The Sunshine Act: Its Harms and Possibilities for Change
Chai R. Feldblum

American Association of law Schools
Annual Conference
January 4, 2015

Let me start with a disclosure: I never taught the Government in Sunshine Act when I taught Administrative Law at Georgetown Law. Indeed, my sense is that the Sunshine Act is an under-taught and under-studied law, in comparison to the teaching and studying of other laws governing agencies, such as the APA or even FOIA.

This is understandable. The APA and FOIA apply to every federal agency. In contrast, the Sunshine Act applies only to agencies that are headed by a group of board or commission members. The law defines a covered agency as one that is: "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate."

So the Sunshine Act governs the 70 or so agencies that are headed by such collegial bodies – including the EEOC, where I serve.

Second, the provisions of the Sunshine Act are very internally-focused. The law tells a certain type of agency how to operate internally. There is very little reason for anyone outside of the agency to experience any direct impact from the law.

However, for those of us who care about good governance – lots of us in this room -- I believe we should care about the purposes and effects of the Sunshine Act. On a personal level, I can tell you that as a Commissioner of the EEOC (where I have been serving since April 2010, and where I was confirmed a year ago for a second term that will end in until July 2018), I have found that the Sunshine Act affects the workings of the Commission every day – in a detrimental manner.

The operative provision of the Sunshine Act is that "every portion of every meeting" that a covered agency holds must be open to public observation. 5 U.S.C. §552b(b). There are ten limited exemptions to

that requirement that basically track the exceptions in the Freedom of Information Act (FOIA) – except that, of key importance, there is no exemption comparable to FOIA's exemption for interagency or intra-agency "pre-decisional" memoranda or letters. And that is because the entire point of the Sunshine Act is to make transparent – to bring into the sunshine – the pre-decisional deliberations of these bodies.

So what is a "meeting" for purposes of the Sunshine Act? Obviously, that's of key importance. The statute defines a meeting as:

> The deliberations of at least the number of individual agency members required to take action on behalf of the agency *where such deliberations determine or result in the joint conduct or disposition of official agency business* . . . 5 U.S.C. §552b(a)(2) (emphasis added)

There are three elements that make up a meeting. First, there must be a quorum of members present –the number necessary to make a decision for the agency. For the EEOC, that is three Commissioners. Second, the members must be in a forum in which deliberations could determine or result in official agency business. So, if three EEOC Commissioners attend a speech or a reception at the same time, that is not a meeting because we are not in a forum that allows us to interact and deliberate in a manner that could result in agency action. (We can't clump together and deliberate on Commission business – but we can all be at the event together.) And finally, to be a meeting, the members have to engage in deliberations that "determine or result in the joint conduct or disposition of official agency business."

Those these three criteria create a "meeting" – which must be held in public and notice of which must be published in advance in the Federal Register.

Even while the Sunshine Act was being considered by Congress, there were those who could anticipate its harmful effects. I talked with someone who worked in Congress during that time and he told me

that he and his colleagues called the bill The Government by Staffers Act. As he explained, it was pretty obvious that a natural outcome of the law would be to devolve most or all deliberations down to the staff level – because there was no prohibition on staff members from all the commissioners or board members to meet together.

I have certainly seen that impact at the EEOC. There are many issues that are discussed solely among staff; then there are conversations just between each commissioner and her staff, and based on that, a decision is made about how to vote on the issue. The result, of course, is that there are fewer direct substantive conversations between any of the commissioners on that issue.

The approach I have used at the EEOC – at least for any policy issue I care about – is to engage in sequential deliberation and negotiations. I am permitted under the law to talk and negotiate with one colleague at a time. I usually begin a deliberation and negotiation with one of my Republican fellow Commissioners with whom I have a good relationship. She then talks to her fellow Republican Commissioner. I then talk (separately) with each of my two fellow Democratic Commissioners. This sequential conversation is obviously not a particularly efficient process. But it does ensure some direct substantive conversations between some of the Commissioners themselves. But it reduces the possibility of more creative and consensual ideas emerging – in a quicker fashion – during a substantive conversation with all the Commissioners present.

Following either staff deliberations or sequential deliberations by commissioners or board members, it would be good practice for a commission or board to meet in public to discuss the policy issue and vote on the policy in public. That would make transparent, at a minimum, the positions that each member of the commission or board has on the issue and would give the public a sense of the policy debate, if there is one.

A number of multi-member bodies do have this practice. Those bodies hold public meetings on major policy issues. They reserve the use of their electronic voting system (or paper notation system, if they still just have that) primarily for the myriad administrative decisions that commissions and boards often need to vote on. They do not use their electronic voting systems for major substantive policy decisions.

But the Sunshine Act itself does not preclude using an electronic voting system for all policy decisions – big and small. That has been my experience at the EEOC. A document is sent through an electronic voting system for the commissioners to vote on; if there is a majority in favor of the policy, the document is approved; and the public learns of the Commission's position only when the document goes public.

The only exception to this approach is an internal practice that has grown up at the EEOC that permits any commissioner to "agenda" the document – that is, to require that there be a public Commission meeting on which the document will be voted on. During my four years at the Commission, the "agenda" option has been used only once (to force a public meeting on regulations that the Commission issued under the ADEA on a party-line vote) and the Chair of the Commission, on her own accord, held a public meeting so we could vote on guidance with regard to the use of criminal records in employment decisions. Everything else has been done through a non-transparent electronic voting system.

Another mechanism is the use of briefings at which staff can brief commissioners or board members on ongoing agency activities. But this is a very constrained setting. Commissioners can ask factual questions, but they cannot follow up those questions with any statement of an opinion that might influence her fellow Commissioners on the issue being discussed.

The adverse effects of the Sunshine Act are not hard to discern. Quite early, those effects began to be studied. In 1984, less than a decade after enactment of the law, ACUS (the Administrative Conference of the US) studied what it described as a two-fold problem caused by the law: 1) the law's negative effects on collegial interactions between board and commission members and 2) agencies' overreliance upon means of conducting business that fall outside the Act's scope.

ACUS' recommendation in 1984 was that members should be permitted "some opportunity to discuss the broad outlines of agency policies and priorities . . . in closed meetings" – with the two caveats that these discussions must either be "preliminary in nature" or "pertain to matters . . . which are to be considered in a public forum prior to final action."

Ten years later, ACUS again addressed the Sunshine Act. This time, ACUS did so in response to a letter from over a dozen past and sitting commissioners and board members stating that law was problematic. ACUS convened a Special Committee to review those concerns and came up with the idea of amending the Sunshine Act to permit a pilot program that would allow for deliberations to take place in private, subject to various requirements. Unfortunately, ACUS was defunded before that report could be forwarded to the full Conference to vote on.

In 2011, under the now funded ACUS – and a reinvigorated ACUS under the strong leadership of Paul Verkuil -- ACUS supported a survey of commissioners, board members and other high-ranking officials in boards and commissions (which I filled out in November 2011.) Based on that survey, ACUS concluded that agency officials "indicated that they are generally able to conduct business under the existing regime." I

So what should be done with the Sunshine Act?

One idea would be for Congress to repeal it. It could conclude that the law is a failed experiment in creating transparency, and has concomitant adverse side effects. However, I find that outcome unlikely. Congress is not going to repeal something called The Government in Sunshine Act, even if it has generated in reality a Government in Shadows regime.

A second possibility is to consider whether the Sunshine Act serves some good purposes and to consider whether it could be modified to serve that purpose without the concomitant adverse side effects. I believe that would be appropriate.

The Sunshine Act applies only to multi-member Commissions. Why did Congress have a special concern with transparency with regard to such agencies?

When Congress creates a multi-member Commission (often an independent agency) to enforce a particular law, it is because Congress believes that law should be implemented by commissioners or board members with set terms (not serving at the pleasure of the President) and by a group that will always have bipartisan representation. And since decisions by these agencies have to be made by a majority of the members (not by one person, such as a Cabinet head), there is utility in the public being given the opportunity to hear the possibly different points of view held by the commissioners or board members.

If so, we should have a law that provides some transparency about possible divergent policy positions, while still permitting useful and substantive deliberations between the policymakers. These substantive deliberations – held in a “safe space,” away from the hearing of constituent stakeholders that tend to be aligned with one political party or the other -- could (possibly) build relationships and

trust among multi-member “collegial bodies” – resulting in creative and bi-partisan ideas.

I think Congress should, at a minimum, adopt ACUS’ 1995 recommendation for a pilot program under the Sunshine Act that agencies could opt into. This pilot program would work as follows:

1) Members could meet in private, without advance notice, provided that the agency “memorialize” the meeting within five days, indicating the participants, the subject matters discussed, and a review of the nature of the conversation.

2) The agency would have to agree to conduct votes and take other official action on important substantive issues in open public meetings and to refrain, to the extent practicable, from using notation voting procedures for such matters.

3) The agency would have to agree to hold open public meetings at regular intervals, to the extent practicable, in which it would be in order for members to discuss issues addressed in private meetings or disposed of through notational voting.

I think this approach is excellent. I hope the public interest community that cares about transparency in government will take this idea seriously and will convince Congress that this is the right first step in amending the Sunshine Act so it actually achieves its purpose.