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Open Government Laws: An Insider's View

Joseph W. Little

Thomas Tompkins

OPEN GOVERNMENT LAWS: AN INSIDER'S VIEW

JOSEPH W. LITTLE† AND THOMAS TOMPKINS‡

The present push in Washington to open to public scrutiny the decision processes of the federal government presents a timely opportunity to examine the workings of the "Government in the Sunshine"[1] laws that have been enacted in most[2] states during the past decade or two.[3] As the popular name suggests, these laws are intended to open up governmental decision making to public view and participation. An evaluation of them will undoubtedly be colored strongly by one's vantage point of their operation. Presumably, the scholarly writing on the subject to date has been penned by authors who themselves are observers of and not participants in government.[4] Without question, a member of the press who benefits from new openness and a public official who feels hemmed in by it would have views differing in some respects from each other and from those of totally objective critics.

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† Professor of Law, Spessard L. Holland Law Center, University of Florida.

‡ Captain, United States Army.

1. This is the popular name for Florida's open government law. FLA. STAT. ANN. § 286.011 (Supp. 1974). Deriving both from the notion of "out in the open" and from Florida's public relations label as the "sunshine state," this descriptive expression apparently has gained widespread use.

2. Meetings of various governmental bodies are declared to be open to the public in forty-one states; *see* Appendix II.

3. To be compared with this report of forty-one states with statutory and constitutional provisions in 1974 is a report of twenty-six states with laws in 1961. Note, *Open Meeting Statutes: The Press Fights for the "Right to Know"*, 75 HARV. L. REV. 199 (1962).

4. *See, e.g.*, H. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); Campbell, *Public Access to Government Documents*, 41 AUSTRALIAN L.J. 73 (1967); Greenberg, *An Annotated History of Florida's "Sunshine Law"*, 118 CONG. REC. 26908 (1972); Hennings, *A Legislative Measure to Augment the Free Flow of Information*, 8 AM. U.L. REV. 19 (1959); Pickerell, *Agencies and the Public: Secrecy and the Access to Administrative Records*, 118 CONG. REC. 26903 (1972); Wickham, *Let the Sun Shine In: Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480 (1973); Comment, *Access to Governmental Information in California*, 54 CALIF. L. REV. 1650 (1966); Note, *An Extension of the Public Hearing Principle*, 46 CHI.-KENT L. REV. 207 (1966); Note, 75 HARV. L. REV., *supra* note 3; Comment, *The Iowa Open Meetings Act: A Right Without a Remedy?*, 58 IOWA L. REV. 210 (1972); Note, *Public Authorities—Records of Public Authorities Not Open to Public Inspection*, 13 SYRACUSE L. REV. 339 (1961); Note, *Administrative Law—Freedom of Information—Texas Open Meetings Act Has Potentially Broad Coverage But Suffers From Inadequate Enforcement Provisions*, 49 TEXAS L. REV. 764 (1971); Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361 (1971).

Being possessed of an elective public office, a full time job as a law teacher, and the distinction of being one of only two public officials known to have been acquitted of criminal charges under a Sunshine Law perhaps gives the principal author of this article a unique perspective from which to comment about the subject.[5] At least these factors shape some well formed biases.

Eliminating secrecy in government is not so simple a task as it first might seem. In an era of electronic communication, enforcement is always problematical at best. But more than enforcement is involved. One assumes that some public purpose is to be served by open government. Starting from that assumption, one quickly learns that other public purposes can be adversely affected by insisting upon too stringent controls. For example, placing public officials in a complete communication vacuum and allowing them to speak to one another only in a public meeting would presumably attain the highest degree of "publicness" in governmental decision making. Yet, the practicalities of doing the business of government would be totally lost, and the crucible of informal interchange and debate, which is the source of most ideas, would be quenched. Furthermore, public officials would be set apart from other citizens as mere dummies with rights of free speech and free association suspended during their terms in office.

In view of this conflict in public purposes, it is not surprising that most appellate litigation has dealt with coverage issues. That is, under what circumstances is a group of public officials required to meet the open government requirements of a particular statute? Quite often these contests have pitted an offended group of local elected officials, who feel their individual rights are being unnecessarily or illegally abridged, against representatives of the press, who believe the officials are conducting the public's business behind an illegal cloak of secrecy. The resolution of the individual disputes requires an answer to the question of how far did the legislature go in its open government statute. This is the stuff of law suits and is of primary concern to the litigating parties. Of more general concern from a policy point of view

5. The principal author is a professor of law at the University of Florida College of Law and an elected City Commissioner of the City of Gainesville, Florida. Shortly after being seated in office, he was arrested on charges of having violated FLA. STAT. ANN. § 286.011 (Supp. 1974), Florida's Sunshine Law. The charges stemmed from a luncheon meeting in a public restaurant attended by the author, one other member of the five person board and the general manager of the city's utility system, who was an employee of the Commission. The charges resulted in a jury trial and acquittal of the two Commissioners. No. 72-8031 (Alachua County Ct.).

are issues pertaining to individual liberties and operational practicalities. The first issue resolves into a question of how far legislatures can go in requiring governmental decision making to be done in public view without invalidly invading the constitutional freedoms of affected officials. The second resolves into a question of how far a legislature should go in creating the best balance between openness and practicality in decision making.

Any practical consideration of coverage must deal with at least four factors. One is the presumption of openness; a second is the allowance of exceptions; a third is the application to less than quorum numbers of a covered body; and a fourth is enforcement mechanisms. By presumption of openness is meant the existence of a legally enforceable right for members of the public to be present at the meetings of covered governmental bodies if no provision expressly concerning the particular kind of meeting exists. The two extremes are: fully open, meaning that all meetings are open to the public unless specifically closed; and, fully closed, meaning that all may be closed unless specifically opened. As has been documented by other authors,[6] the common law evolved no concept of a right in the public to be present, much less to participate, in meetings of governmental decision makers. Perhaps this historical shortfall lies in the feudal origins of our law. But whatever the reason, it leaves us with a status of no inherent public right to open government. Except as the people in their constitutions[7]

6. Note, 75 HARV. L. REV., *supra* note 3, at 1203-04.

7. Thirty-five states have constitutional provisions relating to open government in some respect. ALA. CONST. art. 4, § 57; ARK. CONST. art. 5, § 13; CAL. CONST. art. 4, § 7; COLO. CONST. art. V, § 14; CONN. CONST. art. 3, § 16; DEL. CONST. art. 2, § 11; IDAHO CONST. art. 3, § 12; ILL. CONST. art. 4, § 5(c); IND. CONST. art. 4, § 13; IOWA CONST. art. 3, § 13; MD. CONST. art. III, § 21; MICH. CONST. art. IV, § 20; MINN. CONST. art. 4, § 19; MISS. CONST. art. 4, § 58; MO. CONST. art. 3, § 20; MONT. CONST. art. V, § 13; NEB. CONST. art. III, § 11; NEV. CONST. art. 4, § 12; N.H. CONST. pt. 2, art. 8; N.M. CONST. art. IV, § 12; N.Y. CONST. art. 3, § 10; N.D. CONST. art. 2, § 50; OHIO CONST. art. 2, § 13; ORE. CONST. art. IV, § 14; PA. CONST. art. 2, § 13; P.R. CONST. art. III, § 11; S.C. CONST. art. 3, § 23; S.D. CONST. art. III, § 15; TENN. CONST. art. 2. § 22; TEX. CONST. art. 3, § 16; UTAH CONST. art. VI, § 15; VT. CONST. ch. II, § 8; WASH. CONST. art. 2, § 11; WIS. CONST. art. 4, § 10; WYO. CONST. art. 3, § 14. Typically, sessions of each house of the legislature and of committees of the whole shall be open, unless in the opinion of the legislature, the business is such as ought to be secret. In Utah and Texas all sessions of the legislature are declared open, except that the senates may meet in executive session. Texas limits executive sessions to matters that are not discrete to reveal to the public and for consideration of gubernatorial appointments. Colorado authorizes executive sessions of the Senate for deliberation upon executive appointments, but requires that all votes be taken in an open session. Illinois and Ohio require a two-thirds vote of the house involved to determine that the proceedings should be secret. No state's constitution authorizes legislation to enforce open government provisions. Nevertheless, statutes in Arkansas, ARK. STAT. ANN. §§

or the legislators in statutes[8] choose to mandate these rights, they do not exist.

Starting from the common-law status, legislatures must make a basic policy choice about the standards of openness that are to be imposed. Some of the decided cases demonstrate the extreme positions. *Acord v. Booth*[9] was perhaps the first sunshine law case. There, a citizen of Provo City, Utah had been bodily ejected from a meeting of the Provo city council, sitting as a "committee of the whole." Under an 1898 statute, requiring that the council "shall sit with open doors and keep a journal of its own proceedings,"[10] the plaintiff sued for money damages in *vindication of the infringement of his right as a citizen to be present during the meeting.* Rejecting the argument that the open government law did not apply to the council sitting as a "committee of the whole," a procedure adopted to loosen parliamentary rules prevailing during meetings of the council, the Utah Supreme Court affirmed a jury verdict of damages in the amount of one cent. According to the court, the law required not only "[t]hat the public might know how the vote stood," but also "that the public might know what the councilmen thought about the matters."[11] The position of the Utah court could be described as one holding that within the coverage of the statute everything that is not expressly closed to the public is open.[12] A number of other states have followed this lead, including California[13] and Florida.[14]

6-602 to -604 (1956), and New Hampshire, N.H. REV. STAT. ANN. §§ 91-A:1 to :8 (Supp. 1973), specifically provide for enforcement, while statutes in a number of other states do so by implication. ILL. ANN. STAT. ch. 102, §§ 4-44 (Smith-Hurd Supp. 1974); ME. REV. STAT. ANN. tit. 1, §§ 402-04(a) (Supp. 1973); N.C. GEN. STAT. § 143-318.2 (1973); UTAH CODE ANN. §§ 52-7-1 to -4 (1970); WIS. STAT. ANN. § 66.77 (Supp. 1974).

8. *See* Appendix II.

9. 33 Utah 279, 93 P. 734 (1908).

10. *Id.* at 281, 93 P. at 735.

11. *Id.* at 284, 93 P. at 735-36.

12. Nevertheless, the court did not perceive that the public would always best be served by total openness, nor did it see the Utah law as requiring it. According to the dictum of the court, matters that "might adversely affect public interests if conducted and discussed openly" might be referred to special committees to which the law did not apply. *Id.* at 284, 93 P. at 736. Hence, the Utah court acknowledged that openness in government was but one public interest, which on occasion could be outweighed by others. In proposing the special committee formula for working out the conflict in the context of requiring all meetings of the final decision-making body to be open, however, the court apparently intended that all matters requiring a decision of the governing body would finally be put on the floor for debate and decision making in public.

13. The California cases deal with a statute requiring that "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as other

Standing in contradistinction to the all-is-open view is the position that all is closed except that which is specifically opened. This view apparently prevails in Ohio, where, mindful of the common law ap-

wise provided . . . ." CAL. GOV'T CODE § 54953 (West Supp. 1974). In the preamble to the law the California legislature stated it "to be the intent of the law that [affected bodies'] actions be taken openly and that their deliberations be conducted openly." *Id.* § 54950. Adler v. City Council, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (3d Dist. Ct. App. 1960), was a taxpayer's action under the open government statute seeking to invalidate a zoning ordinance that had been considered in a non-public meeting by an advisory planning commission before being adopted by the city council. Although the decision of the appellate court was sufficiently supported by a holding that the planning commission was not a "legislative body" as defined by the statute, CAL. GOV'T CODE § 54952 (West Supp. 1974) and, therefore, was not subject to the open meeting requirements, the court stated in dictum that the law "was not directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies" and, therefore, "does not forbid such informal development of facts pertinent to zoning problems." 184 Cal. App. 2d at —, —, 7 Cal. Rptr. at 810, 811. *Adler* was criticized in Comment, *Access to Governmental Information in California*, 54 CALIF. L. REV. 1650, 1651-57 (1966). The California legislature broadened the definition of the term "legislative body" to include committees and also boards and commissions supported by funds provided by legislative bodies. CAL. GOV'T CODE § 54952.3 (West Supp. 1974). In Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (3d Dist. Ct. App. 1968), the only appellate court opinion interpreting the revised statute, a trial court had issued a preliminary injunction restraining the board of county supervisors from holding "any closed meeting at which three or more members were present except under the statutory exceptions for personnel and national security matters." *Id.* at —, 69 Cal. Rptr. at 483. The suit was brought in the aftermath of a meeting held by the board at an Elks Club with counsel, administrators and union officials to discuss an employees' strike. On appeal, the board sought to have the injunction dissolved on the grounds that the statute as interpreted by *Adler* did not proscribe non-decisional, information gathering sessions such as the one in dispute. The board also argued that it had a right to confer with its attorney in private as an element of the attorney-client privilege afforded by California law. Refusing to accept the *Adler* approach, the court reexamined the background and purposes of the open meeting law to conclude that it applied to "informal sessions or conferences of the board members designed for the discussion of public business." *Id.* at —, 69 Cal. Rptr. at 487. The court also concluded, however, that the California statutory attorney-client privilege was not repealed by implication as it applied to legislative bodies.

In summary, the California law and cases develop distinctions concerning where the line is to be drawn between openness and competing public interests. In California matters affecting national security and sensitive personnel matters are carved out from the open government law. The *Newspaper Guild* case likewise carves out a lawyer-client privilege in justifiable circumstances. The *Newspaper Guild* opinion also rejects the earlier notion of *Adler* that coverage extends only to "formal" meetings and puts California in the "all meetings" category of *Acord v. Booth.*

14. Florida is far and away the champion state so far as litigation under a sunshine law is concerned. Under a statute providing that:

> (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.

FLA. STAT. ANN. § 286.011 (1974), no less than ten appellate decisions have been rendered. Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973); Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972); City of Miami Beach v. Berns, 245 So. 2d 38

proach, the Ohio Supreme Court interpreted[15] a statute declaring "all meetings . . . to be public meetings open to the public at all times"[16] as not precluding non-public executive sessions in which no formal action is to be taken. Although a later Ohio case[17] invalidated formal actions taken in an executive session, the judicial construction of the legislature's intention in that state is that the common-law rule remains in effect except as the legislature has explicitly ruled otherwise.

If one accepts as the better rule that all is open except that which is specifically closed, as the authors do, he must then decide under what circumstances, if any, excluding the public should be allowed. Most sunshine laws acknowledge a need for closed meetings under specified circumstances in which widespread noising about of a given matter might prove adverse to the public interest.[18] Typical exceptions allow

(Fla. 1971); Jones v. Tanzler, 238 So. 2d 91 (Fla. 1970); Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); Bigelow v. Howze, 291 So. 2d 645 (Fla. Dist. Ct. App. 1974); IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 (Fla. Dist. Ct. App. 1973), *aff'd sub nom.* Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); Shaughnessy v. Metropolitan Dade County, 238 So. 2d 466 (Fla. Ct. App. 1970); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969). While a district court of appeals at one time acknowledged an attorney-client privilege in the law, *id.*, the supreme court has later strongly implied that there are no exceptions, Canney v. Board of Pub. Instruction, *supra*, except as constitutionally guaranteed for collective bargaining purposes, Bassett v. Braddock, *supra*.

15. Beacon Journal Publishing Co. v. City of Akron, 3 Ohio St. 2d 191, 209 N.E.2d 399 (1965).

16. OHIO REV. CODE ANN. § 121.22 (Page 1969).

17. State *ex rel.* Humphrey v. Adkins. 18 Ohio App. 2d 101, 247 N.E.2d 330 (1969). In that case a school board had readmitted a formerly expelled student in executive session. The court held the readmission invalid. *Adkins* cited Blum v. Board of Zoning & Appeals, 1 Misc. 2d 668, 149 N.Y.S.2d 5 (Sup. Ct. 1956), which carried the invalidity position to the extent of saying, "[n]or is this invalidity cured by an announcement, subsequently made at a public meeting, of the action already taken at the executive session." *Id.* at —, 149 N.Y.S.2d at 8. *See also* Dayton Newspapers, Inc. v. City of Dayton, 28 Ohio App. 2d 95, 274 N.E.2d 766 (1971); Thomas v. Board of Trustees, 5 Ohio App. 2d 265, 215 N.E.2d 434 (1966).

18. Executive sessions are authorized by open meeting statutes in thirty-nine states (full citations may be found in Appendix II): Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont, and Wisconsin. In New Mexico, the statute contemplates executive sessions by providing that all final decisions shall be made at public meetings. In five states, properly convened executive sessions may be held only upon a majority vote of the affected agency: Arizona, Arkansas, Connecticut, Maine, and North Carolina. Hawaii and Iowa only require a two-thirds vote of the affected agency. The majority of statutes prohibit final action during an executive session: Alaska, Arizona, Arkansas, Colorado, Georgia, Idaho, Louisiana, Maryland, Nebraska, New Hampshire, Ohio, Oklahoma, South Dakota, and Utah. Most of these statutes, however, offer little guidance for determining what actions may properly be taken. Despite this general lack of guidelines, Wisconsin's statute provides that no formal action shall be introduced, deliberated upon, or adopted during an executive session. Several courts have held that a formal rerun of action taken in executive ses-

private sessions to consult legal counsel concerning pending litigation,[19] to consider issues relating to the character or good name of any person,[20] complaints[21] and disciplinary actions against government employees,[22] acquisition of real property,[23] matters of public finance,[24] matters required to be kept confidential by Federal regulation[25] or law, municipal charter or ordinance,[26] quasi-judicial issues,[27] and others as specified in particular states.[28]

In the face of an all-is-open statute with no exceptions, difficult problems can be placed upon governmental bodies. The courts have

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sion does not comply with the open meetings concept. IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 (Fla. Dist. Ct. App. 1973), *aff'd sub nom.* Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); Scott v. Town of Bloomfield, 94 N.J. Super. 592, 229 A.2d 667 (L. Div.), *aff'd on other grounds*, 98 N.J. Super. 321, 237 A.2d 297 (App. Div. 1967), *dismissed as moot*, 52 N.J. 473, 246 A.2d 129 (1968) (per curiam); Kramer v. Board of Adjustment, 80 N.J. Super. 452, 194 A.2d 26 (L. Div. 1963), *aff'd per curiam*, 45 N.J. 268, 212 A.2d 153 (1965); Blum v. Board of Zoning & Appeals, 1 Misc. 2d 668, 149 N.Y.S.2d 5 (Sup. Ct. 1956). *Contra*, Collinsville School Dist. # 10 v. Witte, 5 Ill. App. 3d 600, 283 N.E.2d 718 (1972); Reilly v. Board of Selectmen, 345 Mass. 363, 187 N.E.2d 838 (1963).

19. Three states provide statutory attorney-client privileges. MO. ANN. STAT. § 610.025(2) (Vernon Cum. Supp. 1973); N.C. GEN. STAT. § 143-318.3(5) (1974); WIS. STAT. ANN. § 66.77(3)(f) (1974). California courts recognized such an exception by strictly construing the California statute not to be in derogation of the common-law privilege. Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 263 Cal. App. 2d 41 (1968). The Arkansas Supreme Court refused to acknowledge such an exception where none was provided in the statute. Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968). The situation is confusing in Florida where the privilege was recognized as an exception by a district court of appeals and apparently by the supreme court. Bassett v. Braddock, 262 So. 2d 425, 428 (Fla. 1972); Times Publishing Co. v. Williams, 222 So. 2d 470, 475 (Fla. Dist. Ct. App. 1969). In a later case, however, the supreme court rejected the privilege as an exception to the open meeting requirement. Canney v. Board of Pub. Instruction, 278 So. 2d 260, 277 (Fla. 1973).

20. Alabama, Alaska, Iowa, Massachusetts, New Hampshire, and Wisconsin; *see* Appendix II.

21. California, Illinois, Missouri, Nevada, New Hampshire, South Dakota, and Wisconsin; *see* Appendix II.

22. Arkansas, California, Illinois, Missouri, Nevada, New Hampshire, Oklahoma, South Dakota, and Wisconsin; *see* Appendix II.

23. Illinois, Iowa, Missouri, New Hampshire, North Carolina, and Wisconsin; *see* Appendix II.

24. Alaska, Massachusetts, New Jersey, and Wisconsin; *see* Appendix II.

25. Illinois, Massachusetts, New Jersey, and South Dakota; *see* Appendix II.

26. Alaska, Massachusetts, New Jersey, North Dakota, and South Dakota; *see* Appendix II.

27. Alaska, Minnesota, Missouri, New Jersey, North Carolina, Washington, and Wisconsin; *see* Appendix II.

28. Labor negotiations are privileged by statute in California, Illinois, and North Carolina, *see* Appendix II, and in Florida by judicial fiat, Bassett v. Braddock, 262 So. 2d 425, 428 (Fla. 1972). In Illinois executive sessions are authorized for the conciliation of complaints arising from discriminatory treatment in violation of federal, state, or local law, *see* Appendix II.

met these situations in different ways. For example, under a law[29] that contains explicit exceptions only for matters affecting national security and sensitive personnel matters, a California court was called upon to decide the legitimacy of a governmental body's conferring in private with legal counsel. Finding that the common law attorney-client privilege could be claimed by public bodies in their client's roles and further finding that the common law in that specific detail had not been abrogated by the open government law, this court carved out a lawyer-client exception for justifiable circumstances.[30]

The California approach exhibits flexibility and an appreciation of the realities of local government. One of the realities is, of course, that in many respects local government operates in a business-like way. Decisions must be made concerning strategy in law suits involving private litigants as opposing parties and to give away one's hand to the opposition which remains free to operate in private, can prove very detrimental to the side of the public. Notwithstanding this, other courts have not accepted the flexible California approach. For example, the Supreme Court of Florida has interpreted the law of that state to be of the all-is-open mode, meaning every meeting every time,[31] excepting only the Florida constitutional provision for collective bargaining strategy sessions.[32] Even the California attorney-client doctrine has apparently been rejected.[33]

In practice, this stance can create very unsettling episodes for governmental officials. As to exactly how unsettling they can be, one must first consider enforcement possibilities. Typically, sunshine law enforcement tools range from none at all,[34] to criminal penalties,[35] to in-

29. CAL. GOV'T CODE §§ 54950-60 (West Supp. 1974); *see* note 13 *supra.*

30. Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 263 Cal. App. 2d 41 (1968).

31. Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973).

32. Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972). The court was interpreting the following language from the Florida constitution: "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." FLA. CONST. art. I, § 6.

33. Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973).

34. Arkansas, Hawaii, Kentucky, Louisiana, Maryland, North Dakota, Ohio, and Wisconsin; *see* Appendix II.

35. To meet secretly in violation of a sunshine law constitutes a misdemeanor in thirteen states: Alabama, Arizona, California, Florida, Indiana, Iowa, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, Texas, and Utah; *see* Appendix II. Punishment is by fine in Alabama, Illinois, Indiana, Iowa, Maine, Nebraska, New Mexico, Oklahoma, Pennsylvania, Texas, and Vermont; *see* Appendix II. Imprisonment is provided for in Illinois, Indiana, Maine, and Oklahoma; *see* Appendix II. At one time, Arkansas allowed removal from office as a penalty, ARK. STAT. ANN. § 6-603 (1956), *repealed*, No. 66, § 1, [1961] Ark. Acts 148; *see* note 109 *infra.*

junctions,[36] to writs of mandamus[37] and other appropriate equitable relief,[38] to invalidation of actions taken.[39] In Florida, for example, criminal penalties,[40] injunctions,[41] and invalidation[42] are available. In the light of the wide ranging enforcement potential and of the Florida position concerning exceptions, consider the dilemma faced by the governmental officials in the following situation that occurred in a Florida city in late 1973. For a period of five years the City of Gainesville litigated an anti-trust treble damages claim against Florida Power Corporation and Florida Power and Light Company. Florida Power Corporation had a viable counterclaim, but Florida Power and Light did not. In July or August of 1973 lawyers of Florida Power Corporation informed the city's lawyers of a willingness to negotiate a settlement to avert going to trial in September. Florida Power Corporation demanded that negotiations be conducted in complete secrecy. Without any input from elected officials for whom they work and without informing the officials that negotiations were proceeding, the city's lawyers negotiated a proposed settlement. In presenting the proposal to the governing body in a public meeting, the city's lawyers cautioned that no probing questions be asked because the settlement was somewhat fragile and because the suit with Florida Power and Light Company, which involved identical issues, was still pending and awaiting trial. The elected officials were asked to make a decision on the $2 million settlement as soon as possible. Claimed damages were $4.5 million, which if recovered fully in trial would yield a triple recovery of $13.5 million for the public. Florida Power also had a counterclaim of litigable merit that upon prevailing would also yield triple damages.

Permissible fines range from ten dollars to one thousand dollars, and sentences range from thirty days to just less than a year. Louisiana, Minnesota, and Texas provide greater penalties for subsequent convictions. Whether a finding of wilful violation is required for conviction remains largely unsettled. The Florida Supreme Court ruled in dictum that proof of scienter is required, Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969), and California makes a violation criminally actionable only when secret action is taken "with knowledge of the fact that the meeting is in violation of the law." CAL. GOV'T CODE § 54959 (West Supp. 1974).

36. California, Connecticut, Florida, Indiana, Iowa, Missouri, New Hampshire, and North Carolina; *see* Appendix II.

37. Arizona, California, Illinois, Iowa, and North Carolina; *see* Appendix II.

38. Arizona, California, Maine, and Massachusetts; *see* Appendix II.

39. Arizona, Alaska, Colorado, Florida, Georgia, Indiana, New Jersey, and Oklahoma; *see* Appendix II. *See also* note 18 *supra.*

40. FLA. STAT. ANN. § 286.011(3) (1974).

41. *Id.* § 286.011(2).

42. IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 (Fla. Dist. Ct. App. 1973), *aff'd sub nom.* Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).

What course of action could the elected officials safely take in trying to inform themselves of the merits of the proposed settlement? What is the consequence if they guess wrong about the legality of what they do? In view of the apparent denial[43] of an attorney-client exception, it would seem foolhardy to risk hashing out the pros and cons with the lawyers in a closed meeting of the whole body. Moreover, since the Florida Supreme Court has several times warned about the evils of attempting to evade the law by breaking into small committees,[44] it would seem unwise for the officials to consult the lawyers two at a time. This leaves individual consultations with the lawyers as a last resort.[45] Obviously, such a procedure does not afford the tempering of judgments and impressions that comes from discussion and argumentation. Pressing further, one may suppose two officials happened to cross paths on the street corner. Could they safely exchange ideas on the matter confronting them? Based upon the rationale that what could not be done officially should not be done unofficially, they could not.

But what would be the consequences if the law were ignored in any of these situations and discussions were held? This is where enforcement produces its effect. First, the law's criminal sanctions might be imposed, making a violation punishable as a misdemeanor.[46] Perhaps even more troublesome than that is the threat that any settlement the city and the power company might later agree to in public would be invalidated because of improper meetings.[47] In summary, it appears that the only safe course to take would be for individual officials to meet privately with counsel to probe the issues as they best can and then vote without discussion in a public meeting. Even if one rejects

43. *See* text accompanying note 33 *supra.*

44. City of Miami Beach v. Berns, 245 So. 2d 38, 41 (Fla. 1971); Jones v. Tanzler, 238 So. 2d 91, 92-93 (Fla. 1970) (concurring opinion). *See also* Bigelow v. Howze, 291 So. 2d 645 (Fla. Dist. Ct. App. 1974); IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 (Fla. Dist. Ct. App. 1973), *aff'd sub nom.* Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).

45. That this procedure threatens to transfer the policy-making role to the legal advisor should be obvious. As to the legality of the procedure, a recent opinion of the Florida Attorney-General has warned that "Care must be taken . . . not to intentionally avoid the requirements of an open meeting by having an individual who is not a board member act as a liason for board members by circulating information and thoughts of individual councilmen to the rest of the board." FLA. ATT'Y GEN. OP. 074-47, Feb. 13, 1974.

46. FLA. STAT. ANN. § 286.011(3) (1974).

47. IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 (Fla. Dist. Ct. App. 1973), *aff'd sub nom.* Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).

the worst possible outcome of the episode described above as being too farfetched to be believable, the situation as it has already emerged makes a travesty of the open government law. Not only were the press and the public unaware of the negotiations and unable to participate in them, but the elected officials themselves were also completely shut out from the very important original stages of the decisional process that Florida's appellate courts have said must be open to public scrutiny. This ironic consequence of total openness can hardly be said to optimize the public good.

I. FUNDAMENTAL ISSUES

The foregoing pages describe the state of judicial interpretations of open government laws. The clear and open approach of the California and Utah cases stand in contrast to the clear but rather closed approach of Ohio and other states. Florida's cases, marked by a zeal for openness and an abandonment of legal craftsmanship in favor of imposing rhetoric while evincing total openness, place difficult burdens upon public officials. The Florida courts have denied any function in passing upon the "wisdom or unwisdom"[48] of what the legislature has rendered into law and often have invited offended litigants to seek assistance in the legislative halls if some exception to the open government law is needed.[49] This analysis suggests that a need exists for a sense of policy direction about competition between open government and the public interest as manifested in some other sphere and about where the line should be drawn. This is largely a matter of differentiating between policy making, which should be covered by the strictures of open government laws, and implementation, which ordinarily should not be so encumbered. The line drawing is particularly difficult with public bodies that have both policy making and implementing functions, such as local governmental bodies and some state agencies. Purely legislative bodies rarely, if ever, face analogous dilemmas, which may account for the insensitivity to the point in some laws. Before the pros and cons of this line drawing are examined, however, the question of whether any overriding constitutional restraint

48. Jones v. Tanzler, 238 So. 2d 91, 93 (Fla. 1970) (concurring opinion); City of Miami Beach v. Berns, 231 So. 2d 847, 849-50 (Fla. Dist. Ct. App. 1970), *cert. discharged*, 245 So. 2d 38 (Fla. 1971). *But see* Town of Palm Beach v. Gradison, 296 So. 2d 473, 480-81 (Fla. 1974) (dissenting opinion).

49. Canney v. Board of Pub. Instruction, 278 So. 2d 260, 264 (Fla. 1973); Jones v. Tanzler, 238 So. 2d 91, 93 (Fla. 1970); Board of Pub. Instruction v. Doran, 224 So. 2d 693, 700 (Fla. 1969).

limits the permissible scope of open government regulations will be addressed.

Beginning from a position that the public has no right to be present and participate in meetings of governmental bodies, as they did,[50] early proponents of open government laws occupied themselves with opening up scheduled meetings of elected governmental bodies sitting as a whole. The law at issue in *Acord v. Booth*,[51] requiring that councils sit "with open doors," is perhaps illustrative. Having attained one level of success, proponents of open government found that governmental bodies often conduct business preliminarily in informal work sessions or in committees. Or perhaps, bodies began to change their *modi operendi* after open government laws removed the shrouds from regular meetings. At any rate, in *Acord*, the members convened themselves in an informal "committee of a whole" to discuss business in a less rigid environment and in private. The *Acord* court ruled, as has been seen earlier, that the law required that the decision-making process, and not just the final vote, be opened to public view. Therefore, although special committees could appropriately consider matters of which open discussion "might adversely affect public interests," committees of the whole where the final votes were taken were not exempt from the law. After a false start in *Adler v. City Council*,[52] which severely restricted the application of the California Sunshine Law, *Newspaper Guild*[53] interpreted the revised California statute to cover *all* meetings of boards and their committees in which a quorum or more was present, whether the purpose of the meeting be for deliberation and discussion or for "formal action." But California has not abandoned the *Acord* position that the public interest sometimes requires confidentiality. The statute explicitly supplies national security and personnel exceptions and *Newspaper Guild* itself interpreted the whole of California law as providing a limited attorney-client exemption.[54]

It is only in Florida that the movement toward open government

50. *See, e.g.*, Note, 75 HARV. L. REV., *supra* note 3.

51. 33 Utah 279, 93 P. 734 (1908).

52. 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (1960).

53. Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968).

54. *Id.* The court was able to interpret California's open government law as not impliedly repealing the attorney-client privilege statute as it applied to legislative bodies and their lawyers. The Supreme Court of Arkansas was unable to make such an accommodation in Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968), under an open government law that allowed no exceptions except as "specifically" provided. None was provided for the attorney-client privilege and none was allowed by the court.

has begun to concern itself with less than quorum numbers of regulated bodies, and only in Florida have the legislature and courts not allowed the possibility that the public interest is sometimes best served by temporary confidentiality.[55] Apparently, the Florida Supreme Court has an abiding fear that public officials will engage in "hanky-panky" if avenues are open for deviously depriving citizens of their "inalienable right to be present and be heard."[56] Furthermore, the court has implied that the evils being avoided make it necessary to apply the law to "any convening of two or more officials."[57]

Consistent with whatever constitutional limitations might apply to the structuring of government itself, legislatures can make their own judgments about whether the public interest requires any exceptions to the open government law, whether for committees or within the context of the "formal-informal" dichotomy accepted by some legislatures and courts. But the same is not necessarily true in extending the scope to gatherings of less than a quorum in number, at least so far as the application of criminal sanctions is concerned.

What is the limiting case in extending the scope of public meeting laws? Ostensibly, the limiting case would be to attach criminal penalties to the mere act of communicating about public business outside a public meeting by two members of a public body. In deciding whether such a regulation could be sustained as an appropriate exercise of the police powers of a state, one must balance the interests being protected by the regulation against abridgements of the freedoms of speech and association guaranteed by the first amendment to the United States Constitution. To illustrate the problem, consider the following hypothetical situations. Assume in each instance that a state open government statute purports to outlaw the described incidents and to visit criminal penalties upon convicted offenders. Assume in each case that the commissioners referred to are members of a five-member elected body of a city and that it takes a minimum of three votes to pass any question before the body.

(1) Two commissioners meet by happenstance in a public res-

55. The only sure exception is that for collective bargaining, Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972). At the time this article is being written, the Florida legislature is considering a bill to remove that exception.

56. Board of Pub. Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969); *see* Note, 75 HARV. L. REV., *supra* note 3 (demonstrates that no such "inalienable" right exists in the common law or under the federal constitution).

57. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); City of Miami Beach v. Berns, 245 So. 2d 38, 41 (Fla. 1971).

taurant for lunch. During lunch they discuss golf and weather, but no city business or public business of any kind. After lunch, the two are arrested and later convicted under the open government law.

(2) The second situation is the same as the first except, in addition to discussing golf and weather, the two commissioners discuss current city business matters. No agreements are reached and no promises about voting are made. The two are convicted under the open government law.

(3) The third situation is the same as the second expect the commissioners meet by prior appointment. They are convicted under the open government law.

(4) The fourth situation is the same as the third except the commissioners meet in a non-public place for the purpose of deciding upon a common course of action concerning pending matters of public business and agree to a voting pattern. They also agree to engage other commissioners in secretive sessions to produce an agreement of a majority prior to having public debate. The two are convicted under an open government law.

In each situation, will the law withstand constitutional challenge?[58] The remaining portion of this section will outline the details of the issues that are raised by the intersection of sunshine laws and the first amendment in the limiting case. In approaching this task, one might categorize people entitled to claim the protections of the first amendment in terms of their attachment to public decision-making processes as follows: mere citizens, public employees and public officials.

Over repeated dissents of first amendment absolutists such as Douglas and Black (most of the time), the Supreme Court has ruled on occasion that first amendment freedoms are not quite inalienable even as to mere citizens, but may be curtailed under limited circumstances. The use of speech alone can be punished under conspiracy statutes when there is a "clear and present danger" that the substantive evil to be prevented will be caused by the speech.[59] Moreover, "[w]here a statute does not directly abridge free speech, but—while

58. The third situation is essentially that faced by the principal author in his personal sunshine law violation. *See* note 5 *supra*. Since the case ended in an acquittal by jury, the basic constitutional issues were not ruled upon by an appellate court.

59. Dennis v. United States, 341 U.S. 494 (1951). The "clear and present danger" test is a rhetorical product of Justice Holmes. Apparently, it was first used in the celebrated case of Schenck v. United States, 249 U.S. 47, 52 (1919). *Schenck* involved the violation of an espionage act by persons encouraging men to avoid military service. The opinion also contains the famous dictum that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.*

regulating a subject within the State's power—tends to have the incidental effect of inhibiting first amendment rights—it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and lack of alternative means for doing so."[60] No less a civil libertarian than Hugo Black himself uttered that dictum in a majority opinion of the Court when it refused to intervene in a state prosecution under a criminal syndicalism statute. In the same vein, rights otherwise guaranteed by the first amendment can be abridged when there is a "compelling state interest"[61] that justifies the infringement, such as the interest of the government in gaining information to combat the overthrow of the government by force and violence.[62] Even the first amendment freedoms of mere citizens may be limited where necessary to deny the threat of "clear and present danger" posed by a conspiracy or when a "compelling state interest" in restricting speech exists.[63]

Citizens who become employees of the state or federal governments apparently relinquish some of their constitutional liberties within the scope of the "compelling state interest" standard. It is well established that a public employer may require loyalty to the government and insist that it be pledged by oath.[64] Apparently, this requirement

60. Younger v. Harris, 401 U.S. 37, 51 (1971).

61. The following remark from Justice Frankfurter's concurring opinion in Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957), is apparently the source of the "compelling state interest" terminology: "For a citizen to be made to forego even part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling." *Id.* at 265.

62. Barenblatt v. United States, 360 U.S. 109 (1959).

63. Not every threat or state rationale will suffice as "compelling," however. Citizens may with impunity refuse to answer questions about their activities and associations propounded by investigating committees of either the state or federal governments when the government has not established that the line of questioning is relevant to the subject matter under investigation. Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957). And before a state may compel an organization, such as the NAACP, to disclose the identity of its members, the court must have "controlling justification for the deterrent effect on free engagement of the right to associate which disclosure of membership lists is likely to have." NAACP v. Alabama, 357 U.S. 449, 466 (1958). Hence, in the absence of such a showing, a state cannot compel a foreign corporation to reveal its membership list as a qualification for doing business within its borders.

64. Garner v. Board of Pub. Works, 341 U.S. 716 (1951). Garner refused to take an oath that he would not "advise, advocate or teach, . . . overthrow" of the government by force and violence and had not done those things during the preceding five years. In upholding the statutory oath, the Supreme Court said, "the provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States." *Id.* at 720-21. The Court noted, however, that California courts had required scienter as an element of the statute. *Id.* at 723-24.

is valid because state employment is a "privilege" that may be conditioned upon reasonable terms of employment, including loyalty.[65] Moreover, the scope of inquiry as to loyalty may include past behavior, because " 'past conduct may well relate to present fitness' " and " 'past loyalty may have a reasonable relationship to present and future trust.' "[66] Persons not choosing to pledge their loyalty may "retain their beliefs and associations and go elsewhere."[67]

The federal government may also regulate the political activities of its employees, for example, by preventing their holding party offices, working at polling places, and being party paymasters,[68] and by prohibiting their participation in political management and campaigns.[69] States may likewise validly prohibit their employees from engaging in a wide range of partisan political activities.[70] The compelling interest

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65. Adler v. Board of Educ., 342 U.S. 485 (1952).

66. *Id.* at 492-93, *quoting* Garner v. Board of Educ., 341 U.S. 716, 720 (1951).

67. This language is extracted from Adler v. Board of Educ., 342 U.S. 485 (1952): "It is . . . clear that [teachers] have no right to work for the state in the school system on their terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and association and go elsewhere." *Id.* at 492. The influence of Oliver Wendell Holmes, Jr. is at work here. In a Massachusetts case involving the dismissal of a police officer who involved himself in politics contrary to a rule of his department, Holmes said,

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

McAuliffe v. City of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). In testing loyalty, however, the government must allow an opportunity for an employee or applicant to show that his association in a group advocating the violent overthrow of government was innocent of knowledge of the disloyal aims of the group. Wieman v. Updegraff, 344 U.S. 183 (1952). Hence, a loyalty statute suffers from constitutional overbreadth if it leaves an innocent joiner only the options of admitting his association, albeit innocent, and thereby losing the job, or committing perjury to get it. Likewise a statute requiring that public employees list all organizations and associations of which they are members is constitutionally invalid in that it presents greater infringement of the freedom of association than legitimate state purposes allow. Shelton v. Tucker, 364 U.S. 479 (1960).

68. United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947).

69. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

70. These activities include:

> soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates to any paid public office; taking part in the management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters to

in these instances is to avoid the danger " 'that political rather than official effort may earn advancement and . . . that governmental favor may be channelled through political connections.' "[71] In short, under appropriate circumstances, "the government has an interest in regulating the conduct and 'the speech of its employees that differ(s) significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' "[72]

Nevertheless, a state's interest in disciplining public employees does not justify the curtailing of a teacher's right to speak freely on public issues in criticism of his "ultimate employer" when the speech does not impede "the teacher's proper performance of his daily duties in the classroom" or interfere, "with the regular operation of the schools generally."[73] In these circumstances, the interest of the state in limiting employees' "opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[74] Any foreshortening of this freedom can be justified only where the content of the criticism leveled against the public employer is so utterly without merit as to exceed the standards of defamation of public officials under *New York Times Co. v. Sullivan*.[75] Those standards require nothing less than that the defamatory utterances were made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[76] Mere negligence clearly is not sufficient.[77] In the absence of behavior meeting these stringent criteria, dismissal from employment cannot be employed validly to bridle the tongues of public employees.[78]

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the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

Broadrick v. Oklahoma, 413 U.S. 601, 616-17 (1973).

71. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 555 (1973), *quoting* United Pub. Workers of America v. Mitchell, 330 U.S. 75, 98 (1947).

72. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973), *quoting* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

73. Pickering v. Board of Educ., 391 U.S. 563, 572-73 (1968). The *Pickering* principle may have been badly eroded in Arnett v. Kennedy, 416 U.S. 134 (1974), in which a majority of the Court allowed dismissal for cause on account of allegedly defamatory remarks made by a subordinate federal employee of his superior. Justices Marshall and Douglas dissented; Justice White dissented in part.

74. Pickering v. Board of Educ., 391 U.S. 563, 573 (1968).

75. *Id., citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

76. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

77. *Id.* at 288.

78. Pickering v. Board of Educ., 391 U.S. 563, 574 (1968).

Moving the inquiry into the domain of elected public officials, the class primarily affected by open government laws, one finds relatively little litigation regarding first amendment freedoms. In a case in which a public prosecutor has been convicted of criminal defamation for criticizing judges as being lazy and inefficient, the United States Supreme Court reversed, holding that even erroneous critical statements might be the subject of civil or criminal penalties only if made with "the high degree of awareness of their probable falsity demanded by New York Times."[79] Furthermore, in the absence of some showing that the offending remarks created a "clear and present danger" of causing some substantive harm, a court may not hold a sheriff in contempt who has publicly criticized the judge's role in a grand jury investigation.[80] As to the fact that an elected official was involved, the Court said: "The petitioner was an elected official and had the right to enter the field of political controversy, particularly where his political life was at stake. . . . The role that elected officials play in our society makes it all the more imperative that they may be allowed freely to express themselves on matters of current public importance."[81]

Turning to a different facet of the issue, the Supreme Court suggested that, while a state may exact a higher standard of "loyalty" from legislators than from plain citizens, presumably in application of the public employee rationale, it may not be more restrictive of speech for elective officials than for mere citizens.[82] The *New York Times* standards apply. As a matter of fact, the Court hinted that elected officials have even more freedom to express themselves on public issues than do mere citizens, if that is possible, when it said:

> The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be fully able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.[83]

No case has been discovered that addresses the specific question in issue: can a state proscribe the behavior described in the several hypothetical situations and apply criminal sanctions to violators? The

79. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
80. Wood v. Georgia, 370 U.S. 375 (1962).
81. *Id.* at 394.
82. Bond v. Floyd, 385 U.S. 116 (1966).
83. *Id.* at 136-37.

cases discussed above may be placed either into a general free speech category, suggesting a right to speak out and be heard publicly on any topic, or into a free association category, suggesting a right to associate in private or in public with any person or group of persons for any purpose short of perpetuating a substantive crime. In respect to free speech, elected officials have no lesser first amendment rights than mere citizens; no compelling interest can justify a restraint on their speaking out on partisan political issues as it does in the case of public employees. Nevertheless, the hypothetical sunshine law cases do not fit the free speech model, but seem to be more analogous to that of free association. That the state may demand loyalty of public officials, including, presumably, if the public employee rationale holds, not having knowingly been a member of an association committed to the overthrow of the government by force or violence, seems well settled. That the state may not require elected officials to eschew participation in partisan politics seems so certain that it barely merits mentioning. While these similarities and differences between public employment and elective public service are instructive, they are not close enough on point to settle the issues. They do, however, frame the question that the Court would ask in ruling upon the validity of an open government law in the context of the hypotheticals, and they provide a basis for predicting the answer. The question is, does the state have a compelling interest sufficient to justify the infringement of constitutionally guaranteed freedoms that is represented by outlawing the described behaviors.

What are the interests being protected by open government laws? Although the courts have talked about the evils of conducting the public's business "secretly" and in the "dark" behind "closed doors," the mere exclusion of the public does not necessarily imply that the public's interest is being badly served in the decisions made. Those catchy phrases are merely surrogates for something else. Among the more important public interests advanced by open government laws are that: voters are enabled to evaluate their elected officials better; information about current public issues will be better disseminated; public participation may supply information not otherwise available to the decision makers; public participation may supply points of view that would otherwise be ignored; and, perhaps most importantly, opportunities for undetected official misconduct are narrowed.[84]

84. Note, 75 HARV. L. REV., *supra* note 3, at 1200-01.

How do these purposes measure up against those involved in previously litigated situations? "Loyalty" in the sense of vowing to defend the government against powers that would overthrow it with force and violence has been held to justify infringements on the free speech of public employees,[85] and has been said in dictum to apply to elected officials.[86] Moreover, preventing the subversion of proper administration of government through politicization of the civil service justifies abridging the freedoms of association and speech of public employees in respect to partisan political activities.[87] On the other hand, the dangers to proper administration of government posed by public criticism of the government, which may even be erroneous so long as the bounds of the stringent *New York Times* criteria are not exceeded, do not justify an infringement of the speech of either public employees[88] or elected officials.[89] It could be argued by analogy that avoidance of conflicts of interests and misappropriation of public monies constitutes a sufficient state interest to justify some limits on speech and association of elected officials, but that avoidance of mere criticism of governmental operations does not.

Open meeting laws do not entail limiting speech in the sense of forbidding one to make known his views to the public, as did the free speech cases seen earlier. To the contrary, open government laws encourage that result. If applied to the hypothetical situations described, however, they do stifle private conversation between individuals and in a real sense insulate them from one another. Consequently, the situations described more nearly represent restrictions on association than on speech. Backing off from the non-quorum hypotheticals, one should be able to argue successfully that a state's interest in preventing the misdeeds recounted above is sufficient to place restrictions upon association in regard to the manner in which elected officials sitting as a public body make decisions on public business. That the state could invalidate all decisions made in violation of any open meeting law seems clear enough as a general proposition. That officials who refuse to abide by the regulations could be caused to forfeit their positions seems equally clear on the basis of the loyalty and partisan politics cases. That officials who actually engage in some of the activities

85. *See* note 64 and accompanying text *supra.*
86. Bond v. Floyd, 385 U.S. 116 (1966).
87. *See* note 70 *supra.*
88. Pickering v. Board of Educ., 391 U.S. 563 (1968).
89. Bond v. Floyd, 385 U.S. 116 (1966).

sought to be prevented by open government law, for example appropriating the public's money for one's personal use, could be made the subject of criminal sanctions also seems quite certain. But that merely engaging in a meeting from which the public is excluded and making decisions that are not in themselves contrary to the public interest or otherwise unlawful could be made the subject of a *criminal penalty* is not so certain. None of the "compelling state interest" cases has resulted in someone's being convicted in a criminal prosecution.[90] Only the "clear and present danger" cases involved that issue.[91] Therefore, if criminal penalties are to apply to violations of open government laws, it is arguable that a "clear and present danger" that the persons involved will engage in some substantive evil must appear, and not just that they will meet in secret. If such a showing must be made to convict members who attend formal meetings of decision making bodies outside public view, *a fortiori* no less a showing would be necessary to convict individual officials for having engaged in any of the informal meetings posed in the hypothetical situations. Thus, it would appear that the officials in none of the situations could be criminally punished, save in the fourth hypothetical situation and then only if the parties

90. The last two partisan politics cases are instructive. In Broadrick v. Oklahoma, 413 U.S. 601 (1973), an Oklahoma statute authorized dismissal upon violation, not criminal penalties. Similarly, the federal Hatch Act cases, including the latest, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), involved a statute authorizing dismissal or suspension, but not criminal penalties, 5 U.S.C. §§ 7323-25 (1970). *See also* Pickering v. Board of Educ., 391 U.S. 563 (1968), involving dismissal of a teacher because of criticism of school board policies.

The loyalty cases are in the same vein. Garner v. Board of Pub. Works, 341 U.S. 716 (1951), was a reinstatement suit following a dismissal for cause under a California law. Adler v. Board of Educ., 342 U.S. 485 (1952), was a declaratory action seeking to invalidate a New York law (the Feinberg Law) that rendered disloyal persons ineligible for employment or subject to removal. Wieman v. Updegraff, 344 U.S. 278 (1961), was a taxpayer's action to enjoin further payments to employees who had not taken an Oklahoma loyalty oath. Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961), was a suit to invalidate Florida's statute which required "immediate discharge" of employees who refused to take a loyalty oath. Shelton v. TUcker, 364 U.S. 479 (1960), a slightly different case, was a declaratory suit involving an Arkansas statute requiring disclosure by public employees of certain associations. Although it did involve punishing refusal to disclose certain associations, Barenblatt v. United States, 360 U.S. 109 (1959), is not an exception to the foregoing cases, because it involved a prosecution for contempt of Congress and not a statutory eligibility requirement. *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

91. Dennis v. United States, 341 U.S. 494 (1951), involved a criminal conspiracy conviction for violation of the Smith Act, 18 U.S.C. § 2385 (1970), making unlawful the advocacy of the overthrow of the government by force and violence and other actions. Wood v. Georgia, 370 U.S. 375 (1962), involved a conviction of contempt of court with criminal sanctions imposed because of certain criticisms of a judge. *See also* Garrison v. Louisiana, 379 U.S. 64 (1964).

were plotting an action that was punishable of itself.

Assuming that the state could not impose criminal sanctions, except as suggested above, could the state otherwise enforce an open government regulation by prohibiting any of the situations described? Invalidating decisions made in secret meetings presents no problem in terms of the power of the state, but it would seem to be tilting windmills except in the fourth hypothetical situation. Could the state, however, disqualify the persons involved from holding office as a result of a violation? Based on the partisan politics cases,[92] it might be determined by the courts that the state has a compelling interest in disqualifying individual officials who meet in non-quorum numbers to perpetuate some result the open government law was designed to prevent, so long as preventing that result was in itself a compelling interest of the state. Could the state go further, however, and in broadshot manner disqualify all the officials in all the situations even though they had no intention to and did not perpetuate any of the unwanted results? The partisan politics cases suggest an affirmative answer.[93] In them the Court approved laws that regulate all partisan politics, and not just specific acts that in fact subvert the interests of the state. Hence, it appears that a general law disqualifying elected officials who attend non-public meetings could be validly enforced.[94]

Under closer inspection, however, the analogy is not so compelling. In the first place, the risk of some unwanted result from the free association of individual officials in the first through third hypo-

92. *See* notes 68-71 and accompanying text *supra.*

93. Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632 (1974), raises a caveat in this analysis, however. *Lafleur* involved mandatory leave policies for pregnant school board employees. The Court held that due process requirements invalidated conclusive presumptions about an individual's ability and safety in continuing to work beyond a specified period in the term of a pregnancy. The Court gave no hint, however, that it intended to question the conclusive presumptions that it has formerly approved in the partisan politics cases.

94. A separate and more difficult question is whether such a statute should be invalidated on its face because of "overbreadth" of coverage. In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court observed that:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Id. at 615. *See also* Arnett v. Kennedy, 416 U.S. 134 (1974). Since the first through third hypothetical situations are constitutionally protected and are not "within the scope of otherwise valid criminal laws," a statute outlawing them is arguably invalid on its face and not just in application.

thetical situations hardly seems to be one that the state has a compelling interest of averting in this way. The cost of such a measure is quite high. Not the least cost is the infringement of freedoms involved. But that is not the only cost, including some that accrue directly to the state. Ideas are seldom germinated and nurtured to fruition in a vacuum, and the complete details and intricacies of controversial matters are seldom examined fully in the course of a meeting of a board, whether it be formal or informal. For example, one would never expect all the constitutional ramifications of open government laws to be exposed in a public meeting of a governmental body. Much of the early generation and testing of ideas occurs in the ambiance of intense intellectual exchange that rarely occurs in formal meetings of public bodies. It may also be true that schemes in conflict with the public good are bred in the same intimate context. That outlawing the four hypothetical situations would shut down the positive side of this process is possible, but that it would foreclose the negative side when telephones and personal mobility make enforcement so tenuous anyway is hardly likely. So a balance must be struck, first by the legislature, and ultimately, if infringement of constitutional freedoms is involved, by the courts.

Striking a balance among the interests to be protected is never easy. It might be that the interest of the state could never be compelling enough to outlaw individual contacts made for information gathering purposes, as in the second and third hypothetical situations. On the other hand, enforcement difficulties being as great as they are, a state might justify outlawing all secret decision making whether or not the substance of the decision runs counter to the public interest. This approach would catch the fourth hypothetical situation. If the courts were to agree with these arguments, legislation that disqualifies public officials that meet in pairs to decide how to vote on public issues, whether the matters at issue were in themselves inimical to the public good or not, would be validated on the basis of a compelling state interest. By contrast, legislation that outlaws the other three situations would be invalidated as infringing the constitutionally protected right of association without a sufficient justification.[95]

95. Before leaving this inquiry, one should consider one further point that has been raised by dicta in Florida cases. Assuming *arguendo* that the foregoing analyses were rejected by the courts and that laws criminally outlawing the hypothetical situations were validated, could one sustain a conviction in any of the situations under a law such as Florida's which outlaws attendance at "meetings of any agency or authority of any county, municipal corporation or any political subdivision . . . at which official acts are to be taken . . . ." FLA. STAT. ANN. § 286.011(1) (Supp. 1973). The issue boils down

II. LEGISLATIVE ISSUES

Having examined the current state of open government laws, one may be better able to settle upon various policies in developing a model law. The following remarks will examine some differing positions and indicate the ones that seem best to the authors. Based upon those policy judgments, a model statute has been prepared and is attached as an appendix.

Although precepts of open government including the right of the people to attend and participate in meetings of public bodies would seem to be intrinsic rights of the people in a democratic nation, it has been observed that they were not recognized in the antiquity of the common law and must, therefore, be imposed by legislation or constitutions. Given this status, each legislature that chooses to enact or amend an open government law must select between the position that

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to whether the statute applied to the hypothetical situation " 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.' " Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), *quoting* United States v. Harriss, 347 U.S. 612, 617 (1954). If it does not, then it is "void for vagueness" because "it encourages arbitrary and erratic arrests and convictions." Papachristou of City of Jacksonville, *supra* at 162, *citing* Thornhill v. Alabama, 310 U.S. 88 (1940) *and* Herndon v. Lowry, 301 U.S. 242 (1937). That the Florida statutes give no "fair notice" that luncheon discussions between two members of a board are prohibited hardly merits debate. And, yet, the Florida Supreme Court, speaking in dictum in a case that did not involve criminal prosecution, and applying standards quite similar to those laid down by the United States Supreme Court, rejected void for vagueness arguments and held that the Florida "statute complies with the requirements of organic due process prescribed by the Constitution." Board of Pub. Instruction v. Doran, 224 So. 2d 693, 698 (Fla. 1969). In what can only be described as a flat contradiction to the United States Supreme Court's rulings on vagueness, the Florida court has said that "[i]f a public official is unable to know whether by any convening of two or more officials he is violating the [open government] law, he should leave the meeting forthwith." City of Miami Beach v. Berns, 245 So. 2d 38, 41 (Fla. 1971). This is a perfect analogy to saying to a beggar on the street, "If a citizen is unable to know whether by appearing on public streets he is violating the vagrancy law, he should leave the street forthwith." The United States Supreme Court has condemned such an approach by a state as being inconsistent with the freedom of its people. Papachristou v. City of Jacksonville, *supra*. Furthermore, in the context of loyalty oath requirements the Court has held that " 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961), *quoting* Conally v. General Constr. Co., 269 U.S. 385, 391 (1925). In sum, the opinion of the Florida Supreme Court that affected officials must "leave forthwith" when they cannot decide whether their conduct has been outlawed runs directly contrary to constitutional freedoms as measured by the United States Supreme Court. The upshot of this argument is, therefore, that if Florida or any other state decides to outlaw the behavior described in any of the hypothetical situations, to avoid constitutional invalidity on vagueness grounds the specific behavior outlawed must be described explicitly enough that "men of common intelligence" need not guess at its meaning. United States v. Harriss, 347 U.S. 612, 617 (1954).

everything not specifically closed is opened and the position that everything not specifically opened is closed. Among the arguments that can be advanced for limiting the openness of governmental decision making are: that certain matters, if discussed in public, allow private interests to benefit at the public's expense (as in matters relating to the purchase of lands); that openness will inhibit free give and take among officials and lead to poorly thought out decisions; that disputes between policy makers and administrators, if publicly aired, will create difficult and inefficient management of programs; that certain matters are too sensitive for public view (certain personnel matters and matters of security); that public officials will waste time in needless speechmaking and other egosalving activities; and, that sensational and irresponsible reporting of news will distort the facts and unjustifiably undermine confidence in public officials.[96]

Although each of these criticisms has some credibility, none is persuasive by itself and all of them together can justify no more than the narrowest of exceptions at most. The arguments for open government simply outweigh them.[97] If there was ever a time when the populace at large left the business of government to the chosen few, that time is gone. Recent years have shown unprecedented levels of public participation through every imaginable device including mass demonstrations and hundreds of instances of civil disobedience. Needless to say, the routine business of city and county commission meetings does not elicit such intense participation, but non-routine business sometimes does, and some plain citizens watch over even the boring stuff. Although it might not be empirically demonstrable, it seems intuitively certain that openness produces better governmental programs, more efficiency in government, and government more responsive to public interests and less susceptible to corruption than does secrecy. A free, literate and otherwise informed public should ask for and should be satisfied with nothing less than openness in every level of government. Consequently, the authors opt for a law that opens governmental decision making except as explicitly closed. In choosing this position, we are neither blinded to other public interests that sometime require temporary confidentiality nor tempted to use it as a shibboleth to justify insensitive intrusions into the freedom of the people it is intended to regulate. The limits and exceptions to openness must be carefully and narrowly defined.

96. *See* Note, 75 HARV. L. REV., *supra* note 3, at 1199-1200, 1202.
97. *See, e.g., id.* at 1200-01.

Before those points are addressed, however, two further general attributes of openness need to be settled. The first is that true openness requires a genuine opportunity for members of the public to be in attendance at meetings of governmental bodies and also to participate actively whenever feasible. This implies that ample notice of meetings is to be given, that they will be held at reasonable times and in reasonably accessible places that are fully open to and can accommodate the public, and that members of the public can attend without being required to stand any expense above normal expenses one accrues in getting to any public place. Hence, if a public body is to hold a public luncheon meeting, it would be in a place that accommodates attending members of the public without cost whether or not they purchase anything. Because the availability and capacity of facilities in local communities vary widely, statutory requirements should be set in terms of minimum criteria that must be met by whatever specific conforming regulations are developed locally.

The second general attribute goes to which public bodies are covered by the law. The openness policy that the authors favor requires no less than that all policy making bodies be covered. To give meaning to that expression, the term "public body" may be defined as: all governmental bodies, whatever they may be named and including the state legislature, to which members are elected under the law by the citizens of this state or of any town, municipality, county or other political subdivision or authority thereof, and shall include committees, subcommittees, boards and commissions, whatever they may be named, appointed by law, resolution or otherwise by or under the authority of an elective body or elective official for the purpose of assisting said elective body or elective official in performing its governmental functions, whether said committees, subcommittees, boards and commissions are comprised of elected officials or private persons or both.

This coverage sweeps across every facet of collective decision making at the policy level. It does not, however, invade the domain of purely administrative decision making as exemplified by that of city managers and county administrators in conducting the routine business of their offices. Although no objection would be raised to having the public informed as to what is being said and done in most management affairs, to burden the executive operations of government with requirements of notice and meeting in public halls for any conference a manager has with department heads would take openness to a foolhardy

extreme.[98] The administrators should be responsible to the policy makers, who in their decision-making role are the proper targets of open government illumination.

The foregoing remarks neither advocate nor condone secrecy in the management of governmental programs. They simply recognize that control of public management raises different issues and requires different techniques than does control of public policy making. A fundamental point to be borne in mind is that public management is a business. Garbage must be collected, sewers built, fires put out, schools run, law breakers arrested, and all this, if it is to be done effectively and economically, must be done under a management plan that does not include giving public notice and listening to citizen comments on every management decision. Citizen recourse should be through their policy makers, where all should be open. Moreover, another means of management control is through open record laws, which is a subject beyond the scope of this article.

An earlier section of this article showed that a major disputed issue is whether and under what circumstances exemptions to the open meeting concept can be justified. In fact, one may ask whether the public interest is ever to be served by confidentiality. The answer is clearly in the affirmative, if and only if, exemptions are now allowed to swallow the rule. Preceding discussion has developed most of the circumstances. National security (which is rarely, if ever, a matter of state or local concern), attorney-client privilege, sensitive personnel matters where reputations might be needlessly damaged or in which the government may suffer the loss of valuable services, preparing for collective bargaining, and perhaps, decisions on real property acquisition, all sometimes may involve factors that need to be considered or acted upon by public bodies during a time when full disclosure would be contrary to the public good. Warnings[99] that public officials would use exemptions to take all the business of the public behind closed doors, cynical though they be, are not to be ignored. Accordingly,

98. For criticisms of "absolute openness" even as to elected bodies see Wickham, *supra* note 4, at 490.

99. The Florida Supreme Court has raised this spectre on at least three occasions. In Jones v. Tanzler, 238 So. 2d 91 (Fla. 1970), it was said, "Following this reasoning, any Council could divide itself into groups of small committees and each councilman would have an opportunity to commit himself on some matter on which foreseeable action will be taken by expressing himself at a secret committee meeting in the absence of the public and without giving the public an oportunity to be heard." *Id.* at 93 (concurring opinion).

restraints should be placed upon the use of exemptions. These could include convention in executive session only during the course of a public meeting; allowing it only for specific purposes within authorized exemptions and only upon greater than majority vote of the public body involved; requiring immediate reports of non-confidential aspects of the matters concerned; and, requiring the release by a specified certain date of all minutes, recordings and other official records and documents stemming from the executive session. Coupling these restrictions with appropriate sanctions should hold down the use of executive sessions and come close to eliminating its abuse.

Examination of judicial interpretatons of open government laws has shown that the courts have split on whether "meetings" include both gatherings for taking formal action and gatherings for obtaining information and otherwise informally discussing a matter of public business. Insofar as meetings of the whole of public bodies, or even of members in numbers large enough to reach a collective decision of the body, are concerned, the better position and the one adopted in drafting the proposed model statute is that any meeting in which matters of public business are to be considered should be public meetings. Attempting to extend coverage to less than quorum gatherings runs smack into the face of practicality and, more fundamentally, into the sanctuary of individual freedoms of the affected officials, discussed above.

The constitutional arguments will not be repeated, but an additional component of practicality deserves mention. Spontaneity of idea production and pre-fixed time schedules rarely coincide. Consequently, to insist rigidly upon one risks the loss of the other. Because the line between policy development and implementation is frequently thin, especially in local government where whether or not a tree is to be cut can sometimes be policy, some leeway is called for. Frequently, public officials have a need to visit sites or otherwise gather background information outside public meetings. Except when constituted as committees that make recommendations, little harm is done by nonquorum members gathering information on the spur of the moment and a lot of good could accrue. Ordinarily the information obtained will be reported to the parent body in an open meeting for discussion and decision if appropriate. While nonquorum meetings could be employed as a subterfuge for developing a consensus on a public issue outside a public meeting, successful policing of intentional misbehavior of that sort would hardly be worth the costs.

The preceding remarks point up that enforcement, or more importantly, enforceability is a key element of the open government concept. While it might be argued that a legislative or constitutional open government policy without enforcement mechanisms would be worthless, that probably is not true.[100] Most public officials would honor the policy most of the time.[101] Unfortunately, the exceptions might be occasions when public scrutiny is most needed. Accordingly, a full range of legitimate enforcement schemes should be provided. Injunctions, invalidations of actions taken, criminal penalties, and suspensions or removal from office all have been employed.[102] Except for criminal penalties, which have been shown to be of doubtful constitutional validity in most open government contexts, each of these is a valid sanction if used properly.

That injunctions are appropriate devices for bringing recalcitrant public bodies in line goes without saying. If the members continually ignore the requirements of the law, citizens should be able to seek relief in the courts. Moreover, it should be observed also that courts could legitimately use incarceration and fines to enforce contempt powers if the officials persist in violating the law to the point of ignoring court orders. But merely enjoining or even jailing public officials who violate the law does not correct the harm that may already be done by decisions taken in secret. Consequently, courts should be given authority to invalidate tainted actions upon petition of citizens. Invalidation should be discretionary, however, within the constraints of what is in the best interest of the public at the time the court makes its ruling. In many cases an earlier defect could have been rendered harmless by full disclosure and debate in later public meetings. Certainly the public, including the public body involved, should be entitled to adduce evidence on that point. In those cases, and perhaps in others where the substance of the decision taken in violation of the law is not contrary to the public interest, invalidation might create unnecessary delays or costs in the decisionmaking process. Indeed, in a case such as *Town of Palm Beach v. Gradison*,[103] where the invalidity was

100. Apparently a number of states have no enforcement mechanisms. *See* note 34 *supra*. *See also* Wickham, *supra* note 4, at 495 (discussion of the need of enforcement).

101. Even the suspicious Supreme Court of Florida suggested this is so, when it said, "Few, if any, governmental boards or agencies deliberately attempt to circumvent the government in the sunshine law." Town of Palm Beach v. Gradison, 296 So. 2d 473 476 (Fla. 1974).

102. *See* text accompanying notes 34-39 *supra*.

103. 296 So. 2d 473 (Fla. 1974), *aff'g* IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 (Fla. Dist. Ct. App. 1973).

attributed to earlier meetings of an inferior appointive body even after the board in question had held full public hearings, it is hard to see how the defects in the decision process could have harmed the public in any way. In every case courts should be given discretion to produce the best result for the public and not be constrained rigidly to invalidity as a remedy.[104]

Apart from judicial contempt powers and the possible embarrassment of being in violation of the law, what other punitive measures should be available to control the individuals who might violate the law? Criminal penalties are to be eschewed both because of constitutional difficulties and doubtful utility.[105] Sustaining a criminal prosecution would apparently require showing that the violations involved scienter[106] and would certainly require proof of all the elements of the crime "beyond a reasonable doubt." That convictions would seldom be obtained in crimes as innocuous as "secretly" attending a meeting seems certain, especially when the crime contained no element of substantative illegality. The public has a healthy skepticism about the doings of public officials, but it probably does not go that far.

That criminal penalties are inappropriate does not mean that public officials may not be individually called to account for violations of

104. Arguably, a statutory requirement that all final actions be taken in public contemplates the invalidity of actions taken in private. Whether these secret actions are void or merely voidable remains unsettled. The problem may be illustrated by the cases of Elmer v. Board of Zoning Adjustment, 343 Mass. 24, 176 N.E.2d 16 (1961); Toyah Independent School Dist. v. Pecos-Barstow Independent School Dist., 466 S.W.2d 377 (Tex. Civ. App. 1971). In *Elmer*, the Supreme Judicial Court of Massachusetts held that "[i]nvalidation of action taken, although it would tend strongly to enforce the [statutory] policy, would not be primarily a remedial measure" and refused to invalidate actions taken at an improperly noticed meeting. 343 Mass. at 27, 176 N.E.2d at 18. In *Toyah School District*, a Texas court declared the Texas Open Meetings Act mandatory and, in granting invalidation, suggested that "[t]o say the statute is mandatory, and at the same time to insist that action taken in disregard of its mandatory provisions is insulated against challenge is to utter a contradiction." 466 S.W.2d at 480. The Iowa court, in Dobrovolny v. Reinhardt, — Iowa —, 173 N.W.2d 837 (1970), refused to invalidate actions taken privately, holding that the statutory remedies were exhaustive and that authority for invalidation must come from the legislature. A well-reasoned dissenter argued that the majority recognized the public's statutory right to know but refused to grant the only available remedy when the statutory violations are complete. The dissent further argued that the court should fashion its remedies to give full effect to the important legislative policy.

105. Criminal penalties have been called "the most common and least useful sanction found in current legislation." Wickham, *supra* note 4, at 496.

106. In Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969), the Florida Supreme Court, in dictum, read the requirement of scienter into the Florida law. The California statute is explicit on the point, making a violation criminally actionable only when action is taken "with knowledge of the fact that the meeting is in violation" of the law. CAL. GOV'T CODE § 54959 (West 1966).

open government laws.[107] By analogy to the loyalty and partisan politics laws, it can be argued that willingness to conduct public business in public is a qualifying condition to continue holding office. Consequently, if an official intentionally violates a properly drafted law, he may be suspended or even removed from office. This sanction is not only less subject to constitutional invalidity than is a criminal one but is also more likely to be effective in practice. In the first place, suspension or removal from office would be a far more serious consequence to most officials than would a fine or even a short stint in jail. For another, removal from office would not require meeting the stringent criteria of criminal prosecutions, such as proof beyond a reasonable doubt and unanimous jury verdicts. This assertion obviously opens up another line of constitutional inquiry that will be mentioned but not pursued here. The Supreme Court's ruling in *Bond v. Floyd*,[108] that an elected public official cannot be required to give up his constitutional freedom to speak out on public issues as a qualification for public office, is obviously a limit in respect to open government laws, but it is one that need never be reached in stating a workable law.[109] Moreover, removal is not only of greater constitutional validity than criminal penalties, but it is also more likely to be effective in practice. In the first place, suspension or removal from office would be a far more serious consequence to many public officials than would a fine or even a jail sentence. For another, suspension or removal from office in a noncriminal proceeding would presumably not be required to meet the stringent criteria of criminal prosecutions, including, for example, proof beyond a reasonable doubt and unanimous jury verdicts.[110] It goes with

107. As this article is being written, a former Secretary of Education of Florida is under indictment and has resigned his office because of charges of misuse of his office for personal gain and at least two others of a seven person cabinet are under investigation. Resignation was made on April 25, 1974. Moreover, in 1973 the Lieutenant Governor of Florida was censured by the legislature for misuse of his office and was removed from his appointed post of Secretary of Commerce. It follows, therefore, that even a strong sunshine law will not eliminate abuses such as this. Moreover, when they occur, more effective sanctions are available in other laws.

108. 385 U.S. 116 (1966).

109. This assumption is not to be taken for granted, however. In a commentary on *Bond v. Floyd*, it was said that "no court, federal or state, had assumed the power to determine the qualifications of an elected member of a legislative body." Annot., 17 L. Ed. 2d 911, 912 (1966). *Bond v. Floyd* broke that silence at least to the extent of guarding against the use of impermissible qualifications. *See also* Powell v. McCormack, 395 U.S. 486 (1969). In that case, the Court held that Powell had been impermissibly excluded from his seat in Congress, but explicitly expressed "no view on what limitations may exist on Congress's power to expel or otherwise punish a member once he has been seated." *Id.* at 507 n.27.

110. For example, Florida's constitution authorizes the governor to suspend munici-

saying, however, that removal would require the affording of constitutionally acceptable due process to the person removed from office.[111]

III. CONCLUSION

The news media and especially the press can be justifiably proud of the roles they have played in bringing open government laws into being in many states.[112] In this they have been true guardians of the public interest, as they have been in assiduously policing public affairs to ferret out governmental abuses for public view and correction. With that background some members of the media are likely to view certain of this article's policy conclusions with disfavor and, perhaps, distrust. As examples, why should the law not apply to non-quorum gatherings? How can exemptions really be justified? And, why should the law have no criminal sanctions? In short, some are likely to view the proposed model statute as nothing but a "gutting" of some existing version.

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pal officers when "indicted for crime," and to suspend county officers for "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence," and other reasons. FLA. CONST. art. IV, § 7. The Arkansas removal statute provided in part: "Any member of a board or commission who participates in a closed meeting except for the discussion of matters declared to be privileged as set out in Section 2 [§ 6-602] of this Act, shall be subject to dismissal by the Governor of the State of Arkansas or by proper proceedings brought in a court of competent jurisdiction." ARK. STAT. ANN. § 6-603 (1956), *repealed*, No. 66, § 1, [1961] Ark. Acts 148.

111. In an old case involving removal of an elected official, the Supreme Court laid down the general rule that removal is a matter of state constitutional and legislative law. Wilson v. North Carolina, 169 U.S. 586 (1898). In *Wilson* the Court said that "if the Supreme Court of a State had acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process." *Id.* at 594. While *Wilson* did not attempt to define due process requirements, it did hold that jury trial was not required.

Guidance can be found in a series of recent cases in which the Supreme Court has evolved standards of due process that apply in respect to removal of government employees. Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). While these cases may not comprehend all the issues involved in the removal of elected public officials, they do indicate that due process protections must be afforded persons whose governmental jobs have a "property" interest component that can be diverted only upon a showing of "cause." Since suspension or removal for violating the sunshine law would be for cause, at least those protections would presumably be afforded. Even as to governmental employees, there is dispute among the members of the Court as to the nature of the proceedings required to discharge a tenured employee permissibly. In Arnett v. Kennedy, *supra*, the latest case, the plurality opinion was that the legislation creating the tenured position could define the scope of the dismissal procedure, at least within limits. *Arnett* approved a procedure that allowed dismissal prior to an evidentiary hearing so long as such a hearing with appropriate remedies were to be held in due time. The three dissenting justices would require an evidentiary hearing prior to dismissal. *See also* Note, *Removal of Public Officers in Louisiana*, 46 TUL. L. REV. 777 (1972).

112. *See* Note, 75 HARV. L. REV., *supra* note 3.

In a time when the public and especially the media portion of it are so justified in their suspicions of public officials, reactions of that sort are not unexpected.

Perhaps, brief allusions to an analogous issue will prove persuasive to some newspeople. Presently the press is under terrific pressure from government. Not only has a figure of no less importance than a Vice-President of the United States taken some of their numbers to task publicly but local prosecutors and judges have used criminal contempt as a device to pry others loose from their news sources. It should not be gainsaid that news reporters are public persons by choice just as elected officials are and that they sometimes have more effect on the public than do elected officials. Yet, many members of the media and of the public believe such a use of the contempt power to be an unwarranted intrusion upon the first amendment's guarantee of a free press. In that sense such a practice inhibits newspeople in going about the public's business of informing itself of what goes on in the community. By the same token public officials should not be turned into elected pariahs that may not see or communicate with each other except in ceremonial fish bowls. Within the rather restrictive ambit of the regulations outlined above, they should be allowed to inform themselves fully about the decisions they must make for the public just as newspeople go about informing themselves to answer their charge to serve the public.

One really cannot press the analogy between open government laws and so called "shield" laws too far because it rapidly breaks down. The one thing that does not break down, however, is the first amendment freedom nesting at the heart of each issue when it is pushed to the extreme. Perhaps even the skeptics that reject arguments of practicality as bold surrogates for secrecy will be sensitive to the issue of guaranteed constitutional freedom. When the media and the public accept its erosion for one class among us, who is to say which class is next?

Appendix I

Open Meeting Law Of The State of _____

XXX.01 Definitions.

(1) "Public body" means any entity defined by Sec. XXX.01(2) or Sec. XXX.01(3).

(2) "Board or commission of any state agency or authority" shall include boards or commissions, including the legislature, to which members are elected under law by the citizens of this State, and shall include committees and subcommittees; whatever they may be named, appointed by law, resolution or otherwise by or under the authority of an elective body or official for the purpose of assisting an elective body or official in performing its direct functions, whether said committees and subcommittees are comprised of elected officials or private persons or both.

(3) "Agency or authority of any county, municipal corporation or any political subdivision" shall include all bodies to which members are elected under law by the citizens of a county or municipality or any other political subdivision of this State, and shall include committees and subcommittees, whatever they may be named, appointed by law, resolution or otherwise by or under the authority of an elective body or official for the purpose of assisting an elective body or official in performing its direct functions, whether said committees and subcommittees are comprised of elected officials or private persons or both.

(4) "Private person" is a natural person appointed to serve on a public body under the authority of an elective body of which said person is not a member.

(5) A "meeting at which public acts are to be taken" is any gathering in person of not less than a quorum of the members of a public body that has been scheduled or otherwise previously arranged among the persons so gathering for the purpose of conducting the business of said body. Any gathering of not less than a quorum of the members of public body becomes a meeting at which public acts are to be taken whenever said gathering begins to conduct the business of said body.

(6) A "public meeting" is a meeting held at a time and place which is reasonably accessible to members of the public and which is in fact fully open to members of the public who attempt to attend at the scheduled time and place. A meeting does not fail to be public merely because held at a time or place that is inconvenient for some citizen or citizens or because every person who attempts to attend cannot be accommodated in the meeting place.

(7) A "regularly scheduled public meeting" of a public body is a public meeting that is scheduled in accordance with standing rules adopted by or specified for said public body, or one that is scheduled by a public body at a previous public meeting.

(8) An "emergency public meeting" of a public body is a public meeting that is not a regularly scheduled public meeting that has been called by the chairman or members of said public body.

(9) "To conduct the business" of a public body is to engage in any activity of the public body that would ordinarily and appropriately be conducted in a public meeting.

(10) A "quorum' of the members of a public body means a simple majority or more of the total number of members comprising said body at a given time, or, if less than a simple majority is required to take a collective decision, a quorum includes any number that by the rules of the public body can by vote bind it to a collective decision of its members.

XXX.02 Meetings open to the public and minutes; Notice of public meetings; unlawful devices and subterfuge.

(1) All meetings of any public body, except as otherwise provided by law at which public acts are to be taken are declared to be public meetings open to the public at all times. The minutes of a public meeting of any public body shall be promptly recorded and shall be open to public examination.

(2) Public notice shall be given of all public meetings of public bodies in accordance with rules prescribed by the body, if it is an elective body, or if it is an appointive body, by the elective body under which it is appointed. In no case may a regularly scheduled public meeting of a public body be convened earlier than twenty-four hours after the time of convention of the public meeting of said body at which it was scheduled, and in no case may an emergency public meeting be convened earlier than two hours after notice is given to representatives of the news media under rules to be prescribed under this subsection.

(3) Any device or subterfuge undertaken by members of a public body with the intention of making final collective decisions of public business without holding a public meeting for open discussion of the issues involved shall be unlawful. Nothing herein shall make illegal informal discussions, either in person or telephonically, between members of public bodies for the purpose of obtaining facts and opinions provided that there is no intention of violating the first sentence of this subsection and provided that subsections (1) and (2) of this section are not violated.

XXX.03 Exceptions; juridical functions; certain personnel matters; property acquisition; certain quasi-judicial matters; summaries of executive sessions.

(1) The requirements of Sec. XXX.02 shall not apply to courts and petit juries while deliberating and to meetings of grand juries; nor shall this act otherwise impair courts and judges in the exercise of existing powers in conducting juridical proceedings.

(2) The public may be excluded during executive sessions of public meetings that otherwise conform to this act for the following purposes:

a. considering the appointment, employment, promotion, dismissal or removal of a public employee, unless said person requests that the public not be excluded:

b. considering the acquisition of property under circumstances in which premature public knowledge would be likely to affect adversely the public's interest in making said acquisition;

c. consulting with legal counsel concerning pending or proposed litigation;

d. consulting with staff, counsel and consultants concerning collective bargaining issues and proposals.

All proceedings conducted in executive session shall be sound recorded and said recordings shall be made available for public hearing as soon as the public's interest would not likely be adversely affected by their release, and no later than one year from the date of said executive session at most. Copies of all memoranda and notes used to convey information during said executive session shall be retained for release to the public along with said recordings.

A summary of subjects discussed and final actions taken while the public is excluded shall be announced to the members of the public present at the conclusion of any executive session of a public body and a written summary shall be made available for public examination not later than the close of business of the second succeeding business day after conclusion of the executive session. Said summaries may exclude specific information temporarily until the public's interest would not likely be adversely affected by its release.
(3) The requirements of Sec. XXX.02 shall not apply to meetings held for the purposes of mediation or conciliation of complaints by public bodies, such as Civil Rights Commissions, authorized by law to enforce said law through mediation and conciliation.

XXX.04 Enforcement; invalidating non-conforming actions; injunctions; criminal sanctions; removal from office.

(1) No law, ordinance, resolution, rule, regulation or other collective decision of a public body shall be valid unless taken or approved at a properly noticed public meeting. The trial courts of general jurisdiction of this State shall have jurisdiction to issue orders invalidating said actions taken by a public body not in conformity with this act upon application of any citizen of this State. Whether or not later public approval of any public action formerly invalidly taken by a public body or by a subordinate public body cures the former invalidity is to be determined by the court on the basis of what is in the best interest of the public in respect to the disputed matter at the time the court renders its opinion.

(2) The courts of general jurisdiction of this State shall have jurisdiction to issue injunctions to enforce this act upon application of any citizen of this State.

(3) Any person who is a member of a public body who knowingly attends

a meeting at which public acts are to be taken with the intention of avoiding the requirements of Sec. XXX.02(1) or Sec. XXX.02(2) or who knowingly violates Sec. XXX.02(3), may be suspended or removed from office by proceedings brought in a court of general jurisdiction in this State. Said proceedings may be commenced by petition of not less than ten qualified electors within the jurisdiction of the public body of the accused person. Said proceedings shall be conducted in accordance with the rules of civil procedure, shall be without recourse to jury determination, and shall be decided by the court upon the preponderance of the evidence.

(4) Upon a determination that a member of a public body has violated the act for the first time during any term of office, said member may in the discretion of the judge be suspended from office and all rights and privileges of office for a period of not less than ten days and not more than thirty days, or removed from office for the remainder of said term. In the event of any subsequent violation during a given term of office, said person shall be removed from office for the remainder of said term.

(5) Any person removed from any public office shall not be eligible for election or appointment to any public body until the expiration of one full year after the normal expiration of said person's term of office.

Appendix II

Open Government Laws

Alabama	ALA. CODE tit. 14, §§ 393-94 (1958).
Alaska	ALASKA STAT. § 44.62.310 (Supp. 1973).
Arizona	ARIZ. REV. STAT. ANN. §§ 38-431 to -431.08 (Supp. 1973), *as amended*, (Supp. 1974).
Arkansas	ARK. STAT. ANN. §§ 6-602 to -604 (1956), *as amended*, (Supp. 1973).
California	CAL. GOV'T CODE §§ 54950-60 (West Supp. 1974).
Colorado	COLO. REV. STAT. ANN. § 3-19-1 (1963),
Connecticut	CONN. GEN. STAT. ANN. §§ 1-21 to -21a (1969), *as amended*, (Supp. 1974).
Delaware	DEL. CODE ANN. tit. 29, § 5109 (Cum. Supp. 1968).
Florida	FLA. STAT. ANN. § 286.011 (Supp. 1973).
Georgia	GA. CODE ANN. §§ 23-802, -9912, 40-3301, -9911 (1971), *as amended*, (Supp. 1973).
Hawaii	HAWAII REV. STAT. §§ 92-1 to -3 (1967).

Idaho	IDAHO CODE § 59-1024 (Supp. 1973).
Illinois	ILL. ANN. STAT. ch. 102, §§ 41-46 (Smith-Hurd Supp. 1974).
Indiana	IND. ANN. STAT. §§ 57-601 to -609 (Burns 1962), *as amended*, (Burns Supp. 1973).
Iowa	IOWA CODE ANN. §§ 28A-A.8 (Supp. 1974).
Kansas	KAN. STAT. ANN. §§ 75-4317 to -4320 (Supp. 1973).
Kentucky	KY. REV. STAT. ANN. §§ 87.030, 88.040 (1971).
Louisiana	LA. REV. STAT. §§ 42:5-:9 (1965), *as amended*, (Supp. 1974).
Maine	ME. REV. STAT. ANN. tit. 1, §§ 401-06 (1964), *as amended*, (Supp. 1973); *id.* § 404-A (Supp. 1974).
Maryland	MD. ANN. CODE art. 23A, § 8, art. 25, § 5 (1973); *id.* art. 41, § 14 (1971).
Massachusetts	MASS. ANN. LAWS ch. 30(A), § 11(A), ch. 34, § 9(F), ch. 39, §§ 23(A)-(C) (1973).
Michigan	MICH. STAT. ANN. § 5.46(7)(d) (1973).
Minnesota	MINN. STAT. ANN. § 10.41 (1967); *id.* § 471.705 (Cum. Supp. 1974).
Missouri	MO. ANN. STAT. §§ 610.010-.030 (Vernon Cum. Supp. 1974).
Nebraska	NEB. REV. STAT. § 84-1401 (1971).
Nevada	NEV. REV. STAT. §§ 241.010-.040, 244.080, 268.305, 386.335, 396.100 (1971).
New Hampshire	N.H. STAT. ANN. §§ 91A:1-:8 (Supp. 1973).
New Jersey	N.J. STAT. ANN. §§ 10:4-1 to -5 (Supp. 1974).
New Mexico	N.M. STAT. ANN. §§ 5-6-23 to -26 (Supp. 1974).
North Carolina	N.C. GEN. STAT. §§ 143-318.1-.7 (1974).
North Dakota	N.D. CENT. CODE § 44-04-19 (1960).
Ohio	OHIO REV. CODE ANN. § 121.22 (Page 1969).
Oklahoma	OKLA. STAT. ANN. tit. 25, § 201-02 (Supp. 1973).
Pennsylvania	PA. STAT. ANN. tit. 65, §§ 251-54 (1959).
Rhode Island	R.I. GEN. LAWS ANN. § 45-43-7 (Supp. 1973).
South Dakota	S.D. COMPILED LAWS ANN. §§ 1-25-1 to -2 (1967).

Texas	TEX. REV. CIV. STAT. ANN. art. 6252-17 (Supp. 1973).
Utah	UTAH CODE ANN. § 52-4-1 (1970).
Vermont	VT. STAT. ANN. tit. 1, §§ 311-14 (Cum. Supp. 1973).
Washington	WASH. REV. CODE ANN. §§ 42.32.010-.020 (1972).
Wisconsin	WIS. STAT. ANN. § 66.77 (Supp. 1974).