

OPEN MEETINGS AND CLOSED MINDS: ANOTHER ROAD TO THE MOUNTAINTOP

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I. INTRODUCTION: CONVENTIONAL WISDOM, INCONSISTENCY, AND COUNTERPRODUCTIVE CONSEQUENCES

The conventional wisdom among judges, legislators, the public—and especially the media—is that “open meetings” are a good thing.¹ As a generalization, it is certainly a superficially attractive proposition.

On closer examination, the legal requirements of open meetings laws are wildly irrational in design and inconsistent in application—especially

1. See *infra* Part II.A.1-4.

when measured by their stated objectives.² As a counterproductive consequence, they often create more barriers to the attainment of those objectives than if the laws did not exist.³

Interpretations of Iowa's Open Meetings law,⁴ like the open meetings laws of the federal government⁵ and forty-eight other states,⁶ have only made the inherent problems worse. This is particularly true with regard to the standards governing "deliberations"⁷ by agency⁸ members⁹—especially

2. See IOWA CODE § 21.1 (2003) (stating that the Iowa Open Meetings law "seeks to assure . . . that the basis and rationale of governmental decisions . . . are easily accessible to the people"); see also *infra* Parts II.B., III.C-D, G.

3. See *infra* Part II.B.

4. IOWA CODE §§ 21.1-21.11.

5. See Freedom of Information Act, 5 U.S.C. § 552 (2000) (requiring each agency to "publish in the Federal Register for the guidance of the public" a description of its organization, its general mode of operation, its rules of procedure, and its substantive rules); Privacy Act, *id.* § 552a(d)(1) (allowing an individual access to agency records pertaining to him); Government in the Sunshine Act, *id.* § 552b (constituting the federal government's version of an open meetings law); Federal Advisory Committee Act, *id.* app. 2 § 5(a) ("[E]ach standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction . . .").

6. See R.J. Shortridge, Note, *The Incidental Matters Rule and Judicially Created Exceptions to the Nebraska Public Meetings Law: A Call to the Legislature in Meyer v. Board of Regents*, 510 N.W.2d 450 (Neb. App. 1993), 73 NEB. L. REV. 456, 456-57 n.1 (1994) (listing the state open meetings laws in existence as of 1994); see also Christopher W. Deering, *Closing the Door on the Public's Right to Know: Alabama's Open Meetings Law After Dunn v. Alabama State University Board of Trustees*, 28 CUMB. L. REV. 361, 367 (1997-1998) (stating that "all fifty states and the District of Columbia have enacted" open meetings laws).

7. This Article later expands on the differences between the contexts in which agency members' discussions occur. See *infra* Part III.D. Throughout the Article, "discussions" is used as an all-encompassing term that refers to all conversations among members of an agency; "deliberations" is reserved for those discussions required by the law to be open to the public and media. For now, it is sufficient to note that different considerations come into play with the deliberation associated with the application of preexisting, clear law or rules to ascertainable facts (sometimes called adjudication), and the deliberation that precedes the creation of new policy or rules (sometimes called rulemaking).

8. As used in this Article, and most open meetings laws, the term "agency" refers to a public body for which the highest authority consists of a *group* of individuals rather than a single executive. See, e.g., 5 U.S.C. § 552b(a)(1) (defining "agency"). The Article later addresses the reasonableness of having different standards of openness for such agencies. See *infra* Part III.G.2.

9. A "member" of an agency is one of the individuals in the group elected or appointed to head it—as distinguished from all other employees or staff of the agency. See 5 U.S.C. § 552b(a)(1), (3) (defining "member").

when applied to discussions unrelated to pending decisions.

Thus, a generation after enacting Iowa's first Open Meetings law, the Iowa Legislature should review the original purposes and standards of its law. With the reflection borne of experience, some of those original purposes and standards may now appear to have been inappropriate from the outset. Others may have made sense at the time, but do no longer. Still more may be as appropriate today as they once were. Whatever those identifiable purposes and standards were, or are, all are ill served by their irrational, inconsistent, and counterproductive implementation.

Once the members of the Iowa Legislature have agreed on the purposes behind the Iowa Open Meetings law, they should compare those purposes with the law's current standards and application of these standards with an eye toward consideration of such amendments as may be necessary.

This Article addresses, in turn, the purposes of open meetings laws and the current operation and effects of such laws on agency members' discussions and deliberations in light of those purposes. It concludes with recommendations for legislative revision. This Article argues that the purposes of Iowa's Open Meetings laws are, in some contexts, often better served by *less* rather than *more* openness. The objectives of these laws can still be served—indeed, better served in those instances—by affording agency members the freedom to engage in the closed discussions that alone can produce the quality of creativity and analysis the laws seek to promote.

Open meetings to hear public input serve a purpose. Open meetings with agenda items, decisional documents, and *votes for which members provide some explanation of their reasons* serve a purpose. But there are occasions when the Iowa law's *ends* (i.e., that agency members provide “the basis and rationale of governmental decisions”¹⁰) can be better served through *means* other than the indirect requirement of open meetings. Indeed, the open meetings requirement may very well not only fail to produce the basis and rationale for the agency's decision, it may actually contribute to its obfuscation.

As this Article demonstrates, to go around the barn, searching for the needle of basis and rationale in the haystack of deliberations often becomes a fruitless and self-defeating task. To search for a rationale where one is neither legally required nor administratively provided is a futility.

10. IOWA CODE § 21.1 (2003) (providing “that the basis and rationale of governmental decisions” is central to the intent of the Iowa Open Meetings law).

To capture *all* discussions merely because they are called deliberations is an impossibility. To try to do so only guarantees that fewer discussions and deliberations will take place, and that fewer wise decisions will be made.

The inconsistency in the theory and application of open meetings laws is a function, in part, of the fact that they are both under- and over-inclusive. The open meetings laws are under-inclusive in that their principles and standards are not applied at all to single-headed agencies, multimember courts, legislative bodies, advisory committees, or committees of government employees.¹¹ They are under-inclusive in that, even as to multimember-headed agencies, they cover neither multimember meetings when less than a quorum¹² is present nor presentations by special interest pleaders to individual agency members.¹³ And as explained above,¹⁴ there is nothing in the open meetings laws, standing alone, that even encourages, let alone requires, that agency members provide a written or oral statement of the *reasons* for their decisions.

Furthermore, this Article argues that open meetings laws are over-inclusive insofar as they are held to apply to meetings of a quorum where discussions occur that are unrelated to agency deliberations and decisions at current or future meetings. That is why this Article proposes an alternative approach—as an option, not a requirement—that can both better serve the laws’ purposes and simultaneously improve the quality of agency decisions. So long as agencies serve the laws’ *purposes*—i.e., so long as members explain the basis and rationale for their votes—there is simply no rational reason to require all predecisional discussions among agency members to be open to the media and the public. No comparable institutions of government—courts, legislatures, or single-headed agencies—are restricted by such a procedural requirement.¹⁵ Unless the legislatures are prepared to extend comparable open meetings requirements to those institutions, there is no rational reason to impose them upon multi-headed agencies.

11. *See infra* Part III.G.

12. See Tom Miller, *Counting Heads at a Public Meeting: How Many Officials Are Needed for a Quorum?*, Sunshine Advisory: A Bulletin on Iowa Open Meetings and Public Records Laws (July 2003), at http://www.state.ia.us/government/ag/Sunshine_adv/advisory_03July_Quorum.html for more information on quorum requirements in Iowa.

13. *See infra* Part III.E.

14. *See* discussion *supra* Part I.

15. *See infra* Part III.G.

II. THE GOALS AND COSTS OF OPENNESS

Certainly, much of the rationale for openness in agencies is little more than the untested conventional wisdom that, of course, openness in government is a good thing. It is hard to oppose an act entitled *Government in the Sunshine*. Who, given the choice, would want to argue on behalf of the forces of darkness?

But once the more precise purposes of openness are articulated, matters become more complex. Clearly, at least some of those purposes, some of the time, are better served by permitting agency members to engage in wide-ranging inquiry and deliberation out of the view of the media and the public.¹⁶

A. *The Goals of Openness*

Laws, like agency rules, should be “calculated to accomplish their objectives in the most sensible way possible.”¹⁷ If they are failing to accomplish their objectives or, worse still, defeating the very purposes they were ostensibly created to serve, they need to be revisited and revised.

The purposes and goals of openness of agencies’ meetings can usually be surmised and are occasionally articulated.¹⁸ Many of these alleged

16. *See infra* Part III.F.

17. *See* ARTHUR EARL BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* § 5.2.2 (1986) (discussing agency rulemaking procedure).

18. United States Court of Appeals Judge Skelly Wright identified a number of the original goals, or purposes, of Congress in enacting the open meetings requirements of the federal Sunshine Act:

Congress enacted the Sunshine Act to open the deliberations of multi-member federal agencies to public view. It believed that increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people.

Common Cause v. Nuclear Regulatory Comm’n, 674 F.2d 921, 928 (D.C. Cir. 1982) (footnote omitted).

Professor Bonfield identifies six virtues of the requirements administrative procedure acts impose upon agencies’ rulemaking generally. BONFIELD, *supra* note 17, §§ 5.1-5.3. These virtues include increased assurance that rules are: (1) lawful; (2) technically sound (i.e., that agencies make rules in light of all information that is relevant, base rules on accurately assessed and relevant opinions and data, and issue rules calculated to sensibly accomplish the rules’ objectives); (3) responsive to

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purposes will be challenged later in this Article.¹⁹ For now they are simply stated.

1. *Openness Is a Way of Preventing the Self-dealing, Conflicts of Interest, and the “Smoke-filled, Backroom Deals” of an Earlier Era*

Justice Louis Brandeis’s oft-quoted observation puts the argument succinctly: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”²⁰

2. *A Democratic People’s Self-governing, and Its Ability to Provide Checks on Government Abuses, Requires an Informed Public and Is Served by Openness*

Open meetings provide greater opportunities for public participation in the agency process. They help provide the additional information necessary to create and hold citizens’ interest in their government and give citizens the tools to make the government more responsive to their desires.²¹

public participation and “the current views of the community at large”; (4) provide adequate notice of the rulemaking procedure and effective date of rules; (5) avoid overregulation; and (6) create public satisfaction and a sense of the rules’ fairness. *Id.*

19. *See infra* Part II.B.

20. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 62 (1933), *quoted in* Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 *FED. COMM. L.J.* 473, 474 (1997). But, as Professor Arthur Bonfield has noted, while it may be true that “mould does not grow where there is light . . . too much sunlight causes sunburn.” Arthur Bonfield, *Chairman’s Message*, 40:1 *ADMIN. L. REV.* iii, iv (1988).

21. Regardless of whether the public has a right to attend public proceedings, there is a widespread belief that in order for a democratic people to engage in meaningful self-government their government must operate with the maximum possible transparency. *See, e.g.*, U.S. CONST. amend. I (prohibiting restrictions on, *inter alia*, freedom of the press); Freedom of Information Act, 5 U.S.C. § 552 (2000) (outlining public disclosure of information by federal agencies); Nicholas Johnson, Note, *Right of Public and Press to be Admitted to a Criminal Trial*, 35 *TEX. L. REV.* 429, 432 (1957) (arguing that “a ‘fair trial’ is one open to the public” at all stages of the proceedings). For a discussion of self-governing as a “purpose” of the First Amendment, *see, e.g.*, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1 (2d ed. 1988) (discussing various purposes of the First Amendment’s protections). Citizens need to know what their government is doing in their name if they are to affect

3. *Requiring Agency Members to Deliberate in Public Session Results in Their More Thorough Examination of Issues and Articulation of Policies and Decisions*

Members are more likely to carefully consider relevant data and opinions, and produce policies and rules that are more technically sound, pragmatic, and sensible if they know someone is watching.²² The Iowa law declares that its intent is “to assure . . . that the basis and rationale of governmental decisions . . . are easily accessible to the people.”²³

4. *Openness Creates More Citizen Acceptance of, Cooperation with, and Confidence in Government Agencies and Their Decisions*

The effectiveness of many institutions of government turns, in the final analysis, on the public’s voluntary acceptance and self-application of rules perceived to be reasonable and fair. Openness helps create the cooperation and confidence essential to ordered liberty in a democratic society.²⁴

and ultimately control that government. They need to have confidence that their elected and appointed officials are honest and representing citizens’ interests. As President Richard M. Nixon once said, “‘People have got to know whether or not their President is a crook. Well, I’m not a crook. I earned everything I’ve got.’” Carroll Kilpatrick, *Nixon Tells Editors, ‘I’m Not a Crook,’* WASH. POST, Nov. 18, 1973, at A1. Supporters of open meetings argue that giving citizens—and their surrogates, the media—access to all discussions among the members of multimember government agencies also serves that end.

22. See *Government in the Sunshine: Hearings before the Subcomm. on Reorganization, Research, and Int’l Orgs. of the Senate Comm. on Gov’t Operations*, 93d Cong. 25 (1974) (statement of Rep. Gunter) (stating that the federal open meetings act will restore confidence in the government, because “public faith is a fragile thing”).

23. IOWA CODE § 21.1 (2003).

24. See Jessica M. Natale, *Exploring Virtual Legal Presence*, 1 J. HIGH TECH. L. 157, 158 (2002) (stating that the primary purpose of open meetings laws “is to maintain or restore confidence in the political process through disclosure”).

Most judicial and scholarly commentary on the purposes of open meetings laws, however, never reach even this depth of analysis; they often focus only on the mechanism of openness as if it was the end rather than a means. They do not go on to ask, let alone answer, the question of *why* openness is an important objective. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (“Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall.”) (footnote omitted); see also *Dobrovlny v. Reinhardt*, 173 N.W.2d 837, 840-41 (Iowa 1970) (reasoning that the purpose of the Iowa Open Meetings law “is to prohibit secret or

5. *Increasing Media Executives' Compensation Is Not a Purpose of the Open Meetings Law*

Of course, overlaying any discussion of open meetings, like the cloud cover over Iowa on a gloomy day, is the media. Newspapers and television corporations and their litigation and lobbying organizations are the most vigorous proponents of openness of meetings²⁵—unless, of course, it is the *media's* records or meetings that are at stake.²⁶

'star chamber' sessions of public bodies, to require such meeting be open and to permit the public to be present"); Michael Spake, *Public Access to Physician and Attorney Disciplinary Proceedings*, 21 J. NAT'L ASS'N ADMIN. L. JUDGES 289, 304 (2001) ("[T]he rationale behind open meetings legislation is to effectively enable the public to examine government proceedings."). This concept "supports the basic idea that the right of the public to participate in democracy includes the right to be informed. Thus, by having statutory right of access, citizens are able to examine public affairs." *Id.*

Legal encyclopedias offer little more. See 73 C.J.S. *Public Administrative Law and Procedure* § 19 (1983) ("The provision is intended to permit public access to meetings of administrative bodies, to eliminate much of the secrecy surrounding deliberations and decision on which public policy is based, and to give the public the fullest and most complete information regarding affairs of government . . .") (footnotes omitted).

25. In Iowa, for example, one such organization is the Iowa Freedom of Information Council. See IOWA FREEDOM OF INFO. COUNCIL, at <http://www.drake.edu/journalism/foi/council2.html> (last visited Oct. 3, 2004) ("The Iowa Council was established primarily in response to increases in the amount and the costs of litigation involving the news media.").

26. The media sees nothing inconsistent with their insistence on others' openness while shrouding their own discussions in secrecy. T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA* 1002-08, 1017-19 (6th ed. 2003). Media corporations' board meetings, editorial meetings, assignment editors' discussions, reporters' notes, names of sources, and television news outtakes are all closed to public scrutiny.

When their own discussions are at stake, journalists are perfectly capable of articulating the reasons why closed, confidential discussions are sometimes necessary in any organization. See *id.* at 1003-19 (presenting and analyzing numerous justifications for confidentiality). Those reasons prove to be very similar to the ones put forth in this Article on behalf of closed, predecisional discussions by agency members. Compare *id.*, with discussion *infra* Part II.B (arguing against mandatory public revelation of an agency's predecisional discussions).

The Council on Foreign Relations' (CFR's) ground rules call for confidentiality and "[m]any meetings are held off-the-record to encourage frankness among participants." COUNCIL ON FOREIGN REL., at <http://www.cfr.org/about/memberfaq.php> (last visited Oct. 11, 2004). A breach occurred in March of 2002 after a CFR meeting when off-the-record comments made by former Treasury Secretary Paul O'Neill were quoted in the New York Times. Joseph Kahn & Richard W. Stevenson, *Treasury's Chief Is Said to Fault Steel Tariff Move*, N.Y. TIMES, Mar. 16, 2002, at 1A, available at <http://query.nytimes.com/gst/abstract.html?res=FA0F11F8345D0C758DDDDAA0894D>

There is little question of the media's valued role as a surrogate for a public that is usually unable, or unwilling, to attend agency meetings in person. But there is also little doubt that at least some of the media owners' motivation has more to do with personal profit than public service.

The Iowa Legislature may have had many purposes in mind when it created the state's open meetings requirements. But one can be relatively sure those purposes did not include a legislative finding of a state need for an increase in television stations' ratings and newspapers' circulation, so as to raise even further advertising rates, corporate revenues, and compensation paid the media's chief executives and owners. Such economic consequences may or may not be in the public interest. They are not, however, adequate reasons for reporters to attend agency members' predecisional discussions in the hopes of fashioning a headline out of a casual or misinterpreted remark.

As discussed below, there is little or no evidence that "gotcha journalism"—even if one thinks it is valuable—is dependent upon open meetings for its existence.²⁷ The dusty back roads of investigative journalism almost always lead elsewhere.

B. *The Costs of Open Discussions and Deliberations*

One lesson learned from a cost-benefit analysis is that one cannot make a rational decision on the basis of benefits alone. Benefits there may be, but costs must also be tabulated and balanced against those benefits.

This Article argues that many of the so-called benefits of open

A404482 (reporting off-the-record comments made before the CFR that, subject to interpretation, may be viewed as critical of the Bush Administration's decision to "impose tariffs on imported steel").

In March of 2002, Les Gelb, formerly a distinguished columnist for the New York Times and subsequently President Emeritus of the CFR, was interviewed about the incident by Brooke Gladstone of the radio program *On the Media*. *On the Media: Off the Record Leaks* (NPR radio broadcast, Mar. 23, 2002), available at <http://www.wnyc.org/onthemedial/otm032302.html> (last visited Oct. 11, 2004). Gelb said, "obviously the board of directors here and I and the staff are very upset . . . because it goes to the whole issue of candor at our meetings. . . . [I]t's very important . . . [for us] to get the kind of understanding of problems and issues and policies that you can't get in sort of 'set-piece, on the record' speeches. . . . [W]e really want the conversation to be relaxed where you're not watching your words at all." *Id.*

These are, of course, as this Article subsequently discusses, some of the very reasons why public bodies *also* sometimes need off-the-record discussions. For the similar needs of courts, see *infra* Part III.G.1.

27. See *infra* Part III.E.

discussions and deliberations evaporate with close analysis. But even when the benefits are real, they are often more than offset by their costs.

Requiring agency members to reveal their predecisional discussions to the public is especially costly. Indeed, this Article argues that the consequences of doing so are counterproductive; when measured against the purposes of the laws, they actually work *against* the legislative intent.²⁸

There are many forces working *against* the thorough deliberations thought to lead groups of discussants to wiser and more well-considered decisions than any individual member would devise alone. Many individuals feel inhibitions and anxiety when speaking in *any* situation, even in small, private groups—such as the *closed* meetings of agency members.²⁹ Indeed, the Boston University Center for Anxiety and Related Disorders reports that “[t]he most common social phobia is a fear of public speaking.”³⁰

Some children have grown up being told that they “should be seen and not heard.”³¹ Adults may adopt the adage that “[i]t is better to keep your mouth shut and appear stupid than to open it and remove all doubt.”³² As a result, conversations sometimes fall into what we call awkward silences. There are even United States Senators, members of Congress, and TV anchor persons—all members in good standing of the so-called “chattering classes”—who are seemingly incapable of formulating complete thoughts and sentences without reading from scripts written by a staff member. Even the President of the United States is sometimes ridiculed for his syntax.³³

28. See *infra* Part III.B-D.

29. See BOSTON UNIV. CTR. FOR ANXIETY AND RELATED DISORDERS, WHAT IS SOCIAL PHOBIA?, at <http://www.bu.edu/anxiety/socphob.html> (last visited Oct. 3, 2004).

30. *Id.*

31. For a speculative article about the origins of the quote “children should be seen and not heard,” see *Old Wives Tales*, at <http://www.oldwivestales.net/QandAarticle1124.html> (last visited Oct. 3, 2004).

32. This adage has most commonly been attributed to Mark Twain. INTERNATIONAL FEDERATION OF LIBRARY AND INSTITUTIONS, at <http://www.ifla.org/faife/litter/origin/index.htm> (last visited Oct. 20, 2004). However, it has also been attributed to Samuel Johnson, http://www.thinkexist.com/English/Author/x/Author_4062_4.htm (last visited Oct. 20, 2004), and Abraham Lincoln, <http://www.bookreporter.com/community/quote/02-07.asp> (last visited Oct. 20, 2004).

33. See PAUL BEGALA, “IS OUR CHILDREN LEARNING?”: THE CASE AGAINST GEORGE W. BUSH 33 (2000) (listing several poorly worded statements made by President George W. Bush).

It is unreasonable to expect more of state and local agency members—many of whom are unpaid volunteers—than professionals are able to deliver. Agency members are human. They have grown up in the same culture as everyone else. Many agency members have neither the self-confidence born of a lifetime of academic training, public speaking, and debate, nor the heightened level of agency-relevant experience and expertise that might otherwise overcome some of their insecurities.³⁴

Coupled with these universal human inhibitions are agency members' responsibilities. Theirs is *not* casual conversation. It is often quite serious. Thus, they have an even greater reluctance to risk what may become a self-inflicted serious embarrassment.³⁵ They may fear a display of ignorance of relevant facts, illogical analysis, uncertainty, undeveloped and ill-considered ideas, an unseemly and unintended provocation of divisiveness, slips of the tongue interpreted as bias or prejudice, ideas thought radical, or the appearance of self-serving motives.³⁶

The inhibitions may involve more than mere anxiety about potential public embarrassment.³⁷ Members may have reasonable concerns that what they say could result in a loss of customers for their business, a loss of their job if employed by others, social ostracism at the country club or workplace, or a loss of an election if they want to be reelected.³⁸

Such inhibitions may vary with the individual and the setting. They are probably most severe when sitting behind a formal bench in front of television cameras or a large, hostile crowd.³⁹ They are probably less so when members are facing each other around a table or in a living room setting, even if a single print reporter is present.⁴⁰ But there is always some reluctance to speak one's mind born of the awareness that others are recording and judging one's every word.⁴¹

34. See Randolph J. May, *Taming the Sunshine Act: Too Much Exposure Inhibits Collegial Decision Making*, LEGAL TIMES, Feb. 5, 1996, at 24.

35. *Id.*

36. *Id.*

37. Michael A. Lawrence, *Finding Shade from the "Government in the Sunshine Act": A Proposal to Permit Private Informal Background Discussions at the United States International Trade Commission*, 45 CATH. U. L. REV. 1, 11-12 (1995).

38. See *id.* at 11 n.54 (noting that social, economic, and political repercussions may stem from the Sunshine Act's requirements).

39. See *id.* at 10-11 (discussing a study that found "a majority of respondents believed that the presence of the press and public under open meeting statutes subtly inhibit[s] the free exchange of ideas and opinions").

40. *Id.* at 11.

41. *Id.* at 11-12 & nn.54-55.

The nature of the proceeding or issue also makes a difference. Suppose agency members are applying preexisting law to found facts—called adjudication—as when a school board conducts an expulsion hearing of a student caught with a gun or drugs in school. *Privacy concerns* may, quite properly, dictate that such hearings be closed.⁴² But school board members' reluctance to deliberate in public about the *application* of clear and widely accepted school policies, providing for expulsion for such offenses, would probably be less of a factor than when *formulating* such controversial policies in the first place.

One can imagine issues that would leave at least some school board members virtually tongue-tied when discussed for the first time in public. Examples might include condom distribution in junior highs, drug testing of all students, compulsory school uniforms, posting the Ten Commandments in classrooms, closing an elementary school, or the installation of video camera monitors and metal detectors—to name a few.

Empirical studies,⁴³ the reports and insights of commentators,⁴⁴ and

42. See, e.g., IOWA CODE § 21.5(1)(e) (2003) (allowing for private hearings and deliberations during the student suspension and termination process).

43. See Bradley, *supra* note 20, at 474 (citing David M. Welborn et al., *Implementation and Effects of the Federal Government in the Sunshine Act*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 199 (1984) (providing a comprehensive background summary of the Government in the Sunshine Act, including the practical ramifications of a proposed recommendation on agency relations)).

44. Professor Richard J. Pierce, Jr. notes a number of adverse consequences of requiring multimember agencies to conduct their deliberations in public:

[M]eetings . . . are infrequent; . . . important decisions [are made] . . . with no prior deliberation; and communications . . . are grossly distorted by the presence of the public. Commissioners are reluctant to express their true views for fear that they will expose their ignorance or uncertainty . . . [The] stilted and contrived discussions . . . greatly impede the kind of frank exchange of views that is essential to high quality decisionmaking by a collegial body.

1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 296 (4th ed. 2002). Kathy Bradley comes to similar conclusions with regard to the impact of open meetings on the Federal Communications Commission. She writes of the costs of the Act:

[T]here are larger costs, . . . drawbacks which must be seriously considered when determining whether the Act achieves its original purpose without serious detrimental effects. . . . [I]ncreased costs were . . . in terms of greater costs to effectiveness and sound decision making. . . . [C]osts have come in the form of decreased collegial decisionmaking, [and] policy being determined by the staffs of commissioners . . . [T]here is more use of notation voting, as well as fewer potentially useful discussions being held, and more concentration of

the experience of the Author⁴⁵ suggest that the self-defeating consequences of requiring predecisional discussions of *new* policies to be conducted in public include the following.

power in the hands of the chairman.

Bradley, *supra* note 20, at 481-82 (footnotes omitted).

Randolph J. May, who sat on a now-defunct special committee of the Administrative Conference of the United States which examined the effectiveness of the Government in the Sunshine Act, noted several reasons why open meetings are unproductive:

Among the reasons: concern that providing initial views publicly, without sufficient thought and information, may harm the public interest by irresponsibly introducing uncertainty or confusion to industry, financial markets, or the general public; a desire on the part of members to speak with a uniform voice on matters of particular importance or to develop negotiating strategies that might be thwarted if debated publicly; reluctance of an agency member to embarrass another agency member or himself through inadvertent, argumentative, or exaggerated statements; concern that an agency member's statements may be used against the agency in subsequent litigation or misunderstood by the public or the press—for example, when someone is testing a position by “playing devil's advocate” or merely “thinking out loud” in the early stages of deliberation.

May, *supra* note 34, at 24; *see also* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 217 (1997) (arguing that public participation decreases the effectiveness of agencies).

Yet another report, based on surveys administered to twenty-six federal agencies, indicated that open meetings decrease and impair collegial decisionmaking in that most members came into meetings with their minds made up, agency members were reluctant to discuss some matters, members transmitted views through their staff, and notation voting increased. Welborn et al., *supra* note 43, at 234-42. The report's authors suggested that Congress might want to revisit balancing the problem of decreased collegial decisionmaking with the overall objective of the federal open meetings law. *Id.* at 249.

45. This experience includes the Author's work for a number of administrative agencies, from presidential appointments in Washington, D.C., to a local school board in Iowa City, Iowa. The Author also taught Administrative Law at the University of California, Berkeley School of Law (Boalt Hall) (1960-63), where he and his students researched a number of state and local agencies. His law practice with Covington & Burling in Washington (1963-64) involved the Civil Aeronautics Board as well as a number of other federal agencies. During his tenure as U.S. Maritime Administrator (1964-66), he also served Chair of the Maritime Subsidy Board. From 1966 to 1973 the Author was a Commissioner of the FCC. And upon returning to his town of Iowa City, Iowa, he served two terms on the Iowa City Broadband and Telecommunications Commission (1981-87), and one on the Iowa City Community School District Board of Directors (1998-2001). He has also experienced board work on a number of nonprofits' advisory boards and boards of directors, of relevance to the Article, *see infra* Part III.F.

1. *Fewer Meetings Are Scheduled and Less Deliberation Takes Place*

It is less threatening for members to fail to discuss an issue adequately, and to vote on the basis of inadequate information and understanding, than to open themselves to the risks set forth above.⁴⁶ The least threatening alternative of all, of course, is to have either fewer meetings,⁴⁷ or none at all.

Even when meetings are held and comments are made, it is not at all clear that openness actually produces the full analysis of an issue's facts and arguments that open meetings advocates promise.⁴⁸ Comments made by members may be more likely to be short, contrived, stilted, scripted, and aimed more at representatives of the media than a member's colleagues.⁴⁹

There is also a greater incentive to use a "consent agenda"⁵⁰ or other procedures that enable voting without discussion. A motion to approve a consent agenda, although it can be an efficient procedure to dispose of

46. See *supra* Part II.B. Fort Worth's *Star-Telegram* columnist Dave Lieber has argued that school boards' desire to please the public has eroded the amount of debate that takes place at public meetings. See Mark Walsh, *School Boards Struggle with Sunshine Laws: Prosecutors Take Aim at Alleged Violations*, EDUC. WEEK, Sept. 25, 2002, at 1, 14 (discussing Lieber's contention "that little serious policy debate is conducted at public meetings anymore"). He offered, as an example, a school board meeting where "more time was devoted to honoring student musical groups than to discussing items on the board agenda." *Id.*

47. See Rogelio Garcia, Congressional Research Service Reports, *Government in the Sunshine: Public Access to Meetings Held Under the Government in the Sunshine Act, 1979-1984*, reprinted in SENATE COMM. ON GOVERNMENTAL AFFAIRS, GOVERNMENT IN THE SUNSHINE ACT: HISTORY AND RECENT ISSUES, S. REP. NO. 101-54, at 61, 63 (1989) (showing a thirty-one percent decline in all meetings held between 1980 and 1984, based on a survey of fifty-nine federal agencies).

48. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) (reasoning that the expectation that people's remarks will be publicized may, in fact, impede collegial decisionmaking); see also Bevis Longstreth, Editorial, *A Little Shade, Please: The Government-in-the-Sunshine Act Isn't Working*, WASH. POST, July 25, 1983, at A13 ("The act stifles spontaneity, informality and flexibility. It suffocates the free, open and uninhibited exchange of ideas within a collegial body that promotes sound decision-making—the very purpose of providing for a collegial body, rather than a single head, to run the agency.").

49. See Welborn et al., *supra* note 43, at 228-32.

50. A "consent agenda" is "[a] list of business awaiting a deliberative assembly's vote that is not expected to be substantially opposed and is therefore scheduled for a vote without debate, or for automatic adoption unless a member objects." BLACK'S LAW DICTIONARY 216 (8th ed. 2004). In other words, it allows "[a]ll items [to] be passed with a single motion, no discussion." JOHN CARVER, PLANNING BETTER BOARD MEETINGS 7 (1997).

noncontroversial items, can also be used to sweep a lot of decisions into one vote faster than an audience member or reporter can bat an eye.⁵¹

2. *The Deliberation and Decisional Power the Law Once Placed in Agency Members Necessarily Migrates to the Agency's Executive Head, Staff, and Other Bodies*

Legislative bodies create agencies for a purpose. First, legislative bodies simply have too many responsibilities for their members to master arcane subjects and then legislate in detail.⁵² Delegating such matters to an agency created for the purpose is simply a legislative necessity.⁵³

A second of these purposes, or hopes, is that well-considered policies are more likely to emanate from the candid and considered deliberations of a *group* of independent individuals with growing expertise and focus than from a single individual.⁵⁴ If the adage “two heads are better than one”⁵⁵ is true, so the reasoning goes, presumably five or seven are better still.

Finally, at least for school boards, the elected members can function as a political intermediary between the often ill-considered chaos of direct democracy on the one hand,⁵⁶ and the otherwise-unchallenged we-know-

51. See Tim Ray, *Spitz Out-Negotiated City on Contracts*, J. REC., Oct. 30, 1987, at 2, available at 1987 WL 4337960 (discussing a city council's use of the consent agenda “where items are routinely approved unless they are pulled from the agenda for individual consideration”); Steve Ellman, *Wedged-In: West Palm Residents Sue to Block City's Sale of Triangular Parcel*, PALM BEACH DAILY BUS. REV., Nov. 5, 2002, at 2 (providing an example of how the use of consent agendas deprives citizens of notice).

52. See Serge Mezhburd, *The Unintelligible Standard: Rethinking the Mandate of the FTC from a Nondelegation Perspective*, 57 N.Y.U. ANN. SURV. AM. L. 361, 380 (2000) (stating that strict nondelegation is infeasible).

53. See *id.* at 366-72 (detailing “the scope and history of the FTC's rulemaking authority”). Congress' creation of the Federal Communications Commission (FCC), with its responsibility for formulating public policy related to what are sometimes highly technical matters, would be an example of such an agency. *Id.*

54. See Welborn et al., *supra* note 43, at 234-42 (discussing the advantages and disadvantages of collegial decisionmaking).

55. This adage is commonly attributed to John Heywood. See BARTLETT'S FAMILIAR QUOTATIONS 147 (Justin Kaplan ed., 17th ed. 2002) (citing John Heywood, PROVERBS I, at 9 (Julian Sharman ed., 1874 ed.)). Heywood's first version of *Proverbs* was printed in 1546. *Id.* at n.1.

56. A school board's stakeholders include students, parents, teachers, other school district employees, principals and other administrators, property tax payers, the business community—all citizens who consider themselves affected by the quality and cost of the local schools. See, e.g., Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogical Approach to Education Reform*, 14 YALE

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better-than-you-do-and-besides-we've-always-done-it-that-way “expertise” of professional educators on the other. When open deliberation requirements result in *less* group process, what usually fills the vacuum is a shift to, in the case of schools, the superintendent.

Agency executives have their own reasons for wanting to avoid responsibility for decisions. Thus, what the agency members pass to the executive may get passed on again to an outside consultant (who may or may not be told in advance what recommendation is desired) or a committee of special interest representatives left to fight it out among themselves.

Regardless of who makes the ultimate decision, once the agency members relinquish *their* responsibility, the legislative purposes for creating the multimember agency in the first place have been frustrated.

3. *Agency Members Lose Interest, Invest Less Time, and Contribute Less*

Because there is less incentive for agency members' discussions (because they must take place in public⁵⁷), less discussion is done anywhere. As a result, the transfer of agency members' powers and responsibilities to the agency's executive continues. Members are *discouraged* from investing additional time and effort on their own.

Few individuals need a reason to do less work. As has been said, “man is as lazy as he dares to be.”⁵⁸ There are many perfectly valid reasons for an agency member to limit the amount of time she takes from family, paid employment, and pleasurable pursuits to put into agency business. This is especially so, as with school board members, when it is an unpaid volunteer position.

When these considerations are coupled with a decline in agency discussions, there is even less incentive for members to engage in the independent research, writing and sharing of think pieces, exploration of new ideas, and brainstorming sessions that they were ostensibly elected or appointed to undertake.

L. & POL'Y REV. 99, 121 (1996) (defining traditional stakeholders as “students, parents, teachers, administrators, and school board members,” and expanding the definition of stakeholders to include any individual having a personal stake in the school board's decisions).

57. *See supra* Part II.B.

58. The original source of this insight is unknown. The Author first heard it from United States Supreme Court Justice Felix Frankfurter and assumed it originated with him.

4. *Innovation, Change, and Institutional Self-Renewal Are Impeded When Candid Deliberations Are Prevented*

Most institutions are prone to ossification over time. A new agency's very first employees' enthusiasm for their original mission gradually gives way to institutional preservation. Concern for agency budgets, leave policies, health and retirement benefits, pay raises, work rules, quality of food in the lunch room and coffee in the lounges, corner offices, and prized parking spaces leaves little time for thinking about original purposes, let alone innovations and best practices.

Moreover, the instinctive response to any proposed change—no matter how beneficial to the institution's mission—tends to be fear, resistance, and a rearrangement of the wagons in a circle. It tends *not* to be curiosity, enthusiastic exploration, or embracing. Moreover, the resistance to research, reading, thinking, and writing that exists in other institutions turns out to be just as alive and well in educational institutions supposedly devoted to intellectual inquiry.⁵⁹

Given the open meetings laws' seemingly endless requirements,⁶⁰ agency lawyers have every incentive to provide legal interpretations of statutory standards and propose agency practices focused on those lawyers' safety, self-preservation, and the virtual elimination of agency risk. Agency lawyers thus have an incentive to discourage members' discussions at every turn. This is true even when their legal advice contradicts both common sense and statutory purposes.

It need not be so. *Self Renewal*,⁶¹ a brilliant little book by former Secretary of Health, Education, and Welfare (HEW) John W. Gardner, addresses these issues and offers some solutions.

59. See, e.g., THEODORE R. SIZER, HORACE'S SCHOOL: REDESIGNING THE AMERICAN HIGH SCHOOL 1-11 (1992) (chronicling such resistance through the representative character of Horace Smith); TEACHERS COLL., COLUMBIA UNIV., TC TODAY: SUPERINTENDENTS DISCUSS NEED FOR AND RESISTANCE TO CHANGE (Sept. 1, 1998), at <http://www.tc.columbia.edu/news/article.htm?id=3807&tid=12> ("Persuading a district to follow a vision . . . isn't easy Most districts have teachers who have been at the same school for 15 or 20 years [They] have seen superintendents come and go [T]hey respond to new calls for change with a mantra: 'this too will pass.'"); see generally NEIL POSTMAN, THE END OF EDUCATION: REDEFINING THE VALUE OF SCHOOL (1995) (underscoring the absence of, *inter alia*, thinking, questioning, and arguing in the American educational environment, and proposing five methods by which these problems can be cured).

60. See discussion *infra* Part III.A-D.

61. JOHN W. GARDNER, SELF RENEWAL: THE INDIVIDUAL AND THE INNOVATIVE SOCIETY (1963).

Agency members serve fixed terms,⁶² whether they are elected or appointed. Compared with permanent staff members, they are less boxed in by the social mores of an ossified institution focused on self-preservation.⁶³ As such, if they choose, they can be a force for innovation and self-renewal⁶⁴—exploring the Internet and literature for the innovations and best practices of comparable institutions.

Requiring open meetings for predecisional discussions causes members to transfer power to agency executives and to lose interest in jobs they, not unreasonably, perceive as less important. As the downward spiral continues—from less discussion to more executive power to less member interest in jobs they accurately perceive to be less important—the open meetings laws contribute to the very ossification the multimember agencies were, in part, designed to prevent.⁶⁵

It is against the background of these enumerated purposes and goals of openness, open meetings laws, and their seeming drawbacks, that the “deliberation” requirement of the Iowa Open Meetings law can be examined.

III. THE DELIBERATION REQUIREMENT OF THE IOWA OPEN MEETINGS LAW

Most routine meetings of a multimember agency—such as a federal or state commission, or a local school board—occur at the agency’s main office.⁶⁶ They may be held in a room designated for that specific purpose, where members sit behind a formal, raised “bench” at regularly scheduled times every week or month. An agency executive prepares an agenda that is circulated to the members in advance of the meeting, along with supporting documents prepared by the agency’s staff.⁶⁷ If a quorum is

62. See, e.g., Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1137 (2000).

63. See GARDNER, *supra* note 61, at 3 (stating that “[w]hen organizations and societies are young, they are flexible, fluid, not yet paralyzed by rigid specialization and willing to try anything once”).

64. See *id.* at 76 (“Experienced managers know that some organizations can be renewed through new leadership and new ideas.”).

65. See discussion *supra* Part II.A.1-4.

66. This information is drawn from the Author’s experience. See *supra* note 45.

67. See, e.g., DES MOINES PUB. SCH., MEETING SCHEDULE & AGENDAS, *at*

present, the meeting is devoted to a discussion of the agenda items. This usually leads to a recorded vote of the members' decisions (though usually with no statements of reasons from the members) regarding matters that legally cannot be, or have not been, delegated to the staff.⁶⁸

"Government in the Sunshine" or "Open Meetings" laws provide (with some enumerated exceptions⁶⁹) that the media and public may attend such meetings.⁷⁰

A. *Statutory Exceptions to Open Meetings*

There is often dispute, sometimes litigated, regarding the propriety of an agency's characterization of its business as properly falling within one of the exceptions.⁷¹ Such disputes are beyond the scope of this Article—except insofar as they illustrate the purposes of the law and its recognition of circumstances best served by closed sessions.

Closed sessions are permitted for discussions of items such as confidential records,⁷² litigation strategy with counsel,⁷³ negotiation

<http://www.dmps.k12.ia.us/schoolboard/2schedule.htm> (last visited Oct. 31, 2004) (describing the agency's typical agenda for school board meetings). For the most current school board agenda, see DES MOINES PUB. SCH., REGULAR SCH. BD. MEETING TENTATIVE AGENDA 1-23 (Nov. 2, 2004), at <http://www.dmps.k12.ia.us/quickref/BoardAgenda110204.doc>.

68. See, e.g., DES MOINES PUB. SCH., REGULAR SCH. BD. MEETING MINUTES 1-6, 44 (Oct. 5, 2004), at <http://www.dmps.k12.ia.us/schoolboard/3-041005appmin.doc> (recording of minutes, decisions, motions, and votes during the October 5th meeting).

69. See, e.g., IOWA CODE § 21.5 (2003) (noting such exceptions).

70. See, e.g., *id.* §§ 21.3-21.4 (providing for public notice and attendance).

71. See, e.g., *Schumacher v. Lisbon Sch. Bd.*, 582 N.W.2d 183, 184-86 (Iowa 1998) (ruling for parents, who sought open meeting for child's suspension hearing, against school board, who insisted on a closed session); *Tel. Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 533-34 (Iowa 1980) (rejecting newspaper's contention that interviews conducted by one or two city council members should have been conducted by full council in open meetings); see also *Joiner v. City of Sebastopol*, 178 Cal. Rptr. 299, 300 (Cal. Ct. App. 1981) (holding that interviews conducted by two members of city council violated open meetings requirements because committee was appointed by full council); *Wisconsin ex rel. Newspapers, Inc. v. Showers*, 398 N.W.2d 154, 165-66 (Wis. 1987) (holding that closed meeting of four of eleven sewage commission members violated open meetings requirements because budget issue they discussed required vote of two-thirds of eleven commissioners, which could be controlled by the four who met).

72. IOWA CODE § 21.5(1)(a).

73. *Id.* § 21.5(1)(c).

sessions,⁷⁴ or student expulsion hearings.⁷⁵ Performance or discharge evaluations of personnel may be held in closed session if “needless and irreparable injury” might otherwise result.⁷⁶ An agency may close its discussions of real estate purchases “where premature disclosure could be reasonably expected to increase the price.”⁷⁷

What is the reason for these exceptions? Many have to do with interests of privacy. But not one expressly addresses the ability of agency members to engage in a discussion that would be otherwise inhibited by the considerations mentioned above.⁷⁸

B. *Open Meetings Application to Government Bodies*

Aside from the purposes behind the enumerated exceptions, the Iowa Open Meetings law acknowledges no benefits of closed session deliberations.⁷⁹ Its requirements are all-encompassing: “Meetings of governmental bodies shall be . . . held in open session [A]ll actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.”⁸⁰

The Act covers only “governmental bodies.”⁸¹ But that is defined as including virtually every imaginable public institution and more. “A board, council, commission or other governing body” created by the legislature, executive order, or existing within a political subdivision is included within this definition.⁸² Nonprofit corporations funded in part by property taxes,

74. See 44 Op. Iowa Att’y Gen. 162, 162 (1981) (concluding that school boards are not required to hold open meetings when conducting negotiating sessions or strategy meetings under the state Public Employment Relations Act).

75. IOWA CODE § 21.5(1)(e).

76. *Id.* § 21.5(1)(i).

77. *Id.* § 21.5(1)(j). Not only is “openness” a means and not an end, not only does it have costs as well as benefits, but it is also not the only value to be served—as the statutory exceptions demonstrate. As Professor Arthur Bonfield has said: “[W]e need to balance the need for openness against other equally important values [O]penness in government is no virtue when it substantially interferes with or impairs government efficiency [and] effectiveness” Arthur Earl Bonfield, A Presentation to the Joint Committee on the Open Meetings Law of the General Assembly 1 (Dec. 20, 1977) (on file with the author).

78. See *supra* Part II.B.

79. IOWA CODE § 21.5(5) (“[N]othing in this section requires a governmental body to hold a closed session to discuss or act upon any matter.”).

80. *Id.* § 21.3.

81. *Id.*

82. *Id.* § 21.2(1)(a), (b).

and advisory boards created “to develop and make recommendations on public policy issues” are also considered to be governmental bodies under the Act.⁸³ As defined, a school board would be a governmental body covered by the Act.⁸⁴

Excluded from the Act’s coverage, of course, are multiple-member judicial bodies and single-headed agencies.⁸⁵ This Article later explores the logic of the distinctions justifying this disparate treatment, given that most asserted benefits of openness seem equally applicable to such institutions.⁸⁶

C. *What and When Is a “Meeting”?*

To understand why single-headed agencies are excluded, one of the most significant definitions must be examined—the definition of “meetings.”⁸⁷ Recall that it is “meetings” that are to be in open session. So what and when is a meeting? Is it possible for agency members to have what we will call an “encounter”—i.e., a meeting in the colloquial sense—that is not a “meeting” in the legal sense of the Iowa Act? If so, the benefits of closed-session discussions could be obtained at such an encounter.

Unfortunately, the law defines “meeting” as “a gathering in person or by electronic means . . . of a majority of the members of a governmental body”⁸⁸ and provides that “all actions and discussion at meetings . . . shall be conducted and executed in open session.”⁸⁹ The Iowa Code contains no

83. *Id.* § 21.2(1)(e)-(f).

84. *See id.*

85. *See id.* § 21.2 (failing to include single-headed agencies in the legal definition of “governmental bodies” for purposes of the Act); *infra* note 90 and accompanying text.

86. *See infra* Part III.G.1-2.

87. A task force of the Administrative Law Section of the American Bar Association found that the definition of “meeting” in the Government in the Sunshine Act was problematic. SENATE COMM. ON GOVERNMENTAL AFFAIRS, *supra* note 47, at 18. That group recommended that Congress *not* include in the definition of meeting: (1) spontaneous casual discussions, (2) briefings by staff or outsiders, or (3) general discussions preliminary in nature. *Id.*

88. IOWA CODE § 21.2(2).

89. *Id.* § 21.3. This Article addresses the law that currently exists. But as the reader may suspect, those drafting the Iowa Open Meetings law and its revisions have no doubt considered, rejected, and compromised with regard to many definitions of “meeting” and other provisions of the law. Although the details of that legislative history are outside the scope of this Article, they have been pulled together in a thorough, well-written and even entertaining account elsewhere. *See* Steven Stepanek, *Open in the Name of the Law: A Study in the Use and Usefulness of the Iowa Open*

exclusion for encounters for the purpose of closed discussions, even when the purposes of the law would be served by keeping such discussions closed.

The other consequence of the legal definition of meeting is the presumption that there is more than one agency head; it refers to “a majority of the members of a governmental body.”⁹⁰ That is how single-headed agencies get excluded from the need to disclose their intra-agency deliberations. Why should the deliberations within a single-headed agency be excluded from the requirements of media and public access?⁹¹ If the Act serves a public policy purpose for deliberations within multimember agencies, it ought to be equally purposeful to apply it to the others. Or, otherwise put, if the Act’s purpose is *inapplicable* to other institutions, what is it about multiple-member agencies that makes it applicable to them?

Another irrational inconsistency is the exclusion from the Act’s coverage of deliberations conducted by less than a quorum of an agency’s members.⁹² This Article acknowledges that most meetings at which *decisions* are made *should* be held in open session. It is the *predecisional* discussions, *regardless* of the number of members participating, that this Article argues an agency should sometimes be able to hold in private.

Indeed, if this interpretation is not within the contemplation of the Act, why should gatherings of *less* than a quorum of a multimember agency be *excluded* from its coverage—as most acknowledge they are?⁹³ The only logical reason for excluding such gatherings is that they are incapable of producing the “decisions” that can be made only by a quorum. In other words, the value of open meetings is limited to those meetings at which

Meetings Law 11-76 (2004) (unpublished Ph.D. dissertation, University of Iowa) (on file with the University of Iowa Library).

90. IOWA CODE § 21.2(2); *see supra* note 82 and accompanying text.

91. For a suggestion of how this might work, see *infra* Part III.G.2.

92. *See* IOWA CODE § 21.2(2) (requiring an open meeting for deliberations conducted by a governmental body where a “majority of the members” are present).

93. *See, e.g., id.* (defining “meeting” as a formal or informal gathering of a *majority* of members comprising a governmental body where deliberation or action takes place) (emphasis added); CAL. GOV’T CODE § 54952.2(a) (West 1997) (defining “meeting” as “any congregation of a *majority* of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of . . . the local agency to which it pertains”) (emphasis added); ILL. COMP. STAT. ANN. 120/1-02 (West 1993) (“Meeting means any gathering of a *majority* of a quorum of the members of a public body held for the purpose of discussing public business.”) (emphasis added).

binding decisions can be made and votes taken and recorded.

On the other hand, if there *is* a benefit to the public and media being able to attend predecisional discussions among the members, that benefit would seem to flow from *any* encounter, regardless of how many members are present. The value would seem to be as applicable to the deliberations of three members of a seven-person agency (not a majority) as to the deliberations of four (a majority). The former, however, is excluded and the latter is covered.

This leaves, of course, an enormous loophole in the Iowa Open Meetings law, and one that is often utilized by the otherwise law-abiding members of agencies.⁹⁴ Because most agency members find that at least *some* discussions simply must be held in private, it is not uncommon to find them occurring among groups of three (in seven-person agencies).⁹⁵ They see nothing wrong with this practice,⁹⁶ and neither does the law as written: if there is not a quorum there is not a statutory meeting, and if there is not a meeting there is no requirement that it be open.⁹⁷

Are there any circumstances, other than the enumerated exceptions,⁹⁸ under which a quorum of the members *can* be together, and any topics they could then discuss, that are, or should be, excluded from the demands of

94. See, e.g., *Joiner v. City of Sebastopol*, 178 Cal. Rptr. 299, 300 (Cal. Ct. App. 1981) (holding that interviews conducted by two members of city council violated open meetings requirements because committee was appointed by full council); *Tel. Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 531-32 (Iowa 1980) (describing actions of city council, which conducted interviews with only one or two council members present); *Wisconsin ex rel. Newspapers, Inc. v. Showers*, 398 N.W.2d 154, 165-66 (Wis. 1987) (holding that closed meeting of four of eleven sewage commission members violated open meetings requirements because budget issue they discussed required vote of two-thirds of eleven commissioners).

95. See, e.g., *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 465 (1984) (finding that three of seven FCC Commissioners regularly met with their Canadian and European counterparts); NEW YORK COMM. ON OPEN GOV'T, ADVISORY OPINION (Aug. 7, 2001), at <http://www.dos.state.ny.us/coog/otext/o3348.txt> (involving a seven-person city council which sought advice on the legality of "3 x 3" meetings—three meetings of three council persons each—as a way to avoid open meetings requirements).

96. See sources cited *supra* notes 94-95. The Author's experience is consistent with the facts of these cases. It is common for new members of an agency to soon discover the disadvantages of trying to limit all discussions with their colleagues to those held in open meetings, even while they continue to reserve their formal agency deliberations for open sessions. For more on these disadvantages, see *infra* Part III.F.

97. See IOWA CODE § 21.2.

98. See *id.* § 21.5 (listing exceptions).

the Iowa Open Meetings law? Not if the Act truly covers all discussions.

Actually, under the Act, the “meeting” definition provides that an encounter shall *not* be considered a meeting if it is “for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of [the Act].”⁹⁹ But of course, such an exemption by its express terms precludes its use for discussions touching on any topic that could possibly be interpreted as falling “within the scope of the governmental body’s policy-making duties.”¹⁰⁰ So defined, this would mean that a school board’s discussion of virtually any one of thousands of K-12 policy issues, government reports, or news items “within the scope of [its] duties”¹⁰¹—even though unrelated to its school district, let alone agenda items for proposed decisions—would be forbidden by law.

D. *What and When Is “Deliberation”?*

On the assumption that the requirements of openness are triggered under the Act only if a meeting occurs (an encounter of a majority of the members),¹⁰² there remain additional questions regarding what constitutes a meeting. Not every encounter is a meeting; a “meeting” includes only those encounters “where there is *deliberation or action* upon any matter within the scope of the governmental body’s policy-making duties.”¹⁰³

Thus, the fact that section 21.3 requires that “all actions and discussions at meetings” be conducted “in open session”¹⁰⁴ does not turn all

99. *Id.* § 21.2(2). An Iowa Attorney General’s Opinion offers the concrete focus test for determining when a “ministerial purpose” becomes “deliberation or action.” The opinion states:

[G]athering for ‘purely ministerial’ purposes may include a situation in which members of a governmental body gather simply to receive information upon a matter within the scope of the body’s policy-making duties. During the course of such a gathering, individual members may, by asking questions, elicit clarification about the information presented [T]he nature of any such gathering may change if either ‘deliberation’ or ‘action’ . . . occurs. A meeting may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they exercise judgment or discretion.

44 Op. Iowa Att’y Gen. 10 (1981).

100. IOWA CODE § 21.2(2).

101. *Id.*

102. *Id.*

103. *Id.* (emphasis added).

104. *See id.* § 21.3 (requiring a meeting to trigger open meeting requirements).

discussions and encounters of agency members into “deliberations.”¹⁰⁵ The discussion must have taken place at a “meeting.”¹⁰⁶ If there has not been a “meeting,”¹⁰⁷ there is nothing to trigger the requirement of an open meeting.¹⁰⁸ And a “meeting” only occurs “where there is deliberation.”¹⁰⁹ So it is only those discussions that may be characterized as deliberations that must be in open session.¹¹⁰

One may argue the administrative difficulty of drawing the line where “discussion” stops and “deliberation” begins, and then bootstrap to the conclusion that, therefore, all discussions should be treated as the equivalent of the statutory definition of “deliberation.” But however difficult the distinction between “discussion” and “deliberation” may be, both the law and common dictionary definitions suggest the distinction exists.

The Act speaks of “deliberation or action.”¹¹¹ What does “deliberation” mean when used in conjunction with “action”? Does it mean such deliberation as normally precedes *imminent* action? Or is it meant to stand apart? Does it include the discussion of “*any matter[s]*” even potentially “within the scope of the board’s policymaking duties”¹¹² (i.e., any “shop talk,” breakout session discussion at a conference, provision of information to agency members, or brainstorming)? Does it make any difference how remote the prospect of the members ever taking “action” related to the discussion may be?

As written, the current Act creates more interpretative confusion than it resolves. (1) If an encounter occurs at which “action” is neither contemplated nor occurs, it would at least not meet the “action” portion of the definition.¹¹³ (2) Similarly, if “deliberation” is defined as meaning *predecisional* discussion, or “deliberation leading to action,” and neither action nor decision ever occurs, the discussion would not meet the “deliberation” standard.¹¹⁴ (3) If neither “action” nor “deliberation”

105. *Id.* §§ 21.2(2), 21.3.

106. *Id.*

107. *Id.* § 21.2(2).

108. *See id.* § 21.3 (requiring a meeting to trigger open meeting requirements).

109. *Id.* § 21.2(2).

110. *Id.*

111. *Id.*

112. 44 Op. Iowa Att’y Gen. 162 (1981) (emphasis added) (describing the nature of a gathering involving deliberation or action).

113. *See* IOWA CODE § 21.2(2).

114. *See id.*

occurs at an encounter, it is not a “meeting.”¹¹⁵ And if there is no meeting, there is no applicability of the Iowa Open Meetings law, regardless of what is discussed.¹¹⁶

Suppose agency members attend a convention related to their agency’s business, such as school board members attending an Iowa Association of School Boards annual conference. While there, enough of the members to constitute a quorum of the board get together for lunch. Over lunch they discuss the subject presented at one of the morning sessions. It is a subject potentially “within the scope of the governmental body’s policy-making duties”¹¹⁷—as would be the subject of virtually every workshop and speech at the conference. The board members’ luncheon discussion is lively, analytical, informative, and provocative. But neither then, nor subsequently, does any member have the slightest intention of proposing action by the board, nor do they ever arrive at a decision regarding the subject discussed. Have they violated the Iowa Open Meetings law? How could they possibly have constructed an agenda for their luncheon meeting and made it public in advance, since they did not know (a) the subject of the workshop or speech, (b) that a quorum of members would be having lunch together, or (c) what they would be discussing? If this is really thought to be a serious open meetings problem, is it not a little silly to say the solution is for them to split into three luncheon groups so that none will constitute a quorum?¹¹⁸

What help can we find in the dictionary? *The Oxford English Dictionary* defines “deliberation” as “[t]he consideration and discussion of the reasons *for and against a measure* by a number of councillors (e.g., in a legislative assembly).”¹¹⁹ It defines “deliberate” similarly: “To weigh in the mind; to consider carefully *with a view to decision*; to think over” and “[t]o *resolve, determine, [and] conclude*.”¹²⁰

Thus, whether one uses the Iowa Code’s “deliberation or action”

115. *See id.* (“‘Meeting’ means a gathering . . . of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body’s policy-making duties.”).

116. *See id.* § 21.3.

117. *See id.* § 21.2(2) (defining “meeting” as including “deliberation or action upon any matter within the scope of the governmental body’s policy-making duties,” but not gatherings for “purely ministerial or social purposes”).

118. *See id.* (defining a “meeting,” for purposes of the Act, as a quorum, or “gathering . . . of a majority of the [agency’s] members”).

119. THE OXFORD ENGLISH DICTIONARY 414 (2d ed. 1989) (emphasis added).

120. *Id.* at 413-14 (emphasis added).

characterization¹²¹ or the standard dictionary definition,¹²² deliberations related to “the *scope . . .* of policy-making”¹²³ but unrelated to potential policy *decisions* should not be considered the kind of “deliberation” contemplated by the Act. To argue otherwise leads to ludicrous results.

Suppose two school board members stop to chat on the street. One asks the other if she saw yesterday’s TV evening news item about the new requirement of school uniforms in a neighboring school district. They discuss the idea for a couple minutes and go on their way. Because two (of five or seven) board members would not constitute a quorum, there would not have been a “meeting.”¹²⁴ But was there “deliberation”? What if there was a quorum—if, say, four members ran into each other at a local coffee shop and had the same brief discussion? Should that be considered a violation of the Iowa Open Meetings law?

Because the two members’ “deliberation” began while watching the TV news item that triggered it, if the public is to know “the basis and rationale” of their subsequent discussion, are the members required to obtain, and place in the public record, a video clip copy of the news item? An audiotape or transcript of their conversation? A summary? At least tell the public that the TV watching and conversation occurred?

Should it make a difference if they subsequently *do* make an agenda item out of the idea, discuss it in an open meeting, and ultimately adopt school uniforms? If so, does that make it better (because “deliberation” was eventually held in an open meeting), or worse (because that makes it clear the earlier discussion *was* a part of the board’s deliberative process, the “basis and rationale of governmental decisions”¹²⁵)? Can a chance remark or discussion be retroactively judged to have been “deliberation”?

If the public benefits from knowing the discussions held between four members of a seven-person body, why should it not equally benefit from knowing the discussions among three? If three, why not two?¹²⁶ If two,

121. IOWA CODE § 21.2(2).

122. See THE OXFORD ENGLISH DICTIONARY, *supra* note 119, at 413-14 (defining “deliberation”).

123. *Id.* (emphasis added).

124. See IOWA CODE § 21.2(2) (defining a meeting as requiring a majority of members).

125. See *id.* § 21.1 (requiring open meetings to ensure “that the basis and rationale of government decisions . . . are easily accessible to the public”).

126. Professor Arthur Bonfield has offered “common sense” as an argument against going so far. If “meeting” was defined to include

why not the deliberations of a single member—her research and reading, thoughts about possible policies, discussions with others, and early drafts of policies she intends to propose to her colleagues?

“Deliberation” can be done alone. In fact, most individuals do just that with regard to many decisions every day (e.g., should I order the dessert or stay with my diet? Should I go shopping tonight after work or wait until next Saturday?).

So defined, an individual agency member’s “deliberations” with regard to matters “within the scope of” her “policy-making duties”¹²⁷ may be prompted by research on the Internet, a newspaper story, memories of an early childhood experience, conversation over coffee at work, or something heard on the radio or seen in the local paper. A new idea can come from many unpredictable sources—even dreams. Surely the legislature could not have intended that the public have access to the *entire* deliberative process of every member of an agency.

Since that definition is as unworkable as it is improbable, what seems much more reasonable is to take the law at its word. Statutory “deliberations” occur only at meetings (whether in person or electronic) at which a majority of members are gathered simultaneously for purposes of making *decisions*.¹²⁸ They can include discussions on drafting future agenda items on which the agency *will* vote, discussions focused on a particular agenda item *prior* to its disposition at a meeting, or a member’s declaration of the reasons for her position on an agenda item in conjunction with her vote.

In short, the definition of “deliberations” need not be restricted to discussions in open meetings prior to voting. But neither should it be defined to include members’ informal discussions at a time when formal proposals have not been contemplated, formulated, or scheduled for “deliberation.”

any discussion of two members . . . the act will practically be unworkable. Could we, should we, really bar phone conversations between two agency members? There are limits of practicability and common sense to what you can call a ‘meeting,’ and the extent to which you can realistically bar private discussion by two members

Bonfield, *supra* note 77, at 4.

127. IOWA CODE § 21.2(2).

128. *See id.* (requiring deliberations in order for a gathering of the members of a governmental body to fall within a statutory definition of a meeting).

E. *Exempting Predecisional Discussions Will Affirmatively Serve the Purposes of Open Meetings*

As the Iowa law is drafted, so long as decisions are neither contemplated nor imminent, there should be no limit as to what members may discuss. There is simply no deliberation, no action, and therefore no “meeting” or applicability of the Iowa Open Meetings law. Not only does this interpretation accord with a reasonable reading of the Act and the dictionary definitions of the terms, it is also the best way to promote the purposes of the Act.

Agency members will still hold open meetings to receive public input. They will still do the public’s business in public: “deliberate” and vote on agenda items and provide some reasons for their votes. Moreover, should they fail to do so, any serious abuses of an agency’s opportunity to hold discussions in closed sessions will be subject to checks from a number of sources. The media will report and editorialize about supposed violations.¹²⁹ There will be the social pressure of complaints from members of the public as well as the members’ family, friends, and neighbors. Severe and repeated violations of the Act may provoke prosecutors to act.¹³⁰ There is always the ultimate elective or appointive control by an appointing executive or the electorate. Finally, there is nothing to keep legislators from returning to the issue.

Would such a procedural modification risk disserving the purposes of open meetings? A review of those purposes reveals no problem.

There is little if any evidence that any backroom, shady deal has ever been prevented by requiring it to be conducted in an open meeting. If an agency member wants to engage in such transactions, there are plenty of ways to do so.¹³¹ Did any drafter of the Iowa Open Meetings law actually

129. See, e.g., Tim Higgins, *Supervisors Dispute Portrayal of Meeting*, DES MOINES REG., Aug. 4, 2004, at 1B (highlighting the tension between supervisors and advocates of open government when closed-door meetings are held); Tim Higgins, . . . *But Secrecy Was Arrogant*, DES MOINES REG., July 26, 2004, at 8A (arguing that the public should be displeased by the outcome of deliberations conducted in closed-door meetings where counsel members and supervisors rotated in and out of the room to avoid the Iowa Open Meetings law).

130. See IOWA CODE § 21.6 (providing for enforcement of the Act).

131. As Thomas Tucker has observed, “[t]o the extent that there are shady dealings, open meetings will at most cause a change of venue . . . [b]ecause such a problem is one of human nature rather than procedure.” Thomas H. Tucker, “Sunshine”—*The Dubious New God*, 32 ADMIN. L. REV. 537, 544 (1980), quoted in Stepanek, *supra* note 89, at 26.

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expect there would be public display and confessions of such corrupt practices once formerly closed sessions were opened?

Moreover, to the extent that is a concern, it is far more likely that corruption will occur in private conversations between influential private citizens and agency members—meetings well outside the Act’s requirements.

Suppose a local city council member who owns rental properties wants the school board to know his views regarding the board’s choice of funding the construction of a new school—the choice between imposing an increase in property taxes or sales taxes. He will most likely talk confidentially to the school board member he trusts the most. He would not have come to a closed meeting of the entire school board in the past, and he will not come to an open public meeting now.

Moreover, such efforts by outsiders to exert influence on agency members is not even covered by the Act—and yet may constitute a far more serious perversion of the public’s business as well as an impediment to information about that business.

Nor is it likely that any media effort to check agency abuses is going to come as a result of media presence at encounters that do not involve “deliberation or action.”¹³² The checking value from media oversight is far more likely to be the result of investigative reporting than a mere repetition of what happens at open meetings.

And, as this Article explained earlier, requiring agency members to engage in predecisional discussions in public session does *not* result in the more thorough examination of issues and articulation of policies that is claimed.¹³³ Members are, if anything, *less* likely to carefully consider relevant data and opinions and produce technically sound, pragmatic, and sensible policies if they know someone is watching.¹³⁴

Finally, requiring all discussions to be held in public only increases the tendency of members to become “rubber stamp” agencies or otherwise delegate and diffuse the supposed strength of group decisions by deferring to those of the agency’s executive and staff.

132. See IOWA CODE § 21.2(2) (using such terms when defining a “meeting” under the Act).

133. See discussion *supra* Part II.B.

134. See discussion *supra* Part II.B.

F. *The Proper Function of Agencies Creates Less Need for Open Meetings*

John Carver is perhaps the leading advocate for reconceptualizing the role of boards generally, whether those of Fortune 500 for-profit corporations, non-profits and non-governmental organizations (NGOs), or school districts.¹³⁵ In this Section, Carver's terminology will be used: "boards" instead of "agencies," and "chief executive officers" (CEOs) instead of "executives."

For a variety of reasons, some quite sensible and others bordering on irresponsible, the members of many boards are loath to become proactive, not to mention "activist."¹³⁶ Aside from a rare inquiry or discussion, to the extent they have thought about their role at all, their actions indicate they seem to perceive it as one of sinecure, superficial oversight, and support of the CEO.¹³⁷

Anyone who has served on a variety of boards has probably experienced at least one for which the following will sound familiar.¹³⁸ Although the meetings are called "board meetings," and there is a "board agenda," for all practical purposes, board members are little more than an audience at a "CEO meeting."¹³⁹ The CEO prepares the board agenda with little or no input from any board member.¹⁴⁰ The CEO prepares the

135. John Carver is the author of several works. *See, e.g.*, JOHN CARVER, *BOARDS THAT MAKE A DIFFERENCE* (2d ed. 1997); CARVER, *PLANNING BETTER BOARD MEETINGS*, *supra* note 50; JOHN CARVER, *REINVENTING YOUR BOARD* (1997); John Carver, *Remaking Governance: The Creator of 'Policy Governance' Challenges School Boards to Change*, AM. SCH. BD. J., Mar. 2000, at <http://www.uiowa.edu/~cyberlaw/writing/asbjcarv.html>. The reference to "boards" or "CEO" in this Section is simply use of Carver's terminology. "Boards" is intended to include any multimember body or agency. "CEO" refers to any single-headed institution's executive.

136. *See generally* CARVER, *BOARDS THAT MAKE A DIFFERENCE*, *supra* note 135, at 11-12 (describing the characteristics of less-involved boards, and "[b]oard[s] as cheerleaders").

137. *See id.* For convenience, although occasionally specific titles are used (such as a "superintendent" of a school district), "CEO" is used generally to encompass such titles as president, general manager, superintendent, executive director, dean, and others. CARVER, *BOARDS THAT MAKE A DIFFERENCE*, *supra* note 135, at 104; CARVER, *REINVENTING YOUR BOARD*, *supra* note 135, at 40.

138. Unless otherwise supported, the following information in this section is drawn from the Author's experience. *See supra* note 45.

139. *See* CARVER, *BOARDS THAT MAKE A DIFFERENCE*, *supra* note 135, at 180 (finding it "common for boards to defer to their CEOs on agenda sequence and content").

140. *See* CARVER, *REINVENTING YOUR BOARD*, *supra* note 135, at 44.

documents and the presentations regarding those agenda items, and may even offer scripts for board members' comments and motions. The CEO recommends how agenda items should be resolved. The CEO conducts the board meeting, and his or her staff members make the presentations.

Few if any board members take it upon themselves to conduct independent investigations of or research agenda items. Virtually none have ever drafted a substantial policy document for board consideration.¹⁴¹ And it is rare that any board member would have access to personal "staff"—indeed *any* assistance from the organization other than individuals reporting to, and controlled by, the CEO. This is the kind of multimember board or agency that open meetings laws not only contemplate, but perpetuate.

The board's CEO knows when and where the meeting will be held and what will be discussed. It is therefore relatively easy for CEOs with "rubber stamp" boards to comply with the legal requirements of notice and agenda.¹⁴²

The problems only arise for boards that are willing to undertake what Carver and the open meetings laws consider to be a board's proper roles: long-range planning,¹⁴³ the allocation of governing responsibilities between the board and CEO, the establishment of measurable purposes and goals, and the management of information reporting systems to track their accomplishment.¹⁴⁴ For these are the functions that board members perform, for the most part, independently of the CEO.

If agency members undertake such functions, they need to have a heightened level of collegiality, the opportunity for informal one-on-one conversations, group brainstorming, consultations with outside experts, individual research on the Internet and elsewhere, and in general a more informal environment. How could one prepare a conventional "agenda" prior to a brainstorming session—and what use would it be if it could be

141. See, e.g., CARVER, BOARDS THAT MAKE A DIFFERENCE, *supra* note 135, at 207.

142. Cf. *id.* at 12 (discussing, *inter alia*, the "loose control," advisory, and supportive roles of a rubber stamp board).

143. This is what Carver refers to as "Ends policies." CARVER, REINVENTING YOUR BOARD, *supra* note 135, at 135-41; see also CARVER, BOARDS THAT MAKE A DIFFERENCE, *supra* note 135, at 12-13 (noting a board's role in, *inter alia*, developing long-range plans).

144. See CARVER, REINVENTING YOUR BOARD, *supra* note 135, at 135-41 (outlining possible approaches a board could take when developing "Board-CEO Linkage," "Executive Limitations," and "Ends policies").

done?

An agency's informal discussions involving "governance," as Carver defines it,¹⁴⁵ are very different from the law's notion of a conventional agency's deliberations regarding "decisions." Indeed, Carver would suggest that a conventional agency's "decisions" are more properly the domain of the CEO than agency members.¹⁴⁶ At the opposite end of Carver's continuum from a "rubber stamp" board is what he complains of as a "micro-managing" board.¹⁴⁷ This is a board with members who want to participate in (if not dictate) decisions more properly left to the CEO.¹⁴⁸ The CEO's job, as Carver sees it, is to reach the board's "Ends" without "violating its Executive Limitations."¹⁴⁹ The CEO's job description and the board's periodic evaluation of her performance are identical with those ends.¹⁵⁰ If she reaches them, a promotion or other recognition is warranted. If she fails to do so, at least an explanation—and possibly a revision of ends, or even termination—will be required. The CEO need not come to the board with every decision, what might be characterized as "stop until we say go." Most decisions will be for the CEO alone to make, or "go until we say stop." The CEO can adopt any means for reaching the ends that is not forbidden in the executive limitations.

Given such an allocation of responsibility, there is much less need to apply the rigorous detail of open meetings laws to an agency's informal discussions. Most of them will not relate to the conventional notion of "decisions" anyway. Of course, none of this is to say that when an agency's informal governance discussions *do* reach the stage of voting on and providing the reasons for specific new policies, programs, or expenditures, that they should not be done in open session. It is only to say that preliminary informal exchanges will benefit from the board members' sense of freedom to throw all options on the table—however outrageous and politically unacceptable they may be—without fearing the potential

145. CARVER, BOARDS THAT MAKE A DIFFERENCE, *supra* note 135, at 17-20.

146. See CARVER, REINVENTING YOUR BOARD, *supra* note 135, at 4 (stating that a CEO will have greater authority under Carver's "Policy Governance model").

147. See CARVER, PLANNING BETTER BOARD MEETINGS, *supra* note 50, at 6-8 (defining "rubber stamping," and criticizing the boards who use it); CARVER, BOARDS THAT MAKE A DIFFERENCE, *supra* note 135, at 9 (describing boards that spend a disproportionate amount of time on trivial issues).

148. CARVER, BOARDS THAT MAKE A DIFFERENCE, *supra* note 135, at 115-18 (proposing that boards and CEOs keep their roles separate).

149. *Id.* at 108. For Carver's definition of "Executive Limitations," see *id.* at 34.

150. See *id.* at 108.

loss of face, election, job, or business. To discourage such discussions—and thereby such proper and even essential functions of agency members—is a very heavy price to pay for the inflexible application of laws. This is especially so when the very purposes of such laws are disserved, rather than served, by their application.

G. *There Is No Reason to Hold Multimember Agencies to a Different Standard Than Comparable Institutions*

Few would argue with the desire to “enhance citizen confidence in government [or] encourage higher quality work by government officials”—to quote from Judge Skelly Wright’s *Common Cause v. Nuclear Regulatory Commission*¹⁵¹ opinion.¹⁵² But it does not follow from those lofty aspirations that requiring agency members to hold all of their discussions in public is the only or best way to achieve those goals. Indeed, as this Article has demonstrated, such a requirement not only fails to serve the purposes for which it is imposed, it actually defeats that legislative intent.¹⁵³

But there is yet another reason why agencies should be free to conduct some of their deliberations in private. Comparable institutions, as to which the *purposes* of open meetings laws are seemingly equally applicable, are *not* required to conduct all of *their* deliberations in public.¹⁵⁴ Since there are few, if any, rational reasons for the distinction, and the disadvantages of doing so are clear, the requirements should be similar.¹⁵⁵

It is instructive to begin by noting a number of institutions—for which both citizen confidence and higher-quality work are equally essential—that do *not* deliberate in public.

151. *Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921 (D.C. Cir. 1982).

152. *Id.* at 928.

153. *See* discussion *supra* Part II.B.

154. *See* Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1175-84 (1993) (challenging the effectiveness of state sunshine laws in legislative and judicial settings).

155. *See* SPECIAL COMM., ADMIN. CONF. OF THE U.S., *Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 423-25 (1997) (recognizing that the federal open meetings law has a chilling effect on the collegial decisionmaking process and recommending a pilot program giving agencies more leeway to conduct private meetings and requiring a detailed memo to be published within five days after each meeting).

1. *The Courts*

Many of the institutions left free of open meetings shackles are a part of the judicial system itself—that branch of our federal and state governments one could argue is *least* subject to democratic control, and therefore *most* in need of processes promoting citizen confidence.¹⁵⁶ Few, if any, agency members have the lifetime appointments enjoyed by many judges.¹⁵⁷ And even agency members with relatively long terms are subjected to significant controls by elected officials—certainly far more than are judges.

A prosecutor's decisionmaking process is conducted out of public view. Her presentation to a grand jury and its deliberations are secret. Criminal and civil trial juries deliberate in private. Lawyers' settlement, or plea-bargaining sessions are closed, as are conferences in judges' chambers. At the appellate level, all of the judges' informal discussions, formal deliberative conferences, staff memos from law clerks, and circulated draft opinions are closed to media and public.¹⁵⁸

All that is open are the trial and its supporting documents, the briefs on appeal, the appellate oral argument (if any), and the ultimate written opinion of the court.¹⁵⁹ This is apparently thought, by judges and legislators alike, as sufficient public disclosure to ensure the necessary level of citizen confidence in what they do.¹⁶⁰

156. See Brian T. FitzGerald, Note, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381, 398 (1990) (stating that the mystery surrounding the deliberations behind court opinions "reduce[s] public confidence in the courts" by "diminish[ing] the public's understanding of the legal process and [by] undermin[ing] the public's belief in the overall fairness of the judicial system"); see also Howard T. Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373, 385 (1984) ("For much of the public, appearances are all it has to go by.").

157. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

158. See Edwin R. Render, *On Unpublished Opinions*, 73 KY. L.J. 145, 158 (1984) (stating that even if parties to an agreement choose not to publish an appellate opinion, doing so might create an "impression of impropriety").

159. Note that what is substituted for an "open" judicial conference is not merely a decision, but a reasoned decision. Professor Gerald B. Wetlauffer has thoroughly researched and documented the evolution and emphasis of the "legal process school," its call for reasoned opinions, and its objections to "unreasoned per curiam decisions." Gerald B. Wetlauffer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 21-34, 31 n.101 (1999).

160. Then-Justice William H. Rehnquist argued over twenty-five years ago that a closed conference of the Justices of the United States Supreme Court allowed for an honest exchange of ideas since no underdeveloped ideas would leave the walls of

By what logic should a small town's school board be held to more rigorous standards of openness than those applicable to the United States Supreme Court itself?

2. *Single-Headed Agencies*

Most federal, and many state, executive branch and independent agencies are *not* multimember agencies and therefore not affected by open meetings statutes.¹⁶¹ For example, if an agency's name ends in "administration" or "agency," such as the United States Federal Aviation Administration (FAA), it is likely headed by a single individual with the

the conference room. William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559, 565 (1977). Moreover, Justice Rehnquist wrote that since the Justices made tentative votes and sometimes changed them, the Justices did not want public reactions to have any impact on their decisions. *Id.* at 566. *But see* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 959-62 (1989) (noting and refuting judges' arguments that limited publication is necessary because (1) the quality of unpublished opinions "decreases their information value" and (2) doing otherwise would "increase the demands on judges"). For a description of the secrecy of the conference of the Justices, see ROBERT L. STERN ET AL., SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 20-21 (2002).

It could be argued that although the appellate courts' deliberations are hidden from public view, they ultimately produce a written opinion. Judicial opinions are intended to be a presentation of the range of arguments, the court's disposition of them, and a reasoned presentation of its conclusion and decision. However, even this defense cannot be offered with regard to the United States Supreme Court's certiorari process. *See id.* at 301-03. There may be a trial court opinion and record, an appellate court opinion, and briefs of the parties with regard to certiorari. *Id.* at 288. But there is no opportunity for oral argument before the Supreme Court. *Id.* at 293-94. There is no report of the Justices' deliberations; indeed, there may be very little discussion among them that could even be characterized as deliberative. *Id.* at 292-93. There is no process for getting access to their notes (or those of their law clerks) regarding the reasons for their votes. *Id.* at 293. And, with the rare exception of a separate *dissenting* opinion, there is seldom an opinion from the Court. *Id.* at 303. The certiorari order may consist, in its entirety, of nothing more than the single word "denied." *Id.* at 301, 311. And yet, that "opinion" of the Court is dispositive, the single most important decision regarding the future, and outcome, of that case. Obviously, the Court thinks its procedure adequate to insure the parties' and the public's "citizen confidence" in the Court as an institution—and from the relative lack of public complaint or debate on the issue one must conclude it is right. *See id.* at 286 (stating that "the Justices have been free to develop such internal procedures and processes as they believe will permit the most expeditious and effective administration of the certiorari workload").

^{161.} *See, e.g.*, IOWA CODE § 21.2(1)(d) (2003) (defining governmental bodies as multimembered bodies).

title “administrator.”¹⁶²

Some of these agencies have hundreds, even thousands, of employees.¹⁶³ There are no discussions or deliberations *among* multiple members of the agency because there is only *one* “member” of the agency in the open meetings sense. But the administrator certainly engages in deliberations—or more likely the agency *staff* engages in deliberations with the administrator in the course of formulating a policy or decision.¹⁶⁴

Surely citizen confidence in the actions of single-member agencies is no less important than multimember agencies. And certainly procedures could be devised to make their deliberative process public if that was the only way to achieve the laudable purposes of open meetings laws. Copies of staff documents and audiotape records of staff meetings could be available in the agencies’ public reading rooms. Yet the law wisely does not impose such requirements.¹⁶⁵

The Freedom of Information Act¹⁶⁶ (FOIA) expressly *excludes* the primary source of agency staff deliberations—since most of them are in writing.¹⁶⁷ For the very reasons cited in this Article, the law simply “does not apply” to “intra-agency memorandums.”¹⁶⁸ If to promote citizen

162. From 1964 to 1966, the Author served as the Maritime Administrator of the U.S. Maritime Administration, a single-headed agency.

163. See, e.g., FED. AVIATION ADMIN., 2003 ANNUAL OCCUPATIONAL SAFETY AND HEALTH REPORT 1, available at <http://www.aee.faa.gov/aee-200/Annual/Ann03.pdf> (providing that 49,477 employees are covered by the FAA’s 2003 annual report).

164. Deliberation within an agency such as the FAA is very comparable to that within a multimember agency, such as the FCC. As a glance at the FAA’s key officials reveals, there are numerous individuals with titles of assistant or associate administrator, as well as “chiefs” of offices and bureaus. See FED. AVIATION ADMIN., ABOUT FAA, at <http://www.faa.gov/aboutfaa/Officials.cfm> (last visited Oct. 10, 2004). Their roles in such deliberations that may occur *with* “the” administrator are very similar in function to deliberations *among* the commissioners of the FCC.

165. See, e.g., IOWA CODE § 21.2(1)(d) (defining governmental bodies as multimember bodies).

166. 5 U.S.C. § 552 (2000).

167. See *id.* § 552(b)(5) (excluding “inter-agency or intra-agency memorandums or letters” from FOIA’s coverage).

168. *Id.* As the Supreme Court has noted, FOIA’s protection of intra-agency deliberations rests on a concern “that the ‘frank discussion of legal or policy matters’ . . . might be inhibited if the discussion were made public.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (quoting S. REP. NO. 813, at 9 (1965)). “[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.” *Id.* at 150-51 (quoting *United States v. Nixon*, 418 U.S. 683,

confidence the law did impose such requirements on the judiciary and executive branch agencies far removed from the people, it might be because the citizenry has no other direct, political means of control.

3. *Legislative Bodies*

Legislative bodies, by contrast, are directly and regularly monitored and selected by the voters. Thus, they have the least *need* for artificial procedures to build citizen confidence. Yet most open far more of their deliberative processes to public view than do courts and single-member agencies. They may prepare transcripts of legislative floor debates, such as the daily *Congressional Record*. There may be live radio or cable-distributed coverage of their proceedings, such as C-Span.¹⁶⁹ Committee hearings and other sessions are more open than in years past. Transcripts of hearings and printed committee reports may be made available in depository libraries around the country.

Still, there is an enormous amount of legislative deliberation (and lobbying) that takes place in informal gatherings and party caucus meetings out of public view. When Senate Majority Leader Lyndon B. Johnson used his favorite Biblical quotation, “[c]ome, let us reason together,”¹⁷⁰ he was much more likely to be talking about a closed-room discussion over “bourbon and branchwater” than an open debate on the Senate floor.

The 1776 Declaration of Independence marks in many ways the beginning of our nation as a nation. If ever there was a need for public

705 (1974)).

169. In Iowa, AM public radio stations WSUI (Iowa City) and WOI (Ames) virtually blanket the state with live coverage of the Iowa Legislature during some of its sessions.

170. President Johnson’s occasional use of the quotation is often cited. *See, e.g.*, Interview with Jack Valenti, President & CEO, Motion Picture Association of America, and Motion Picture Association (date unknown), at <http://www2.gwu.edu/~nsarchiv/coldwar/interviews/episode-13/valenti1.html> (last visited Nov. 8, 2004). Valenti was a top aide to President Lyndon B. Johnson and remained a loyalist throughout Valenti’s years as president of the Motion Picture Association of America and Motion Picture Association, in Encino, California (June 3, 1996) at <http://www2.gwu.edu/~nsarchiv/coldwar/interviews/episode-11/valenti1.html> (giving a brief biography of Jack Valenti); Press Release, Motion Picture Association of America and Motion Picture Association, Jack Valenti Announces Resignation after 38 Years as Head of MPAA/MPA, at http://www.mpaa.org/jack/2004/2004_07_01a.pdf (outlining Valenti’s tenure as the head of the MPAA/MPA). The full quote is, “Come now, let us reason together, says the LORD. Though your sins are like scarlet, they shall be as white as snow; though they are red as crimson, they shall be like wool.” *Isaiah* 1:18 (New International Version).

confidence in the public process, it was surely then. And yet if history records anyone's objection to the fact that it was drawn up without an "open meeting," this Author has yet to encounter it. Such support as the Declaration of Independence would come to enjoy was derived, not from media and public access to the drafter's deliberations in an open meeting, but from its written, reasoned arguments. Indeed the document itself seems to acknowledge both the need for public acceptance and the role of reasoned writing in its achievement. The Declaration of Independence begins, "[w]hen . . . it becomes necessary [for colonies to declare their independence], a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation."¹⁷¹

Similarly, the United States Constitution's "presentment" requirement,¹⁷² which authorizes presidential vetoes of bills,¹⁷³ does not require the President to hold open meetings when he and his staff deliberate on the matter. It provides: "If he approve[s the bill] he shall sign it, but if not he shall return it, *with his Objections* to that House in which it shall have originated . . ." ¹⁷⁴ In short, the best way to serve the policy *end* of "a decent Respect to the Opinions of Mankind," to borrow from the characterization in the Declaration of Independence,¹⁷⁵ is the *means* of a written, reasoned explanation. Open meetings may be another means of serving that end—but one thought less desirable by those contemplating and drafting the Declaration of Independence and the United States Constitution.

The standards found adequate in our nation's basic legal documents and the means adopted for other legal institutions reflect an awareness of the counterproductive consequences of requiring all discussions to be open to the media and public. There is no reason these standards should not be applied to the deliberations of multimember agencies. The Iowa Legislature should free state and local multimember government bodies from the requirement that *all* of their discussions be conducted in public.

IV. POSSIBLE LEGISLATIVE REVISIONS

The following standards would seem desirable:

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171. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
172. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill . . . shall, before it becomes a Law, be presented to the President . . .").
173. *Id.*
174. *Id.* (emphasis added).
175. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

Agencies should be encouraged (or even required) to receive public input regarding proposed policy and rulemaking decisions in a variety of ways—including open meetings.

Multimember agencies should be required to achieve the *ends* of the open meetings laws, but should be provided the flexibility of choosing alternative *means* of doing so. One means would be to conduct all discussions in open session, as now. A second option might be an agency's use of the appellate courts' procedure: *all* discussions, and even deliberations, could be held in closed session, but only if *written* statements summarizing arguments of interested parties, the rationale of individual agency members, and their votes were made available to media and public.

After all, reasoned decisionmaking is not merely a casual afterthought in administrative process. Providing "the basis and rationale of governmental decisions" is the goal of Iowa's Open Meetings law.¹⁷⁶ Section 553 of the federal Administrative Procedure Act expressly requires that an agency's "rules" must incorporate "a concise general statement of their basis and purpose."¹⁷⁷ Section 557 requires that "[a]ll decisions . . . shall include . . . the reasons or basis therefor."¹⁷⁸ The United States Supreme Court has held that, at least in some contexts, due process requires that "the decision maker should state the reasons for his determination."¹⁷⁹

Nonetheless, it may be both unnecessary and unrealistic to *require* small agencies, such as small town school districts, to issue *written* opinions. Thus, a third option would be to permit agency members to conduct predecision discussions away from media and public view so long as they always cast their votes in open meetings,¹⁸⁰ and accompany those votes with

176. IOWA CODE § 21.1 (2003).

177. 5 U.S.C. § 553(c) (2000).

178. *Id.* § 557(c)(3)(A).

179. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). *See Karol v. Bd. of Educ. Trs.*, 593 P.2d 649, 652 (Ariz. 1979) (stating that deliberations and arguments conducted before a vote need not be disclosed, although *votes* must be open to public examination); *Judge v. Pocius*, 367 A.2d 788, 791 (Pa. Commw. Ct. 1977) (stating that "preliminary activities of deliberation, discussion and decision which lead up to affirmative formal action" are not formal activities such that they must be done in a public meeting).

180. This proposal presumes that each member's statement of reasons would be presented orally. Presumably, many members would be uncomfortable with a requirement that written, court-like opinions would have to be prepared. However, such would probably be most desirable if and when any agency, or individual member, wanted to do so.

at least a brief explanation of their reasons—something that is now neither required nor regularly done. This option would actually *better* serve the statutory intent “that the basis and rationale of” agency decisions be provided¹⁸¹ than present law¹⁸² and practice do. Perhaps a summary of closed session deliberations might be required.

Legal challenges regarding alleged agency abuse of open meetings *purposes* should have to bear the burden of coming forward with at least *some* evidence of such a violation. Relevant standards in evaluating the presence of abuse might include: (1) the existence of a pattern or practice of violation, (2) the substantiality of the issue involved, (3) whether an agency decision was arrived at during the closed discussions or deliberations, and (4) the failure of members to provide the requisite brief statement of reasons when voting.

181. IOWA CODE § 21.1.

182. The present *statutory* Open Meetings law, while lauding the *end* of agency revelation of the “basis and rationale” for decisions, *see id.*, provides no failsafe *means* for achieving that goal. *See* discussion *supra* Part I. To the extent that end is thought desirable it can best, perhaps only, be provided by requiring that agencies provide reasoned opinions supporting their decisions—preferably in writing, but at least orally. This is something the present Open Meetings law neither provides the public nor requires of agency members.

To the extent agencies *are* required to provide reasoned explanations for their action, the requirement comes from the courts, not the Open Meetings law. Both federal and Iowa courts have noted the importance of reasoned decisions—though they do not always agree on how to dispose of cases where reasons are not provided. *See, e.g.,* Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1055 (7th Cir. 1992) (Posner, J.) (vacating a Commission opinion which, “despite its length, [wa]s unreasoned and unreasonable . . . arbitrary and capricious”); *id.* at 1049 (explaining that “the standard for judicial review of administrative action [is that i]t is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational”); *Branstad v. Veneman*, 212 F. Supp. 2d 976, 989 (N.D. Iowa 2002) (explaining that courts must permit an agency to make “fact-based determinations in its own field of expertise”) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d. 621, 633-34 (Iowa 2000) (stating that the workers’ compensation commissioner has the duty to state the evidence relied upon in reaching its conclusions, and that the court can work back from the reasoned opinion to figure out why the agency decided a matter a particular way) (citing *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510 (Iowa 1973)).

Thus, not only would the proposal in this Article improve the performance of agencies and better serve the Open Meetings law’s goal of public confidence in the “basis and rationale” for their decisions, it would also reinforce the courts’ expressed need for reasoned agency decisions.

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V. CONCLUSION: OPENING THE OPEN MEETINGS LAW

There is a strong case to be made for eliminating the strict open meetings requirements imposed on *all* discussions among the members of multimember agencies. Options should be made available to such agencies that would allow them to simultaneously conduct predecisional discussions and deliberations in private so long as the members publicly provide the reasons for their (individual) final decisions and votes. Such options, on the occasions when they were chosen by an agency, will improve the quality of its decisions while simultaneously serving the purposes of the open meetings laws far better than the current law.

Other governmental institutions are able to serve the purposes of such laws, such as public confidence in their process, without the open meetings requirements. Moreover, there are substantial costs in decreased quality of governing resulting from the inhibitions felt by agency members required to hold all their discussions in public. It is long past time for the Iowa Legislature to revisit, rethink, and revise Iowa's Open Meetings law.