to the particular transportation problem. Full disclosure thus will only aid the Commission and the public.

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[13] *Wellford* v. *Hardin*. U.S.C.A. Md. 1971, 444 F. 2d 21.

[14] Hughes, Charles Evans, *The Supreme Court of The United States*. N.Y.: Columbia University Press, 1928, p. 68.

[15] See *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court*. Alan Barth. Knopf. 1974.

Commission policy will also be better understood and more readily accepted if more information is made available. Congressman Brock Adams recently observed:

"It is ironic that a regulatory system which is based on a system of published rates and tariffs somehow does not permit the publication of the comments of a dissenting member of the rate-making agency." [16]

Congressman Adams' point is well taken. There *is* a danger that the lack of a procedure for facilitating an individual Commissioner's expression of separate views might undercut confidence in the ICC.

Everyone in government must prevent further erosion of public confidence. Government agencies must make the public's business public. That was the Congress' intent when it passed the Freedom of Information Act. That is a clear application of President Ford's instruction when he called for a new emphasis on open government. With such near unanimous concern, I hope we will proceed to put the concept of open government more fully into practice soon. The Motor Carrier Lawyers Association's traditional active and constructive role before the Interstate Commerce Commission may cause you to pursue this matter with appropriate committee studies, recommendations and suggestions; if so it is especially appropriate in this context that any dissenting views you may have with respect to ICC disclosure policies also be aired.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., September 21, 1973.

Hon. SAM J. ERVIN, Jr.,
Chairman, Committee on Government Operations,
U.S. Senate

DEAR MR. CHAIRMAN: Reference is made to your letter of January 17, 1973, requesting our views on S. 260, 93d Congress, the "Government in the Sunshine Act," which would provide that meetings of certain Government agencies and congressional committees shall be open to the public.

Title I of the bill pertains to congressional procedures. The rules for conducting proceedings in the respective Houses of Congress being within the exclusive domain of the Congress we have no specific recommendations to make. However, we would point out that a period of one year has been prescribed for retention of the transcript of meetings of congressional committees and subcommittees (see page 6, line 20; page 12, line 5; page 16, line 17), while transcripts of agency meetings must be retained at least two years (see page 22, lines 3–7). For the sake of consistency the Committee may wish to consider making both retention periods the same and also consider whether one year is sufficient.

Section 201(a) of the bill provides that all "meetings" (including meetings to conduct hearings) at which "official action" is considered or discussed shall be open to the public; and, in section 201(b), six exceptions to the general rule are listed, of which exception (2) relates solely to "internal agency office management and procedures" of an agency. None of the above-quoted terms are defined thus making the bill subject to an interpretation which could impede the conduct of official business by the various agencies without furthering the purposes of the bill. The Committee, therefore, may wish to consider revising the bill to include definitions of the quoted terms, or to provide specific guidelines as to the type of meetings that may be excepted under subsection (b).

The last paragraph of section 201(b), starting on page 20 at line 11, provides that an agency shall promptly publish its vote and provide an explanation for closing any part of a meeting to the public. In title I of the bill the congressional committees would be given one day in which to make available a written explanation of Committee action in closing a hearing to the public. (See page 4, line 25; page 10, line 13; page 15, line 17.) For the sake of consistency the Committee may wish to consider making the time period for providing an explanation the same for Committees and agencies.

With regard to subsection (e) of section 201 of the bill reference has been made only to the first five exceptions to the publication requirement. (See page 21, line 18.) The Committee may wish to consider inclusion of exception (6) of subsection (b) which starts on page 20 at line 6 of the bill. A similar condition is noted on the next page of the bill (page 22, line 3) and the reference to "subsection (a)" should be "subsection (b)."

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[16] Daily Congressional Record. June 21, 1974, p. E4120.

Enclosed are some suggested technical and editorial changes which the Committee may wish to consider.

Sincerely yours,

PAUL G. DEMBLING,
For the Comptroller General of the United States.

Enclosure.

Suggested technical and editorial changes to S. 260, 93d Congress.

Page 4, lines 15 and 18—word "and" should be deleted, and in line 18 "or" inserted.

Page 8, line 19—insert the words "of the" after "members."

Page 9, line 10—delete the word "or" after "government."

Page 10, line 6—word "and" should be deleted and "or" inserted.

Page 12, lines 1 and 2—should read "close information specified in clauses (i), (ii), (iii), (iv), or (v) of subparagraph "(A)" to be consistent with rule on page 11, lines 16 and 17.

Page 13, line 11—should read "133 C" in lieu of "133 (c)" and "101 (a) (3)" in lieu of "101 (3)."

Page 14, line 5—delete the word "or" after government.

Page 14, line 25—word "and" should be deleted and "or" inserted.

Page 18, line 17—after "membership" add the words "that such meeting."

Page 19, line 6—delete the word "or" after "government."

Page 19, line 23—delete the word "and" after "benefit."

Page 20, line 2—delete the word "and" after employee and insert "or."

Page 20, line 7—insert parenthesis after the word "initiation."

Page 20, line 21—words "to be" should be inserted after "is."

Page 24, line 5—Section 202(a) of this bill is probably intended to read as follows: "SEC. 202 (a) Title 5 of the United States Code is amended by adding after section 557 the following, 'new section:' §557A Ex Parte communications in agency proceedings

(a) This section applies * * *"

There is already a subsection 557(a) in title 5.

Page 24, line 22—should read "the National Environmental Policy Act of 1969."

FEDERAL POWER COMMISSION,
Washington, D.C., November 4, 1974.

Hon. SAM J. ERVIN, Jr.,
Chairman, Committee on Government Operations,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In response to your request for comments on S. 260, we enclose four copies of the report of the Federal Power Commission on that bill.

While the Office of Management and Budget has no objection to the submission of this report, some agency views have not yet been received and, accordingly, this does not represent an Administration position.

Sincerely,

JOHN N. NASSIKAS,
Chairman.

Enclosure.

FEDERAL POWER COMMISSION—REPORT ON S. 260—93D CONGRESS

S. 260 is a bill to provide "that meetings of Government agencies and of congresssional committees shall be open to the public, and for other purposes." Title I of the bill applies to Congressional procedures. Title II of the bill applies to agency procedures and defines "agency" as in 5 U.S.C. 551(1) where the body comprising the agency consists of two or more members.. Section 201(a) provides that, except as provided in section 201(b), "all meetings (including meetings to conduct hearings) of such agencies at which official action is considered or discussed shall be open to the public."

Section 201(b) provide that meetings may be closed to the public if a majority of the agency members vote that matters to be discussed fall within one of the following exemptions: (1) national security or confidential conduct of foreign relations, (2) internal agency personnel or management matters or financial auditing, (3) defamation of an individual other than a government

officer or employee with respect to his employment (except in the case of a witness at a hearing, the hearing can be closed only on his request); (4) the identity of informers or enforcement agents or similar sensitive information vital to law enforcement; (5) information relating to trade secrets or financial information where the information has been obtained by the Federal government on a confidential basis, is required to be kept confidential by Federal statute and if disclosed, would injure a person's competitive position; and (6) the conduct or disposition of a case of adjudication where the agency is acting in an essentially judicial capacity.

Transcripts are required to be kept of all such agency meetings although the agency may vote to delete from transcripts available to the public portions dealing with matters under section 201(b)(1)-(5). A public announcement of the date, place, and subject matter of each meeting is to be made by the agency at least one week in advance unless the agency members vote that agency business requires an earlier meeting date.

Section 202 would add to Title 5 of the U.S. Code a new section 557a on ex parte communications in agency proceedings. The section applies to (1) any agency adjudication or rulemaking on the record which under the Administrative Procedure Act is subject to a requirement of trial-type procedures; (2) any agency rulemaking proceedings which the APA requires to be noticed for public comment; and (3) any proceedings to prepare an environmental impact statement required by the National Environmental Policy Act. Ex parte communications between an interested person and member of the agency, hearing examiner or employee involved in the decisional process of such proceedings are prohibited. The agency would be required to place in the public record of the proceeding any communications received in violation of the prohibition.

Each agency is directed to promulgate regulations to implement the requirements of Title II. Any person may initiate an action in Federal court to challenge the regulations implemented, the decision to close a meeting or make a deletion from a transcript and to review an alleged improper ex parte communication.

The Federal Power Commission holds regular weekly meetings, with top staff in attendance which are not open to the public. Minutes of Commission meetings are kept by the Commission Secretary and these minutes are classed as public records (18 CFR 1.36(c)(5)) and made available for examination on request. Decisions on all regulatory matters are made by the entire Commission and are arrived at through deliberative and consultative processes at these weekly meetings. In reaching decisions, the Commission is required to make public interest determinations in accordance with the standards of the Commission's organic acts, the Federal Power Act and the Natural Gas Act. Commission decisions and the votes of each Commissioner on particular matters are recorded in the opinions, orders, and other documents issued by the Commission. In addition to being served on the parties of record in particular proceedings, these documents are freely available to the public in the Commission's Office of Public Information. All Commission opinions and all but the most routine orders are subsequently published by the Commission in bound volumes of the FPC Reports.

Oral arguments before the Commission are open to the public and transcripts are made of such arguments (18 CFR 1.29(b)). In addition, written notice of oral argument is served on all parties to the proceedings, published in the Federal Register, and made public in news releases issued by the Commission's Office of Public Information.

The Commission would not favor opening its weekly meetings to the public because of the deliberative nature of such meetings as explained above. We believe that this position follows from the same reasoning that was given for exempting inter-agency and intra-agency memoranda and letters from public disclosure under the Freedom of Information Act (5 U.S.C. 553(e)(5)). The House report explained that exemption as follows:

Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. (H. Rept. 1497, 89th Cong., 2d Sess., p. 10).

As President Johnson stated on signing the Freedom of Information Act, "officials within Government must be able to communicate with one another fully and frankly without publicity." The House report in its general discussion of the bill's provisions also stated:

* * * in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented * * * could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure * * * in such cases. (H. Rep., 5—6).

Section 201(a) of S. 260 would apparently also apply even to occassional informal meetings among the Commissioners with no staff present since official action could be considered or discussed. In addition to the obvious impracticality and even impossibility of giving the required one week notice to such meetings, we would oppose opening such meetings for the same reasons as we oppose opening the weekly meetings.

The Federal Power Commission acts in many ways to keep the public informed of matters pending before the Commission and thus provide the opportunity for citizens input into the decision-making process. All notices of proposed rulemakings are published in the Federal Register and include a request for comments from any interested person in writing by a specific date. As required by provisions of the Federal Power Act, Natural Gas Act or policy of the Commission, notice is published in the Federal Register upon the institution of any of the more than 50 types of proceedings listed in the Commission's Statement of General Policy and Interpretations (18 CFR §2.1). A copy of the formal notice is served on the State commission or commissions of States affected thereby (18 CFR § 1.37(b)), and a press release is issued by FPC's Office of Public Information.

Under Sections 4(e) and 4(f) of the Federal Power Act applications for license and preliminary permit and amendments thereto are also noticed in local newspapers in the country or counties where the project is located. In addition, a service list is prepared to notify the various State and local officials and agencies affected. The Commission's regulations require each utility filing a change in electric rates to mail each purchaser affected a copy of the proposed rate schedule. (18 CFR §35.2(d)). A copy of each rate schedule which results in increased rates must be mailed by the utility to the public service commission in every State affected. In these ways, the public receives notice of matters pending before the Commission and may file protests, complaints, or petitions to intervene. The Commission has a liberal policy of granting such petitions to intervene.

In addition to oral arguments before the Commission, all hearings before an administrative law judge and rulemaking conferences are open to the public.

The requirement of Section 201(c) of S. 260 that each agency announce the date, place, and subject matter of its meetings a week in advance would not be workable for this agency because of the statutory time limitations imposed upon many actions of the Commission. In order to assure the timely handling of matters before the Commission, we would necessarily make frequent use of the provision of Section 201(c) that allows the agency to vote that agency business requires such meetings be called at an earlier date.

The Commission would also have to make extensive use of exceptions (5) and (6) of Section 201(b) allowing the agency to close portions of its meetings. Exception (5) would apply because of the statutory prohibitions of Section 301(b) of the Federal Power Act and Section 8(b) of the Natural Gas Act which provide that no member, officer or employee of the Commission may divulge any facts or information acquired during the examination of books, records, data or accounts of licensees, public utilities and natural gas companies. Exception (6) would apply because of the Commission's extensive quasi-judicial functions.

While the Office of Management and Budget has no objection to the submission of this report, some agency views have not yet been received and, accordingly, this does not represent an Administration position.

JOHN N. NASSIKAS,
Chairman.

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