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# Chapter 11: Expanding Gubernatorial Access to Closed Session Agency Meetings

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## Chapter 11: Expanding Gubernatorial Access to Closed Session Agency Meetings

*Megan DeHerrera*

### *Code Section Affected*

Government Code § 54957 (amended).  
AB 246 (Bradford); 2013 STAT. Ch. 11.

### I. INTRODUCTION

In September 2011, the Los Angeles County Board of Supervisors (Board) held a closed session meeting with public officials and the Governor of California, Jerry Brown, to discuss the impact of legislation to realign the California prison system.<sup>1</sup> While the Board characterized the meeting as a “conference regarding potential threats to public services or facilities,” the Los Angeles County District Attorney’s office concluded the meeting was more about “financial issues” and constituted a violation of the Ralph M. Brown Act (Brown Act).<sup>2</sup> On February 2, 2012, Californians Aware<sup>3</sup> brought a lawsuit against the Board for violating the Brown Act by unlawfully meeting in a closed session with the Governor on a matter not concerning public security.<sup>4</sup> The lawsuit ultimately settled, and the Board “acknowledg[ed] the correctness of [Californians Aware’s] legal challenge, commit[ted] not to repeat such uses of the closed session, and releas[ed] transcripts of its actual discussions with the Governor.”<sup>5</sup> After the controversy settled, Assemblymember Bradford introduced Chapter 11<sup>6</sup> to fill the gap in existing law prohibiting the Governor from

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1. Letter from Steve Cooley, L.A. Dist. Attorney, to the L.A. Cnty. Bd. of Supervisors, at 1–2 (Jan. 24, 2012), *available at* <http://documents.latimes.com/district-attorney-response-brown-act-complaint-against-board-supervisors-12612-2/> [hereinafter Cooley] (on file with the *McGeorge Law Review*); *see also* Letter from Terry Francke, General Counsel, Californians Aware, to Steven Bradford, Cal. State Assembly, at 2 (May 3, 2013) *available at* <http://www.scribd.com/doc/139353900/AB-246-OPPOSE> [hereinafter Francke] (on file with the *McGeorge Law Review*) (noting the legislation was AB 109, a measure to facilitate transfer of “state inmate[s] . . . to county jails or probation supervision” during the realignment process).

2. Cooley, *supra* note 1, at 1, 5.

3. *See* Verified Petition for Writ of Mandate, an Injunction, and Declaratory Relief for Violations of the Ralph M. Brown Act with Exhibits A Through M at 2, *Californians Aware v. Los Angeles County Board of Supervisors*, No. BS135835 (L.A. Sup. Ct. Cal. Feb. 3, 2012), *available at* <http://calaware.org/wp-content/uploads/2012/03/Petition-for-Writ-of-Mandate1.pdf> [hereinafter Petition] (on file with the *McGeorge Law Review*) (describing Californians Aware as “a 501(c)(3) non-profit public benefit corporation organized under the laws of California, governed by a board comprised of public officials, publicly-minded citizens, and journalists, whose mission includes the promotion and defense of the principles of open government”).

4. *See generally id.* (alleging other violations of the Brown Act unrelated to Chapter 11 and thus not discussed herein).

5. Francke, *supra* note 1, at 3.

6. CAL. GOV’T CODE § 54957 (amended by Chapter 11).

attending closed session local agency meetings on matters pertaining to public security.<sup>7</sup>

## II. LEGAL BACKGROUND

First, Section A generally describes the Brown Act, which requires local public agencies to hold meetings open to the public.<sup>8</sup> Next, Section B examines the public security exception to the Brown Act.<sup>9</sup> Finally, Section C discusses the impetus for Chapter 11—the lawsuit against the Los Angeles County Board of Supervisors alleging Brown Act violations.<sup>10</sup>

### A. *The Ralph M. Brown Act*

The Brown Act was enacted in 1953 to address the concern that certain local government proceedings occurred in secret and without public participation.<sup>11</sup> Under the Brown Act, “[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in [the Brown Act].”<sup>12</sup> To promote transparency in local government, the statute declares that “[t]he people insist on remaining informed so that they may retain control over the instruments they have created.”<sup>13</sup> The Brown Act provides that “no closed session may be held by any legislative body of any local agency”<sup>14</sup> unless

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7. OFFICE OF ASSEMBLY MEMBER STEVEN BRADFORD, AB 246—FACT SHEET, at 1 [hereinafter AB 246—FACT SHEET] (on file with the *McGeorge Law Review*).

8. *Infra* Part A.

9. *Infra* Part B.

10. *Infra* Part C.

11. See OPEN & PUBLIC IV: A GUIDE TO THE RALPH M. BROWN ACT 5 (2d ed. 2010), available at <http://www.cacities.org/UploadedFiles/LeagueInternet/86/86f75625-b7df-4fc8-ab60-de577631ef1e.pdf> [hereinafter OPEN & PUBLIC IV: A GUIDE TO THE RALPH M. BROWN ACT] (on file with the *McGeorge Law Review*). “In late 1951, *San Francisco Chronicle* reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series on ‘Your Secret Government’ that ran in May and June 1952.” *Id.*

12. CAL. GOV’T CODE § 54953(a) (West Supp. 2013).

13. *Id.* § 54950 (West 2010).

14. *Id.* § 54962; see also *id.* § 54952 (defining “legislative body” as including “governing bod[ies] of a local agency or any other local body created by state or federal statute” and “commission[s], committee[s], board[s], or other bod[ies] of a local agency”); *id.* § 54951 (defining “local agency” as “a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency”).

## 2014 / Government

“expressly authorized” by statute.<sup>15</sup> Even then, exceptions must be construed narrowly so as to, where possible, maintain the public’s right of access.<sup>16</sup>

### B. *The Public Security Exception*

In 1971, the California Legislature amended the Brown Act to expressly create a public security exception with Chapter 587.<sup>17</sup> This law allowed for closed sessions “with the Attorney General, district attorney, sheriff, or chief of police, or their respective deputies, on matters posing a threat to the security of public buildings or a threat to the public’s right of access to public services or public facilities.”<sup>18</sup> The legislation’s sponsors reasoned “that high security trials, bombings of public buildings, and potentially violent mass protests [in the early 1970’s] all require[d] planning for the protection of the public and public employees.”<sup>19</sup> After the tragedies of September 11, 2001, additional language expanded the public security exception with Chapter 1120’s passage in 2002.<sup>20</sup> Chapter 1120 added closed session meetings regarding “threat[s] to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electrical service” and permitted “a security consultant or a security operations manager” to attend the closed sessions.<sup>21</sup>

### C. *Los Angeles County Board of Supervisors Lawsuit*

The controversy involving the Board in 2011 provided the basis for Chapter 11’s introduction.<sup>22</sup> When the Board met with Governor Brown regarding AB 109—legislation related to the California prison system’s “realignment”—it allegedly violated the Brown Act in two ways.<sup>23</sup> First, the topic of the meeting arguably “pertained [more] to implementation of the newly enacted laws, including budgetary matters, [and] allocation of resources” than to a “threat to public access to services and facilities contemplated” by the public security

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15. *Id.* § 54962; *see also id.* § 54957(b)(1) (excepting closed sessions for personnel decisions); *id.* § 54956.9(a) (West Supp. 2013) (excepting closed sessions regarding “pending litigation”); *id.* §54956.8 (West 2010) (excepting closed sessions for real property negotiations).

16. *See* CAL. CONST. art. I, § 3(b)(2) (“A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.”).

17. 1971 Cal. Stat. ch. 587, § 1, at 1180–1181 (amending CAL. GOV’T CODE § 54957).

18. *Id.*

19. Cooley, *supra* note 1, at 3.

20. 2002 Cal. Stat. ch. 1120, § 2, at 7183–7184 (amending CAL. GOV’T CODE § 54957); *see also* Francke, *supra* note 1, at 2–3 (naming the September 11th terrorist attacks as reason for amendment).

21. 2002 Cal. Stat. ch. 1120, § 2, at 7183–7184 (amending CAL. GOV’T CODE § 54957).

22. *See supra* notes 1–7 and accompanying text; *see also* Part I (discussing how the L.A. County Board of Supervisors’ controversy sparked Chapter 11’s introduction).

23. *See generally* Cooley, *supra* note 1 (discussing the Board’s indiscretions).

*McGeorge Law Review / Vol. 45*

exception.<sup>24</sup> Second, the Board met with the Governor in a closed meeting, even though the Governor was not among those expressly authorized by the exception to meet in closed sessions.<sup>25</sup> The trial court did not have occasion to decide whether the topic of the meeting violated the Brown Act<sup>26</sup> because the parties settled the lawsuit.<sup>27</sup> A bill introduced in the legislature in 2012 was considerably similar to Chapter 11 and attempted to address the Board's alleged indiscretions, but failed in the Senate.<sup>28</sup>

## III. CHAPTER 11

Chapter 11 makes two changes to the Brown Act.<sup>29</sup> First, Chapter 11 adds the Governor of California to the persons authorized by the Brown Act to attend closed session meetings of local agencies “on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public’s right of access to public services or public facilities.”<sup>30</sup> Second, the California Constitution requires that a statute restricting public access to meetings include “findings demonstrating the interest protected by the limitation and the need for protecting that interest.”<sup>31</sup> Chapter 11 includes such mandated findings.<sup>32</sup> While recognizing that Chapter 11 “imposes a limitation on the public’s right of access,” its findings specify the reason for the legislation as protecting “the health and safety of the people of California . . . by giving governing bodies the authority to meet with the Governor in closed meetings to discuss security matters that may include sensitive information.”<sup>33</sup>

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24. *Id.* at 5.

25. See Francke, *supra* note 1, at 2 (The Brown Act did not “lawfully [allow] the Governor in such a nonpublic meeting.”).

26. ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 246, at 3 (Apr. 3, 2013).

27. See *LA County Supervisors Reach Agreement in Brown Act Lawsuit*, ANTELOPE VALLEY TIMES (Apr. 20, 2012), <http://theavtimes.com/2012/04/20/la-county-supervisors-reach-agreement-in-brown-act-lawsuit/> (on file with the *McGeorge Law Review*) (describing the settlement between L.A. County and Californians Aware, where the County agreed to pay Californians Aware’s legal fees and costs of \$14,750.70).

28. AB 1736, 2012 Leg., 2011–2012 Sess. (Cal. 2012) (as amended Aug. 21, 2012, but not enacted); see also SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 246, at 4 (Feb. 6, 2013) (stating that the only staff of the Governor allowed in closed meetings under the legislation proposed in 2012 were those with “subject matter expertise”).

29. CAL. GOV’T CODE § 54957 (amended by Chapter 11).

30. Compare *id.* § 54957 (amended by Chapter 11), with *id.* § 54957 (West 2010) (allowing only the “Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager” to attend closed sessions). Chapter 11 also expressly permits the Governor’s “deputies” to attend such closed sessions. *Id.* (amended by Chapter 11).

31. CAL. CONST., art. I, § 3(b)(2).

32. *Infra* note 33.

33. 2013 Cal. Stat. ch. 11, § 2.

## 2014 / Government

## IV. ANALYSIS

Section A considers the opposition's argument that Chapter 11 invades the public's right to open meetings.<sup>34</sup> Section B explores the actual necessity for Chapter 11 in the face of existing measures and seeming lack of changes in the political climate.<sup>35</sup> Section C analyzes whether the legislature drafted Chapter 11 too broadly.<sup>36</sup>

A. *Does Chapter 11 Threaten the People's Right to Public Participation?*

Opponents maintain that Chapter 11 threatens the people's broad right to civic participation by expanding exceptions to the Brown Act beyond the legislature's intentions.<sup>37</sup> A fundamental precept in California's Constitution provides the foundation for the Brown Act: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."<sup>38</sup> Against this backdrop, "local legislative bodies [play] a vital role in bringing participatory democracy to the citizens of [California.]"<sup>39</sup> Chapter 11's opponents argue that the law "depriv[es] the public of opportunities to address [local agencies]" because it allows for more closed session meetings.<sup>40</sup> They also contend that this restriction conflicts with California's Constitution and undermines the purpose of the Brown Act, which is to promote openness in local government.<sup>41</sup> General counsel for Californians Aware echoed these concerns with his statement regarding the Board controversy: "[T]he Board has repeatedly used Brown Act labels to mislead the public rather than to deal with controversial matters publicly."<sup>42</sup>

By its text, Chapter 11 admits to restricting the public's right to access to public meetings for the limited purpose of allowing "governing bodies the authority to meet with the Governor in closed meetings to discuss security

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34. See *infra* Part IV.A (discussing the public's right to participate in local government).

35. See *infra* Part IV.B (discussing the necessity for Chapter 11).

36. See *infra* Part IV.C (discussing whether Chapter 11 is drafted too broadly).

37. See generally Francke, *supra* note 1 (arguing Chapter 11 conflicts with legislative intent of the Brown Act).

38. CAL. CONST. art. I, § 3(b)(1).

39. BILL LOCKYEAR, OFFICE OF THE ATTORNEY GENERAL, THE BROWN ACT: OPEN MEETINGS FOR LOCAL LEGISLATIVE BODIES (2003), available at [http://ag.ca.gov/publications/2003\\_Intro\\_BrownAct.pdf](http://ag.ca.gov/publications/2003_Intro_BrownAct.pdf) (on file with the *McGeorge Law Review*).

40. Press Release, Californians Aware, CalAware Sues L.A. Supervisors for Brown Act Violations (Feb. 3, 2012) at 1, available at <http://calaware.org/awareness-area-government/calaware-sues-l-a-supervisors-for-brown-act-violations> [hereinafter Press Release] (on file with the *McGeorge Law Review*).

41. CAL. CONST. art. I, § 3(b)(1); SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 246, at 1 (Feb. 6, 2013); see also Cooley, *supra* note 1, at 4 (commenting that the legislature does not intend the public security exception to act as a "sanctuary" for discussing improper matters in closed sessions).

42. Press Release, *supra* note 40, at 2.

*McGeorge Law Review / Vol. 45*

matters that may include sensitive information.”<sup>43</sup> The public security exception is already drafted with safeguard measures to thwart the possibility of generating future improper closed session meetings with the Governor.<sup>44</sup> For example, “[c]losed session items must be briefly described on the posted agenda . . . and the body must make a public announcement prior to the closed session discussion.”<sup>45</sup> Additionally, after the closed session meeting, the local agency “must provide an oral or written report on certain actions taken and the vote of every elected member present.”<sup>46</sup> Thus, Chapter 11 only compromises the people’s right to public participation in the narrowest sense.<sup>47</sup> Given the safeguard measures already contained within the Brown Act, Chapter 11 does not seem to severely impact the people’s right to participate in local government unless the measure is used for improper purposes.<sup>48</sup>

*B. Is Chapter 11 Necessary?*

Chapter 11’s supporters argue the statute fills a gap in existing law to allow the Governor to attend closed session meetings on public security matters.<sup>49</sup> As the Governor already leads the entities responsible for responding to public security matters, supporters reason that the law should authorize the Governor to attend closed meetings on these issues.<sup>50</sup> For example, the Governor heads the state militia as Commander-in-Chief, as well as the California Military Department, and is responsible for the California Emergency Management Agency.<sup>51</sup> Many argue the Governor’s inclusion is imperative to protect confidentiality of such closed session meetings.<sup>52</sup>

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43. 2013 Cal. Stat. ch. 11, § 2.

44. See AB 246—FACT SHEET, *supra* note 7, at 2 (describing reporting measures that mitigate the effects of closed session meetings).

45. *Id.*

46. *Id.*

47. See *id.* at 1 (noting also that the Governor can only attend closed meetings regarding public security issues and not meetings for any of the other Brown Act exceptions).

48. See *infra* Part IV.C (discussing improper uses of the Brown Act).

49. See AB 246—FACT SHEET, *supra* note 7, at 1–2 (positing that there is a need for the Governor to attend closed sessions on public security matters).

50. *Id.*

51. ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 246, at 3 (Apr. 3, 2013); see also CAL MIL. & VET. CODE § 140 (West 2010) (“The Governor of the State, by virtue of his office, is the Commander in Chief of the Militia of the State.”).

52. See, e.g., Patrick McGreevy, *California Lawmakers Vote to Exclude Public from Some Meetings*, L.A. TIMES (June 3, 2013), <http://www.latimes.com/news/opinion/editorials/la-ed-board-of-supervisors-brown-act-20130610,0,7082265.story> (on file with the *McGeorge Law Review*) (including Senator Hernandez’s concern regarding the gap in law without Chapter 11: “This is a dangerous oversight when confidentiality in matters of public safety is needed”).

## 2014 / Government

It is unclear how Chapter 11 will actually fill the gap in existing law.<sup>53</sup> First, the Governor already has the authority to suspend statutes in a time of declared emergency under the California Emergency Services Act.<sup>54</sup> Thus, even before Chapter 11, in an emergency, the Governor could presumably suspend the Brown Act and meet with local agencies on any matter, including public security issues.<sup>55</sup> Additionally, opponents argue Chapter 11 fails to indicate a “direct, functional expertise . . . the Governor would contribute to a closed session” concerning public security.<sup>56</sup> Last, the political climate has not changed to necessitate an amendment to the Brown Act to allow closed sessions with the Governor.<sup>57</sup> Unlike the last two significant revisions to the public security exception, there are no current reasons the political climate calls for additional exceptions to the Brown Act.<sup>58</sup> Thus, because the Board sponsored Chapter 11,<sup>59</sup> some posit the measure is a retroactive validation of the Board’s actions, as opposed to a legitimate reaction to an oversight in existing law.<sup>60</sup>

It is unknown how often public officials exercise the security exception in local civic affairs, but given the lack of case law on the subject, it is likely infrequent.<sup>61</sup> Allowing the Governor’s involvement in closed session agency meetings appears insignificant and weakens supporters’ argument that Chapter 11 is vital to conducting meetings on public security matters.<sup>62</sup>

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53. See CAL. GOV’T CODE § 8571 (West 2012) (declaring the Governor’s powers in an emergency).

54. See *id.* (“During a state of war emergency or a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code, where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.”).

55. *Id.*

56. SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 246, at 3 (Feb. 6, 2013); see also Francke, *supra* note 1, at 3 (“[N]o case has been made in more than 40 years that a local government body cannot cope with such threats without bringing the Governor into its closed session.”).

57. See Francke, *supra* note 1, at 1–2 (arguing there are no new social or political changes like those that prompted the Brown Act public security exception, such as the “criminal and civil disobedience challenges” in the 1970s and the subsequent September 11, 2001 terrorist attacks).

58. *Id.* at 2.

59. See AB 246—FACT SHEET, *supra* note 7, at 2.

60. See Francke, *supra* note 1, at 2 (“The Los Angeles County Board of Supervisors calendared its proposal to introduce legislation essentially identical to this less than a week after being named in [the] . . . lawsuit. . .”).

61. See *id.* at 2 (claiming the need to exercise the security exception is “vanishingly rare” and since 1980, Francke could not “recall hearing of a single closed session invoking this provision other than a misplaced application of it”).

62. See generally SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 246, at 3 (Feb. 6, 2013) (challenging the value that the Governor adds to closed session meetings).



### C. *Is Chapter 11 Drafted Too Broadly?*

Although Chapter 11 enacts only a minimal change to the Brown Act, the small addition in language is significant and controversial.<sup>63</sup> Critics suggest that local agencies do not adhere to the Brown Act procedures as diligently and honestly as the Act intends, and thus Chapter 11 could increase the improper use of closed session agency meetings.<sup>64</sup> For example, in the September 26, 2011 meeting that spurred this legislation, the record reflected Governor Jerry Brown stating at the meeting's end: "Let's get our Brown Act cover story."<sup>65</sup>

Additionally, as Chapter 11 allows the Governor's "deputies" to attend these closed session meetings but does not define "deputy," Chapter 11 opens the door for additional individuals to attend the meetings without a legitimate reason, which may undermine the Brown Act's effectiveness.<sup>66</sup> Last, by allowing the Governor to attend closed session agency meetings, the legislation may lead to additional closed meeting exceptions on other unnecessary matters.<sup>67</sup>

## V. CONCLUSION

Chapter 11 allows the Governor to now attend closed session local agency meetings on matters concerning threats to public security.<sup>68</sup> While this closes a loophole in the law and possibly prevents additional lawsuits like the controversy involving the Board, its long-term ramifications remain uncertain.<sup>69</sup> As opponents argue, the law may encourage future legislation and allow additional abuses of the law, potentially frustrating the Brown Act's intentions to make local agency meetings open to the public.<sup>70</sup>

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63. See CAL. GOV'T CODE § 54957 (amended by Chapter 11) (only adding the Governor to the people allowed in closed session meetings, but not amending the types of meetings allowed under the public security exception).

64. See OPEN & PUBLIC IV: A GUIDE TO THE RALPH M. BROWN ACT, *supra* note 11, at 4 ("News media and government watchdogs often argue the [Brown Act] is toothless, pointing out that there has never been a single criminal conviction for a violation. They often suspect that closed sessions are being misused.")

65. Confidential Transcript of Closed Session Meeting of L.A. Cnty. Bd. Supervisors, at 81 (Sept. 26, 2011), available at [http://ronkayela.com/wordpress/wp-content/uploads/2012/04/Transcript-9\\_26-1.pdf](http://ronkayela.com/wordpress/wp-content/uploads/2012/04/Transcript-9_26-1.pdf) (on file with the *McGeorge Law Review*).

66. CAL. GOV'T CODE § 54957 (amended by Chapter 11); SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 246, at 3 (Feb. 6, 2013).

67. See McGreevy, *supra* note 52 (including Senator Yee's objection to Chapter 11: "If we start allowing for exceptions in matters of public security, it could be used to justify the concealment of information on anything from disaster preparedness to realignment").

68. *Id.* § 54957 (amended by Chapter 11).

69. See *The Brown Act Means What It Says*, L.A. TIMES (Jun. 10, 2013), <http://www.latimes.com/news/opinion/editorials/la-ed-board-of-supervisors-brown-act-20130610,0,7082265.story> (on file with the *McGeorge Law Review*) (positing that Chapter 11 supporters "cynically hop[e] that by getting one part of the law changed, the public and prosecutors will assume the other part of the law has changed as well," thus allowing closed session meetings on matters not threatening public security).

70. See *id.* (subtitled the article "L.A. County supervisors and state legislators should stop messing with the open meetings law").