

NOTE

Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC *and You*

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Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.⁽²⁾

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Introduction

"Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant and electric light the most efficient policeman."⁽³⁾ Justice Brandeis' words, so often quoted in reference to the Government in the Sunshine Act (Sunshine Act or the Act), identify the goals set forth by Congress in implementing the Act. The Sunshine Act provides for open meetings of government agencies and the prohibition of *ex parte* communications by agency personnel in connection with adjudicatory hearings.⁽⁴⁾ The policy behind the Act is to allow the public as much access to information regarding the decisionmaking processes of the federal government as is practicable, or in other words, the "government should conduct the public's business in public."⁽⁵⁾ While the primary purpose of the Act is to provide the public with information, this right must be balanced with the protection of individual privacy rights, and should allow the government the ability to continue to carry out its responsibilities efficiently.⁽⁶⁾

Based on one source, the severity of the changes mandated, at least as related to core administrative processes of numerous agencies, ranks the Act "among the most sweeping enactments in the history of the Federal administrative establishment."⁽⁷⁾ Now in its twentieth year, the Sunshine Act has not come without significant costs. This Note discusses how those costs, such as a decrease in collegial decisionmaking, staff level decisions, and increased notation voting, outweigh the benefits of the Act in fostering public understanding. Since the Act does reduce significantly the temptation by agencies to make decisions in complete secrecy and without explanation, this Note argues only that the Act be narrowed to allow the Federal Communications Commission (FCC or the Commission) and other agencies to operate in the same ways as Congress and Federal courts, through open and frank discussion of issues. This Note argues that by narrowing the Act to allow for predecisional debate among agency commissioners, public welfare is heightened because the FCC, as well as other agencies, will make better informed decisions.

I. The Government in the Sunshine Act

A. Purposes Behind the Act

The Sunshine Act, passed in 1976, came in an era when disillusion and distrust of government was high. Vietnam had just come to an end and Watergate was fresh in the minds of the American public. By 1972, almost two-thirds of Americans believed that those in government were acting in their own self-interest rather than acting in the best interest of the country.⁽⁸⁾ The public was not aware of many government activities and much of the information received by the public was information selected for public announcement by the government.⁽⁹⁾

In response to the disillusion and dissatisfaction with government, Congress began to expand open government first with the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA), then by passing new laws including the Sunshine Act. At the time of the enactment of the Sunshine Act, open-records-and-meeting laws existed in most of the states.⁽¹⁰⁾ The open-meetings requirement of the Act, discussed *infra* Part I.B., was designed to allow the public to view firsthand the government process thereby increasing "public understanding of administrative decisionmaking processes."⁽¹¹⁾ In theory, "people are able to gain a better understanding of the thought process behind government actions and to ensure that their concerns have been considered" through this public viewing.⁽¹²⁾

B. Open Meetings

The Act requires every portion of every meeting of an agency, including the FCC, to be open to public observation.⁽¹³⁾ A "meeting" is defined as deliberations which include the number of individuals required to make decisions on behalf of an agency, and result in disposition of agency business.⁽¹⁴⁾ Members of agencies are not allowed to conduct agency business unless it is in accordance with the provisions of 5 U.S.C. 552b.⁽¹⁵⁾ If the commission members hold a

meeting, the agency must make a public announcement of the time, place, and subject matter of the meeting, as well as whether the meeting is to be open or closed, at least one week prior to the meeting.⁽¹⁶⁾ In essence, this means that the five commissioners of the FCC may not discuss agency business when three or more commissioners are in each other's presence. For instance, if two commissioners are speaking about an issue which will be addressed by the FCC in the near future and a third commissioner joins the conversation, the three commissioners violate the Act.⁽¹⁷⁾ The commissioners may only discuss the matter with each other after giving public notice of the meeting.⁽¹⁸⁾

C. Closing Meetings

There are ten exceptions or exemptions whereby meetings may be closed.⁽¹⁹⁾ However, the standard for closing a meeting is a strict one. "In case of doubt as to whether a portion of a meeting is exempt, the presumption is to be in favor of openness[,] . . . [e]ven if a matter falls within an exemption. . . ."⁽²⁰⁾ If the public interest requires that the meeting be open, then it must be open.⁽²¹⁾ Any person is allowed to challenge the closing of a meeting through court proceedings, and the burden of proving that the closing is valid rests with the agency.⁽²²⁾

1. Requirements to Close Meetings

If the commissioners of an agency choose to close a meeting, believing the contents of the meeting fall within one of the exemptions, a majority of the commissioners must vote to do so.⁽²³⁾ The vote of each commissioner must be recorded and made available within one day of the vote,⁽²⁴⁾ so the general public will be aware of a commissioner's stance on openness.⁽²⁵⁾ In addition, if a portion of a meeting is to be closed, the agency must make available a full written explanation of its actions in closing the meeting.⁽²⁶⁾ This explanation should contain under which exemption the closing falls, as well as the factors used in the determination to close the meeting, and how the discussion falls within the exemption.⁽²⁷⁾ The explanation "should in every instance be as detailed as possible without revealing the exempt information."⁽²⁸⁾

2. Requirements Subsequent to the Closed Meeting

The agency must maintain a complete transcript or electronic recording of each closed meeting, to be made available to the public after the meeting.⁽²⁹⁾ The transcript or recording must include the discussion of all items on the agenda, as well as the identity and testimony of any person testifying at the meeting, excluding only those items that are covered under the exemptions.⁽³⁰⁾ In place of deleted material, the agency must give a written explanation of the reason for the deletion and the section of the statute that allows the deletion.⁽³¹⁾

These transcripts are to be made available to the public at the cost of duplication and, if the public interest so requires, the transcripts must be made available at no charge.⁽³²⁾ Furthermore, the agency must keep a complete, verbatim copy of the transcript or recording for at least two years after the meeting or until one year after the conclusion of any agency proceeding addressed in the meeting.⁽³³⁾ At the time of the enactment of the Sunshine Act, it was assumed that once a closed meeting was held, most or all of it would turn out to be nonexempt, and the transcript would be made available in lieu of attending the meeting.⁽³⁴⁾

D. Remedies Available

Any person who believes an agency is in violation of the Sunshine Act may bring action against that agency in federal court.⁽³⁵⁾ However, the action must be brought within sixty days after the meeting in which the alleged violation took place, and must be brought in the District of Columbia, in the district where the agency has its headquarters, or in the district where the meeting was held.⁽³⁶⁾

There are few remedies available for someone alleging a violation of the Act. The district court may enjoin the agency from committing similar violations in the future, or may release portions of the transcript of the meeting that were not

authorized to be withheld.⁽³⁷⁾ A federal court having jurisdiction only on the basis of the Sunshine Act may not "set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose."⁽³⁸⁾ In essence, the only real remedy available to plaintiffs is finding out what happened at the meeting.⁽³⁹⁾

In addition, the court may assess reasonable attorney fees and other litigation costs against any party who substantially prevails in an action, but fees may only be assessed against the plaintiff when the court determines that the action brought was primarily for frivolous or dilatory purposes.⁽⁴⁰⁾ In assessing costs against an agency, the costs may be assessed against the United States.⁽⁴¹⁾

When one considers the remedies available to plaintiffs, it is easy to see why many individuals would not bring an action against an agency. It would be costly and the only real benefit available to plaintiffs will be viewing the information from the meeting. It is hard to imagine a situation in which an ordinary citizen would be so interested in the business of the FCC or any other agency that he or she would incur such substantial costs, not to mention that the suit would most likely have to be brought in Washington, D.C., since few, if any, meetings are held outside the FCC's headquarters. In fact, few have brought suit against the FCC.

II. Litigation Involving the FCC

The FCC has not often been required to defend its actions in closing a meeting. In the landmark case of *FCC v. ITT World Communications, Inc.*,⁽⁴²⁾ the Supreme Court for the first time considered an issue relating to the Sunshine Act. ITT, a telecommunications carrier, brought suit alleging that the FCC's negotiations with foreign officials, through the telecommunications committee of the FCC, were in violation of the Sunshine Act. According to the court record, at the time of the negotiations, ITT and another American corporation were the only corporations providing overseas record telecommunications and were opposed to the entry of new competitors. The Court held that these negotiations were "consultative process sessions," and that "[s]uch deliberations lawfully could not determine or result in the joint conduct or disposition of official agency business' within the meaning of the Act."⁽⁴³⁾

In other cases, the FCC was challenged for closing a meeting based on exemption ten,⁽⁴⁴⁾ for using notation voting to dispose of agency business,⁽⁴⁵⁾ and for not complying with the Sunshine Act's notice requirement for meetings.⁽⁴⁶⁾ The courts decided in favor of the FCC in all of these cases. The most negative decision against the FCC involved the court striking down the FCC's stricter standard concerning the definition of "meeting."⁽⁴⁷⁾ The fact that the FCC in the past has faced few challenges suggests that the FCC has been very open in making decisions, and further suggests that the Act has beneficial effects. However, the larger question is whether the broadness of the Act and its resulting benefits, outweigh the substantial costs to the decisionmaking process.

III. Costs of the Act

When the Sunshine Act was adopted, the Act's proponents determined that added costs would be minimal. For instance, the House Committee on Government Operations estimated that the extra cost to agencies would be minor, and saw most of the costs coming through administrative and clerical expenses. The committee assumed that most agency meetings would be open to the public and would therefore not require transcripts or electronic recordings.⁽⁴⁸⁾ A 1984 report showed that the monetary costs of the Act were, in fact, slight.⁽⁴⁹⁾ Furthermore, it is reasonable to assume that administrative costs have not increased tremendously over subsequent years.

However, there are larger costs, not just monetary in nature, that are drawbacks which must be seriously considered when determining whether the Act achieves its original purpose without serious detrimental effects. From the agency perspective, increased costs were not viewed as coming in monetary terms, but in terms of greater costs to effectiveness and sound decision making.⁽⁵⁰⁾ In reality, costs have come in the form of decreased collegial decisionmaking, policy being determined by the staffs of commissioners, as well as trial runs by the commissioners'

staffs for formal open meetings. Furthermore, there is more use of notation voting, as well as fewer potentially useful discussions being held, and more concentration of power in the hands of the chairman.

A. Decrease In Collegiality

The biggest problem most see with the Sunshine Act is that it decreases collegiality in the decisionmaking process. Collegial decisionmaking is based on the view that those who head an agency will be open and frank in debating their conflicting views.⁽⁵³⁾ However, many commissioners are unwilling to put forth views in an open forum for fear that they may seem uncertain or uninformed about their decisions.⁽⁵⁴⁾ Because of their fear that they will expose their ignorance or uncertainty on an issue, commissioners "disguise their uncertainty with stilted and contrived discussions that greatly impede the kind of frank exchange of views that is essential to high quality decisionmaking by a collegial body."⁽⁵⁵⁾ The reason that agencies have a number of commissioners is that the interchange of differing ideas about public policy issues among the commissioners will lead to "a collective maturing judgment," which in turn will lead to the best result.⁽⁵⁶⁾ The implementation study completed seven years after the adoption of the Act found that there was a shift in decisionmaking away from collegial processes and toward segmented individual processes.⁽⁵⁷⁾ The study found various explanations for this, including increased notation voting and a resulting decline in the importance of meetings in making decisions, and a sense that collegial bodies are impaired in the performance of the agency leadership responsibilities placed on them by the statute.⁽⁵⁸⁾ Since a commissioner may not discuss or debate with all of her colleagues, she will often turn to discussions with staff members.

B. Staffing Decisions

Under the Act, the staffs or assistants to commissioners are not considered to be a "collegial body" and therefore are allowed to meet and discuss agency business freely.⁽⁵⁹⁾ Meetings of staff members began taking place with more frequency after the Sunshine Act was adopted.⁽⁶⁰⁾ These meetings theoretically allow a commissioner to gauge the views of other commissioners before an open meeting, but since a commissioner gains much of his knowledge through secondary discussions with staff members after their consultation with the staff members of other commissioners, decisionmaking and, ultimately, policymaking take place at a lower level, creating a breakdown in the communication lines among commissioners.⁽⁶¹⁾ Furthermore, a staff member feels obligated to reflect the views held by his or her commissioner and is often not willing to change that view based upon the views of other members' staffs.⁽⁶²⁾ There is more flexibility in changing a commissioner's mind when all commissioners are present in an open debate.⁽⁶³⁾ Members are chosen because of their expertise and the Sunshine Act cannot facilitate the public interest when decisions are made by commissioners based on staff information.

C. Notation Voting

Many decisions are made by commissioners through notation voting without deliberation or discussion. Notation voting is sometimes used to dispose of matters which are of slight significance and which would require too much time on the meeting agenda.⁽⁶⁴⁾ However, notation voting is also used to avoid discussing matters in open meetings.⁽⁶⁵⁾

The use of notation voting was upheld in *Communications Systems, Inc. v. FCC*.⁽⁶⁶⁾ The court held that the FCC's use of notation voting was proper, and stated that "[n]otation voting enables Government agencies to expedite consideration of less controversial cases without formal meetings. . . . If all agency actions required meetings, then the entire administrative process would be slowed--perhaps to a standstill."⁽⁶⁷⁾ The use of notation voting is yet another sign that the collegial process has broken down to a great extent under the Act.

D. Potentially Useful Meetings Not Being Held

Another problem under the Act is avoiding useful discussion. There is some indication that useful discussions may be avoided because those not subject to the Act are reluctant to discuss matters in a public forum. Additionally, there is some evidence to suggest that those not subject to the Act are reluctant to engage in closed meetings when classified or

sensitive material is involved.⁽⁶⁸⁾

In *ITT*, discussed *supra* Part II, the court held that meetings between the telecommunications committee and foreign governments were not "meetings" within the definition of the Act.⁽⁶⁹⁾ In deciding this case, the Supreme Court may have been aware of the potential problems the FCC would face during negotiations with foreign governments if it was required to disclose the negotiations to the public.

E. Control By the Chairman

Since the chairman is not allowed to confer with all of his colleagues, he will generally turn to his staff, as previously discussed. This creates a potential problem that the public may get a picture of the agency through the chairman's eyes only. The temptation to confer only with his staff is especially strong when the chairman is under time pressure, which is generally the case when the chairman is asked to speak before congressional committees.⁽⁷⁰⁾ It would be difficult for the chairman to circulate his testimony to all of the commissioners one-by-one, take their individual suggestions into account, then recirculate the testimony again prior to the hearing.⁽⁷¹⁾ The chairman is often expected to testify before Congress, and without the potentially differing views of the other commissioners, the public gains a view of the Commission based upon only one member. This certainly does not help the public gain a better understanding of how the Commission makes decisions.

IV. Suggested Reforms

A. Recent Hearings

The Sunshine Act has generated some controversy since its enactment, but has recently been in the news as a result of hearings held on the Act. One of the most fervent supporters of reform to the Act is Commissioner Steven M.H. Wallmann of the Securities and Exchange Commission (SEC). In a September 1995 hearing before a special committee of the Administrative Conference of the United States (an independent, nonpartisan group dedicated to reforming federal administrative processes), Commissioner Wallmann stated that he was "an ardent supporter of the act's main goal: enhancing public understanding of agency decision-making through open deliberations."⁽⁷²⁾ However, he added that, except in rare instances, open meetings are "short, scripted and perfunctory events involving no deliberation among agency officials."⁽⁷³⁾ At the time of the hearings, Wallmann was in a different situation than the FCC commissioners: Because of delays within the executive branch, the SEC, which is supposed to have five commissioners, had only two.

Although the FCC now has five commissioners, it is not impossible for the situation that occurred at the SEC to become a reality at the FCC. When and if this happens, the collegial process suffers even more of a breakdown. Another administrator speaking at the hearing, Chairman Stuart E. Weisberg of the Occupational Safety and Health Review Commission, testified that, at his agency, a quorum consists of two members.⁽⁷⁴⁾ Because of this small quorum, "commission members historically have been very reluctant to talk to any other member outside of agenda meetings, lest those seeing two members together might think they were violating the act."⁽⁷⁵⁾ This is essentially what happened at the SEC; since there were only two commissioners, they were unable to communicate with each other on agency matters without violating the Act and were forced to communicate through their staffs.⁽⁷⁶⁾

According to Alan C. Campbell, former president of the Federal Communications Bar Association, a relaxation of the definition of "meeting" within the Act would improve the decisionmaking process.⁽⁷⁷⁾ Along these lines, this Note argues that the Sunshine Act should follow in the footsteps of the FOIA, and allow predecisional deliberations to occur among commissioners, without the need for public viewing.

B. Exemption under FOIA

In order to allow for frank and open debate, FOIA, under exemption five which pertains to interagency and intra-

agency memoranda, allows protection from public view those communications made in the predecisional deliberations.⁽⁷⁸⁾ FOIA requires every agency to publish agency rules, procedures, and organizational materials in the Federal Register.⁽⁷⁹⁾ However, the agencies are not required to publish information which falls under one of the exemptions in 5 U.S.C. 552b. The fifth exemption in FOIA pertains to inter- or intra-agency memoranda or letters that are not be available to anyone outside the agency. However, if another agency is involved in litigation with the agency that prepared the memoranda or letters, the memoranda or letters may be available to that agency.⁽⁸⁰⁾ The purpose of the exemption was to avoid premature disclosure of agency transactions, and to allow frank and open debate of views within the agency in order to better allow formulation of policies and procedures.⁽⁸¹⁾ According to the legislative history, the exemption was intended to exempt disclosure of information when necessary, yet at the same time not permit complete administrative secrecy.⁽⁸²⁾ By adopting an exemption in the spirit of FOIA that would allow predecisional debate, members of the FCC would be able to engage in open deliberations, such as those in which they engaged prior to the adoption of the Sunshine Act.

According to A.A. Sommer, who served as a commissioner of the SEC prior to the Sunshine Act, gatherings around the chairman's table were common, and allowed for discussion with "utmost candor" issues confronting the Commission.⁽⁸³⁾ However, Sommer stated that this type of candor is impossible "in the presence of the press, the public, and members of the staff uninvolved in the matter under discussion."⁽⁸⁴⁾ Decisionmaking through open debate is what best serves the public interest. For those affected by the decisions of the FCC, which includes most of the public in cases like the recent debate on children's television, the best solutions arise from informed decisionmaking, which is the purpose behind multimember agencies.

According to the Welborn study, the underlying problem appears to be "that policy and strategic planning and the provision of meaningful direction to the staff commonly require the speculative exploration of sensitive matters at an early stage if there are to be productive results."⁽⁸⁵⁾ This is difficult because there are uncertainties as to the dimensions of the problems, the views of staff and other members, and available options. In addition, when the public reacts adversely to tentative "strategic thinking," this makes it even more difficult.⁽⁸⁶⁾ Therefore, "collective discussions of important matters often do not take place, or they come so late in the process that the positive effects of free collegial interaction are substantially forfeited."⁽⁸⁷⁾ Allowing an exemption such as the one under FOIA would encourage the FCC to engage in open debate about sensitive matters without the worry of adverse public reaction to a position the FCC is not going to take.

V. Benefits of Narrowing the Act

One of the problems with the Sunshine Act is that it was designed to protect against an evil that does not appear to have existed at the time of enactment. Proponents of the bill did not cite any evidence or examples in which secrecy in administrative deliberations had given poor results, nor did they argue that the officials in agencies were not trustworthy.⁽⁸⁸⁾ Instead, they based their decision on the ideal that open government leads to more trust from all.⁽⁸⁹⁾ However, there were no laws enacted, nor are there any now, which require the federal courts or the congressional committees to disclose their deliberations.⁽⁹⁰⁾ It is reasonable to argue that the Supreme Court and Congress make decisions that are equally as important, if not more important, than government agencies. By allowing predecisional deliberations outside the public eye, agencies such as the FCC are afforded at least some of the protection courts and legislatures are allowed in their deliberations. If the public has the right to know what is happening in the administrative agencies, why not the judicial and legislative branches as well?

In addition, by allowing this limited exemption, the public will get more informed decisions. The current Act is said to protect the public, but the methods by which it institutes protection may actually harm the public overall. The implementation of the Act addressed how government works procedurally, not the substantive concerns of the average voter.⁽⁹¹⁾ The Act has little effect on the average person. In fact, journalists and those who do business with the FCC, are those most likely to take advantage of the Act.⁽⁹²⁾ This is evidenced in the discussion of whom it is that generally brings suit against the FCC for violations of the Act.

The Act was not designed to allow for the public to gain information through the press. However, in a guide to understanding the Act, agencies conducting open meetings are not required to guarantee adequate accommodations for everyone wishing to attend. "The purpose can be adequately served if *some* members of the public are present, particularly if they include representatives of the news media."⁽⁹³⁾ If the press is the primary target audience for these meetings, the public gains its views through the press. It is certainly true that information through the press can be misleading and ultimately lead to a misunderstanding of the law and a decline in the trust of the government.

What the public gains through this process is sometimes a distorted view of the government. The public is left with short, scripted open meetings, interpreted by the press. People are left with decisions that are not well thought out because commissioners do not discuss them openly in a collegial debate, and the public is sometimes left with a darker view of the government than the Act ever intended. Therefore, by allowing the exemption, nothing is necessarily lost in the way of public understanding. If commissioners explain their decisions in sufficient detail, the press is likely to report more accurate information, therefore facilitating public understanding.

Those who are concerned that the right of the public to know would be compromised by a reform in the Act need only look to the relations among the FCC commissioners. It is unlikely that the commissioners are going to resort to secret compromised views outside of the public eye. Terms are staggered in the FCC and it is often possible for commissioners to be appointed who have differing political views and stances. Allowing predecisional debate will foster the airing of these differences and allow all of the commissioners to arrive at informed decisions.

Conclusion

The Sunshine Act, as a policy for open government, has significant benefits. However, the broad application of the Act has created significant costs to the decisionmaking processes of agencies. In order to effectively allow for informed decisions, commissioners must be able to discuss ideas in an open debate without the fear of appearing uncertain or uninformed. A predecisional debate exemption would foster open debate among commissioners. Let the sunshine in, but only where it is necessary, and where the public actually gains some benefit from it.

1. B.S. Indiana University--Bloomington; candidate for J.D. Indiana University School of Law--Bloomington, 1997.
2. H.R. Rep. No. 94-880, pt. I, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2184.
3. Louis Brandeis, *Other People's Money* 67 (1933).
4. 5 U.S.C. 552b (1994).
5. S. Rep. No. 94-354, at 1 (1975).
6. Government in the Sunshine Act, Pub. L. No. 94-409, 2, 90 Stat. 1241 (codified at 5 U.S.C. 552b (1994)).
7. David M. Welborn et al., *Implementation and Effects of the Federal Government in the Sunshine Act in 1984* Recommendations and Reports, at 199, 201 (Administrative Conference of the United States: Background Report for Recommendation 84-3).
8. 133 Cong. Rec. 5177 (1987) (statement of Senator Lawton Chiles, author of the sunshine legislation, on the tenth anniversary of the Sunshine Act). Senator Chiles further stated in his address that "there is no commonsense reason why citizens shouldn't be able to watch how Government spends their money and reaches decisions affecting their businesses, their communities and their future. Citizens cannot hold Government officials accountable if they don't know what those officials are doing." *Id.*
9. *Id.*
10. Welborn et al., *supra* note 6, at 202.
11. H.R. Rep. No. 94-880, pt. I, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2184 (citing testimony of Glen O.

Robinson, a former FCC Commissioner, in a hearing before the Government Information and Individual Rights Subcommittee).

12. 133 Cong. Rec. 5177 (1987).

13. 5 U.S.C. 552b states:

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members . . . and any subdivision there-of authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in joint conduct or disposition of official agency business. . . .

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section . . . every portion of every meeting of an agency shall be open to public observation.

Id.

The FCC clearly falls within the definition of an agency in this Act, and thus members/commissioners are required to hold open meetings unless they determine that one of the exemptions applies.

14. 5 U.S.C. 552b(a)(2).

15. 5 U.S.C. 552b(2).

16. 5 U.S.C. 552b(e)(1).

17. Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 5.18, at 219 (3d ed. 1994).

18. *Id.* 5.18, at 220. Professor Davis further posits that the Government in the Sunshine Act "renders collegiality impossible in a collegial body that heads an agency." *Id.* This argument will be revisited in a later discussion of the effects of the Act.

19. These exceptions pertain to:

(1) national defense and foreign policy;

(2) personnel rules and practice;

(3) information explicitly protected from disclosure by statute;

(4) trade secrets and privileged or confidential commercial information;

(5) accusations of criminal conduct or the formal censure of an individual;

(6) information of a personal nature the disclosure of which would be an invasion of privacy;

(7) investigatory records used in enforcement;

(8) information generated in the regulation of financial institutions;

(9) material the premature disclosure of which would produce financial speculation or threaten the stability of a financial institution, and that which would "be likely to significantly frustrate implementation of a proposed agency action";

(10) issuance of subpoenas, participation in civil, international or foreign actions or proceedings, and dispositions of adjudicatory matters.

Welborn et al., *supra* note 6, at 201.

20. H.R. Rep. No. 94-880, pt. I, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2185.

21. *Id.*

22. *Id.* at 3-4.

23. 5 U.S.C. 552b(d)(1), states that action to close a meeting "shall be taken only when a majority of the entire membership of the agency . . . votes to take such action."

24. 5 U.S.C. 552b(d)(3).

25. H.R. Rep. No. 94-880, pt. I, at 13.

26. 5 U.S.C. 552b(d)(3).

27. H.R. Rep. No. 94-880 at 13-14.

28. *Id.*

29. 5 U.S.C. 552b(f)(2).

30. *Id.*

31. H.R. Rep. No. 880, at 15.

32. *Id.*

33. 5 U.S.C. 552b(f)(2).

34. H.R. Rep. No. 880, at 15.

35. 5 U.S.C. 552b(h)(1).

36. *Id.* This is different than the original draft of the proposed bill. In the original bill, an action could be brought in *any* United States district court, allowing the plaintiff to bring an action where she resides or where she has her principal place of business. Concern was voiced about this by House members, fearing that it would "lead to duplicative lawsuits spread across the country covering the same agency meeting or meetings." H.R. Rep. No. 94-880, pt. I, at 17 (citing views of Representative Frank Horton).

37. 5 U.S.C. 552b(h)(1).

38. 5 U.S.C. 552b(h)(2). A federal court may provide these remedies if it is a court that is otherwise allowed by law to review agency action. The D.C. Circuit Court of Appeals recognized this in a decision where the plaintiff claimed it was harmed by a closed meeting because it might have sought an emergency stay of an order issued by the defendant. The court noted that "'release of transcripts, not invalidation of the agency's substantive action,' is the remedy generally appropriate for disregard of the Sunshine Act." *Braniff Master Executive Council of the Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 693 F.2d 220, 226 (D.C. Cir. 1982) (quoting *Pan Am World Airways v. Civil Aeronautics Bd.*,

684 F.2d 31, 36 (D.C. Cir. 1982)).

39. H.R. Rep. No. 94-880, pt. I, at 17. The House Report specifically states that "since a judicial determination that a meeting was unlawfully closed will in most instances come long after the meeting has been held, and since the substantive action taken at the meeting cannot be nullified when the court is acting solely under this subsection, the possibility of finding out what transpired at the meeting represents the only realistic remedy available to a plaintiff." *Id.*

40. 5 U.S.C. 552b(i).

41. *Id.*

42. *ITT*, 466 U.S. 463 (1984).

43. *Id.* at 473 (quoting 5 U.S.C. 552b(a)(2) (1984)).

44. *Shurberg Brdcast. of Hartford, Inc. v. FCC*, 617 F. Supp. 825, 827 (D.D.C. 1985) (Plaintiff, at the time of the closed meeting, was involved in an outside action against the FCC requesting a writ of mandamus. The FCC closed the meeting on the basis of pending adjudication.)

45. *Communications Systems, Inc. v. FCC*, 595 F.2d 797, 798-99 (D.C. Cir. 1978). Communications petitioned for review of an FCC decision not to allow it to convert their FM radio station from a Class B to a Class C station. Communications argued that the FCC's deliberations on its request be held in public. The FCC made their decision based on notation voting. The court held that the Sunshine Act does not require the FCC to hold meetings before issuing orders to deny a request such as Communications'. *Id.* at 798.

46. *Washington Ass'n for Television and Children (WATCH) v. FCC*, 665 F.2d 1264, 1267 (D.C. Cir. 1981) WATCH challenged the notice given by the FCC in regard to an open meeting to decide whether to call a meeting with shorter notice. The court held in favor of the FCC, but struck down the FCC's definition of "meeting" in its own regulations, as being more inclusive than the one contained in the Sunshine Act, and thus in excess of the Commission's rulemaking authority. *Id.* at 1272-73.

47. *Id.*

48. H.R. Rep. No. 94-880, pt. I, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2187.

49. *See Welborn et al., supra* note 6, at 220. Agency officials, at the time of implementation of the Act, pointed out four areas where they saw loss in administrative efficiency and delay which they thought did not lead to substantial benefit. These included the provision for a majority vote to delete or amend an agenda item, the full written explanation of reasons for closing a meeting, the required list of persons expected to attend a closed meeting, and for a presiding officer's statement concerning the time and place of the meeting. However, the Welborn study found that there were few serious administrative difficulties and that the Act is part of agency life, and "in the narrow administrative sense it functions smoothly." *Id.*

50. *Id.* at 204.

51. Marshall J. Breger, *Sunshine Act: Decade of Exposure Leaves Wrinkles*, Wall St. J., Sept. 25, 1986, at 30.

52. Notation voting is a process in which each commissioner receives his own copy of a proposed agenda item. The commissioner then reads over each item and checks off whether he wishes to have a discussion on the matter, by way of a meeting, or he will enter a vote to approve or disapprove an item. When he has finished looking over the items, the list is sent to the Minutes Branch, where the results are determined. If any commissioner has requested discussion on any item, then it will be placed on the meeting agenda. If there is no request for discussion on an item, the votes are tabulated and the item is considered approved or disapproved. *Communications Sys. v. FCC*, 595 F.2d 797, 798 (D.C. Cir. 1978) (citing FCC Br. at 26-27).

53. The Hoover Commission's Committee on Independent Regulatory Commissions concluded, before the Sunshine Act was enacted, that decisions are improved as a result of interactions among a group of peers, and stated:

A distinctive attribute of commission action is that it requires concurrence by a majority of members of equal standing after full discussion and deliberation. At its best each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a course of decisions based on different points of view and experience.

This process has definite advantages where the problems are complex . . . and where the range of choice is wide. A single official can consult his staff but does not have to convince others to make his views or conclusions prevail. The member of the commission must expose his reasons and judgments to the critical scrutiny of his fellow members and must persuade them to his point of view. He must analyze and understand the views of his colleagues if only to refute.

Welborn et al., *supra* note 6, at 235 (quoting Commission on Organization of the Executive Branch of Government, Task Force Report on Regulatory Commissions app. N at 21 (1949)).

54. Breger, *supra* note 49.

55. Davis & Pierce, *supra* note 16, 5.18, at 221.

56. Mr. Friedman also stated that it is impossible for the kind of discussion needed to take place on policy issues to be done in a public forum, which leads to a deterioration in the decision-making process. *Capital Markets Deregulation and Liberalization Act of 1995: Hearings on H.R. 2131 before the House Comm. on Commerce*, 104th Cong. 237 (1995) (statement of Stephen J. Friedman).

57. Welborn et al., *supra* note 6, at 236.

58. *Id.*

59. H.R. Rep. No. 94-880, pt. I, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2189.

60. Meetings of staff members were not unheard of before the Sunshine Act, but the Welborn study found that they were much more common after the Act. The study also noted that these meetings were much more likely to take place before the scheduled open meetings. Welborn et al., *supra* note 6, at 223.

61. *Id.*

62. *Id.* at 239

63. *Id.*

64. *Id.* at 236.

65. *Id.*

66. *Communications Sys., Inc. v. FCC*, 595 F.2d 797 (D.C. Cir. 1984).

67. *Id.* at 800-01.

68. Welborn et al., *supra* note 6, at 233.

69. *FCC v. ITT World Comm., Inc.*, 466 U.S. 463 (1984).

70. A.A. Sommer, Jr., *A Commissioner's Anger*, *Insights*, Nov. 1991, at 4.

71. *Id.*

72. Commissioner Wallman along with former and current commissioners of federal agencies requested these hearings before the subcommittee. Marcia Coyle, *Agencies Ask for Less Sunshine*, 18 Nat. L.J., Sept. 25, 1995, at A12.
73. *Id.*
74. *Id.*
75. *Id.*
76. Commissioner Wallman stated that because of the Act, commissioners deal through aides and written memos, which he refers to as a "bureaucratic and time-consuming process" that does not lead to effective decisionmaking. See *DON'T HIDE/Government Secrecy Keeps Ducking Its Ugly Head*, Hous. Chron., Sept. 14, 1995, at 32.
77. Coyle, *supra* note 70.
78. Davis & Pierce, *supra* note 16, 5.18, at 221.
79. 5 U.S.C. 552(a)(1) (1994).
80. 5 U.S.C. 552(b)(5) (1994).
81. 2 Administrative Law, *supra* note 6, 10.06[1] at 10-92 (1996).
82. *Id.* at 10-93 n.2.
83. Sommer, *supra* note 68, at 3.
84. *Id.*
85. Welborn et al., *supra* note 6, at 237.
86. *Id.*
87. *Id.*
88. *Id.* at 203.
89. *Id.*
90. *Capital Markets Hearings*, *supra* note 55.
91. Steven D. Stark, *D.C.'s Illusory Changes*, 17 Nat. L.J., July 3, 1995, at A21. Mr. Stark argues that many of the current proposed changes in the GOP contract are guilty of this also.
92. See Welborn et al., *supra* note 6, at 247.
93. Richard K. Berg & Stephen H. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* (1978).