

Third remedy: constitutional.

#### **4. Remedial response to adverse judicial decisions interpreting the state's Open Meeting Law.**

##### Addressing Open Meeting Law:

With regard to the state's Open Meeting Law, G.L. c.39, § 23A and 23B the following is offered.<sup>39</sup>

This Report examines in detail the operation of the state's Open Meeting Law [copy of law on Pp 72—75 of this report] and the impact this law has had on the city council and, as it turns out, all legislative assemblies across the state. An opinion is offered about the impact of the statute on political speech and association and recommendations are offered that suggest ways the law may be amended to address these constitutional concerns.

The intent is to accurately explain the case law surrounding the Speech or Debate Clause of the state and federal constitutions, as well as the controlling issues inherent in the First Amendment to the United States Constitution. The research is presented fairly, accurately and in context, and with the goal of giving the city council a better understanding of the degree of encroachment on protected activities believed to have occurred.<sup>40</sup>

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<sup>39</sup> While the initial Open Meeting Law, c.626 of the Acts of 1958 was of a general nature, referring to boards, commissions and committees, a later revision to the law, c. 303 of the Acts of 1975 broadened the language of the Act to include the various levels of government "however created or constituted within the executive or legislative branch of the commonwealth. . ." The question of whether legislative committee meetings are open to the public is not at issue. Whether discussion between legislators outside the committee setting most certainly is. Nonetheless, this is the same language that is codified in G.L. c. 39 Section 23A & B. In all revisions of the law, the legislature stipulated that the law "shall not include the general court or the committees or recess commissions thereof, or bodies of the judicial branch."

<sup>40</sup> While this Report has focused only on the state's Open Meeting Law, a cursory review of the state's Public Records Law suggests the same infirmity exists in its drafting and application.

This Report concludes that there is sufficient cause to reexamine the state's Open Meeting Law, both as written and as applied, as the statute prohibits meetings, deliberations and discussions from occurring between elected officials wishing to exchange their views, concerns, strategies and/or suggestions in private with one another, whether meeting as a committee informally or individually in groups. The constitutional issues raised by such a broad prohibition on speech and political associations, imposed by the Open Meeting Law, warrants that examination, for it is well-settled in law that a statute should not be read in such a manner as to defeat a constitutional privilege, but rather it must be read to avoid that conflict. It is the constitution, not the statute that sets the parameters of its own limitations.

In this regard, it should be understood that what this Report offers is an informed opinion "about" the law, not an opinion "of law." If, however, the conclusions of this Report are fairly accurate, as this author believes they are, and the law is to serve its intended purpose, the recommendations contained herein, that the law be revisited, are worth considering. Leaving it alone is not the answer, given the constitutional frictions inherent in its drafting and across-the-board, sweeping application. The notion that there are no constitutional issues involved in a statute that limits speech and prohibits political associations to such an extent, is patently absurd.

As for methodology, a large part of this Report focuses on the impact the state's Open Meeting Law has had on protected First Amendment activities. It also focuses on the impact of the statute on the Deliberation, Speech and Debate Clause of Art. XXI of the Declaration of Rights of our state and Art. I, § 6 of the federal constitutions. Because so few citizens know about or understand the reason for Art. XXI, it might well be worth citing it at the outset.

The council will note that this Report weaves both First Amendment and state constitutional and federal issues together, since they are so closely intertwined. Neither Art. XXI, nor the state's Open Meeting Law, should be read to defeat or

overly burden the free speech clause of the First Amendment, or the numerous ancillary rights protected by that Amendment. Indeed, the "deliberations," "speech" and "debate" clause should be read in harmony with the speech guarantees of the First Amendment.

As for our state constitution, Art. XXI reads as follows:

The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

With these 43 words the constitutional Framers sought to ensure that legislators would not face either civil or criminal prosecution for the lawful exercise of their constitutional duties as elected representatives. We pay particular attention to the words of the Article: nothing in a legislator's "deliberations," "speech," or "debate," can be "the foundation for any accusation or prosecution, action or complaint."<sup>41</sup>

What do these words mean?

In the first case to reach the Supreme Court of the United States regarding the federal Speech or Debate Clause, Kilbourn v. Thompson, 103 U.S. 168 (1880) the nation's highest court pointed to a decision of the Supreme Judicial Court of Massachusetts interpreting the reach of the Deliberation, Speech and Debate

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<sup>41</sup> It should be noted that the federal guarantees included in Art. I §6 of the United States Constitution apply to states and local governing bodies as well. Hence, the rights described in this Report are both federal and state rights. The Supreme Court of the United States has defined the clause this way: "The Speech or Debate Clause was designed to assure a co-equal branch of government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." United States v. Gravel, 408 U.S. 606, 616 (1972) "Indeed, the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts. The Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. It precludes any showing of how a legislator acted, voted or decided." United States v. Helstoski, 442 U.S. 477, 489 (1979). The Massachusetts Supreme Judicial Court has also enumerated the state protections in the seminal case of Coffin v. Coffin, 4 Mass. 1 (1808) and this Report will go into greater detail about that decision throughout.

Clause of Art. XXI of our state's Declaration of Rights. That case was Coffin v. Coffin, 4 Mass. 1 (1808). The court described the Coffin decision as "perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight."

While language interpreting the federal Speech and Debate Clause has been both expanded upon and narrowed in various federal court decisions,<sup>42</sup> the relevant part of Coffin, authored by Chief Justice Theophilus Parsons, and joined by the rest of the court, described the broad latitude the Massachusetts court thought should be extended legislators in this state under Art. XXI. It reads, in relevant part:

In considering this Art., it appears to me that the privilege secured by it is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect, the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending, the General Court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house or by an act of the legislature.

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives

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<sup>42</sup> Regarding federal case law, in United States v. Brewster, 408 U.S. 501, 515 (1972) the Supreme Court of the United States interpreted Chief Justice Parson's words as "referring to legislative acts, such as committee meetings which take place outside the physical confines of the legislative chamber. . ." And in United States v. Helstoski, 442 U.S. 477, 490 (1979) the Court held that the protections did not extend to a mere promise "to deliver a speech, to vote or to solicit other votes at some future date." A plain reading of the language of Coffin, suggests that the Massachusetts constitution does, indeed, provide more latitude. When read liberally, it must also harmonize with the federal constitutional guarantees contained in the First Amendment.

to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the Art. ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the Art. as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

Because of the importance of the above words to this discussion; because of the nature of the activities the Framers sought to protect; and because of the liberal construction given the Article by the Coffin court in Massachusetts, this Report will expend considerable effort exploring what those words mean in all contexts and how they are inextricably linked to a legislator's First Amendment rights of speech and association. The rights contained in the Article must be read to comport with the rights and privileges of the Amendment. As shall be seen the privilege protects members in the exercise of their legislative functions, even against the express will of the body. The privilege is unique and it is important.<sup>43</sup>

Clearly, given the constitutional issues involved, the statute should be examined under the most critical light, for while a rationale basis test of a statute may be sufficient to justify most laws, only a statute that survives the most exacting scrutiny can justify the expansive encroachment on private deliberations, speech and

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<sup>43</sup> The Supreme Court in United States v. Johnson, 383 U.S. 169, 178-181 (1966) explained the Clause this way: "Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." at 178. "The legislative privilege, protecting against prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the practical security for ensuring the independence of the legislature." at 179. The Court went on to explain, "It was not only fear of the executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs, leaving punishment more to the wishes of the crown than to the gravity of the offense." at 181.



association permitted by the state's Open Meeting Law. The courts call this "strict scrutiny," and few statutes that trespass survive its demands.

With regard to this particular statute, this Report finds that the encroachments on speech are severe: the statute has resulted in fines and penalties for the city council. It has resulted in self-censorship of legislative activity and suppression of speech by elected officials doing their jobs. Putting aside any thought of what Art. XXI actually means for the moment, the above unintended consequences, when viewed under a First Amendment lens, represent an egregious and unacceptable outcome for a statute with such a lofty and important public purpose.<sup>44</sup>

After a thorough examination of the case law, this Report concludes that the right of elected officials to meet and deliberate, not just as a formal body, but as individual elected officials, regardless of number, who share a common cause and purpose must be ranked as fundamental to the democratic process.<sup>45</sup>

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<sup>44</sup> For a more complete discussion on First Amendment issues, see, for example: *Buckley v. Valeo*, 424 U.S. 1, (1976) and citations. Political association "a basic constitutional freedom" at 25; "advocacy of the passage or defeat of legislation" protected at 48; "unfettered exchange of ideas" protected at 40; "group association" protected at 65-66; "effective advocacy of both public and private points of view, particularly controversial ones," protected at 15; if government interests involves "suppressing of communication," it is not a valid governmental interest," at 17.

<sup>45</sup> Some may ask what's the harm if all the statute does is prohibit elected officials from meeting in private to discuss legislation? They can still meet; they can still talk; what right has been abridged? The answer should be obvious: unless the constitution *does not apply* to elected officials, the right of elected officials to meet in private is the right of all political groups to associate. The constitution guarantees groups the right to meet and both define their membership and limit its deliberations to that membership only, especially when strategy or the opportunity to gather information that may advance their cause is available to them and they choose not to share that information with others. Consider, for example, how members of the United States Senate "Group of Twenty-one" formed to act as a leverage in votes on judicial appointments. In the present example, we are talking about individual legislators, members of the Boston City Council, banding together to advance their agenda and discuss that agenda privately – a distinction the state's Open Meeting Law does not allow. This Report argues that such a sweeping inclusionary mandate crosses the constitutional line and interferes with political speech. As the Supreme Court of the United States said in another context about this right, in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402 (2000) "Consistent with this tradition, the Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs.'" *Tashjian, supra*, at 214-215, 107 S.Ct. 544, which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," *La Follette*, 450 U.S., at 122, 101 S.Ct. 1010. That is to say, a corollary of the right to associate is the right not to associate. "Freedom of association would prove an empty guarantee if

Unfortunately, the zeal surrounding enforcement of the state's Open Meeting Law has been carried out seemingly unmindful of the constitutional issues that surface when one takes the time to look. The application and increasingly expansive interpretation of the statute was summed up best by the Clerk of the City of Boston in a written statement and testimony given before the Boston City Council where she referred to the manner in which the law has been interpreted and applied as a "kind of tyranny," metered out with "a kind of hysteria."<sup>46</sup>

In the above regard, this Report raises an issue of "first impression," meaning it has not been considered by a court before, at least not under the proposed viewpoint offered here. Ironically, the central problem with the statute was actually raised in the form of a question from a superior court judge who asked of plaintiffs bringing suit against the city council (paraphrase): "How can legislation be advanced if legislators are prohibited from speaking with one another or meeting with colleagues to form coalitions or gather support for their ideas? How does one gather co-signers without violating the law? Kressel et al. v. Boston City Council and Committee on Government Operations, CA 06-2126 (J. Connolly) 2007 [Tab 5]. Answering that single but profound question is not only important to the Bos-

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associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." \*575 *Id.*, at 122, n. 22, 101 S.Ct. 1010 (quoting L. Tribe, *American Constitutional Law* 791 (1978)). See also *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)."

<sup>46</sup> Former city councilor and city clerk Rosaria Salerno's statement read before the city council's Committee on Rules and Administration on Sept. 11, 2006, was included in submissions to the court in *McCreary vs. Flaherty*, spoke eloquently of the unintended consequences of the state's Open Meeting Law, this way: "I have a grave concern that the zeal for transparency might become a kind of tyranny. As I have discussed this with representatives of the government and I read the newest interpretation/application of the open meeting law, I think the spirit of the law has long since disappeared and a kind of hysteria is emerging. . . . Decisions that affect the quality of people's lives should be informed decisions. The men and women who make such decisions on our behalf should know what they are talking about, should know all the ramifications, good, bad or otherwise. To preclude any discussion out of the public eye of such weighty decisions is an ill-informed regulation, one that does not serve the public well. To expect that all the Councilors will come to all discussions cold, with no previous conversation among them is as absurd as it would be to expect or accept a surgeon to undertake an operation without prior consultation. . . . Transparency must be the gold-standard. Good sense must be an ingredient in the formula."

ton City Council, but to the public that relies on that council's members to advocate on its behalf and in its interests.

Clearly, a more thorough examination of the meaning of the words contained in Art. XXI of the Declaration of Rights, as well as the important First Amendment privileges alluded to herein, should be undertaken, not with a zeal to protect the statute, as has been done in the past, but with a zeal to safeguard what the constitution guarantees for the good of all citizens.<sup>47</sup>

In the case of the Boston City Council, a review of the litigation involving the council, cited earlier in this Report, demonstrates rather glaringly that a city councilor's ability to deliberate toward, advance and build consensus for legislation, or even be informed about issues in private briefings, as in the Tularernia case, has been severely impacted by judicial decisions and state law that make the mere act of talking with other legislators or informed experts about issues, outside a public forum, not only uncomfortable for many legislators but unlawful in the eyes of the courts. As Mr. Micawber in Charles Dickens' *David Copperfield* said, "If the law says that, then the law is an ass."<sup>48</sup>

While the goal of the state's Open Meeting Law is to provide transparency and insight into the deliberative process by mandating that meetings of governmental bodies be open to the public, a goal this Report fully endorses, its application and practical consequences make it difficult for legislators to privately discuss legislation or build consensus among colleagues to advance their legislative agenda.

It is worth examining, before continuing, the context in which the very debate about the statute occurs. In reviewing the full breadth of public discussion on this

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<sup>47</sup> Perhaps law schools could be invited to venture an opinion on this subject, as should scholars and academics interested in the subject matter.

<sup>48</sup> Unfortunately, Micawber, a good man, ended up in debtor's prison.



subject, two conflicting views emerge about whether the operation of the law, as it is currently written and applied, is a good or bad thing.

Advocates for stricter enforcement of the law argue that the public is entitled to more openness in government to expose and eliminate “backroom deals” by removing all private discussions from the “shadows.” The “public’s right to know” reigns supreme in an era of “sunshine” legislation.<sup>49</sup>

The other view suggests that the act of speaking with a select group of colleagues or even a lobbyist with business before a legislative body, is what elected officials do and are expected to do, and that while they are performing such functions they are unequivocally protected in that exercise by the full bundle of protection afforded them by virtue of the First Amendment of the United States Constitution as well as other constitutional doctrines. Further, they argue, elected officials need not surrender that privilege in the interest of satisfying the curiosity of advocates on one or the other side of an issue. How elected officials form their opinions, and what influences them to vote one way or the other, the argument goes, is part of the formative thought process that leads to consensus. This Report will deal with the issue of “influences” elsewhere in this Report.

This Report suggests that while appealing to some, the characterization of meetings in such broad, cynical and ominous terms, as suggested by the former view, is also misleading and counterproductive to good government. Indeed, the very protections afforded legislators by both the Deliberation, Speech and Debate Clause, of the Declaration of Rights and the First Amendment, were written to protect against the far greater evil that grew from “successive monarchs [utilizing] the criminal and civil law to suppress and intimidate critical legislators.” U.S. v. Brewster, 408 U.S. 501 507-08. [Emphasis supplied]

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<sup>49</sup> While it is assumed that all meetings of the state legislature and all legislative bodies must be held in public, the state constitution is actually silent on this subject, mandating only that the legislature ought to assemble frequently to conduct its business. Art. XXII, Declaration of Rights.

Unfortunately, the Open Meeting Law's intent, explained in its various summaries, supports the more cynical view of private meetings of elected officials. This statutorily fatal rationale is embedded both in case law and publications of the state attorney general's office.<sup>50</sup>

The broad sweep of the state's Open Meeting Law makes no distinctions between informal deliberations and discussions held between committee members, as part of the ongoing legislative process to advance legislation, and committee meetings held in secret to debate legislation and conduct a vote outside the public's view. There is a difference. The latter situation, clearly, though not called for by our state constitution, may rightly be covered by statute -- and if properly drawn, that statute may very well advance a compelling state interest that is narrowly tailored to serve a public good, drafted in such a way that it offers the least restrictive alternative to what presently exists. This is not the case here. The expanding application of the state's Open Meeting Law eviscerates free, open, private speech between elected officials. The crime under the statute is not fraud, slander, bribery, or any other punishable civil or criminal offense, but rather meeting privately with others to speak and express a private point of view, concern, suggestion or plan. The statute simply washes away a full bundle of First Amendment protections.

A review of the constitutional case law on the subject reveals that ensuring transparency by mandating "open public meetings" of governmental bodies is not the same as mandating public insight into the thought process or motivation behind a vote either in private discussions or other (e-mail) communications between

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<sup>50</sup> The attorney general's explanation of the law's purpose is explained as follows: "The requirements of the Open Meeting Law grow out of the idea that the democratic process depends on the public having knowledge about the *considerations* [emphasis added] underlying governmental action, for without that knowledge people are not able to judge the merits of actions taken by their representatives. The overriding intent of the Open Meeting Law is therefore to foster and, indeed, require open discussion of governmental action at public meetings." Overview and Summary of Attorney General Martha Coakley, Open Meeting Law Guidelines, citing Gigliione v. School Committee of Southbridge, 376 Mass. 70, 70 (1978) "The open meeting law is designed to eliminate much of the secrecy surrounding the *deliberations* [emphasis added] and decisions on which public policy is based."

elected officials and colleagues (or even constituents or lobbyists) seeking to move a bill forward – all of which are constitutionally protected exercises when done either as part of the legitimate legislative process, or as part of the speech clause of the First Amendment. The right to form political associations and alliances among like-minded legislators, to exchange ideas and gather information to develop strategy is not an ancillary interest of only some, but stands at the apex of protected First Amendment activities for both private and especially public officials, for it makes little sense to grant to the public a right to associate to elected certain people to public office, then deny that right to those they elect to serve their interests.<sup>51</sup>

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<sup>51</sup> This Report has focused considerable attention on the effect of the state's Open Meeting Law on a local legislator's Art. XXI privilege to speak and meet freely with colleagues to advance his or her legislative agenda, and has referred repeatedly to other rights secured by the First Amendment governing political speech and association. The two rights are inextricably intertwined and one should not be read at the expense of the other. The author of this Report believes that the state's Art. XXI and Federal Art. I, §5 protections afforded to "deliberation, speech and debate" are enough to raise a serious question about the law's broad, indiscriminate sweep. Speech (deliberation) is the issue and, along with state protections, the First Amendment's guarantees are implicated and should not be dismissed as they have been in the past. As noted earlier and expanded upon here, broad and far-reaching restrictions on an elected official's speech and ability to form political associations to advance a legislative agenda should trigger a court's "strict scrutiny." The state's Open Meeting law, as opposed to being narrowly drawn, so as to avoid the constitutional challenge, suggests the following absurdity: "No elected official may meet privately to gather majority support for his or her proposal; neither may he or she meet to form an alliance with other like-minded colleagues to plan strategy or receive new information that may advance their legislative agenda." As foolish as it sounds, this is the impact the statute has on elected officials' speech and associational rights. The state's Open Meeting Law, however well-intended, imposes significantly more of a burden than an incidental restriction on speech, and First Amendment case law governing free speech, leaves little room for doubt that any state law that significantly intrudes on a legislator's or private citizen's fundamental rights and duties under the constitution must be narrowly drawn and serve a compelling state interest, for the rights of free speech and political association lie at the foundation of a free society. The state statute, this Report argues, does not meet that constitutional burden. The central question in any First Amendment analysis is this: Is the First Amendment so limited in scope and application that it protects the right of citizens to band together to form political associations to elect candidates to public office who share those views, but does not protect the right of political candidates once elected to band together with colleagues to advance the agenda they were elected to promote? As the Supreme Court noted in *Burger v. Freeman*, 504 U.S. 191: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S., 214, 216, 86 S.Ct. at 1437. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964). Combined with previously noted constitutional restrictions on statutes that impose a burden on speech, it is difficult to see how the state's Open Meeting Law can pass this difficult test of its own constitutionality.

As noted earlier and throughout this Report, such broad and freewheeling inquiries into the deliberative process to expose motivation, authorized by statute, have been repeatedly viewed dimly by courts that have examined such laws under a slightly different constitutional microscope. Additionally, the magnitude of the offense to speech and formation of political alliances, allowed by the statute, when viewed under a constitutional lens appears very much in conflict with protections afforded legislators engaged in the process of law-making and decision-making.<sup>52</sup>

This Report relies on the historic legislative process as understood by most legislators, and argues that the legislative process does not begin on the floor of the house or senate or in a city council chamber where a matter comes for a final vote. The legislative process actually ends there and is easily distinguished from the political or administrative process. A bill germinates and grows in support through speech and the building of alliances to see it through to completion.<sup>53</sup>

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<sup>52</sup> The question arises: is it "speech" that the statute is aimed at regulating or is it the act of "meeting"? This Report has found a long line of cases, most notably, *U.S. v. O'Brien*, 391 U.S. 367 (1968) that might be invoked to claim that the state's Open Meeting Law in no way seeks to suppress speech, but rather seeks merely to regulate the activity of meetings of forums of elected officials outside a public venue. Thus, where *O'Brien* raised a First Amendment claim that his speech was being interfered with when he was arrested for burning his draft card on the steps of the South Boston courthouse, and he argued that his actions were his way of "speaking" out against this country's involvement in the Vietnam War, the Supreme Court of the United States ruled that his conduct was prohibited by federal statute, and that he could still speak against the war all he wanted, but not by burning a federal document in protest. The problem with using this analogy is obvious: the state's Open Meeting Law viscerates the right of elected officials to associate privately, to define who will be invited to gather as part of their group, or to exclude those who don't share the views of the group thus assembled. In *O'Brien*, the burning of a draft card, a symbolic act, could be separated from the speech element of the protest. In the present case, however, regulation of the activity of "meeting" is aimed squarely at discouraging private speech and the forming of group associations to advance that speech. The author of this Report has found no controlling authority for such a severe restrictions on speech and peaceful, political associations.

<sup>53</sup> But what of committee hearings? Don't committee members deliberate, speak and debate at these forums? The answer is, rarely. Committee hearings, like commission hearings, are places where views are more often sought and testimony is given. Questions are sometimes asked of those testifying, but rarely do members engage in serious deliberations (consultations with one another) toward consensus at such forums, although members can and do harter back and forth during hearings. This dilemma is the core problem with the state's Open Meeting Law. The law seeks to end "deliberations" outside formal settings. But legislators will and do talk amongst themselves about what was heard and what they want to do about it. It is after committee hearings, before a final floor vote is taken, that serious lobbying begins in earnest and councillors are under greatest pressure to act, compromise, or postpone a vote.

Indeed, the process of moving legislation forward is a continuous, time-consuming and laborious process with its roots planted thick in history, custom and practice of all legislative bodies. The process begins early, as was observed, although not ruled on, in *Coffin* at \*20, when counsel for the defendant House member (along with the state's attorney general) advanced a view of the full legislative process, steeped deep in speech and group associations, as most understood the historic process both then and now, and as they expected it to be applied under Art. XXI of the state's Declaration of Rights.

Now, by "a subject matter under consideration" must be understood, not merely a subject at the very instant under debate; but the phrase must include one which has been before the house, and is not yet finally determined; and whether any other matter is before the house at the moment, cannot, in the nature and reason of the thing, make a difference. It is necessary to deliberate in various ways and forms. Subjects, for instance, are commonly referred to committees in their various stages. It is the duty of such committees to deliberate, and they must be protected in their deliberations, or the end of their appointment will be frustrated.

Whenever a measure is proposed to the house, it is the right, and it is the duty, of every member, to communicate \*21 to his brethren the information he possesses, and to obtain such as he may need.

\*\*15 Further, the members have a right to deliberate and confer with each other on a measure not yet publicly moved, and they must be protected and privileged in the exercise of such right. Suppose, for example, a member contemplated an impeachment of a certain public officer; it would be his duty to confer with his brethren, and their duty to confer with him, on the propriety and expediency of the proposed measure; to scrutinize the character and conduct of the officer. And shall it be said that for the exercise of this duty a member is amenable in this Court in an action for slander? Is not a principal benefit and effect of the provision of the constitution annihilated by such a construction of it?<sup>54</sup>

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<sup>54</sup> As noted previously, in *Coffin*, counsel for the defendant member of the House of Representatives acknowledged the need and duty of legislators to confer on matters even "contemplated" to come before the body, outside a formal committee setting and in many different ways. While the Court in *Coffin* sidestepped the distinction between giving and receiving information, as counsel proposed, *Coffin* at \*\*22, or deciding whether the full protection of Art. XXI applied to both occasions, the Court did opine that the protections did extend to both speech and conduct engaged in in the performance of one's official duties. While the Court's silence on this point is problematic, when construed liberally and in context with the full breadth of the Court's construction of the



It should be noted that the above words of counsel were offered in the context of enumerating the immunities granted exclusively under Art. XXI's Deliberation, Speech and Debate Clause and did not involve the making of legislation, but rather involved a slander leveled at a private citizen by a member of the House and where that member was charged with the offense of slander. It was never argued that the words spoken could not be spoken, or uttered in a hallway, or in private to another member or members of the chamber or committee, as the state's Open Meeting Law commands.<sup>55</sup>

Indeed, the author of this Report has found no controlling authority allowing such unwarranted intrusion into the forming of political associations and discussions that come out of those meetings as condoned by the state's Open Meeting Law, and the case law that does exist on the subject, as noted above and, when weighed on a "constitutional" as opposed to "statutory" scale, appears to come down against any law that trespasses on the individual rights that are protected by both the clause and the amendment. "Of these privileges," wrote a unanimous court in Coffin, referring to the protections afforded members under the state's constitution, "thus secured to each member, he cannot be deprived, by a vote of the house or by an act of the legislature."<sup>56</sup>

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Clause. It is not unreasonable to argue that counsel for the defendant (and state's attorney general) was on point about what is and what is not protected.

<sup>55</sup> The question is: would the member have been prosecuted or questioned had he been standing in the hallway and, instead of uttering a slander, been discussing his views about legislation privately with several colleagues? The state's Open Meeting Law says, yes. Such informal discussion about legislation before the body is deemed a violation of the act. Coffin at \*31, however, says that the privilege extends to any "language or conduct" that is "in the character of a representative, [and] is the foundation of the prosecution." The problem with the Open Meeting Law is that it seeks to prevent elected officials from speaking about public matters in private, thus construing "the character of the office," in such a way as to exclude private speech among elected officials. The First Amendment issues raised by such a restrictive interpretation should be obvious.

<sup>56</sup> It should be noted that not all legislative acts are protected exercises, only those acts that are intertwined with and a necessary part of advancing the legislative process. Political and administrative acts are not protected by either Art. XXI of the Declaration of Rights, or Art. I, §6 of the US Constitution. This does not mean those "political" acts are not protected by the First Amendment. However, in Massachusetts, as elsewhere, the underpinnings of Coffin seem to be settled as a matter of constitutional law. See, for example, Iryin v. McGee, Not Reported in N.E. 2d 1993, 1



The Coffin court observed that its reading of Art. XXI applied in both criminal and civil contexts, Coffin at \*27. Viewed thusly, this Report proposes that the right conferred by Art. XXI on an elected official in a wide variety of settings, seems constitutionally grounded and cannot be dismissed by an act of the legislature. “These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the right of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.” Coffin at \*\*19.

This Report finds that the fatal flaw with the Open Meeting Law is this: even if the Article applies only to those words or acts already spoken or performed, the statute, in addition to trespassing on First Amendment activities, prohibits at least one universally understood and significant “function of the office” of an elected official: namely, meeting with colleagues on a personal basis to set a course of action to take. Here, the foundation of the complaint against the city council is the very act of soliciting support and building consensus among colleagues to move an item to the floor for debate and a successful vote itself.

The law aims at eliminating the privilege of privacy, thus eviscerating the right of members to define who they wish to talk with and whom they wish to exclude in their discussions. As for judicial inquiries into the nature and content of the deliberations after a vote is taken, as has been done by Massachusetts courts, courts that view such inquiries under a constitutional, as opposed to a “rational basis” statutory lens, have consistently held that the motivations for a vote, regardless of whether the motivations and considerations are improper or serve the highest public purpose, are outside judicial review and may not be the basis for complaint.<sup>57</sup>

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Mass Repr. 201, WL 818806 (Mass Superior). “Speech and Debate Clause is an absolute bar when legislative members act within the legitimate legislative sphere.” at \*4. [Emphasis added]

<sup>57</sup> See, United States v. Brewster, 408 U.S. 501, 509 (1972). “Our conclusion . . . was that the privilege protected Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.”

To put it in more understandable terms: the application of the state's Open Meeting Law is so restrictive that the very gathering of the five-member congressional committee to write this nation's Declaration of Independence (Jefferson, Franklin, Adams, Livingston and Sherman) would be a violation of law under today's restrictive rulings. Applying today's standards, it could and likely would be argued that the vote of the Continental Congress adopting the Declaration was a "mere formality" (conducted outside public view, incidentally) to affirm the committee's recommendations and, hence, an illegal act because the gathering and formulation of the Declaration was held in "secret" and out of public view.<sup>58</sup>

Based on a review of various constitutional standards, this Report suggests the simple proposition that one of the "certain natural, essential, and unalienable rights," that our state constitution alludes to in its Declaration of Rights, Art. 1 — a right also enumerated in the First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and understood by necessity as part of Art. XXI of that same Declaration -- is the right to deliberate with colleagues in private and in public where they may exercise the full ex-

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<sup>58</sup> The preponderance of case law suggests that even the weighty goal of "transparency," or the very idea of inquiring into a legislator's "motivations" or "considerations" about why he or she acted or voted the way they did or will, may not be enough where the right of speech is concerned and most so where the intent in the statute is to limit private speech or to allow inquiry into, or expose, the real or imagined motivation for a vote. Besides the latter's coherent offense to the First Amendment, the Deliberation, Speech and Debate Clause, read to comport with the First Amendment, countenances no such inquiry into the motivation for a legislator's vote. See, United States v. Johnson, 383 U.S. 169, 184-185 (1966) ("It was undisputed that Johnson delivered the speech; it was likewise undisputed that Johnson received the funds; controversy centered upon questions of who first decided that a speech was desirable, who prepared it, and what Johnson's motives were for making it. The indictment itself focused with particularity upon motives underlying the making of the speech and upon its contents. We hold that a prosecution under a general criminal statute dependant on such inquiries necessarily contravenes the Speech or Debate Clause."). See also, United States v. Helgeson, 442 U.S. 472, 488-89, (1979) ("The Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts . . . it precludes any showing of how [a legislator] acted, voted, or decided," citing U.S. v. Brewster, 409 U.S. at 525; accord U.S. v. Johnson, 383 U.S. The question is, then, what illegal act is the Open Meeting Law aimed at? The inescapable conclusion is that it is aimed at peaceful, deliberations, speech and association itself. See Fields v. Brewster, 459 F. 3d 1, 9-10 for discussion of what is and what is not a protected legislative act. When read alongside the Coffin opinion and its progeny, Art. XXI may be seen, as noted earlier, as an absolute bar to the prohibitions the state law and courts have imposed. Johnson was prosecuted under a criminal statute, and the privilege stood. The privilege under a civil statute should be even greater as the offense against the public good is questionable at best.

tent of political speech and association to advance legislation. A review of the case law in each area suggests that this right need not be surrendered by an elected official any less than by a private citizen; no less in private discussions than in public ones; and no less because of one's position in government than in the private sector.

Indeed, had a Stuart or Tudor monarch proposed such a regulation under which legislators would be prohibited from speaking privately with one another about matters of public importance, except under the watchful eye of a potentially hostile or even confused, divided and/or misled public, or a hostile monarchy, or a court steeped in politics, the Framers would certainly have viewed such a mandate as utterly offensive and unacceptable. It is worth remembering our own history: the entire congress had to meet in secret and privately to ensure their own safety and to hammer out differences in language with each other, before putting the Declaration of Independence before the public for consumption.

The issue, now more narrowly drawn, should be clearer: whether, as applied, the state's Open Meeting Law unconstitutionally trespasses on the rights inherent in a legislator's integral functions and duties protected by the First Amendment to the United States Constitution and our own state's Art. XXI, and federal Art I, §6 guarantees. This Report argues that the answer is in the affirmative; the statute than can be narrowly tailored, sweeps, instead, too broadly and continues to sweep and grow unchecked.

Again, it must be emphasized that the issue is not whether the state legislature may or may not regulate the rules of its own two houses or define the powers of Art. 89 legislative bodies of a similar nature, for the Art. clearly gives the state legislature that very right; the issue is whether in delegating home rule powers to local municipalities the legislature may, (a) limit the protections afforded local legislators by a rule or statute that impedes those officials' Deliberations, Speech or Debate protections, afforded them by virtue of Art. 1 § 6 of the United States

Constitution and Art. XXI of the Massachusetts Declaration of Rights, and (b) trespass on a local legislator's First Amendment speech and associational rights by mandating that those rights be restricted only to public forums, or only in gatherings where one vote less than a majority necessary for passage or defeat of a matter under proposal is present in a room, when the very essence of advancing a legislative agenda of like-minded officials is based on a legislator's belief that he or she has the necessary support for passage or defeat of a proposal coming before the body.<sup>69</sup>

This Report concludes that such a restriction on political and group association engaged in to advance a legislative agenda is, or seems, wholly unwarranted and should be viewed as highly suspect under serious First Amendment analysis.

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<sup>69</sup> With regard to Art. XXI immunities, instructive language appears in the case of *Spallone v. U.S.*, 495 U.S. 265 (1990). While not fully on point, its discussion of First Amendment principles is exactly on point and informative for us here. It wrote: "In perhaps the earliest American case to consider the impact of the legislative privilege, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized that 'the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people....'" *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). This theme underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the "public good" by interfering with the rights of the people to representation in the democratic process. [Emphasis added] *Lake Country Estates*, supra, 440 U.S. at 404-405, 99 S.Ct. at 1178-1179; *Lerney*, supra, 341 U.S. at 377, 71 S.Ct. at 788." The principle has been explained again in *Irvin v. McGee*, 1 Mass.L.Rptr. 201 (1993) and further expounded upon by the federal courts. See *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (C.A. 2006) to include "facts that are an integral part of the deliberative and communicative process by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." (Citations) For additional discussion on local legislative immunity see *Corpus Juris Secundum*, 62 CJS Municipal Corporation § 395. (See below)

As noted earlier in Massachusetts the case may be far more direct. No act of the legislature can intrude on the process protected by the Deliberation, Speech and Debate Clause of Art. XXI of the Declaration of Rights, because "[t]he freedom of deliberation, speech and debate, in either house of the legislature, is so fundamental to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." See *Coffin*, 4 Mass. 1, \*\*19. ("Of these privileges, once secured to each member, he cannot be deprived, by a resolve of the house or by an act of the legislature." *Id* at \*27.

As noted previously, the author of this Report has found no controlling authority where the right to speak in private was so restricted and upheld, nor has he found substance to the argument that the right to advocate liberally in private and/or public may be restricted by any legislative assembly, except in the most extreme cases approaching the clear and present danger level. For the right to speak and associate does not derive from the legislature, but from the people, who elect a republican form of government that speaks on their behalf, and where that right must be exercised to its greatest efficiency in the interests of the constituencies served and for the public good.

To the extent the state's Open Meeting Law, or any other statute or regulation, trespass on that right, the statute, etc., must give way to the supremacy clause of the federal constitutions. That this is not the case is a matter of record.<sup>68</sup>

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<sup>68</sup> The author of this Report recognizes that this is an unpopular position for a legislator to take, since a strong public sentiment weighs in favor of "openness" in government and "transparency," and the public's interest in knowing what "considerations" are behind decision making. This sentiment was expressed as recently as April, 2008 as this Report was being refined. In a front page Art. in the Boston Globe on April 25, 2008, titled, "Legislative wheels turn out of view," Columnist Matt Viser, wrote, "Most important decisions take place behind closed-doors, including those on some of the weightiest topics. . . and because the legislature exempted itself decades ago from the state's open meeting and public records laws, lawmakers often deliberate in private and keep key documents – schedules, e-mails, even some voting records – hidden from public view." cont.-

When framed as: "hidden from public view," the meetings do, indeed, appear sinister. But even this allegation is not strong enough reason to dismantle the First Amendment's constitutional bar, or the protections afforded legislators under Art. XXI, for even weighty concerns are "less important to the common wealth, than the free and unreserved exercise of the duties of a representative, unwearied by the fear of legal prosecution." *Coffin* at \*28. cont.-

Another report from the Boston Globe, by Steven Rosenberg, August, 7, 2008, titled: "Gloucester mayor backs off plan to bar press at pregnancy forums," surfaced regarding an alleged breach of the state's Open Meeting Law by the Gloucester mayor and school committee. Here, a private non-profit group wanted to call three meetings of 40 residents (one exclusively for students) to attend and discuss the "pregnancy" controversy involving high school students. The city's acting legal counsel, Suzanne Egan, advised the mayor and committee that such a meeting, even though sponsored by a private group, if attended by members of the school committee, constituted a violation of the state's open meeting law. "If the meetings are held to inform the School Committee's decision-making process, then they are subject to the Open Meeting Law." A city resident agreed, stating: "We need transparency and leadership on this issue and not be in the dark." This Report notes the obvious tension between the resident's opinion and the apparent disinterest in the First Amendment rights of the non-profit in calling the meeting and limiting attendance – and this does not even take into account the statement of the city's counsel that members of the school committee could not attend and listen, without violating the statute. Constitutional red flags should be down all over that playing field. The constitutional issue wasn't even raised.



Hence, where the state legislature certainly has an interest in requiring “open” public meetings of “quorums” of “governmental bodies” where the transaction of public business is concerned, it is another question whether this restriction on private speech and association can even apply to an individual or group of individuals meeting informally, elected or otherwise, as members of a committee or otherwise, who are advocating for support of a proposal that is before an assembly, not yet law, or maybe not even before the body for discussion. And this is where much of the problem with the application of the state’s Open Meeting Laws currently lies. There is considerable confusion and debate over a statute that has been expanded to the breaking point.<sup>61</sup>

Moreover, it is troubling and problematic, to be kind, that the state legislature intended that members of municipal legislative bodies not be able to discuss legislation in private, to form alliances, talk about a bill’s merits with others to persuade doubters, ask to meet with like-minded supporters to plan strategy, or pass their ideas around for comment and criticism in meetings where only those they wish to be invited are, in fact, invited to attend. Yet, all these deliberations, all integral parts of the legislative process by which laws are made and advanced, are foundations of every complaint under today’s expansionist rulings.<sup>62</sup>

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<sup>61</sup> Such a strict application of the state’s Open Meeting Law was applied in a case described earlier (*McCrea vs. Flaherty*) where officials from Boston University sought to quickly brief members of the city council on an emerging public health issue that was the subject of rumor and misinformation, reported by the press. A hastily called briefing session of councilors in the office of the council president to provide them with details so they could respond to their constituents was declared a violation of the state’s Open Meeting Law, and the council was fined.

<sup>62</sup> While the courts have stated the obvious: that an individual member is not a “committee,” (49 Mass.App. Ct. 119, 124 (2000)) other decisions have made this distinction somewhat irrelevant, since when individual members begin to speak and solicit support, a “rotating” or “serial” quorum may be assumed, (*Shannon v. Boston City Council*, No. 87-539 (Suff. Sup. Ct. Feb. 28, 1989.) In effect this presents members of the city council with a classic Hobson’s choice – a choice (not to speak) with no alternative. Indeed, the Mass Appeals Court upheld recently the ruling of a lower court that a “quorum” is not even necessary for a violation of the Open Meeting Law to exist, rather the act of sending out a notice of a meeting to all members is a violation. (Discussed earlier in this Report, *McCrea vs. Flaherty*, Mass App. Ct. No. 07-P-224 (Slip opinion).



Sadly, the courts have not been helpful. It should be noted, not without irony, that while the “escape” language in the G.L. c. 39, § 23A says the Act “shall not apply to any chance meeting or social meeting at which matters relating to official business are discussed so long as no formal agreement is reached,” the exception has been rendered near meaningless by decisions that see “revolving” quorums in all group discussions and “serial” messaging in all telephone conversation.<sup>63</sup>

As noted elsewhere in this Report, the inherent problem with the law as written and as applied was best summed up by the judge alluded to earlier in the Report. How does one get to a consensus? How does one gather co-sponsors if one cannot speak to enough members to win passage of a bill before it is called to the floor? The issue here is very much about speech!

Logically, in exempting itself and judicial deliberations from public scrutiny, the state legislature, perhaps cognizant of the constitutional issues with the law itself, saw that all these actions should be excluded from regulation, especially when these activities occur outside a formal committee or hearing structure or with groups.<sup>64</sup> As the city council has learned, discussions about legislation either in person between like-minded legislators or by phone is viewed with suspicion by

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<sup>63</sup> The exemption says “chance” meetings may be proper, but this Report argues that “chance” meetings may be too narrowly drawn to pass constitutional muster. Has the First Amendment been whittled down in Massachusetts such that only chance discussions of elected officials are protected? The fact is, legislation is not made by “chance,” it is made by plan and by counting votes, and counting votes requires that elected officials have the opportunity to meet specifically to ask whether they have the necessary votes to move forward. Ineffective advocacy presumes group association of like-minded individuals. Here, the right to speak and associate is inextricably intertwined with the free, open and robust exchange of ideas and concerns, expressed both at and outside of public view, whether spoken in group meetings or one-on-one, or with a majority present.

<sup>64</sup> As noted earlier, the courts had the option of reading the exclusion of the state legislature itself, as applying to all legislative bodies of the same kind, *ejusdem generis*. This option was not adopted. As it stands now, the activities of individual legislators have been bundled into the law under a myriad of “serial,” “rotating,” “revolving” violation decisions, effectively viscerating an “integral part of the deliberative and legislative process” by which laws get proposed, advocated and made. Here, the law does not support “everything said or done by [a member] in the exercise of the function of that office,” but rather is used to ensure that the process is thwarted at every stage. (Quote from Fields v. Johnson, 459 F. 3<sup>rd</sup> 1, 40-41, citing at 13 Coffin v. Coffin, 4 Mass. 1.)

the courts. The courts have shown no hesitancy to characterize such gatherings as unlawful. After a thorough examination of the Act and its case law, this Report notes that while the current status of the law is fixed in case law in Massachusetts, it need not be assumed to be permanent. The power to clear the act of its ambiguities and constitutional infirmities rests with either the legislature as a first resort or the courts.

It is the conclusion of this Report that to the very large extent the law intrudes upon the legitimate legislative process of bringing a bill to the floor for debate and discussion, by limiting a legislator's ability to garner support for that bill by meeting and deliberating privately with colleagues of like mind, the law grates against both the federal and state guarantee of broad privilege contained in both Art. I, §6 of the United States Constitution, and especially the broader view shared in Coffin about Art. XXI (Declaration of Rights) of the state constitution; if, on the other hand, the legislative process protected under Art. XXI does not extend to private conversations between elected officials working toward consensus and support for legislation, then the application of the state's Open Meeting Law to political speech and the formation of peaceful political alliances of elected officials grates against a member's First Amendment speech and associational rights privilege. Political speech is at the apex of protections afforded by the First Amendment. In both cases, the law as written and as applied presents significant constitutional entanglements that this Report recommends can and should be addressed and cannot and should not be dismissed. As it currently stands the state's "Deliberations, Speech and Debate" clause is read as exclusive of a member's First Amendment rights and privileges and a state statute seems to ride shotgun over both.

#### Why a change in the state's Open Meeting Law is necessary.

Based on the above, this Report argues that the state's Open Meeting Law can be amended, and in this regard, recommends that the statute be redrafted to take into account the differing natures of a "governmental body" in session and a legislator

or legislators meeting informally, engaged in the work of building consensus for legislation throughout the legislative process, a process that, to be most effective, must rest on assurances that a majority supports what is being proposed.<sup>65</sup> The changes are recommended both to clarify the ambiguity that exists and to avoid the constitutional questions that lurk beneath the surface of the current law and go directly to the issue of political free speech.<sup>66</sup>

As for boards, commissions and agencies covered under the original statute, these are "governmental bodies" that are presumed to be neutral in their decision-making, governed by set laws that are applied evenly in a public forum to those who come before them. Yet, even when boards and agencies sit down to draft regulations affecting the public and/or reports of their own, they sit in private to deliberate and only later are their regulations and reports made public and opened for public comment. So, while the constitutional protections afforded elected officials under Art. XXI do not extend to boards, agencies and commissions, although First Amendment principals do, only legislators under state law may not deliberate privately, to confer with others to advance their ideas or recommendations.

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<sup>65</sup> Even assuming *arguendo* that a meeting of a governmental body means that both a formal and an informal gathering of legislators are governed by the state's Open Meeting Law, both, then, would presumably fall under the protection of Art. XXI, for if it is "official" it is covered by the protection of the Deliberation, Speech and Debate Clause of the Art. by virtue of its entanglement with the statute itself, and any law that seeks to open deliberations to public scrutiny to expose motivations or reasons for a vote, falls on the foul side of the protections afforded by the Art.. The fact is, soliciting majority support for a bill in a private meeting is not the same as winning that vote on the floor. As noted elsewhere in this Report, votes can evaporate quickly once floor debate begins and pressure mounts for passage or defeat.

<sup>66</sup> This Report has pointed out other areas where application of a broad state statute to a legislator's speech and activity is problematic. In all cases, the constitutional protections afforded legislators when acting in their legislative capacity is of its highest priority and deserves to be further examined under the appropriate constitutional microscope. The privilege is to be construed liberally, as Coffin at 27 stated, and as the Supreme Court of the United States recognized in U.S. v. Gravel, 408 U.S. 606, 616-617, where the privilege extended even to elected officials' aides, who are not members of the body and who do not participate in committee hearings. "it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for members of congress to perform their legislative tasks without the help of aides and assistants: that the day-to-day work of such aides is so critical to the Member's performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech and Debate Clause -- to prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary (citation) will inevitably be diminished and frustrated."

At minimum, this Report recommends, based on all that has been found, that informal but clearly purposeful deliberations and discussions between elected officials, regardless of number, should be regarded as superior to that of a board, commission or agency member, since the work of a legislator who is trying to build support among colleagues at every stage of making law is best done when the opportunity presents itself, by plan and thoughtfully, and employed to achieve majority support before moving a bill or ordinance forward to a floor vote.

Moreover, as noted earlier in this Report, and putting aside for a moment First Amendment considerations, a large body of case law has interpreted the Speech and Debate Clause as prohibiting inquiry into a legislator's motives for voting as he or she does. Lifting the restriction on speech would eliminate the conflict.<sup>67</sup>

Secondly, and more importantly, meetings of local legislative bodies and their committees are "open to the public" anyway and, with the exception of the state legislature that has allowed electronic voting on certain issues for its members, the open meeting process for all official meetings of governmental bodies is followed in all cities and towns across the state, and all votes are taken in public.<sup>68</sup> Accordingly, this Report should not be read as advocating for closed official meetings of governmental bodies, even though as noted earlier there is no "constitutional" as opposed to "statutory" provisions for such open public meetings to occur. Rather, this Report recommends that the definition of "meetings" and

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<sup>67</sup> As noted earlier in this Report, it has been held by the Supreme Court of the United States that the Clause does not protect the promise to give a vote, suggesting that the protections apply only after a vote is taken and an inquiry is begun. This reading may be narrower than our own state's interpretation in *Coffin*, that shields every act performed in the course of moving the legislative process forward -- and it certainly doesn't take into account First Amendment issues.

<sup>68</sup> The fact is, formal meetings are conducted in public where radio, TV and printed media as well as the public are invited to attend; committee and council hearings are broadcast live on city council TV and a large library of previous meetings and hearings is available over the Internet to view; a weekly agenda is printed and available to all as well. Councilors' offices are open to the public every day, and individuals and/or groups are invited to meet and lobby councilors as they wish. Committee hearings are not only open to the public, but the public is always invited to attend and testify. A strong case can be made that the very open nature of the process assures full disclosure of official proceedings, without having to trespass on the constitutional right of elected officials to confer in private and associate with like-minded advocates, too.

"governmental body" be defined to exclude local legislative members engaged in the deliberative process of advancing legislation. The provision should be applied and interpreted liberally.<sup>69</sup>

Interestingly, while under current law the mayor and/or governor may send aides to lobby and poll councilors for their votes before final action is taken, and special interests (private and corporate) may meet separately one-by-one with the entire legislative body to solicit support for the way they wish a vote to go, state law precludes a committee chair from doing the same with members of his or her own committee. Under current law, the only ones who don't know the likely outcome of a proposal under review are the legislators themselves whose names are attached to its making.<sup>70</sup>

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<sup>69</sup> View this recommendation in light of the fact that the state's Open Meeting law defines a "Meeting" as "any corporal [physical] convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered . . ." This term is discussed in-depth in *Mass. Practice* Ch. 13 § 1415. No "quorum," however, is necessary for private meetings and, hence, the term may be irrelevant in that context. If, on the other hand, the meaning of "quorum" means that the gathering would constitute a "quorum" in a formal session on the floor, then the law's reach to private discussions may trespass on First Amendment rights of speech and association because the exercise of those rights is an integral part of the legislative process. Under the level of scrutiny recommended by this Report, the anecdotal examples provided in *Mass. Pract.* § 1415 are unpersuasive in a legislative context precisely because the essence of law making is to gather votes and support before a vote. So, while the Open Meeting Law can require that discussion and votes be taken at formal meetings of a legislative body, the law may be on less certain footing where it trespasses on the legislative process of building consensus, however gathered.

<sup>70</sup> A personal anecdote regarding just how precarious "counting votes" actually is may be helpful. Names are withheld for obvious reasons. A vote for council president was to occur. The council president at the time was entering the chamber and this author asked if he had the votes to get re-elected. He said he did. "I have eight; I may have nine," he beamed confidently. It takes seven votes to be elected president. This meant that he counted six other votes he believed he had before the final vote was taken. When the official vote was taken, for whatever reason, the council fractured and the vote ended in a 6-5 deadlock, with two city councilors refusing to support either candidate. When it became evident that neither of the contenders' supporters would switch their votes, one of the two holdouts threw his name in for council president, and was elected by unanimous consent. The point is this: no unofficial meeting of elected officials where votes are counted means anything until the final vote is taken and that vote is taken — always — in public. In another meeting of councilors, on another issue, a majority vote deteriorated when the mayor started calling individual members and lobbying them to break with colleagues. The majority fell apart!



And to complicate matters further, under a most recent ruling of the Mass Appeals Court, McCrea v. Flaherty, covered elsewhere in this Report, it was declared that even a mailing to all members inviting them to a meeting constituted a violation of the state's Open Meeting Law, regardless of whether anyone, let alone a quorum was in attendance.<sup>71</sup>

This Report concludes that the problem with the unchecked expansion of the law is this: in making and advancing law, the expectation is that a legislator will pursue his or her constituents' legislative interests until a coalition and consensus builds for support of a specific proposal that is not yet law. Under current interpretations of the state's Open Meeting Law such discussions and efforts are suspect, if not outright illegal.<sup>72</sup>

Lastly, the impartiality that is supposed to govern a board, commission or agency's actions and votes is not a function of a legislator building momentum to support or defeat a particular proposal. In such cases, lobbying and consensus building - counting votes -- is the essence of political speech and redress, and a legislator ought not have to forfeit that constitutional right in private in order to be able to exercise another constitutional right to speak in public.

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<sup>71</sup> As noted earlier, both the Supreme Court of the United States and the state Supreme Judicial Court of Massachusetts have long recognized that the Speech or Debate Clause protects more than just votes on the floor of the chamber, but includes acts that are integral to the deliberative and communicative process. The Coffin decision, as noted elsewhere in this Report, seems to be broader in its protections than even the federal courts have allowed. So, where the Supreme Court of the United States in United States v. Helstoske, 442 U.S. 477, 490 didn't go so far as to embrace "[a] promise to deliver a speech, to vote or to solicit other votes at some future date," as falling within the ambit of the federal Speech or Debate Clause, the Massachusetts Supreme Judicial Court in Coffin at 27 wrote that the Deliberation, Speech and Debate Clause of Art. XXI, exempted from prosecution, civil or criminal "every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house or irregular and against their rules." How would a Massachusetts court interpret liberally, the words "every thing said or done . . . in the exercise of the functions of that office"? Because this question has not been brought before, the answer is unknown. We know only that it appears never to have even been considered.

<sup>72</sup> The law is applied so broadly, that: "[D]iscussion by telephone among members of a governmental body on an issue of public business within the jurisdiction of the body [is a] violation of the law." Harshbarger v. Board of Selectmen of Lexington No. 88-364 (Middlesex Superior Ct. Aug. 18, 1989).



As noted elsewhere in this Report, a general rule of statutory construction is that a court is supposed to interpret a law to avoid a constitutional question. Conflicts and misunderstandings abound because the waters have been muddied such that “rotating,” “revolving” quorums and “serial telephone conversations” and now even “mailings” are concepts created by the courts to suggest illegality, even when less than a quorum of members meets and talks. How can a legislator know how to act in any given circumstance, when the very thing the law allows (meetings of less than quorums) is specifically prohibit by the courts? The effect is chilling.

The Committee has asked for remedies, the following three Acts are, in this case, the only avenues available; the first is narrowly tailored to the problems found as the law presently exists. Because the Acts involve judicial rulings, the state legislature would be the only forum for redress. One Act clarifies how to determine when a “rotating” quorum exists and when it does not. The second proposal confronts the constitutional question directly and removes any doubt about the right to political speech and vote gathering, again by amending the current Act. The third proposal calls for the legislative exemption to apply to all legislative bodies.

### Option 1. Amending G.L. c. 39, Section 23B

Section 1. Remove the second sentence of 23B which says: “No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section.”, and replace it with the following new language:

“Nothing contained in this Act shall preclude an individual legislator from meeting with colleagues to build support for, gather consensus toward, or solicit cosigners for or against proposed legislation or a committee report, nor shall a gathering of members in private to discuss strategy or ascertain the level of support for an item before or coming before

the body constitute a violation of this act. The term quorum shall not apply to such gatherings.”

The above change is, still, a compromise, and the writer of this Report is not certain as of this writing that it is even a wise compromise of protected First Amendment or Art. XXI activities.

The second route would be to view the law, as applied, as an unconstitutional infringement on the right of a legislator to do his or her job. In short, regulating “verbal exchanges” or “gatherings” outside the official forum where business is transacted is irrelevant because in those gatherings, outside a specific forum, the full power, protection and force of the First Amendment, is at its apex, where political speech and vote gathering is the essence of our republican form of government and the constitutional and statutory duty of all elected officials.

Moreover, a duly constituted meeting of a quorum of members of the city council in session or a committee thereof, must and always has been open to the public. But a gathering of individual legislators outside its official forum cannot be a “quorum” because “quorum” is a term of art that does not exist outside the body and is truly meaningless in any other context. Question: how many members does it take to hold a “private” meeting? The answer is: as many as one can gather to talk. Stated another way: the First Amendment protects the right of a legislator to meet with as many like-minded legislators as he or she can muster to win their support for what is about to be voted on at a duly constituted meeting of the body. Ideally a legislator would know beforehand that he or she goes into a meeting with a majority plus one to win support for his or her proposal. Under current law, that very act would be illegal.

The second amendment to G.L. c. 39, Section 23B, would be as follows:

### Option 2: Amend G.L. c. 39, Section 23A & B

Section 1: Remove in its entirety from Chapter 39 § 23A the definition of "Deliberation."

Section 2: Remove the period at the end of the sentence defining "Meetings," and add the following new language and punctuation:

"; nor shall this definition apply to deliberative exchanges, verbal or otherwise, between elected officials, singularly or collectively, seeking support for, building consensus toward or devising strategies to support or defeat legislation, or any other matter that may come before the body at a duly constituted meeting of members."

Section 3: Remove in its entirety from Chapter 39 § 23B the second paragraph, beginning with the words: "No quorum of a governmental body . . ."

The effect of the latter amendment would be exactly what Chapter 39, §23 says: "All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section." This change would remove any and all constitutional issues since the law would direct that a meeting of a governmental body must held in public, meaning committee hearings and full meetings.

The final proposal would be the ideal arrangement and would avoid the constitutional conflict that presently exists. It would treat all legislative bodies the same.

### **Option 3: Amend G.L. c. 39, Section 23A & B**

Section One: Under the definition of "Governmental Body," remove all words in the first sentence after the words "region city or town" and add the following new language:

"and the governing board of local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting; and provided, further, that for purposes of this Act, local legislative bodies shall be accorded the same exemption granted in Art. XXI and G.L. c. 30A, § 11A to the general court or the committees or recess commissions thereof."

## **Chapter 39: Section 23A. Definitions**

Section 23A: The following terms as used in sections twenty-three B and twenty-three C shall have the following meanings:—

"Deliberation", a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction.

"Emergency", a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

"Executive session", any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.

"Governmental body", every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting.

"Made public", when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body.

"Meeting", any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

"Quorum", a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body.

## **Chapter 39: Section 23B. Open meetings of governmental bodies.**

Section 23B. All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section.

No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section.

No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members of the governmental body have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.

Nothing except the limitations contained in this section shall be construed to prevent the governmental body from holding an executive session after an open meeting has been convened and after a recorded vote has been taken to hold an executive session. Executive sessions may be held only for the following purposes:

(1) To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual, provided that the individual to be discussed in such executive session has been notified in writing by the governmental body, at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties.

A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights:

(a) to be present at such executive session during discussions or considerations which involve that individual.

(b) to have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation in said executive session.

(c) to speak in his own behalf.

(2) To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights:

(a) to be present at such executive session during discussions or considerations which involve that individual.

(b) to have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation in said executive session.

(c) to speak in his own behalf.

(3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, and to conduct collective bargaining sessions.

(4) To discuss the deployment of security personnel or devices.

(5) To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.

(6) To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.

(7) To comply with the provisions of any general or special law or federal grant-in-aid requirements.

This section shall not apply to any chance meeting or social meeting at which matters relating to official business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction, or advisory power.

Except in an emergency, a notice of every meeting of a governmental body subject to this section shall be filed with the secretary of state, and a copy thereof posted in the office of the executive office for administration and finance at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to the time of such meeting. The notice shall be printed in easily readable type and shall include the date, time and place of such meeting. Such filing and posting shall be the responsibility of the officer calling such meetings.

A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public; provided, however, that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer. All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions. No votes taken in open session shall be by secret ballot.

A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting.

Upon qualification for office following an appointment or election to a governmental body, a member shall be furnished by the state secretary with a copy of this section. Each member shall sign a written acknowledgment that he has been provided with such a copy.

The attorney general shall enforce the provisions of this section.

Upon proof of failure by any governmental body or by any member or officer thereof to carry out any of the provisions of this section, any justice of the supreme judicial court or any justice of the superior court sitting in the county in which the governmental body customarily meets or in the absence of such sitting of court then any justice of the superior court sitting in Suffolk county shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provision at future meetings. Any such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney for the district in which the governmental body is located. The order of notice on the complaint shall be heard no later than ten days



after the filing thereof or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of such complaint the burden shall be on the respondent to show by a preponderance of the evidence that the actions complained of in such complaint were in accordance with and authorized by this section, by section nine G of chapter thirty-four or by section twenty-three B of chapter thirty-nine. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

Any such order may also, when appropriate, require the records of any such meeting to be made public, unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized. The remedy created hereby is not exclusive, but shall be in addition to every other available remedy.

The rights of an individual set forth in this section relative to his appearance before a meeting in an executive or open session, are in addition to the rights that an individual may have from any other source, including, but not limited to rights under any laws or collective bargaining agreements, and the exercise or nonexercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

## 4. Conclusions:

A review of the above legislative/executive cases unearths a number of unwarranted restrictions on charter powers brought about by a misreading of statutes and mislabeling of the city of Boston charter as a “strong mayor/weak council” form of government. This Report points to a lack of understanding by the courts of the history of how the city council and its central staff came into being, as well a misunderstanding of how and why the changes that occurred over the years actually strengthened the city council’s legislative hand.

The 1885 charter<sup>73</sup>, investing in the mayor the executive powers of the city was a logical and sound administrative move, as was the consolidation of executive powers found in the 1909 charter<sup>74</sup>. Neither of these charter revisions, however, invested in the executive branch control, either directly or indirectly, over the city council, its staff or the expenditure of its budget in pursuance of its operational or legislative goals. The language for such an audacious reading is made possible only because the courts and to a lesser extent the city council has allowed it.

Secondly, as noted previously, the city council has been harmed by the judiciary’s broad sweep of a legislator’s right to associate and advance his or her legislative agenda into language that mandates that all meetings of governmental bodies, such as boards, commissions, agencies and city council meetings, be open to the public. This Report has raised the issue and encourages further examination into the law’s impact, particularly as that law grates against First Amendment speech protections and this state’s Art. XXI protections as well as federal guarantees contained in both the First Amendment and Art. §6 of the United States Constitution.

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While this Report has focused almost exclusively on the loss of legislative powers at the hands of both the judiciary and the executive branch, it is ultimately in the hands of the legislative branch to balance the scales, including Rules changes that invest in committee chairs far greater control over spending than they currently enjoy. This Report, hopefully, has shown the way.