FALL 2004

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Indecent Proposals: Why Most Recent FCC Indecency Crackdown Risks Crossing Center Line into Oncoming First Amendment Showdown

By Robert Corn-Revere and Ronald London

On Sept. 22, 2004 the Federal Communications Commission (FCC) announced it was fining the CBS Network $550,000 for Janet Jackson's infamous "wardrobe malfunction" that concluded the halftime show of the 2004 Super Bowl. The fine did not set a record under the FCC's rules against broadcast "indecency," but it sent a clear message that the Commission is mad as Hell and is not going to take it any more. As this issue of the First Amendment Law Letter goes to press, members of Congress continue to explore ways to enact legislation that would empower the FCC to multiply the magnitude of such fines by ten or even nearly twenty times.

Although the halftime show may have been the breast-shot seen 'round the world, it was not the beginning of the current legal revolution governing broadcast indecency. The broadcast indecency *contretemps* started months earlier with the FCC's Enforcement Bureau decision that U2 lead-singer Bono's spontaneous remark "this is really, really fucking brilliant" while accepting a Golden Globes Award on live TV did not constitute actionable indecency.[1] The decision attracted the attention of Capitol Hill and was headed for reversal by the Commission when Congress convened the first congressional oversight hearings. Because the now-famed "wardrobe malfunction" occurred days after the initial hearing, it eclipsed the previous controversies. L'affair Super Bowl galvanized momentum for newly restrictive and constitutionally-suspect FCC indecency rules, an indecency enforcement crackdown startling in its breadth and heavy-handedness, and new legislation to vastly increase indecency fines.

CONTINUED ON NEXT PAGE

Does California Need More Sunshine?: A Brief Polemic in Favor of California's Proposed Constitutional "Sunshine Amendment"[1]

By John D. Kostrey and Duffy Carolan

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing…"[2]

The simple logic that the public's business should be done in public escapes many state and local government agencies. More often than not, secrecy enshrouds government activities and thwarts citizen efforts to scrutinize and participate at the state and local levels. Fortunately for the citizens of California, help is on the way. On Nov. 2, 2004, the general election ballot will provide Californians with the chance to vote on, and hopefully approve, the Sunshine Amendment, thus enshrining the right of open government where it rightfully belongs—in the state constitution.[3]

Although the right of access to meetings of public bodies and writings of public officials and agencies already is delineated in statutory laws, enshrining these fundamental concepts in the constitution will protect them against inevitable encroachment from the Legislature and the fluctuations of the political process. Perhaps it will raise the public's awareness of the need for transparency in government as well, which is exemplified through the degradation of these rights in recent years by government agencies bent on reading access laws narrowly, by legislative adoption of exemptions to our access laws and by

CONTINUED ON PAGE NINE

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CONTINUED FROM PAGE ONE

Even before any new legislation was enacted, however, the FCC proposed massive fines for broadcast indecency, culminating in a record $1.75 million settlement with Clear Channel. They included:

- a $755,000 maximum fine for bits on the syndicated "Bubba the Love Sponge" show;
- a $495,000 maximum fine against six Clear Channel stations for airing the Howard Stern Show;
- maximum fines of $357,000 and $247,000 to two licensees for sexual banter;
- a maximum $55,000 penalty for a radio broadcast that described a sex act in "colloquial terms" and "innuendo" rather than as direct references.

The FCC also imposed a maximum $27,500 fine against a TV station for a live news interview with the cast of the stage production "Puppetry of the Penis" because of the accidental, brief "overexposure" of one of its members. FCC Chairman Michael K. Powell told Congress the indecency fines represented "the most aggressive enforcement regime in decades," and he pledged to further sharpen the agency's "enforcement blade."

Background to current crackdown

The FCC regulates indecent broadcasts pursuant to 18 U.S.C. § 1464, which prohibits the transmission of "obscene, indecent or profane language by means of radio communication." The FCC defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[2] The Supreme Court narrowly upheld this standard in the famous George Carlin "Seven Dirty Words" case, *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978). Although the 5-4 decision upheld the FCC's authority to regulate broadcast content, it emphasized that the Commission's power is limited. Justice Powell, who supplied a crucial swing vote for *Pacifica's* slim majority, stressed that the FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves." *Pacifica,* 438 U.S. at 760-761 (Powell, J., joined by Blackmun, J., concurring). Justice Powell was willing to allow the FCC some control because he believed the FCC would "proceed cautiously," and he instructed the FCC to consider the chilling effect on speech "as it develop[s] standards" in this area. *Id.* at 760, 762.

Lower court decisions that subsequently upheld the basic indecency standard similarly counseled agency caution. In *Action for Children's Television v. FCC,* 852 F.2d 1332 (D.C. Cir. 1988) *("ACT I"),* the D.C. Circuit considered FCC implementation of a generic indecency definition in a series of rulings in which the FCC held that broadcasts that would not have violated Pacifica's "filthy words" standard nevertheless were indecent.[3] The court rejected vagueness and overbreadth challenges to the generic definition but vacated the FCC's rulings that found post-10:00 p.m. broadcasts indecent, holding that a "reasonable safe harbor rule" was constitutionally mandated and the FCC's findings in that regard were "more ritual than real" and its underlying evidence "insubstantial." *Id.* at 1341-42. The court directed the FCC to be "sensitive to" the facts that "the speech at issue … is protected by the first amendment" and that the agency's "avowed objective is not to establish itself as censor but to assist parents in controlling the material young children will hear." *Id.* at 1334. The court also reiterated that "[i]ndecent but not obscene material … qualifies for first amendment protection whether or not it has serious merit." *Id.* at 1340. It allowed the Commission some latitude to regulate in this constitutionally protected area, noting it did so with the expectation that any "potential chilling effect of the FCC's generic definition … will be tempered by [its] restrained enforcement policy." *Id.* at 1340 n.14.

The *Golden Globes Bureau Decision* seemed to keep these admonitions in mind. The FCC staff applied well-established FCC precedent and held that the NBC-affiliate broadcast licensees that aired the awards show did not violate the law because, with such live, unscripted events, "fleeting and isolated remarks of this nature do not warrant" sanctions.[4] The decision is consistent with language in *Pacifica* stating it would be "inequitable" to "hold a licensee responsible for indecent language" when "public events likely to produce offensive speech are covered live, and there is no opportunity" for editing. 438 U.S. at 733 n.7. The Bureau decision, and its refusal to impose a fine or any other sanction, was consistent with Justice Powell's understanding that *Pacifica* did not approve sanctions against "the isolated use of a potentially offensive word." 438 U.S. at 760-761 (Powell, J., concurring); *see also id.* at 772 (Brennan, J., dissenting).

In an unfortunate part of the decision—that attracted the most attention—the staff also reasoned that "the material aired … does not describe or depict sexual and excretory activities and organs," as required by the indecency definition, but rather simply included an "adjective or expletive to emphasize an exclamation." *Golden Globes Bureau Decision,* 18 FCC Rcd. at 19861-62.

The decision was adopted with little fanfare but was soon the center of a political firestorm. Those outraged with the decision demanded to know how this alleged dirtiest of dirty words could not be indecent. Leading the charge was the Parents Television Council (PTC), a self-appointed watchdog of broadcast content that had mobilized its members to bombard the FCC with email complaints about the broadcast. The PTC filed an application for full Commission review seeking to have the Bureau's decision reversed.

While that request was pending, and before the year was out, both the Senate and the House of Representatives had issued resolutions calling the FCC to task. The Senate urged the FCC to reconsider the Bureau's decision and to "return to vigorously and expeditiously enforcing" the indecency standard, to "reassert its responsibility as defender of the public interest" against "degrading influences of indecent programming," and to "use all … available authority" including "fines … for each separate 'utterance' or 'material' [and] license revocation proceedings for repeated violations." S. Res. 283, Dec. 9, 2003. The Senate resolution came one day after the House protested "the lowering of standards [and] weakening of the rules of the [FCC] prohibiting obscene and indecent broadcasts." H. Res. 482, Dec. 8, 2003. At the same time, the "Clean Airwaves Act" was introduced to amend Section 1464 to specify "words and phrases … and other grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms)" that constitute "profanity" under the statute.[5]

Legislative and regulatory hand-wringing continued into the new year, including adoption of another House resolution largely mirroring Senate Resolution 283. H. Res. 500, Jan. 21, 2004. Meanwhile, FCC Chairman Michael K. Powell openly lobbied fellow Commissioners to reverse the *Golden Globes Bureau Decision.* At the same time, he called on Congress to raise the maximum fine the FCC can impose against licensees airing indecent programming "by at least tenfold" from its then present level of $27,500 per offense. His entreaties soon were answered. The Chairman of the House Committee on Energy and Commerce's Subcommittee on Telecommunications and the Internet introduced legislation to increase the fines from $27,500 for each indecent broadcast (with a maximum of $300,000 for continuing violations) to $275,000 per incident (with a $3 million cap). The Subcommittee also held a hearing on Jan. 28, 2004, to examine FCC indecency enforcement. In addition, the Senate started its own inquiry by scheduling a hearing to be held Feb. 11, 2004.

Not coincidentally, the FCC stepped up its indecency enforcement by proposing, the day before the House hearing, fines against two radio stations for airing sexually oriented bits involving, respectively, New York's St. Patrick's Cathedral and a D.C. Catholic school, and a third fine against a TV station for a news story on the Australian show "Puppetry of the Penis," which included an inadvertent glimpse of the title character.[6] Little did the FCC know, however, how soon it would have an opportunity to flex its indecency muscles. Just days after the House hearing, stakes were raised considerably by the now-infamous 2004 Super Bowl halftime show.

Did the FCC overreact to Janet Jackson's "wardrobe malfunction?" Consider the following: It took 11 days after the "day of infamy" for President Franklin D. Roosevelt to convene the Roberts Commission to investigate the attack on Pearl Harbor, and it took one year and 77 days after Sept. 11, 2001 before President George W. Bush authorized the National Commission on Terrorist Attacks Upon the United States. But it took the FCC less than 24 hours to issue a letter of inquiry demanding a full investigation of the Super Bowl halftime performance.

Some thought this was over-the-top. At least one poll indicated that nearly 80 percent of respondents believed the investigation was a waste of tax dollars.[7] Nevertheless, congressional activity rapidly took on new urgency. The House quickly scheduled another indecency hearing on Feb. 11, 2004, moving so aggressively that schedules for the two chambers' inquiries had to be coordinated to facilitate the appearances of common witnesses. Proposals began making their way through Congress to increase FCC

authority over indecent broadcasts. Bills proposing to increase maximum FCC indecency fines to up to $500,000 per utterance joined the existing proposal for a tenfold increase and the new list of "off limits" dirty words.[8]

The flurry of activity in Congress soon culminated in legislative and regulatory action. On March 11, the House passed H.R. 3717, the Broadcast Decency Enforcement Act of 2004. The bill calls for increased fines of $500,000 per incident for obscene, indecent or profane broadcasts. It also specifies criteria for the FCC to consider in setting the amount of fine, including whether the offending material was live or recorded and/or scripted or unscripted; whether there was an opportunity to review recorded or scripted programming or a reasonable basis to believe live or unscripted programming might contain offending material; whether a delay was utilized for live or unscripted programming; the size of the audience; and whether the material was part of a children's program. The bill also would relieve network affiliates of liability for network programming they lack the ability to preview or if it is live or unscripted and there was no reason to believe it would contain offending material. On the other hand, it would allow FCC fines against non-licensees (*i.e.,* performers) if they willfully or intentionally "utter" an indecency.

Though indecency legislation temporarily stalled in the Senate, that chamber eventually passed the Broadcast Decency Enforcement Act of 2004, S.A.3235, as an amendment to the National Defense Authorization Act for Fiscal Year 2005, S.2400. However, the House and Senate ultimately could not reconcile the bills and the legislation was dropped on Oct. 8, 2004.

FCC vastly changes indecency legal environment

As Congress debated changes in the law, the FCC effected a sea change on March 18 when it reversed the *Golden Globes Bureau Decision* and held Bono's exclamation indecent and profane. That same day, the Commission issued three other decisions adopting or applying new indecency rules.[9] The full Commission rejected the Bureau analysis of Bono's use of the word "fucking," finding that "within the scope of our indecency definition … it does depict or describe sexual activities." *Golden Globes Order* ¶ 8. It then found the material otherwise satisfied the indecency definition in that it was patently offensive under contemporary community standards for the broadcast medium, *id.* ¶ 9, and it adopted a new *de facto* rule that "any use of [the] word ['fuck'] or a variation, in any context, inherently has a sexual connotation and therefore falls within the … indecency definition." *Id.* ¶ 8.

In addition, the FCC held that prior decisions "that isolated or fleeting broadcasts of the 'F-Word' … are not indecent or would not be acted upon" are "no longer good law," *id.* ¶ 12, and it adopted what is essentially a requirement that broadcasters use technological measures such as delays to avoid airing a single or gratuitous use of a vulgarity. *Id.* ¶ 11. The FCC also found "an independent ground" that the material violated Section 1464 as being "'profane' language," *id.* ¶ 13, and it put broadcasters "on notice" that it "will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation." *Id.* ¶ 14. Rather, the FCC announced that hereafter it "will also consider under the definition of 'profanity' the 'F-Word' and those words … that are [likewise] highly offensive." *Id.*

The FCC also took the "opportunity to reiterate … that serious multiple violations of [the] indecency rule … may well lead to … license revocation proceedings" and that fines could issue "for each indecent utterance in a particular broadcast." *Id.* ¶ 17. However, notwithstanding a finding that the broadcast of Bono's expletive was indecent and profane, the FCC did not fine the licensees that aired the offending material. *Id.* ¶ 15. By a 3-2 vote, it found such action would be inappropriate because precedent at the time of the broadcast would have permitted airing the material, and the *Golden Globes Order* was "a new approach to profanity," such that the licensees "lacked the requisite notice to justify a penalty." *Id.*

The FCC reinforced and/or built upon the new *Golden Globes Order* rules in the concurrently issued *Infinity Radio, Infinity Broadcasting* and *Capstar* actions, as well as in other actions issued shortly thereafter.[10] The Commission's new approach included deeming colloquialisms or innuendo actionable whenever the FCC finds there is an "unmistakable" sexual connotation,[11] holding that the indecency of a broadcast can turn on the "identities of the participants,"[12] restricting the extent to which broadcasters can look to prior agency statements defining indecency for guidance,[13] and stating an intent to

pursue sanctions even in the absence of complaints.[14]

Reaction to the FCC's sharp change in direction on indecency regulation was virtually instantaneous, and eminently foreseeable. Broadcasters immediately began eliminating or curtailing live programming. They also fired on-air personnel. Examples included not only Clear Channel's termination of Howard Stern's show on its six stations (that had drawn a $495,000 fine), but also some personalities that merely aired a single offending word inadvertently. Radio stations also began removing or editing numerous songs, including quite a few that had aired for years without complaint. Networks canceled or altered edgy television shows even though audiences had long been on notice as to their content and/or tone, and some even were previously found not indecent. For example, public broadcasters were compelled to edit out a hint of cleavage in the *American Experience* documentary "Emma Goldman." In "Every Child is Born a Poet: The Life and Work of Piri Thomas," a program featuring readings and dramatizations of the work of this renowned poet, writer and educator, PBS cut out several expletives (including nonsexual epithets) though they appeared in the original works. Citing this substantial chilling effect, a coalition of two dozen licensees, public interest organizations, professional associations, production entities, programmers, writers and performers sought reconsideration of the *Golden Globes Order,* asking the FCC to seriously consider whether "the system of government regulation" it has newly adopted is "fundamentally incompatible with the First Amendment."

Golden Globes Order focuses attention on constitutional problems of FCC indecency scheme

The *Golden Globes Order* raises a host of constitutional questions notwithstanding the Supreme Court's decision in *Pacifica* a quarter century ago. Even before the *Golden Globes Order,* the FCC's Section 1464 enforcement regime was fraught with constitutional difficulties, and the new indecency and profanity standards, more zealous enforcement, higher fines, and other recent policy changes focus attention on the need for wholesale First Amendment review. In this regard, the government has a constitutional obligation to address significant First Amendment issues when it modifies or reaffirms any regulation of broadcast content. *See Meredith Corp. v. FCC,* 809 F.2d 863, 874 (D.C. Cir. 1987).

Any such reexamination must acknowledge that the Supreme Court's 5-4 ruling did not give the FCC *carte blanche* to decide what broadcasts are indecent or to impose unlimited penalties. The ability to regulate so-called "indecent" speech is a limited constitutional exception, not the rule. The Supreme Court has invalidated indecency restrictions imposed on print media, film, the mails, cable television, and the Internet,[15] and in doing so confirmed that indecent speech is fully protected and not subject to lesser First Amendment scrutiny as "low value" speech. *Playboy,* 529 U.S. at 826. It has acknowledged the FCC's definition of indecency was not endorsed by a majority of Justices and repeatedly described *Pacifica* as "emphatically narrow."[16] Lower courts have not analyzed or reaffirmed Pacifica, but instead simply recited and applied its outcome.[17]

Both broadcasting and the media environment in which it operates change over time, and with it so, too, must regulatory standards that bear on broadcast programming. As the Court observed in *CBS v. Democratic Nat'l Comm.,* 412 U.S. 94, 102 (1973), "problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." In the 26 years since *Pacifica* and the nine years since the D.C. Circuit last considered broadcast indecency, it has become less tenable to assume that broadcasting may be subjected to special rules because it is a "uniquely pervasive presence." *Pacifica,* 438 U.S. at 748. During this interval the FCC has found that traditional media "have greatly evolved," and "new modes … have transformed the landscape, providing … more control than at any other time in history."[18] Notably, *Reno v. ACLU* subjected the indecency definition (in the Internet context) to rigorous scrutiny for the first time and found it seriously deficient. 521 U.S. at 871-881. It has not helped that while legal standards and the media environment have been evolving the FCC has shown a marked inability to clarify, solidify, and/or apply its own standard.[19]

From the outset, the regulation of indecent speech has presented a paradox. Courts confirm that "indecent" speech is fully protected by the Constitution, yet the amorphous FCC standard provides little protection as a practical matter.

Meanwhile, "obscenity" that purportedly is unprotected is subject to First Amendment doctrine that provides more actual legal protection. The test for obscenity, adopted in *Miller v. California,* 413 U.S. 15 (1973), permits restriction only of works that, taken as a whole, are deemed by the average person applying contemporary community standards to appeal to the prurient interest; that depict or describe in patently offensive ways sexual conduct specifically defined by applicable state law; and that taken as a whole lack serious literary, artistic, political, or scientific value. Meanwhile, the indecency standard bars transmission (at times of day when children are likely in the audience) of language or material that, in context, depicts or describes, in terms patently offensive under contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Unlike the test for obscenity, the FCC's standard applies to select passages not whole works, is based not on average persons in a community but on children, and literary or artistic merit do not bar liability.

The Supreme Court has held that the *Miller* test "critically limits the uncertain sweep of the obscenity definition." *Reno,* 521 U.S. at 872-873. By sharp contrast, the focus of the FCC's indecency enforcement on select passages and not works as a whole is alone a significant constitutional defect. This problem with the indecency standard merely scratches the surface of its constitutional shortcomings, as it does not even begin to consider the extent to which the standard does not evaluate the effect of material on the average person but rather on the most vulnerable members of the community (children), and the extent to which it likely restricts material that has serious literary, artistic, political or scientific value. Because the test is far less rigorous, the Supreme Court found the indecency standard as applied to the Internet "unquestionably silences some speakers whose messages [are] entitled to constitutional protection," and the requirement that isolated passages be considered "in context" is no cure. *Id.* at 871, 873. Since *Reno,* virtually every court ruling on laws that depend on the indecency standard has found them unconstitutional.[20]

The FCC's historical enforcement of its indecency standard also has lacked strict procedural safeguards that govern any administrative processes that effectively deny or delay the dissemination of speech, see, e.g., *Freedman v. Maryland,* 380 U.S. 51, 58-61 (1965), and that are required by a constitutional mandate for the government to use "sensitive tools" to "separate legitimate from illegitimate speech." *Speiser v. Randall,* 357 U.S. 513, 525 (1958). The FCC's regime of enforcing indecency is inconsistent with the basic First Amendment principles that any delay in rendering a decision on the permissibility of speech be minimal, that speakers receive prompt judicial review, *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 367-368 (1971), and that in every case where the government seeks to limit speech a constitutional presumption runs against it and requires the government to justify the restriction. *Playboy,* 529 U.S. at 816; *Interactive Digital Software Ass'n v. St. Louis County,* 329 F.3d 954, 959 (8th Cir. 2003).

With respect to judicial review in particular, the process is anything but prompt even after the FCC finds a particular broadcast indecent. Licensees challenging such findings generally must either agree to pay the fine and appeal, or refuse to pay and endure enforcement proceedings (assuming the government initiates collection action) before raising a defense in court. *See, e.g., AT&T Corp. v. FCC,* 323 F.3d 1081, 1085 (D.C. Cir. 2003). But since the FCC in the interim may withhold action on other matters the licensee has pending before it, no licensee has been able to hold out long enough to test the validity of an FCC indecency ruling. *See Action for Children's Television v. FCC,* 59 F.3d 1249, 1254 (D.C. Cir. 1995) *("ACT IV").* Under this system, Clear Channel recently paid $1.75 million, the largest "voluntary payment" ever negotiated between the FCC and a broadcaster to settle indecency charges. *Clear Channel Communications, Inc.,* FCC 04-128, (June 9, 2004). The payment was in addition to a $755,000 forfeiture Clear Channel paid in February for a broadcast not covered by the settlement.

The fact that there are no court decisions interpreting or applying the indecency standard in particular cases compounds the problem, as licensees must look to the FCC for clarity, but its decisions provide scant guidance. First, most such decisions are unpublished, informal letter rulings stored in individual complaint files at the FCC and thus are unavailable, especially those declining to take action.[21] Second, even where the FCC reaches the merits of a complaint, its decision typically consists of conclusory statements finding the broadcast indecent. The FCC's one attempt to address this problem, the aforementioned *Industry Guidance* adopted pursuant to the *Evergreen Media* settlement, *see*

supra notes 2, 19, was little help. The FCC pointed out that "contextual determinations" critical to indecency analyses "are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material." *Industry Guidance,* 16 FCC Rcd. at 8002-03. And though the FCC stated in the past that, if individual rulings fail to "remove uncertainty" in this "complicated area of law," it may use its power to issue declaratory rulings to clarify the standard, *New Indecency Enforcement Standards,* 2 FCC Rcd. at 2727, the FCC in practice has never granted such a request. *See Infinity Broad. Operations, Inc.,* 18 FCC Rcd. 26360 ¶ 6 n.14 (2003).

FCC's new approach has significant First Amendment flaws

The *Golden Globes Order* brings long-simmering problems underlying the indecency standard to the fore by taking the FCC well beyond established precedent and ultimately raising questions about *Pacifica's* continuing validity. *Pacifica* upheld the FCC's narrow authority to regulate indecent broadcasting only to the extent it exercised "caution" and "restraint," *see, e.g.,* 438 U.S. at 756, 760-761 (Powell, J., concurring); *ACT I,* 852 F.2d at 1340 n.14, and since then courts have raised significant questions about the government's limited authority in this sensitive area. By overruling precedent that isolated or fleeting uses of "indecent" words are not actionable, and undermining the importance of "context" in indecency analysis, the *Golden Globes Order* eliminated interpretive restraints long relied upon to help ensure constitutional enforcement of Section 1464.

Despite a purported attempt to clarify matters by decreeing that "any use of [the 'F Word'] or a variation, in any context, inherently has a sexual connotation," *Golden Globes Order* ¶ 8, the FCC only muddied the waters. It warned broadcasters that it intends to interpret broadly the ban on "vulgar and coarse language" including "words (or variants thereof) that are as highly offensive as what it repeatedly referred to as the 'F-Word.'" *Golden Globes Order* ¶¶ 13-14. Whether a word may be deemed "highly offensive" depends on "contemporary community standards" for the broadcast medium, yet the FCC has never previously defined that standard other than to say it is national and reflects the "average broadcast viewer or listener," whoever that may be. The FCC recently claimed it has "experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards." *Infinity Radio* ¶ 12. Contrary to this assertion, however, there has been no such "interaction" and the last time a court ruled in this area was nearly a decade ago, at the behest of broadcasters, not the FCC. *See ACT IV,* 59 F.3d 1249. Worse, the FCC discounts objective means of ascertaining contemporary community standards such as polling or ratings, *see Infinity Broad.* Operations, 17 FCC Rcd. 27711, 27715 (Enf. Bur. 2002), though recent surveys reveal far different attitudes within the broadcast audience than the FCC presumes. *See* Kavla McCabe, *Study Reveals Rock Listeners' Views on Indecency,* RADIO & RECORDS, Apr. 9, 2004 at 1; *Rated R for Rock,* RADIO & RECORDS, Apr. 9, 2004 at 15.

The FCC's new holding that certain expletives can be "profane" further undermines the constitutionality of its rules. It replaces one already-vague rule with several vague standards applying to words or images that may include blasphemy or divine imprecation, "personally reviling epithets naturally tending to provoke violent resentment," "language so grossly offensive" that it "amount[s] to a nuisance," and "vulgar, irreverent, or coarse" words. Notably, the religious-based category "blasphemy" and "divine imprecation," render such phrases as "go to hell" or "god damn it" actionable, *see Duncan v. United States,* 48 F.2d 128, 134 (9th Cir. 1931), and thereby violate the First Amendment's Establishment Clause. The "nuisance" and "personally reviling epithet" prongs also raise significant First Amendment problems under well-established precedent.[22]

Conclusion

It has been over a quarter of a century since the Supreme Court has reviewed the constitutionality of the broadcast indecency standard. During that period, there have been vast changes in the media landscape that shatter the assumption on which *Pacifica* was based, that broadcasting has a "uniquely pervasive presence in society." 438 U.S. at 748. At the same time, other decisions invalidating the indecency standard when applied to other media raise fundamental questions about *Pacifica's* continuing validity. The current crusade against broadcast indecency by Congress and the FCC may lead to a long overdue reassessment of the government's power in this area.

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[1] *Complaints About Various Licensees Regarding Their Airing of the "Golden Globes Awards" Program,* 18 FCC Rcd. 19859 (Enf. Bur. 2003) *("Golden Globes Bureau Decision").*

[2] *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999, 8000 (2001) *("Industry Guidance").*

[3] *Id.* at 1334 (citing *Pacifica Found.,* 2 FCC Rcd 2698 (1987); *The Regents of the Univ. of Cal.,* 2 FCC Rcd 2703 (1987); *Infinity Broad. Corp. of Pa.,* 2 FCC Rcd 2705 (1987)).

[4] 18 FCC Rcd. at 19861 (citing *Entercom Buffalo License LLC (WGR(AM)),* 17 FCC Rcd. 11997 *(Enf. Bur. 2002); L.M. Communications of S.C., Inc. (WYBB(FM)),* 7 FCC Rcd. 1595 (Mass Med. Bur. 1992); *Peter Branton,* 6 FCC Rcd. 610 (1991); *Industry Guidance,* 16 FCC Rcd. 8008-09).

[5] H.R. 3687, 108th Cong., 1st Sess. (2003).

[6] *Infinity Broad. Operations, Inc.,* 18 FCC Rcd. 19954 (2003); *AMFM Radio Licenses, Inc.,* 18 FCC Rcd. 19917 (2003).

[7] *The Associated Press/Ipsos Poll: Janet Jackson's Act Bad Taste, But Not a Federal Case,* February 24, 2004 (www.ipsos-na.com/news/pressrelease.cfm?id=2062&content=full). While 18 percent of those surveyed thought that the halftime show was "an illegal act," 54 percent said that the incident was an act of bad taste but not illegal. Twenty-seven percent thought it was neither.

[8] Other proposals included basing fines on the number of viewers that see or hear an alleged indecent broadcast, or on a percentage of the broadcaster's revenues; a requirement that indecency fines lead to revocation hearings, either for every three violations or at license renewal; extension of the FCC's power to impose fines to include talent or non-licensees that perform offending content; liability on networks for programming aired by affiliates; mandatory retention of tapes of broadcasts for 180 days; and an expedited 180-day time limit for the FCC to decide whether a broadcaster has violated indecency rules. See Broadcast Indecency Enforcement Act of 2004, S.2056, 108th Cong. (2004), Broadcast Decency Responsibility and Enforcement Act, S.2147, 108th Cong. (2004).

[9] *Complaints About Various Licensees Regarding Their Airing of the "Golden Globes Awards" Program,* 19 FCC Rcd. 4975 (2004) *("Golden Globes Order"); Infinity Radio License, Inc.,* 19 FCC Rcd. 5022 (2004) *("Infinity Radio"); Infinity Broad. Operations, Inc.,* 19 FCC Rcd. 5032 (2004) *("Infinity Broadcasting"); Capstar TX Ltd. P'ship,* 19 FCC Rcd. 4960 (2004) *("Capstar").*

[10] *Enter-com Seattle License, LLC,* FCC 04-89 (May 14, 2004) *("Entercom"); Emmis Radio License Corp.,* 19 FCC Rcd. 6452 (2004) *("Emmis Radio"); Clear Channel Broad. Licenses, Inc.,* 19 FCC Rcd. 6773 (2004) *("Clear Channel").*

[11] *Capstar ¶ 9; Infinity Broadcasting ¶ 10; Infinity Radio ¶ 5.*

[12] *Emmis Radio* ¶ 10.

[13] *Entercom* ¶ 12; *Clear Channel* ¶ 12. *See also Golden Globes Order* ¶ 12.

[14] *Clear Channel* ¶ 16.

[15] *Butler v. Michigan,* 352 U.S. 380, 383 (1957) (book with obscene, immoral, lewd, lascivious language or descriptions); *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123, 125, 130 n.7 (1973) ("movie films, color slides, photographs, and other printed and graphic material [carried] into the United States from Mexico"); *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60 (1983) (unsolicited mail with contraceptive information); *United States v. Playboy Entmt. Group, Inc.,* 529 U.S. 803 (2000) (cable channels primarily dedicated to sexually-oriented programs); *Reno v. ACLU,* 521 U.S. 844 (1997) ("indecent" and "patently offensive" Internet content).

[16] *E.g., Reno,* 521 U.S. at 866-67, 870; *Bolger,* 463 U.S. at 74.

[17] *E.g., ACT I,* 852 F.2d at 1339; *Action for Children's Television v. FCC,* 932 F.2d 1504, 1508 (D.C. Cir. 1991) *("ACT II"); Information Providers' Coalition for Defense of the First Amendment v. FCC,* 928 F.2d 866, 875 (9th Cir. 1991); *Alliance for Community Media,* 56 F.3d 105, 129 (D.C. Cir. 1995), rev'd in part and aff'd in part sub nom. *Denver Area Educ. Telecomms. Consortium v. FCC,* 518 U.S. 717, 756 (1996); *United States v. Evergreen Media Corp. of Chicago,* 832 F.Supp. 1183, 1186 (N.D. Ill. 1993).

[18] *Biennial Regulatory Review* ¶¶ 86-87. *See also Denver Area Educ. Telecomms. Consortium,* 518 U.S. at 744 ("[c]able television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so"). *In Denver Area,* the Court upheld a provision that permitted cable operators to adopt editorial policies for leased access channels, but rejected government-imposed restrictions on indecent programs on leased and public access channels.

[19] *See New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees,* 2 FCC Rcd. 2726 (1987) *("New Indecency Enforcement Standards")* (switching from indecency standard applicable to only seven specific words in Carlin monologue to generic indecency policy); *Evergreen Media, Inc. v. FCC,* Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994) (settled to require the FCC to adopt industry guidance); *Industry Guidance,* 16 FCC Rcd. 7999 (settling enforcement action by, *inter alia,* committing to provide "industry guidance" on meaning of indecency standard within six months but taking six-and-a-half years to do so). *Compare The KBOO Found.,* 16 FCC Rcd. 10731 (Enf. Bur. 2001) (proposed $7,000 forfeiture for broadcast of "Your Revolution"), *with The KBOO Found.,* 18 FCC Rcd. 2472 (Enf. Bur. 2003) (reversing prior decision and rescinding forfeiture after "Your Revolution" was effectively banned for 21 months); *compare Citadel Broad. Co.,* 16 FCC Rcd. 11839 (Enf. Bur. 2001) (proposing $7,000 forfeiture for broadcast of "radio edit" of "Real Slim Shady"), *with Citadel Broad. Co.,* 17 FCC Rcd. 483 (Enf. Bur. 2002) (reversing prior decision and rescinding forfeiture after "Real Slim Shady" was effectively banned for 6 months).

[20] *PSINet v. Chapman,* 362 F.3d 227 (4th Cir. 2004); *ACLU v. Johnson,* 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler,* 238 F.3d 420 (6th Cir. 2000) (table); *ACLU v. Napolitano,* Civ. 00-505 TUC ACM (D. Ariz. Feb. 21, 2002); *American Bookseller's Found. for Free Expression v. Dean,* 202 F.Supp.2d 300 (D. Vt. 2002); *Bookfriends, Inc. v. Taft,* 223 F.Supp.2d 932 (S.D. Ohio 2002).

[21] *See* Remarks of Commissioner Michael J. Copps to the NATPE 2003 Family Programming Forum (Jan. 22, 2003) (of nearly 500 complaints received in 2002, 83% were either dismissed or denied, one company paid a fine, and the rest are pending or "in regulatory limbo").

[22] *Gooding v. Wilson,* 405 U.S. 518, 523 (1972); *Cohen v. California,* 403 U.S. 15, 20 (1971); *Lewis v. New Orleans,* 415 U.S. 130 (1974).

California's Proposed Sunshine Amendment - *CONTINUED FROM PAGE ONE*

judicial interpretation of these laws in favor of government secrecy. California is not alone in recognizing the need to protect the public's right of access through its constitution. So far, several other trailblazing states have passed similar legislation.[4] With any luck, the voters of California will follow suit and prevent this auspicious opportunity from passing them by come November.

The Amendment and its effect

The Sunshine Amendment is a unique piece of legislation that will place a constitutional amendment on the ballot to allow voters to strengthen the public's right of access to both government records *and* meetings of government bodies.[5] If Californians approve the Amendment, it would, as of Jan. 1, 2005, amend Article I, Section 3 of the California Constitution, which currently provides: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." The Amendment would make the aforementioned provision subdivision (a) and would state the following as subdivision (b):

(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property, without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement or prosecution records.

(6) Nothing in this subdivision repeals or nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, or caucuses.[6]

The Sunshine Amendment, if enacted, would accomplish many things. First, the Sunshine Amendment would firmly establish a fundamental constitutional right for people to scrutinize what their government is doing by mandating access to government records and meetings of government bodies.[7] By elevating the right of access to constitutional stature, all newly enacted state laws and administrative regulations would be *required by law* to conform to the Amendment's provisions. Practically speaking, it would bring more weight to the public's right of access both at the agency level and when access disputes are brought before our courts for resolution. This is because the Amendment leaves no doubt as to the importance of access to the people of California and consequently renders ineffective the assertion that access in a particular case serves no public purpose—a claim often asserted by government

agencies to defeat access. Additionally, engrafting this right into our constitution, at least theoretically, increases both accountability and legitimacy by giving citizens a stronger basis for knowing and understanding what their representatives are up to. Unless citizens have access to information, they are simply incapable of participating and contributing effectively to our republican system of self-government.

Second, the Sunshine Amendment would mandate that statutes, court rules or other authority be construed broadly when they further the public's right of access and be construed narrowly when they limit the right of access. While this requirement applies most directly to courts interpreting statutory law, it also applies by logical extension to the agencies making the initial determination of whether to grant access to public records or meetings. Even though case law has long required this construction under existing access laws, placing it expressly within the constitution hopefully will avert many disputes at the agency level by discouraging access denials based on overly broad interpretations of existing exemptions that favor government secrecy.

Third, the Sunshine Amendment would require that in adopting new laws, court rules or other authority that limit the right of access, express findings be made demonstrating the interest purportedly protected and the need for protecting that interest. Thus, the adoption of agency rules and regulations, for example, intended to impede public access will no longer be allowed on the whim of the agency's governing body but will require actual on-the-record findings demonstrating the need for secrecy and demonstrating how the exemption will achieve that need. This requirement resembles that which already is required of courts before sealing any court record or closing any court proceeding. As a matter of constitutional and common law, judges must keep secrecy to a minimum and must explain their reasons for excluding public access, based on the dictates of the situation they are facing.[8] Importantly, this requirement will give the public much needed ammunition to challenge the purported justification for new laws, court rules or other authority that seek to limit the public's right of access.

Fourth, the Sunshine Amendment leaves intact the right of privacy guaranteed by the constitution by clarifying that it does not supersede or modify the existing constitutional right of privacy.

The Amendment expressly recognizes that it does not affect the protections afforded peace officers over information concerning their official performance or professional qualifications already set forth in our Evidence Code and penal laws.[9] Additionally, presumably inserted in order to win legislative approval, the Amendment would have no power to supersede or modify any existing or future limits on public access to meetings and records of the Legislature found in the constitution, statutes, and house rules.[10]

Notwithstanding the Sunshine Amendment's short list of enumerated exemptions, the overall thrust of Prop 59 is to firmly establish a fundamental right of open government for the public.

How existing open government laws have fallen short

At first, it might seem unnecessary (or even redundant) to install a constitutional amendment to safeguard a basic right of democracy. To help citizens eradicate governmental corruption, California has already enacted a public records act, open meetings acts, and other statutes that are supposed to guarantee access to information at all levels.[11] Unfortunately, the existing laws have been unable to stop widespread governmental secrecy. Public officials repeatedly flout state and local sunshine laws and stonewall efforts to find out what is going on in government.

Specific examples of the current access laws' shortcomings are endless. In 2001, former Governor Gray Davis hid the details of the state's power company contracts during the energy crisis.[12] After media organizations represented by Davis Wright Tremaine LLP filed a petition seeking access to these state-funded contracts under the California Public Record Act (CPRA), the former governor insisted that it would irreparably harm the public interest to disclose any of the contracts until "Jan. 1, 2003," which was (not coincidentally) seven weeks after the next gubernatorial election. After a protracted legal battle, the media organizations were finally granted the release of the contracts in unredacted form, and it was revealed that nearly $43 billion in deals were made.[13] Even though this signaled to academics that, "the state negotiated the electricity contracts at the worst possible time, for far longer than necessary, at ridiculously inflated prices," it was too late to turn back the clock.[14] Now, as a result of the former governor's inexperience in

negotiating the contracts and his subsequent secrecy, the untimely disclosure of the state's clandestine dealings will cost California taxpayers billions of dollars over the next two decades.[15]

Commissioner Charles Quackenbush's resignation provides another clear example of the access laws' limitations. For months, state Senator Byron Sher and reporters attempted to obtain records from the Insurance Department documenting how former Commissioner Quackenbush was regulating insurance companies' claims stemming from the 1994 Loma Prieta earthquake.[16] They cited the CPRA as authority in their requests, but were denied at every turn because the agency categorically marked all the documents as "confidential."[17] Ultimately, it was a whistleblower's leak to the *Los Angeles Times*—not the power of the CPRA—that generated the incriminating evidence that caused an ensuing public uproar and eventually prompted Quackenbush's resignation.[18]

Both scandals demonstrate that when releasing records is potentially embarrassing or incriminating to the officials that process the requests, the agency's knee-jerk response is commonly unmitigated denial. The public should not be forced to rely on the discretionary power of public officials (or insider leaks reported to the media) to obtain information that is owed to them as a matter of law.

Discretionary abuse in favor of government secrecy is not unique to state officials. Secrecy at the local level occurs with comparable frequency and has made access to basic public information problematic as well. Indeed, when *The Bakersfield Californian* recently asserted a right of access from its local school district to disciplinary records of an elementary school principal, who was under investigation for allegedly murdering his former wife, their two children and his mother-in-law, the paper was met with claims that the former-principal's purported privacy rights—in how he conducted himself on the job—outweighed the public's right of access. Luckily, a superior court, and subsequently an appellate court, disagreed.[19] But it took a lawsuit to pry open the district's files. Similarly, a lawsuit by the *Daily Review* in Hayward was the sole incentive for the local school district to release investigatory records pertaining to two high-ranking district administrators initially investigated in connection with the alleged destruction and stowing away of public records.[20]
Most recently, the City of Oakland flouted its own sunshine laws, requiring disclosure of exact gross salary and paid benefits to every public employee, when they denied CPRA requests made by *The Oakland Tribune, The Contra Costa Times,* and *East Bay News Service* for individual salary information of certain city employees.[21] It did so despite a long history of providing this information to the public and in misplaced reliance on a case where no such ordinance existed and where, preliminarily, assurances of confidentiality and policies of secrecy were shown to exist.[22] Without disclosure of this basic public information about how taxpayer dollars are being spent, it becomes difficult to hold our government accountable for misuse of public funds and nearly impossible to root out rampant government favoritism or nepotism.[23]

In innumerable other scenarios, the CPRA has been litigated so vehemently it has lost its teeth. In 1998, a legislative task force (responding to the fallout from the Quackenbush scandal and his subsequent resignation) issued a report entitled, "KEEP OUT: The Failure of the California Public Records Act," concluding that the law had been "interpreted, reinterpreted and fiddled with to the point that it has become of little appreciable value to the public."[24] Two years later, in 2000, a Senate committee's efforts to investigate concerns related to the Quackenbush controversy were so thwarted that a department attorney had to risk her job and license in order to provide the committee with relevant records (withheld by her superiors) showing probable misconduct by insurance companies.[25]

An abundance of empirical data highlights the CPRA's deep-rooted flaws. The published study of CFAC's October 2000 audit, entitled "State of Denial," concluded that legitimate requests for public information were denied by sheriff's departments 80 percent of the time, cities and police departments 79 percent of the time, and schools 72 percent of the time.[26] These astoundingly high percentages are akin to a similar study conducted in July 2002, when *The Vacaville Reporter* released a public information audit—"For the Record"—in which they reported that 45 percent of the public records requests submitted to Solano County (and its seven cities) failed to disclose records in compliance with access laws.[27]

Most recently, during a six-week period in April 2004, *The Contra Costa Times* sent out 20 reporters and editors to agencies across the region.[28] The result of this study was alarming: 1) only 37 of the 86

agencies timely complied with requests for statements of economic interest;[29] and 2) only 20 of 79 agencies granted immediate access to the employment contract of an agency's top executive official (such as a city manager or school superintendent), notwithstanding a statute unequivocally making such contracts public records.[30] Despite the clear language of the CPRA, the prolonged delays (and steadfast refusals in some cases) associated with public records requests persists. The passage of a constitutional amendment will hopefully reduce these repeated and often unjustified denials of public access.

Similarly, the government blatantly abuses the Ralph M. Brown Act and often operates surreptitiously.[31] Although closed sessions are permissible for a few narrowly defined exceptions—for example, to discuss litigation or certain personnel issues—the Brown Act generally obligates government agencies to meet and act in public.[32] In March 2002, a *Los Angeles Times* article reported that "the Los Angeles County Board of Supervisors (LACBS) makes more than 90 percent of its official decisions without public debate, spending millions of taxpayer dollars on contracts, settling major lawsuits and making policy changes behind closed doors, or without discussion."[33]

A prime example of these violations occurred in December 2001 and January 2002 when the LACBS defied the Brown Act's mandates by holding illegal secret meetings to discuss how to derail ballot measures that would increase the pay of county health care aides.[34] This important public policy issue, which was not listed on the agenda, should have been discussed in public. It was only because of the mistaken release of internal board documents in February 2002 that the public even learned of the board's blatant violations of the Brown Act.[35] In spite of the board's insistence that it committed no wrong, a court subsequently declared the serial closed door gatherings of the LACBS unlawful, thanks to a *Los Angeles Times* lawsuit that brought the issue to public light.[36]

The illegal practices of the LACBS are far from unique. In October 2002, Ohlone College's board of trustees unanimously voted to establish architect selection committees for two major construction projects to be paid for by a taxpayer bond of $150 million. The selection committees, though comprised in part of public members and acting under the direction of the board, were originally planning to conduct their selections in secret. It was not until the local paper, *The Argus,* threatened to sue the board that it agreed to fully comply with the Brown Act's open meetings laws for its selections committees.[37]

In short, discussions and deliberations that should be held in public are consistently being conducted furtively in violation of the Brown Act. Legislation can only go so far in controlling how government officials govern. At present, it is simply too easy to administer blanket denials to document requests by citing a CPRA exemption without justification, or disobey the Brown Act by holding hush-hush governmental meetings. As evidenced by the litany of abuses inflicted on our current transparency laws, a constitutional guarantee of openness is crucial. Whereas legislation is ill-equipped to microregulate routine governmental operations, the constitutional mandates of Prop 59 are specifically designed to combat access laws' susceptibility to manipulation and misinterpretation. In short, Prop 59 has the power to reduce the astounding frequency with which governmental agencies engage in non-compliance, outright abuse, and utter disregard of our existing open government laws.

How the judiciary has contributed to the erosion of open government laws

Sadly, courts have factored significantly into the gradual weakening of our current public access laws. These laws remain the public's main safeguards against crooked and inept government. Over the last decade, courts have chipped away so much at the strength of the existing open government laws that the CPRA has been dramatically altered in the process. Consequently, the need for a constitutional basis for openness has accelerated dramatically in the last few years, making it more essential now than ever before.

For example, in 1991, the California Supreme Court paved the way for the vague, ambiguous and overly broad "deliberative process" exemption by allowing government decision-makers to withhold documents that would show how their decisions were reached, who influenced them or what their thinking was during their deliberations.[38] Initially, the logic behind the exemption was to protect creative debate and candid consideration of alternatives within an agency.[39] Unfortunately, to illustrate how bottomless this exemption has become, it has been cited to deny access to phone billing records of city council members that

would reveal calls placed as part of official city business.[40] Presumably, the nonsensical justification against disclosure is that the records would reveal who council members called, which in turn is the "functional equivalent" to the "substance or direction" of the judgment and mental processes of city council members.[41] It defies logic to claim that mere disclosure of telephone numbers somehow reveals the psychological innerworkings of an individual's mind.

The "deliberative process" exemption also has prevented the public from getting any information about the identity or qualifications of people the governor is considering for appointment to important offices, such as vacated seats on county boards of supervisors.[42] This overused "privilege" has even allowed the governor to claim that something as basic as his appointments calendar is not a public record![43] Routine disclosure of all of these records, however, is essential to guarantee a free flow of information to the public as well as provide a safeguard against governmental corruption.

Addressing other exemptions, our courts have concluded that even when no harm can be associated with the release of police records in closed investigations, the CPRA allows police departments to keep their files closed permanently at their discretion.[44] This rule is in stark contrast to the comparable provision under the federal Freedom of Information Act (FOIA) – 5 U.S.C. § 552 – which requires the FBI and other federal law enforcement agencies to open files of closed cases when doing so would cause no harm.[45] Recently, the California Supreme Court even extended the "law enforcement" investigatory records exemption to basic information about routine traffic stops.[46]

The Brown Act also has suffered in recent years at the hands of the judiciary. Because the litigation and appellate process is so costly and time-consuming, citizens are finding it practically impossible to reverse decisions that public bodies make in closed sessions.[47] Moreover, besides drastically weakening the ability to rectify illegally-made decisions, the process of prosecuting Brown Act violations often becomes a quagmire because members of elected bodies cannot be ordered (during the discovery process) to disclose actions or discussions during closed sessions.[48] This bar to discovery essentially deprives the plaintiff of any direct evidence to use in enforcing the law as it now stands.[49] Also on the open meeting side, courts have concluded that local councils and boards can use closed sessions under the personnel exemption to set performance goals for their chief executives.[50]

Although the judicial system has allowed clandestine government behavior to flourish in spite of the access laws, the passage of Prop 59 would take significant strides towards ensuring that this trend comes to a halt. By establishing a stronger constitutional framework for access to meetings and public records, Prop 59 will make it significantly harder for agencies to keep things hidden from public view for arbitrary or inadequate reasons and for courts to ignore the importance of public scrutiny of the public's business.

Conclusion

Placing the Sunshine Amendment on the ballot symbolizes a strong positive step towards opening California government. If the Amendment passed and became part of the constitution, its goal of openness would be catapulted into the echelon of our state's most cherished values, and the people's respect for transparency in government would likewise be enhanced. As exemplified above, a Sunshine Amendment is sorely needed in this state to protect against the ever eroding rights of the public to scrutinize how the government is carrying out the public's business.

One of the most important components of representative government is transparency. While mandates favoring greater public access may be annoying, inconvenient, cumbersome (or even extremely embarrassing), the collective public's interest in knowing what their government is up to outweighs any opposing individual interests in secrecy on the part of officials and agencies. Public scrutiny keeps government honest. Hopefully, in November 2004, the voters of California come to concur with this fundamental democratic principle and will vote "yes" on Prop 59, California's much needed Sunshine Amendment.

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[1] Throughout this article, the "Sunshine Amendment" will be referred to interchangeably under its more formal legislative pseudonym – Senate Constitutional Amendment 1 or SCA 1 – or under the proposition number for the November 2004 general election ballot – Proposition 59 or Prop 59. The current version of SCA 1 has endured a long-stalled congressional history; its proposed legislative predecessor was referred to as Senate Constitutional Amendment 7 or SCA 7. *CFAC: California First Amendment Coalition, at* http://www.cfac.org/sca/sca1.html. SCA 1 is the brainchild of the California Newspaper Publishers Association ("CNPA") and California First Amendment Coalition ("CFAC"). Both organizations have become seriously alarmed at the steady stream of laws making it harder to get access to heretofore open public records and the unjustified closures of public meetings. *See also March to Close Government Meetings, Public Records Might Slow With SCA7, Milpitas Post,* March 14, 2002.

[2] *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 572 (1980) (C.J. Warren Burger) (emphasis added).

[3] The proposed Sunshine Amendment, which was introduced by Senator John Burton, a San Francisco Democrat and president *pro tem* of the state Senate, passed the Senate in June 2003 on a 34-0 vote, and the Assembly in January 2004 on a 78-0 vote. *See* Californians for Open Government, *The California Sunshine Amendment, Government Open to the People, Frequently Asked Questions About the Sunshine Amendment and Talking Points* (2004); CNPA, *SCA 1 CNPA Legislative Bulletin Articles: Sunshine Campaign Meeting Set,* January 26, 2004, *at* http://www.cnpa.com/LEG/GA/sunshine.htm; *Open-Government Measure Reaches California Ballot, The Associated Press,* January 14, 2004. A majority of voters must approve the addition to the state Constitution for it to become law.

[4] Several states, including Florida, Louisiana, Montana, New Hampshire, and Tennessee, have adopted constitutional guarantees of public access to government records and government proceedings. *See* CFAC, *supra* note 1; SCA 1 *Senate Constitutional Amendment – Bill Analysis, at* http://info.sen.ca.gov/pub/bill/sen/sb_0001-0050/sca_1_cfa_20030715-_123944_asm_comm.html.

[5] *See* CFAC, *supra* note 1.

[6] Proposed SCA 1, last amended in Senate June 27, 2003, *at* http://info.sen.ca.gov/pub/bill/sen/sb_0001-0050/sca_1_bill_20030627_amended_sen.html (emphasis added).

[7] CFAC, supra note 1.

[8] Under well-established First Amendment principles, a court may seal a judicial record only "in the rarest of circumstances" and blanket sealing orders are presumptively unconstitutional. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 20 Cal. 4th 1178, 1226 (1999). Court records can be sealed only if the Court finds that (i) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest. Cal. R. Ct. 243.1(d); *NBC Subsidiary,* 20 Cal. 4th at 1181.

[9] Perhaps one of the biggest disappointments of the Sunshine Amendment came soon after its original version, SCA 7, was introduced to the Legislature in 2002, when the powerful law enforcement employee lobby threatened to derail SCA 7 if not amended to specifically provide for preservation of peace officer privacy rights under existing statutory laws. *See* CNPA Legislative Bulletin, April 8, 2002, *at* www.cnpa.com/Leg/GA/legbularchive/01-02/040802.htm. To enhance the likelihood of SCA 7's passage, CNPA and CFAC reluctantly agreed to amend the language to provide for preservation of the current procedure for obtaining information on the official performance or professional qualifications of peace officers. While Prop 59 expressly recognizes the existence of these procedures, the current language leaves room for judicial interpretation of the proper reconciliation of these procedures with the constitutional right of access.

[10] Interestingly, during his campaign and post-election pronouncements, Governor Arnold Schwarzenegger declared his firm opposition to SCA 1's "Legislature" exemption. While he wholeheartedly supported SCA 1, he announced that he "would eliminate the special protection from public scrutiny of proceedings, records, and deliberations of 'the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.' There is no reason why the Legislature should be shielded from the antiseptic of sunshine." *Join Arnold! Official Website: Californians for Schwarzenegger,* at http://www.joinarnold.com/en/agenda; *see also CFAC: California First Amendment Coalition, at* http://www.cfac.org/Stories/public_information.html.

[11] These laws include the California Public Records Act ("CPRA"), Cal. Gov't Code §§ 6250 et seq., the Ralph M. Brown Act, Cal. Gov't Code §§ 54950 *et seq.,* the Bagley-Keene Open Meeting Act, Cal. Gov't Code §§ 11120-11132, the Legislative Open Records Act, Cal. Gov't Code §§ 9070 *et seq.,* and the Grunsky-Burton Open Meeting Act, Cal. Gov't Code §§ 9027-9032. Additionally, several municipalities have enacted local sunshine ordinances that in certain respects provide broader protections than those afforded under state laws. *See, e.g.,* San Francisco Sunshine Ordinance, Administrative Code Chapter 67; Oakland Sunshine Ordinance (Ord. 12483 (part), 2003; Ord. 11957 § 00.2, 1997); Contra Costa County Better Government Ordinance 95-6, Ordinance Code Article 25-2.205(d) (1995).

[12] *See, e.g., Let The People Know, Orange County Register,* June 20, 2002; *An End To Secrecy, San Francisco Chronicle,* April 9, 2002; *Upgrading Our Right To Open Government, Palo Alto Weekly,* March 13, 2002; *Open State, Burton Bill Enforces Public Right To Information In Age Of Secrecy, Santa Rosa Press Democrat Editorial, February 24, 2002, at G2; Support Your Right To Open Government, Lodi News Sentinel,* February 4, 2002.

[13] *Secret Power Contracts To Be Unveiled, Silicon Valley/San Jose Business Journal,* June 14, 2001; Carolyn Said, *The Energy Crunch/A Year Later, San Francisco Chronicle, available at* http://www.sfgate.com/cgi-bin/article.cgi.

[14] *Shine The Light On Open Government, Chico Enterprise-Record,* February 15, 2002; *Silicon Valley/San Jose Business Journal, supra* note 13.

[15] *Open Public Records To State's Citizens, Orange County Register,* January 31, 2002.

[16] *See* Terry Francke, *Held Accountable, Los Angeles Daily Journal,* February 20, 2002; *see also Let The Sun Shine, Sacramento News & Review,* April 11, 2002.

[17] *Don't Let Government Hide, Los Angeles Times,* March 12, 2002, at B12.

[18] Editorial Board, Staff, *Our Voice: Citizens Need Greater Government Access, The Desert Sun,* January 16, 2004, at B6; *Let The Sun Shine On Open Government, Merced Sun-Star,* April 22, 2002; *Time To Stamp Out Secrecy, Torrance Daily Breeze,* February 3, 2002; *Time To End Government Behind Closed Doors, San Diego Union-Tribune,* January 31, 2002; *Chico Enterprise-Record, supra* note 15; *Lodi News Sentinel, supra* note 12.

[19] *See Bakersfield City School District v. Superior Court,* 118 Cal. App. 4th 1041 (May 2004).

[20] Both newspapers were represented by Davis Wright Tremaine LLP.

[21] *See* Oakland Sunshine Ordinance, *supra* note 11, Section 2.20.220C5.

[22] *See Teamsters Local 856 v. Priceless, LLC,* 112 Cal. App. 4th 1500 (2003); *see also* Robert Gammon, *City Won't Say Who Got Top Pay, The Oakland Tribune,* June 13, 2004; Thomas Peele, Bruce Gerstman, *Times Sues Oakland For Salary Data, West County Times,* July 23, 2004, at A 03.

[23] Thomas Peele, Bruce Gerstman, *Oakland Part of Push for Disclosure, The Contra Costa Times,* June 29, 2004.

[24] *See* Francke, *supra* note 16.

[25] Virginia Ellis, *A Staffer in Quackenbush's Insurance Department Who Reported Wrongdoing Faced Dismissal and the Loss of Her License, Los Angeles Times,* February 22, 2001, at A3.

[26] California State University-Fullerton journalism students assisted CFAC in carrying out this study. *See Orange County Register, supra note 15; see also Chico Enterprise-Record, supra* note 14.

[27] Barbara Smith, Staff Reporter, *Audit Inspires Change in Solano Agencies, The Vacaville Reporter,* July 28, 2002; Diane Barney, Managing Editor, *Solano's Public Documents Are Not All That Public, The Vacaville Reporter,* July 21, 2002; *Kent Pollock, Fighting for Open Records, The Vacaville Reporter,* July 21, 2002.

[28] Thomas Peele, Denis Cuff, Liz Tascio, and Ashley Surdin, *East Bay Agencies Delay Or Refuse Public Records Request, Newspaper's Audit Finds Widespread Noncompliance Despite Clear Rule, The Contra Costa Times,* July 25, 2004.

[29] Statements of economic interest are state-mandated documents which list officials' businesses and investments to alert the public to conflicts of interest. Denial of access to this public information occurred fifty-seven percent of the time in Contra Costa, Alameda, and southern Solano counties. In all, sixteen agencies never produced the economic interest statements. *Id.*

[30] Cal. Gov't Code § 6254.8. Twelve of the seventy-nine agencies never produced their top official's contract. *Id.*

[31] Ted Rohrlich, *Law Requiring Open Meetings Often Ignored, Los Angeles Times,* Dec. 13, 1998, at 1.

[32] Enacted originally in 1953 and amended frequently since, the law is intended to ensure that the actions of local governments "be taken openly and that their deliberations be conducted openly." Cal. Gov't Code § 54950 *et seq.* It declares that "[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." *Id.*

[33] Evelyn Larrubia, *Supervisors' Decisions Are Made Mostly Behind Closed Doors, Los Angeles Times,* March 26, 2002, at B1.

[34] Evelyn Larrubia, *Board Secretly Urged Killing Ballot Item, Los Angeles Times,* March 8, 2002, at B1. During one meeting on December 18, 2001, the Board voted to intentionally violate a state election law by withholding a ballot title and summary from election officials. *Los Angeles Times Communications LLC v. Superior Court,* 112 Cal. App. 4th 1313, 1317 (2003) (represented by Davis Wright Tremaine LLP).

[35] See Larrubia, *supra* note 34; *More Openness Needed, Mountain Democrat of Placerville,* March 28, 2002.

[36] *See generally Los Angeles Times Communications LLC v. Superior Court , supra* note 34. *The Times* was represented by Davis Wright Tremaine LLP and was subsequently awarded its attorneys' fees associated with the lawsuit. *Id.*

[37] *Keeping Public Meetings Open Isn't Frivolous, The Argus,* Dec. 5, 2002. The Argus was represented by Davis Wright Tremaine LLP.

[38] *See Times Mirror v. Superior Court of Sacramento County,* 53 Cal. 3d 1325 (1991); Cal. Gov't Code § 6255(a).

[39] *Id.* at 1351-52 (Kennard, J., dissenting).

[40] *See Rogers v. Superior Court,* 19 Cal. App. 4th 469 (1993); *see also* Duffy Carolan and Selena Poon Ontiveros, *Tapping Officials' Secrets the Door to Open Government in California,* at CA-11-13 (Reporters Committee for Freedom of the Press, 4th ed. 2001) (discussing generally the deliberative process exemption).

[41] *Rogers,* 19 Cal. App. 4th at 479.

[42] *See Wilson v. Superior Court,* 51 Cal. App. 4th 1136 (1996); *see also Nothing Keeps Official Business…, Inland Valley Daily Bulletin,* April 5, 2002.

[43] *See Times Mirror, supra* note 38; *see also Don't Let The Bureaucrats Lock You Out, San Jose Mercury News,* April 9, 2002, at 6B; David Yarnold, Mercury Executive Editor, *Let The Sunshine In, San Jose Mercury News,* March 17, 2002.

[44] *Williams v. Superior Court,* 5 Cal. 4th 327 (1993); *Don't Let The Bureaucrats, supra* note 43.

[45] California Public Records Act: Exemptions for Law Enforcement Information, *at* http://www.cfac.org/LAW/CPRA.

[46] *Haynie v. Superior Court of Los Angeles County,* 26 Cal. 4th 1061 (2001).

[47] *See* Yarnold, *supra* note 43.

[48] *Kleitman v. Superior Court of Santa Clara County,* 74 Cal. App. 4th 324 (1999); Richard P. McKee, *Secrecy Enshrouds LA County Halls of Power, Los Angeles Daily Journal,* March 20, 2002.

[49] *See Kleitman, supra* note 48; *see also* McKee, *supra* note 48.

[50] *Duval v. Board of Trs. of the Coalinga-Huron Joint Unified Sch. Dist.,* 93 Cal. App. 4th 902 (2001).

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