CENTER FOR AMERICAN PROGRESS

LEGAL ISSUES IN LOBBYING REFORM

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JAMES THURBER: Our next and final panel is going to be on the legal issues in lobbying reform. We could have started with that at the very beginning, the foundation – legal foundations of this, but we decided for you to listen to others in terms of the reforms, what the law seemed to be, and the final presentations will be made by people – two lawyers – and also Joe Minarik, who's worked on lobbying reform for many years, to talk about the legal issues in lobbying reform.

The chair, Tom Susman, is director of government affairs office for the American Bar Association. The American Bar Association is a cosponsor of this event and Tom Susman and Bill Luneburg both helped to arrange that. They are coauthors of the absolute only book, the best book, on the law related to lobbying called "The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers and Lobbyists." Even though it's very expensive – sorry – I require my students to have it for my lobbying class.

TOM SUSMAN: (Off mike.)

MR. THURBER: (Chuckles.) Right. I usually work alone on the humor, Tom, but – (laughter) – that's fine. Tom has taught at American University, as many people in the audience have, and he's lectured at the university, and he will introduce the topic of legal issues and lobbying reform. Tom, thanks for coming.

MR. SUSMAN: Thanks, Jim. And I echo Norm's and the provost and others – both thanks for your tremendous effort in making this gathering possible at an absolutely propitious time in the evolution of lobbying disclosures and restrictions and also for the tremendous academic work you've done.

Those of us who labor in the fields, I think, very much need to have people studying and understanding how the process works, keeping track of the numbers and the data. It brings us back to the ground often as we, kind of, get caught up in the daily activities of the lobbyist.

It's a special pleasure, you really do have a diverse panel up here and it's a pleasure for me to share the table with two colleagues who really have, also, very different perspectives but also a great deal of grounding on lobbying law and process. The first presenter – and I'm going to apologize on his behalf because Joe Minarik has told us earlier that he's got another obligation before the end of this panel, so when we get to Q&A time I hope you'll still be here so at least we can shoot you with questions first, but otherwise we'll certainly understand that. Thank you for joining us.

Joe is the Committee for Economic Development's director of research and senior vice president and his area is nothing particularly relevant to what's going on these days – esoteric things like the federal budget and health care. (Laughter.) So he's a very busy man and among other things, he was involved in the study and report on lobbying that the CED put out. I know

Jim was also very intimately involved in that. You've got the rest of the bio so I'm going to skip the history, but other than to say that he has worked on Capitol Hill and is well-grounded in Washington from the legislative and executive branches so – did you ever work in the courts?

JOE MINARIK: No.

MR. SUSMAN: All right so two out of three isn't bad.

MR. MINARIK: I've been accused a few times. (Chuckles.)

MR. SUSMAN: Two out of three. Next we'll hear from Bill Luneburg. And Joe's going to start out by sort of giving us an overview of the reform agenda going back to his studies. Bill is going to highlight – for the 2007 amendments to the Lobbying Disclosure Act and expansion of legal restrictions and directives relating to lobbyists, the Honest Leadership and Open Government Act and he will highlight the most significant changes and perhaps give us some assessments on those.

And then I'm going to close up by looking forward and, sort of, the next step – some of the items that I will identify as unfinished business are on Joe's list. Some are on my own list. And then I'm going to step back a little bit and suggest some caution, that as we march forward to deal with these ominous and evil special interests that we need to, perhaps, slow down a bit. And in that respect I may take issue even with some proposals that Joe will make and certainly with some directions that Norm Eisen seemed to be plotting.

So with that, by way of overview – I didn't introduce Luneburg; I just remembered that. I didn't say about the fact that he has been a professor at University of Pittsburgh School of Law, written widely in administrative law, environmental law. He's now chair of the administrative law section of the American Bar Association and I think certainly has equal claim to fame as I might, except that he did most of the work on the fourth edition of the lobbying manual – that big blue book that's in the back. So why don't we start with you, Joe?

MR. MINARIK: Thanks very much for having me. I'm pleased to be here and pleased to have an opportunity to congratulate Jim on 30 years at the Center. We were very happy to collaborate with Jim on the work that the Committee for Economic Development did on our project "Making Washington Work." I guess you all know that it doesn't. So Jim was very helpful to us and happy to have the opportunity to give him an "'at a boy" for all the work that he has done here in Washington.

Having an economist talking about legal issues in lobbying reform reminds me a little bit about the time I heard Alan Greenspan tell a joke. You want to hear it, by the way? (Laughter.) I guess not. Okay. Maybe later.

But I am happy to talk about these issues. CED, as many of you may know, is an organization with a board of trustees of approximately 200 people. Most of them are business executives. We have a few university presidents but primarily it's a business organization. So

why are business concerned about lobbying and other such issues and why, possibly, to sit at a table with people who are interested in, perhaps, more disclosure, more restriction?

The trustees of CED are concerned about this and other issues of governance because they have observed over years that many important issues have been left to fester rather than being addressed in the public debate. If you will, government is not taking care of business. If we don't address those problems, the environment is worse for our business executives; it's worse for their firms, their employees and their customers. If government doesn't do its job, then obviously, none of us can do ours.

We observe that this nation is prosperous, in large part, because we have a consensus in our society of fair rules that everybody can observe and with relationships of trust we can do business and we can all prosper. Over time, it seems as though that consensus has been breaking down. One observation that one of our trustees made to me once is United States' preeminence in the world is not preordained. This is something that we have to earn, that we have to nurture and we have to defend. And if we aren't doing what we need to do in addressing public issues, our leadership can evaporate. And we have to be more conscious of that.

Furthermore, in the public dialogue our business trustees have observed that this breakdown of standards of civility which we observe and the break down, to some extent, in the honesty in public dialogue are going to break down the trust that we need so that when we need to address crises in a short period of time, we will not have the foundation on which we can do that. And if we can't do that then obviously we have put our future at risk.

Now, we looked at what was going on in Washington and basically saw three categories of problems. One is how policymakers get into office. A second is how they're influenced when they are in office, and then, third, how their procedures often times lead to counterproductive public policies.

Let me run through those just very quickly in turn. Starting off, how do policymakers get into office? Well, one of the problems that we have in this country very obviously is a dysfunctional campaign finance system. We had a public financing system for the presidential election; we just went through a president election cycle where we had a successful candidate turn down public financing both at the primary and at the general election levels. We need to get that system working better to build stronger trust and a better sense, in the part of the electorate, that they are the ones who are choosing their leaders.

We also have a private-financing system for members of Congress. We've talked already today about some of the issues that that raises and the ways in which public trust is eroded. We also talked in the electoral process about problems of redistricting. As many have observed, we have a system right now where it is probably more accurate to say that the representatives choose their constituents rather than the constituents choose their representatives. And in the course of that system, we have districts drawn to be noncompetitive that causes a migration of the center of gravity in the political spectrum from the center out to the edges and a result of that, the policymaking system is a lot less stable.

Now, once policymakers are in office, they are further influenced by the campaign finance system. I don't need to talk about that any further. And they are influenced by lobbying. That's why we're here and I'll talk about that a little more later. Allow me to skip that topic for the moment but, just to go through what our trustees cited as the problems in the way Washington works.

People are offended by earmarks. The Congress is given the power of the purse by the Constitution; there's no necessary way to say that when a member of Congress directs resources that he or she is exercising poorer judgment than when the president of the United States directs resources in an appropriations request. But appearances matter. And when the electorate looks at the way the system is working, when you have situations that arise under a lack of transparency and information becomes available and members of Congress are embarrassed by something that they were trying to hide from the public, you are eroding the trust that we need between the members of Congress of their electorate.

In the workings of the Congress, we have closed rules, we have self-executing rules such that the workings of the legislative process are not transparent and the authority is taken away from committees of jurisdiction and taken to the leadership in processes that were not anticipated when our system was created. Very often, because of the polarization in the political environment filibusters prevent necessary action in the Senate. That's part of the Senate's function, but arguably the process has gone too far.

We have conference committees that meet in secret or don't meet at all – not fulfilling the normal circumstance that we expect where two piece of legislation pass the two chambers and then are reconciled towards the middle in a conference committee. Oversight processes have been weak. The budget process has broken down. Very often policy is made by continuing resolution or by riders on must-pass pieces of legislation, both of which do not facilitate careful making of policy. And as I mentioned a moment ago, the process has become excessively polarized.

There are ways to address this problem. We need better disclosure. We need a process of regular order where rules in the Congress are open; there is debate; there is the opportunity to offer amendment, where you don't have self-executing rules but rather votes are taken in the open. Conferences should meet publicly. The concept of scope in the resolution of two pieces of legislation in a conference should be restored. We need a budget process again, badly.

We'd even like to see changes in the congressional schedule, such that you have a few long legislative weeks that keep members of Congress here in town. Who knows? Maybe they'd even get to know each other across the aisle on the weekends. And if they do, it's possible that we'll have a greater comity and a greater sense that we can address problems.

Now, lobbying drives a lot of this. As has been said earlier, and we definitely agree, lobbying is an essential part of the legislative process. Everybody has the right to speak; everybody has the right to go to the legislature for redress.

However, like the process of earmarks, we have seen a process of lobbying in recent years where when information becomes public, members of Congress are embarrassed and they find that their behavior has not been appropriate and we lose public trust. Appearances matter. If we don't have trust on the part of the public, if the public believes, as was mentioned earlier, that well over half of all lobbying and campaign contributions by lobbyists amount to bribes, we are not going to have the trust as a nation that we need to achieve sound outcomes.

Lobbying has become an enormous industry here in Washington. Jim Thurber mentioned some of the numbers before. One of the things that I have found, myself, to be quite striking – if you take the reported amounts of lobbying expenditures and divide them by 535 for the members of the House of Representatives and the Senate, you come to about $4 million spent on lobbying in Washington per year, per member. And if you take that and you divide that by 365, you're talking about hundreds of thousands of dollars per day, per member. And if you consider, as has been mentioned before, that this is lobbying very narrowly defined and you think about how much more money is being spent, it's really quite frightening to think about the extent to which this industry has come to take over this town.

And then there's always the interaction between lobbying and campaign finance where all too often you have lobbyists working for members of Congress in other contexts as managers of finance for campaigns. And then you get into real problems with, sometimes beyond appearances, but the simple question of financial influence. We think that you need, essentially, three things in principle in Washington: You need transparency, you need accountability and you need enforcement. People need to know what is going on. We need to hold people to account and if people violate the rules, we need to have those rules enforced.

When CED had looked at the lobbying problem overall, we talked about – this is a statement that was issued before the most recent legislation – but among the issues that we saw that needed to be addressed: greater transparency through better reporting, we wanted to go to a quarterly rather than semi-annual framework of timing. We wanted to broaden the definition of lobbying to issue advocacy and grassroots activities, coalition-building, those kinds of things where, really, lobbying is very active but we've defined that out for purposes of legislation. We wanted to have more disclosure of past involvement, more restrictions on the revolving door. We'd like to see reporting requirements imposed on members of Congress as well as lobbyists.

If the requirement of reporting is good enough for those people who go to talk to members of Congress about issues, as was mentioned earlier, we think that having the members of Congress put their schedules out to the public would be a good thing. We were concerned about travel and gifts and also concerned about the lobbying ban for members of Congress. Now we've had legislation. Some of these issues have addressed. Some of them have been sort of addressed – sort of, you know of course, is a technical term – such things as searchable databases and common formats between the House and the Senate for reporting, so that people can actually get information and look at it carefully.

Some of these issues haven't been addressed at all. So as an economist I would like to hope that talking about some of these issues will help the discussion along at the margin. Some of you probably got that joke, some of you probably didn't. And as was mentioned in my

introduction, I unfortunately have a long-standing commitment to United Airlines and I didn't buy the trip insurance so at some point in a few moments I'm going to have to leave but I do want to thank Jim, again, for having me here and let me see if I can give my attorney friends here a little bit of trouble in the discussion.

MR. SUSMAN: There's a joke here some place isn't there? About an economist, a law professor and a lobbyist sitting at a table? There must be something there. Well, thanks a lot Jim. (Applause.) Bill?

WILLIAM LUNEBURG: So much, apparently, is being made of the fact that there are two lawyers at the table and two things I get enjoyment from in terms of talking about lobbying, including the fact that I spend most of my life studying it. The second is that, if there's any profession that's below lawyers in public esteem, it's the profession of lobbying. So may that always be the case. Unfortunately, of course, a lot of lobbyists are also lawyers and we'll stop there.

So I come at these problems primarily as a lawyer and not a lawyer who has lobbied. Pittsburgh is pretty far from the capital, unless I'm doing grassroots work, it's difficult to do a lot of lobbying there. My approach comes, or is informed to a large degree from the fact that I have worked in the government in an agency and prior to Tom's enlistment in the lobbying manual enterprise, I spent most of my professional life focusing on the administrative process. And there are a lot of things that characterize that process. But, for current purposes, several that are of primary relevance are, number one, some emphasis on transparency and at least in some context, an attempt to create a decision-making process where the decision-makers focus on the merits and extraneous influences are eliminated and there's at least some attempt to level the playing field.

If you're familiar with federal agencies and their regulations barring ex parte communications during rule-makings and adjudications, they capture many of these themes. So when I look at lobbying regulation I look at it at least from that perspective. Which may be the wrong perspective – may be too idealistic.

Now, turning to what I want to talk about, Tom said well why don't you give the top five reforms in HLOGA that you think are the most important. And of course, HLOGA covered a lot of ground: earmark reform, congressional procedures, post employment restrictions – I spend most of my time on the Lobbying Disclosure Act so I'm going to focus on that act. Five is a good number because if I gave you 10 it would probably exhaust everything that was done by HLOGA with regard to the LDA. So at least I have to be somewhat selective if I give you five and I'll give you five in terms of what I think are their relative importance, starting with the most important.

But let me start with two general observations. Number one, this statute, which came into being in 1995 replacing a 40-some year old statute that was routinely ignored and unenforced by the Department of Justice was, pure and simple, a disclosure scheme. And when I talk about disclosure, the purpose was, you can have disclosure just to governmental officials,

that could be a disclosure scheme. But this scheme was aimed at disclosure to the public at large. But that's all it aimed at accomplishing.

I think you can find some people who say it didn't do a very good – it was better than what came before, but given the generality of the information it was a modest improvement. But in this city, modest improvements in the way things are done should be celebrated, not denigrated. So Sen. Levin and the people in Congress who worked on this bill certainly deserve all the congratulations they've gotten for the enactment of this statute.

But in 1977 this statute really moved to another level. In my view it became close to the centerpiece of federal lobbying regulation. It all of a sudden was linked with federal election law, congressional gift and travel rules and executive branch gift rules. And at that point, it started to have some real punch and indeed, though we don't know from the empirical data whether that punch is one of the reasons that registrations of lobbyists have gone down.

Now, we've talked a lot today – a variety of people have talked today – about the legal definition of lobbyist in the LDA. It's briefly stated: Someone who's employed for compensation – you can do it free and you don't have to register; for more than one lobbying contact – by the way, I'm not going to bore you with all of the definitions, I'm just giving you the overview – two or more communications to covered officials, high executive and legislative branch officials, where you spend 20 percent or more of your time over a three-month period doing this, doing lobbying activity and you earn a certain amount of money or you incur certain expenses.

In my view, the problem with the definition is not its vagueness. There is some vagueness, marginal vagueness. When does an activity, lobbying activity does turn on the intent? Was it intended to support lobbying contacts? So there is some difficulty there, but I don't think the problem is with the vagueness. If there's a problem, the problem is the pure arbitrariness of the definition.

Twenty percent. Why not 19? Why not 21? Well, if you just look at the statute you may come away with the notion that, well, Congress is entirely arbitrary but you have to realize that one of the sticking points in amending this statute was trying to come up with a workable definition of lobbyist. That's where the sticking point, or one of the sticking points was for the 30 or 40 years that Congress worked on it. And there are a variety of ways to define lobbyist.

Well, finally there was a political consensus on this arbitrary decision. Here's the problem everybody or most people are talking about today. That definition has now been incorporated in congressional gift rules and now the Obama initiatives restricting lobbyists. And I think the point that's been made today is that that automatic transference of that definition developed for disclosure purposes into all these other contexts has created serious problems. As a lawyer you learn, or should learn early that the same word or phrase, can – should be defined differently in different contexts or things can go seriously awry.

So when the Obama administration drafted these initiatives – just focusing on them, restricting lobbyist communication, making them public – they had a ready-made definition. It

may not have been the perfect one. But the problem is, how do you define – there are any number of ways you could define lobbyist. And this was a ready-made distinction and it was easy to adopt it and apply it. Now, whether the disadvantages, the costs of that are worth the benefits remains to be seen.

I think a good case can be made that, in fact, that definition should not travel as far as it has been made to travel. And now let me turn to these five, these top five – I'm not going to be like David Letterman; I'm not starting at the bottom. I'm starting at the top and I'm stopping with five: first of all, making the congressional gift rules enforceable. Now, this was against the gifters – legally enforceable. Now, this is obviously a second-best option. The people who should be punished for taking the gifts are the congressman, but that has not obviously happened.

So the next-best option is to make these gift rules enforceable against the gifters and that's what this statute does. It makes them criminally and civilly enforceable. Now, that restriction is applied only to LDA-defined lobbyists. One question I have, is why is it – if you don't spend 20 percent of your time lobbying, but you are in engaged in lobbying, you give a big screen TV to a congressman as part of an event honoring him, why shouldn't you be penalized? Why should this arbitrary definition determine whether these rules are enforceable against you, particularly given the fact that Congress is not enforcing them against its own members?

Number two, lobbyists bundling disclosure: Now you all know what bundling is. It's not the lobbyist's own money. He goes or she goes and collects it or basically, arranges for the money to go to campaign committees and candidates. There was bundling disclosure prior to HLOGA, but if a lobbyist did it they weren't identified as a lobbyist and secondly they had to touch the money. If they made a solicitation, the money went directly to the candidate – no reports.

HLOGA eliminates that; the bundling is identified with LDA registrants and LDA lobbyists and they have to touch the money. As long as the committee credits them with the campaign contribution, it is reportable – not by the lobbyists, by the way – but by the recipient. These bundling reports are filed with, generally speaking, the Federal Election Commission or whoever the recipient or the entity is that's supposed to receive campaign finance reports. Again, this is tied to the definition of LDA lobbyist. So you can do a lot of bundling and you're not going to end up in the FEC reports.

Third, Section 203 reporting by lobbyist – as defined, the LDA – and registrants, LDA registrants, of their political contributions over $200 and their various gifts they make to or for the benefit of congressmen and executive branch officials. For example, if you throw a party in honor of a congressmen or an executive branch official. This reporting on political contributions duplicates, to some degree, the reporting that is done by political committees to the FEC.

But there is a significance in that duplicate reporting. I'm going to talk about it in a minute. Connected with this 203 reporting – do you want me to shut up?

MR. SUSMAN: Focus.

MR. LUNEBURG: Move faster? Okay. It's a certification that a lobbyist has to say they know and understand the gift rules and they've given no gift in violation of the rules. Anybody read the congressional gift and travel rules? They're arcane. They are Byzantine. You could always in a criminal case as a defense say, I didn't understand those rules.

But here's the trick for the U.S. attorney; all they do is they show the certification the lobbyist showing the excess contribution and the certification by the lobbyist, I understand the rules and will agree to abide by them. Then the defense attorney moves to the next defense, which presumably would be insanity. (Laughter.)

Fourth, criminal penalties to give some punch to the law and fifth a publicly accessible database. And I hope we get into this – and I'll stop here, Tom – and Craig Holman is here from Public Citizen. He's worked a lot on this. If you're going to have a disclosure statute for the public, you need the public accessibility of the data – not on microfiche in the offices of the Senate secretary and the clerk. Now it has to be on the Internet, downloadable and searchable and it's supposed to be linked to the FEC database.

Just think of this kind of database. You put in a lobbyist's name, his 203 political – or her – political contributions come up as filed with the secretary and the clerk. The same data from the FEC, from political committees for that lobbyist – do they match? Or is there some inconsistency? What is going on here? And at the same time, you get the bundling data for that lobbyist – not just what the lobbyist himself or herself has given but what they have raised for the candidate. All on the screen in front of you.

HLOGA contemplates that as a possibility. It does not exist now. I don't know a lot about the technology but I think it's probably doable. All you have on the secretary's Web page is a link to the general FEC Web site. One more thing – if I can say one more thing.

We've talked a lot today about the Supreme Court expected invalidation of the corporate ban on campaign contributions from corporations. That's going to have a lot of bad effects, but there's one good effect I think that might come from it. The only way to deal with this problem – or one of the only ways – is going to be disclosure. I would hope that would mean that the Supreme Court is very patient and very receptive to expanded disclosure if they will not tolerate limits on what people can give. So there might some good news if this decision comes out.

MR. SUSMAN: Thank you. Great. (Applause.) Before we turn to a few exchanges, I'd like an opportunity to give my prescription for – Bill used five advances in the lobbying law – but I'm going to quickly sketch out five reforms that I think represent unfinished business. Some of these you've heard a great deal of discussion about and one or two might be new.

First, requiring the reporting of grassroots lobbying. We've had a lot of discussion about that. We know what it is. The Internal Revenue Code already defines it for nonprofit organizations. The Court of Appeals for the District of Columbia has told us just within the last couple of weeks that a constitutional challenge to coalition greater disclosure failed by virtue of the public interest in disclosure outweighing any potential for inhibition. So grassroots, that's at

the top of the list. There's many times more dollars spent for grassroots lobbying than on direct lobbying and that's an important place to start.

And, by the way, I should have added at the beginning that these are personal suggestions. As Jim indicated, I moved out of the private law firm sector to work at the American Bar Association, which has recommendations on lobbying and other issues, but my comments today both now and in answers to questions certainly don't purport to represent the views of the ABA.

Second is a fuller reporting of lobbying contacts, also a discussion you've heard before. However, I would stop short of suggesting that members of Congress do any reporting. I think that's pernicious. I can, sort of, see the days of the MiniCam on the congressional lapel pin where you have to identify everybody because, after all, if this just is, as has been suggested in earlier panels, a sending of the daily schedule, then of course the members are going to only schedule a very few things and most of the meetings won't be on the schedule or will be out of the building. That can't help the public interest.

And then again, I can understand, I, sort of, already have plans to take those members of Congress who I would like to see defeated and I'm going to create the Committee for the Promotion of Cruel and Inhumane Treatment to Animals and Children and we're going to meet with that congressman's staff as often as anyone can get in the door and sign in very loudly and then, make sure that the opponent at the next election knows how often this congressman is meeting with – it lends itself to that kind of pernicious – all right.

Number three, require LDA disclosure in any filing of any kind of contingent fee or a bonus arrangement. Right now, if the money hasn't been paid, theoretically, it doesn't disclose-able, though congressional offices have suggested that it would be nice. And especially in these days with a requirement for campaign and other reports under 203, the proscriptions that the administration is imposing – I can tell you, because I've been chair of the American League of Lobbyists' Ethics Committee and I've had questions come in from lobbyists who are taking stimulus issues on contingent fees and they do not have to report it any place; they are not lobbyists under the LDA. And that needs to be changed.

Fourth, improve the accuracy of reported lobbying expenditures. There are a number of ways to do that. I should simply say see the Notre Dame article by Luneburg and Susman outlining a number of reasons for more intelligent, nonduplicative, more detailed reporting on the forums, removal of the IRS alternative, et cetera – I don't need to get too legalistic on you.

And finally, and this is my most important – and I was glad to see there was some sentiment, even within the lobbying community – and that is, get lobbyists out of the business of campaign finance in all manner. Not just as Pat Griffin was talking about, how he would feel perfectly comfortable not being able to contribute. That may be the least of the problems and maybe the toughest nut to crack constitutionally. But I think that constitutionally there should be no problem with telling lobbyists that, yeah, you can give your $2300. You cannot bundle; you cannot raise money; you can't be a treasurer on a campaign; you can't participate in a fundraiser;

you cannot host a fundraiser; you cannot visibly be active in any way on the financial side of congressional campaigns.

And I think that the lobbying community would embrace it enthusiastically. I do understand that Scott Lilly's comment earlier about, does this create a void that would be filled by the clients rather than the lobbyists? And so be it. With the disclosure that we all support, I think that would be still perhaps the fastest way to the result of what would have to ultimately be public financing because there just wouldn't be enough money to drive the engine the way it has been.

One last personal comment and that is on Norm Eisen – I thought it would be unseemly for me to raise a question – but, enough is enough. I think the revolving door is what gives both the private sector in Washington and the government the richness of experience that it has, the perspective that it has. The notion that it was okay for Jim to leave the Hill and to go teach but not to leave the Hill and to go practice law in a law firm where he might be called upon to advise clients and represent them as a lobbyist –

I'm not talking about conflicts of interest. I'm simply talking about status crime of having been a registered lobbyist and having that preclude you from government service. And with this administration, beyond presidential appointments, even lower-level appointments, advisory committees, things of that sort that I am hearing. I have been affected by the top-down notion that lobbyists are unclean and to be avoided at most costs.

I wish it would stop and I think that the whole idea that lobbyists are, sort of, the scapegoats for failures of Congress and administrative initiatives is – well, I've been in Washington for about 40 years now; I've never seen a lobbyist drop a bill in the hopper in either house of Congress. I've never seen the lobbyist vote on legislation or an amendment in either house; I've never seen their name on legislation. On the federal regulatory level, not a notice of proposed rulemaking has a lobbyist name as the person to call on this and no agency decision has a lobbyist as the adjudicator.

So, sure, they're involved – lawyers are involved; public relations people are involved; corporations are; academics are involved; the Congress itself intervenes quite a bit in what goes on in this town. And the notion that somehow everything evil that happens is attributable to lobbyists seems to me deserves at least occasional counterweight.

Why don't I suggest, if anyone has questions – we were going to do a panel discussion but I think since Joe has to depart, we can start with any questions for him, or we can just start amongst ourselves with any comments on anything anyone else has said, including the ability for anyone to have a right of reply to anything that I just said.

MR. LUNEBURG: Hey, can I do a little promo? But not for a book. This area of lobbying – for years, in terms of constitutional issues, it was largely dead on the federal level. It's obviously getting hotter. These Obama initiatives raise questions, for example, of the right of a client to have their lobbyist accompany them to the White House.

Tom has mentioned all these First Amendment issues that have come up in terms of trying to exclude lobbyists from servings on the boards of PACs or whatever. The ABA does have a taskforce now to look at – or the administrative law section – to look at these issues.

And it's a prominent taskforce involving Trevor Potter, who was John McCain's general counsel; Joe Sandler, who was general counsel of DNC; Charles Freed at Harvard; and Rebecca Gordon, who was at Perkins Coie, who's now deputy general counsel at DNC, as well as a variety of other prominent people.

But as the court comes down with its decision whenever it does, which obviously will play into this, hopefully there will be at least some studied attention to some of these constitutional issues that are implicated if you're going to tell lobbyists, look, you've got to get out of the campaign process. There are associational rights that are going to be implicated and it'll just be interesting to see how this whole area plays out.

MR. SUSMAN: Joe?

MR. MINARIK: Yeah, just briefly, we have a lot of agreement across the table. Tom did put his finger on one issue that was controversial in the CED deliberations and that was having members disclose their own sides of meetings with lobbyists.

We have one trustee who is a former member, who had a heart attack when he heard that recommendation coming from other trustees on our subcommittee, but fortunately we also have a health reform proposal, so we were able to take care of him. The other trustees, in fact, felt so strongly about it that it was retained. But, yes, we recognize that it does raise issues. And I think it's one thing that, perhaps, people would want to talk about.

MR. SUSMAN: Yeah, and as Bill suggested, it is unlikely that members will impose on themselves any such requirements or restrictions. I mean, if they can't get the courage to prevent gift-taking, they're unlikely to want that intrusive a disclosure into how they spend their days and evenings.

Yeah, we have some – oh – some good questions. You want to just – let's just start at this end and then we can work on round the room. Delighted to see hands up.

Q: Hi, Melanie Beller. My question had to do with – you were talking about trying to get lobbyists out of the fundraising business, but what about a lobbyist – which I used to be; an in-house lobbyist for a corporation – a food processing group. So I run the PAC. My corporate officers are giving money; that kind of thing. So where would you put an in-house lobbyist –

MR. SUSMAN: I'd take them out of the PAC. I mean, again, you don't have to be fired, but my own view is that you should not be a PAC officer or adviser.

Q: But then who among that group is better qualified to make recommendations about –

MR. SUSMAN: Well, there's no question about that. I mean, jeez, is this going to disable corporations from being as effective in channeling their PAC money to influence Congress? Maybe, maybe.

Q: Well, that, too.

MR. LUNEBURG: That's the point!

MR. SUSMAN: It might be. I mean, that's, yes, and I think that is the point. Why don't we just continue over here and then we'll come across?

Q: I'm Muriel Morrissey. I'm on the law faculty at Temple University. Joe, you referred to a lot of agreement within the panel. I want to pick up on what I thought was a big area of disagreement, but maybe I misunderstood what you were saying.

To me, your presentation sounded like a viewpoint about lobbyists that is – I'm going to pick words that weren't words you used – disparaging. You had the phrase, this industry has taken over this town, where I thought Tom – and to a very similar extent, I thought, Bill – was suggesting that actually tainting the whole notion of the status of lobbyist is getting in the way of a sensible way and productive way of thinking about lobbyists.

If we could, sort of, collectively see lobbyists as purveyors of useful information, as people who've been lobbyists as very useful people, say, to come into an administration and advise on policy, but I think the revolving door thing, at least President Obama's approach, almost assumes that having done the lobbying, they have a lot of information and all of it is going to be put to use for the particular point of view they lobbied about, which, to me, is an attack on the lobbyist's integrity, implicitly, and also diminishes the value of the knowledge that they acquired as lobbyists – as though, as a lobbyist, you get a lot of information and then you spew it out, but you don't actually acquire useful knowledge. And as I said, I'm just wondering if, in fact, there is a difference there within the panel.

MR. MINARIK: I don't recall the particular sentence of mine to which you refer but if I did say the words that you heard, which I think is very well possible, what I meant by that – I'm an economist – was more the size of the lobbying industry than the notion that lobbyists are dictating results.

People who grind the numbers – and Jim Thurber is my connection on this one – lobbying is the third-biggest industry in Washington; after government, tourism, then you've got lobbying. And if we really are talking about expenditures of somewhere between four and $8 billion a year, that's a big business. That is not to say that – Tom's exactly right – lobbyists don't write bills, don't bring –

MR. SUSMAN: Well, I didn't say that. (Laughter.)

MR. MINARIK: Their names aren't on them – okay, okay, okay. People work in particular lines of work very often because they believe in what they're doing. And when their

interests and their expertise are useful in making government work, absolutely, they should have the opportunity to make those kinds of contributions.

If somebody from the defense industry has the opportunity to make a contribution in the Pentagon and they're willing to take what is usually a reduction in pay – and sometimes even an increase in hours; I can guarantee you that the wage rate is going down – I think that's wonderful.

There ought to be transparency so that people know that and have the opportunity to take into consideration what the background is. And obviously, you have problems if someone is trying to apply not just an expertise about defense but, rather, selling a particular company's product. Then you're getting into different territories.

But I thought Bill's presentation was wonderful in making the distinction between the technical definition of a lobbyist and the possible concerns that you might have about influence. When the distinction between someone who is a lobbyist and someone who works for a firm that does lobbying is so gray and so hard to draw and you try to draw it for purposes of legislation and enforcement, and so you have to write hard words and draw a hard line but it's in an area where the distinctions are very – in reality are very difficult to draw. So I don't want to go too far on – it certainly was not my intent to demonize the profession, but rather to make the point that we in this town are spending an awful lot of money on this line of business.

MR. LUNEBERG: You know, I'm sure there are corrupt congressmen, senators; I'm sure there are bribes and gifts that influence. The law that has been developed seems to be a pretty primitive and probably inadequate way to really identify and get and capture. It's really using an atom bomb to kill maybe a fly and causing all sorts of unintended consequences in the process.

So put those cases aside. And I'm not even sure whether the system of government that we have – whether those few cases of bribery, whatever – if we're any worse for it, if you look at the consequences.

The more disturbing thing is this issue of money, and I read Bob Kaiser's book, and I was very impressed. Despite all I knew about the lobbying profession down here, it really did come across as really shocking, I mean, in terms – the picture that he painted: a problem of money influencing who gets what. Well, that's society today outside of Washington. The problem in many areas is money is directing the determination where public resources are used; maybe not the merits or whatever. X gets into Harvard because his father is going to give Harvard X amount.

I don't know that lobbying reform or anything we can do is going to solve a societal preoccupation with the almighty dollar. I mean, I'd like to think the situation could be improved; I think I'm instinctively drawn to the idea of limiting lobbyists' involvement in political campaigns.

But money will have its way. However it is restricted, that money will find other ways to influence public policy. So we're just kind of chasing it into other ways. There may be better ways than lobbying regulations to deal with what I think is the overarching problem.

MR. SUSMAN: We had a question over here.

Q: Hello, my name is Larry Ottinger and I'm president of the Center for Lobbying in the Public Interest, and I want to thank American University and the Center for American Progress for putting together – this is certainly an important topic for all of the country and the issues we face.

I wanted to introduce, or at least raise, an issue that hasn't been brought up so much, and that's of charities. The Center for Lobbying in the Public Interest, or CLPI, was founded out of the independent sector 10 years ago, and so, represents the largest foundations and largest charities in the country.

And while, you know, there are two ways to try to get it; try to make our democracy and government work better. One is the restrictions and limitations and disclosures that we've been talking about with respect to the corporate sector and large, wealthy interests. And the other is really to bring more people into the process – it's really more of a civic participation, civic engagement piece.

And I wanted to ask you two questions with regards to charities, which are not very engaged but are a huge part of society. We have a private sector; we have a public sector and we have a nonprofit sector that we normally count on for service delivery but not civic participation.

And so the question is how some things that we might do together that might make a difference. One are the charitable lobbying rules, which, most people don't know that charities can lobby, but they can, and our founding board chair was a fellow named Tom Troyer who some people in this room may know, helped to get those rules enacted.

And we now have two sets of rules in front of the IRS, for example, that could be simplified and updated since '76. And I think that would be the solution to the First Amendment problems, we often say, is more speech. And this is a more-speech type situation; if we could make philanthropy and charities feel more comfortable – something that makes sense. The rules now don't make sense for government, philanthropy or charities.

The second idea is could the lobbying profession and lawyers as lobbyists – law firms as well as lobbying firms – work with charities? The legal profession has something known as pro bono work and it's obviously an organized profession and bar and it's a requirement. And the question is, is there a way to maybe bring lobbyists – for-profit lobbyists – together, frankly with charities that could use help in developing lobbying strategies and plans around issues, and in a way that would benefit all concerned?

MR. SUSMAN: Before you hand over the mike, let me ask you one question, and that is, my recollection of the Internal Revenue Code change that prohibited businesses from deducting

lobbying expenses was in large part influenced by a sense of uneven playing field because, after all, charitable organizations, which got benefits from government – the nonprofit status was a rationale for restricting their lobbying, with the general theory being government shouldn't pay for lobbying itself, right? And so the thought being, okay, that's unfair, then, if we allow businesses a tax deduction, therefore, indirect government subsidy to lobby.

If we revisit the lobbying rules for charities, do we have to – I mean, I'm not prejudging this – I'm just – do we have to be open to, and perhaps ensure that we accommodate the business deductibility as well?

Q: Well, right now, what we're talking about or exploring in terms of charitable lobbying rules really isn't changing the rules so much as you have two tests – more of a simplifying and updating the rules.

I think, you know, there's a deeper discussion about looking at the rules for corporations and for charities, but I would say, you know, it's not a "good versus bad" thing. I think that charities have all different kinds of views of the solutions of social problems, whether it's vouchers versus improving the public schools or whatever the issue may be. There's not a single view and I think companies are different, as well.

But I think there is a fundamental difference – that companies are set up to maximize shareholder value and to make profit – private gain – and charities, by law, are required to work for a charitable purpose. Now, you may say, well, I know some examples of ones that don't – but by law, they're very different, and charities can't amass huge treasuries or profits, et cetera, et cetera.

So I think it leads into a slightly different discussion, but the charitable lobbying rules we're talking about are really just taking the existing rules, making them more rational and sensible. But I think if the Supreme Court decides the Citizens United case, I think we're looking at having to reevaluate what we all can do.

MR. LUNEBERG: On the distinction between private business and charities, that was a distinction that was discussed earlier about these restrictions applying to or not restrictions – the Obama restrictions applying to businesses and vested interest as opposed to the public interest groups. It lost, obviously, with the administration because they don't want to be in a position of saying, these people are working in the public interest and these are not.

I mean, I would assume if the Treasury looks at the things consistently with the White House, it would be difficult to make the argument you're making for, at least, eliminating the special treatment.

Now, I don't know how you would simplify the rules. I mean, they are complex, but of course, most tax rules are complex. So what changes are you talking about?

MR. SUSMAN: Well, that's something for us lawyers, probably, to sit down and work on outside of the public arena. I do want to – Jim, some of the authors you mentioned

historically who've looked at lobbying – and it's a treatment by law and by the public – have grappled with this issue of good versus bad lobbying; you know, can we distinguish between those who lobby for the public good and those whose lobbying are special interests – and defining special interests as meaning the factions that are inimical to the public good.

And I mean, you know, I think it's appropriate that the Congress hasn't done that because I don't think it can. You know, I always kind of muse on – it depends – I was in private practice as a lobbyist for 27 years – I never represented a special interest; those were always on the other side. And any good lobbyist will ground her argument in principle, in public policy, in the common good, no matter how narrow your goal.

And so I'm not sure that – that's a difficult thing – and likewise, even the nonprofit – think of the health-care industry, for example – we hear a lot about lately. I mean, you know, do the public hospitals have, at bottom, different motivation than for-profit hospitals in the way in which they treat patients and perform?

I mean, the answer is – I guess where I just come back to – I asked this question to the administration in the early days of its lobbying directives. And they felt that it was just too difficult to figure out how to deal with who's good and bad. And I remained especially interested in that subject because, after all, I've moved to the bright side. You know, I moved from the private, law firm world representing associations and corporations. One was the Business Roundtable, and you would probably say, "bad guys." Another was the American Library Association – you might say, "good guys" – both non-profit organizations.

But now that I'm with the American Bar Association, it's good guys. We have no question about that one. I think that's a challenge, and it's always worth thinking about because where this is going to take me. I think lobbyists need to spend more time not trying to justify – we can't justify being a lobbyist and what we do and the importance of lobbying. But the need for a high ethical standard, the need for broader and fuller disclosure, the need for strict enforcement – those are the things that I think cut across good/bad, profit/nonprofit, you know, the whole arena. And we can't lose sight of that.

One more question. Well, I got – two more questions. One back there and then we'll end with one up here. I'm sorry to do that, but – I'll keep the answers short; you can ask a long question.

Q: Carol Black. Professor Luneberg, I do disagree with one thing you said. You said we've talked a lot about this case; I think we've barely touched on Citizens United, and I feel very concerned that it seems like based on the attitude of the people talking today, it's like everybody's waiting.

But should we really wait? Because all of the people who have attended the hearing – I've listened to the tapes on C-SPAN. It sounds like they are leaning, not just, say limiting the amount of corporate contributions or corporate payment for the film. It was like, they really are leaning toward actually declaring the entire McCain-Feingold unconstitutional.

So if that's the case, aren't people out there now running to try to go ahead and start drafting a new law to replace it? And it seems like you would be cognizant if that's happening. And I'm just scared that we're just all waiting. And the way McCain and Feingold talked when they came out on the steps, they sound like they're very concerned what's going to happen if there's going to be that gap and something isn't passed quickly. Thank you.

MR. LUNEBERG: Well, you can't draft a law until you know what they say. I mean, they may say things broadly or narrowly, and I assume you can go out and draft a variety of versions, depending on what they do. But if it's a matter of First Amendment jurisprudence, it's not like you can draft a statute and say, no, you still can't give it.

I'm sympathetic with what you say but I don't quite know what legislation can do if the Supreme Court says that corporations should be treated like individuals in terms of their speech, and if individuals have to be able to be given – are given the right to give, and have to be given. So –

MR. SUSMAN: So each company can give $2300?

MR. LUNEBERG: Yes.

MR. SUSMAN: I mean, that's what we don't know, okay? This is the problem: First, I would say to your question, I bet you a few senators and congressmen do have draft bills, but those of us who look at this – maybe it's the triumph of hope over experience, but there are so many in ways in which the Supreme Court can decide that case and should decide it, narrowly, regardless of which party it holds for that you sort of think, well, maybe a couple of the justices will wake up one morning and say, geez, you know, I did make a commitment when I was confirmed to call the balls and strikes, and this is what I ought to do in this case, rather than impose an agenda on the nation.

But on the other hand, I must say, as I've heard a lot of the discussions that say, you know, the states where there are no inhibitions on corporations. It turns out, those companies don't give a lot more than in the states where there are. So I don't think I'd expect the corporations of America to start pouring money into campaigns the day after the Supreme Court comes down, if it does strike down. I just don't think they'll wait and see – keep in mind, remember, the effort against soft money contributions was really initiated by corporations. I mean, I know not initiated by public interest and advocacy groups, but I mean, when General Motors said, I'm not going to give any more soft money for conventions and things like that, then it began to catch on. And I don't know where that's going to go, but I think we have every right to certainly be concerned. Last question, Otto.

Q: Otto Hetzel, emeritus professor of law, Wayne State University. There's been very little discussion in this topic that – particularly in the area, obviously, of Congress, but of the role of the executive branch – I know they don't lobby in theory. But in practice, if you've got anything of interest there, there's a great deal of lobbying that goes on. And I just wondered if you have any comments, the two of you, as two of the experts in the field, as to what kind of

restrictions, if any, should be – and the same type that you're talking about for the private sector lobbyists?

MR. LUNEBERG: Tom is the expert, and I'll defer to him in answering that question.

MR. SUSMAN: Yeah, I mean, that's a tough question. Just from a legalistic standpoint, there's a prohibition on expenditures of federal funds for lobbying Congress, but that's very narrowly applied and has never been enforced, so I'm going to set that aside.

Another question which one could have asked Norm Eisen is that when he was talking about – he was showing on the board the various exceptions, what about communications, about a specific application to an agency during the process of consideration from a congressional office, either a member of Congress or staff. And they don't prohibit it; I guarantee that. And I haven't seen any go up on any Web site yet. It's hard to believe –

MR. LUNEBERG: The Treasury, the similar rules for TARP, now seems to eliminate the exception allowing communications from Congress.

MR. SUSMAN: But Congress probably hasn't figured that out yet. It's only because Bill follows this –

MR. LUNEBERG: No, no. There was a blog the other day that indicated that –

MR. SUSMAN: I mean, I think that that's – you know, I don't think you can stop the –

Q: I'm just talking about the disclosure and purchases. Is Jim Thurber's lunch at the White House mess with Norm Eisen going to be listed as a –

MR. SUSMAN: Sure – it would be if it were – no, it just would be listed after September 15th. In fact, I think many of us are quickly trying to make appointments in the White House after September 15th so that our family and friends can see how powerful we are in this town. (Laughter.)

MR. THURBER: Let me just comment – the largest lobbying group in Washington, D.C., is the federal government. Okay? They're lobbying more than anyone else and they can be easily asked to come up and share information, or they can call someone to ask them to come up. And that's behind your question, and we didn't address that at all today, and that's a good question.

MR. SUSMAN: I should invite our hosts back to the podium to conclude this afternoon's entertainment and – (audio break). (Applause.)

MR. THURBER: Scott, shall I go first?

SCOTT LILLY: Sure.

MR. THURBER: We just have about a minute summary here. First of all, I just want to thank the Center for American Progress and Scott Lilly and your staff, but also Becky Prosky, my staff member who helped organize this, and Chris Magan (ph), who's doing blogging and – is it called Twittering? – during this, out on the Internet. And I also want to tell everyone here that you can come to our Web site and CAP's Web site within a day or two and you'll have the presentations that people have had here, but also the video of all of this so it's part of the record.

I want to end by saying that two things have happened here – and I think we've had some consensus on it, it's just a matter of how you implement it – and that is, that transparency is good for democracy. We need more transparency; the question is, how do you enforce that? And how far do you go with that? Is it just this little group of 22,000 people that are federal-registered lobbyists, or should we go beyond that?

Another consensus from all of us is that Congress is not doing its job in terms of enforcement of its own ethics, and also the role of the Ethics Committee and also David Scag's (ph) office of public integrity – I've forgotten the exact name of that – on the House side. They're not doing their job. The same thing happened leading into the scandals associated with Abramoff.

There are several things going on right now, and they're not investigating it, and frequently it is related to what I like to teach my students, and that is the iron law of reciprocity. If the chairman of the Ways & Means Committee has some problems, you go lightly when you're investigating the chairman of the Ways & Means Committee because he has a great deal of power. That went on over the years until the scandals associated with Wilbur Mills and other people totally got rid of the chairs. That continues. I don't know how you change that, but I would call on Congress to do a better job policing themselves rather than passing new rules that attack lobbyists.

Scott?

(END)