

HJR

44

HOUSE COMMITTEE REPORT

(7)

Date referred: 2/10/88

FURTHER REFERRALS:

DATE: March 24, 1988

The Judiciary Committee has considered HJR 44

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

RECOMMENDS:

- replace with CS HJR 44 (Jud) the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

[Signature]
[Signature]
[Signature]
[Signature]

SIGNING OTHER RECOMMENDATIONS:

[Signature]
John L. Taylor Do NOT
PASS W/O AMEND.

[Signature]
 Vice Chairman's signature

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY
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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	3-24-88	1:30p.m.
H. JUD.	2-24-88	1:30p.m.

Original sponsors: Brown, Ellis,
Frank, et al.

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE JOINT RESOLUTION NO. 44 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 Proposing an amendment to the Constitu-
6 tion of the State of Alaska relating to
7 open meetings.

8 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. Article I, Constitution of the State of Alaska, is amended
10 by adding a new section to read:

11 SECTION 23. MEETINGS OPEN. The deliberations of each house of
12 the legislature and its committees shall be open to the public unless
13 the legislative body is meeting in executive session to consider
14 matters authorized by law. If a matter is appropriate to a particular
15 legislative body, private and substantive deliberation on the matter
16 by a quorum of that legislative body is a violation of this section.
17 A member of the legislature who wilfully violates this section is
18 subject to a civil penalty for each wilful violation in an action
19 brought in the superior court. Caucuses of the legislature may meet
20 in private to consider matters of procedure, organization, or strate-
21 gy. The provisions of this section that permit executive sessions and
22 caucuses shall be narrowly construed to achieve maximum public access
23 and to avoid unnecessary executive sessions and caucuses.

24 * Sec. 2. (a) The purpose of the amendment to art. I, Constitution of
25 the State of Alaska, proposed in sec. 1 of this resolution is to make
26 openness in government the rule and secrecy the exception. The amendment
27 ensures that the public is not excluded during the substantive deliberative
28 and decision-making stages of the budgetary and lawmaking process.

29 (b) The existing open meetings law, AS 44.62.310 and 44.62.312,

1 complies with this constitutional amendment and the amendment provides a
2 basis for judicial enforcement of that law, notwithstanding art. II,
3 secs. 6 and 12, Constitution of the State of Alaska.

4 (c) The existing open meetings law requires that votes be conducted
5 in a manner that allows the public to know how members voted. For execu-
6 tive sessions, it requires that meetings first be convened as public meet-
7 ings and the question of holding an executive session be determined by a
8 majority vote of the body. Reasonable public notice is required for open
9 meetings.

10 (d) Under existing law, a legislative body may use an executive
11 session only to discuss

12 (1) matters, the immediate knowledge of which would clearly have
13 an adverse effect on the finances of the government;

14 (2) subjects which tend to prejudice the reputation and charac-
15 ter of any person, provided the person may request a public discussion; and

16 (3) matters which by law, municipal charter, or ordinance are
17 required to be confidential.

18 (e) This amendment is not intended to prevent the free flow of ideas
19 among legislators or their participation in public forums, community
20 events, or social events. Meetings of less than a quorum of the legisla-
21 tive body that have the purpose or effect of circumventing the open meet-
22 ings law would also be a violation of this section.

23 (f) In the preparation of its neutral summary under AS 15.58.020(6)-
24 (C), the Legislative Affairs Agency shall consider the statement of legis-
25 lative intent contained in (a) - (e) of this section.

26 * Sec. 3. The amendment proposed by this resolution shall be placed
27 before the voters of the state at the next general election in conformity
28 with art. XIII, sec. 1, Constitution of the State of Alaska, and the elec-
29 tion laws of the state.

Adopted

Original sponsors: Brown, Ellis,
Frank, et al.

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17 A member of the legislature who wilfully violates this section may be
18 fined for each wilful violation in an action brought in the superior
19 court. Caucuses of the legislature may meet in private to consider
20 matters of procedure, organization, or strategy.

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24 ensures that the public is not excluded during the substantive deliberative
25 and decision-making stages of the budgetary and lawmaking process.

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10 an adverse effect on the finances of the government;

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12 ter of any person, provided the person may request a public discussion; and

13 (3) matters which by law, municipal charter, or ordinance are
14 required to be confidential.

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16 among legislators or their participation in public forums, community
17 events, or social events. Meetings of less than a quorum of the legisla-
18 tive body that have the purpose or effect of circumventing the open meet-
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21 (C), the Legislative Affairs Agency shall consider the statement of legis-
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25 with art. XIII, sec. 1, Constitution of the State of Alaska, and the elec-
26 tion laws of the state.

Kennedy

*definition of: -> tainted bill
-> statute of limitations
->*

BY BROWN, ELLIS, FRANK,
DAVIS, COTTEN, NAVARRE,
POURCHOT AND BOYER

1 IN THE HOUSE

2 HOUSE JOINT RESOLUTION NO. 44

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 Proposing an amendment to the Constitu-
6 tion of the State of Alaska relating to
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14 unless the legislative body is meeting in executive session to con-
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16 particular legislative body, private and substantive deliberation on
17 the matter by all quorum of that legislative body is a violation of this
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19 matters of procedure, organization, or strategy.

20 * Sec. 2. (a) The purpose of the amendment to art. I, Constitution of
21 the State of Alaska, proposed in sec. 1 of this resolution is to make
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27 basis for judicial enforcement of that law, notwithstanding art. II,
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29 (c) The existing open meeting law requires that votes be conducted in

definition??

cont decision

intention

->

1 a manner that allows the public to know how members voted. For executive
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17 legislative body that have the purpose or effect of circumventing the open
18 meetings law would also be a violation of this section.

19 (f) In the preparation of its neutral summary under AS 15.58.-
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21 legislative intent contained in (a) - (e) of this section.

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24 with art. XIII, sec. 1, Constitution of the State of Alaska, and the elec-
25 tion laws of the state.

Adopted

A M E N D M E N T # 1

Offered in the HOUSE

By Brown

TO: CSHJR 44 (Judiciary)

Page 1, lines 17 - 18:

Delete "may be fined"

Insert "is subject to a civil penalty"

Failed

AMENDMENT #3

Offered in the HOUSE

By Brown

TO: CSHJR 44 (Judiciary)

Page 1, line 19, after "court":

Insert "and the court may enjoin violations of this section"

*and grant
declaratory
relief*

Adopted

5-1378Bb ✓
Bradley

A M E N D M E N T #2

Offered in the HOUSE

By Brown

TO: CSHJR 44 (Judiciary)

Page 1, line 20, after "strategy.":

Insert "The provisions of this section that permit executive sessions and caucuses shall be narrowly construed to achieve maximum public access and to avoid unnecessary executive sessions and caucuses."

A M E N D M E N T

Offered in the HOUSE

By Taylor

TO: HJR 44

Page 1, line 7, after "meetings"

Insert "of the legislature"

Page 1, lines 11 - 19:

Delete all material and insert:

"SECTION 23. LEGISLATIVE MEETINGS PUBLIC. (a) Each meeting of a house of the legislature, of a committee of the whole of a house of the legislature, or of a committee of the legislature is open to the public except as provided by this section. This section does not apply to a vote taken to organize the legislature or to subcommittees of a legislative committee.

(b) If subjects described under (c) of this section are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss subjects described in (c) of this section shall be determined by a majority vote of the house of the legislature or of a committee of the legislature. A subject may not be considered at the executive session except one mentioned in the motion calling for the executive session unless the subject is auxiliary to the main question. A vote may not be taken at the executive session.

(c) The following subjects may be discussed in an executive

session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the state;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters that by law are required to be confidential.

(d) Reasonable public notice shall be given for each meeting required to be open under this section. The notice shall include the date, time, and place of the meeting.

(e) A vote taken contrary to this section is void."

WORK DRAFT

WORK DRAFT

WORK DRAFT

5-1378A✓
Bradley
12/16/87

1 IN THE HOUSE

BY BROWN

2 HOUSE JOINT RESOLUTION NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

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19 matters of procedure, organization, or strategy.

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21 the State of Alaska, proposed in sec. 1 of this resolution is to make
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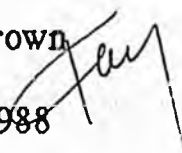
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Kay Brown

Alaska State Legislature House of Representatives

MEMORANDUM

TO: All House Members

FROM: Rep. Kay Brown 

DATE: April 22, 1988

RE: HJR 44 - Proposed Rules CS



Attached for your review is a work draft for a proposed Rules Committee Substitute for CS HJR 44(Judiciary) that I requested in response to concerns voiced by some House members.

The changes are:

- 1) lines 19-20, add "A court may not prescribe rules or procedures for the conduct of legislative business."
- 2) line 18, delete "penalty" and insert "fine".

These changes are intended to make clear the legislature's intent that the court not prescribe operating procedures such as defining the circumstances under which teleconferences should be held, room size, adequate public notice, and other operational matters.

A civil "fine" rather than a "penalty," would provide a deterrent for wilful violations and define the extent of court enforcement. This change further indicates the legislature's intent that the court not enjoin violations.

In response to these concerns, the House Rules Committee will be meeting at 8:00 a.m. Tuesday, April 26, in the Speaker's Chambers to consider adoption of the proposed Committee Substitute. I welcome your questions and comments.

Attachment

Original sponsors: Brown, Ellis,
Frank, et al.

1 IN THE HOUSE

BY THE RULES COMMITTEE

2 CS FOR HOUSE JOINT RESOLUTION NO. 44 (Rules)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

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17 A member of the legislature who wilfully violates this section is
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Kay Brown

Alaska State Legislature
House of Representatives

MAR 30 1988

MEMORANDUM

TO: All Members of the House

FROM: Rep. Kay Brown 

DATE: March 28, 1988

RE: Open Meetings Constitutional Amendment



Attached for your review is CS HJR 44 (Judiciary), "Proposing an amendment to the Constitution of the State of Alaska relating to open meetings," and a news article.

I introduced the constitutional amendment to ensure the right of public access to the deliberations of legislative bodies. The legislative process must be accountable, accessible, and responsive to the press and the people of Alaska.

A summary of the legal proceedings leading up to the introduction of HJR 44 is relevant. As you will recall, the League of Women Voters v. Adams et al lawsuit was brought over the closed budget discussions in caucus meetings during the 1986 session. The Superior Court found an implied right of access to the proceedings of the legislature under the Alaska Constitution. The Superior Court appeared to hold that discussion and binding decisions on substantive legislation cannot be made in a private caucus. However, the open meetings law specifically does not apply to "...any votes required to be taken to organize a public body..." (AS 44.62.310(a)). It had been noted earlier by the Supreme Court that the statute has no application to private caucuses, so there is no reason to exempt from the statute organizational votes which take place in those caucuses. (Tamara Cook memo, Dec. 11, 1986).

P. O. Box 20-2661
Anchorage, AK 99520-2661
(907) 272-0207

During Session:
P. O. Box V
Juneau, AK 99811
(907) 465-4998



The case was appealed to the Alaska Supreme Court. The higher court had earlier demonstrated an unwillingness to interfere in matters of procedure involving the legislature (Malone v. Meekins, 650 P.2d 351 (Alaska 1982)). The legislature is constitutionally required to determine rules for its own proceedings and it may not do so by statute because this would bind itself in the future (the legislature would be subject to the Governor's veto of the repeal of the statute, or would need a supermajority vote to override a veto.) The task before the Supreme Court in League of Women Voters was to determine whether the public has an unenumerated right of access to legislative meetings at which substantive budget decisions are made.

The Supreme Court reversed the lower court's ruling and held that there is no implied right of public access to legislative committees or caucuses under the Alaska Constitution. The Court's decision was based on the separation of powers doctrine; that is, the Court had no constitutional authority to enforce the law governing the operating procedures of the legislature. The Court concluded that it is not the function of the judicial branch to require the legislature to follow its own rules.

HJR 44 would amend the constitution to mandate legislative adherence to the Open Meetings Act and to provide for judicial enforcement in the instance of a violation. It provides the legal framework to protect the public's right to openness in the legislative process.

The resolution requires that deliberations be open unless the body is meeting in executive session to consider matters authorized by law. It prohibits a quorum of each house and its committees from engaging in private and substantive deliberation on a matter appropriate to that body. It allows private caucuses for matters relating to procedure, organization and strategy.

HJR 44 was amended in House Judiciary to provide for a civil penalty in Superior Court for a wilful violation of the open meetings requirement. It also was amended to provide that the language permitting executive sessions and caucuses shall be narrowly construed to avoid unnecessary closed meetings.

The intent language included in the constitutional amendment makes clear that it is not intended to prevent the free flow of ideas among legislators, or their participation in public forums, community meetings, or social events.

CS HJR 44 (Judiciary)

Page 3

HJR 44 requires a two-thirds vote of both the House and the Senate, and the signature of the Governor to place it before the voters in November. I would appreciate your careful review and consideration of this measure. Please call me at -4998 if you have any questions or concerns. Thank you.

Attachments

January, 1988

Opinion

Open meetings: A critical issue

When the Alaska Supreme Court issued its opinion on the open meetings lawsuit brought against the Alaska legislature by the League of Women Voters and two Alaska newspapers, the ruling brought to light a crucial flaw in our state constitution. The court ruled that it had no jurisdiction in the open meetings dispute and accordingly could not force the legislature to comply with the state Open Meetings Act.

The crucial issue in the open meetings lawsuit concerned the right of the press and the public to know about and understand the deliberations of their elected representatives. The need for access to legislative deliberations has never been more critical than at present. Decisions made in Juneau are of vital interest to all Alaskans as the state comes to terms with declining oil revenues.

In response to the Supreme Court's decision, one legislative leader characterized the ruling as giving legislators "a blank check." In essence, the Alaska Supreme Court found that the legislature's conduct is above the law that requires other state and local officials to conduct the public's business in the open.

Before the Supreme Court ruling, it had been our belief that the public was entitled to open legislative meetings; we now know that a constitutional amendment is needed. With that goal in mind, we have introduced an identical Joint Resolution in both the House and the Senate that would amend the Alaska Constitution and specifically provided for open meetings by the legislature.

The proposed amendment language is the work product of a number of individuals who began meeting shortly after the Supreme Court issued its ruling, including representatives of the League of Women Voters and several news organizations. In trying to draft suitable language with the help of this ad hoc group, we knew that it was essential to develop both realistic and workable standards. Such standards must fundamentally ensure openness by the legislature but also not prevent the free exchange of ideas among le-

By Rep. Kay Brown and Sen. Arliss Sturgulewski

gislators, which is essential to a legislator's ability to represent his or her constituents. At the same time, we felt that the legislature, as the state's only bicameral legislative body, elected along partisan lines, must have the flexibility to exercise that partisanship.

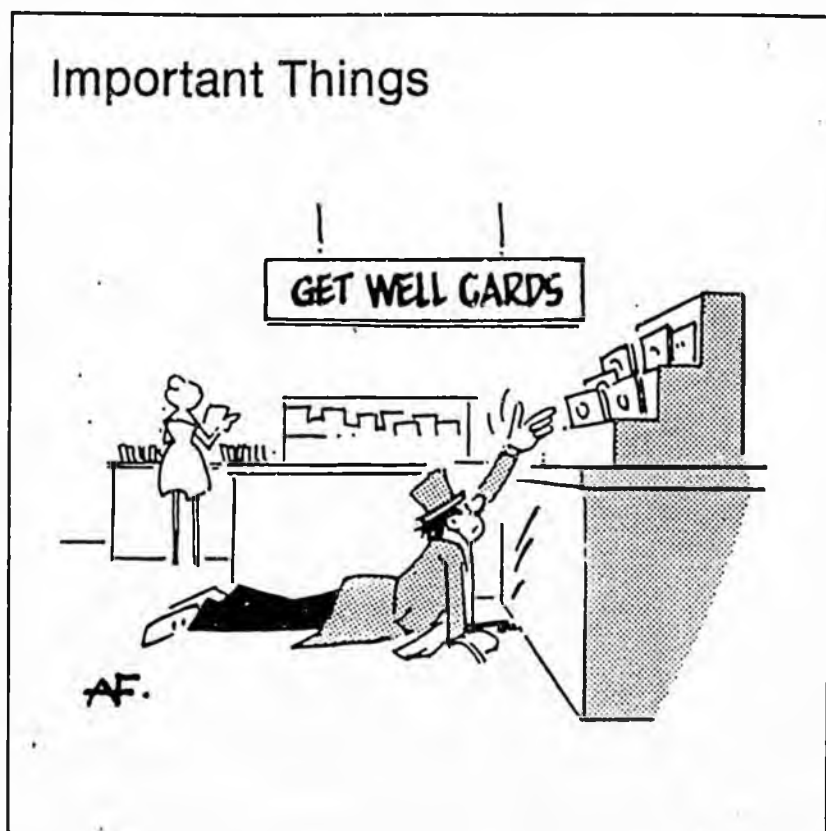
With these standards in mind, our proposed amendment requires that legislative deliberations be open unless, as presently provided by the Open Meetings Act, the body is meeting in a properly convened executive session to consider matters expressly authorized by law. The amendment also states that if a matter is appropriate to a particular body (which includes committees and subcommittees), then "private and substantive deliberation on the matter by a quorum of that legislative body" is prohibited. The proposed amendment also recognizes the unique role of legislative caucuses and specifically allows caucuses to meet in private, but only to consider "matters of procedure, organization, or strategy."

We recognize, of course, that our amendment draws a fine line of distinction between a discus-

sion that would be prohibited as "private and substantive" and a discussion that would be permissible as a matter of caucus "strategy." In the final analysis, however, it is our feeling that it will be incumbent upon all legislators to police themselves as a group and for individual members to insist when appropriate, as we have, that the public's right-to-know must be protected and that the public's substantive business be conducted openly.

Finally, we believe that the proposed amendment provides both a realistic and workable set of standards by which the legislature can conduct legislative business in an open manner while still providing legislators an opportunity to participate in confidential partisan activities. Without a constitutional amendment to provide for the public's right of access, the legislature will continue to be free to meet at will behind closed doors in clear violation of the Open Meetings Act, but beyond the reach of the courts.

Rep. Kay Brown and Sen. Arliss Sturgulewski both represent Anchorage in the Alaska State Legislature.



STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 18, 1988

SUBJECT: Open meetings
(CSHJR 44(Judiciary))

TO: Representative Kay Brown

FROM: Richard A. Bradley 
Legislative Counsel

I have reviewed the citations from the House Research Agency report that Roxanne provided to me on the avoiding of action for a violation of open meeting laws. I have reviewed about half of the laws of the other states and will, if you wish, review the remainder. But it seems that some kind of pattern appears in the laws of the states that I did review. Let me make some observations about the laws and then offer the individual analyses of the states from Alabama through Missouri.

First, and I think this is significant, I found no case where an Act of a legislature was avoided. It appears that no action was avoided (or challenged until Abood) where the violation was based only on the actions of a committee or subcommittee of the legislative body.

There is some logic to this point. While committee recommendations are useful, a member may vote for or against final passage based on or in spite of recommendations of a committee. What one committee does may be disregarded by a subsequent committee or used for entirely different reasons. It should not follow that the action by a committee vitiates the final legislative action.

In probably every state, state constitutions will require votes on final enactment to be public. Whether a disregard of committee action that violates open meeting concepts (if final action is open) is a serious loophole or a reasonable expectation may be debatable but it appears to explain why the application of open meeting concepts to legislative

action does not result in the avoidance of the final legislative action. The legislature should have the power to cure the defects in legislation caused by a committee of the legislature.

While the senate and the house each seem to have their own different ideas about the amount of debate required for adoption, it is quite different for a court to order the legislature to engage in "substantial, de novo, independent and public reconsideration of those substantive matters previously discussed in private." That remedy was requested in Abood v. League of Women Voters of Alaska, 743 P.2d 333, 334 (Alaska 1987).

The amount of debate required to cure a violation is the kind of question that the courts would be required to address if a violation by a committee is permitted to taint the final legislative action fatally. If I am correct that only violations by the enacting body will cause action to be void, the cure for violations is not a problem since no violation by the legislature itself will (or can) occur.

During our discussion, I noted frustration with effective remedies. John Hartle suggested an analogy to the exclusionary rule (on evidence in criminal trial obtained in violation of civil rights, etc); the only remedy is the exclusion of the evidence; the only solution here is the avoidance of the law.

I disagree. A number of the states permit citizen complaints for mandatory or other injunctions against the violations. A number permit the citizen plaintiff to obtain fines for violations. One would permit the court to terminate the term of a member who violated open meetings requirements and was sanctioned twice during a term; that would not work as to a legislator since expulsion of members is also constitutionally regulated but it could work on other levels of government. The Maryland provision says that the action of a public body may not be voided because of the violation by another public body; perhaps that addresses the legislature vs. its committees question.

At that point, the proper sanction is not an avoidance of the legislation but the proper sanctions against individuals involved at the committee level. And as I suggest, the cases that do appear address violations by school boards, municipalities, and other public bodies. I found no case

where the defect in committee action voided the action by the final adopting body that itself complied with open meeting requirements.

Finally, an analysis of state laws. While it has been suggested (by the House Research Agency report) that each state has an open meeting law, it is far from true that the citations offered prove that the legislatures have uniformly subjected themselves to such laws.

Alabama. I could find no laws at the citation suggested in the HR report. Title 13 has been repealed. No entries in the index for the topic.

Arizona. Sec. 38.431. Applies to the legislature. No case in annotation appears to have challenged legislative violations. Only applies when a quorum is present according to AG opinion. Court may impose a fine of not to exceed \$500. Sec. 431.07. Public body may not expend public money to defend action under certain circumstances. Sec. 431.07. Either house of legislature may exempt itself by adoption of rule or procedure. Sec. 431.08(B). Does not apply to conference committees of legislature or any caucus. Sec. 431.08(A); conference committees shall nonetheless be open.

Arkansas. Citation incorrect: see A.C.A. 25.19.101 et seq. Open meetings section does not apply to the legislature. Sec. 25.19.106. Misdemeanor penalty for violations of \$200 or 30 days (sec. 25.29.104). Action taken not void unless adopted at a public meeting. Sec. 25.19.106.

California. Citation given (sec. 11120 et seq., Cal. Gov't Code) applies only to executive branch agencies. See earlier memorandum for comments on sections applicable to the legislature.

Colorado. C.R.S. sec. 24.6.401 et seq. Applies to the legislature. Sec. 24.6.402. Does not apply to "chance meeting or social gathering at which discussion of public business is not the central purpose." Sec. 24.6.402(2.1). Provisions on invalidity may not apply to the legislature: "(4) No resolution, rule, regulation, ordinance, or formal action of a board, committee, commission, or other policy-making or rule-making body shall be valid unless taken or made at a meeting that meets the requirements . . ." Note

that while it applies to a committee in the legislature, a committee is not a policy making body.

Connecticut. G.S.C. sec. 1.21. Appears to apply to the legislature. Sec. 1.21(a). Establishes notice; has no provision explicitly establishing application to the legislature or providing for the implications of violations (even as to executive branch agencies).

Delaware. 29 D.C.A. sec. 10001 et seq. Includes legislature. Sec. 10002. "Any action taken at a meeting in violation of this chapter may be voided by the Court of Chancery" within 60 days of notice of the action but not more than 6 months from the action. Sec. 10005(a). No annotations regarding violations by the legislature.

Florida. Ch. 286, F.S. at 011. Does not apply to the legislature. Sec. 286.011(1). Did not determine whether other law applies to the legislature.

Georgia. C.G. sec 50-14-1 et seq. Not applicable to the legislature.

Hawaii. H.R.S. sec. 92.3. Does not apply to the legislature. Sec. 92.10; rather, will be subject to rules adopted by the legislature (I have not found such rules). Executive action voidable on "proof of willful violation." Sec. 92.-11.

Idaho. I.C. sec. 67-2340 et seq. General sections do not apply to the legislature. Sec. 2341. Open legislative meetings required. Sec. 2346. Curiously, there is no statutory authorization for any executive session by legislative committees: "All meeting . . . shall be open at all times"; I suggest the section cannot be taken seriously. Action taken at a meeting that violates the sections is null and void. No cases construing statute in context of suit against legislature for its violation.

Illinois. 102 Ill. A.S. sec. 41 et seq. Includes "legislative . . . bodies of the state . . . except the General Assembly and committees or commissions thereof." Sec. 41.02. Did not find any specific sections applying to the legislature.

Indiana. B.I.S.A. sec. 5-15-1.5-1. Appears to apply to the legislature. Sec. 5-14-1.5-2(a). Notice requirement do not

apply to the legislature. Sec. 5-14-1.5-5(g). Citizen may enjoin action taken at an executive session or to declare void action in violation of notice requirements (not applicable to legislature). Sec. 5-14-1.5-7(a). Court may award costs and attorney fees if action was knowing and intentional. Sec. 5-14 - 1.5-7(f).

Iowa. The correct citation is chapter 21 in the 1987 code. The chapter does not apply to the legislature. Remedies include assessment of fines of \$100 to \$500 for participants; no fines for a person who voted against the violating meeting or acted in good faith or in reliance of legal advice. Sec. 21.6(3). Costs and attorney fees for prevailing party who establishes the violation. Sec. 21.6(3). Voids the action taken in violation if the case is brought within six months of the action on a determination that the public interest in the enforcement of the open meeting policy outweighs the public interest in sustaining the validity of the action taken; doesn't apply to an action regarding the issuance of bonds or other indebtedness of a governmental body if a public hearing, election, or public sale has been held. The court may remove an individual who has engaged in two prior violations in which damages were assessed during the member's term. May issue a mandatory injunction punishable by civil contempt. Ignorance is no defense.

Kansas. 75 K.S.A. sec. 4317 et seq. Appears to apply to the legislature. Sec. 4318. Violators subject to a \$500 civil penalty. Any binding action taken in violation is voidable in an action brought by the attorney general or county attorney. Sec. 4320. Court may award costs and attorney fees. Exceptions for impeachment are made. Sec. 4318. One annotation says that there was no "authority for private individual to bring action to void acts performed in violation of open meetings law. Stoldt v. City of Toronto, 678 P.2d 153 (Kansas 1984). Unannounced gathering prior to official meeting violates the law. Coggins v. Public Employee Relations Board, 581 P.2d 817.

Kentucky. KRS 61.805. Appears to apply to the legislature. Sec. 61.805(2), but with some "exceptions" "committees of the general assembly other than standing committees". Sec. 61.810(9). Courts may enforce by injunction. Sec. 61.845. Curiously, though there are pages of annotations of opinions of the attorney general as well as court decisions, no case involves the legislature.

Louisiana. RS 42.5 is the law; a 1981 amendment deleted the language that exempted the legislature in those words but the words now used do not include the legislature. Sec. 42.4.2(2). A specific section authorizes closed or executive sessions of legislative houses and committees. Sec. 42.6.2. The law also exempts "chance meetings, social gatherings, or other gatherings at which only presentations are made to members of the legislature or members of either house thereof or of any committee or subcommittee if no vote or other action, including formal or informal polling of members, is taken." Sec. 42.6.2(C). The legislature is exempted from requirement applicable to executive agency that meetings for the year be announced at the beginning of the year. Sec. 42.7. Suits to void action must be filed within 60 days of the action.

Maine. 1 M RSA sec. 401 et seq. Applies to the legislature. Sec. 402.2. For violations of the policy: "If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action shall be illegal and the officials responsible shall be subject to the penalties hereinafter provided". I note that "Acts" are not included. The penalty is a class E crime, probably a misdemeanor. No case examines a challenge to a legislative enactment.

Maryland. 76A A.C.M., sec. 7 et seq., reorganized as 10 A.C.M., 501 et seq. in the 1984 edition. Regarding enforcement, the law says: . . . the court may declare void any final action taken at a meeting held in wilful violation of [the law] if the court finds no other remedy would be adequate under the circumstances. However, the action of a public body may not be voided because of the violation . . . by any other public body." Sec. 10-510(a)(2); sec. 10-510(e) authorizes injunctions or other appropriate relief. The section specifically excludes actions appropriating public funds, levying taxes, or providing for the issuance of bonds, notes, or evidences of public obligation from the authority of the court to void actions. Sec. 10-510(a). No case examines a challenge to a legislative enactment.

Massachusetts. 30A M.G.L.A. sec. 11A. Does not apply to the general court (legislature) or the committees or recess committees of the general court. Sec. 11A.

Representative Kay Brown
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March 18, 1988

Michigan. Michigan has a constitutional provision requiring open meeting unless the public welfare requires otherwise. Art. 4, sec. 20. The current citation to the general law is 15 M.C.L.A. sec 261 et seq. "Public body" is defined as "any state . . . legislative . . . body, including a . . . committee, subcommittee . . . empowered by the state constitution . . . to exercise governmental . . . authority" Sec. 15.262(a); under 15.262(d), "decision" includes a "vote . . . upon a . . . bill . . ." Attorney General opinions are consistent that committee action is covered. A reenactment complying with the act cures a prior enactment that was deficient; the effective date is on the reenactment. Sec. 15.270. No case addresses a challenge to a legislative enactment.

Minnesota. M.S. 471.705. Does not apply to the legislature.

Mississippi. Not reviewed.

Missouri. M.R.S., sec. 610.010 et seq. Applies to the legislature. Sec. 610.010(2). Violations include injunctive relief. Sec. 610.027(1). Civil fines of not more than \$100 are authorized. Sec. 610.027(3). Actions may void the action on evidence that the governmental body violated the section "if the court finds under the facts of the particular case that the public interest in the enforcement of the policy . . . outweighs the public interest in sustaining the validity of the action taken at the closed meeting, record, or vote." Sec. 610.027(4). Injunctive relief is authorized. Sec. 610.030. No annotation applies a challenge to a legislative enactment.

If I may be of further assistance, please advise.

RAB:bb
b4/020

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

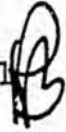
LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 15, 1988

SUBJECT: Open meetings; "action violating the section
is void" (CSHJR 44(Solicitor))

TO: Representative Kay Brown

FROM: Richard A. Bradley
Legislative Counsel 

I have reviewed the citations that Roxanne Turner provided to me regarding the constitutions and laws of California and Oregon regarding open meetings.

A brief summary of the provisions would be that neither state has any provision voiding laws for violations of the open meetings laws of those states.

Nor do the constitutions of those states lead to that result.

The California Constitution provides that the "proceedings of each house and the committees thereof shall be public except as provided by statute or concurrent resolution, when such resolution is adopted by two-thirds vote of the members of each house, . . ." Art. IV, sec. 7(c), California Constitution.

Contrary to the information Roxanne gave me, the enabling legislation at Secs. 11120 - 11131 of the California (Government) Code does not apply to the legislature but rather only to state executive branch agencies. And I believe that no provision of that law provides that action taken in violation of it is void. The only remedies offered in those sections of the California law is the authorization of litigation seeking mandamus or injunctive relief (Sec. 11130), costs and attorney fees (Sec. 11130.5), and a provision making the conduct a misdemeanor (Sec. 11130.7). A copy of these sections is enclosed.

Representative Kay Brown
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California does, however, have an open meetings law specifically concerned with the legislature. See Secs. 9027 - 9031, California (Government) Code, copies enclosed.

The legislative formulation of art. IV, sec. 7(c), quoted above, provides that all "meetings of the Assembly and Senate and the committees and subcommittees thereof, and any conference committee, shall be open and public and all the proceedings shall be conducted openly so that the public may remain informed, except as otherwise provided in this article. All meetings of any conference committee shall be open to press representatives accredited by the Joint Rules Committee." Sec. 9027.

Two sanctions are stated: (1) a knowing violation is a misdemeanor. Sec. 9030; and (2) a mandamus or injunctive action for declaratory relief may be filed. Sec. 9031.

The Oregon laws are consistent.

The Oregon Constitution provides that the "deliberations of each house, of committees of each house or joint committees and of committees of the whole, shall be open." Art. IV, sec. 14, Oregon Constitution. The section also directs each house to adopt rules to implement the section and both houses are directed to adopt joint rules relating to joint legislative activity.

I have included copies of ORS Secs. 192.610 - 192.690. They are ambiguous as to whether they apply to legislative Acts or legislative proceedings. I can find no provision within these sections that uses terms to be expected in laws applying to the legislature. But I can find no specific provisions that do apply to the legislature; since we do not have access to the legislative rules, that may well be the location of those provisions.

Sec. 192.680 establishes the policy that the court may order equitable relief as it considers appropriate. The law also provides that

A decision shall not be voided if other equitable relief is available. The court may order payment to a successful plaintiff in a suit brought under this section of reasonable attorney fees at trial and on appeal, by the governing body, or public body of which it

Representative Kay Brown
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is a part or to which it reports. ORS, sec. 192.-
680(1).

This remedy may be offered because it would be very unlikely that a plaintiff could prove "actual damages" for a violation of the law.

The law also provides that if the violation was a "result of wilful misconduct by any member or members of the governing body, that member or members shall be jointly and severally liable to the governing body . . . for the amount paid under subsection (1)."

Finally, the Oregon law provides that "the provisions of this section shall be the exclusive remedy for an alleged violation of ORS 192.610 - 192.690."

I believe it is accurate to note that neither California nor Oregon will void a legislative Act for a violation of their open meetings laws. The laws also suggest that sanctions against members whose conduct is wilful is a proper recourse.

During the meeting yesterday, I heard the suggestion several times that voiding the law was required because no other remedy was available. It seems that there may be some others.

You may wish to consider the alternatives that seems to flow from the California and Oregon experience.

(1) Amend the open meeting law to permit injunctive and mandatory actions for violations of the law, with the sanction available from the funding of the agency sued but with the court given the option, as in Oregon, of assessing the fine against the acting members if the violation was wilful.

(2) Make violations of the open meeting law by legislators a violation of legislative ethics, AS 24.60.

If I may be of further assistance, please advise.

Enclosures

RAB:bb
b4/013

HJR 44

Kay Brown

Alaska State Legislature House of Representatives

DEC 30 1988

TO: All House Members

FROM: Representative Kay Brown

DATE: December 28, 1987 *Kay*

SUBJ: Constitutional Amendment for Open Meetings

Please find attached a draft Joint Resolution that I plan to introduce along with Representatives Ellis, Frank, Davis, Cotten and Navarre providing for an amendment to the state constitution relating to open meetings. The proposed amendment provides a reasonable and workable solution to a difficult problem, and I would welcome additional co-sponsors of this legislation.

The amendment would constitutionally mandate legislative adherence to the Open Meetings Act and provide for enforcement in the instance of a violation. The amendment also allows legislative caucuses to meet in private for certain specific purposes.

The proposed language is the work product of a number of individuals who began meeting together shortly after the Supreme Court issued its ruling on the open meetings lawsuit last September. It is my feeling that the amendment provides a realistic and workable set of standards under which we can conduct the public's business while also providing a constitutional basis for court enforcement of the Open Meetings Act.

As you know, the Supreme Court ruled that the Open Meetings Act is not enforceable against the legislature. In League of Women Voters v. the Alaska Legislature, not even the defense attorneys disputed that the law had been violated. However, the Supreme Court found that it had no constitutional basis to force the legislature to adhere to the open meetings statute.

Respect for the legislature is diminished when we mandate a law for other public bodies, such as municipal assemblies, but do not hold ourselves to the same standard. The proposed amendment requires that legislative deliberations be open unless the legislative body is meeting in executive session to consider matters authorized by law. It states that if a matter is appropriate to a particular legislative body, a quorum of

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that body (ie, committee, subcommittee, etc.) cannot engage in private and substantive deliberation on that matter.

The amendment specifically allows legislative caucuses to meet in private to consider matters of procedure, organization or strategy. The legislative intent included in this measure makes it clear that this amendment is not intended to prevent the free flow of ideas among legislators or participation by legislators in public forums, community meetings, or social events.

As I mentioned, the language included in this draft is the product of several meetings with a variety of individuals and organizations. This same group is presently discussing the possibility of an initiative drive to place an advisory resolution on the ballot.

If you have any questions, or would care to discuss this proposal, please feel free to contact my Juneau office at 465-4998 after January 7th. If you wish to have your name listed as a cosponsor when the resolution is introduced, please let me know by January 13th.

SECTIONAL ANALYSIS OF HJR 44

Proposing an amendment to the Constitution
of the State of Alaska relating to open meetings.

SECTION 1 amends Article 1, Declaration of Rights, of the Constitution of the State of Alaska, by adding a new Section 23:

The deliberations of each house of the Legislature, and its committees and subcommittees, shall be open to the public, unless the legislative body is meeting in executive session to consider matters authorized by law.

If a matter is appropriate to a particular legislative body, private and substantive deliberation on the matter by a quorum of that body is prohibited.

Caucuses of the legislature may meet in private to consider matters of procedure, organization or strategy.

SECTION 2 Expresses legislative intent and summarizes provisions in the existing open meetings law.

Subsection (f) provides that the Legislative Affairs Agency will consider the statement of legislative intent expressed in (a) through (e) when preparing its neutral summary for the election pamphlet.

SECTION 3 Provides that the amendment will be placed before the voters at the next general election.

Prepared by:
Rep. Kay Brown
January 29, 1988

By Brown, Ellis, Frank, Davis, Cotten,
Navarre, Pourchot, Boyer, Koponen,
Boucher, Davidson, and Menard

**HJR 44: Proposing an amendment
to the Constitution of the State of Alaska
relating to open meetings**

HJR 44 proposes to amend the State Constitution by:

- mandating legislative adherence to the Open Meetings Act
- providing for court enforcement in the instance of a violation
- requiring that legislative deliberations be open unless the body is meeting in executive session to consider matters authorized by law
- prohibiting a quorum of a legislative body (committee, subcommittee, etc.) from engaging in private and substantive deliberation on a matter appropriate to that body
- allowing legislative caucuses to meet in private to consider matters of procedure, organization or strategy

HJR 44 includes intent language making it clear that this amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community meetings, or social events.

The proposed language is the work of a number of individuals who began meeting together shortly after the Supreme Court issued its ruling last September.

Prepared by:
Rep. Kay Brown
January 29, 1988

By Brown, Ellis, Frank, Davis, Cotten,
Navarre, Pourchot, Boyer, and Koponen

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Prepared by:
Rep. Kay Brown
January 19, 1988

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Prepared by:
Rep. Kay Brown
January 29, 1988

January 29, 1988
House State Affairs Committee
The Alaska Legislature

Testimony of the League of Women Voters of Alaska

HJR 44: Proposing an Amendment to the Constitution of the
State of Alaska relating to open meetings.

Madame Chair, Members of the Committee:

My name is Eve Reckley. I represent the League of Women Voters of Alaska. You have before you House Joint Resolution number 44 proposing to amend the Constitution of the State of Alaska to mandate that the business of the Legislature and thus, the business of the people of Alaska, be conducted in open meetings. The resolution is simple and straight forward. It requires the Legislature to abide by the open meetings law it enacted. And it provides the legal framework within the constitution for the courts to enforce it.

In short, the League, advocating in the public interest, is asking legislators to stand up and be counted on this issue. The League has done so, by taking its case for open meetings of all legislative bodies to the Supreme Court of the State of Alaska. Our belief is strong that the deliberations and the decision-making of the Legislature and its constituent groups must be done in full public view. Our resolve is strong that we will advocate for a guarantee that the public has access to the legislative process.

An amendment to the Constitution of the State of Alaska expressly mandating this right of public access, is the only way to secure this guarantee. It provides the courts the legal justification for enforcement. Without it, the Open Meetings Act has little meaning.

The League and its co-appellants claimed in Superior Court that closed meetings by members of the House and Senate Finance committees at various times in formulating the 1987 budget, violated the open meetings act. While that claim was upheld by the Superior Court, the Supreme Court reversed it on the grounds that there "is no implied right of public access to legislative committee or caucus meetings under the Alaska Constitution." Under the separation of powers doctrine in the Constitution, the Supreme Court held it had no legal basis to enforce the laws and procedures under which the Legislature governs itself.

The League now asks you to give the courts the power to enforce the Open Meetings Act and guarantee the right of public access to legislative deliberations. The League does not make this request lightly. We consider a constitutional amendment so important that we will continue to work with other interested groups to launch an initiative campaign, if the Legislature fails to act.

The proposed constitutional amendment before you does not broaden the open meetings act, nor change existing law permitting an executive session for matters requiring confidentiality. Nor is the amendment intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events.

Thomas Jefferson, framer of our national constitution, noted that as democratic institutions develop and mature, changes would occasionally be necessary to guarantee for all citizens the right of full participation. I am paraphrasing a quote inscribed in marble on the Jefferson Memorial in Washington, D.C.: As a man, I would not expect to wear the clothes that fitted as a boy, and so democratic institutions must grow and change as circumstances dictate.

We are a young state, under 30 years of age, and we are maturing in our democratic processes. The League believes that the Alaska legislative system should be "responsive, representative, accessible, efficient, and accountable."

Constitutionally mandating open meetings is vital to making the legislative process accessible and accountable to the people of Alaska.

As you know, this amendment requires a two thirds vote of both the House and the Senate and the signature of the Governor to place it on the ballot for a vote of the people in November.

This process will provide an opportunity for public date and then for voters to say whether they believe public access to legislative meetings should be guaranteed in the Constitution of the State of Alaska.

The League asks you to give the people of Alaska the opportunity to make that decision. Thank you.



February 24, 1988
House Judiciary Committee
The Alaska Legislature
Testimony On HJR 44

Mister Chairman, Members of the Committee:

I am Eve Reckley. I represent the League of Women Voters of Alaska. The League supports enactment of House Joint Resolution No. 44 to amend the Constitution of the State of Alaska to require that deliberations of legislative committees and subcommittees be open to the public. We appreciate the opportunity to present testimony on this legislation which is one of the League's highest priorities for action in this legislative session.

The League believes strongly in the right of public access to deliberations of legislative bodies, so much so, that it pressed its challenge of violations of the Open Meetings Act by legislative committee members to the Supreme Court of the State of Alaska. While the issue was undisputed, that closed meetings were held at various times during the formulation of the 1987 Alaska state budget, the high court held "there is no implied right of public access to legislative committee or caucus meetings under the Alaska Constitution." The League asks you now to approve this resolution to constitutionally guarantee the right of public access to deliberations of legislative bodies.

The League submitted affidavits to the Superior Court attesting to "a pattern of meetings by legislative committee and caucus majority members which were closed to the public, the press, and sometimes minority members of the legislature." The legislators did not deny the meetings occurred, or that they conducted the business and made the decisions that the League alleged. However, the Supreme Court's decision reversing the decision of the lower court was based on the separation of powers doctrine, that the court had no constitutional authority to enforce the law governing the operating procedures of the Legislature.

It is questionable whether such a "win" is really a win for either the Legislature or the public. We believe that when the Legislature refuses to follow the laws it establishes, public confidence is undermined. You have an opportunity now to help restore that public confidence.

The resolution before you, HJR 44, is simple and straight forward. It would amend the constitution to provide the legal framework for the courts to enforce the Open Meetings Act. An amendment to the Constitution of the State of Alaska to expressly mandate the right of public access, is the only way to secure this guarantee. Without it, the Open Meetings Act, insofar as it relates to the Legislature, is meaningless. This proposal, developed with the League's participation and support, is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, or social events.

Time and again the question has been raised, what is substantive deliberations? We think you know. And if there is ever a question, trust the public to make that determination. Hold the discussions in open meetings. The League believes that the better informed the public is, the better our government will be because it will be reflective of the will of the people.

The League believes that constitutionally mandating open meetings is vital to making the legislative process accessible and accountable, as well as more responsive to, and representative of the people of Alaska. As you know, the resolution requires a two-thirds vote of both the House and Senate and the signature of the governor to place it before voters in November. This process will give voters a say in whether they believe public access to legislative meetings should be guaranteed in the Constitution of the State of Alaska.

The League of Women Voters of Alaska asks you to give the people of Alaska the opportunity to make that decision. We urge your approval of HJR 44.

Thank you.

Appearances: Avrum M. Gross and Susan A. Burke, Gross & Burke, Juneau, for Senate Appellants/Cross-Appellees, Mitchell E. Abood, Jr., Don Bennett, John B. Coghill, Edna DeVries, Richard I. Eliason, Bettye Farhenkamp, Jan Faiks, Frank R. Ferguson, Paul Fischer, Richard Halford, Tim Kelly, Jalmar M. Kerttula, Patrick Rodey, John C. Sackett, Arliss Sturgulewski, Fred F. Zharoff, Jack Gibbons, and Peggy Mulligan. Richard M. Burnham, Findley & Burnham, Juneau, for House of Representatives Appellants/Cross-Appellees, Albert P. Adams, John Binkley, H.A. Boucher, Bette M. Cato, Jim Duncan, Steve Frank, John G. Fuller, Peter Goll, Max F. Gruenberg, Jr., Ben F. Grussendorf, Adelheid Herrman, Niilo E. Koponen, Ronald L. Larson, M. Mike Miller, Mike W. Miller, Mike Navarre, John Ringstad, Richard Shultz, John Sund, Robin L. Taylor, David W. Thompson, and Kay Willis. D. John McKay and Laura N. Cromwell, Middleton, Timme & McKay, Anchorage, for Appellees/Cross-Appellants League of Women Voters of Alaska and Anchorage Daily News.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

MATTHEWS, Justice.

COMPTON, Justice, dissenting.

These appeals arise from the superior court's decision that a claim that certain groups of state legislators held closed committee meetings and caucuses in violation of the Open Meetings Act was not justiciable, but that a claim that the closed meetings violated an implied constitutional right of public access to meetings of legislative units was both justiciable and correct. We agree that the claim of violation of the Open Meetings Act by state legislators is nonjusticiable, but contrary to the superior court's decision, we hold that there is no

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THE SUPREME COURT OF THE STATE OF ALASKA

MITCHELL E. ABOOD, JR., DON BENNETT,)
JOHN B. COGHILL, EDNA DeVRIES, RICHARD)
I. ELIASON, BETTYE FARHENKAMP, JAN)
FAIKS, FRANK R. FERGUSON, PAUL FISCHER,)
RICK HALFORD, TIM KELLY, JALMAR M.)
KERTTULA, PATRICK RODEY, JOHN C.)
SACKETT, ARLISS STURGULEWSKI, FRED F.)
ZHAROFF, JACK GIBBONS, PEGGY MULLIGAN,)
ALBERT P. ADAMS, JOHNE BINKLEY,)
H.A. BCUCHER, BETTE M. CATO, JIM DUNCAN,)
STEVEN FRANK, JOHN G. FULLER, PETER)
GOLL, MAX F. GRUENBERG, JR., BEN F.)
GRUSSENDORF, ADELHEID HERRMAN, NIILLO E.)
KOPONEN, RONALD L. LARSON, M. MIKE)
MILLER, MIKE W. MILLER, MIKE NAVARRE,)
JOHN RINGSTAD, RICHARD SHULTZ, JOHN)
SUND, ROBIN L. TAYLOR, DAVID W.)
THOMPSON, and KAY WILLIS,)
File No. S-1831
File No. S-1841
File No. S-1957

Appellants and Cross-Appellees,)

v.)

LEAGUE OF WOMEN VOTERS OF ALASKA,)
and ANCHORAGE DAILY NEWS,)

Appellees and Cross-Appellants.)

O P I N I O N

[No. 3230 - September 29, 1987]

Appeal from the Superior Court of the State
of Alaska, First Judicial District, Juneau,
Walter L. Carpeneti, Judge.

The League attached affidavits from several senators and representatives which described these meetings in some detail.

The League charged that these meetings violated the Open Meetings Act (AS 44.62.310), the Uniform Rules of the Legislature (Rule 22), various federal and state constitutional provisions, and common law rights of access to government. The superior court was asked to declare that the closed meetings violated state and federal law, and that any appropriation bill adopted as a result of such meetings would be void unless each house of the legislature conducted "substantial, de novo, independent and public reconsideration of those substantive matters previously discussed in private." The injunctive relief sought by the League was aimed at preventing the legislature from continuing to engage in the type of meetings complained of, and from enacting the state budget for FY 1987 unless and until certain remedial action was taken.

On April 30, the superior court held a hearing on an application by the League for a temporary restraining order, and on May 1 the court issued its first decision in this case. The court concluded that litigation premised upon the alleged closed meetings held in violation of the Open Meetings Act presented a justiciable controversy. The court refused to issue the requested TRO, however, because it found that it could not fashion an order that would effectively control these legislative activities. The court then decided that it was empowered to

implied right of public access to legislative committee or caucus meetings under the Alaska Constitution. We therefore reverse.

I. FACTS AND PROCEEDINGS

In April 1986, the League of Women Voters of Alaska, the Anchorage Daily News, and the Fairbanks Daily News Miner (collectively referred to hereafter as the League) filed an action seeking a declaratory judgment and injunctive relief against certain members of the Alaska Legislature (the Legislators) and four legislative employees. The League alleged that members of the Senate and House Finance Committees had held meetings "closed to the press and members of the public," and during those meetings had "engaged in collective fact-finding, deliberation, debate and decision-making with respect to the budget for FY 1987." The complaint further alleged that members of the House Finance Committee and the Senate Finance Committee had met jointly in meetings closed to the press and public "to discuss and attempt to obtain agreement upon the amount of funds available for the FY 1987 budget." The complaint also alleged that members of the House Finance Committee and the Senate Finance Committee had met from time to time in "closed caucus meetings" with other members of the ruling majority, and during these meetings had engaged in "substantial collective discussion, deliberation, and decision-making" concerning the FY 1987 budget.

issue a final declaratory judgment solely on the basis of the League's complaint and affidavits filed in support of the motion for the TRO. The court found that a pattern of conduct which was violative of the Open Meetings Act had been established, that action taken contrary to the Act was void, and therefore that any budget decision which was reached at a closed meeting was void.

The Legislators immediately appealed from the superior court's decision and requested emergency relief, claiming that due process had been denied to them because the decision had been rendered before the Legislators had been afforded a fair opportunity to respond on the merits. After an expedited argument, we reversed the judgment issued by the superior court and remanded the case for the purpose of conducting a full hearing on the merits.

Shortly thereafter, the Legislators filed their answers to the complaint, and moved to dismiss the case or alternatively for summary judgment, arguing that the issues in the case were nonjusticiable and that the claims against the Legislators were barred by legislative immunity. The League filed a cross-motion for summary judgment on the justiciability issue.

In October 1986, the superior court entered its second decision in this case, the partial final judgment which is the subject of this appeal. The court reversed its earlier ruling and concluded that the League's claim that the closed meetings violated the Open Meetings Act was not justiciable. The League

appeals from this ruling. The court proceeded to hold, however, that the public and press enjoy an implied right of access to the proceedings of the legislature under article I, section 5 of the Alaska Constitution, which guarantees freedom of speech and of the press. The court further held that a claim that the Legislators violated this constitutional right was justiciable. The court finally held that legislative immunity was not a bar to the suit. The Legislators appeal from these rulings. The State of Alaska, intervenor on behalf of the Legislators below, and the Fairbanks Daily News Miner, are not participants in this appeal.

II. STANDARD OF REVIEW

All of the issues in this appeal raise questions of Alaska constitutional and statutory law, subject to de novo review. The facts of this case are not in dispute; the only facts in the record are the seven affidavits submitted by the League which attest to a pattern of meetings by legislative committee and caucus majority members which were closed to the public, the press, and sometimes minority members of the legislature. The Legislators do not deny that these meetings occurred, or that they conducted the business and made the decisions that the League alleges.

III. VIOLATIONS OF THE OPEN

MEETINGS ACT ARE NOT JUSTICIABLE

The League argues that the Legislators violated Alaska's Open Meetings Act¹ and the legislature's Uniform Rule

1. The Alaska Open Meetings Act provides:

Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. . . . Except when voice votes are authorized, the vote shall be conducted in such manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the bodies specified in this subsection.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No

(Footnote Continued)

(Footnote Continued)

action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges, or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section. . . .

(f) Action taken contrary to this section is void.

AS 44.62.310.

22² through the closed meetings attested to in the League's affidavits. The superior court held that these claims were

2. Uniform Rule of the Legislature 22 provides:

OPEN AND EXECUTIVE SESSIONS. (a) All meetings of a legislative body are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided by (b) of this rule.

(b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

(2) discussion of subjects that tend to prejudice the reputation and character of a person;

(3) discussion of a matter that may, by law, be required to be confidential.

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.

(d) The provisions of this rule may not be interpreted as permitting the exclusion of a legislator from an executive session, whether or not the legislator is a member of the body that is meeting. A legislator not a member of the body holding an executive session shall, however, be subject to the same rules of confidentiality and decorum as pertain to regular members of the body.

nonjusticiable because "[j]usticiability in this case depends on a determination that there is a constitutional right alleged to have been infringed." (Emphasis by the court.) As a general proposition, we agree.

In Malone v. Meekins, we recognized that

the established principle that courts should not attempt to adjudicate "political questions" . . . stems primarily from the separation of powers doctrine. . . . "[I]t is the relationship between the judiciary and the coordinate branches of the . . . Government . . . which gives rise to the 'political question.'"

650 P.2d 351, 356 (Alaska 1982) (quoting Baker v. Carr, 369 U.S. 186, 210, 7 L. Ed. 2d 663, 682 (1962)). See also Abood v. Gorsuch, 703 P.2d 1158, 1160 (Alaska 1985) ("There are certain questions involving coordinate branches of the government, sometimes unhelpfully called political questions, that the judiciary will decline to adjudicate.").

Our statement in Abood suggests the difficulty inherent in precisely defining the contours of the doctrine of justiciability. It is not possible to draw the exact boundary separating justiciable and nonjusticiable questions.

Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision . . . and the actual hardship to the litigants of denying them the relief sought.

Poe v. Ullman, 367 U.S. 497, 508-09, 6 L. Ed. 2d 989, 999 (1961) (Frankfurter, J., plurality opinion). Nor will merely characterizing a case as nonjusticiable or political in nature render it immune from judicial scrutiny. Malone, 650 P.2d at 356. Rather, to identify those political questions which will be held to be nonjusticiable, we have utilized the approach adopted by the United States Supreme Court in Baker v. Carr. Id. at 357; see also Abood, 703 P.2d at 1160. In Malone, we explained that the Supreme Court of the United States had identified "various elements, one or more of which is '[p]rominent on the surface of any case held to involve a political question. . . .' These elements included (1) a textually demonstrable commitment of the issue to a coordinate political department" 650 P.2d at 357 (citing Baker v. Carr, 369 U.S. at 217, 7 L. Ed. 2d at 686).

The Legislators argue that article II, section 12 of the Alaska Constitution contains an express textual commitment of authority, which specifically and exclusively authorizes the legislature to adopt its own rules of procedure. Article II, section 12 provides in part: "Rules. The houses of each legislature shall adopt uniform rules of procedure." Pursuant to this authority, the legislature has adopted Uniform Rule 22, in language substantially identical to the Open Meetings Act, providing that all meetings of a legislative body are open to the general public.. Compare notes 1 and 2, supra. The Legislators argue that since the constitution commits to the legislature the

authority to set its own procedures, only the legislature may determine whether the Open Meetings Act should apply to the legislature, and how it should apply consistent with Uniform Rule 22. The Legislators rely on this court's decisions in Malone and Abood, and on the Florida Supreme Court's opinion in Moffitt v. Willis, 459 So.2d 1018 (Fla. 1984).

In Malone, we declined to address the question of whether the legislature had violated AS 24.10.020, which prohibited a person other than the Speaker of the House from convening a session of the House. We held that the matter of the election or removal of the Speaker was committed by the constitution to the House, and the judicial branch owed respect to that body. We explained that

[s]uch a declaration would, in our view, be an unwarranted intrusion into the business of the House. To be sure, the judicial branch of government has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including the compliance by the legislature. But a statute such as AS 24.10.020 relates solely to the internal organization of the legislature, a subject which has been committed by our constitution [Article II, section 12] to each house.

650 P.2d at 356 (footnote omitted). We also considered the question whether the "reasonable public notice" requirement of the Open Meetings Act, AS 44.62.310(e), was violated by the legislature and said, "we regard this question as it

relates to the internal organization of one of the Houses of the legislature to be nonjusticiable." Id. at 359.

In Abood, we held nonjusticiable the question of whether a joint session of the legislature could legally be presided over by the President of the Senate in the absence of the Speaker of the House. At issue was the interpretation of the legislature's Uniform Rule 51 which required the presence of both officers. We agreed with the trial court that the issue arose out of "the rulemaking powers of the legislature." 703 P.2d at 1164. We also agreed that "out of respect owed to a coordinate branch of state government, [we must] defer[] to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." Id.

Our holdings in Malone and Abood are controlling in this case. The Alaska Constitution expressly commits to the legislature authority to adopt its own rules of procedure. The question whether legislative business should be conducted in open or closed sessions is a procedural question which has traditionally been the subject of legislative rules. See Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569, 577 (D. Utah 1985) (a right of access to administrative hearings is more a procedural right than a substantive right); see also P. Mason, Manual of Legislative Procedure sec. 630 (1979) (committee meetings open to public except when considering specified restricted subjects). Pursuant to this constitutional

grant of authority, the legislature has enacted Uniform Rule 22 and the Open Meetings Act in substantially identical language.

The League asserts that the Legislators have violated both the Uniform Rule and the Open Meetings Act. If they have, to hold that these claims are justiciable places the judiciary in direct conflict with the legislature's constitutionally authorized rulemaking prerogative. We agree with the Florida Supreme Court that it is the legislature's prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative. Moffitt v. Willis, 459 So.2d 1018, 1021 (Fla. 1984).³ As we stated in Malone, "except in extraordinary

3. The facts in Moffitt are virtually identical to the facts in this case. Newspaper publishing companies brought a declaratory judgment action against the state house speaker and senate president alleging that secret meetings of the legislature violated the legislature's rule requiring open meetings, a statute requiring the legislature to follow its own rules, and various state and federal constitutional provisions. The Florida Supreme Court held that the courts lacked jurisdiction to hear the case, explaining:

In our view, a judicial determination of this matter hinges on the meaning of legislative committee meetings and what activity constitutes such a meeting. At this point, the judiciary comes into head-to-head conflict with the legislative rulemaking prerogative.

Article III, section 4(a) of the Florida Constitution gives each house the power to determine its own rules of procedure. . . .

(Footnote Continued)

circumstances, as where the rights of persons who are not members of the legislature are involved, it is not the function of the judiciary to require that the legislature follow its own rules." 650 P.2d at 359. In support of this proposition, we cited United States v. Smith, 286 U.S. 6, 30, 76 L. Ed. 954, 958-59 (1932), where the Court discussed the rule that the only justiciable limitations on a legislative body's power to adopt rules of its proceedings are that the body

may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rules and the result which is sought

(Footnote Continued)

[T]his provision gives each house the power and prerogative not only to adopt, but also to interpret, enforce, waive or suspend whatever procedures it deems necessary or desirable so long as constitutional requirements for the enacting of laws are not violated. . . . It is the final product of the legislature that is subject to review by the courts, not the internal procedures.

. . . .

Just as the legislature may not invade our province of procedural rulemaking for the court system, we may not invade the legislature's province of internal rulemaking. . . . A member of the legislature can raise a point of order regarding a violation of any of the rules of the house or senate. That is the proper forum for determining the propriety of the activities complained of in the suit below.

Id. at 1021-22 (emphasis by the court, citations omitted).

to be obtained. But within these limitations all matters of method are open to the determination of the house. . . .

Id. at 33, 76 L. Ed. at 959, quoting United States v. Ballin, 144 U.S. 1, 5, 36 L. Ed. 321, 324 (1891). See also Exxon Corp. v. F.T.C., 589 F.2d 582, 590 (D.C. Cir. 1978) ("Although the courts will intervene to protect constitutional rights from infringement by Congress, . . . where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress . . ."), cert. denied, 441 U.S. 943, 60 L. Ed. 2d 1044 (1979); Consumers Union of United States v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 24 (D.D.C. 1973) ("A congressional rule which infringes upon the constitutional rights of persons other than Congressmen presents a proper question for the judiciary"), rev'd on other grounds, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051, 46 L. Ed. 2d 640 (1976); State ex rel. City Loan & Sav. Co. v. Moore, 177 N.E. 910 (Ohio 1931) (the legislature's disregard of its own rules as to its lawmaking procedures is not subject to judicial inquiry, where the rule is not embraced in the constitution); Schweitzer v. Territory, 47 Pac. 1094 (Okla. 1897) (since the court cannot declare an act of the legislature void on account of noncompliance with rules of procedure made by itself to govern its deliberation, the failure of the legislature to observe a statute enacted by itself, and concerning the legislature's procedure for lawmaking, was no ground for refusing

to enforce a statute passed in noncompliance with the rule, where there was no constitutional provision mandating a particular procedure); State v. Cumberland Club, 188 S.W. 583, 585 (Tenn. 1916) (where a state legislature has the right under its constitution to make its own rules of procedure, it must be the judge of those rules, and all the court can do is to ascertain whether the constitution has been complied with). Likewise, in Abood, we noted that the "nonjusticiability [of rules violations] doctrine would not apply to cases involving our constitutionally mandated duty to insure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." 703 P.2d at 1161.⁴

We observe that in Smith, the Court held that where the "construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." 286 U.S. at 33, 76 L. Ed. at 959. In this case, the construction of the Open Meetings Act and Uniform Rule 22 does not affect persons other than members of the legislature in the same sense as was the case in Smith. There, the controversy was between the United States Senate and an appointee of the

4. We adjudicated the question presented as to the quorum needed for acts of the legislature in joint session because it "is a question of Alaska constitutional law. . . . to which the nonjusticiability doctrine does not apply." Id. at 1161.

President, the resolution of which depended upon the right of the Senate to reconsider, under its rules, its prior confirmation of the President's nominee after the President had appointed the nominee pursuant to the earlier confirmation. Here, there is no specific individual with any particular right at stake in the controversy. Rather, the right granted under the Open Meetings Act as it applies to the legislature, and under Uniform Rule 22, is a right of the public generally to observe the legislature's proceedings.

It is true that the legislature has identified in the Open Meetings Act the public's interest in open meetings, AS 44.62.312(a), and we have recognized that the Act exists primarily to advance the people's interest, and that it is applicable to the legislature.⁵ Alaska Community Colleges' Federation of Teachers v. University of Alaska, 677 P.2d 886, 891 (Alaska 1984). We do not retreat from these principles. The question before us, however, is not whether the Open Meetings Act applies to the legislature, but rather whether the legislature's alleged violation of the Act or Uniform Rule is justiciable.⁶ As

5. Even so, it is beyond doubt that the legislature has the power to exempt itself at any time from the coverage of the Open Meetings Act.

6. Compare Cole v. State, 673 P.2d 345, 349 (Colo. 1983) (held: requirement of open meetings law that legislative caucus meetings be open to public does not conflict with state

(Footnote Continued)

we have concluded, the Open Meetings Act, as it applies to the legislature, like the legislature's Uniform Rule 22, merely establishes a rule of procedure concerning how the legislature has decided to conduct its business. Of course, having made the rule, it should be followed, but a failure to follow it is not the subject matter of judicial inquiry. See State ex rel. City Loan & Sav. Co. v. Moore, 177 N.E. 910, 911 (Ohio 1931).

If there were allegations that the legislature, acting pursuant to or in violation of one of its rules of procedure, had infringed on the rights of a third person not a member of the legislature as in Smith, or had ignored constitutional restraints or violated fundamental rights, then the "exceptional circumstances" exception to the rule of nonjusticiability would come into play. None of these factors are involved in this case, however, and there is no basis for employing the "exceptional circumstances" exception.

Thus, because the constitution commits to the legislature the authority to provide for its own rules of procedure, and because the question of whether a legislative committee meeting or caucus meeting shall be open or closed falls within this grant of authority, we regard the question whether the Legislators have violated the Open Meetings Act or Uniform

(Footnote Continued)

constitutional provision authorizing legislature to establish its own rules, however, court did not discuss justiciability).

Rule 22 to be nonjusticiable. As we have recognized, the legislature's violation of its rules of procedure may be justiciable in "exceptional circumstances" of constitutional dimension. If the League's claim is to survive this justiciability challenge, it must involve a right protected by either the Alaska Constitution or the United States Constitution.

IV. NO IMPLIED CONSTITUTIONAL RIGHT OF ACCESS TO LEGISLATIVE MEETINGS

The United States Constitution does not expressly require the Congress to hold any of its meetings in public. There is also no common law right to attend meetings of government bodies. Society of Professional Journalists, 616 F. Supp. at 572; see Watkins, Open Meetings under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268 (1984) (Watkins); Note, Open Meeting Statutes: The Press Fights for the "Right to Know", 75 Harv. L. Rev. 1199, 1203 (1962) (Note). Indeed, the tradition of the English Parliament, which was subsequently carried on in the legislative bodies of Colonial America, was to hold legislative debate in secret and to prohibit publication of legislative proceedings. Society of Professional Journalists, 616 F. Supp. at 572 (observing that both the Continental Congress and the Constitutional Convention conducted their proceedings in secret, and thus "[i]t is not surprising . . . that the Framers of the Constitution did not include an express provision in the

Constitution that required Congress to deliberate in public");
Watkins, supra at 271.

On the other hand, at least thirty-five states have constitutional requirements that their legislatures meet in public.⁷ See Note, supra at 1203. All fifty states, the District of Columbia, and the federal government have some form of an open meetings act. Watkins, supra at 268, 272. These acts have never been held to be constitutionally required, however. Society of Professional Journalists, 616 F. Supp. at 572; see Watkins, supra at 272.

There is one area where a constitutional right of access clearly does exist, namely, in judicial proceedings. The United States Supreme Court has found under the first amendment that the public and press have a right of access to criminal

7. The State of Oregon amended its constitution in 1974 and 1978 to require that its legislature conduct its deliberations in public. This amendment is found in that part of the Oregon Constitution dealing with the legislative branch, and provides:

The deliberations of each house, of committees of each house or joint committees and of committees of the whole, shall be open. Each house shall adopt rules to implement the requirement of this section and the houses jointly shall adopt rules to implement the requirements of this section in any joint activity that the two houses may undertake.

Or. Const. article IV, § 14.

trials even where the defendant expressly waives his or her right to a public trial and desires the proceedings to be closed. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 65 L. Ed. 2d 973 (1980) (plurality decision adopted as a majority decision in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 73 L. Ed. 2d 248 (1982)). The Supreme Court's rationale for finding this unenumerated right of access is significant. First, criminal trials have historically been open to the press and public. Globe Newspaper, 457 U.S. at 605, 73 L. Ed. 2d at 256. Second, the right of access to criminal trials plays a significant role in the proper functioning of the judicial process. Id. at 606, 73 L. Ed. 2d at 256.

In this case the superior court utilized the analysis applied by Richmond Newspapers/Globe Newspaper to find that the public and the press have an implied right under the Alaska Constitution, article I, section 5, to attend certain meetings of legislative units. The court's analysis is in two parts: an historical review, looking to the practice in effect at the time of the adoption of the Alaska Constitution to determine what the framers intended, and a functional evaluation seeking to determine the effect that a requirement of public access to legislative meetings would have.

We disagree with this analysis because the history of the Alaska Constitutional Convention indicates that the framers of our constitution did not intend to confer a right of public

access to meetings of legislative committees or legislative caucuses.⁸

The constitution expressly provides that it is the legislature's province to establish its own rules of procedure. Alaska Const. article II, section 12. We have held in part III of this opinion that this provision includes the authority to make rules concerning whether legislative bodies shall conduct their business in open or closed meetings. Of course, if the constitution contained an express or implied guarantee of public access to legislative meetings, the legislature could not, pursuant to article II, section 12, adopt a rule or enact a law to the contrary.

At the outset, we are confronted with the rule that the intent underlying constitutional language should first be gathered from the language itself. Baker v. City of Fairbanks, 471 P.2d 386, 397 (Alaska 1970). Although we would naturally expect a provision requiring legislative bodies to conduct their meetings in public to be found in article II, which pertains to the legislature, it is clear that the constitution contains no express provision there, or in the declaration of rights in

8. We are not presented with the issue whether there may be an implied constitutional right of the public and the press to attend floor sessions of the two houses of the legislature, or to attend sessions of the legislature meeting as a whole. Our opinion is limited to meetings of legislative committees and so-called caucuses.

article I, or anywhere else. Thus, we must determine if such a right may be implied.

We begin by seeking to determine the intent of the framers. We find evidence of such intent in the debate at the Constitutional Convention over the question of the public's access to the Convention's own committee meetings. That debate shows clearly that the delegates were aware of the issue and of the necessity for dealing with it directly.

One of the first orders of business for the Constitutional Convention was to adopt procedural rules to govern its own activities in drafting the constitution. Rule 19 concerned public access to the deliberations of the Standing Committees of the Convention. As originally proposed, Rule 19 provided:

The deliberations of the Standing Committees shall not be open to the public except upon invitation of the Committee. Each Standing Committee shall notify the Secretary of the time and place of meetings, and the Secretary shall make such notice public.

1 Proceedings of the Alaska Constitutional Convention 75
(November 9, 1955) (hereafter "Convention Proceedings").

Delegate Rivers spoke first in support of the Rule.

The committees have a lot of work to do and need freedom to express themselves to arrive at a consensus of their thinking and, accordingly, the committees in all fairness, could hear anyone who requested to be heard, and that is the reason for saying that the time of these committee meetings shall be posted or publicized by the Secretary. Everyone is supposed to know when we are

meeting so that anyone can request to be heard, but we don't want to have them open to the public while we try to develop a consensus of our thinking during all of our exploratory work. We think the committees can do better work if the public is there on invitation or if particular persons who want to be heard, do so upon request, and that is the reason for the rule.

Id. Delegate Hellenthal spoke in opposition to the Rule, stating:

This is an unusual rule. I doubt if any other body such as this has such a rule. I know the Congress of the United States does not have such a rule, and I think that we would put ourselves open to the well-deserved criticism that we are meeting in secret session, which has an ugly connotation, but which criticism will be levelled at the group unless we adopt a more normal method. I would suggest the method of executive session, that by majority of two-thirds vote of the members of the committee, that the public be excluded to consider stated objects That is the rule of the United States Congress. I think this rule will involve us in great difficulties, and I see absolutely no need for it. Now if the occasion develops that crackpots or someone (I don't think there are many crackpots in Alaska) start plaguing us, then we can take a prophylactic rule such as the one recommended here, but in the absence of that demonstration I think that this rule has no place before our body.

Id. at 76.

Delegate Sundborg took issue with Delegate Hellenthal's statement.

Many another deliberative body and I think practically every deliberative body has a rule such as this. Committee meetings of the United States Congress are not open to the public except upon invitation of the committees. Hearings are but committee

meetings, I've been excluded from them many times, in Congress. I might say that our legislative committee meetings are not open to the public except upon invitation.

Id.⁹ After noting the secret nature of both committee meetings and plenary sessions of the Federal Constitutional Convention, Delegate Sundborg commented:

I feel we do have to have the freedom which we would have in committee only if we can speak without having a lot of people sitting around breathing down our necks. If a matter comes before a committee which would require the presence of the public, or where the presence of the public would help the committee reach a solution, I am sure any committee would be glad to invite the public in, . . . but I just don't think that business can be conducted efficiently if the public is walking in and out wandering around through these committee rooms all the time we are trying to do serious business.

Id. at 76-77.

Delegate Vic Fischer moved that the first sentence of Rule 19 as proposed be amended to read:

The deliberations of the Standing Committees shall be open to the public, unless the Committee by two-thirds vote of all the members to which it is entitled votes to hold an executive session.

9. Although not required by the United States Constitution, the United States Senate has met in public on a regular basis since 1794, and the House since the War of 1812. Committee sessions, where the bulk of the Congress' work is done, were not routinely open to the public until the mid-1970's. Watkins, supra at 271-72.

Id. at 77. This proposal met with heated disagreement from Delegates Hermann, Taylor, and Barr. See id. at 77-79. Delegate Hermann stated:

I think that . . . the Convention should remember that no business conducted in the committee itself is even final. What we shall be doing in these committees is threshing out minor details, maybe some major ones too, but the point of the matter is that we have no power to translate that into action until it is brought before the Convention as a whole. If the public meetings are open to the Convention, which they certainly will be at all times, any discussion on any matter pertinent to the Constitution will be open to the public.

Id. at 77-78.

At this point the Convention recessed for lunch. Over the lunch recess a compromise was reached. Id. at 80-81. The compromise proposal, adopted by unanimous consent, provided:

The deliberations of the Standing Committees shall be open to the public at such times as may be designated by the respective committees. If a committee finds it to be in the public interest, upon application any citizen may attend committee sessions. . . .

Id. at 81. It is clear that although Rule 19 was crafted in terms of open meetings, in fact the rule establishes a normal procedure of closed meetings unless a committee acted to open a meeting to the public.

In light of the delegates' debate concerning the merits of adopting a procedural rule governing the public's right of access to the Convention's committee meetings, and of their unanimous decision to establish a norm of closed meetings, we do

not believe that they intended that the constitution would direct that committee meetings of the future state's legislature should be open to public access. Rather, it is our view that the Constitutional Convention left this topic to the legislature by providing in article II, section 12 that the legislature was authorized to adopt its own rules of procedure.

Our conclusion is supported by the constitutional framers' understanding that territorial legislative committee meetings were usually closed to the public. The practice of closed territorial legislative committee meetings was noted in the delegates' debate on whether the Convention's Standing Committee meetings should be closed to the public. Convention Proceedings at 76 (comment of Delegate Sundborg). Given this practice, it seems highly improbable that the delegates, if they intended a contrary rule, would be content to leave it for discovery by implication. Rather, since historically the rule was one of closed meetings, it is most reasonable to conclude that the delegates thought they were not changing traditional practices. See Baker v. City of Fairbanks, 471 P.2d 400-401.

We conclude that the framers of the Alaska Constitution did not intend that the constitution require that committee and caucus meetings of legislative bodies be conducted in public. Therefore, we hold that there is no implied right of access to such meetings under the Alaska Constitution.

V.

That part of the superior court's decision which held as nonjusticiable allegations that the Legislators violated the Open Meetings Act or legislative rules is affirmed. That part of the court's decision which held that the public and press have an implied constitutional right of access to meetings of committees of the legislature and caucuses of legislators is reversed.¹⁰ The case is remanded with instructions to dismiss the League's action.

AFFIRMED in part, REVERSED and REMANDED in part.

10. Our resolution of the justiciability and implied constitutional right of access issues makes it unnecessary to address the parties' contentions as to legislative immunity (Alaska Const. Article II, section 6).

COMPTON, Justice, dissenting.

In 1972 the Alaska Legislature amended the Open Meetings Act to express that

[i]t is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

AS 44.62.312(a) (emphasis added). It is clear that the Open Meetings Act provides for and protects a public right. The Act creates an obligation on the part of all state governmental bodies to open their meetings to public scrutiny. This court has held that the Act by its own language "plainly includes the state legislature." Malone v. Meekins, 650 P.2d 351, 358 (Alaska 1982). Therefore, the legislature cannot now unilaterally and without public debate abrogate that right.

As the court recognizes, the contours of the doctrine of justiciability are not easily defined. To guide our

deliberations, we have in the past looked to the criteria enunciated by the Supreme Court in Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663 (1962). See Malone v. Meekins, 650 P.2d at 356-57. The relevant Baker criterium discussed by the court today is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" 396 U.S. at 217, 7 L. Ed. 2d at 686. This court recognizes, and I do not contest, that the Alaska Constitution contains an express textual commitment authorizing the legislature to adopt its own rules of procedure.¹ Yet the issue before the court is the public's statutory right to be informed. Our past cases have not held that resolution of this issue lies outside the province of the judiciary, contrary to the opinion of this court today.

In Malone, this court addressed the justiciability of legislative rules regarding who may call the legislature to order. This court refused to act as a "sort of super parliamentarian." 650 P.2d at 359. We also declined to determine what public notice is "reasonable" under the Open Meetings Act. AS 44.62.310(e). I do not seek to overrule that precedent. If courts were to act as "super parliamentarians,"

1. Alaska Const. art. II, § 12. The fact that the legislature has adopted a rule which mirrors the statute should not confuse the issue before the court. Adoption of a rule similar to a statute cannot erode the force of the statute as law. If the legislature wishes to exempt itself from the requirements of the statute it can do so in the act itself.

...thereby denying the legislature reasonable interpretations of its internal rules, the legislature would be hobbled to the point of inactivity. However, the legislature's disregard of a right granted by the Open Meetings Act does not deserve the same deference as its interpretation of a phrase contained in that Act. This is more than a matter of degree. It is a matter of the complete denial of the public's express right to witness important legislative debate. Thus Malone does not control in the current case.

In Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985) we held non-justiciable the question of whether the President of the Senate could legally preside over a joint session of the legislature in the absence of the Speaker of the House. We agreed with the trial court to defer "to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." 703 P.2d at 1164 (emphasis added). We did, however, under the guise of constitutional interpretation, see fit to decide whether a quorum was present. At issue was whether the quorum must be composed of a majority of each house respectively or, alternatively, whether it need only be a simple majority of the total number of legislators. We held the latter, clearly deciding a procedural issue. Id. at 1162. Our definition of what constituted a "quorum," a parliamentary matter seemingly committed to the rule making authority of the legislature, is distinct from "insur[ing] compliance with the

provisions of the Alaska Constitution." Thus, Abood is inapposite to the current case because it dealt with a dispute solely between members of the legislature over their own rules. What precedential value the case does possess shows that this court will decide certain procedural issues for the legislature and that this court has not been completely deferential in the past.

The court also relies on Moffitt v. Willis, 459 So. 2d 1018 (Fla. 1984). The court argues that "[t]he facts in Moffitt are virtually identical to the facts in this case." This simply is not so. The Moffitt court was faced with interpretation of a broad constitutional free speech clause and specific legislative rules. The court deferred to the legislature's rule making power only after limiting the case by observing:

We are not confronted with whether a statute applies, rather we are asked to allow the courts to determine when and how legislative rules apply to members of the legislature.

Moffitt, 459 So. 2d at 1022. Thus the Moffitt court expressly excluded from its holding the specific issue raised in the case at bar.

Moreover, we have recognized the public nature of the Open Meetings Act. In Alaska Community Colleges' Federation of Teachers v. University of Alaska, 677 P.2d 886, 891 (Alaska 1984) we stated that

[s]ection 312 makes clear that the [Open Meetings Act] exists primarily to advance the interests of "the people of this state." When the sunshine act is breached it is "the

people's right to remain informed" which sustains injury.

The Supreme Court in United States v. Smith, 286 U.S. 6, 33, 76 L. Ed. 954, 959 (1932) held that where the "construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." Smith, then, is more analogous to the current issue than the other cases cited by this court.² Whereas in Malone and Aboud the controversy was between members of the legislature, who were parties to the rule making and enforcement proceedings, in Smith the affected person was other than a member of the [United States] senate and unable to personally participate in rectifying the wrong done him. So it is in the current case. The affected persons are not members of the legislature and in fact their interests are at odds with the legislature. Their only recourse is to the courts which, as Smith suggests, should not decline to decide these disputes.

Finally, it is observed that the doctrine of non-justiciability of issues concerning legislative action "is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. at 210, 7 L. Ed. 2d at 682. But, while the

2. The court distinguishes Smith on the ground that in Smith a specific individual was affected whereas in the case at bar it is the right of the public that is affected. The court does not explain the significance of this distinction.

separation of powers theory requires some deference by the judiciary to a coequal branch of government, the theory originated as a system of checks and balances on the power of each branch. The line between when this court should act with deference and when it should check the power of the legislature is not easily drawn. However, "where the rights of persons who are not members of the legislature are involved . . .," Malone, 650 P.2d at 359, this court should be more willing to defend those rights than it shows itself to be today.³

3. I do not believe that the constitutional issue addressed in Part IV of the court's opinion need be decided. The clear policy mandate of the statute should be dispositive of the issues presented in this case. This approach adheres "to the doctrine of abstaining from answering constitutional questions when other dispositive grounds exist." Deubelbeiss v. C.F.E.C., 689 P.2d 487, 491 (Alaska 1984) (Compton, J., concurring).

Opinion

The question of the public conduct of the public's business is one of the questions before the Alaska Legislature in its new session. A resolution proposed by Sen. Arliss Sturgulewski and Rep. Kay Brown would put before the state's voters a constitutional amendment to require that all legislative meetings be public except certain exemptions.

The proposal grows out of last year's lawsuit against the Legislature by the League of Women Voters and The Daily News. It transpired that the Legislature never argued about breaking the rules. However, the court ruled that it had no jurisdiction or constitutional basis for requiring the Legislature to follow its own rules.

By
the
rules

That decision essentially told the Legislature it could do whatever it pleases, and the public be damned. The proposal by Sturgulewski and Brown, two among a minority of legislators who have actually resisted the Legislature's general secretive inclinations, is an attempt to make the Legislature live by its rules. That's all.

The proposed amendment would leave legislators the same exemptions as the Legislature provided when it adopted the state's Open Meetings Act. It would also allow party caucuses to meet privately "to consider matters of procedure, organization, or strategy."

That's plenty of leeway for any responsible legislator. The public should call on its legislators to support the Sturgulewski-Brown proposal.

Elements of the Alaska Legislature have gone out of their way in recent years to make important budget decisions in secret — in ad hoc sessions, in caucuses, in, well, who knows?

If legislators balk at the Sturgulewski-Brown proposal, they invite a question: Have you stopped doing the public's business in secret? It's a fair question, and it requires the admission they cannot avoid.

MY TURN

Open Meetings: The need for a constitutional amendment.

By KAY BROWN and
ARLISS STURGULEWSKI

When the Alaska Supreme Court issued its opinion on the open meetings lawsuit brought against the Alaska Legislature by the League of Women Voters and two Alaska newspapers, the ruling brought to light a crucial flaw in our state Constitution. The court ruled that it had no jurisdiction in the open meetings dispute and accordingly could not force the legislature to comply with the state Open Meetings Act.

It is now clear that this flaw can only be corrected by an amendment to the state Constitution which expressly protects the public's right to openness in the legislative process.

No Dispute over Violations: In the League v. the Alaska Legislature case there was no argument over the charge that the legislature held secret budget meetings during the 1986 session in violation of the Open Meetings Act. Nor was there any argument that these meetings violated the legislature's own Uniform Rule 22, which also requires open meetings of legislative bodies.

Neither of these claims was contested by the lawyers defending the legislature. As noted by the court: "The facts of this case are not in dispute. ... The Legislators do not deny that these meetings occurred, or that they conducted the business and

made the decisions that the League alleges." So, if everyone agrees that the meetings were in violation of the Open Meetings Act and Rule 22, what happened?

Courts Powerless to Enforce Law: The Supreme Court based its ruling on interpretations of the state Constitution. Although no one disputed that open meeting violations had occurred, the court ruled that it lacked authority to force the legislature to obey the open meetings law it has enacted. Further, because the Alaska Constitution currently does not expressly provide for open meetings, and because the Constitution gives the legislature the authority to establish its own rules, the Supreme Court determined it could not enforce the Open Meetings Act.

The court did not find the legislature innocent of violating open meeting requirements. Rather, the court decision stated that "because the Constitution commits to the legislature the authority to provide for its own rules of procedure ... we regard the question of whether the legislators have violated the Open Meetings Act or Uniform Rule 22 to be nonjudicial." The court concluded it is not the function of the judicial system to require the legislature to follow its own rules.

The court also addressed the assertion that the public has an "im-

plied" constitutional right of access to the conduct of legislative business. Although it is noteworthy that Supreme Court Justice Compton dissented, and argued forcefully that the court did have jurisdiction in the case, the majority of justices disagreed.

The Need for an Amendment: The crucial issue in the open meetings lawsuit concerned the right of the press and the public to know and understand the deliberations of their elected representatives. The need for access to legislative deliberations has never been more critical than at present. Decisions made in Juneau are of vital interest to all Alaskans as the state comes to terms with declining oil revenues.

In response to the Supreme Court's decision, one legislative leader characterized the ruling as giving legislators "a blank check." In essence, the Alaska Supreme Court found that the legislature's conduct is above the law that requires other state and local officials to conduct the public's business in the open. A constitutional amendment requiring open meetings of the legislature is the only way to remedy this deficiency.

Proposed Constitutional Amendment. Before the Supreme Court ruling, it had been our belief that the public was entitled to open legislative meetings; we now know that a constitutional amendment is needed. With that goal in mind, we have introduced an identical Joint Resolution in both the House and the Senate that would amend the Alaska Constitution and specifically provide for open meetings by the legislature.

The proposed amendment language is the work product of a number of individuals who began meeting shortly after the Supreme Court issued its ruling, including representatives of the League of Women Voters and several news organizations. In trying to draft suitable language with the help of this ad hoc group, we knew that it was essential to develop both realistic and workable standards. Such standards must fundamentally ensure openness by the legislature but also not prevent the free exchange of ideas among legislators which is essential to a legislator's ability to represent his or her consti-

tuents. At the same time, we felt that the legislature, as the state's only bicameral legislative body, elected along partisan lines, must have the flexibility to exercise that partisanship.

With these standards in mind, our proposed amendment requires that legislative deliberations be open unless, as presently provided by the Open Meetings Act, the body is meeting in a properly convened executive session to consider matters expressly authorized by law. The amendment also states that if a matter is appropriate to a particular body (which includes committees and subcommittees), then "private and substantive deliberation of the matter by a quorum of the legislative body" is prohibited. The proposed amendment recognizes the unique role of legislative caucuses and specifically allows caucuses to meet in private, but only to consider "matters of procedure, organization, or strategy."

We recognize, of course, that our amendment draws a fine line of distinction between a discussion that would be prohibited as "private and substantive" and a discussion that would be permissible as a matter of caucus "strategy." In the final analysis, however, it is our feeling that it will be incumbent upon all legislators to police themselves as a group and for individual members to insist when appropriate, as we have, that the public's right to know must be protected and that the public's substantive business be conducted openly.

Finally, we believe that the proposed amendment provides both a realistic and workable set of standards by which the legislature can conduct legislative business in an open manner while still providing legislators an opportunity to participate in confidential partisan activities. Without a constitutional amendment to provide for the public's right of access, the legislature will continue to be free to meet at will behind closed doors in clear violation of the Open Meetings Act, but beyond the reach of the courts.

Rep. Kay Brown and Sen. Arliss Sturgulewski both represent Anchorage in the Alaska Legislature.

HOUSE COMMITTEE REPORT

(7)

Date referred: 1/15/88

FURTHER REFERRALS: Judiciary

DATE: 2-8-88

The State Affairs Committee has considered HJR 44

Proposing an amendment to the Constitution of the State of Alaska relating open meetings.

RECOMMENDS:

- replace with _____ the same title
- attached amendment(s) a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- fiscal impact same as previous fiscal note published _____
- zero fiscal note same as previous zero fiscal note published _____
- zero with analysis

SIGNING DO PASS:

*Scott M...
 Cliff Dawkins*

SIGNING OTHER RECOMMENDATIONS:

*John Walker No Rec
 (K) David Duley No REC
 Terry Martin No Rec*

John Walker
 Chairman's signature

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**STATE OF ALASKA
 1988 LEGISLATIVE SESSION**

BILL VERSION: HJR 44
 PUBLISH DATE: 1/15/88

REQUEST:

Revision Date: 1/22/88
 Title: Constitutional Amendment
relating to open meetings.
 Sponsor: BROWN
 Requestor: State Affairs

Agency Affected: Office of the Governor
 BRU: Division of Elections
 Components: II - Primary & General
Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0	2.2*	0	0	0	0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	2.2*	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	2.2*	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

* Costs included cover 2 to 3 additional pages in each Official Election Pamphlet, for printing and typesetting, and costs estimated to cover computer programming requirements for vote (cont.)

Prepared by: Linda Edgeworth
 Division: Elections

Phone: 465-4611
 Date: 1/22/88

Approved by Commissioner: [Signature]
 Agency: Office of the Governor, Division of Elections

Date: 1/26/88

Distribution (by preparer):

- ✓ Legislative Finance
- ✓ Legislative Sponsor
- ✓ Requestor
- ✓ Office of Management and Budget
- Impacted Agency(ies)

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1/26/88

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CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HJR 44

counting purposes. However, these costs are based on the assumption that all candidates and issues will fit on three ballot cards, which is the norm. It should be noted, however that should the inclusion of this issue require a 4th ballot to be printed, the cost increase would have to be calculated at 16 cents per ballot x approximately 320,000 voters. The total cost of printing the additional ballot card would be \$51.2.

Under these circumstances the fiscal note would be:

53.4