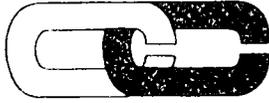


Sunshine Act

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Implementing Government in the Sunshine

It appears certain that the Government in the Sunshine Act will be enacted into law this year. The legislation has been passed by the Senate (94-0) and the House (390-5). The bill is likely to clear conference in September. The President will then be the key actor.

The Sunshine Act is the first major anti-secrecy measure affecting the Executive Branch since the 1967 Freedom of Information Act. The Act is limited to those bodies that make decisions by meetings.

Proper implementation of the Sunshine Act will require active Presidential leadership and initiative. The bill has been opposed by many executive agencies since its introduction four years ago. They have blurred the vital differences between multi-member and single-member agencies.

They have argued that the presence of the press and public at their meetings will inhibit open and candid discussion, impede the progress of their work, and force them to decide controversial matters in secret before they meet. Agencies

have thought of every conceivable justification for closing their meetings, and have lobbied for special exemptions. This resistance to openness poses a direct challenge to the President. He will have to point the way and demand compliance, if open government is to be a reality and made to work.

The Act requires federal agencies headed by two or more Commissioners or similar officers to open their meetings to the public. "Meeting" is defined to include agency deliberations where at least a quorum of the agency heads meet to conduct or dispose of official agency business. While the Act establishes a presumption of openness, it allows an agency to close a meeting under certain circumstances. These exemptions are modeled after those in the Freedom of Information Act. Agencies must publicly announce their meetings in advance, justify all decisions to close meetings, and make a verbatim record of all closed meetings. Those portions of this record which do not contain exempted information must be made available to the public.

There are some specific steps the President could take, through a directive to the agencies covered, to insure meaningful implementation of the Sunshine Act and thereby set a new tone of openness for the Executive Branch.

Directive on Implementation

The Act requires the agencies covered to promulgate regulations covering its openness requirements. Such regulations, for example, would describe how the agency will publicly announce

its meetings, establish procedures for closing meetings when necessary, and specify how the public can obtain copies of transcripts. The agencies have a good deal of discretion in this regard, and the quality of their regulations will be a key factor in making the Sunshine Act work.

The President should issue a directive to the agencies affirming the Administration's commitment to openness, establishing standards of openness, and requiring that agency regulations conform not only to the letter but the spirit of the Act.

This memorandum outlines several points that could be addressed by a Presidential directive:

- agencies should operate under a presumption of openness;
- suitable meeting places and agendas should be provided;
- decisions to close meetings should specify applicable exemptions;
- meeting notices should be fully descriptive and well-circulated;
- meeting transcripts should be easily available;
- use of regulations to close whole categories of meetings should be carefully monitored.

Presumption of Openness

The directive should specify that agencies close meetings only when there is an overriding interest in doing so. The Act allows an agency to close a meeting under certain circumstances, but does not require it to do so. The agency can decide that the public interest served by openness outweighs the justification for

meeting in secret. Agencies should be directed to follow this approach whenever possible.

The directive should also affirm that the presumption of openness established in the Act applies to the entire decision-making process. As the Senate report on the Act stated: "The meetings opened...are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decision-making process, not merely its results, must be exposed to public scrutiny."

The Federal Power Commission's experience with open meetings illustrates the importance of this point. The FPC decided last April to open its meetings to the public. Common Cause has been monitoring these meetings, and we have found that the Commission has devised an ingenious way of undercutting the basic principle of openness. It votes, up or down, on staff recommendations which are distributed to the commissioners, but not to the audience. There is seldom any discussion of the matter, just the vote. It is impossible to know what is going on. The lack of discussion or controversy on the matters considered suggests that the Commission has somehow decided each case beforehand, and is simply going through the motions of publicly voting on them.

It would be helpful if the President were to emphasize his opposition to such game-playing.

Rules and Procedures

The directive should also specify certain rules and procedures for the agencies to incorporate into their regulations, among them:

Meeting Place and Agenda. The agencies' regulations should require all open meetings to be held in a location convenient for public attendance and in a room large enough to accommodate the persons interested in attending. Copies of the agenda including a full description of the cases or other matters under consideration, should be available to those present.

Explanation of Closed Meetings. The Act requires an agency to publish an explanation of its decision to close a meeting within one day of the vote to do so. The regulations should stipulate that such explanation indicate why the meeting falls within one of the exemptions. The explanations should be available to the public upon request.

Notice Requirements. The advance public notice of agency meetings should give a full identification of the subject matter, adequate to inform the public of the substance of the issues under consideration and, when applicable, the identity of the parties involved. These announcements, in addition to being published in the Federal Register, should be published as a weekly calendar of scheduled meetings and sent to those who wish to be on the mailing list for them. Special meetings should also be announced through press releases.

Copies of Transcripts. Agencies are required under the pending bills to keep a transcript or recording of all closed meetings. Those portions that do not fall within an exemption must be made available to the public. The agencies' regulations on making copies of these records available should follow procedures similar to those in the Freedom of Information Act. Requests for copies should be answered within ten days, and a reasonable schedule of fees should be established. Copies should be made available at a reduced cost when the agency believes it is in the public interest.

Closed Meetings by Regulation. The Act allows an agency which will be closing a majority of its meetings under certain exemptions to issue regulations for closing such meetings through expedited procedures. The agency does not have to explain its decisions to close these meetings, and the one-week notice requirement does not apply. Agencies that wish to qualify for this special status should be required to document fully, on the basis of records of meetings over the past several years, that a majority of its meetings do fall within the specified exemptions. The agencies qualifying should specify, in their regulations, the types of meetings to be closed under the expedited procedures and on what grounds.

OMB Review

While the agencies are given flexibility in developing regulations, the Act does not provide for any review of these regulations to determine whether they adequately meet

the Act's requirements and spirit.

The President should direct the Office of Management and Budget to review the agency's proposed regulations to ensure that they meet high standards of openness. OMB's approval of the regulations would be based on their compliance with the Presidential directive outlined above. The result of this review, including any recommended changes, would be available to the public.