

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6683 SENATE STATE AFFAIRS 1087

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2 These allegations concerning particular "meetings" are
3 as follows:

4 (1) Senate Majority Caucuses

5 Senator Arliss Sturgulewski² affirmed that "decisions
6 have been made in these closed caucus meetings on specific
7 budget cuts and levels of funding. These votes have been
8 taken by a show of hands and not been recorded. Many times
9 the votes were close, and it is sometimes hard to remember
10 afterwards how individual senators voted on specific
11 issues." [Sturgulewski Aff., p. 2.] Additionally, she noted
12 that "[t]here is significant pressure from the caucus that
13 all of its members must adhere to the budget decisions made
14 in caucuses." [Id., p. 3.]

15 Senator Patrick Rodey³ affirmed that "[t]he caucus has
16 met numerous times in sessions closed to the public, the
17 press, and to legislators who are not members of the
18 caucus." [Rodey Aff., p. 1.] He affirmed that in these
19 "closed caucus sessions, the senators have discussed the
20 FY 1987 budget at length, and have taken numerous votes
21 about specific budget items Votes taken by the
22 caucus [were] considered binding upon the Finance
23 Committee." [Id. (emphasis added).]

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29 2. Senator Sturgulewski has been a member of the
30 Alaska State Senate since 1978 and is presently a member of the
majority caucus.

31 3. Senator Rodey has been a member of the Alaska State
32 Senate since 1974 and is a current member of the majority caucus.

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2 Senator Vic Fischer⁴ affirmed that the use of closed
3 caucus meetings "to discuss, debate, and decide the budget
4 is a recent development" and did not occur in 1983 and 1984,
5 when he was a member of the finance committee. [Fischer
6 Aff., p. 3.]

7 Reporter Peter Kenyon⁵ affirmed that he observed the
8 Senate Finance Committee "approving the operating budget of
9 one third of the state's departments in less than 90
10 minutes. . . . The amount of debate or discussion afforded
11 items at this session was unusually brief." [Kenyon Aff.,
12 p. 1.] As an example, Reporter Kenyon noted that "the
13 entire discussion of the budget of the governor's office
14 took only two minutes and three seconds." [Id.] He affirmed
15 that "substantive and potentially controversial decisions
16 such as elimination of the Office of Equal Employment
17 Opportunity and the Alaska Women's Commission received no
18 discussion whatsoever." [Id.]

19 (2) House Majority Caucus

20 Representative Pat Pourchot⁶ affirmed that in closed
21 majority caucus meetings, legislators "took notes on all of
22 the Departmental caps, after lengthy discussion and debate
23 on how it would affect the departments." [Pourchot Aff.,
24 p. 2.]

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26 4. Senator Fischer has been a member of the Alaska
27 State Senate since 1980 and is a member of the minority caucus.
28 Senator Fischer also was a delegate to the Alaska Constitutional
Convention in 1955.

29 5. Peter Kenyon is a reporter for Alaska Public Radio
30 Network who covers the Alaska Legislature.

31 6. Representative Pourchot has been a member of the
32 Alaska State House since 1984. He is a member of the House
Finance Committee and a member of the House Majority Caucus.

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2 Representative Rick Uehling⁷ affirmed that he under-
3 stood "that budget caps were set . . . in the meetings of
4 the majority caucus that were also closed to [Representative
5 Uehling] and others in the minority." [Uehling Aff., p. 1.]

6 (3) House Finance Committee

7 Representative Pourchot affirmed that he "attended two
8 meetings of the Finance Committee in the office of Committee
9 Chairman Al Adams that were not open to the public or press,
10 or to the two minority members of the Committee. At these
11 meetings, Representative Pourchot stated, "budget caps" and
12 "the level of funding for the Department of Education and
13 the foundation formula" were discussed. [Pourchot Aff.,
14 p. 2.]

15 Representative Uehling agreed that "the majority
16 members of the House Finance Committee met in closed
17 sessions in the Office of Finance Committee Chairman Al
18 Adams. The other minority members of the Finance Committee
19 and [Representative Uehling] were excluded from these
20 meetings of the majority members of the Committee." [Uehling
21 Aff., p. 1.] Representative Uehling affirmed that budget
22 caps were being set in these closed finance committee
23 meetings as well as in closed caucus meetings. [Id.]

24 On April 29, 1986 (the 107th day of the legislative
25 session), the plaintiffs moved for a temporary restraining order
26 asking the court to prohibit the defendants from "(1) further
27 engaging or participating in collective deliberations, fact-
28 gathering, debate or votes, or otherwise conducting public
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31 7. Representative Uehling has been a member of the
32 Alaska State House since 1982. He is a member of the minority
and serves on the House Finance Committee.

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2 business, except in meetings open to the public upon reasonable
3 public notice, (2) otherwise violating the Alaska Open Meetings
4 Act, AS 44.62.310-312, and (3) finally enacting or passing a
5 budget for fiscal year 1987 without substantial, de novo, inde-
6 pendent and public reconsideration of all matters pertaining to
7 the budget that were previously discussed in sessions closed to
8 the public and press."

9 At a hearing on April 30, 1986, the defendants
10 specially appeared, arguing that legislative immunity was an
11 absolute bar to service during the session and that the issues
12 raised were nonjusticiable political questions.

13 On May 1, 1986, the court quashed the subpoena against
14 the legislators because they were not subject to process of
15 service during the session. However, the court found that
16 service was effective as to the legislative employees. The court
17 denied issuance of a temporary restraining order because it was
18 "unable to fashion a practical and workable decree in the circum-
19 stances of this case." [Transcript of decision, p. 21.] Believ-
20 ing that the consequences of delay would be drastic if the
21 state's budget, then about to be passed, were to be held void
22 months later (after the fiscal year, July 1 to June 30, began),
23 the court then issued final declaratory relief.

24 The defendants appealed to the Alaska Supreme Court on
25 an expedited basis. On May 5, 1986, the Alaska Supreme Court
26 heard oral argument, ruled that the defendants were not afforded
27 the benefits of due process, and reversed and remanded the case
28 to this court. The supreme court also allowed the state to
29 intervene in the action at that time.

30 On May 12, 1986, the Alaska Legislature adjourned. The
31 court then allowed the legislative defendants to be served with a
32 subpoena. Answers to the complaint were filed by the defendants

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2 on May 15, 1986. At a scheduling conference c ?
3 plaintiffs withdrew those counts requesting that the court
4 declare that the FY 1987 budget was void and to enjoin enrollment
5 or enactment of that budget legislation.

6 The parties have since filed dispositive motions, which
7 are the subject of this decision.

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9 ANALYSIS

10 I. JUSTICIABILITY: DO THE PLAINTIFFS HAVE AN IMPLIED RIGHT OF
11 ACCESS UNDER THE ALASKA CONSTITUTION TO LEGISLATIVE MEETINGS
ON THE STATE BUDGET?

12 The defendants contend that the plaintiffs' suit cannot
13 proceed because it raises claims which are nonjusticiable
14 political questions. Thus, the defendants argue that an order of
15 dismissal or, alternatively, summary judgment⁸ in their favor is
16 appropriate.

17 The plaintiffs disagree and argue that the public and
18 press have a constitutional right of access to substantive
19 meetings⁹ of the legislature and its committees (in this case
20 concerning the budget). Thus, the plaintiffs contend that their
21 claims are justiciable and that this court has jurisdiction to
22 rule on them.¹⁰

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25 8. Because the parties appear to be relying on matters
26 (i.e., affidavits) outside of the pleadings, the court finds that
27 the defendants' motions under Alaska Civil Rule 12(b)(6) should
28 be treated as motions for summary judgment under Alaska Civil
29 Rule 56.

30 *9. This court would define that term to include
31 meetings of the members of legislative bodies, including
32 committees, at which substantive and binding legislative
33 decisions are made.

34 10. Plaintiffs make several additional arguments
35 concerning justiciability, among them that a legislature's
36 violation of the "Open Meetings Act", AS 44.62.310, or of the
37 [footnote cont'd]

* but see

Amendment to Mem. Dec. & Order, Oct. 9, 1986, at 3,
adding:

"but also every step of the deliberative and
decision-making process when a legislative unit
meets to transact⁸ public business."

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2 The leading case for determining whether a claim is
3 justiciable is Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663
4 (1962).¹¹ Baker adopted a six element test for determining
5 justiciability of a claim. The elements are:

- 6 (a) a "textually demonstrable constitutional commitment of
7 the issue to a coordinate political department;"
8 (b) "lack of judicially discoverable and manageable stan-
9 dards for resolving it;"
10 (c) "the impossibility of deciding without an initial
11 policy determination of a kind clearly for nonjudicial
12 discretion;"
13 (d) "the impossibility of a court's undertaking independent
14 resolution without expressing lack of the respect due
15 coordinate branches of government;"
16 (e) "an unusual need for unquestioning adherence to a
17 political decision already made;" or
18 (f) "the potentiality of embarrassment from multifarious
19 pronouncements by various departments on one question."
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22 [footnote cont'd]

23 Uniform Rules, would present a justiciable question.
24 [Plaintiffs' Opposition Memorandum, pp. 28-53.] For the reasons
25 argued by the defendants, (Defendants' Memorandum In Support of
26 Motion to Dismiss or Alternatively for Summary Judgment, pp.
27 6-21; House Defendants' Memorandum in Support of Motion for
28 Judgment on the Pleadings, pp. 3-14; State's Memorandum in
29 Support of Motion to Dismiss or Alternatively for Summary
30 Judgment, pp. 9-18), this court rejects those arguments of the
31 plaintiffs. Justiciability in this case depends on a
32 determination that there is a constitutional right alleged to
have been infringed. Aboud v. Gorsuch, 703 P.2d 1158, 1161
(Alaska 1985); Malone v. Meekins, 650 P.2d 351, 359 (Alaska
1982). When there is legislative action which is shown to be in
violation of the constitution, the courts act. See Plumley v.
Hale, 594 P.2d 497 (Alaska 1979).

11. The rationale of Baker was adopted by the Alaska
Supreme Court in Malone v. Meekins, 650 P.2d 351, 356 (Alaska
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Id. at 217, 7 L. Ed. 2d at 686.¹²

If it can clearly be said that one or more of these elements is present in a given case, the matter is said to be nonjusticiable. A nonjusticiable controversy must be resolved elsewhere than in the courts, presumably in the legislature or executive, or ultimately at the polls.

A. Constitutional Commitment to a Coordinate Branch of Government

Article II, subsection 12, of the Alaska Constitution states in part:

Section 12. Rules. The house of each legislature shall adopt uniform rules of procedure.

The defendants and intervenor contend that this provision textually commits to the legislature the right to develop rules of procedure for the internal operation of the body.¹³ Therefore, any alleged failure to follow the rules of procedure of the legislature would not be justiciable, because the Alaska Constitution has assigned this issue to a coordinate political department -- the legislature -- for resolution.

The defendants and intervenor rely on Malone v. Meekins, 650 P.2d 351 (Alaska 1982), as authority for this proposition. In Malone, a former speaker of the Alaska House of Representatives who had been removed as speaker during the

12. While this listing appears neat and precise, it is worthwhile at this point to note that the opinion in Baker referred to the attributes of the nonjusticiable political question doctrine as "attributes which, in various settings, diverge, combine, appear and disappear in seeming disorderliness." 369 U.S. at 210, 7 L. Ed. 2d at 681.

13. In this instance, the legislature has adopted a rule which addresses the issues raised in this lawsuit. Alaska State Legislature, Uniform Rules [hereinafter Uniform Rules], Rule 22.

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2 session brought suit seeking a declaration that his removal was
3 illegal and unconstitutional. The former speaker alleged
4 numerous procedural irregularities including the defendants'
5 failure to follow the uniform rules of the legislature in the
6 meeting during which his removal occurred. The court found that
7 this claim was not justiciable, viewing such a violation as
8 "solely the business of the legislature." Id. at 359. It
9 stated:

10 However, except in extraordinary circum-
11 stances, as where the rights of persons who
12 are not members of the legislature are
13 involved, it is not the function of the
14 judiciary to require that the legislature
15 follow its own rules.

16 Id.¹⁴ (emphasis added) (footnote omitted).¹⁵

17 The Alaska court has recognized that such "exceptional
18 circumstances" can occur when the legislature violates a rule of
19 procedure that has constitutional dimensions. In Abood v.
20 Gorsuch, 703 P.2d 1158 (Alaska 1985), the court noted that the
21 "nonjusticiability [of rules violations] doctrine would not apply

22 14. This conclusion of the Alaska Supreme Court that a
23 violation of the Uniform Rules of the legislature generally does
24 not constitute a justiciable claim is echoed in Hayes v. Charney,
25 693 P.2d 831 (Alaska 1985). In discussing mootness, the Hayes
26 court noted that:

27 [T]he Alaska Constitution gives the
28 legislature the power and duty to establish
29 its own rules. . . . If the legislature
30 wishes to change the notice procedure for
31 Legislative Council meetings, it need only
32 impose the notice requirements it deems fit.

Id. at 834-35.

33 15. The Alaska Supreme Court at this point in the
34 Malone opinion cited to United States v. Smith, 286 U.S. 6, 33 L.
35 Ed. 954, 958-59 (1932), at which the Supreme Court stated that
36 while courts will generally not involve themselves in disputes
37 concerning legislative rules, a legislature "may not by its rules
38 ignore constitutional restraints or violate fundamental rights."

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2 to cases involving our constitutionally mandated duty to insure
3 compliance with the provisions of the Alaska Constitution,
4 including compliance by the legislature." Id. at 1161.

5 ~~Therefore, in order for the plaintiffs' claim to~~
6 ~~survive this justiciability challenge, it must involve a right~~
7 ~~protected by either the Alaska Constitution or the United States~~
8 ~~Constitution.~~¹⁶

9 Nowhere in the Alaska Constitution is the public or
10 press explicitly guaranteed the right of access to legislative
11 meetings. But this does not end the inquiry, for courts have
12 long recognized that constitutions protect rights that are not
13 enumerated in specific terms if those rights are "indispensable
14 to the enjoyment of rights explicitly defined." Richmond News-
15 papers, Inc. v. Virginia, 448 U.S. 555, 580, 65 L. Ed. 2d 973,
16 991 (1980).

17 Richmond Newspapers, which in fact involved an issue
18 similar to that presented here -- public access to governmental
19 proceedings (there, a criminal trial) -- addressed the question
20 whether there were rights beyond those explicitly stated in the
21 federal constitution and which were protected by that document.
22 It traced the question back to the founders:

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25 16. This court addresses the state constitutional
26 claim first. Defendants cite various cases, not from the United
27 States Supreme Court and not from the Alaska Supreme Court, for
28 the proposition that this issue is nonjusticiable and hence for
29 the implied proposition that there is no constitutional right of
30 access to legislative proceedings. Included are Consumers Union
31 of the United States v. Periodical Correspondents' Assoc., 515
32 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051, 46 L.
Ed. 2d 640, and Moffit v. Willis, 459 So. 2d 1018 (Fla. 1984).
These cases, while entitled to the respect and consideration
which the force of their reasoning commands, are ultimately not
persuasive to this court, for the reasons generally set out at
pages 12-31 of this memorandum of decision. In addition, of
course, they do not address Alaska constitutional law.

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1 The State argues that the Constitution
2 nowhere spells out a guarantee for the right
3 of the public to attend trials, and that
4 accordingly no such right is protected. The
5 possibility that such a contention could be
6 made did not escape the notice of the Consti-
7 tution's draftsmen; they were concerned that
8 some important rights might be thought
9 disparaged because not specifically guaran-
10 teed. It was even argued that because of
11 this danger no Bill of Rights should be
12 adopted. . . . James Madison [stated] that
13 "there is great reason to fear that a posi-
14 tive declaration of some of the most essen-
15 tial rights could not be obtained in the
16 requisite latitude." 5 Writings of James
17 Madison 271 (G. Hunt ed. 1904).

18 But arguments such as the State makes have
19 not precluded recognition of important rights
20 not enumerated. Notwithstanding the appro-
21 priate caution against reading into the
22 Constitution rights not explicitly defined,
23 the Court has acknowledged that certain
24 unarticulated rights are implicit in enu-
25 merated guarantees.

26 Id. at 579, 65 L. Ed. 2d at 991. Thus, as the Court pointed out,
27 although the United States Constitution contains no specific
28 provision concerning the right of privacy, the right to be
29 presumed innocent or to proof beyond a reasonable doubt, and the
30 right to travel, all of those rights have been recognized as
31 constitutional rights by the Supreme Court. Stanley v. Georgia,
32 394 U.S. 557, 22 L. Ed. 2d 542 (1969) (right to privacy); Taylor
v. Kentucky, 436 U.S. 478, 483-86; 56 L. Ed. 2d 468 (1978)
(presumption of innocence); In re Winship, 397 U.S. 358, 25 L.
Ed. 2d 368 (1970) (right of proof beyond a reasonable doubt);
Shapiro v. Thompson, 394 U.S. 618, 630, 22 L. Ed. 2d 600 (1969)
(right to travel).

 Returning to the issue raised at the time of the
adoption of the Bill of Rights, the Court concluded:

 The concerns expressed by Madison and others
have thus been resolved; fundamental rights,
even though not expressly guaranteed, have
been recognized by the Court as indispensable
to the enjoyment of rights explicitly
defined.

Richmond Newspapers, Inc., 448 U.S. at 580, 65 L. Ed. 2d at 991.

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Similarly, at the state level, although the Alaska Constitution does not specifically provide a right to a jury trial for juveniles in delinquency cases, nor did it in 1971 recognize a "right to be let alone,"¹⁷ these rights were specifically found by the Alaska Supreme Court to be protected by the Alaska Constitution. R.L.R. v. State, 487 P.2d 27, 32 (Alaska 1971) (article I, section 11, of Alaska Constitution guarantees juvenile charged with delinquency the right to jury trial); Breese v. Smith, 501 P.2d 159 (Alaska 1972) (article I, section 1 of Alaska Constitution guarantees to students the right to wear their hair in accordance with personal tastes, derivative of "right to be let alone").

The issue then before this court is whether the public and press enjoy an unenumerated right of access under the Alaska Constitution to legislative meetings at which substantive budget

17. The Alaska Constitution was amended effective August 22, 1972, to provide specifically for the right to privacy in article I, section 22. However, Breese v. Smith, 501 P.2d 159 (Alaska 1972), discussed in the text infra, arose in 1971 and was based on the law at the time it arose, although the decision was not actually published until September 1972. Significantly for purposes of determining what law applied, the supreme court did not even advert to the newly adopted article I, section 22 in its opinion. Moreover, the court had granted injunctive relief to the student after oral argument in December 1971, long before adoption of the new constitutional provision.

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2 decisions are made.¹⁸ This question apparently has not been
3 previously posed to the Supreme Court of Alaska for resolution.
4 It may be of some assistance, then, to look to federal treatment
5 of the general issue of the constitutional right of the public
6 and the press to have access to the proceedings of government.

7 The United States Supreme Court has addressed this
8 issue a number of times in recent years. The public's right of
9 access to a governmental proceeding was first recognized in
10 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 65 L. Ed. 2d
11 973 (1980). In that case, the Court held that the public and
12 press had a right to attend a criminal trial, based on the First
13 Amendment:

14 We hold that the right to attend criminal
15 trials is implicit in the guarantees of the
16 First Amendment; without the freedom to
17 attend such trials, which people have
exercised for centuries, important aspects of
freedom of speech and "of the press could be
eviscerated."

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19 18. Plaintiffs suggest that this right should be
20 deemed to be implied in the constitutional rights to freedom of
21 speech, Alaska Const. art. I, § 5, to petition the government,
Alaska Const. art I, § 6, and to retain rights other than those
enumerated, Alaska Const. art I, § 21.

22 Article I, § 5 provides:

23 ~~Every person may freely speak, write, and~~
24 ~~publish on all subjects, being responsible for~~
~~the abuse of that right.~~

25 Article I, § 6 provides:

26 The right of the people peaceably to
27 assemble, and to petition the government
shall never be abridged.

28 Article I, § 21 provides:

29 The enumeration of rights in this
30 constitution shall not impair or deny others
retained by the people.

31 The primary focus of the following discussion is on the
32 right to freedom of speech.

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2 Id. at 580, 65 L. Ed. 2d at 991-92 (citation omitted). In a
3 footnote to this holding, the Court observed that whether the
4 public has a right to attend civil trials was a question not
5 raised by that case but added "we note that historically both
6 civil and criminal trials have been presumptively open." Id. at
7 580 n.17.

8 In Globe Newspaper Co. v. Superior Court, 457 U.S. 596,
9 73 L. Ed. 2d 248 (1982), the United States Supreme Court affirmed
10 the right of public and press access to criminal trial proceed-
11 ings. The Court noted that

12 [u]nderlying the First Amendment right of
13 access to criminal trials is the common
14 understanding that a major purpose of that
15 Amendment was to protect the free discussion
16 of governmental affairs. By offering such
17 protection, the First Amendment serves to
18 ensure that the individual citizen can
19 effectively participate in and contribute to
20 our republican system of self-government.

21 Id. at 604, 73 L. Ed. 2d at 256 (emphasis added) (footnotes and
22 citations omitted).

23 Globe Newspaper held that a right of access to criminal
24 trials was encompassed in the First Amendment for two reasons.
25 First, criminal trials had historically been open to the general
26 public and press. Second, such a right of access improves the
27 functioning of the system which accrues benefits both to the
28 defendant and society as a whole. Id. at 605, 73 L. Ed. 2d at
29 256.

30 In addition to access to criminal trials, courts have
31 found a constitutionally based right of access to civil trials,¹⁹
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33 19. In Publicker Industries v. Cohen, 733 F.2d 1059
34 (3rd Cir. 1984), the court recognized a public access right under
35 the First Amendment to a closed hearing on a motion for
36 preliminary injunction regarding whether certain proprietary
37 information should remain confidential.

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2 presidential press conferences,²⁰ formal administrative fact-
3 finding hearings,²¹ and preliminary hearings in criminal cases.²²

4 The analysis utilized by the United States Supreme
5 Court in Richmond Newspapers and the cases which followed it, and
6 by various federal courts treating related issues, suggests that
7 under article I, section 5, of the Alaska Constitution there
8 should be recognized the right of public access to legislative
9 committee meetings of the type involved in the present case. The
10 analysis is in two parts. The first is historical, looking to
11 the practice in effect at the time of the adoption of the Consti-
12 tution to determine what the framers intended in adopting the
13 broad language of that document,²³ and looking to historical
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15 20. Cable News Network v. American Broadcasting Co.,
16 518 F. Supp. 1238 (N.D. Ga. 1981).

17 21. Society of Professional Journalists v. Secretary
18 of Labor, 616 F. Supp. 569 (D.C. Utah 1985).

19 22. Press-Enterprise Co. v. Superior Court, ___ U.S.
___, 54 U.S.L.W. 4869 (June 30, 1986).

20 23. The Alaska Supreme Court has in some areas of
21 constitutional interpretation held that contemporary social
22 values and not historical categorizations would be determinative.
23 For example, in Baker v. City of Fairbanks, 471 P.2d 386 (Alaska
1970), the court specifically rejected historical analysis in
deciding whether a prosecution was criminal for purposes of the
right to jury trial, instead relying on contemporary standards:

24 There is a continuing shift of moral values
25 in society. . . . Because societal values do
26 shift, this sort of crime . . . is peculiarly
susceptible to appraisal by a jury of one's
peers.

27 In deciding as we do, we are in effect
28 disregarding the suggestions made by those
29 who revere history. We feel that the
30 argument from history is not determinative
31 because what was practical historically is
not necessarily adequate to the needs of our
institutions.

[footnote cont'd]

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2 developments since the adoption of the constitution both "because
3 the Constitution carries the gloss of history" and because "a
4 tradition of accessibility [since adoption of the Constitution]
5 implies the favorable judgment of experience." Globe Newspaper,
6 457 U.S. at 605, 73 L. Ed. 2d at 256, quoting Richmond
7 Newspapers, Inc. v. Virginia, 448 U.S. at 589, 65 L. Ed. 2d at
8 997 (Brennan, J., concurring). The second is functional, and
9 requires a determination of the effect which the requirement of
10 openness would have on the functioning of the particular govern-
11 mental entity involved (here, legislative committees). As to the
12 former, the historical record is not altogether clear but
13 suggests at least a "presumption" of openness. As to the latter,
14 there seems to be little question of the salutary effects of
15 openness on the committee process.

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25 [footnote cont'd]

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27 Id. at 396. And see R.L.R. v. State, 487 P.2d 27, 32 (Alaska
28 1971). To the extent that the Alaska Supreme Court would adopt
29 such an approach in the present case, the mixed historical record
30 set out below at 19-23 is of relatively less significance. And,
31 given the direction of the trend in recent years towards greater
32 openness in legislative proceedings, see below at pp. 21-23,
reliance on contemporary values would support the result reached
in this case. But it should be emphasized that this opinion
presumes that the analytical approach utilized in cases dealing
with access to governmental proceedings, not other types of
constitutional issues, should be followed, and it attempts to do
so.

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1. Historical Analysis²⁴

The historical record is incomplete, especially as to the pre-statehood practice regarding the openness of committee

24. This review is limited to the Alaska Legislature, because that body is the subject of this lawsuit. Going back to the oldest legislative body in the English-speaking world, the English Parliament, it appears that an important attribute of the earliest legislative assemblages was that the proceedings were open:

By the end of [the thirteenth] century, England was having regular parliaments. This was not response to popular demand for a voice in government. On the contrary, the summons to assemble elicited more groans than cheers. It was a product of the needs of the king, or of the barons when they were dominant The principal need was money.

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A central machinery to gather taxes did not exist So representatives of countryside and town were called together, [and] the situation was discussed (thus "parley," "parliament") . . .

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During the second half of the thirteenth century, it was established there should be three parliaments a year, and part of the agenda should be the expression and redress of grievances. . . .

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[I]n 1272, . . . [t]he accession of Edward ends the struggle Parliament has been established. . . .

It is now acknowledged doctrine that new law should come from statute - not from the king in private council or from his clerks and judges, but from open legislative operations in which the king himself is visibly active and Parliament takes a hand.

C. Rembar, The Law of the Land: The Evolution of Our Legal System 198-200 (1980) (emphasis added). While the earliest legislative assemblies thus differed greatly from our present ones, an

[footnote cont'd]

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2 meetings. But a review of the available evidence suggests that,
3 at least since statehood, the legislature has strongly tended
4 toward openness and public access to its proceedings. It is
5 helpful to consider some pre-statehood evidence first, for
6 purpose of perspective.

7 In the decades before statehood, although neither body
8 addressed in its rules the question whether committee meetings
9 should be open, the two houses of the Alaska Territorial
10 Legislature operated under very different rules.²⁵ Thus, in the
11 first legislature of the Territory of Alaska, convened at Juneau
12 in 1913, the Rules of the House permitted "reporters of the
13 press", along with very few others, all official personages,²⁶ to
14 be on the floor of the House. Journal of the House of
15 Representatives, First Legislative Assembly of the Territory of
16 Alaska, Rule 20, p. 9 (1913). On the other hand, the Alaska
17 Senate Rules allowed floor sessions to be closed on "any business
18 which may, in the opinion of the Senate, require [secrecy]."
19 Journal of the Senate of the Territory of Alaska, Rule 54, p. 285
20 (1921). This Senate rule survived through territorial days.
21 E.g., Alaska Territorial Legislature, Rules of the Senate and
22 House of Representatives Including Joint Rules of the Senate and
23 House of Representatives, Senate Rule 56 (1951). The House
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26 [footnote cont'd]

27 important feature of the former was that they were, in comparison
28 to what went before them, open.

29 25. Each body had separate rules, although there also
30 existed "Joint Rules of the Senate and House of Representatives,"
31 covering limited topics.

32 26. These were the governor, ex-governor and secretary
of the Territory, the Delegate from Alaska, members of the
Senate, the federal district judge, and "persons in the exercise
of official duty directly connected with the business of the
House."

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2 rules contained no similar authority. Significantly, when the
3 two bodies adopted uniform rules at statehood pursuant to the new
4 state constitution's requirement for uniform legislative rules in
5 article II, section 12, the rules contained no provision similar
6 to former Senate Rule 56. The position of the House, which did
7 not permit closed sessions, apparently won out at the beginnings
8 of statehood.

9 This situation continued from 1959 to 1973: the rules
10 contained no provision allowing closed sessions. Although
11 historical evidence of what actually occurred in legislative
12 committee rooms is not available, it is reasonable to assume that
13 executive sessions, if they occurred at all, were the exception
14 and not the rule.

15 In 1973, the uniform rules were amended to provide that
16 "[a]ll meetings of a legislative body [including committees] are
17 open to all legislators, . . . and to the general public except
18 as provided in (b) of this rule." Alaska State Legislature,
19 Uniform Rule 24 (1973). Except for a renumbering which occurred
20 in 1977, Alaska State Legislature, Uniform Rule 22 (1977), that
21 rule has remained unchanged.

22 It is noteworthy that, at approximately the point when
23 the Uniform Rules of the Legislature were being amended to
24 mandate open proceedings, the legislature also amended AS 44.62.-
25 310, the open meeting law, to extend coverage of the law to the
26 legislature and its committees, 1972 Alaska Sess. Laws ch. 98,
27 § 1, and to include a strong statement of policy regarding the
28 public's right to know of the conduct of government. Id. § 3.
29 That statement provides:

30 Sec. 44.62.312. State policy regarding
31 meetings. (a) It is the policy of the state
32 that

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(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.

(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

This brief review suggests that, while direct evidence of whether legislative committee meetings in Alaska historically have been open is not available, three important facts are true: (1) the legislature has operated at all times, even pre-statehood, under a presumption of openness;²⁷ (2) in the first half of this state's existence (1959 - 1973) the legislature operated under rules providing no authority for closed hearings; and (3) in the second half of this state's history (1973 - 1986), the legislature has operated under rules mandating that legislative committee meetings be open (with certain recognized exceptions). Under these circumstances, this court concludes that there is respectable (though not conclusive) historical evidence of "a tradition of accessibility [which] implies the

27. Even under territorial Senate Rule 54 (later Rule 56), cited above, the session could be closed only upon a determination by the body that secrecy was required.

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2 favorable judgment of experience." Globe Newspaper, 457 U.S. at
3 605, 73 L. Ed. 2d at 256.

4 2. Functional Analysis

5 The second part of the Richmond/Globe analysis, as
6 noted above, is consideration of the effect which a requirement
7 of openness would have on the functioning of government, and
8 specifically in this case, on legislative committees. It appears
9 to this court that the effect would be salutary and that the
10 benefits would be several. Indeed, virtually all of the advan-
11 tages of openness which courts have found in regard to judicial
12 proceedings, both criminal and civil, are equally applicable to
13 the legislative process. These include the following:

14 a) The integrity of the fact-finding process is
15 enhanced by open proceedings. As noted in Wigmore on Evidence,
16 public access "plays an important part as a security for
17 ~~testimonial trustworthiness.~~" 6 J. Wigmore, Evidence § 1834, at
18 435 (J. Chadbourn rev. 1976). The court in Publicker Industries,
19 Inc. v. Cohen, 733 F.2d 1059 (4th Cir. 1984), traced English
20 authorities, including Coke, Hale and Blackstone, who uniformly
21 commented on the beneficial effect of open proceedings on the
22 reliability of testimony adduced from witnesses. Id. at 1058-69.

23 b) Public respect for the legislative process is
24 increased by open proceedings. As the Alaska Supreme Court noted
25 with regard to the Alaska Open Meetings Act:

26 Open decision-making is regarded as an
27 essential aspect of the democratic
28 process. . . . It is believed that public
29 exposure . . . creates greater public
30 acceptance of government action

31 Alaska Community Colleges' Federation of Teachers v. University
32 of Alaska, 677 P.2d 886, 891 (Alaska 1984) (hereinafter "ACCFT").

And as Wigmore noted with regard to judicial proceedings, in a
passage equally applicable to legislatures: "The educative effect

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2 of public attendance is a material advantage. Not only is
3 respect for the law increased and intelligent acquaintance
4 acquired with the methods of government, but a strong confidence
5 in judicial remedies is secured which could never be inspired by
6 a system of secrecy." 6 J. Wigmore, Evidence § 1834, at 435 (J.
7 Chadbourn rev. 1976). And as the Court found in relation to
8 judicial proceedings in Press-Enterprise Co. v. Superior Court,
9 464 U.S. 501, 508, 78 L. Ed. 2d 629, 637 ("Press-Enterprise I"):
10 "The value of openness lies in the fact that people not actually
11 attending trials can have confidence that standards of fairness
12 are being observed; the sure knowledge that anyone is free to
13 attend gives assurance that established procedures are being
14 followed and that deviations will become known." In the same
15 vein, "[o]penness thus enhances . . . the appearance of fairness
16 so essential to public confidence in the system." Id.
17 Conversely, mistrust and suspicion are aroused by closed
18 proceedings. As noted by the federal court in Society of
19 Professional Journalists v. Secretary of Labor, 616 F. Supp. 569
20 (C.D. Utah 1985), "[s]ecrecy breeds mistrust and abuse." Id. at
21 576.

22 c) Open proceedings provide a "therapeutic
23 outlet," cf. Press-Enterprise I, 464 U.S. at 509, 78 L. Ed. 2d at
24 637, by allowing the public to view the legislative solutions
25 (and the reasons for the solutions chosen) to the problems facing
26 the state. Especially in times of stress (for example, in times
27 of budgetary cutbacks such as the state is presently experienc-
28 ing), it is incumbent for the people to be afforded the best
29 opportunity to know the magnitude of the problems facing the
30 state and, more importantly for this discussion, the reasons for
31 the choices made by the legislature in solving those problems.
32 The "budget caps" which various legislators affirmed were set in

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2 closed meetings represent extremely important decisions as to
3 which programs will continue and which will not, whose jobs will
4 be saved and whose will not, which communities or communities of
5 interest will be served and which will not. In the best
6 circumstances, those who lose out in this process will be sorely
7 afflicted. But to deny those persons the solace of understanding
8 why the legislature acted as it did (although they may not agree
9 with the reasons) risks doing violence to the compact between the
10 people and their government. As the Court noted in Richmond
11 Newspapers, 448 U.S. at 572, 65 L. Ed. 2d at 986, "People in an
12 open society do not demand infallibility from their institutions,
13 but it is difficult for them to accept what they are prohibited
14 from observing."

15 d) The ability of the public to engage in
16 informed discussion of governmental affairs, to cast an informed
17 ballot, and ultimately to improve our system of self-government
18 are all enhanced by open proceedings. These propositions seem so
19 apparent that extensive citation is probably not necessary. In
20 ACCFT, the Alaska Supreme Court set out several of the advantages
21 of openness in governmental proceedings, which it called "an
22 essential aspect of the democratic process:"

23 It is believed that [open decision-making]
24 deters official misconduct, makes government
25 more responsible to its constituency, allows
26 for greater public provision of information
to the decision-maker, creates greater public
acceptance of government action, and promotes
accurate reporting of governmental processes.

27 677 P.2d at 891 (citations omitted). In the context of access to
28 civil proceedings, the Sixth Circuit has adverted to the "link
29 between access to the courtroom and the popular control necessary
30 in our representative form of government." Brown & Williamson
31 Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983). In
32 the context of criminal proceedings, the Supreme Court has held

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2 that the "first Amendment embraces a right of access to criminal
3 trials . . . to insure that this constitutionally protected
4 'discussion of governmental affairs' is an informed one." Globe
5 Newspaper, 457 U.S. at 604-05, 73 L. Ed. 2d at 256. In the
6 context of access to information about judicial misconduct
7 proceedings, the Supreme Court has held that an article
8 concerning a pending judicial review proceeding "clearly served
9 those interests in public scrutiny and discussion of governmental
10 affairs which the First Amendment was adopted to protect."
11 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 56 L.
12 Ed. 2d 1, 11 (1978). With these decisions in mind, can it be
13 doubted that public access to legislative meetings would even
14 more directly and forcefully serve the goals of ensuring an
15 informed electorate and improving our system of self-government?
16 It is probably sufficient on this point to conclude with a brief
17 reference to the "state policy regarding meetings" (including
18 meetings of all legislative bodies) found in AS 44.62.312.
19 There, ~~state law~~ declares that legislative committees "exist to
20 aid in the conduct of the people's business," that "the people,
21 in delegating authority, do not give their public servants the
22 right to decide what is good for the people to know and what is
23 not good for them to know," and that "the people's right to
24 remain informed shall be protected so that they may retain
25 control over the instruments they have created." (Emphasis
26 added.)

27 The question next arises whether the functional values
28 identified in the preceding paragraphs can be protected by open
29 legislative floor sessions. It may be argued that only at such
30 sessions may final and binding action be taken on the budget, and
31 hence that public and press access to such sessions is suffi-
32 cient. The argument is flawed. Preliminary substantive meetings

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2 such as the types of committee meetings involved in the present
3 case play a critical role in the shaping of the budget. For
4 example, once the budget finally comes to the floor from the free
5 conference committee, the "report [of the free conference
6 committee] is not subject to amendment in either House." Uniform
7 Rule 42(b). If the report is not adopted in each house, the bill
8 can only be referred back to a second free conference committee
9 on the budget. Id. Floor amendments (with their resultant
10 debate) are not allowed under the rules of the legislature.

11 In Press-Enterprise Co. v. Superior Court, ___ U.S.
12 ___, 54 U.S.L.W. 4869 (June 30, 1986) ("Press-Enterprise II"),
13 the United States Supreme Court was faced with an analogous
14 situation in the area of criminal trials. There, California had
15 closed the preliminary hearing in a mass murder case. The state
16 sought to distinguish the preliminary hearing from the trial
17 (which had to be open under earlier United States Supreme Court
18 decisions) on the ground that the former is not the final action
19 in the case, no conviction can result from it, and the
20 adjudication is before a judicial officer without a jury. The
21 Court answered these arguments in this way:

22 But these features, standing alone, do not
23 make public access any less essential to the
24 proper functioning of the proceedings
25 Because of its extensive scope, the preliminary
26 hearing is often the final and most
27 important step in the criminal proceeding
28 [T]he preliminary hearing in many
29 cases provides the "sole occasion for public
30 observation of the criminal justice system."

31 54 U.S.L.W. at 4872 (emphasis added). The Court also noted that
32 a finding of probable cause at the preliminary hearing "leads to
a guilty plea in a majority of the cases." Id. The situation in
the legislature is virtually identical: Committee actions of the
sort involved here are the most important steps of the budget
process. In the committee is where the real debate occurs and

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2 the substantive decisions made. And in the case of reports from
3 a free conference committee, floor action is limited to approval
4 or rejection. Thus, access to committee meetings would provide
5 the sole opportunity for public and press observation of the real
6 decisionmaking process.

7 In recognizing that the public and press have a consti-
8 tutional right of access to legislative meetings where substan-
9 tive budget decisions are made, this court is mindful that the
10 right is not absolute. Cf. Press-Enterprise I, 464 U.S. at 510,
11 78 L. Ed. 2d at 638 ("closure [allowed if it] is essential to
12 serve higher value and is narrowly tailored to serve that
13 interest"); Globe Newspaper, 457 U.S. at 606-07, 73 L. Ed. 2d at
14 257; Richmond Newspapers, 448 U.S. at 581, 65 L. Ed. 2d at 992
15 ("[a]bsent an overriding interest articulated in findings,"
16 proceeding must be open); Press-Enterprise II, 54 U.S.L.W. at
17 4873 (closure allowed only if "substantial probability" that fair
18 trial will be prejudiced by publicity and no reasonable alterna-
19 tives available); Publicker Industries, 733 F.2d at 1070 (closure
20 allowed only if it "serves an important governmental interest and
21 . . . there is no less restrictive way to serve that governmental
22 interest"). However, this court is not called upon to explore
23 the parameters of the right to access,²⁸ because no party has
24 claimed an exception to the right.

25 In summary, the history of legislative proceedings in
26 Alaska and a functional analysis of the effect of a requirement
27 of openness on the legislative process (and a review of related
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30 28. It is worth noting that the Open Meetings Act
31 contains limitations on the right of access which appear
32 generally to have been created with the principles set out above
in mind.

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2 federal case law) lead this court to conclude that implied in the
3 guarantee of article I, section 5 of the Alaska Constitution that
4 all citizens may speak, write and publish freely on all subjects
5 is the right of access to governmental proceedings, including
6 legislative committee meetings. This court further concludes
7 that this case therefore involves the type of "exceptional
8 circumstances" referred to in Malone v. Meekins: It is a case
9 "where the rights of persons who are not members of the legisla-
10 ture are involved." 650 P.2d at 359. Thus, as held in Abood v.
11 Gorsuch, 703 P.2d 1158 (Alaska 1985), the nonjusticiability
12 doctrine does not apply to this case because this case "involves
13 [the courts'] constitutionally mandated duty to ensure compliance
14 with the provisions of the Alaska Constitution, including compli-
15 ance by the legislature." Id. at 1161. The case is not non-
16 justiciable, therefore, on the ground that the constitution
17 commits its resolution to the legislature.

18 B. Lack of Standards for Resolving the Issue

19 The second element of the test of Baker v. Carr for
20 nonjusticiability is lack of standards for resolving the issue.

21 There are two potential sources of standards in this
22 case. First, the cases (discussed above) which have established
23 and defined the right of public access to various types of
24 governmental proceedings contain reasonably specific standards
25 which, at least by analogy, suggest appropriate standards for
26 this case. Second, statutes and rules concerning open meetings,
27 while they are not constitutionally based, are another general
28 source of the types of factors which ought to be considered in
29 the establishment of standards.

30 It is worth noting, in this regard, that the question
31 at issue here -- whether closed legislative committee meetings
32 violate the constitution -- is far simpler in its ultimate

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2 ramifications than the question found to be justiciable in Baker
3 v. Carr -- whether the houses of the Tennessee legislature were
4 constitutionally apportioned.

5 This case is not nonjusticiable because of a lack of
6 standards.

7 C. Impossibility of Deciding without an Initial
8 Policy Determination of a Kind Clearly for
9 Nonjudicial Discretion

10 The third element of the Baker test for nonjustici-
11 ability is the impossibility of deciding without an initial
12 policy determination of a kind clearly for nonjudicial dis-
13 cretion.

14 There is no initial policy determination here calling
15 for nonjudicial discretion, as the cases above amply illustrate.
16 There is no initial policy decision here required of the legisla-
17 ture.²⁹ This case is not nonjusticiable for this reason.

18 D. Impossibility of Court Independently Resolv-
19 ing the Matter without Lack of Respect Due to
20 the Legislature

21 The fourth element of the Baker test for nonjustici-
22 ability is the impossibility of a court independently resolving
23 the matter without showing a lack of respect due to the legisla-
24 ture.

25 The Alaska Constitution assigns to the courts the
26 responsibility to interpret the constitution and to define the
27 parameters of constitutional rights. The constitution assigns to
28 the legislature, among much else, the authority to develop
29 uniform rules to govern procedures within the legislature.

30 29. To the extent that the legislature has made any
31 policy decisions in this area, they appear to be consistent with
32 the court's conclusions: AS 44.62.310 and Uniform Rule 22, which
are legislative enactments, strongly support the principle of
open legislative meetings.

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2 Because a court will involve itself in examining
3 matters otherwise committed to the legislature only when such
4 matters involve the constitutional rights of third parties, this
5 court believes that no lack of respect for the legislature is
6 shown by reaching such issues. Thus, a court can review the
7 exceptional case, i.e., where the constitutional rights of third
8 parties are involved, without becoming a "superparliamentarian"
9 and interfering with the routine workings of a coordinate branch
10 of government on a day to day basis.

11 Judicial resolution of this matter involves no lack of
12 respect due to a co-equal branch of government.

13 E. Unusual Need for Unquestioning Adherence to
14 Political Decision Already Made

15 The fifth element of the Baker test for nonjustici-
16 ability is the unusual need for unquestioning adherence to a
17 political decision already made.

18 This factor is not present, for at least two reasons.
19 First, the action by plaintiffs at this point seeks only
20 declaratory relief: there is no specific action of the legisla-
21 ture which is at issue which "ought to be adhered to." Second,
22 on the facts presently before the court, it would be difficult to
23 say that the legislature should be deemed to have made a contrary
24 decision on the substantive question of open meetings. The
25 continued existence of the Open Meetings Act and Uniform Rule 22,
26 along with the affidavits of legislators mentioned above, suggest
27 at the very least a strong division within the legislature on
28 this issue. Certainly, there is no contrary decision that this
29 court should adhere to.

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F. Potentiality of Embarrassment from Multifarious Pronouncements by Various Departments on One Question

The sixth and final element of the Baker test for nonjusticiability is the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

To the extent that there are legislative pronouncements on this subject, they appear to be consonant with what this court has concluded the Alaska Constitution demands. Both a statute (AS 44.62.310-.312) and a uniform rule (Rule 22) require open meetings. Under these circumstances, the potential for a contrary pronouncement seems extremely low. Presumably, too, explication by the courts of the constitutional ramifications of the rights involved would further lessen the chances for a contrary pronouncement by the legislature.

In conclusion, the issue raised by this case is not nonjusticiable. A court may reach the merits of the dispute if it is not precluded by legislative immunity from doing so. Accordingly, the court next examines the arguments of the intervenor and the intervenor that the defendants enjoy legislative immunity.

II. IMMUNITY: ARE THE DEFENDANTS IMMUNE FROM SUIT UNDER THE ALASKA CONSTITUTION?

Defendants next argue that they enjoy immunity from this action by virtue of article II, section 6 of the Alaska Constitution, and that the case must therefore be dismissed.

Article II, section 6 of the Alaska Constitution provides in relevant part:

Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session.

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2 In determining the meaning of this provision, and hence
3 its scope, it is helpful to review its historical basis. It has
4 a general similarity to the "speech or debate" clause of the
5 federal constitution. Kerttula v. Abood, 686 P.2d 1197, 1201
6 (Alaska 1984). The United States Supreme Court reviewed the
7 history of the speech or debate clause in Kilbourn v. Thompson,
8 103 U.S. 168, 26 L. Ed. 377 (1881). In that case, Justice Miller
9 traced the history of the struggles between the English monarchy
10 and the parliament:

11 The freedom from arrest and the freedom of
12 speech in the two Houses of Parliament were
13 long subjects of contest between the Tudor
14 and Stuart kings and the House of Commons.
15 When, however, the revolution of 1688
16 expelled the last of the Stuarts and intro-
17 duced a new dynasty, many of these questions
18 were settled by bill of rights, formally
19 declared by the Parliament and assented to by
20 the Crown. . . . One of these declarations
21 is "that the freedom of speech, and debates,
22 and proceedings in Parliament, ought not to
23 be impeached or questioned in any court or
24 place out of Parliament."

25 26 L. Ed. at 391. It was noted that Queen Elizabeth and her two
26 successors had denied members of Parliament the privilege of
27 having their debates unquestioned and had punished them for
28 speaking their minds freely, and that the privilege was even-
29 tually perceived to be "indispensable." Id. See also Tenney v.
30 Brandhove, 341 U.S. 367, 372-75, 95 L. Ed. 1019, 1025-26 (1951).
31 Thus, the historical purpose of legislative immunity was to
32 protect legislators from arrest or other prosecution for state-
ments made in the legislature. This purpose was noted by the
Alaska Supreme Court in Kerttula v. Abood, 686 P.2d 1197, 1202
(Alaska 1984): "The historical policy is that of protecting
disfavored legislators from intimidation by a hostile executive."

It is clear that this case does not involve intima-
tion by a hostile executive of legislators who are disfavored

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2 because of what they have said. The case is not brought by the
3 executive branch. It does not challenge any statements made by
4 legislators. It is not aimed at disfavored legislators.

5 There is, however, a second and more recently-
6 articulated policy which supports legislative immunity. While
7 prevention of intimidation of legislators by the executive is the
8 "central role" of the clause, United States v. Johnson, 383 U.S.
9 169, 181, 15 L. Ed. 2d 681 (1966), "[t]hat role is not the sole
10 function of the Clause, however, and English history does not
11 totally define the reach of the Clause." Eastland v. United
12 States Servicemen's Fund, 421 U.S. 491, 502, 44 L. Ed. 2d 334,
13 336 (1975). The Clause must be interpreted in light of the
14 American experience and in the context of the American constitu-
15 tional scheme of government. United States v. Brewster, 408 U.S.
16 501, 508, 33 L. Ed. 2d 507 (1972). Thus, "when it applies, the
17 Clause provides protection against civil as well as criminal
18 actions, and against actions brought by private individuals as
19 well as those initiated by the Executive Branch." Eastland, 421
20 U.S. at 502-03, 44 L. Ed. 2d at 336 (emphasis added). The basis
21 for this American expansion of the reach of the Clause is the
22 belief that legislators who are acting within the sphere of
23 legitimate legislative activity "should be protected not only
24 from the consequences of litigation's results but also from the
25 burden of defending themselves." Dombrowski v. Eastland, 387
26 U.S. 82, 85, 18 L. Ed. 2d 577, 580 (1967) (per curiam). Thus,
27 the second policy which supports legislative immunity is "the
28 protection of legislators from the burdens of forced participa-
29 tion in private litigation." Kerttula, 686 P.2d at 1202. The
30 present litigation is private, i.e., brought by private parties.
31 And, if there is no legislative immunity, the named legislative
32 defendants (44 of the 60 members of the legislature) will be

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2 forced to defend. Hence, the court must determine if the present
3 case attacks legislators for statements made "in the exercise of
4 their legislative duties."

5 As the court noted in Kerttula, the phrase "legislative
6 duties" (and the federal counterpart, "legislative acts") has

7 a core meaning which is clear. It neces-
8 sarily includes activities internal to the
9 legislature such as voting, speaking on the
10 floor of the House or in committee, authoring
11 committee reports, introducing legislation,
12 and questioning witnesses in legislative
hearings However, the extent to
which "legislative duties" reach beyond these
core activities is not clear, and the answer
probably cannot be gained by reference to any
single phrase or formula.

13 Id.

14 This observation seems particularly apt, as a review of
15 several cases in the United States Supreme Court shows that the
16 Court has wrestled with the proper formulation to define the
17 scope of legislative immunity. While it began with an expansive
18 definition ("things generally done in a session of the House by
19 one of its members in relation to the business before it"
20 Kilbourn v. Thompson, 103 U.S. 168, 204, 26 L. Ed. 377, 392
21 (1881)), the immunity has not been applied that broadly. Thus,
22 in United States v. Brewster, 408 U.S. 501, 515-16, 33 L. Ed. 2d
23 507, 519-20 (1972), the Court noted that it had "[n]ever treated
24 the Clause as protecting all conduct relating to the legislative
25 process. In every case thus far before this Court, the Speech or
26 Debate Clause has been limited to an act which was clearly a part
27 of the legislative process - the due functioning of the process."
28 (Emphasis in original.)

29 In Gravel v. United States, 408 U.S. 606, 625, 33 L.
30 Ed. 2d 602 (1972), the Court provided the following definition:

31 Legislative acts are not all-encompassing.
32 The heart of the Clause is speech or debate
in either House. Insofar as the Clause is

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construed to reach other matters, they must be an integral part of the deliberative and communicative process by which Members participate in Committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation. . . . [T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."

Id. at 625, 33 L. Ed. 2d at 602 (citation omitted).

This standard was repeated and utilized by the Court in Doe v. McMillan, 412 U.S. 306, 314, 36 L. Ed. 2d 912, 922 (1973), and Eastland v. United States Servicemen's Fund, 421 U.S. 491, 44 L. Ed. 2d 324 (1975). Gravel also articulated the standard in a slightly different formulation: If the challenged action is "essential to legislating," it is entitled to protection. 408 U.S. at 621, 33 L. Ed. 2d at 600.

The critical question, then, for resolution of the defendants' claim of immunity, is whether the acts complained of by the plaintiffs were legislative acts. Were they "essential to legislating?" (Gravel) Were they "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings?" (Gravel, Doe, Eastland) Were they part of the "due functioning of the [legislative] process?" (Brewster)

The gravamen of the plaintiffs' complaint is that the defendants excluded the public and the press (and, occasionally, other legislators)³⁰ from various legislative committee meetings.

30. See Complaint for Declaratory and Injunctive Relief, para. 16. Such a claim, if raised properly by a person with standing to raise it -- which this court does not decide here -- would prevail over the immunity defense by virtue of Malone v. Meekins, 650 P.2d 351, 358 and n.14 (Alaska 1982). See also Aboud v. Gorsuch, 703 P.2d 1158, 1163-64 and n.6 (Alaska 1985).

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2 The complaint is not a challenge to the holding of legislative
3 committee meetings alone; such a claim would be frivolous.
4 Indeed, the complaint poses no challenge to "any statement made
5 in the exercise of . . . legislative duties." Properly viewed,
6 then, this case is not simply "about meetings" as defendants
7 argue; it concerns the act of closing the door before the
8 meetings begin. Is the exclusion of the public "essential to
9 legislating"? Is secrecy "an integral part of the deliberative
10 and communicative process"? Are closed sessions part of the "due
11 functioning of the legislative process"?

12 The answer to these questions is no. Defendants have
13 not argued to the contrary. And in light of the overwhelming
14 weight of the policy established by AS 44.62.310 and by Uniform
15 Rule 22,³¹ it seems likely that such an argument, if made, would
16 not be persuasive.

17 As noted by the Court in Gravel, the privilege may be
18 extended to matters beyond pure speech and debate, but "only when
19 necessary to prevent indirect impairment of such deliberations."
20 408 U.S. at 625, 33 L. Ed. 2d at 602. Conducting committee
21 meetings in secret simply does not seem necessary to prevent
22 impairment of committee deliberations. Certainly there has been
23 no argument, much less any showing, that it is necessary in this
24 case.

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28 31. It should be clear that this court cites these
29 sources of law only to establish the weight of the policy
30 arguments favoring openness in the legislative process and not to
31 establish the justiciability of the plaintiffs' claims. As noted
32 above in part I of this memorandum of decision, neither the
statute nor the legislative rule is sufficient to allow this
court to act. Only the constitutional claim justifies judicial
action as against a separation of powers defense.

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2 Gravel provides another formulation of the test, which
3 is perhaps the most helpful in assessing this case. Eschewing
4 any "cramped construction" (e.g. "speech or debate" means only
5 statements made on the floor during debate), Gravel noted that

6 the Court has sought to implement its funda-
7 mental purpose of freeing the legislator from
8 executive and judicial oversight that realis-
tically threatens to control his conduct as a
legislator.

9 408 U.S. at 618, 33 L. Ed. 2d at 598.³² Does the present action
10 in any way realistically threaten to control the conduct of any
11 legislator? Again, the answer must be no. There is no sugges-
12 tion that it does, nor can this court divine how it might. This
13 case simply requires that the conduct -- whatever it might be --
14 take place where the public can see it.

15 It may be argued by defendants that the court has drawn
16 the question too narrowly, and that it is analytically incorrect
17 to separate out the act of locking the door of the meeting hall
18 from the act of meeting itself. Since the act of meeting is
19 clearly a part of the legislative process, the argument goes, the
20 court is barred by legislative immunity from hearing the case.

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23 32. Gravel is cited heavily by the defendants in this
24 case for the proposition that legislative employees and aides are
25 entitled to the same protection as their employers if they are
26 carrying out legislative acts, and it does stand for that
27 proposition. But much more importantly, it stands for the
proposition that where illegal or unconstitutional conduct is
involved, previous cases

28 reflect a decidedly jaundiced view towards
29 extending the Clause so as to privilege
30 illegal or unconstitutional conduct beyond
31 that essential to foreclose executive control
of legislative speech or debate and
associated matters such as voting and
committee reports and proceedings.

32 408 U.S. at 620, 33 L. Ed. 2d at 599 (emphasis added).

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But courts, especially including the United States Supreme Court, have from the beginning drawn similarly close distinctions to separate out legislative acts (which are immune from judicial scrutiny) from non-legislative acts (which are not).

In Kilbourn v. Thompson, the House had passed a resolution holding Kilbourn in contempt of the House. Thompson, the sergeant-at-arms of the House, had executed the House's warrant, arresting Kilbourn. The Court found that passing a resolution was legislative, and hence protected activity, but the enforcing it was not. Thompson enjoyed no immunity. Nor would any House member who attempted to enforce it. Gravel, 408 U.S. at 621, 33 L. Ed. 2d at 600.³³ In the instant case, holding the meeting is clearly legislative activity, but barring the public from the meeting is not.

In Powell v. McCormack, 395 U.S. 486, 23 L. Ed. 2d 491 (1969), Congressman Adam Clayton Powell was excluded from the United States House of Representatives by a vote of that body. On the grounds of legislative immunity, the Supreme Court affirmed the dismissal of the case against various members of Congress, but it refused to dismiss as against the legislative employees who had to carry out the exclusion order: the doorkeeper who refused him admittance to the floor, the sergeant-at-arms who refused to pay Powell his salary, and the clerk who

33. Specifically, the Court stated:

[N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest Neither they nor their aides should be immune from liability or questioning in such circumstances.

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2 refused to perform clerical duties for him. Upon reaching the
3 merits of the case, the Court granted Powell the principal relief
4 he had requested: a declaratory judgment that his exclusion had
5 been unlawful.³⁴ It is instructive to consider the extremely
6 fine distinction the Court made in Powell: The legislators'
7 actions in voting to exclude Representative Powell were
8 protected, yet the doorkeeper's actions in closing the door to
9 him were not.³⁵ In the instant case, there is a substantially
10 greater distinction between the holding of a meeting (protected)
11 and the closing of the door to that meeting (not protected).

12 In Gravel v. United States, 408 U.S. 606, 33 L. Ed. 2d
13 583 (1972), the Court was called upon to decide whether an aide
14 to Senator Gravel could be questioned before a grand jury
15 inquiring into possible crimes committed in the publication of
16 government documents popularly referred to as the Pentagon
17 Papers. The Court went to great lengths to draw the distinction
18 between protected legislative activities -- for which immunity
19 protected both legislator and legislative aide -- from non-
20 legislative activities. It held that legislative immunity
21 provided protection for a number of activities, including

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25 34. Ironically, the Court remanded on the question of
26 back pay, even though the existence of the dispute over back pay
27 allowed the Court to overcome the defendants' mootness defense
28 and (along with the other employee-related issues) allowed the
29 Court to overcome the immunity defense.

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28 35. It must be emphasized that the distinction is not
29 that legislators in doing an act are protected but that their
30 aides in doing the same act are not. Gravel v. United States,
31 408 U.S. 606, 33 L. Ed. 2d 583 (1972), has made it clear that if
32 a legislator would be protected in doing an act, then the aide
would also be protected. The proper distinction is between
legislative acts (speech, debate, voting, meeting, etc.) and
non-legislative acts (enforcing contempt order, enforcing an
arrest warrant, excluding a person from the floor, etc.).

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2 preparation for a legislative subcommittee hearing,³⁶ but did not
3 extend to arrangements for republication of the documents with a
4 private publisher, nor did it extend to questions tracing the
5 source of the documents (in both cases, as long as no legislative
6 act was implicated).

7 The point that emerges from these and other cases is
8 that the Court will faithfully guard the immunity of legislators
9 for statements made in the performance of their legislative
10 duties, but that it will go no further. If the challenged action
11 itself is not a legislative act, the protection is unavailable.
12 Because this court has concluded that the acts in question,
13 properly narrowly defined, were not legislative acts, there is no
14 constitutional immunity from this lawsuit which challenges
15 them.³⁷

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18 36. Even here, the Court carved out an exception
19 allowing questions which would be "relevant to investigating
20 possible third-party crime." Gravel, 408 U.S. at 620, 33 L. Ed.
21 2d at 605.

22 37. This court therefore does not reach an alternative
23 argument concerning immunity: that even if legislative immunity
24 could be found to apply on these facts, it would be outweighed by
25 the public's constitutional right of access to governmental
26 proceedings. Given the above finding that legislative immunity
27 does not attach here, this court need not attempt that balancing
28 process.

29 Defendants also argue that the testimonial immunity
30 afforded legislators by the Alaska Supreme Court's decision in
31 Kerttula v. Abood, 686 P.2d 1197 (Alaska 1984), requires
32 dismissal of this case. Even assuming that there are two
distinct types of immunity, the argument seems premature. In
Kerttula, a non-party legislator (Senator Kerttula) had been
subpoenaed for a deposition in the case of Abood v. Gorsuch,
3AN-83-5980 Civ. Senator Kerttula resisted the subpoena. The
court was called upon to decide the motion to quash the subpoena.
In the present case, resolution of the motions for summary
judgment does not require this court to decide whether the
testimonial immunity argued for by the defendants would be
available or not to any particular legislator. Any motion to
quash a subpoena can be decided when it is ripe. And while it is
possible to speculate about the various ways in which the

[footnote cont'd]

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2 III. 42 U.S.C. § 1983: DO THE DEFENDANTS ENJOY IMMUNITY,
3 ABSOLUTE OR QUALIFIED, FROM AN ACTION BASED ON VIOLATION OF
4 THE PLAINTIFFS' CIVIL RIGHTS?

5 Defendants argue that legislative immunity shields them
6 absolutely and, if not, that in the alternative they are entitled
7 to a qualified good faith immunity which protects a § 1983
8 defendant "unless the constitutional right he was alleged to have
9 violated was 'clearly established' at the time of the violation."
10 Davis v. Scherer, 468 U.S. ___, ___, 82 L. Ed. 2d 139, 149
11 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 73 L. Ed. 2d
12 396, 410-11 (1982); Butz v. Economou, 438 U.S. 478, 498, 57 L.
13 Ed. 2d 895, 911 (1978); State v. Haley, 687 P.2d 305, 317 (Alaska
14 1984). Plaintiffs contend that these cases are distinguishable
15 because they involved claims for damages, whereas plaintiffs'
16 suit seeks only a declaration of what the law is.³⁸ Plaintiffs
17 go on, however, to state that the § 1983 cause of action offers
18 no more relief to plaintiffs than a direct cause of action under
19 the Constitution, and that it is therefore "unnecessary to more
20 specifically address the § 1983 issues at this time." (Plain-
21 tiffs' Memorandum, pp. 54-55). Under these circumstances, and
22 given that the constitutional right the defendants are alleged to
23 have violated could not be said to have been "clearly estab-
24 lished" at the time the defendants acted, the court grants
25 summary judgment in favor of the defendants on those parts of the
26 plaintiffs' claims which rest upon 42 U.S.C. § 1983.

27 [footnote cont'd]

28 plaintiffs may attempt to prove their case, it would be
29 speculation only.

30 38. Absolute judicial immunity as to actions for
31 damages does not extend to declaratory and injunctive relief.
32 Pulliam v. Allen, 466 U.S. 522, 80 L. Ed. 2d 565 (1984); Martinez
v. Winner, 771 F.2d 424, 436 (10th Cir. 1985). However, the
precise distinction which plaintiffs attempt to make has not been
recognized by courts construing 42 U.S.C. § 1983.

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CONCLUSION

Because the public and press enjoy an implied right of access to the proceedings of the legislature under the Alaska Constitution, plaintiffs' complaint presents a justiciable issue. Plaintiffs' claims that legislative action violates the Open Meetings Act or the Uniform Rules of the Legislature are, however, not justiciable. Because the actions of defendants which are challenged by the plaintiffs (closing the door to legislative committee meetings) do not implicate "statements made in the exercise of their legislative duties" and are not "legislative duties," legislative immunity is not a bar to this action. Finally, because the plaintiffs cannot show that the constitutional right of the public and press to have access to legislative committee meetings was "clearly established" at the time of the acts complained of, plaintiffs cannot prevail on their claim for relief under the federal statute.

For these reasons, the defendants' motions for summary judgment based on nonjusticiability and legislative immunity are denied, while the defendants' motions for summary judgment on the 42 U.S.C. § 1983 claim are granted. Plaintiffs' cross-motion for summary judgment is therefore granted to the extent noted in the preceding paragraph.

The case should be returned to the trial calendar, and will be at the request of any party.

IT IS SO ORDERED.

DONE at Juneau, Alaska, this 15th day of October, 1986.

Walter L. Carpeneti
Walter L. Carpeneti
Superior Court Judge

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Superior

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

LEAGUE OF WOMEN VOTERS)
OF ALASKA, et al.,)
)
Plaintiffs,)
)
v.)
)
ALBERT P. ADAMS, et al.,)
)
Defendants,)
)
and)
)
STATE OF ALASKA,)
)
Defendant-)
Intervenor.)

FILED IN THE TRIAL COURTS
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

OCT - 9 1986

Clerk of Court
By PE Deputy

No. 1JU-86-986 CIV

PARTIAL FINAL JUDGMENT

The court has reviewed all pleadings and memoranda submitted by the parties, and has heard oral argument on the defendants' motions for summary judgment and plaintiffs' cross-motion for partial summary judgment. It has issued its Memorandum of Decision and Order with respect to those motions. Defendants have moved for partial final judgment under Civil Rule 54(b), and the plaintiffs do not oppose entry of a partial final judgment.¹ The court finds that there is no just reason for delay and expressly directs entry of judgment as follows:

1) Judgment is entered for the plaintiffs and against the defendants on plaintiffs' claim that the public and press have a constitutional right of access to meetings of the members of legislative bodies, (including committees), and including every step of the deliberative and decision-making process when a legislative unit meets to transact public business.

1. Plaintiffs opposed certain language of the form of order proposed by defendants.

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2) Judgment is entered for the plaintiffs and against the defendants and defendant-intervenor on defendants' affirmative defense that legislative immunity bars the action;

3) Judgment is entered for the defendants and against the plaintiffs on defendants' affirmative defense that allegations that the legislature has violated the Open Meetings Act and the Uniform Rules of the Legislature are not justiciable;

4) Judgment is entered for the defendants and against the plaintiffs on plaintiffs' claim for relief under 42 U.S.C. § 1983.

IT IS SO ORDERED.

DONE and ENTERED this 9th day of October, 1986.

Walter L. Carpeneti
WALTER L. CARPENETI
Superior Court Judge

CERTIFICATION

The undersigned certifies that on October 9, 1986, copies of this Order were sent to:

- D. John McKay, Esq.
- Avrum Gross, Esq.
- Richard Burnham, Esq.
- Jonathan Rubini, Esq.

[Signature]
Secretary to Judge Carpeneti

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ALBERT P. ADAMS, et al.,)
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Defendants,)
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and)
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STATE OF ALASKA,)
)
Defendant-)
Intervenor.)

FILED IN THE TRIAL COURTS
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

OCT - 9 1986

Clerk of Court

By Deputy

No. 1JU-86-986 CIV

AMENDMENT TO MEMORANDUM OF DECISION AND ORDER,
AND FINDINGS AND CONCLUSIONS SUPPORTING
ISSUANCE OF PARTIAL FINAL JUDGMENT

At the hearing on defendants' motion for entry of partial final judgment, a question arose as to the scope of the decision announced by this court in the Memorandum of Decision and Order of October 1, 1986. Defendants proposed a form of order which included the following language:

Judgment is entered . . . that the public and press have a constitutional right of access to all meetings of members of the Alaska legislature at which substantive and binding legislative decisions are made.

Plaintiffs objected to the qualifying language after the word "legislature", arguing that the court's decision went further than meetings at which decisions are made. Defendants, pointing out that the language was drawn from footnote 9 of the Memorandum of Decision and Order, indicated that their intention was merely to set out in judgment form what the court had ruled, and that the language should be altered if the court intended something else.

1 This issue illustrates clearly why trial courts
2 should be cautious in entering Civil Rule 54(b) partial final
3 judgments. On the one hand, the Memorandum of Decision and
4 Order does contain language at footnote 9 which can be read
5 narrowly, for the reason that a decision on the specific
6 factual case being offered by the plaintiffs (see the
7 affidavits summarized at Memorandum of Decision and Order, pp.
8 4-6) required no more. On the other hand, if the case is to
9 proceed to appellate review at this point, it hardly serves the
10 interests of the parties or of judicial economy to state the
11 judgment of the trial court in the narrowest terms, if such
12 statement would limit the supreme court in its treatment of the
13 important issues raised by this case.

14 On the first question, then, whether the case should
15 proceed now to appellate review, this court concurs with the
16 parties that the "general policy against piecemeal appeals" is
17 outweighed in the present case by the "danger of actual
18 hardship caused by delay in entry of final judgment." Johnson
19 v. State, 577 P.2d 706, 710 (Alaska 1978). Most importantly,
20 forcing the defendants to defend at trial would deprive them of
21 immunity before the supreme court could decide the correctness
22 of this court's decision on immunity. Additionally, trial of
23 issues which the defendants claim are nonjusticiable before the
24 supreme court has decided that question may cause hardship.
25 While it is true that a judgment for the defendants on the
26 facts at trial would moot any appeal altogether, it remains
27 that the defendants would have been forced to defend and in
28 that sense their claimed immunity could not be vindicated. On
29 balance, this court concludes that partial final judgment
30 should be entered so that appellate review may be had.

31 It remains then to decide the form of the partial
32 final judgment: narrower, related closely to the facts alleged

1 in the affidavits, and only enough to satisfy what was
2 necessary for purposes of deciding the motions for summary
3 judgment, or broader, to facilitate supreme court review of the
4 entire issue of access to legislative meetings? This court
5 concludes that the latter course should be followed, given the
6 fullness of briefing and argument provided by all parties to
7 the court and given the importance to the people and to the
8 legislature of a full resolution of this issue by the supreme
9 court if that is possible.

10 As to the precise form of the partial final judgment,
11 counsel for the Senate defendants noted during the hearing on
12 entry of partial final judgment that the defendants' proposed
13 judgment drew language at least suggested by Brookwood Area
14 Homeowners Association v. Anchorage, 702 P.2d 1317 (Alaska
15 1985). This court accepts the suggestions of counsel for the
16 defense (that the proposed partial final judgment be modified
17 to reflect the court's intent and that Brookwood serve as a
18 guide), and amends footnote 9 of the Memorandum of Decision and
19 Order accordingly to read as follows:

20 9. This court would define that term to
21 include not only meetings of the members of
22 legislative bodies, (including committees),
23 at which substantive and binding
24 legislative decisions are made, but also
25 every step of the deliberative and
26 decision-making process when a legislative
27 unit meets to transact public business.

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1 The court will issue a partial final judgment which reflects
2 this amendment to its Memorandum of Decision and order.

3 IT IS SO ORDERED.

4 DONE this 7th day of October, 1986.

5
6 Walter L. Carpeneti
7 WALTER L. CARPENETI
8 Superior Court Judge

8 CERTIFICATION

9 The undersigned certifies that on October 9, 1986,
10 copies of this Order were sent to:

- 11 D. John McKay, Esq.
- 12 Avrum Gross, Esq.
- 13 Richard Burnham, Esq.
- 14 Jonathan Rubini, Esq.

15 F. de Boer
16 Secretary to Judge Carpeneti

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FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Office of the Governor
 Title: Const. Amend. - Open Meetings BRU: Division of Elections
 Sponsor: Sturgulewski Components: I Elections
 Requestor: Sturgulewski

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	-0-	2.2*	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	2.2*	-0-	-0-	-0-

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

REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

* Costs included cover 2 to 3 pages in each Official Elections Pamphlet, for printing and typesetting, and costs estimated to cover computer program-ing requirements for vote (Continued)

Prepared by: Linda Edgeworth Phone: 465-4611
 Division: Elections Date: 1/17/89
 Approved by Commissioner: *Sandra Stout* Date: 1/17/89
 Agency: Division of Elections

Distribution (by preparer):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CS SJR 1 (Staff)

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

FISCAL NOTE

REQUEST:

Revision Date: 12/8/89
 Title: Proposing an amendment relating
to open meeting
 Sponsor: State Affairs Committee
 Requestor: State Affairs Committee

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	2.2*	-0-	-0-	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	2.2*	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

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

Prepared by: Linda Edgeworth
 Division: Division of Elections

Phone: 465-4611
 Date: 12/8/89

Approved by Commissioner: [Signature] (Acting)
 Agency: Division of Elections

Date: 12.11.89

Distribution (by preparer):

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

CONTINUATION OF FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSJR 1

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

COMPARISON OF OPEN MEETING LAWS AND PROPOSALS

	Uniform Rule 22	AS 44.62.310	SJR 1	SB 3
<u>Premise</u>	All meetings of a legislative body are open to ...the general public.	Same as Rule 22	Private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house of the legislature or a committee is prohibited.	Same as SJR 1
<u>Ex-ception</u>	Same as AS 44.62.310	To discuss matters that may (1) adversely impact state finances if immediately known (2) prejudice a person's reputation (3) be required by law to be kept confidential	Same as AS 44.62.310	Same as AS 44.62.310
<u>Penalties</u>	Bill involved is returned to house of origin without further action. (Rule 54)	Actions taken in violation of law are void.	Court may impose civil fine as specified in law; may not invalidate legislation.	Court may impose civil fine (maximum \$500); may not invalidate legislation; injunction to stop action may be sought; is violation of ethics code.
<u>Other</u>			Prohibition applies only to quorum of body or committee.	Same as SJR 1. Specifies that caucuses may meet in private to consider procedure, strategy, organization.
			Requires vote of public to enact.	

COMPARISON OF OPEN MEETING LAWS AND PROPOSALS

	Uniform Rule 22	AS 44.62.310	SJR 1	SB 3
<u>Premise</u>	All meetings of a legislative body are open to ...the general public.	Same as Rule 22	Private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house of the legislature or a committee is prohibited.	Same as SJR 1
<u>Exemption</u>	Same as AS 44.62.310	To discuss matters that may (1) adversely impact state finances if immediately known (2) prejudice a person's reputation (3) be required by law to be kept confidential	Same as AS 44.62.310	Same as AS 44.62.310
<u>Penalties</u>	Bill involved is returned to house of origin without further action. (Rule 54)	Actions taken in violation of law are void.	Court may impose civil fine as specified in law; may not invalidate legislation.	Court may impose civil fine (maximum \$500); may not invalidate legislation; injunction to stop action may be sought; is violation of ethics code.
<u>Other</u>			Prohibition applies only to quorum of body or committee.	Same as SJR 1. Specifies that caucuses may meet in private to consider procedure, strategy, organization.
			Requires vote of public to enact.	

SJR 1, PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF ALASKA RELATING TO OPEN MEETINGS.
(SEE ALSO SB 3)

TO TESTIFY:

SENATOR STURGULEWSKI, BILL SPONSOR (MCKAI)

DICK BRADLEY, LEGAL SERVICES (ON CONSTITUTIONAL AMENDMENT VS. STATUTORY CHANGE)

GENE STORM, OPEN MEETINGS COALITION (TELECONFERENCE FROM ANCHORAGE)

VICKI BOREGO, LEAGUE OF WOMEN VOTERS (MAY OR MAY NOT TESTIFY)

OTHERS (SEE WITNESS LIST)

FYI:

REP. BROWN'S HJR 1 WAS HEARD BY HOUSE STATE AFFAIRS 1/23.
CONCERNS RAISED:

WHAT ABOUT SUBCOMMITTEES? (MCKAI SAYS WAS MUCH DISCUSSION LAST YEAR; SENATE CHOSE TO EXCLUDE. QUORUM OF SUBCOMMITTEE COULD BE AS FEW AS 2 PEOPLE AND IT SEEMED TOO INTRUSIVE TO PROHIBIT 2 PEOPLE FROM DISCUSSING LEGISLATION.)

WHAT CONSTITUTES AN OPEN MEETING? (MCKAI SAYS IF THE CONSTITUTIONAL AMENDMENT PASSES THE OPEN MEETINGS STATUTE SHOULD BE AMENDED TO DEFINE OPEN MEETING IN TERMS OF NOTICE, ACCESSIBLE LOCATION, PUBLIC PRESENCE, ETC. ALSO TO DEFINE EXECUTIVE SESSION, QUORUM, ETC.)

WHO WILL ACTUALLY BRING CHARGES IN CASE OF A VIOLATION? (MCKAI SAYS PRIVATE COUNSEL, AS IN LEAGUE OF WOMEN VOTERS CASE.)

OTHER CONCERNS RAISED IN PAST:

SHOULD THE AMENDMENT BE TO ARTICLE I OF THE CONSTITUTION (RIGHTS) OR ARTICLE II (LEGISLATURE)? (LEGAL SAYS EITHER IS APPROPRIATE; STURGULEWSKI PREFERS IN ARTICLE I.)

NOT SPECIFYING IN THE CONSTITUTION WHEN EXECUTIVE SESSION IS APPROPRIATE LEAVES THE LEGISLATURE DISCRETION TO GRANT THEMSELVES BROAD STATUTORY AUTHORITY TO GO INTO EXECUTIVE SESSION.

ALLOWING THE COURT TO "INTERFERE" WITH THE LEGISLATURE'S OPERATION THROUGH ENFORCEMENT OF OPEN MEETINGS IS "THE CAMEL'S NOSE UNDER THE TENT". (SJR 1 ATTEMPTS TO ADDRESS THIS BY STATING THAT A COURT MAY NOT PRESCRIBE RULES OR

PROCEDURES FOR THE CONDUCT OF LEGISLATIVE BUSINESS BECAUSE
OF A VIOLATION -- PAGE 1, LINES 19-20)

ALSO NOTE:

NO MENTION OF CAUCUS. SJR 1 PROHIBITS PRIVATE DISCUSSION OF
LEGISLATION (PAGE 1, LINE 17) -- NO PROHIBITION ON
DISCUSSION OF ANYTHING ELSE, SO DISCUSSION OF STRATEGY, BLAH
BLAH BLAH WOULD BE ALLOWED.

PROHIBITION LANGUAGE IS VERY SPECIFIC. PAGE 1, LINES 17-18
READS "LEGISLATION UNDER THE JURISDICTION OF A COMMITTEE OR
BODY". THIS MEANS THAT JUDICIARY COMMITTEE COULD MEET
PRIVATELY TO DISCUSS LEGISLATION THAT IS CURRENTLY IN
RESOURCES COMMITTEE, ETC.

COURT CANNOT INVALIDATE LEGISLATION BECAUSE OF A VIOLATION
(PAGE 1, LINE 20). RATHER, THE MEMBER(S) WHO VIOLATE THE
ACT WILL BE CIVILLY FINED (PAGE 1, LINE 21).

A PETITION DRIVE IS UNDERWAY (GENE STORM, WHO INTENDS TO TESTIFY,
IS HEADING IT UP). THE PETITION PROPOSAL IS APPARENTLY MORE
STRINGENT THAN SJR 1. HOWEVER, IT CALLS FOR AN ADVISORY VOTE,
WHICH MEANS THAT IF THE QUESTION GOES ON THE BALLOT AND THE
VOTERS APPROVE IT, THE LEGISLATURE WOULD BE ASKED TO DO WHAT
WE'RE DOING NOW (I.E. PASS LEGISLATION REGARDING OPEN MEETINGS).

NEXT GENERAL ELECTION IS 1990.

1 IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

2 HOUSE BILL NO. 140

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to violations of the open meetings
7 section of the Constitution of the State of Alaska;
8 and amending Alaska Rule of Civil Procedure 82 and
9 Alaska Rule of Appellate Procedure 508; and providing
10 for an effective date.

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 * Section 1. AS 24.40 is amended by adding new sections to read:

13 ARTICLE 2. LITIGATION INVOLVING THE OPEN MEETINGS REQUIREMENT.

14 Sec. 24.40.050. DEFENSE ON CHARGES OF VIOLATING THE OPEN MEETING
15 REQUIREMENTS. The Legislative Council shall underwrite the costs and
16 attorney fees reasonably necessary to the defense of a member of the
17 legislature who has been charged with a violation of the open meetings
18 requirements of the Constitution of the State of Alaska.

19 Sec. 24.40.060. FRIVOLOUS OR MALICIOUS COMPLAINTS. If the court
20 determines that a lawsuit charging a violation of the open meeting
21 requirements of the Constitution of the State of Alaska was brought
22 frivolously or maliciously, the court shall assess as attorney fees
23 and costs the actual expenses of the Legislative Council expended in
24 the defense of the charges and may assess a civil penalty on the
25 plaintiff of not to exceed \$1,000.

26 Sec. 24.40.070. ARBITRATION. If the Legislative Council be-
27 lieves that the amount incurred in a defense under AS 24.40.050 by
28 private counsel for costs and attorney fees was unreasonable or exces-
29 sive, it shall offer to reimburse the member a portion of the costs

1 and attorney fees. If the member does not accept the offer of the
2 Legislative Council, the matter shall be resolved by binding arbitra-
3 tion under AS 09.43.010 - 09.43.180. If the member and the Legisla-
4 tive Council do not agree on the selection of an arbitrator, the
5 arbitrator shall be selected under the rules of the American Arbitra-
6 tion Association.

7 Sec. 24.40.080. LIMITATIONS OF ACTIONS. A person may not bring
8 an action for a violation of the open meeting requirements of the
9 Constitution of the State of Alaska unless the action is commenced
10 within 180 days of the violation.

11 Sec. 24.40.090. VIOLATION OF OPEN MEETING REQUIREMENTS. An
12 individual member of the legislature determined by the court to have
13 violated a provision of the open meetings requirements of the Consti-
14 tution of the State of Alaska may be assessed a fine not in excess of
15 \$1,000 for each violation.

16 * Sec. 2. The provisions of sec. 1 of this Act have the effect of
17 changing Alaska Rule of Civil Procedure 82 and Alaska Rule of Appellate
18 Procedure 508 by limiting the courts' discretion in awarding costs and
19 attorney fees.

20 * Sec. 3. This Act takes effect on the effective date of a constitu-
21 tional amendment proposed by the Sixteenth Alaska State Legislature relat-
22 ing to open meetings.

Senator Pourchot
January 27, 1989

OPEN MEETINGS
CONSTITUTIONAL PROVISIONS IN OTHER STATES

SOURCE: "Constitutional Provisions Mandating Open Access to State Legislatures", Freedom of Information Center, 11/21/86

The constitutional provisions of other states in respect to open meetings seem to fall into three categories:

- 1 - Provisions adopted in the 1800's which allow the legislature to close meetings when they determine secrecy is required.
- 2 - Provisions adopted more recently, which apply only to a body of the legislature, not to legislative committees.
- 3 - Provisions also adopted more recently which apply to the legislature and its committees.

Category 1:

Pennsylvania

The sessions of each House and of committees of the whole shall be open, unless when the business is such as ought to be kept secret. (Art. II, sec. 13)

Similar language is contained in the state constitutions of Alabama (1901), Arkansas (1879), Colorado, Connecticut (1818), Delaware (1897), Indiana (1851), Iowa (1857), Maryland, Minnesota (1857), Mississippi (1890), Nebraska (1875), New Hampshire (1793), New York (1894), Ohio, Pennsylvania, South Dakota (1889), Tennessee, Vermont (1793), Washington (1889), Wisconsin (1848), and Wyoming (1890).

Category 2:

Florida

Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed. (Art. III, sec. 4) (1968)

Idaho

The business of each house and of the committee of the whole shall be transacted openly and not in secret session. (Art. III, sec. 12) (1890)

Michigan

The doors of each house shall be open unless the public security requires otherwise. (Art. IV, sec. 20) (1963)

Nevada

The doors of each house shall be kept open during its session, except the senate while sitting in executive session. (Art. IV, sec. 15) (1864)

New Mexico

All sessions of each house shall be public. (Art. IV, sec. 12) (1911)

Texas

The sessions of each House shall be open, except the Senate when in executive session. (Art. II, sec. 22) (1984)

Utah

All sessions of the legislature, except those of the Senate while sitting in executive session, shall be public. (Art. VI, sec. 15)

Category 3

California

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) (1966)

Georgia

The sessions of the General Assembly and all standing committee meetings thereof shall be open to the public. Either house may by rule provide for exceptions to this requirement. (Art. III, sec. 4)

Illinois

Sessions of each house of the General Assembly and meetings of committees, joint committees and legislative commissions shall be open to the public. Sessions and committee meetings of a house may be closed to the public if two-thirds of the members elected to that house determine that the public interest so requires. (Art. IV, sec. 5) (1970)

Montana

The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public. (Art. V, sec. 10) (1972)

North Dakota

All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, shall be open and public. (Art. IV, sec. 14) (1974)

Oregon

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) (1978)

Senator Sturgulewski's Office

ALASKA SUNSHINE
SJR 1 Questions and Answers

1)

Q - Shouldn't SJR 1 contain definitions of all its terms and be more detailed and precise in specifying when legislators are required or not required to hold open meetings?

A - The language in section 1 of SJR 1 will become part of the Alaska constitution and the language is "constitutional" in nature rather than "statutory". To the greatest extent possible, SJR 1 uses plain english and unambiguous words. The proper place for definition of terms is in statute.

2)

Q - Won't the existence of a open meetings section in the constitution invite frivolous lawsuits from citizens who are unhappy with a particular piece of legislation?

A - No. Until the Supreme Court's 1986 decision in the suit by the League of Women Voters and the Daily News, it was commonly thought that the legislature was subject to the existing open meetings act which is much stricter than the proposed amendment. During that time there were no open meeting related suits against the legislature.

There are also 160 municipal governments in Alaska and a host of state, municipal, and school related commissions and boards, all of which are subject to suit under the open meetings law. Despite the possibilities, there have been only a handful of open meeting lawsuits against these entities. SJR 1 also prohibits invalidation of legislation which further decreases the motivation for someone who dislikes a particular law to file a frivolous suit.

3)

Q - Why doesn't the amendment make a specific exemption for caucuses and specify what can be discussed in them?

A - How to deal with caucuses has been the most difficult issue in the history of this legislation. Most early drafts contained specific exemptions for caucuses and references to what type of discussion was allowed in them. Most drafts (there have been 41 so far), would have allowed discussion on "organizational matters", "strategy", or "procedure".

Unfortunately there has never been agreement on what these terms mean. Constitutional language does not contain definitions and while it would be appropriate to leave the definitions to implementing legislation, this approach would leave the legislature vulnerable to these terms being redefined in statute by initiative

at a later date.

In the Senate State Affairs Committee last year, the committee resolved the problem by specifying that only one type of discussion is prohibited and it doesn't matter where it occurs; "private and substantive discussions or debates on legislation under its jurisdiction by a quorum of a house of the legislature or of a committee." Any other discussion is permitted anytime, anywhere, including in caucuses.

4)

Q - Will this amendment be the "camel's nose under the tent" which allows the courts to tell the legislature how to conduct its business?

A - No. This has been a favorite argument of persons opposed to the amendment, but the amendment has been amended to specifically prohibit the court from prescribing rules or procedures for the conduct of legislative business or invalidating legislation because of a violation of open meeting requirements.

5)

Q - Should there be a companion bill that amends the existing open meetings statute?

A - The proposed amendment provides that the legislature may implement it. This would appropriately be done by amending the existing open meeting statute and a bill doing so will be desirable once we know the final form of the amendment. The earliest the amendment can become part of the constitution is in time for the 1991 legislative session. This leaves plenty of time to work out the technical aspects of implementing legislation.

6)

Q - Will courts pay attention to the intent contained in section 2 of SJR 1?

A - If a court case arose where Court needed to look at the legislative history of the open meetings amendment the court would look first at the explanations that were before the voters in the official election pamphlet when they voted to ratify the amendment.

Section 2(d) of the intent instructs Legislative Affairs to consider the statement of legislative intent contained in Section 2 in the preparation of its neutral statement for the pamphlet. We would also include the statement of legislative intent in the statement in support of the measure which we are allowed to include in the pamphlet. If the court needed to look beyond that, the intent contained in the resolution itself, would be the preeminent piece of legislative history.

7)

Q - Would passage of this amendment leave the legislature vulnerable to the public passing a very restrictive open meetings statute by initiative?

A - No. The open meetings amendment will provide a basis for judicial enforcement of the existing open meetings law or subsequent amendments to that law to the extent the provisions of the statute are consistent with the amendment. While future statutory changes can and probably will take place, whether they are done by the legislature or the initiative process there can be any enforcement of any provision that does not conform to the amendment.

The best prevention of an initiative process is the public perception that by passing this resolution and obeying it, there is no need for an initiative.

8)

Q - What are Sections 6 and 12, Article II of the state constitution and why does the intent language say "notwithstanding" these sections?

A - Section 6 is legislative immunity and Section 12 is the legislative rule making authority. The proposed amendment is a limitation on the authority of the legislature. When it gives the court the right to enforce a rule in this one specific area and to impose civil fines on individual legislators who willfully violate the law, it creates a tension between Article I and Article II. This intent makes clear how that tension is resolved and avoids unnecessary litigation.

9)

Q - SJR 1 provides for civil fines for violation of the open meetings statute. Is there a limit on the size of the fines and why isn't invalidation of legislation retained as a penalty?

A - A limit on the amount of the civil fines may be established by the legislature in statute. The reason the amendment prohibits invalidation of legislation is because it is a draconian penalty which does not directly penalize the individuals who were responsible for the violation. If the invalidation was used, it could invalidate legislation which has had a whole series of public hearings and was the subject of only one secret meeting. There are also doubts whether invalidation is constitutionally enforceable.

COMPARISON OF KEY PROVISIONS OF VARIOUS OPEN MEETINGS PROPOSALS

	<u>SJR 1 (1989)</u>	<u>CSHJR 1 Staff ('89)</u>	<u>1988 Sen St Aff</u>	<u>'88 House Passed Version</u>	<u>Current Initiative</u>	<u>Oregon Constitution</u>
OFFICIAL MEETINGS	Discussions and debates of each house of the legislature and its committees shall be open to the public	Same as SJR 1	Same as SJR 1	Deliberations of each house of the legislature and its committees shall be open to the public	All collective information gathering, deliberation, and decision making of each house of the legislature and of all subunits of the legislature and each house of the legislature shall be open to the public	Deliberations of each house, of committees of each house or joint committees and of the committee of the whole shall be open
ACCIDENTAL QUORUM	Private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house of the legislature or a committee is prohibited	Private and formal or informal discussions that lead to promises, agreements, or votes on legislation under its jurisdiction by a quorum of a house of the legislature or a committee are prohibited	Same as SJR 1	Private and substantive deliberation by a quorum of a legislative body on any subject under its jurisdiction is prohibited	If a matter is appropriate to a particular legislative body, nonpublic consideration of the matter by a quorum of that legislative body is prohibited	
STATED EXCEPTIONS	Executive session	Same as SJR 1 Subcommittee of a committee of the legislature	Same as SJR 1	Executive session Caucuses of the legislature may meet in private to consider matters of procedure, organization, or strategy. The provisions of this section that permit executive sessions and caucuses shall be narrowly construed	Executive session Legislators may meet collectively only to consider matters of procedure, organization, or strategy	
PENALTY	Court may not prescribe rules or procedures for the conduct of legislative business or invalidate legislation Court may impose a civil fine upon a member of the legislature for a wilful violation	Same as SJR 1	Same as SJR 1 Same as SJR 1	Court may not prescribe rules or procedures for the conduct of legislative business Same as CSHJR 1(St Aff)	Action taken in violation of this section may be voided The legislature shall prescribe additional penalties	

A TEMPORARY LAW OF THE STATE OF ALASKA

*Initiative
Rec'd from Jeff
Bowman, AKPIRG
1-25-89*

Directing the Lieutenant Governor to place an initiative on the next general election ballot advising the legislature to place on the ballot an amendment to the Constitution of the State of Alaska relating to open meetings.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

* Section 1. The Lieutenant Governor of the State of Alaska is directed to place before the voters at the next general election, as allowed by law, an initiative which reads:

Shall the people of the State of Alaska advise the legislature to place a constitutional amendment on the ballot requiring the legislature to conduct its business publicly, amending Article I of the Constitution of the state of Alaska by adding a new section to read:

SECTION 23. MEETINGS OPEN. All collective information gathering, deliberation, and decision making of each house of the legislature and of all sub-units of the legislature and each house of the legislature shall be open to the public unless a legislative body is meeting in executive session to consider matters authorized by law. If a matter is appropriate to a particular legislative body, nonpublic consideration of the matter by a quorum of that legislative body is a violation of this section. Legislators may otherwise meet collectively in private only to consider matters of procedure, organization, or strategy. Action taken in violation of this section may be voided and the legislature shall prescribe additional penalties for violation of this section. This section shall be interpreted to provide maximum public access to legislative deliberation.

STEPHEN McALPINE
LIEUTENANT GOVERNOR

STATE OF ALASKA

P. O. BOX AA
JUNEAU 99811
(907) 465-3520

January 11, 1989

Ms. Cheryl D. Anderson
Suite 797
3605 Arctic Boulevard
Anchorage, AK 99503

Dear Ms. Anderson:

The initiative application relating to the open meeting law has been certified as being in proper form under the provisions of AS 15.45.010 through AS 15.45.060, and Article XI of the Alaska Constitution. This petition will be identified as Initiative #88-OPEN. The official certificate for this application is enclosed.

I am enclosing a copy of the Attorney General's Opinion dated January 4, 1989. Please review the Opinion, giving particular notice to the summary language, and contact my office if you have any comments on the suggested petition summary language. Upon finalization of the impartial summary for this initiative, the Division of Elections will prepare and print numbered petition booklets for circulation.

If this office may be of further assistance, please do not hesitate to contact us.

Warmest regards,

A handwritten signature in cursive script that reads "Stephen McAlpine".

Stephen McAlpine
Lieutenant Governor

Enclosures

cc: Jeffrey R. Bohman
Carol Murkowski-Sturgulewski
Sandra J. Stout

MEMORANDUM

STATE OF ALASKA

RECEIVED

State of Alaska

Department of Law

JAN 4 1989

TO:

Hon. Stephen McAlpine
Lieutenant Governor
and

Sandra J. Stout, Director
Division of Elections
Office of the Lieutenant Governor

DATE:

January 4, 1989

LIEUTENANT GOVERNOR

663-89-0169

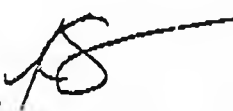
TEL. NO.:

465-3600

SUBJECT:

Initiative petition
application relating to
open meetings
(Amended)

FROM:

Kathleen Strasbaugh 
Assistant Attorney General
Governmental Affairs Section

Note: This memorandum replaces the memorandum dated November 28, 1988 on the above subject. The proposed petition summary has been reworded, and a few sentences added to section III.

I. Introduction

You have asked us to review an application for an initiative petition which would direct you to ". . . place an initiative on the next general election ballot advising the legislature to place on the ballot an amendment to the Constitution of the State of Alaska relating to open meetings."

We previously recommended rejection of an application from the sponsors of this initiative because it was framed as an advisory vote rather than as the enactment of a law. See 1988 Inf. Op. Att'y Gen. (July 15; 663-88-0487) (not yet indexed).

While we have reservations about the wording of both the application for the petition and the proposed bill, and about whether it is appropriate to recommend approval of what could be characterized as an end run around certain constitutional limitations upon the use of the initiative, 1/ we believe you must approve the application under Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173 (Alaska 1985) and other Alaska Supreme Court cases holding that the power of the people to propose laws by the initiative is to be liberally construed.

1/ Cf. 1976 Inf. Op. Att'y Gen. (December 23; Pegues); 1979 Inf. Op. Att'y Gen. (February 13; J-66-474-79); 1979 Inf. Op. Att'y Gen. (May 22; J-66-733-79); Starr v. Hagglund, 374 P.2d 316 (Alaska 1962).

Hon. Stephen McAlpine, Lt. Governor
Sandra Stout, Director
Division of Elections

January 4, 1989
Page 2
Our file 663-89-0169

II. Applicable Law

An application for an initiative must be in the proper form, as must the attached bill. AS 15.45.030; AS 15.45.040. An initiative must enact a law as required by Article XI, Section 1 of the Alaska Constitution and must be on a subject not prohibited by Article XI, Section 7 of the Alaska Constitution. See Boucher v. Engstrom, 528 P.2d 456, 460-461 (Alaska 1974).

III. Analysis

The application in question is styled as a temporary law of the State of Alaska. It directs the lieutenant governor to place an initiative on the ballot at the next general election. The initiative itself advises the legislature to place a constitutional amendment on the ballot regarding open meetings. Cf. 1985 Inf. Op. Att'y Gen. (August 22; 366-031-86).

The previous opinions of this office cited above have suggested that the voters are not permitted to place an advisory question on the ballot directly because such a ballot question would not enact a law within the meaning of Article XI, Section 1 of the Alaska Constitution. However, direction to a state official to perform an act, in this case the placement of a question on the ballot, does qualify as an enactment. Cf. Yute Air, 698 P.2d at 1182. As the court noted in Yute Air, Article XII, Section 11 of the Alaska constitution, although subject to Article XI, permits the people to exercise the lawmaking powers assigned to the legislature unless clearly inapplicable. Under the Yute Air court's approach, the power to enact a temporary law directing a government official to act is not clearly inapplicable to the initiative process. 2/ Nor is it on a topic forbidden by Article XI, Section 7 of the constitution.

Although the ballot question portion of the bill is somewhat vaguely and rhetorically worded, the bill itself is in the proper form as required by AS 15.45.040. The application documents also appear to meet the requirements of AS 15.45.-030(1)-15.45.030(2). Thus, if your review of the signatures

2/ While the legislature customarily places measures and constitutional amendments on the ballot by resolution, such resolutions, unlike those held ineffective as laws in State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 773-774 (Alaska 1980), have a clearly binding effect, i.e. they require an action by a government official. Yute Air, 598 P.2d at 1182.

Hon. Stephen McAlpine, Lt. Governor
Sandra Stout, Director
Division of Elections

January 4, 1989
Page 3
Our file 663-89-0169

reveals that the requirements of AS 15.45.030(3)-15.45.030(4) have been met, we recommend that the application be approved.

The following petition summary is suggested for your consideration in carrying out the requirements of AS 15.45.090(2):

"A temporary act requiring the lieutenant governor to place a measure on the ballot advising the legislature whether to amend the state constitution regarding open meetings."

This bill, if passed, would make a temporary law telling the lieutenant governor to place a measure on the ballot at the following general election. That measure would advise the legislature to put a constitutional amendment about open meetings on the ballot. This measure only tells the lieutenant governor to put the advisory question on the ballot at the election after this bill is voted on. It does not make the legislature put a constitutional amendment on the ballot. It does not amend the state constitution.

Please let us know if we may assist you further in this matter.

KS:tg

STATE OF ALASKA
LIEUTENANT GOVERNOR
JUNEAU

CERTIFICATE

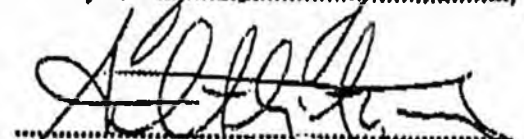
I, STEPHEN McALPINE, LIEUTENANT GOVERNOR FOR THE STATE OF ALASKA, DO HEREBY CERTIFY THAT the initiative application which proposes an amendment to the Constitution of the State of Alaska relating to open meetings has been reviewed and is in proper form as required under the provisions of Article XI of the Constitution of the State of Alaska and under the provisions of AS 15.45.010 through AS 15.45.070.

I, FURTHER CERTIFY THAT the application contained the signatures and addresses of more than 100 qualified voters.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau, the Capital,

This eleventh day of January
A.D. 19 89


LIEUTENANT GOVERNOR

CONSTITUTIONAL PROVISIONS MANDATING OPEN ACCESS TO STATE
LEGISLATURES--STATE BY STATE
Freedom of Information Center--November 21, 1986

ARKANSAS: Art. V, S. 13. Sessions to Open. The sessions of each house and of committees of the whole shall be open, unless when the business is such as ought to be kept secret. (1879)

Legal Periodicals. Watkins, "Open Meetings Under the Arkansas Freedom of Information Act", 38 Ark. Law Review 268 (1984).

CALIFORNIA: Art. IV, S. 14. The doors of each House shall be open, except on such occasions as, in the opinion of the House, may require secrecy. (1849) Amended 1879. Art. IV, S. 13. Open and Secret Sessions. (Volume missing)

COLORADO: Art. V, S. 14. Open Sessions. The sessions of each house, and of the committees of the whole, shall be open, unless when the business is such as ought to be kept secret. 1980 Replacement Volume. Art V, S. 14. Open Sessions. Open Meetings law not in conflict. Although this section of Art. V, Colorado Constitution, expressly authorizes the general assembly to conduct certain business in secret, both the senate and the house of representatives have determined that the business of legislative caucuses is not such as ought to be kept secret. Therefore, the open meetings law does not conflict with this section of Art. V., Colorado Constitution. Cole v. State, 673 P. 2d 3451 Colo. 1983. Applied in Glennon Heights, Inc., v. Central Bank & Trust, 658 P. 2d. 872 (Colo. 1983). (states that Art V, S. 14 is a constitutionally mandated procedure)

CONNECTICUT: Art. 3, S. 16. Debates to be public. Sec. 16. The debates of each house shall be public, except on such occasions as in the opinion of the house may require secrecy. Historical note: Identical provisions were contained in the 1818 Constitution in Art. Third S. 11 and in the 1955 Constitution in Art. 3 S. 14.) (1965) See 373A.2d 193 →

DELAWARE: Art. II, S. 11. (1897) accessibility to each House and Committees of the whole. Section 11. The doors of each House, and of Committees of the Whole, shall be open unless when the business is such as ought to be kept secret.

FLORIDA: Art. 3, S. 4. Quorum and procedure. (b) Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed. (1968) →

GEORGIA: (Art. III Sec. IV) Paragraph XI. Open Meetings. The sessions of the General Assembly and all standing committee meetings thereof shall be open to the public. Either house may by rule provide for exceptions to this requirement. →

IDAHO: Art. 3 s. 12. Secret sessions prohibited. The business of each house, and of the committee of the whole shall be

S12 rules
S16 priv.

S15 priv.
313 rules

313 priv.
39 rules

Idaho
§7 priv.
§9 ruled/purs.

transacted openly and not in secret session. (1890) →

§36(c)
ruled
§12 priv.

ILLINOIS: Art. 4 S. 5(c). Sessions of each house of the General Assembly and meetings of committees, joint committees and legislative commissions shall be open to the public. Sessions and committee meetings of a house may be close to the public if two-thirds of the members elected to that house determine that the public interest so requires; and meetings of joint committees and legislative commissions may be so closed if two-thirds of the members elected to each house so determine. (1970)

under 1870 Const. only a majority vote was necessary to close mtgs.

Smith-Hurd Illinois Annotated Statutes, 1971, St. Paul: West Publishing, p. 147. 1970. Illinois. Art. 4 S. 5(c). Subsection 5(c) requires that all sessions of the General Assembly and meetings of joint committees and legislative commissions be open to the public. Sessions and committee meetings of a house can be closed to the public only if two-thirds of the members of that house determine that the public interest requires such secrecy. Two-thirds of each house must make a determination that the public interest requires the closing of meetings of joint committees and legislative commissions. Under the 1870 Constitution, only a majority vote was necessary to close meetings.

→

Art. 4, S. 7(a). Committees of each house, joint committees of the two houses and legislative commissions shall give reasonable public notice of meetings, including a statement of subjects to be considered. (1970)

"Constitutional Commentary" by Robert A. Helman & Wayne W. Whalen. Smith-Hurd Illinois Annotated Statutes, 1971, p. 152. Subsection 7(a) establishes for the first time a Constitutional requirement that committees of each house, joint committees of the two houses and legislative commissions give reasonable public notice of meetings including a statement of subjects to be considered. The terms "reasonable public notice" and "statement of subjects" are not defined. The Subsection does not state the remedy available to a member or to an injured citizen if such notice is not given. The Legislative Committee Report, which proposed the language adopted by the Convention states: "This requirement hopefully would enhance and encourage public participation in the legislative committee process." Implicit in Subsection 7(a) is the power of each house, or both house jointly, to establish committees and commissions to aid in the conduct of business.

In prior const. 1846 art. 3 §17.

§10 ruled
§8 priv.

INDIANA: Art 4 S. 13. Doors to Be Open. The doors of each House, and of Committees of the Whole, shall be kept open, except in such cases, as, in the opinion of either House, may require secrecy. (1851)

§11 priv.
§9 ruled

IOWA: (1857) Art. 3 S. 13. Doors of each house. Sec. 13. The doors of each house shall be open, except on such occasions, as, in the opinion of the house, may require secrecy.

Art. 3 S. 9. Authority of the houses. Opinion 8. Open Meetings.

I.C.A. Chapter 28A., Requiring open meetings does not apply to the general assembly or any of its committees because the law by its terms does not include such and because of the right of each house, under this section, to determine its own rules of proceedings. Op. Atty. Gen. (Cusack), Feb. 6, 1973.

319 rules
318 priv.

MARYLAND: Art. III S. 21. Doors to be kept open. The doors of each House, and of the Committee of the Whole, shall be open, except when the business is such as ought to be kept secret. Quoted in Avara v. Baltimore News Am. Div. 292 Md. 543, 440 A.2d 368 (1982).

Cl. did not address question of whether immunity applied or this clause gave unbridled discretion to committee to close doors

MICHIGAN: SEE attached sheet, 3-A.

310 priv.
37 rules

MINNESOTA: Art. 4 S. 14. Open sessions. Sec. 14. Each house shall be open to the public during its sessions except in cases which in its opinion require secrecy. (adopted 1857; amended 1974) →

348 priv.
355 rules

MISSISSIPPI: Art. 4 S. 58. The doors of each house, when in session, or in committee of the whole shall be kept open, except in cases which may require secrecy; and each house may punish, by fine and imprisonment, any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence, or who shall in any way disturb its deliberations during the session; but such imprisonment shall not extend beyond the final adjournment of that session. (1890) →

310 rules
315

NEBRASKA: Art. III S. 11. Legislative journal; vote viva voce; open doors. The Legislature shall keep a journal of its proceedings and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question shall at the desire of anyone of them be entered on the journal. All votes shall be viva voce. The doors of the Legislature and of the Committees of the Whole shall be open, unless when the business shall be such as ought to be kept secret. (Amended 1934) →

311 priv.
36 rules

NEVADA: Art. IV S 15. Rules Relating to Legislative Procedures. The doors of each house shall be kept open during its session, except the senate while sitting in executive session, and neither shall, without the consent of the other, adjourn for more than three days, not to any other place than that in which they may be holding their sessions. (1926. Update not available.) (1864)

Pt 2 art. 21
Priv.
Pt. 2 art 22
rules

NEW HAMPSHIRE: Pt. 2 (Art) 8th. (Open Sessions of Legislature.) →
The doors of the galleries, of each house of the legislature, shall be kept open to all persons who behave decently, except when the welfare of the state, in the opinion of either branch, shall require secrecy. (1970 ed., update not available.) →

313 immunity
311 rules

NEW MEXICO: Art. IV S 12. (Public sessions; journals.) All sessions of each house shall be public. Each house shall keep a journal of its proceedings and the yeas and nays on any questions shall, at the request of one-fifth of the

immunity of legislators fr. civil process - 94 ALR 1470

members present, be entered thereon. The original thereof shall be filed with the secretary of state at the close of the session, and shall be printed and published under his authority. (1978) (adopted 1911)

311 priv. ✓
§9 ruled

NEW YORK: Art. 3 S. 10. (Journals, etc.; open sessions; adjournments) Each house of the legislature shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days. (1938) (w/amendments 1969)

derived from
Const. 1894 art.
3, 11; Cont. 1846
art 3 § 11; Const.
1821, art. 1, § 4
Const 1777 art.
15.

priv. art. IV
rules art. VI
§ 12

1974 r 514
NORTH DAKOTA: (1984) Art IV S. 28. All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, shall be open to the public.

Note: The section as originally adopted read: "The sessions of each house and of the committee of the whole shall be open unless the business is such as ought to be kept secret." (North Dakota Century Code, Replacement Vol. 13, Indianapolis: Allen Smith, 1981, p. 155.) On p. 156: Law Reviews. Government in the Sunshine: The Status of Open Meetings and Open Records in North Dakota, Daniel S. Guy and Jack McDonald, 53 N.D. Law Rev. 51. (Note: no constitutional update available.)

1889
§ 50

✓ OHIO: Art. II S. 13. When Session to Be Public. The proceedings of both houses shall be public, except in cases which, in the opinion of two-thirds of those present, require secrecy. Research aid O-JUR2: Legislative Section 21.

✓ OREGON: Art. IV S. 14. Deliberations to be open; rules to implement requirement. 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.

(Amendment proposed by S.J.R. No. 36 1973 and adopted by people Nov. 5, 1974. Amendment proposed by H.J.R. No. 29 1977 and adopted by people May 23, 1978.)

315 priv.
311 ruled

PENNSYLVANIA: Art. 2 S. 13. The sessions of each House and of Committees of the Whole shall be open, unless when the business is such as ought to be kept secret. →

§ 9 ruled
311 priv.

(1889)
SOUTH DAKOTA: Art. III S. 15. Open legislative sessions--Exception. The sessions of each house and of the committee of the whole shall be open, unless when the business is such as ought to be kept secret. (Historical note. The 1974 amendment proposal (S.L. 1974 Ch. 1 rejected Nov. 5, 1974.) would have transferred the substance of the first clause of this section to new S. 6; would have extended it to joint session, all committee meetings and legislative commission meetings; and would have deleted the secrecy clause. The proposal would also have rewritten the other portions of the article. (Amendment proposed by S. J. R. 1975. Ch. 2. as amended by S. J. R. 1975. Ch. 2.)

Art 4 S16 rules
S11 privilege.

Michigan Compiled Laws Annotated. St. Paul: West, 1985, pp. 525 (Constitution of Michigan, vol. name).

1963

Art. 4, S. 20. Open Meetings. The doors of each house shall be open unless the public security otherwise requires.

prim const. 1835

Convention Comment. This is a revision of Sec. 18, Art. V, of the present (1908) constitution declaring that meetings of the legislature shall be open unless public "security" otherwise requires. The new word replaces "welfare" and is more descriptive of a situation which might require secrecy.

Art. 4, S. 17. Committees, record of votes, public inspection, notice of hearings. SEC. 17. Each house of the legislature may establish the committees necessary for the efficient conduct of its business and the legislature may create joint committees. On all actions on bills and resolutions in each committee, names and votes of members shall be recorded. Such vote shall be available for public inspection. Notice of all committee hearings and a clear statement of all subjects to be considered at each hearing shall be published in the journal in advance of the hearing.

p. 519. Convention Comment. This is a new section designed to eliminate secrecy in legislative committee meetings. Such committees must keep a recorded roll call vote of all action on bills and resolutions taken in committee and the vote must be available for public inspection.

Notice of all committee hearings and a clear statement of all subjects to be considered at each hearing shall be published in the journal prior to the hearing.

p. 521. (Atty. Gen. Op.) 6. Notice of hearings' requirement of this section that notice of all committee hearings be published in advance in the journal applied to all scheduled public hearings before a legislative committee, not to committee meetings, and, therefore, absence of printed notice in house journal of proposed committee consideration of house bill did not invalidate house action in approving bill. Op. Atty. Gen. 1965, No. 4427, p. 96.

7. Open Meetings. Since a joint legislative committee is "public body" within the meaning of M.C.L.A. S. 15.262, its meetings are subject to the requirements of the Open Meetings Act, M.C.L.A. S. 15.261, et seq. Op. Atty. Gen. 1978, No. 5300. p. 451.

A legislative committee is included within the purview of the Open Meetings Act M.C.L.A. S. 15.261 et seq., and may not engage in the practices of "round-robbing" by which votes on a measure are obtained by a member of the committee going to other members and obtaining their signatures on a tally sheet. Op. Atty. Gen. 1977, No. 5222, p. 216.

get these from Pleadings

Immunity from ~~trial~~ pretrial discovery depositions & discovery when ^{senators} non-party
Bishop v. Montante, 237 N.W. 2d 465 (1976) - ind. important issue.

U. of Mich. Law Library Study Report on Legislative Privilege. Michigan Law Revision Commission (1983), 18th Annual Report, p. 14

1976, Ch. 1, rejected Nov. 2, 1976.) (South Dakota Codified Laws, Indianapolis: Allen Smith, 1978, p. 242.) Law Reviews. "Constitutional Limitations on the Enactment of Statutes in South Dakota", 25 S.D. Law Rev. 14 (1980).

✓ TENNESSEE: Art. 2 S. 22. Open sessions and meetings--Exception--The doors of each House and of committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret.

✓ Law Reviews. "Tennessee Sunshine: The People's Business Goes Public", Richard L. Hollow and Rudolph L. Ennis, 42 Tenn. L. Rev. 52.

✓ Atty. Gen. Op. Election of committee officers, OAG 83-072 (2/23/83).

TEXAS: Art. 3 S. 16. ^{1876; amended 1984} Open sessions. Sec. 16. The sessions of each House shall be open, except the Senate when in Executive session.

Vernon's Constitution of the State of Texas Annotated, St. Paul: West, 1984, p. 459.) Interpretive Commentary. Originally it was the custom of the British Parliament to hold its sessions behind closed doors, and the seal of secrecy was placed on its deliberations. Such was thought necessary to prevent the King from learning what the members of Parliament were thinking and doing.

In America, it has been the belief that known and open responsibility is valuable as a check or an incentive upon the representatives of the people, and that secrecy of legislative proceedings is conducive to intrigue and unconstitutional combinations.

Therefore, to change the principle of parliamentary law calling for closed sessions, the constitutions of most of the states provide for public proceedings except on occasion when, in the judgment of the house concerned, secrecy may be desirable.

The Texas Constitution here follows this trend providing that the legislative sessions shall be open, except the Senate when in executive session.

Executive sessions are those where the Senate considers matters not discreet to reveal to the public. At such times, there is also considered (p. 460) the gubernatorial appointments which must be confirmed or rejected by the senate.

UTAH: Art. VI S. 15. All sessions of the Legislature, except those of the Senate while sitting in executive session, shall be public; and neither house, without the consent of the other, shall adjourn for more than three days, not to any other place than that in which it may be holding session. (Collateral References. "Committee created by joint or concurrent resolution to function after adjournment of legislature," 28 A.L.R. 1158). (Attempts to amend, 1971

*excludes
Cons.
1845-art 3 §18
1861-art 3 §17
1866-art 3 §17
1869-art 3 §22*

*§14 priv.
from
§11 rules*

*Rules §12
priv §8*

*See Tenny v. Brandhove
immunity i
public good*

and 1972, have failed.)

319 rule
Ch. 1, Art. 14
priv.

VERMONT: Ch. II ~~§~~^{art. 8}. The doors of the House in which the General Assembly of this Commonwealth shall sit, shall be open for the admission of all persons who behave decently, except only when the welfare of the State may require them to be shut. (1793; amended 1982)

319 rule
316 priv. fr.
317 freedom
318
319

WASHINGTON: Art. 2 S. 11. Each house shall keep a journal of its proceedings and publish the same except such parts as require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall adjourn for more than three days, nor to any place other than that in which they may be sitting, without the consent of the other. (Adopted 1889)

318 rule
315
316
priv.
immunity

WISCONSIN: Art. 4 S. 10. Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open except when the public welfare shall require secrecy. Neither house shall, without consent of the other, adjourn for more than three days. ("Open Meetings of Government Bodies" see: W.S.A. S.19.81 et seq.) (1848)

312 rule
316 priv.

WYOMING: Art. 3 S. 14. The sessions of each house and of the committee of the whole shall be open unless the business is such as requires secrecy. (1890)

Legis ~~Imm~~ Priv. → 41 ALR 4th 1116

Wis. Immunity - not great for us - do we have - State v. Beno, 327 341 NW 2d 668 (1984)

Wash. immunity not critical - Op. Atty Gen 61-62 No. 134 - not in our law library

insightfully observed: "An informal conference or caucus of any two or more members [of a public body] permits crystalization of secret decisions to a point just short of ceremonial acceptance."⁵⁸ Statutory regulation of informal meetings, however, raises constitutional problems involving the right of free speech. In *Keyishian v. Board of Regents*,⁵⁹ the United States Supreme Court stressed the precision which must attend statutory regulation of expression:

We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms, . . . [f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." . . . When one must guess what conduct or utterance may lose him his position, one necessarily will "[s]teer far wider of the unlawful zone. . . ."⁶⁰

In regulating attempts to circumvent its requirements, therefore, an open-meeting law must be precise enough so that its members may know the conduct proscribed. But more than mere precision of regulation is required. Regulation of chance meetings must also recognize the substantive right of free speech enjoyed by members of governing bodies. Article I, section 19 of the Tennessee Constitution, after all, secures not only the rights of free press and open government, but also that of free speech.⁶¹ While "the right of free speech is not absolute at all times and under all circumstances,"⁶² it too must be protected along with the right of open government.

In an effort to recognize the free speech rights of members of governing bodies and at the same time to prevent circumvention of the law, Tennessee's Open-Meeting Act provides:

Nothing in this section shall be construed as to require a chance

58. *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971).

59. 385 U.S. 589 (1967).

60. *Id.* at 603-04 (citations omitted).

61. The relevant language is: "[E]very citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." TENN. CONST. art. I, § 19.

62. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). See also *Terminiello v. City of Chicago*, 337 U.S. 1, 6 (1948); *Cuntwell v. Connecticut*, 310 U.S. 296, 310 (1940); *Melton v. Young*, 328 F. Supp. 88, 91 (E.D. Tenn. 1971), *aff'd*, 465 F.2d 1332 (1972), *cert. denied*, 411 U.S. 951 (1973).

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the extent of requiring t
a public forum. In *City*
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and government is p
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63. Open-Meeting Act § 2
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must never be called for the pur
IND. ANN. STAT. § 37-605 (Bur
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as to defeat the declared policy
meetings "shall not be used as
STAT. ANN. § 42:6 (1965) (close
purposes of this [act]"); ME.
not be used to defeat the purp
(Cum. Supp. 1974) ("Executi
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65. 245 So. 2d 38 (Fla.

ation of government without permitting public scrutiny and participation is what the law seeks to prohibit.⁶⁶

Moreover, that court's further definition of a secret meeting could just as well be followed to define chance meetings under the Tennessee Act.

A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public. When at such meetings officials . . . transact or agree to transact public business at a future time in a certain manner they violate the . . . sunshine law, regardless of whether the meeting is formal or informal.⁶⁷

This definition should satisfy the constitutional rule that the proscribed conduct be clearly delineated so that "those who desire to obey the statute will have no difficulty in understanding it."⁶⁸

D. Notice of Meetings

Besides chance or sham public meetings, an open-meeting law can fail to achieve its intended purpose of public scrutiny of the public's business if open meetings are not preceded by adequate public notice. Section 3 of Tennessee's Sunshine Law treats this problem.

The substance of section 3 of the Act is based largely on an amendment.⁶⁹ The original House bill provided:

Any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate public notice of such meeting.⁷⁰

The amendment incorporated verbatim this original section as subsection (b) of the current law and added the following subsections:

- (a) Any such governmental body which holds a meeting pre-

66. *Id.* at 41.

67. *Id.* See also *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 1973); *Canney v. Board of Pub. Instruction*, 278 So. 2d 260 (Fla. 1973); *Board of Pub. Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969).

68. *Memphis Publishing Co. v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974).

69. This amendment to H.R. 1486, *supra* note 15, was sponsored by Representative Michael Murphey and was adopted by the House on February 11, 1974.

70. *Id.*

viously scheduled by statute, ordinance, or resolution, shall give adequate public notice of such meeting.

(c) The notice required by this subsection shall not be in substitution of, and shall not be deemed to be, any notice otherwise required by law.

Read together, subsections (b) and (c) require a governing body to give adequate public notice of a meeting when, or where the meeting is held.

Subsection (c) provides that the notice requirement exists independent of any notice otherwise required by law of any governmental body. It does not impliedly repeal any law relating to notice; instead, it is a broadsword. After adherence to the notice otherwise required by law, it is necessary, to achieve adequate public notice of a governing body's meetings, notice otherwise required by law. It evidences a legal fiction that the notice requirement of the statute, ordinance, or resolution is not available information to the public. It is the precise legal fiction recognized, yet have turned a blind eye to the requirement.⁷¹

Central, however, to the meaning ascribed to the sole portion of the Act is the meaning ascribed to the sole portion of the Act spoke in the recent case *Memphis*.⁷²

We think it is impossible to what the phrase "adequate public notice" means. We agree with the Chief Justice that adequate public notice is based on the totality of the information available to the public. In the ab-

71. Open-Meeting Act §§ 1-3.

72. Reply Brief of Tenn. 1.

73. *Memphis Publishing Co. v. City of Memphis*, 513 S.W.2d 511 (Tenn. 1974).

called Senatorial and Assembly Districts. Each Senatorial district shall choose one Senator and each Assembly district shall choose one member of the Assembly.

Adopted June 3, 1980.

Former Section: Former Art IV § 6, similar in part to present Art IV § 6, was adopted May 7, 1879, amended November 2, 1926, November 3, 1942, and repealed June 3, 1980. The text of former § 6 is set out in 2 *Deering's Constitutional Annotations* at page 68.

Cross References:

- Reapportionment of districts: Art XXI § 1.
- Compilation by county clerk of reapportionment information: Elec C § 51.
- Boundaries of assembly districts: Elec C § 30010.
- Boundaries of senatorial districts: Elec C § 30020.
- Reapportionment of House of Representatives: 2 USCS § 2a.

If research prior to 1974 is desired, consult the collateral references and casenotes in 2 *Deering's Constitutional Annotations* beginning at page 70.

Collateral References:

- 42 Cal Jur 3d Legislature §§ 2, 3.
- Am Jur 2d Elections §§ 12 et seq.

Law Review Articles:

- Legislative apportionment. 1 *Hast Const LQ* 289.

NOTES OF DECISIONS

Population variations of up to 7.83 per cent, and averaging less than 2 per cent, among Connecticut's state legislative districts under a reapportionment plan are insufficient to prove a prima facie case of invidious discrimination under the equal protection clause. *Gaffney v Cummings* (1973) 412 US 735, 37 L Ed 2d 298, 93 S Ct 2321; for similar analysis of Texas' plan (involving 9.9% variation between largest and smallest districts), see *White v Regester* (1973) 412 US 755, 37 L Ed 2d 314, 93 S Ct 2332.

When a federal court imposes a reapportionment plan upon a state, single-member districts are preferable in the absence of unusual circumstances; however, legislative reapportionment is primarily a matter for legislative consideration and determination, and when the state accepts this responsibility, its decisions as to the most effective reconciling of traditional policies should not be restricted beyond the commands of the equal protection clause. *Wise v Lipscomb* (1977) 434 US 1329, 54 L Ed 2d 41, 98 S Ct 15.

§ 7. Procedure; Journal; Public Sessions; Recesses

(a) Each house shall choose its officers and adopt rules for its proceedings. A majority of the membership constitutes a quorum, but a smaller number may recess from day to day and compel the attendance of absent members.

(b) Each house shall keep and publish a journal of its proceedings. The rollcall vote of the members on a question shall be taken and entered in the journal at the request of 3 members present.

(c) The proceedings of each house and the committees thereof shall be public except as provided by statute or by concurrent resolution, when such resolution is adopted by a two-thirds vote of the members

Meetings

[Added by Stats 1967 ch 1656 § 122.]

- § 11120. Legislative finding and declaration; Open proceedings; Citation of article
- § 11121. "State body"
- § 11121.2. Additional definition of "state body"
- § 11121.5. Applicability to official student body organizations
- § 11121.7. Additional definition of "state body"
- § 11121.8. Additional definition of "state body"
- § 11121.9. Providing copy of article to members of state bodies
- § 11122. "Action taken"
- § 11123. Required open and public meetings
- § 11124. Prohibited conditions to attendance
- § 11124.1. Recording proceedings
- § 11125. Notice of meeting
- § 11125.1. Agenda and other "writing" as public record; Inspection
- § 11125.2. Public report of action taken regarding public employee
- § 11125.5. Emergency meetings; Notification of media
- § 11126. Permitted closed sessions
- § 11126.1. Minute book of closed session
- § 11126.3. Statement of reasons and authority for closed session
- § 11126.5. Clearing room where meeting wilfully interrupted
- § 11126.7. Fees
- § 11127. State bodies subject to article
- § 11128. When closed sessions held
- § 11129. Continuance or recontinuance of hearing
- § 11130. Commencement of action
- § 11130.5. Costs and attorney fees
- § 11130.7. Offenses
- § 11131. Prohibition against use of certain facilities

Cross References:

- Cancer Advisory Council exempt from conducting meetings open to public in accordance with this article: H & S C § 1702.
- Exclusion of meetings of board of directors of State Compensation Insurance Fund from provisions of this article: Ins C § 11770.5.
- Application of provisions of this article to meetings of Colorado River Board of California: Wat C § 12516.
- Required certificate, of Colorado River Board of California, that meetings were in accordance with provisions of this article: Wat C § 12519.

Collateral References:

- Cal Jur 3d Public Housing § 22, Public Utilities § 23.

Annotations:

- Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

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(c) The proceedings of each house and the committees thereof shall be public except as provided by statute or by concurrent resolution, when such resolution is adopted by a two-thirds vote of the members

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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NOTES OF DECISIONS

Population variations of up to 7.83 per cent, and averaging less than 2 per cent, among Connecticut's state legislative districts under a reapportionment plan are insufficient to prove a prima facie case of invidious discrimination under the equal protection clause. *Gaffney v Cummings* (1973) 412 US 735, 37 L Ed 2d 298, 93 S Ct 2321; for similar analysis of Texas' plan (involving 9.9% variation between largest and smallest districts), see *White v Regester* (1973) 412 US 755, 37 L Ed 2d 314, 93 S Ct 2332.

When a federal court imposes a reapportionment plan upon a state, single-member districts are preferable in the absence of unusual circumstances; however, legislative reapportionment is primarily a matter for legislative consideration and determination, and when the state accepts this responsibility, its decisions as to the most effective reconciling of traditional policies should not be restricted beyond the commands of the equal protection clause. *Wise v Lipscomb* (1977) 434 US 1329, 54 L Ed 2d 41, 98 S Ct 15.

§ 7. Procedure; Journal; Public Sessions; Recesses

(a) Each house shall choose its officers and adopt rules for its proceedings. A majority of the membership constitutes a quorum, but a smaller number may recess from day to day and compel the attendance of absent members.

(b) Each house shall keep and publish a journal of its proceedings. The rollcall vote of the members on a question shall be taken and entered in the journal at the request of 3 members present.

(c) The proceedings of each house and the committees thereof shall be public except as provided by statute or by concurrent resolution, when such resolution is adopted by a two-thirds vote of the members

of each house, provided, that if there is a conflict between such a statute and concurrent resolution, the last adopted shall prevail.

(d) Neither house without the consent of the other may recess for more than 10 days or to any other place.

Adopted November 8, 1966; Amended November 7, 1972; June 4, 1974; June 8, 1976.

Prior Law: See 2 *Deering's Constitutional Amendments* at page 76.

Amendments:

1972 Amendment: Substituted "10" for "3" in subd (d).

1974 Amendment: Substituted "as provided for statute or by concurrent resolution, which such resolution is adopted by a two-thirds vote of the members of each house, provided, that if there is a conflict between such a statute and concurrent resolution, the last adopted shall prevail" for "on occasions that in the opinion of the house require secrecy" in subd (c).

1976 Amendment: Substituted "when" for "which" before "such resolution" in subd (c).

Former Section: Former Art IV § 7, similar in part to the present section, was adopted May 7, 1879, and repealed November 8, 1966. The text of former § 7 is set out in 2 *Deering's Constitutional Annotations* at page 76.

Cross References:

Senate organization: Gov C § 9022.

Assembly organization: Gov C § 9023.

Choosing legislative officers: Gov C §§ 9170-9172.

Removal of legislative officers: Gov C § 9173.

Custody of journal: Gov C § 12160.

Proceedings of House of Representatives and Senate: USCS Constitution Art I § 5.

If research prior to 1974 is desired, consult the collateral references and casenotes in 2 *Deering's Constitutional Annotations* beginning at page 76.

Collateral References:

Cal Jur 3d Legislature §§ 12, 15, 16, Statutes §§ 40-44.

Am Jur 2d States, Territories and Dependencies §§ 35 et seq.

§ 8. Passage of bills; Effective dates; Urgency statutes

(a) At regular sessions no bill other than the budget bill may be heard or acted on by committee or either house until the 31st day after the bill is introduced unless the house dispenses with this requirement by rollcall vote entered in the journal, three fourths of the membership concurring.

(b) The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, two thirds of the membership concurring. No bill may be passed until the bill with amendments has been printed and distributed to the members. No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs.