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Charles T. Munger
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Re: *The California Legislature Transparency Act*

Dear Mr. Munger:

You have asked me to analyze a claim by a Deputy Legislative Counsel in a letter dated June 13, 2016, to Assemblyman Richard Gordon and Senator Benjamin Allen (the "June 13 letter") that there are ten purported "ambiguous terms and phrases" in your proposed initiative measure, the California Legislature Transparency Act, of which you and Sam Blakeslee are proponents.

I strongly disagree with the Deputy Legislative Counsel's claims. While ambiguities can be claimed in almost every constitutional or statutory provision, once the purportedly ambiguous phrases here are read in the context of the text in which the phrase appears pursuant to settled rules of constitutional and statutory construction, the identified phrases cannot be deemed ambiguous.

"Perhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." (Scalia and Garner, *Reading Law* (2012) p. 167.) Yet, generally speaking, the June 13 letter's claims of ambiguity pluck phrases out of their context, and fail to observe this fundamental rule of interpretation. The referenced claims of ambiguity have no merit, and in many cases, they are downright frivolous.

1) "Aggrieved party": "Any aggrieved party shall have standing to challenge" the Legislature's rules governing recording equipment. (Proposed art. IV, § 7, subd. (c)(1).)

The June 13 letter states that the term "aggrieved party" in proposed article IV, section 7, subdivision (c)(1) of the initiative's constitutional provisions is undefined and

nonspecific. It argues that it is therefore unclear "what injury" a person must suffer before having legal standing to challenge the Legislature's rules regulating the placement and use of recording equipment. First, the term, "aggrieved" party has a settled meaning in the law. It has been previously used in the Constitution (Cal. Const, art. XX, § 22, subd. (d)) and in many statutes (e.g., Code Civ. Proc., § 902 ["aggrieved" party may appeal from a judgment or appealable order]). Second, in light of its settled meaning, and read in the context of the proposed constitutional text that "[a]ny aggrieved party shall have standing to challenge said rules" regulating the placement and use of recording or broadcasting equipment, it is clear that an "aggrieved" party must be one who desires to record or broadcast a proceeding but has been or will be prevented from placing or using his or her equipment under the Legislature's rules. Significantly, the authors of article XX of the Constitution saw no need to define "aggrieved" either; its meaning was clear from the text of the provision.

2) "In their entirety": "the Legislature shall also cause audiovisual recordings to be made of all proceedings . . . *in their entirety*" (Proposed art. IV, § 7, subd. (c)(2).)

The June 13 letter states that the term "in their entirety" in the context of the Legislature's obligation to cause audiovisual recordings to be made of all proceedings . . . in their entirety" under proposed article IV, section 7, subdivision (c)(2) of the constitutional initiative is "nonspecific" as to whether "the Legislature may edit recordings that are posted and archived to omit 'dead time' in which the house or a committee proceeding is recessed."

However, the remainder of that same provision makes clear that "dead time" during a recess need not be recorded. Specifically, the provision provides that recordings of the legislative proceedings "in their entirety" shall be made public through the Internet "within 24 hours after the proceedings have been recessed or adjourned for the day . . . ." This suggests that there is no intent to record the proceeding after it has been recessed.

Secondly and more importantly, it is well settled that constitutional and statutory provisions are construed to avoid absurdity. (See William Blackstone, Commentaries on the Laws of England, § 2 at 60 (4th ed. 1770); Scalia and Garner, *Reading Law* (2012), p. 234.) It would be absurd to argue that there is an obligation to record proceedings in an empty room during a several-hour recess.

On the other hand, if the proceeding has not been recessed or adjourned, but there is a lull in the proceeding, the proposed language is quite clear that the recording must continue because the "entirety" of the proceeding must be recorded and made accessible to the public.

3) "The Legislature shall": "the Legislature . . . shall make such recordings public through the Internet within 24 hours . . . and shall maintain an archive of said

recordings, which shall be accessible to the public through the Internet and downloadable . . . ." (Proposed art. IV, § 7, subd. (c)(2).)

The June 13 letter states that the proposed constitutional duty to record and archive recordings under article IV, section 7, subdivision (c)(2) of the proposed constitutional initiative is inconsistent with proposed Government Code section 10248, subdivision (a)(6), which imposes a duty on Legislative Counsel to make available to the public the audiovisual recordings of the legislative proceedings required by the proposed constitutional amendment. The June 13 letter asks "whether the Legislature and Legislative Counsel share an obligation to post and archive recordings or whether each has a separate, independent obligation." There is no inconsistency, and the contention is absurd. The initiative is quite clear that the Constitution places the duty to record, to make the recordings available to the public, and to maintain an archive of said recordings upon the Legislature. This is important since the office of the Legislative Counsel is not recognized in the Constitution. The initiative then implements the Legislature's duty by directing its agent, Legislative Counsel, to carry out the required function of making available the audiovisual recordings to the public and archiving them under proposed Government Code 10248, subdivision (a)(6). This makes sense because that existing statute already requires Legislative Counsel to retain certain other legislative information on behalf of the Legislature. In sum, the Government Code effectuates the constitutional requirement.

4) "Accessible to the public": "The Legislature . . . shall maintain an archive of said [audiovisual recordings of proceedings], which shall be *accessible to the public* through the Internet and downloadable for a period of no less than 20 years as specified by statute." (Proposed at: IV, § 7, subd. (c)(2).)

The June 13 letter states that the term "accessible to the public" in proposed article IV, section 7(c)(2) is "ambiguous and nonspecific as to what constitutes accessibility," because "[f]or instance, [the] 'accessible' requirement is ambiguous as to whether archived materials must be updated to be compatible with current technology or whether they need only be accessible in the medium in which they were originally recorded."

First, as a matter of common sense, "accessible to the public" cannot mean that material can be maintained in a way that is *incompatible* with current technology and thus "inaccessible" to the public.

Second, the California Supreme Court has been clear that "[w]ords used in a constitutional provision 'should be given the meaning they bear in ordinary use.'" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) The dictionary defines "accessible" as "[e]asily obtained." (Webster's II New College Dict. (2001), p. 6.) Accordingly,

"accessible to the public" requires that the public be able to "easily obtain" the recordings, which necessarily means that it must be accessible based on the technology of the day. In short, "accessible to the public" must be judged based on the technology of the day.

Finally, since "context is a primary determinant of meaning" (Scalia and Garner, *supra*, p. 167), the phrase must be read in the context of the entire phrase, "*accessible to the public* through the Internet and downloadable," which clearly requires the ability to easily obtain the recordings and "download" them.

5) "Downloadable": "said recordings . . . shall be accessible to the public through the Internet and *downloadable* for a period of no less than 20 years . . . ." (Proposed art. IV, § 7, subd. (c)(2).)

The June 13 letter next states that the term "downloadable" "raises [the] same ambiguity concerns identified in Item # 4" because "the term is technology-specific" and a "technology-neutral term" should have been used. (However, the June 13 the letter proposes no alternative.)

First, the term, "downloadable," is clearly understood as the ability to access information from the Internet and to take the content into the user's own possession for further use. Indeed, the term is already used in several statutes, which itself undermines the claim that "downloadable" is ambiguous since it has a consistent meaning.

Second, were the term ever to come into disuse, "[w]ords must be given the meaning they had when the text was adopted." (Scalia and Garner, *supra,* p. 78; *United States v. Rabinowitz* (1950) 339 U.S. 56, 70 (Frankfurter, J., dissenting).) Thus, the term, "downloadable," will continue to have a clear meaning and will not be considered ambiguous in the future.

6) "Or ultimately becomes a statute": "No bill may be passed *or ultimately become a statute* unless the bill with any amendments has been printed, distributed to the members, and published on the Internet, in final form, for at least 72 hours before the vote . . . ." (Proposed art. IV, § 8, subd. (b)(2).)

The June 13 letter states that the phrase, "or ultimately become a statute," "is unnecessary at best and ambiguous at worst" because "a bill that fails to satisfy the criteria for 'passage' in Section 8 of Article IV cannot become a statute, rendering the initiative's language unnecessary," and the phrase might suggest "by negative implication that a bill's failure to comply with other passage requirements . . . would *not* prevent that bill from becoming a statute."

First, the phrase is *not ambiguous* because it makes clear that unless the 72-hour advance notice is given, the bill cannot become a statute. As an initial matter, it should be noted that this provision is largely borrowed from the notice requirement found in the New York State Constitution, which provides that no bill shall be passed or become a law unless it shall have been printed and upon the desks of its members, in its final form, at least three calendar legislative days prior to its final passage. This will give courts a further interpretative guide.

Second, the phrase is *necessary* to eliminate the risk that the Legislature or the courts would find that *substantial compliance* with the 72-hour requirement is sufficient to satisfy it. For instance, in the context of the constitutional procedural requirements for initiative measures, the California Supreme Court has found that substantial compliance may be sufficient. (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1014 & fn. 20.) The referenced phrase is necessary because it makes clear that substantial compliance is *not* sufficient. Instead, if the 72-hour notice is not given, the bill cannot "ultimately become a statute."

Finally, the June 13 letter speculates that the inclusion of the phrase somehow suggests "by negative implication" that a bill's failure to comply with the *other* requirements in section 8 of article IV might not prevent the bill from becoming a statute. This speculation is misguided because unless otherwise stated, all constitutional provisions are mandatory or prohibitory. Article 1, section 26 of the California Constitution provides, "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." In other words, as explained by the California Supreme Court, "'[e]very constitutional provision is self-executing to this extent, that everything done in violation of it is void." (*Katzberg v. Regents of the University of California* (2002) 29 Cal.4th 300, 307.) Thus, the concern that the added language compelling compliance with the 72-hour rule will imply that other constitutional requirements for enacting bills are discretionary and need not be followed is unwarranted. Instead, the additional phrase, "ultimately become a statute," avoids the risk that substantial compliance with the 72-hour notice is sufficient to allow a bill to becomes a statute, given the nature of such a procedural requirement. Accordingly, the added language is necessary to strengthen the prospects of compliance with this provision and is not ambiguous.

7) "Before the vote": "No bill may be passed or ultimately become a statute unless the bill with any amendments has been printed, distributed to the members, and published on the Internet, in its final form, for at least 72-hours *before the vote* . . . ." (Proposed art. IV, § 8, subd. (b)(2).)

The June 13 letter argues that "[t]he term 'the vote' is ambiguous as it is not evident to which vote or votes the 72-hour requirement applies" and that it might "apply only to the single vote preceding a bill's presentment to the Governor."

The vote obviously and clearly applies to the vote that "passes" a bill out of either house. As noted earlier, "the judicial interpreter [must] consider the entire text, in view of its structure and of the physical and logical relation of its many parts." (Scalia and Garner, *Reading Law*, *supra*, p. 167.) The very same subdivision (b) that is amended by the initiative here also provides that "no bill may be passed unless, by a rollcall vote entered in the journal a majority of the membership of *each house* concurs." (Italics added.) Thus, "the vote" that "passed . . . the bill" is the vote of each house.

Indeed, the same section of the Constitution that is amended to add the 72-hour requirement – section 8 – refers to "either house" or "each house" in the context of the passage of legislation at least three times: "[n]o bill may be *passed* unless it is read by title on 3 days in *each house*" (Cal.Const., art. IV, §8, subd. (b)); "no bill may be *passed* unless, by a rollcall vote entered in the journal a majority of the membership of *each house* concurs" (*id.* §8, subd. (b)); "no bill other than the budget bill may be heard or acted on by . . . *either house*" (*id.* §8, subd. (a)). This shows that in the context of section 8, the passage of a bill refers to its passage in each house.

Moreover, even the same sentence that is amended by the initiative references votes in each house of the Legislature. That sentence provides for a waiver of the notice provision in the case of a declared emergency, but in such a case, it also requires that "*the house considering the bill* thereafter dispenses with the notice period for that bill by a separate rollcall vote…" (Proposed art. IV, §8(b)(2).) Since *waiver* of the 72-hour provision requires a vote of the "house considering the bill," it would be inconsistent for *compliance* with the 72-hour provision to only apply to the second house considering the bill.

8) "Final form": No bill may be passed or ultimately become a statute unless the bill with any amendments has been printed, distributed to the members, and published on the Internet, *in its final form*, for at least 72-hours before the vote . . . ." (Proposed art. IV, § 8, subd. (b)(2).)

Similarly, the June 13 letter states that "[f]or the same reasons identified in Item 7, the requirement that a bill be published in its 'final form' is ambiguous as it is not evident whether the requirement is intended to apply to the final form of the bill as voted on in each house or the 'final' final form of the bill that is ultimately presented to the Governor."

For the same reasons that it is clear that the initiative applies to the passage of a bill by either house, as stated in the response to issue number 7, the term "final form" applies to the bill passed in each house. The language is clear: "No bill may be passed… unless the bill with any amendments has been printed, distributed to the members, and published on the Internet in its final form . . . ." This notice requirement does not apply only to the "final final form" of the bill.

Moreover, the June 13 letter fails to acknowledge that the initiative includes a statement of purpose and other findings and declarations. These statements of intent are relevant to the interpretation of the measure (see *Legislature v. Eu* (1991) 54 Cal.3d 492, 504) and clearly show that the 72-hour notice provision was intended to benefit both the public and *all the members of the Legislature* to give "our representatives the necessary time to carefully evaluate the strengths and weaknesses of the final version of a bill before a vote." (Initiative, §3(c).) Any interpretation that suggests that only the members of the second house considering the final version of the bill prior to submission to the Governor are afforded the benefit of the 72-hour notice would deny the right of *all members* to adequate notice and time to evaluate the bill.

9) "Any legitimate purpose": "Televised or other audiovisual recordings of the public proceedings of each house of the Legislature and the committees thereof may be used for *any legitimate purpose* . . . ." (Proposed Gov. Code, §9026.5, subd. (a).)

The June 13 letter states that the term "any legitimate purpose" in connection with the use of televised or other audiovisual recordings of legislative proceedings is "ambiguous and highly subjective" because although the initiative repeals the express prohibition against using Assembly-generated television signals for commercial (or political) use, "it could be argued that such uses are still prohibited under the initiative's language," and "the initiative provides no objective standards against which an individual can determine whether a contemplated use of a recording furthers a 'legitimate' purpose."

First, the claim that it could be argued that commercial uses are still prohibited under the initiative is frivolous. Where a prohibition against commercial use is not only *repealed*, but *replaced* with the right to use the recordings "for any legitimate purpose," the intent could not be more clear. Otherwise, repealing a statutory provision would have no effect.

Second, as the respected jurist, Benjamin Cardozo, observed, "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." (*Panama Ref. Co. v. Ryan* (1935) 293 U.S. 388, 439 (Cardozo, J., dissenting).) Here, the Senate has no statutory prohibition on the use of its recordings while the Assembly currently prohibits the use of its recordings for political or commercial

purposes. The initiative repeals the Assembly's prohibition on use and replaces it with general authority permitting "any legitimate use." The California Supreme Court has stated that "[w]ords used in a constitutional provision 'should be given the meaning they bear in ordinary use,'" and "the word 'any' means without limit and no matter what kind." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) Accordingly, the phrase, "any legitimate interest" – which replaces the provision prohibiting any "political or commercial purpose" – is clearly intended and does provide for broad use of the recordings. This protects the public against a subsequent Legislature seeking to prohibit the public's legitimate uses of the televised or other audiovisual recordings of the Legislature since as an initiative statute, this measure cannot be amended by the Legislature unless approved by the electors. (See Cal. Const., art. II, § 10, subd. (c).) Nonetheless, it should be noted that the phrase, "any legitimate use," recognizes that there may be some situations where a proposed use is not legitimate, such as to defame someone.

10) Government Code Section 10248, subd. (a)(6): The Legislative Counsel shall make the following information available to the public in electronic form: "All audiovisual recordings of legislative proceedings that have been caused to be made by the Legislature . . . . Each recording shall remain accessible to the public through the Internet and downloadable for a minimum period of 20 years following the date on which the recording was made and shall then be archived in a secure format."

Referencing item 3, the June 13 letter contends that "the initiative's constitutional and statutory provisions are inconsistent and therefore, ambiguous." It argues that "one could . . . argue that the plain language of the provisions states the Legislature is constitutionally required to post and archive recordings and, in addition, the Legislative Counsel is statutorily required to post and archive the same recordings."

Responding to this point first and as noted in my response to item 3, the constitutional obligation to make the audiovisual recordings public within 24 hours is placed on the Legislature, but the statute provides that the Legislature's agent, the Legislative Counsel, will implement this constitutional obligation. There is no suggestion that the Legislature and its agent, the Legislative Counsel, are to duplicate the same task. Indeed, it is well settled that statutes should be interpreted to avoid absurd results (Scalia and Garner, *Reading Law, supra*, p. 234), and requiring a complete duplication of effort would be an absurd result.

The June 13 letter also claims that statutory language regarding posting and archiving does not track the constitutional language. To the contrary, the constitutional language requires the Legislature to maintain an archive of the recordings, "which "shall be accessible to the public through the Internet and downloadable for a period of no less than 20 years as specified by statute." (Proposed art. IV, §7, subd. (c)(2).) The statutory provision identically

requires, "Each recording shall remain accessible to the public through the Internet and downloadable for a minimum period of 20 years . . ._." Thus, the obligations are entirely consistent. Since the Constitution only sets *minimum* requirements that the statute must implement, the statute then goes further and requires that at the end of the 20 years the recordings must thereafter be archived in a secure format. In sum, the constitutional and statutory provisions are consistent and clear: Materials are to be accessible on the Internet and downloadable for a period of no less than 20 years and shall thereafter be archived in a secured format.

Please feel free to contact me if you have any further questions.

Very truly yours,

Daniel M. Kolkey

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