REFORM OF THE GOVERNMENT IN THE SUNSHINE ACT

Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act

The Government in the Sunshine Act, enacted in 1976, requires federal agencies headed by a collegial body, a majority of whose members are appointed by the President and confirmed by the Senate, to open its meetings. About 50 federal agencies are subject to the Act, including the major independent regulatory commissions such as the Securities and Exchange Commission, Federal Trade Commission, Federal Communications Commission and the National Labor Relations Board. (Departments, and many agencies headed by a single individual, are not covered by the Act.) The Act's ten enumerated exemptions generally parallel those in the Freedom of Information Act (FOIA), with one important exception. The Sunshine Act has no exemption that parallels the fifth exemption in the FOIA for interagency and intra-agency "pre-decisional" memoranda and letters. The Act also prescribes in detail the procedures that agencies must follow to invoke an exemption and to close a meeting. The Act's primary purposes are to provide the public with information regarding the decisionmaking processes of federal agencies, and to improve those processes, while protecting the rights of individuals and the ability of the government to carry out its responsibilities.

In a letter dated February 17, 1995, signed by over one dozen current and former commissioners of multi-member agencies and several private organizations, the Chair of the Administrative Conference of the United States (ACUS) was asked to review the effectiveness of the Government in the Sunshine Act. The letter's signatories stated strong support for the Act's underlying goal of enhancing public understanding of agency decisionmaking, but expressed concern as to whether the Act is, in fact, meeting this goal as well as it might. They also suggested that the Act has adversely affected the decisionmaking at multi-member agencies because of the Act's "chilling effect" on the willingness and ability of agency members to engage in collegial deliberations A copy of the February 17 letter is attached to this report as Exhibit 1.

In a letter to the ACUS Chair, dated May 11, 1995, the members of the Federal Trade Commission, referring to the February 17 letter, endorsed an examination of the effectiveness of the Act. The FTC Commissioners stated: "Notwithstanding the laudable goals of this legislation, having operated under the Act for more than fifteen years, questions may be raised whether it provides for the proper balance between public access and candor in agency deliberations and whether the purposes arguably served by the Act are not adequately addressed by other statutes such as the Administrative Procedure Act." A copy of the May 11 letter from the FTC is attached to this Report as Exhibit 2.

The Chair established the Special Committee to study issues raised by these letters. The Committee, in a series of open meetings held from May to September, and at a public hearing held on

September 12, 1995,[1] heard from numerous agency officials and reviewed articles written for ACUS and others to the effect that public meetings under the Act often lack meaningful substantive exchange of ideas and real collective deliberation on issues being decided. Among the reasons given for the inhibiting effect of public meetings on collective decisionmaking are the following: concern that providing initial deliberative views publicly, without sufficient thought and information, may harm the public interest by irresponsibly introducing uncertainty or confusion to industry or the general public; a desire on the part of members to speak with a uniform voice on matters of particular importance or to develop negotiating strategies which might be thwarted if debated publicly; reluctance of an agency member to embarrass another agency member, or to embarrass himself, through inadvertent, argumentative, or exaggerated statements; concern that an agency member's statements may be used against the agency in subsequent litigation, or misinterpreted or misunderstood by the public or the press, as for example, when the agency member is testing a position by "playing devil's advocate" or merely "thinking out loud"; and concerns that a member's statements may affect financial markets.

In addition, the Committee has received extensive and credible testimony that the restrictions imposed by the Act have had the effective of not only diminishing discussions on the merits of issues before agencies, but also preventing debate concerning agency priorities and the establishment of agency agendas, even though such discussions of a preliminary nature may not technically constitute a "meeting" otherwise required to be held in public under the Act.[2] While it may be permissible pursuant to a literal interpretation of "meeting"[3] for a quorum of agency members to conduct preliminary discussions on an issue, as a practical matter it is extremely difficult for an agency member to make the distinction between actions that actually dispose of agency business and those that merely constitute preliminary discussions. Agency members, and agency general counsel who advise them, are understandably--and appropriately--concerned about engaging in discussions with a quorum of agency members that could be perceived, even arguably, as crossing the line, even though the discussions may, in fact, not dispose of official agency business. And, of course, it is difficult, *a priori*, to know whether a conversation that is anticipated to be preliminary will turn into a conversation that takes on a more definitive cast.

Although there obviously are exceptions, and open meetings held under the current Act are valuable in that they allow an agency to explain publicly the results of its prior decisionmaking, the Committee believes that, generally, true collective decisionmaking does not occur at agency public meetings. Further, the Committee believes the Act also promotes inefficient practices within agencies which themselves contribute to the erosion of collegial decisionmaking and, correspondingly, to a decline in the quality of agency decisions that the public receives. For example, in order to avoid having a meeting of a quorum, the Act has the effect of encouraging agencies to use one-on-one "rotating" meetings in order to reach consensus among the agency's members. This is obviously an inefficient way for a multi-member body to conduct business, just in terms of the additional time spent by agency members in conducting such meetings, compared to a group meeting at which all members could

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[1] A copy of the Federal Register notice, dated August 8, 1995 (60 Fed. Reg. 40302) is attached to the Report as Exhibit 3. The hearing transcript is attached as Exhibit 4.

[2] A "meeting" means the "deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result inn the joint conduct or disposition of official agency business...." 5 USC 552(a)(2).

[3] See FCC v. ITT World Communications, Inc., 466 US 463 (1984).

deliberate together. More importantly, serial meetings of this type are no substitute for collective decisionmaking; the outcomes of such meetings may significantly vary from those that might have resulted from a free exchange of views among all the members of a multi-member agency. Another consequence of the Act has been that it encourages the deliberative process to be conducted by and through the staff of the agency members, enhancing the power of the intermediary staff members *vis a vis* the agency members and, perhaps, reducing the accountability of appointed agency members.

The Committee is also aware of and is concerned about the tendency for agencies subject to the Sunshine Act to rely increasingly on notation voting (i.e., voting on an item by circulation based on a memorandum without discussion in a public meeting) when taking action on important substantive matters. The Sunshine Act does not prohibit notation voting, and notation voting was used to some extent prior to enactment of the Sunshine Act to deal with routine or emergency matters. Nevertheless, the routine use of this mode of decisionmaking, at least with regard to important substantive matters, does not further the Act's goal of openness and improved public access to agency decisionmaking. Thus, to the extent that the Sunshine Act has increased this use of notation voting, it has diminished whatever opportunity for collective decisionmaking would have existed at a meeting attended by the agency members.

In light of the above, the Committee is concerned that the public is neither receiving the enhanced access to the governmental decisionmaking process that the Act envisioned, nor as discussed below, is it receiving the benefit of better agency decisions through collegial decisionmaking. It should be noted that the Committee also heard from representatives of several major press-related organizations who, while not disputing the view that agency members are generally reluctant to have substantive discussions in public meetings, expressed the view that such public officials should change their behavior and be admonished to do so. These representatives tended to believe that the Act itself was not the problem. The Committee was nevertheless persuaded that the Act does need to be adjusted, and it offers the following recommendations for changes in the Act (and in agency behavior) in the belief that these adjustments will increase collegial decisionmaking among the members of multi-member agencies, and at the same time improve, or at least not diminish, the public's access to the agency's actual deliberative process.

The Committee notes that concerns with respect to the effectiveness of the Act and its impact on the collegiality of agency decisionmaking have been the subject of debate for some time.[4] Moreover, it must be remembered that the principal reason that Congress has established multi-member agencies in the first place is because Congress has made the judgment that, for the matters subject to the agency's jurisdiction, there is a benefit from a collegial decisionmaking process that brings to bear on the ultimate decisions the diverse viewpoints of agency members who have differing philosophies, experiences, and expertise. If the Act has had the effect, as a matter of fact, of diminishing, or in some cases negating, the collegial decisionmaking process that is the *raison d'être* for a multi-member agency, without enhancing public understanding of the agency decisionmaking process, it is appropriate to consider alternative models that are consistent with achievement of the objectives of the Act.

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[4] See ACUS Recommendation 84-3, "Improvements in the Administration of the Government in the Sunshine Act, 1 CFR 305.84-3, 49 Fed. Reg. 29942, (July 25, 1984).

Therefore, the Committee recommends that Congress establish a time-limited pilot program that would allow agencies more leeway to have private meetings, subject to appropriate memorialization, if they opt to make commitments to avoid undue use of notation voting and to hold regular open meetings. The Committee recommends five to seven years as the time period--enough time to allow an assessment of the pilot to see whether the approach encompassed in it achieves the twin purposes of increasing the availability of information to the public and increasing collegial decisionmaking in the agencies. If Congress finds that the pilot worked well, it could amend the Act accordingly; if the assessment shows problems or bad faith on the part of agency decisionmakers in carrying it out, it could be terminated at that point.

More specifically, the pilot program should authorize an agency subject to the Government in the Sunshine Act to allow its members to meet in private, without advance notice, provided that the agency requires such meetings to be memorialized by "a detailed summary" of the meeting, made public no later that five working days after the meeting, that would indicate the date, time, participants, subject matters discussed, and a review of the nature of the discussion. Before such pilot program may go into effect, the participating agency also would have to agree (l) to conduct votes and take other official actions on important substantive matters (not covered by the Act's exemptions) in open public meetings and to refrain, to the extent practicable, from using notation voting procedures for such matters, and (2) to hold open public meetings, to the extent practicable at regular intervals, at which it would be in order for members to address issues discussed in private sessions or items disposed of by notation. This opportunity for discussion is not intended to imply that finality of matters previously voted on by notation would be affected by such discussions except to the extent that the agency acts consistently with its own procedures for reconsideration. The results of such a pilot program should be examined carefully by Congress and other appropriate entities before it is extended or made permanent.

The Committee recommends, in addition to the institution of the pilot program, that the Act be amended to require agencies to develop and publish rules or policy statements outlining their procedure for notation voting and the types of issues for which it will normally be used. The Committee also recommends that agencies hold regularly scheduled open meetings at which it would be in order for members to discuss, among other things, items disposed of by notation.

The Committee was also convinced that there is a special problem caused by the Act with regard to agencies operating in an adjudicative capacity. The Act currently contains an exemption that permits closure of meetings involving the "initiation, conduct, or disposition by the agency of a particular case of formal adjudication pursuant to the procedures in section 554 of [the APA] or otherwise involving a determination on the record after opportunity for a hearing." Agencies such as the Federal Trade Commission and the Occupational Safety and Health Review Commission (OSHRC) frequently and properly close meetings to discuss the disposition of such cases. The problem occurs when, after such a meeting, the commissioners begin writing the opinions necessary in such cases. Should they wish to discuss the wording of such an opinion, as would an appellate court, the members have to notice, and vote to close, another "meeting" under the Act. Obviously, this inefficiency is heightened in the case of a three-member commission such as the OSHRC where no two members can ever discuss agency business in private because they would constitute a quorum. Therefore the Committee recommends that the Act be amended to make clear that, when an agency properly closes a meeting under exemption 10, any subsequent meeting to discuss the same specific adjudicatory matter

need not be subject to the notice and closure procedures under the Act. The Committee recognizes that this proposal should perhaps be extended to follow-up discussions to meetings closed under other exemptions as well, but it did not have enough time to study that question.

The Committee also heard testimony about special problems caused by the above-quoted wording of exemption 10 at the United States International Trade Commission (ITC). The ITC has several types of adjudicative proceedings, some of which are governed by section 554 of the APA, and therefore clearly fall within the terms of exemption 10, and others of which would appear to fit the definition by "otherwise involving a determination on the record after a opportunity for a hearing." The ITC, perhaps due to an abundance of caution, has declined to invoke this exemption for any of its adjudications. The Administrative Conference has already urged the ITC to revisit this issue and seek a statutory clarification if necessary.[5]

Finally, the Committee believes that agencies could and should consider steps to make the open meetings more useful and to increase the flow of information to the public. The Committee reiterates the suggestions made by ACUS in 1984[6] and adds a few more.

In addition to the recommendations set forth below, the Committee considered several other ideas. The Committee rejected some of them, such as repealing the Act (which was not supported by any of the participants in the Committee meetings or public hearing), amending it to permit each agency to develop its own openness regulations, or amending it to cover only meetings of the full board or commission. Other proposals, beyond those recommended below, and including some of those contained in the August 8 Federal Register[7] notice, may be worthy of further consideration., in lieu of or even in conjunction with, the recommendations contained herein

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[5] In Recommendation 91-10, "Administrative Procedures Used in Antidumping and Countervailing Duty Cases," Part D, ACUS made the following recommendation to the ITC:

> "To encourage collegial decisionmaking, the ITC should exchange drafts, views and other information before entering into formal deliberations. The Commission should decide whether informal meetings to discuss the disposition of AD/CVD cases constitute meetings exempt from the Sunshine Act under exemption 10. If the Commission determines that such meetings are subject to the Sunshine Act, then Congress should consider amending the Tariff Act to provide that the Sunshine Act does not apply to informal meetings held to discuss the disposition of AD/CVD cases."

[6] The Committee subscribes to the earlier ACUS recommendation made to the agencies in this regard in Recommendation 84-3 (1):

> "Agencies should continually strive to reflect fully in their activities the basic purpose of the Government in the Sunshine Act, which is to enlarge public access to information about the operations of government. Agencies are strongly encouraged to review periodically their sunshine policies and practices in light of experience and the spirit of the law for the purpose of making adjustments that would enlarge public access to meaningful information, such as (a) invoking the exemptions of the Act only where there is substantial reason to do so; and (b) making open meetings more useful through comprehensible discussion of agenda items and provision of background material and documentation pertaining to the issues under consideration."

[7] See, e.g., the various proposals outlined in the Federal Register notice, supra note 1.

Recommendation

(1) Congress should establish a pilot program, to last for five to seven years, that would authorize an agency subject to the Government in the Sunshine Act to allow its members to meet in private, without advance notice, provided that (a) the agency requires such meetings to be memorialized by "a detailed summary" of the meeting, made public no later than five working days after the meeting, that would indicate the date, time, participants, subject matters discussed, and a review of the nature of the discussion, and (b) that before such pilot program may go into effect, the participating agency also (i) agrees to conduct votes and take other official actions on important substantive matters (not covered by the Act's exemptions) in open public meetings and to refrain, to the extent practicable, from using notation voting procedures for such matters, and (ii) agrees to hold open public meetings, to the extent practicable at regular intervals, at which it would be in order for members to address issues discussed in private sessions or items disposed of by notation. This opportunity for discussion is not intended to imply that finality of matters previously voted on by notation would be affected by such discussions except to the extent that the agency acts consistently with its own procedures for reconsideration. The results of such a pilot program should be examined carefully by Congress and other appropriate entities before it is extended or made permanent.

(2) Congress should also amend the Sunshine Act in several particulars:

(a) to require agencies subject to the Act to develop and publish rules or policy statements outlining their procedure for notation voting and the types of issues for which it will normally be used.

(b) to make clear that when an agency properly closes a meeting under exemption 10, any subsequent meeting to discuss the same matter need not be subject to the notice and closure procedures under the Act.

(3) Agencies subject to the Sunshine Act should develop regulations (or policies) that maximize the amount of information made available to the public before, during, and after agency meetings. For example, agencies should strive to publish meeting notices further in advance of the date for meetings where feasible; to provide more complete summaries of upcoming agenda items; to make available relevant non-privileged documents before or during meetings; offer closed circuit television coverage of meetings where there is enough interest; and to release minutes, summaries, and decisional opinions as soon as feasible after meetings.

(4) The United States International Trade Commission should follow ACUS Recommendation 91-10[8] and revisit the issue of whether its adjudications are covered by exemption 10 of the Act.

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[8] See note 1, supra.