

Legislative Reform*

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* March 23, 2001. Moderator: Matthew Myers, President, Campaign for Tobacco-Free Kids. Panelists: Jamie Court, Executive Director, Foundation for Taxpayer and Consumer Rights; Charles R. Halpern, Chairman of the Board, Dēmos: A Network for Ideas and Action; Gene Kimmelman, Co-Director, Washington, D.C. Office of Consumers Union; Wendy Wendlant, National Political Director, National Association of State PIRGs.

I. STATEMENT OF ISSUES

Apart from campaign finance, federal and state legislators are subject to antidemocratic internal rules, personal or staff conflicts of interest, secrecy in deals struck, and information imbalance favoring special, organized interests. The problem is not confined to Congress, but, in roughly parallel fashion, affects all fifty state legislatures, which together consider 150,000 bills annually, 37,000 of which become law—seventy-five times the number enacted by Congress.¹

II. CURRENT PROBLEMS

A. Bias

The most pervasive bias of general concern is favoritism for those with a proprietary, short-term stake in public policy. Apart from the campaign finance issue are issues of lobbying, job interchange, and information access.

1. Legislator Conflicts of Interest

At the federal level as well as in some states, legislators must disclose personal holdings that might impact their official decisions. What are the coverage problems in current law? Is disclosure enough of a check?

Note that legislators are often not prohibited from dealing with those having public business before them. Problems particularly arise with legislators who are attorneys maintaining law firm ties. Because of the attorney-client privilege, special interests can often hire legislators or those close to them without detection. How can such conflicts be prevented statutorily or otherwise?

2. Job Interchange: The “Deferred Bribe”

Related to the above, many legislators work closely with lobbyists whose employers have a financial stake in legislative business. Legislators are commonly hired as lobbyists themselves or are otherwise hired by such interests after leaving the legislature. It is difficult to detect a promise to hire made to a legislator while still in office and casting official votes.

1. See State Action, *State Legislatures and Resources*, at <http://www.cfpa.org/statemap.cfm> (last visited Feb. 1, 2003).

3. *Staff Job Interchange*

How do we prevent excessive self-interested bias of legislative staff? Currently, staff members receive job offers and often leave public employment for lobbying jobs with profit-stake interests. Should we require professional staff to refuse for a period of time (one year, two years, or longer) any employment with a profit-stake interest having business before the public office he or she serves? Some states ban former agency officials from appearing before the agency that previously employed them for one year after employment ends. But is that enough, given the limited definition of lobbying and the deferred bribe impact of a job offer made while still in public employ?

III. PROPOSED SOLUTIONS

A. *The Oaks Model*²

One proposed solution is to work in reverse: rather than prohibiting importuning offers made to a public official, focus on the official. Under the Oaks model, enacted in three California cities in 2000, public officials essentially enter into a contract when they take local office. It provides that public compensation for that office is paid with the understanding that all decisions made will be “on the merits” and without regard to the personal financial gain of the public official. Where such public officials distribute millions or billions of dollars in public benefits, exemptions, and privileges, they agree to not personally profit from any person or group that has received substantially disproportionate public benefits based on their decisions. Hence, a legislator voting to grant huge subsidies to the dairy industry would agree that for a period of five years or until two years after leaving that public office, whichever is longer, he or she will not accept any honorarium, gift, job, or campaign contribution from a person or industry benefiting from his or her vote. Decisions are to be made on the merits.

2. For a copy of an Oaks initiative, see The Foundation for Taxpayer & Consumer Rights, *Oaks Proposal*, available at <http://www.consumerwatchdog.org/citizen/rp/> (last visited Feb. 1, 2003).

B. Other Models

Other models require placement of assets in blind trust, prohibit law practice while serving in public office, or impose conflict of interest standards closer to those applicable to judges. What alternatives might accomplish the neutral decisionmaking goal?

IV. INFORMATION AND ADVOCACY IMBALANCE

Even where a legislator lacks personal financial bias and wants to make a decision on the merits, he or she must have balanced information from which to decide. That is not currently the case.

A. Lobbying

California has 1600 registered lobbyists.³ Of this total, one full-time person and one half-time person represent the interests of children. Several other lobbyists represent service providers who attend to children in various ways, but their perspective may not be the same as a long range interest in their clients or customers. Other states have similar imbalances and, at the federal level, over 20,000 lobbyists ply the halls of Congress, with very few representing diffuse, disadvantaged, or future interests.⁴ Given the complexity of public issues and the press of business, many public officials view their role as that of mediators between groups contending for their attention and favor. This “vector” view of legislators is implicit in the current legislative process federally and in most states. How can the current imbalance be redressed to allow our ethical sensibilities toward our children and our legacy to transcend the advocacy currently extant?

We currently regulate lobbying by requiring certain disclosures and by generally prohibiting excessive gifts or cash payments by lobbyists directly to legislators. Does this limitation solve the problem of access and preferential influence by monied interests?

Some possible solutions to consider include: (1) apply *ex parte* restrictions to legislators and elevate the public hearing process; (2) subsidize charity and nonprofit advocacy, not profit-stake lobbying; and (3) publicly financed independent information.

3. Cal-Access, *Welcome to Lobbying Activity*, at <http://cal-access.ss.ca.gov/Lobbying/Lobbyists/calaccess.aspx?letter=A&sort=&session=2001> (last visited Feb. 1, 2003).

4. Your Congress.com, *Lobbyists FAQ*, at http://www.yourcongress.com/ViewArticle.asp?article_id=63 (last visited Feb. 1, 2003).

1. Apply Ex Parte Restrictions to Legislators; Elevate the Public Hearing Process

Should legislators operate more like judges, subject to such restrictions as *ex parte* contact limitations? Currently, most bills are heard in committees, where testimony is delivered and exhibits presented. However, much of the committee process is window dressing while real decisions are made in offices during visits by lobbyists who have access. These lobbyists know the background and personal histories of legislators they visit. They know which buttons to push in privately arguing for or against legislation. What if hearings were made more meaningful by treating them more like judicial hearings? Parties are expected to make their point in public and subject to cross-examination. They do not make private appeals that can be misleading or would be easily rebuttable if made in public. Why do we preserve such evidentiary fairness when a decision by a public official—a judge—is made concerning the rights of a single litigant, but then eschew it when a decision is made affecting the rights of millions?

Instead of *ex parte* contact limitations, should legislators at least be required to disclose their contacts with parties interested in their official decisions?

2. Imbalance: Subsidize Charity and Nonprofit Advocacy, Not Profit-Stake Lobbying

Can we partly redress the current imbalance of advocacy favoring profit-stake interests? Currently, we allow business and profit interests to deduct monies spent on lobbying as a “necessary business expense.”⁵ This means that lobbying by profit-stake interests is twenty to forty percent subsidized by other taxpayers who must make up the taxes thus foregone. Meanwhile, lobbying by those who lack a profit-stake, but whose interest is considered charitable, are denied or limited in their access to our legislators. Should this not be reversed? Why not end any deductibility of lobbying expenses and allow an assured percentage, something like twenty-five to fifty percent of the budget of nonprofit or charity qualifying entities to be expended for such advocacy?

Should we pay compensation to those who provide information to legislators on behalf of general, disadvantaged, or future interests? How?

5. See I.R.C. § 162 (2000).

3. Publicly Financed Independent Information

One way to moderate the information imbalance is for legislatures to have their own independent source of information about public policy options.

Such information could come from institutional sources, such as general accounting offices, little Hoover Commissions, committee or party staffs, or from competent personal staffs. Should legislators be required to devote a percentage of their office budgets for such policy staffing, as opposed to the district and constituent service function upon which so many of them focus almost exclusively? How can we assure adequate and independent information from committee staff or from independent oversight agencies?

B. Impact of Term Limits

What is the impact of term limits on the advocacy and information imbalance between short-term profit interests and longer-term interests? On the one hand, such limits may prevent the development of sinecures, free from public check, and may stimulate new blood and new ideas. On the other hand, they may make legislators even more dependent on the current information imbalance and may facilitate much mischief by outsiders able to manipulate a legislature now lacking an institutional memory and amenable to shallow sound bite arguments. For example, California's short limits—six years in the Assembly and eight years in the Senate⁶—combined with cuts in legislative resources for staffing and information, have made legislators more dependent on outside lobbying influence, which favors special interests. These term limits have also magnified the effect of campaign contribution influence, as officials must gear up for expensive races before new constituencies much more often. Is there a different term limit formulation that could advance stated goals without such collateral effect?

V. BYPASSING THE LEGISLATURE

Some states allow the electorate to bypass the legislature by enacting statutes, and even constitutional amendments, by direct popular vote. The initiative and referendum process has become an important democratic safety valve.

However, some problems have impeded the proper functioning of this process in many states. First, special interests have gained access to the

6. See California the Golden State, *Compiled by the Office of the Chief Clerk Assembly of the State of California*, at <http://www.assembly.ca.gov/clerk/BILLSLEGISLATURE/goldenstate.htm> (last visited Feb. 1, 2003).

public forum by paying for signatures to qualify propositions. Second, they respond to most citizen initiated proposals with fake counterproposals of their own. Third, they spend millions of dollars on deceptive political advertising, which rarely identifies the actual vested interest financing the ad.

Another problem with initiatives has been their high rate of court reversal, usually based on language that might well be corrected if subjected to the kind of examination that bills receive in the normal legislative course. However, the inflexible format of initiatives requires them to be voted upon as stated in the qualifying initiative.

Are there reforms that might strengthen the initiative process without stimulating its capture by special interests? Can we provide public legal assistance to petition proponents regarding questions of constitutionality and consistency with existing law—similar to the Office of Legislative Counsel available to legislators? Can we treat volunteer gathering of signatures differently than signatures gathered by “hired gun” paid collectors? How can we police campaign deceit, or can we? How can we require identity disclosure of initiative ad proponents and opponents?⁷

VI. PUBLIC ACCESS

The internal rules of the legislature inevitably relate to media attention and public responsiveness. If business is conducted in private, without public vote, then the special interests that dominate such an environment will often prevail. California, for example, has a “suspense file” procedure allowing legislators and the governor to kill bills supported by the broad population without accountability or public vote.⁸ How can it be prevented or countered?

Related to accountability are the sunshine provisions of the Congress and state legislatures. Many legislatures have exempted themselves from the same public records and open meeting provisions that they apply to local governments and executive branch agencies. Why should they not live by the same standards?

How transparent and fair are the legislative rules themselves? What

7. See, e.g., *Cal. Prolife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998) (problematic decision analyzing the constitutionality of California’s proposition 208).

8. STANDING R. OF THE ASSEMBLY 58.2, available at <http://carecure.rutgers.edu/Quest/California/Rules%20of%20the%20Assembly#AR58.2> (last visited Feb. 1, 2003).

are the highest priorities for reform in this area?

Anyone who has advocated before any legislature has witnessed the common arrogance of its membership. Hearings are abruptly canceled or conducted with little respect for the citizens who wish to comment, even those who travel hundreds of miles at great cost to tell their stories. Time limitations may prevent input from everyone who wants to be heard, but the atmosphere in many state legislatures is deference to members and longstanding lobbyists along with open disdain for citizens who are not "heavy hitters." What can be done to stimulate internal rules assuring open proceedings, public votes, and accountability?

Are those who represent broad citizen concerns effective lobbyists? A recent survey of child advocates found them to be relatively impotent factors in influencing state legislative outcomes. Would a higher level of professionalism help? How is that accomplished without taking on the negative attributes of an inside player?

VII. MEDIA ATTENTION

In order for the interests of the impoverished to be advanced, decisionmakers must be without excessive money based bias, and information and advocacy must be balanced. But beyond this, the issues relevant to those interests must be raised. They must be on the public agenda table. Increasingly, the media sets that agenda. Underrepresented interests are of concern to the body politic. Elected officials tend to respond quickly and sensitively to issues raised by the media and receiving the attention of the populace.

How do we influence the media to address matters of concern to the dispossessed or to the longer range future? The media is poor at covering subjects that lack a journalistic "handle," including social trends which are gradual, even if massive and important, such as child poverty or widespread privacy loss. How do we facilitate such coverage for legislative attention?

In addition to the selection of a legislative agenda, the media is the critical card available to the public interest advocate when an issue is before a legislature. It may allow for partial redress of advocacy imbalance among those lobbying the legislature, and it gives a weapon to those who lack campaign finance or direct membership assets. How do we take advantage of it?

Beyond media access, what impact does increasing concentration of media ownership have on the composition of legislatures and their publicly driven agendas? Rupert Murdoch controls the communications satellite on three continents and is now negotiating to buy Direct TV, one of America's two national satellite systems. Two cable firms

control the other national satellite system. Cable concentration is extreme, with local monopolies being the rule, absent meaningful rate regulation. Two firms, AT&T and Time Warner, now control eighty percent of the national cable communications market. One of them has now combined with the nation's largest Internet service provider, and both (dominating high speed Internet access) have contended they can confine consumer choice to their own designated Internet service provider.⁹ In combination with the relaxation of cross ownership rules and the decline of the Fairness Doctrine, the ascension of "free market" regulators, where a free market is lacking, is particularly dangerous, given the First Amendment implications extant—all of which may be momentous as applied to legislative elections and media coverage of the Congress and state legislatures.

VIII. LOBBYING AND FOUNDATION SUPPORT

Many foundations labor under the misapprehension that their § 501(c)(3) status absolutely prohibits "lobbying." It is "political." In fact, the absolute ban on political involvement applies to candidate elections.¹⁰ The definition of lobbying is relatively narrow under federal and state law, and a substantial increase in the "education of public officials" from those without a proprietary stake in public policy is both lawful and desirable. Why are some foundations afraid? Why do so many seem to direct funding not to leveraged change, but to pilot projects, studies, and spending without likely impact? What can be done to make advocacy funding a part of their agenda?

IX. COMPOSITION

The composition of legislatures turns on elections, entry opportunity, campaign finance support, redistricting, ease of registration and voting, voting accuracy, and other democratic mechanisms. What are the current structural impediments to the election of those legislators, based on informed exercise of democratic will from the bottom, rather than on manipulation from incumbents or others at the top?¹¹

9. See *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

10. I.R.C. § 501(c) (2000).

11. See Miles Rapoport, *Democracy's Moment: Can the Debacle of 2000 Ignite a Movement for the Democratic Renewal?*, AM. PROSPECT, Mar. 12–16, 2001, at 41.

X. BACKGROUND ON PANELISTS

Matthew Myers is president and chief legal counsel of the Campaign for Tobacco-Free Kids, a privately funded organization established to focus the nation's attention and action on reducing tobacco use among children. In his previous role as executive vice president, he oversaw all of the Campaign's advocacy, outreach, and grassroots development efforts.

Myers is a nationally recognized tobacco control advocate. In 1996 he received the "Smokefree America Award," as the lawyer who made the greatest contribution to tobacco control efforts in the United States. In 1989 he was awarded the prestigious Surgeon General's Medallion from Dr. C. Everett Koop, for contributions to the public health of the nation. Former FTC chair and author Michael Pertschuk featured Myers's legislative advocacy efforts in his book, *The Giant Killers*.¹²

He joined the Campaign after a fifteen-year partnership in the Washington, D.C. law firm of Asbill, Junkin & Myers, where he specialized in complex commercial litigation and cases concerning employment law, the Privacy Act, health law, and First Amendment issues. First as staff director and then as counsel to the Coalition on Smoking or Health, an organization comprised of the American Cancer Society, the American Lung Association, and the American Heart Association, he has testified before Congress and agencies of the executive branch.

Jamie Court is executive director for the nonprofit Foundation for Taxpayer and Consumer Rights in Santa Monica, California. He is the author of *Making A Killing: HMOs and the Threat to Your Health*.¹³ In 1994 Court, along with consumer advocate Harvey Rosenfield, established Consumers for Quality Care, the health care watchdog project of the Foundation, to protect the public interest in high quality health care. Court was named "Consumer Educator of the Year" by the Consumer Attorneys Association of Los Angeles in 1998 and "Patient Rights Advocate of the Year" in 1996 by Consumer Attorneys of California. He is a frequent media commentator and contributor. Prior to his insurance reform efforts, Court was a homeless advocate and community organizer. He is a graduate of Pomona College in Claremont, California.

Charles Halpern was the founding president of the Nathan Cummings Foundation from 1989 through November 2000. The Foundation's areas

12. MICHAEL L. PERTSCHUK, *GIANT KILLERS* 53–54, 56–61 (1986).

13. JAMIE COURT, *MAKING A KILLING: HMOs AND THE THREAT TO YOUR HEALTH* (1999), available at <http://www.makingakilling.org/> (last visited Feb. 1, 2003).

of interest are health, the arts, the environment, and Jewish life.

He is the chair of the boards of the Center for Contemplative Mind in Society and Dēmos: A Network for Ideas and Action. Beginning in March 2001, he will divide his time between Berkeley, California, and New York City.

The founding dean of CUNY Law School, Halpern was also a founder of the Center for Law and Social Policy in the 1970s, a seminal center of public interest advocacy. He helped to create the Mental Health Law Project and has taught at Georgetown and Stanford law schools.

Gene Kimmelman, co-director of Consumers Union's Washington, D.C. office, is responsible for management of the office, as well as oversight of all federal advocacy issues. He has extensive expertise in a wide variety of public policy issues, including telecommunications, cable television, product liability, antitrust law, and health care.

Kimmelman is a recognized expert on deregulation and consumer protection issues, particularly in the area of telecommunications. He was the lead consumer advocate on the Omnibus Telecommunications Act of 1996 and was successful in advocating the addition of significant consumer protections to the telecommunications deregulation legislation.

Prior to joining Consumers Union, Kimmelman served for two years as chief counsel and staff director for the Antitrust Subcommittee of the Senate Judiciary Committee. Prior to that, he was legislative director for the Consumer Federation of America, where he directed CFA's legislative, regulatory, and judicial intervention program. He began his career as a consumer advocate and staff attorney for Public Citizen Congress Watch.

Wendy Wendlandt is the national political director for the National Association of State Public Interest Research Groups (PIRG) and has held that position since 1992. In this capacity, Wendlandt has assisted many of the state PIRGs in developing and running campaigns, including CalPIRG's 1996 campaign finance reform ballot initiative, proposition 212,¹⁴ which called for \$100 contribution limits to candidates. She was also a principal advisor in the effort that same year to gather 1.5 million signatures to qualify proposition 212 and three additional measures for the California ballot.

In 2000, she and the state PIRGs, along with six other organizations,

14. See CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 42-47 (1996), available at http://holmes.uchastings.edu/ballot_pdf/1996g.pdf (last visited Feb. 1, 2003).

launched Genetically Engineered Food Alert, the national call for a moratorium on the use of genetically engineered crops and ingredients until they are safety tested, labeled, and under which companies that produce them are held liable for any damages. The GE Food Alert Campaign was responsible for uncovering the illegal use of Starlink corn in taco shells, among 500 other products. In 1999, Wendlandt also helped to found the Genetic Engineering Action Network (GEAN) as the U.S. network of genetic engineering activists, and she continues to chair its steering committee.

She has been with the PIRGs since 1984, working in a variety of capacities, including serving as the executive director of the PIRG in Washington State, where she played key roles in two statewide ballot measure campaigns—one to establish a state toxic waste Superfund cleanup program and one to stop Hanford from becoming the nation’s first high level nuclear waste dump site—and led legislative efforts on a variety of public interest issues, including motor voter registration and pesticide reduction.

Wendlandt is a trustee of the Green Century Funds, the nation’s only family of socially responsible mutual funds founded and owned by nonprofit environmental organizations. She is on the board of Green Corps, the field school for environmental organizing, and has served as one of its lead trainers since its inception in 1991. She also serves as the associate director for CalPIRG, the California Public Interest Research Group. She has a B.A. in Political Science from Whitman College, 1983.

XI. PANEL DISCUSSION¹⁵

MATTHEW MYERS:

We are going to discuss this in dialogue form. The critical question is: “What are the impediments to Congress, state legislatures, and other elected bodies doing the business of the public rather than the narrow special interests?”

We’re here today to try to figure out how we look at the combination of the legislative rules and the public action steps that are necessary to overcome these problems. What we’re going to try to do is to divide our conversation into two broad themes. The first is a look at the insider rules themselves. What are the rules at the congressional, state, and local levels that both enhance our ability to influence the process and

15. This Part has been edited to remove the minor cadences of speech that appear awkward in writing and to identify significant sources when first referred to by the speakers.

inhibit our ability to influence the process?

Second, we're going to ask ourselves the question of how to become more effective at influencing the process itself because we must remember that the people we are influencing are different than judges and administrative heads. They are not appointed, but are ultimately accountable to the people. That makes our advocacy itself quite different.

Let me start with a question and open it up for a dialogue. What are the major rule impediments? What are the major rules that we need to change on the inside of the legislative process if we're going to make it more responsive to the public interest? Wendy, do you want to begin?

WENDY WENDLANDT:

Sure, I think I get to start because the states have some of the worst rules in allowing public interest voices to be heard. All you need to do is visit Chuck Lewis's web site at the Center for Public Integrity¹⁶ to see how terrible the states fare in terms of disclosure. Half the states require literally no disclosure of the financial interests of their legislators.

The second reason is because of the sheer volume of legislation passed through state legislatures. It is about seventy-five times the number of laws passed in the Congress. In 1999 about 150,000 bills were introduced at the state level, and about a quarter of those became law.¹⁷ So we are talking about a lot of legislative action that obviously affects the public every single day.

In terms of the rules, our experience in state legislatures across the country includes an overall dominant problem of committee chairs and leadership able to block the process—so a bill never moves anywhere. That is probably the single biggest problem and probably the problem that is most difficult to resolve.

But we can do something about other things. For example, we could require disclosure of every type of document through radio, television, and the Internet. It is our tax dollars at work creating these documents; and, in order to shed a little light on the process, putting that material on the web or in other public forums seems essential.

The third thing is access to the process—making sure we have

16. See The Center for Public Integrity, at <http://www.publicintegrity.org/dtaweb/home.asp> (last visited Feb. 1, 2003).

17. See State Action, *State Legislatures and Resources*, at <http://www.cfpa.org/statemap.cfm> (last visited Feb. 1, 2003).

effective open meetings acts, including requiring advance disclosure of meeting times and prohibiting last minute changes. It may seem shocking to some of you who deal with more progressive states like California or with the Congress, but, in many states, the meetings are changed at the last minute, and attendees are not even told in what room the hearing is happening. So we are talking about basic reforms here.

The fourth thing that I had on my list is basic ethics. Crucial are conflict provisions ranging from recusal, where a legislator has a conflict of interest, to banning gifts and bribes. Again, the range of these laws across the country is striking.

The next area of needed reform is the recording of votes. Again, this would seem a simple concept, but the recording of votes in committee or on the floor is often lacking. Many times, we have floor votes by voice, where nobody can identify individual votes. So we need to get votes recorded.

The last thing on my list is a little more obscure: being able to force a floor vote on an issue. We need to push issues out to the floor so they don't just end up in a suspense file or in some committee—the dead bills committee. Almost every state has something like that.

Those are some quick things that would help us get access to the process. Now, it does not fundamentally change the amount of money coming into the process or the amount of power we necessarily have in it, but those are just some simple things that we should be working to get into states across the country.

MATTHEW MYERS:

Could I just probe a couple of them? You started off with the disclosure of documents. Since legislatures, unlike courts, don't have to have a formal record before they act and often don't have any record whatsoever, tell me a little bit more what you think in terms of disclosure of documents. I can't tell you the number of bills I've worked on in which, two years out, there is no record of the legislative history.

WENDY WENGLANDT:

Right. Some of them are simple. If there has been a public hearing, there ought to be a transcript, particularly in a big state such as California. Down here in San Diego, it might cost up to \$250 to fly up to Sacramento round trip, even if the ticket is purchased three weeks in advance. The transcript of the hearing ought to be available on a Web site. Some of the reforms are simple. These things are already public, but are not distributed to a wide group of people.

Another example would be lobby disclosure forms: financial interest, financial stake in companies, that type of information. In many places it

is filed, but very difficult to access, and with the advent of the Internet, we ought to be able to just post that information. In Congress, Gary Ruskin has been pushing this, to have congressional research documents available for public consumption. As I understand it, those are only available to congressional staff. Seventy-five million dollars or so is spent to produce those reports, which are actually quite good, and yet members of the public cannot get them without help from a staff person. So even though these documents are already produced, we need to expand their dissemination.

MATTHEW MYERS:

Would you change the rules about the kind of evidence or the kind of information the Congress or legislature has to have before they act?

WENDY WENDLANDT:

I suppose that would be good. It is a little bit like campaign finance reform. What could we actually get in the next ten years? I would think that the more information about legislative history, the better. The idea that, here in California, Steve Peace, the primary author of the California deregulation bill, is now trying to refashion himself as the savior of the energy crisis is appalling. It would be good to have on record some of the legislative history that led us to the fiasco in the first place.

MATTHEW MYERS:

Gene, you work at the federal level. Do you want to comment at all on this issue?

GENE KIMMELMAN:

Yes, a number of things Wendy mentioned just now are being considered in Congress to make all documents available, and that is something that the public interest community ought to be very involved in. It's not a sexy issue, but it's obviously an essential one. My reaction is that we have many of the things the states are lacking, to some extent, at the federal level. Surely they need to be perfected there. So I start off with the reaction that these are really necessary, and there is an awful lot of work that needs to be done here. We are not close to making the public interest community more effective or making legislative bodies more responsive to us. Maybe, in some instances, we ought to question exactly how far we want to push, as opposed to other use of our resources.

At the federal level there are committee reports with pretty strong disclosure requirements, like disclosure of financial interests and ethics rules—a little squishy. Or maybe very squishy. But at least there is disclosure—public access to that information. A lot of the votes are recorded, not by requirement, but by tradition and political pressure. So many things are already available at the federal level, and yet there are some of the same fundamental problems that exist at the state level in meeting public interest needs.

But there are some twists here, including the ability of committee chairmen to block bills. It has certainly been a tradition in the House of Representatives, and yet there is a way around it called a “discharge petition,” a very effective tool to identify who wants to supersede the power of a chairman. I raise questions about how far we want to go down this path of democracy, because Republicans, as opposed to Democrats, have used it very effectively.

Then, there is the filibuster rule in the Senate, which senators use to block a bill on the Senate floor. A supermajority vote is required to overcome a filibuster. In my experience of twenty years of doing this, our policy allies often use filibusters to block extremely dangerous legislation, yet filibusters are also used very efficiently by our opponents. It is an extremely difficult problem to surpass.

But the U.S. Senate is a good example where, even with committee chairmen blocking bills in committee and refusing to hear bills, there is a chance, somewhere along the line, to raise those provisions on the Senate floor because of procedural openings. So there are always opportunities in the Senate. But Congress, nevertheless, has many of the same resulting problems that the states have in passing public interest legislation.

So we can identify improvements that need to be made at the federal level. But some of these would take great effort, and I suggest that we may be better off redirecting our efforts at substantive matters, and not just the procedural rules.

MATTHEW MYERS:

Wendy, how much do the type of rules that you are talking about truly serve as an impediment at the state level?

WENDY WENDLANDT:

It is difficult to say. PIRG is in a big expansion right now, adding advocates in many new states. So we are moving into states that we have not worked in before. What is difficult about it is that some of the rules aren't even written down; so new advocates in the state legislature have a difficult time figuring out how the thing works. So it is an impediment in the sense that an advocate literally can't figure out how to run a campaign because it is unclear where it goes next and what rules might block the campaign along the way.

There are obviously huge other problems, like being outspent by our opposition. Campaign finance influences who is elected in the first place because of big money donors. So it is a little difficult to say in the scheme of things what percentage of the problem this is. But clearly, each place where we are getting pushed back is a problem for the public interest community.

GENE KIMMELMAN:

I wanted to add to this. When we get past looking at just what is required and what information is available, there is a separate access issue that is truly a phenomenal development in Congress—the inability to get into hearings. People, real people, cannot get into hearings. There are so many line sitters starting in the wee hours of the morning when the buildings are opened—the buildings where these public hearings are being held—who are being paid by corporate interests to sit there until the lobbyists show up five minutes before the hearings start, so that they can have access to the public room. Unless there are people who want to sleep there or who have extra staff or nothing else to do with their time, people in the public interest community, or even those in the general public who see a hearing notice, are never going to get in. That is one of the most fundamental access problems today—another form of money in politics.

CHARLES HALPERN:

Let me just add this one point. You asked, Matt, how big an impediment this is at the state level, and I think that is an important question. But in some ways it is a question that is too limiting. Even if the answer were that there is no impediment at all, we ought to be thinking about what an ideal legislative process would look like ten years from now, twenty years from now. And if we had some image of

a legislative process that we were working toward, that would help us set priorities, as Gene suggested we are going to have to do, not because of the immediate impediment, but because we have some vision of what the world should look like. I think that was touched on with the last panel with respect to campaign finance.

If we start with something small like the McCain-Feingold bill, we may end up with a system in which the process is much more open to challenges to incumbents, in which Fanny Lou Hamer is going to be running for the Alabama legislature. I think one of the ways that we, in the public interest world, can deepen and make our work more effective is to be thinking ahead of the crisis.

MATTHEW MYERS:

It is interesting, Charlie, and one of the questions I would ask as we think about the perfect legislative process. One thing that struck me in listening to Wendy's suggestions, is that I could probably craft the perfect procedural legislative process, and then still ask myself the question at the end of the day whether the process will work for the people in it. That does seem to be a fundamental question. It is clearly not a reason not to seek the perfect legislative process, but it is a reason to say how much energy should be spent on those issues.

WENDY WENDLANDT:

Right. But I think the whole question is around the tools of democracy. We are so incredibly outspent, and it gets worse and worse every year, so that we need as many tools as we possibly can to have some parity in some set of circumstances. That is the current situation, and that would not be my ideal world, but that is the situation we are in. So anything that provides more democracy is always better for us.

MATTHEW MYERS:

And Gene was against more democracy?

WENDY WENDLANDT:

No, I know, that's why I am looking at Gene, because we hear the word "initiative," and people are concerned about the initiative process. The initiative process is something that maybe has gotten out of control. But I'm just firm in this: the more democracy the better because we are really screwed if more democracy is not good for the public interest.

GENE KIMMELMAN:

Just to clarify, I'm for it. I think there are a lot of other things, given our resources, that we need to focus on before we get to that long-term

issue because, unless we can bridge the gap between us and the huge powers that be, procedural changes may not deliver us what we want.

MATTHEW MYERS:

Before we move on to that issue, let me pose a broader question. Unlike in a court, where everything that takes place has to take place in a public recorded form, much of the legislative process takes place in a member's office, or between two members walking down the hallway, or a member trading off an issue of concern to his or her constituency for another person's constituency. How would you address those issues, if at all? Because if we are going to talk about making the process transparent, and therefore open, we still have to recognize that bargaining takes place. Any suggestions?

JAMIE COURT:

The only way you can really deal with it is by going to the outside and bringing the outside in. We had an issue with a legislator a couple of years ago who promised an insurance agent he would vote against a bill even though he agreed with it, so we had to make it public. The legislator still hasn't talked to us, but we went after him in his district and got press. That is what the outside game right now is. The other side, the corporations, have figured this out, which is why they've invested heavily in "astroturf technology"¹⁸—which is incredible lobbying technology.

We had some bills to make "claims practices" for the insurance industry a little cleaner, and one of the ways the insurance industry tried to stop our efforts was by having an 800 number system where they literally hooked people up to their respective legislator's office. All policyholders in the state were informed by mailed notice to "call this 800 number," and they got hooked up to the legislator's office to leave a message. They logged an inordinate amount of calls because of the money they spent to do that. They brought the outside in.

We don't have that type of money, but what we do have is the initiative process in California. In other places, we have the ability to work on building some grassroots capacity in order to make legislators pay from the outside. Any facilities that create more opportunities for

18. The term "astroturf technology" refers to artificial grass roots support and concern manipulated by special interests.

empowering people on the outside are important. Our group has worked mostly on the outside through the initiative process in California. I have been involved in different issues, and it is interesting how the initiative, even when it doesn't pass, even when it doesn't succeed, can leverage pressure inside the legislature. The most recent example is California's energy crisis. In the winter we were going very quickly toward a solution that would give the utilities and the energy producers almost everything they wanted. In November we announced that our group was going to do an initiative to create a public power authority and place a windfall profits tax on power generators. Suddenly, the Governor changed his direction, and ever since we have been fighting a war to capture the Governor's attention and to go in a proper direction. The only reason we have any leverage to do that, the only reason the Governor is listening to us—and he doesn't call that often—is because we threatened an initiative on the ballot when he was up for re-election. Basically, that initiative would have suggested that he didn't do a good enough job with the crisis, so we had to go directly to the people. That type of leverage, that type of power, is the ultimate power. There are ways that the initiative process has worked against people of average means because it is corruptible by money, and I hope we will get to that a little later, but it is one of the ultimate outside weapons.

So I would agree with Gene that we need to find a way to bring more people from the outside into the process. One of the ways we have done it is a group called the Oaks Project, which is part of the Foundation for Taxpayer and Consumer Rights. This is something that Ralph Nader inspired in a speech he gave in Thousand Oaks, California, where he said we need a thousand Californians, rooted in their community, strong and sturdy as the California Oak, who will be citizen activists in their community and hold legislators accountable. Each of these Oaks agrees to fifteen hours a month of volunteer time, signature gathering, letter writing, and lobbying. That is a pretty significant commitment for people who work, which is why our number is in the hundreds rather than in the thousands. But what they just did in several cities in California was pretty amazing. They passed local initiatives in Vista, San Francisco, Santa Monica, Pasadena, and Claremont that say any city official who votes to award a contract, or votes to confer a public benefit of substantial value on a private person, cannot take a dollar, a job, or even a campaign contribution from that person for five years after the benefit is given. Now that is the toughest campaign finance reform law in the nation, and it is law in five cities right now. The only reason it worked was because of the initiative process. The Oaks had to collect about 75,000 signatures, all volunteer signatures. The general public does not hear about it much, but bringing in volunteers creates a new type of attention.

So I would agree with Gene that the more our groups can focus on the capacity issue, on bringing the average citizenry into what we do, the more leverage we'll have—as opposed to focusing just on procedural rules.

WENDY WENDLANDT:

Well, Matt, there is one other area which is sort of halfway between outside organizing and procedural rules, and that is campaign finance reform and electoral reform. As to the latter, reforms range from changing the size of legislative districts so they are smaller for more accountability, to instant runoff voting so people can rank their candidates, which would allow third party candidates to have an impact without sacrificing the second choice candidates preferred by a majority of voters. These other things are not inside procedural rules, but they would change the composition of the legislature advantageously.

JAMIE COURT:

There is also “none of the above,” which is an interesting notion. Voters could choose “none of the above” and axe both candidates to get higher quality in future choices; this is something that we have delved into in the past.

MATTHEW MYERS:

Do you think the Oaks Project initiative that you actually passed in several cities would work at the legislative level where campaigns are far more expensive? In essence, what legislators are asked to do in those communities is to not benefit a campaign contributor—terrific idea. Would it work in a campaign to raise millions of dollars?

JAMIE COURT:

One of the hopes for the Oaks Project was that these people would ultimately become public interest candidates in their communities. And, if we're talking at a state assembly or state senator level, hopefully they would become known and have some type of persona that was recognizable, and they wouldn't need millions in campaign funding to get elected. That hasn't panned out yet. We are in the early stages of the project, and we have mixed results. In terms of the systemic process, the Oaks are trying to create new standards for candidates. For instance, we had an interesting demonstration outside the office of the California

Assembly Speaker, Bob Hertzberg. We called him “Bailout Bob” for some actions he took to bail out the utility industry. Such actions do slow down bad legislation because Hertzberg had some higher ambitions. I think it has an effect.

Just in terms of the initiative process, for instance, we are going to the legislature this year to try to get a new standard for initiative politics. There is a problem with the initiative process being corrupted by corporations who put initiatives on themselves under the guise of campaign committees that sound like they are citizen committees. Also, we wanted to create a new standard, called the “Volunteer Qualified Initiative.” This VQI would be as follows: if an initiative qualifies on a volunteer basis, it gets special ballot designation on anything the Secretary of State puts out, and it also could qualify for special state money. In California, we’re talking about turning in about 700,000 volunteer qualified signatures, so that is an awful lot—more than seven times what we did with our six Oaks local initiatives. But that is a very high standard. And the Oaks are trying to create this next level in terms of candidates and initiatives. So I think it is like raising the bar by example in many ways.

Playing in the current game, I don’t think we have a chance. I think if we change the rules of the game we have a chance. But changing the rules is going to be more by new models that are volunteer oriented in action and getting new types of candidates out there. It is very difficult. We faced one legal challenge to our initiative, in Vista, where the court of appeal reversed an adverse preliminary injunction from the trial court, but it is not clear that this is going to be the end of it. So we do not know what is going to happen in the end.

MATTHEW MYERS:

How many states have the initiative process? Do you know?

JAMIE COURT:

That is a good question.

WENDY WENDLANDT:

About twenty-four, I think. But that kind of mixes in referendum states, which are not always as good because that is strictly by way of referral from the legislature to the ballot.

MATTHEW MYERS:

And how significant is that process, Wendy, in holding legislatures accountable?

WENDY WENDLANDT:

I think it is incredibly important, judging from our PIRG experience in the states where we have the initiative process. It is no coincidence that those states tend to be more public interest oriented states. In those states where we have the initiative process, we get better legislation out of the legislature, in addition to the passage of laws through the initiative process.

JAMIE COURT:

Let me also say that it helps hold candidates to campaign pledges, because we had an initiative in 1996 on HMO reform.¹⁹ It was the first HMO reform initiative in the nation to deal with the Patients' Bill of Rights. It pioneered that slogan: "Doctors, not bureaucrats, should be practicing medicine." What that did as a test run was raise the issue in California. In 1999 Governor Davis signed legislation that was almost identical to that initiative.²⁰ The initiative started in 1996 to raise some issues. It failed because people didn't understand the HMO concept; it went to the legislature for a couple of years where Governor Wilson vetoed bill after bill. But it helped to create a public consciousness. By the time Governor Davis took office, there was this whole culture supporting that proposal, and he signed it relatively quickly after taking office. He really didn't have a choice—it had its own momentum. So there is a way to use the initiative process to publicly raise issues that then become very important for candidates. I think it has been very powerful.

One example of such populist impact is in proposition 13,²¹ which is an awful initiative. It limits the tax base and creates radical disparities in the tax burden between property owners—favoring older, wealthier property owners. Many people may know about it, but it brought into

19. CALIFORNIA VOTERS PAMPHLET, PRIMARY ELECTION 52–57 (1996), *available at* http://holmes.uchastings.edu/ballot_pdf/1996g.pdf (last visited Feb. 1, 2003).

20. CAL. HEALTH & SAFETY CODE § 124960 (West Supp. 2003).

21. CALIFORNIA VOTERS PAMPHLET, PRIMARY ELECTION 56–60 (1978), *available at* http://holmes.uchastings.edu/ballot_pdf/1978p.pdf (last visited Feb. 1, 2003).

town a whole era of politicians on the other side of the equation—who were not particularly good for California. They rode in on the coattails of the initiative. Similarly, proposition 103,²² which our Foundation’s president authored, was an insurance reform initiative in 1988. It brought in a lot of people to Sacramento who were pledged to hold the insurance industry accountable. So the coattails of these initiatives really do affect candidates.

MATTHEW MYERS:

How ready is the public interest community to effectively use the initiative process? It involves skills, tactics, and numbers that are different than what we are used to using.

JAMIE COURT:

Yes, I think it is like engaging in political warfare. The public interest community is not used to engaging in warfare on that scale. It is used to engaging on issues, but not in challenging the system. I think that there are some things that will help it in the coming years. One factor that could break this whole issue open is electronic signatures. One of the things the corporations did for us in Washington, D.C., was to pass a new Electronic Signature Act, so they are as valid as a live signature. Well, apparently many people think that will apply to signing an initiative. So this will help all of your groups that have a lot of e-mail activists who will not show up to a meeting or gather a signature, but will respond to an e-mail. If they register their signature electronically and there is a very good idea for an initiative, that also can qualify for all volunteer qualified initiatives. But we are probably going to have to stop changes in the law designed to stop that opportunity because it is too good a deal.

MATTHEW MYERS:

That is where the filibuster comes in handy.

JAMIE COURT:

To qualify an initiative in the absence of a volunteer base, at one dollar per signature, would cost \$700,000. Even once on the ballot, it is very easy to get a “no” vote on an initiative—people like to vote “no” because they feel deceived by the process. So until we have higher standards to sort out these initiatives, like the Good Housekeeping Seal

22. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 98–101, 140–44 (1988), available at http://holmes.uchastings.edu/ballot_pdf/1988g.pdf (last visited Feb. 1, 2003).

of Approval or the “Volunteer Qualified Initiative,” it is difficult for people to sort through them. In California it must be a very simple initiative written in a few sentences that people can read, and it must have a very good ballot summary—so we have to have a good attorney general to give it a good ballot summary. All the gods have to be aligned. It is very difficult to get out a message about an initiative that is not simple or something people readily understand. I think it clearly can be done on issues that are simple. Electricity, for example, is an issue where you would not need a lot of money. The message is already there, and if certain types of people support an initiative on the ballot, the message will be disseminated.

But without issues that are not in the forefront, I think it is very difficult for the public interest community to get out those messages. I think one of the things we could talk about is building capacity to get messages out. That is something that our group has really focused on: HMOs, electricity, real populist issues. But other groups in the public interest community do not focus enough on shaping messages, and using very strong messages, as a way of changing politics. We should be creating the message and then following it with legislation, rather than starting with the legislation to create a message that may never get big enough in that forum to pass legislation.

MATTHEW MYERS:

You talked about the situation where an industry flooded the legislature with phone calls from the 800 number, and you said that we do not have the resources to do that. Then, when you started talking about the initiative, you talked about what we had to learn how to do as a movement. And, I’m struck that the public interest community is often dependent on far too few people and traditional skills in doing what we do. We have not been as creative or quick as the corporate community in using the tools out there. There are now enormous low cost opportunities to get our message out using the Internet, using electronic communications. And those 800 numbers—they are a lot cheaper today than they used to be. We need to begin exploring ways to do those things, because we can do the same things. Our organization has shut down the phone system in three separate state legislatures with quick campaigns because our message is, in fact, a more powerful one, and we do have more constituents out there. We have that funny thing on our side; it’s actually the truth.

Our organization is using a combination of radio advertising and phone banking that has inexpensively changed the dynamic in a number of legislatures fairly quickly. The real lesson that we still come back to is: what are the guts of the legislative process? Is it that people have to go home and face a constituency? We have not done a very good job at making them think their constituency is not only supportive of us (because we all know how to do polling), but cares enough about what we are doing to be watching, active, and ultimately, of course, to do the critical thing—to act at the voting booth. I think we spend far too little time talking about strategies to do those things better. Unless we do that, we can have all the rules we want, but if a member can vote ultimately the way they want to vote, then it is meaningless.

WENDY WENDLANDT:

Right. We spend much more of our time on the outside game than on those inside rules. I point them out because they are a big problem. But it boils down to capacity, so you must have the resources. These 800 numbers, they cost money. We have to be able to do it, so we need to have capacity. And it is training and teaching the people the skills that it takes to do this work effectively, so that we are not expending energy without getting good product. We also need to pay attention to targeting. In terms of a legislative campaign, we are not going to convince the entire legislature, so we really have to figure out who the targets are early on in a legislative campaign. Who are the people with us? Who are the people opposed? Who are the people in the middle? Then how are we going to move the people in the middle? It may be a field campaign, because we have the resources to do it, or there are more creative options for somebody who is particularly intransigent. We have done all kinds of crazy things: fish dogging candidates—sending giant fish into their districts on clean water battles. We did that in a campaign to pass a bill in the California Legislature; we chose five districts and we just followed those candidates everywhere with those fish. Then, in the legislature we lobbied the larger set of people. But that kind of thinking about strategy and resources, I don't think it is something we are particularly facile at doing.

CHARLES HALPERN:

Let me suggest that we, as lawyers, are not very facile at these things. We are here under the auspices of a law school talking about public interest law, not the public interest. I think this discussion underlines for me how far the public interest law movement has come and how modest we lawyers have to be in assessing what our contribution is within this larger movement. I think, Jamie, your comments about the work on the

outside suggest there is a very important role for lawyers in seeing opportunities and drafting documents. But public interest lawyers have to collaborate in a much larger process, in a movement toward democratic reform, which has both a legislative and a popular dimension.

The early successes of public interest law were almost exclusively in the courts, and the skills of lawyers were obviously relevant. One reason for those early successes was the element of surprise. The lawyers for the big corporations did not expect to have environmental advocates making sophisticated arguments under NEPA (the National Environmental Policy Act)²³ when it was first passed. But when we start talking about our participation in the democratic renewal movement, then we have to think more specifically about how we, as lawyers, contribute. In some ways we are less capable at the jobs of community organizing than people without a law degree. It is, to some extent, a handicap.

The other thing I want to highlight is the fact that we have been talking about the public interest law community as if we knew what that meant. I want to suggest that there is at least some strong evidence that no public interest law community now exists. Bob Fellmeth and I were talking earlier about other gatherings similar to this one to bring together the public interest law community, and he could not think of any. And I could remember only the one that we ran at the Center for Law and Social Policy in 1971. So that is a thirty-year hiatus since this community has come together. And without going into too much history, in 1971 it was a very contentious gathering. I am sure this gathering is going to have a smoother end than that one did. There, you had welfare rights advocates, such as George Wiley, simply blowing up at environmental advocates. While our contention was that there was a public interest law community, many of the discussants did not see it that way.

So I think we have to be more self-conscious about this, and, as we think about how to move forward, we should be thinking about how to build a sense of community among public interest lawyers. Few people here, except when they come to a conference like this, identify themselves as public interest lawyers. Most of us identify ourselves as environmental lawyers, health lawyers, lawyers for the poor, lawyers for children, or lawyers for the elderly. If we could build some consciousness

23. National Environmental Policy Act of 1969, Pub. L. No. 91-90, 83 Stat. 852 (codified as amended in scattered section of 42 U.S.C.).

of a public interest law community and of those institutions which bring the public interest law community together, it would be a great achievement.

One example of such an institution today is the Alliance for Justice, in Washington, D.C. It is one of the few places where, on an ongoing basis, these diverse communities of the public interest law movement come together and work on common matters. And—surprise—there is no shortage of matters of common interest that unify everybody. Some of you read today that the Bush Administration is altering the process by which the federal judges are selected, in a way which will close out the American Bar Association and leave the Administration freer to appoint real conservative ideologues to the federal bench. This is an issue in which everyone who is in the public interest law movement has a stake. We should be thinking about how we can identify those kinds of issues. Campaign finance reform is another one. We all have a stake in that issue. We should be identifying those things and thinking about how we work together on those matters of common interest.

What if, for example, a large and well-funded environmental organization designated one person on their staff to work on issues of common concern and other organizations followed the same route? We might be able to build a critical mass for a sense of a public interest law community that actually acts on behalf of shared interest.

JAMIE COURT:

Let me make a case for communication, too. When we passed this Oaks campaign financing conflict of interest initiative in Pasadena, we then had to defend it in court. Pasadena went to join another city in court, so we turned to a center that was a panelist earlier for legal help. It turned out they could not help us because they were already consulting with the Mayor of the city of Pasadena. That said to the activists in the community that this public interest lawyer was not on the side of the community's interest in campaign finance reform. So I think one of the things that needs to be done is to create some communication about where the outside efforts will merge with the inside efforts and with the interests of the public interest community at large, because it was really disheartening to have that happen. We had to spend \$10,000 to actually have a lawyer defend us. So it is important, it is really important, that as everybody walks away from this conference, people make an effort to communicate about what is going on, about whatever vital issues are identified here as a common cause, and it is rather easy to do that electronically. I don't know if anyone has set up a list server for the public interest community, but it might be a wonderful byproduct of this conference.

GENE KIMMELMAN:

Beyond communications, I think Charlie is talking about something more fundamental here that is very important. There are so many issues that are invisible to us with our own blinders on; Charlie mentioned a few. Here is a stray one: everyone is talking about using the Internet electronically to communicate with everyone else and about how it has been a wonderful, open system. Everyone uses a telephone wire, which the telephone company cannot control. But the cable companies, which have a fatter wire that can offer television service with their Internet services, are increasingly dominating the new high speed Internet. After numerous regulatory legal efforts before Congress, and through merger review, we have been unsuccessful at requiring it to be opened. A cable company can have its own company that dominates its high speed pipe with no obligations to the public, leaving no choice and no rate regulation. Now, it is a telecommunications issue, it is a media issue, but it is an issue that could affect everyone's ability to use these new technologies for public participation, for democratic action. We need to put information out about what this means. We need more involvement in these fundamental infrastructure issues. They are, I think, almost comparable to campaign financing.

WENDY WENDLANDT:

I want to add one other thing to Charlie's comments. I know from my experience from working with PIRG and doing a lot of recruitment at law schools that looking for graduating third-year law students who want to come and do public interest work is difficult. By and large, they do not understand public interest advocacy. Ralph Nader addressed one of the questions, discriminatory justice. My experience with graduating law students is that legal services is their vision of what being a public interest lawyer is all about.

And I fear that if we build a network of public service attorneys, we will quickly return to the screaming and shouting between the welfare people and the environmental people. There is a fundamental lack of understanding about what I always refer to as "Nader public interest advocacy." There are not a lot of graduating law students who think they are going to protect consumers' rights to have access to cable. It is not taught at law school. They do not understand it. They do not understand why an attorney would do that. Attorneys litigate, attorneys work for law firms, attorneys don't lobby in the legislature. So I feel

like there is a gulf in the definition of a public interest attorney, and our wing of the public interest movement is losing. The National Association of Public Interest Law (NAPIL) was set up with the very purpose of doing this, of introducing law students to the idea of public interest advocacy and getting them into it. The legal services wing of the public interest movement has largely overtaken it. I am not an attorney, so this is more my layperson activist's view of what the law community thinks of itself.

MATTHEW MYERS:

I think your comments complement what Charlie said. Part of the problem is not just that the public interest community does not communicate, but that we have not advanced the public interest law community. That is in part because people coming out of law school only think of public interest lawyers as doing litigation. Yet, as the world has moved, public interest law is much, much more than litigation. The sort of legislative skills in which many of us are engaged are a very a critical component. Lawyers may not be great organizers, but they are absolutely critical skilled professionals as part of the overall team. We are not doing enough to help the young lawyers (1) have an opportunity for growth in that career arena, (2) see its impact and its value, and (3) see why it requires the most skilled among us.

One of the things that we all need to be doing better is recruiting the best and the brightest by making our work as attractive as it was to us when we were mentored by a number of the people on this panel some years ago and encouraged to go into these fields. We are not doing enough of that because we are not demonstrating how that track is meaningful, how it does affect public policy—putting real live faces on the results. One of the things that I say to a lot of groups is that campaign finance reform is the perfect example. We are never going to sell it on esoteric principles of democracy, because that may interest every single person in this room, but it is not going to energize a whole host of people out there. Unless we make those issues real, in terms of the daily life of people, we are not going to energize the broad numbers necessary.

JAMIE COURT:

I think that is important when we teach young lawyers or when we go back to law school to teach public interest law—to teach politics, political power, and public opinion. Because, you are absolutely right, if we look at what the Supreme Court did recently, it basically said the right to commerce is more important than the Seventh Amendment right to trial, that workers can be shoved into binding arbitration contracts—a

very important principle.²⁴ The reason there has been such an erosion of rights and why binding arbitration is taking over more and more is because the public does not understand what it is losing, does not understand that the Seventh Amendment right to trial is part of the Constitution. There is no one getting that message out. It seems to me that public interest lawyers really need to learn to communicate politically in a way that is effective. I think the people on this panel have learned that over twenty or twenty-five years of experience, and it is something that somehow has to get back into the law schools.

MATTHEW MYERS:

There is an important lesson in skill development. We go to law school, and we do not learn to litigate; God knows what we learn in law school. But at some point early on, we theoretically learn to litigate. But those of us who work in the public arena do not really have much of the very same training. How to fashion a message to influence a judge is very different than how to fashion message to energize a populace—or to gain credibility with the media, or even to get in the media.

Ralph Nader said this at his Keynote Address; it is now much more difficult to get the media to cover these sorts of issues. I think many fewer people watch the news. Many of us do not have a lot of trouble getting to the media, but what we are not skilled enough at is mass communication. How do we synthesize our message so it energizes, how do we synthesize our message so the media will cover us? They will only give us twenty-five seconds in a sound bite, and we better make sure that what we say makes sense in those twenty-five seconds. If we are going to influence the legislative process (which brings me to my transition in the little time we have left to talk about this), can we do this work without a broader examination of the electoral process itself and who is involved and who is not involved? And that goes beyond campaign finance reform. Charlie, do you want to address that?

CHARLES HALPERN:

Yes, I think that is really where much of our discussion and the discussion of the panel before us leads. These discussions lead in the direction of democratic reform. I want to direct your attention to an

24. *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001).

article in the materials by Miles Rapoport²⁵ about the democratic renewal movement, which he thinks has the potential now in the wake of the 2000 election debacle that it never has had before. He talks about some of the possibilities of proportional representation or instant runoff voting.

CHARLES HALPERN:

There is an opportunity here and it seems to me that that is the direction we ought to be going. Miles Rapoport is known to some of you. He was an organizer in the Northeast and has recently headed a new organization called Dēmos, a Network of Ideas and Action, an institution which will be looking at issues of concern to progressives and to the public interest law community and which will think about where we want to head ten or fifteen years from now. It is not going to be dealing with the immediate legislative challenges. They are trying to create a vision of where we are heading with the idea.

Many of us are living with some version of a “Great Society” or “New Deal” picture of what the future looks like, which is quite antiquated. Some of the values that underlie that vision are ones that still animate us. But they do not take into account globalization and its challenges, they do not take into account technology, its challenges, and the opportunities it creates. So as someone said earlier, we need some institutions like the conservative think tanks that started at this task in 1970. We hope that Dēmos is going to be such an organization. Ideally, we will, as they have, become a network of such organizations. But at present we do not have very much. There is a brief write up of Dēmos in the materials, and the web site is www.demos-usa.org. It is worth having a look, because it addresses some of the longer term questions, among them democratic renewal, that I think our analysis leads toward.

GENE KIMMELMAN:

If I could jump in, I think that Charlie is absolutely right. But I think at the same time we are missing something about where we are right now and an immediate step that we need to take. You mentioned the last panel and the importance of kicking off electoral reform and campaign finance, but at that panel it almost splintered at the end as to exactly what that would be. Why was that the case? Because the reality of the political process tries to splinter us with amendments—to propose changes to a positive agenda that potentially destroy our own initiatives. It is not just countering that, which is obviously critical, but what is also missing here is the problem of the welfare advocates versus the environmentalists. I think we need to tackle that head on.

25. See Rapoport, *supra* note 11, at 41.

Having experienced twenty to thirty years of the variety of public interest advocacy that we have been talking about, we have some understanding of the inherent conflicts between a grassroots approach, an initiative approach, a legislative lobbying approach, and a legal strategy in court or regulatory approach. Yet we constantly keep coming back to the same conflicts: are we not reaching high enough, far enough? Are we not idealistic enough? Are we cutting a bad deal? Are we giving away too much? We can never make those issues go away; I think we need a more structured discussion in our community of how we approach those issues maturely and intelligently to avoid being splintered. How do we possibly differ in what our roles are as a grassroots person, or as someone who focuses on initiatives, or someone who lobbies the legislature, and agree to maturely disagree—because at different junctures we need to accomplish some incremental steps while trying to further the larger message. One thing I have learned above all in the lobbying process is that when we win, as seldom as it is, we often lose that in two, three, or four years. It is vulnerable if it is not sustainable with the grassroots movement or if there is some change in climate or change in events. Conversely, sometimes when we lose, we come back stronger two, three, or four years later. We need to build that incremental, sustained effort into our approach. Unless we can maturely engage in such continuing strategies, and build the media part onto it and a litigation strategy with it, we are going to have a difficult time—even with a long term vision.

MATTHEW MYERS:

You have raised a very difficult problem. The very nature of the people we attract are zealous idealists. To put them in the legislative process and ask them to deal with reality and compromise is a prescription for Maalox. But one of the challenges is to put that mix of people together to reach the best possible results. On every issue, we absolutely need the people who will not compromise, who will not bend a single inch, who will be the clarion call for purity—because that is the only way we know what the ultimate vision is. But somehow we also have to train the cadre of people who are capable of going in and helping us take those step-by-step changes that will get us there. Otherwise, we will do as we heard the last panel talk about—reach the precipice of change only to implode on ourselves and not get there.

GENE KIMMELMAN:

But, my point is, not only do we need both—we need to have both in the same room talking to each other about how and why both are significant. It virtually needs to be a curriculum within the public interest community, a course. It is something that we need everyone to sit down and do, to figure out what is meaningful incremental change and what is detrimental incremental change. There will be no one measurement, obviously. It will be no more scientific than political science itself, but I think it is an extremely important discussion to have. We always have it anecdotally or in a particular situation. We never do it with rigor in our community, and I think until we do that and have some feeling of respect for the way people approach it, we are going to have a difficult time getting to some of the bigger goals.

JAMIE COURT:

We just did that in California, putting together the consumer advocates, labor advocates, environmentalists—a lot of people with different interests. We had some very long meetings about how we could work together more effectively to fight our enemies, who seem always to be on the same page. Rather than simply looking at how we can help each other in our current causes, we decided to take a look at a new front legislatively—to choose issues that would legislatively hurt our common enemies. I think it is vital in Washington and in states where there are consumer groups, labor groups, and environmentalists, that those conversations have to occur. Because we are not big coalition builders, but the value of getting together in the way that these industries have, can be substantial. Some of the messages from such combinations are really extraordinary. Look, for instance, at “litigation explosion” and the “frivolous lawsuit” allegations from the insurance and business PAC advertising—these words have become part of our culture because every industry in America uses them and supports them and finances them, and we do not have a comparable joint effort on our side. So I can just say from our experience in California that it looks like something really positive to do.

WENDY WENDLANDT:

Some of the division comes from the distinction between lawyers who litigate, lawyers who are involved in writing legislation, and the nonlawyer advocates who are writing legislation—and who are relying on other people. One way to approach it in a training sense would be to bring people together issue by issue—bring litigators together with lobbyists and try to train each other on a substantive target. It is cross

training in a way because, after doing this work for twenty years and being involved in litigation, we come to understand that those things are related. But I think when we first start, that is not an obvious point. Litigators do not realize that the people are up there at the statehouse working, writing that legislation, and we could possibly fix it there more effectively. We could have written the law in a different way in the first place. Again, cross fertilization training would be helpful.

MATTHEW MYERS:

We have sort of rambled; this may be the most difficult session to organize. The obvious areas of discussion, the rules of the legislature, those are the sorts of things that we as lawyers are comfortable talking about. How do we have a more open process? How do we eliminate institutional bias? Those are some things we did not spend much time talking about, and I suggest that they are absolutely essential.

At a second level, we have talked about a host of skills that are not those traditionally taught to public interest lawyers: how to reach out and build a mass movement, how to communicate with people, and how to work the electoral process in an effective way.

And the third area relates to the electoral process itself. Unless the process is more open and participatory, the reality is that we could do all of our jobs perfectly, and the end product still is not going to be what we think it ought to be, because legislators will not fear going home to their constituents, and campaign money will still override the process.

So we are going to have to break down each of those pieces and recognize that all three are absolutely critical if we are going to move forward. David?

DAVID VLADECK:

A law school is hosting us; many of the panelists are lawyers. I was reminded by one of the questions that many of the law schools are now beginning to have courses on legislative lawyering. CUNY has externships placing law students in lobbying activities to learn first hand. This poses two separate questions. To what extent can these lobbying skills be properly taught in law schools? And what is the proper role of the lawyer in the legislative process? Our organization at one point quite dogmatically insisted that our lobbyists be lawyers. We have not come completely full circle, but we have come ninety percent around. And I think it would be very interesting to get the panelists' views on these questions.

CHARLES HALPERN:

First, I want to be clear about something that we have all talked about: when we are talking about legislation, public interest lawyers are involved in a political process. This is something that we have not always been straight about with our funders or ourselves. Now going back to my life as an ex-funder, I am aware that many foundations are antsy about advocacy and terrified about lobbying. Many sophisticated foundation executives think that no foundation dollars can be used for lobbying, which, as you all know, is completely erroneous.

So I think part of our job as educators is to help educate funders and also nonprofits. There are many nonprofits that think they cannot lobby. They are not likely to be represented here, but they need to understand that they can elect under § 501(h)²⁶ and have quite a safe harbor for their lobbying activities. So I think we should be playing that role.

As for the role of lawyers, I am not hopeful about training lawyers. As a former legal educator, training lawyers to craft punchy messages that really resonate with the voters is problematical. There is too much in our training and background handicapping that skill. I think some things can be taught, but teaching those skills to lawyers is very difficult, with some exceptions.

What seems to me to be missing is something that the conservatives have done so brilliantly, through an organization that they call the Federalist Society. It helps, from their point of view, to bring together law professors, activists, and law students; it becomes the recruiting system, and it provides roles for different people. For the real zealous idealists, there is a role for them; for the people who are just vaguely interested in supporting this kind of work, it does it for them. We have nothing comparable to that. So as we get clearer about what lawyers can learn and should learn to be effective public interest lawyers, it would be well for us to put together some sort of organization in which we all interact, including not only public interest lawyers but also law professors.

I had an odd experience when I was in residence at NYU Law School a couple of months ago. We were getting involved with the estate tax fight—another issue in which all of us have a real stake. The estate tax, as you know, is paid by less than two percent of all Americans. Yet, partly because it was renamed the death tax by its opponents, the idea of repealing the estate tax has developed a tremendous purchase. I walked down the part of the law school corridor where all the tax professors have their offices, and I had a conversation out in the corridor with one

26. I.R.C. § 501(h) (2000).

of them, a former IRS commissioner. He thought it was a disaster to have this thing repealed, but he had in no way communicated this to anybody. People started coming out of their offices, and they also were opposed to the repeal of the estate tax. One professor had just finished a law review article, which was being edited for the *New York University Law Review*, about how important the estate tax is in the overall structure of our tax system. So what I was able to do was to call up Gary Bass and get these guys, and they were all guys, plugged into this effort to oppose the repeal of the estate tax. There has been a sea of change in attitude on the repeal of the estate tax in the last four weeks, partly triggered by the very brilliant piece of public interest advocacy headed by Warren Buffet and Bill Gates, Sr., of all people, which is a reminder of the kind of ingenuity that we have to exercise. The point is to bring the professors into some kind of setting with people who have similar concerns. It is an interesting task in which we public interest lawyers might take a lead.

GENE KIMMELMAN:

I just wanted to comment on David's question. I think a course may be nice, but doing this kind of public interest advocacy requires an apprenticeship, a fellowship, it requires on-the-job training. It is difficult to make the abstract issues involved in rules meaningful until you are actually in a legislative process and feel and experience it. So I think that is critical. I would like to get a list of people who would sign up for such a course to know who to target for a fellowship.

I am one of the people who has probably come full circle on the question of lawyers and lobbying, because I started out feeling strongly that lobbyists should be attorneys. I do not feel that way now. I think the single criterion is exceptional analytical ability. Those who are really sharp can figure out what the constitutional issues are, why legislative language matters, and where it fits in with regulatory matters. Law school is not necessary for that; a lot of people who go to law school don't do that.

MATTHEW MYERS:

Can I just add one thing? In one place I disagree with Charlie. I think all lawyers would benefit from learning how to speak in a way that would influence legislators, because it is the sort of English that we ought to be using in the courtroom as well.

DAVID VLADECK:

It will take a ten-page disclaimer before you open your mouth. I would point to the energy emergency here. The question in the materials notes that it seems to take a crisis to provoke a legislative response these days. I think the question really has two parts: is that observation correct? And, if so, what does that say about our legislative process?

GENE KIMMELMAN:

I think it is correct. I was sitting there listening to Ralph Nader and thinking about healthcare. The majority of the American people want something for the uninsured, for prescription drugs, for managed-care consumer protection, and for privacy protection. You can go through a whole list where there is clear majority support. Why isn't it happening? Well, there are a lot of reasons, but one is the lack of intensity. So a crisis has that element of intensity. Yet, a crisis isn't even necessarily enough, because we will end up with some patchwork fix. Take energy—to the extent Congress has finally awakened and thinks there is a federal problem, it will be “just get me through this summer without brownouts.” I think that is where we are.

My reaction to what Ralph said was that, in addition to where he was going with new institutions, we can take crises and figure out how to mobilize people while they are so focused. Electricity is an example. It is our campaign finance system that gave us these laws. It is a travesty involving corporate power and avoidance of responsibility. It gives us an opportunity to talk about the impossibility of deregulation in certain areas and the fundamental problems with deregulation. It does not just have to be electricity; fly on an airplane or look at a cable television bill. There are broader issues that can immediately be raised. We should try to build something out of it so we can ask: “what is the next chapter reachable through this challenge?”

WENDY WENDLANDT:

That is true. Crises can be an opportunity for us; it is a terrible opportunity, but it provides an opening—it is on the public agenda. The legislature is actually poised to act. They feel like they have to do something—not always good, but at least something. But I think it is a mistake to get into the mindset that a crisis is the only way we can get reform. I think concerted campaigns by public interest groups with institutional support can work. The point of institutions is to have an entity to continue working day after day. It should not just mobilize in case of a crisis. I know Congress is a whole different beast on this score, but with concerted effort and focus at the state level, you can pass

legislation. We have all kinds of examples. It has become more difficult to do this, but taking a piece of legislation and working it through the process—from getting it written, the right sponsors, the right committee, the right testimony, the right endorsers, the whole campaign—it can be done. We, as the public interest community, can set the agenda. But it requires us to have more political power than we have now to do it on a wide range of issues.

MATTHEW MYERS:

The nature of the political process is such that the hard reforms against the special interests are much more difficult without a crisis. There is no question about that. It is also true that a crisis is almost always not enough if we are not poised to take advantage of it. The energy crisis in California becomes real if we put a face on it. Think of all the senior citizens on fixed incomes who have been crushed by the energy crisis. They are the face of that crisis. If they were the face of the campaign to do something about it, there would be a different result. It is not just an esoteric debate about energy and an occasional brownout.

We have seen occasions where we have missed the crisis opportunity, for example, gun control in Columbine. If we are not poised to figure out where we want to go and how to do it, we can have a massive crisis and not be ready to use it for the public good. What is happening now with the shootings in schools and the lack of response is appalling. But I think Wendy also makes an important point: we cannot let ourselves off the hook. We cannot wait for a crisis in order to be able to move. We need to figure out strategies to develop the support. Campaign finance reform is being debated on the floor of the Senate today, not because there was a crisis, but because there was a sustained strategy to do it. Anybody who has done this work realizes that we can mobilize that broad public support with clever messages and by organizing to build intensity, not in all fifty states, but in targeted places. So we cannot let ourselves off the hook by waiting for a crisis.

JAMIE COURT:

There is nothing anybody in this room is working on that they do not think is a crisis. The issue is: how do you make everyone else understand that it is a crisis? There was a crisis with HMOs long before anyone saw a Patients' Bill of Rights. We ran a campaign where, for five months, we faxed a different picture and story of an HMO victim who did not have a

remedy. We sent it to Congress every day, every morning. They got it. The repetition educates the community. I think that one of the problems is a body of knowledge we really have in our day-to-day work. I do not think that we really understand that the public doesn't receive it. I do not think that we understand the degree to which they don't receive it.

MATTHEW MYERS:

That is why that picture that you were sending to the legislature—if you'd been sending it to the local newspaper and citizens' groups—the communications go both ways. You probably did, I'm sure.

JAMIE COURT:

We did. We mostly faxed it to the media folks, and they picked up some of these stories, and that is how it got a face. In fact, when they openly debated HMO reform in Congress, a lot of those pictures were blown up on the floor, and those stories were told. It becomes something that no one can vote against.

I will give you an example of the difference between having a crisis and not. In 1998 proposition 9 would have stopped a lot of the deregulation bills.²⁷ That was the energy initiative our group sponsored; we got a very low percentage of the vote. If there were an initiative on the ballot tomorrow, it would pass. So the degree to which we harness an existing crisis is another issue. When they get to that level of visibility there's a lot of possibility.

DAVID VLADECK:

Jamie's last point is the segue into the next question. Accepting the premise that there is a growing concentration in the media, how much more difficult does that make your job? You need to convince an editor that there is a story here. If there are only two or three networks and there are only six or seven national newspapers, does it make it that much more difficult for your message to get across?

GENE KIMMELMAN:

I think that is where we are going and on two fundamental levels. First, it is not just the concentration of the media, but their ancillary connections. Let's take the name of a company: AOL-Time Warner. You think of all of the holdings—a vast web ranging from Internet to programming to cable properties, on through to the software world. Now, beyond the normal problem of the media just wanting to do what

27. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 40–43 (1998), available at http://holmes.uchastings.edu/ballot_pdf/1998g.pdf (last visited Feb. 1, 2003).

is easy, how much interference with editorial control do these conflicts portend? After fitting their model for the eight-second sound bite, there is a new barrier: how much will they want to cover issues involving their own company? I think journalists themselves worry about this. Add to this layer that the media still relies dramatically on advertising revenue. What leverage do those advertisers have beyond the immediate corporate interest of that media company itself? Where does the media firm have its investments? These are the people who bankroll a lot of what they put out there. What if they start wanting to pull back?

If there are more companies with different strategies, with different corporate bases, with a different view of what their mission is in the media, I think invariably we are going to do better. So I think at the rate we are going with the current political process and with the D.C. Circuit Court of Appeals recently overturning some cable ownership limits,²⁸ a few more major mergers will lead us to such a tight oligopoly that it will be very dependent on those few owners and their attitudes.

JAMIE COURT:

We do not really have a problem selling stories, but the problem is that there are not that many stories that can be sold. The rules of engagement are so narrow, and there are many issues that cannot be furthered in the media and that are left out.

Has anyone watched CNN lately since the merger? You will see now that the center of the *Morning Show* is the Internet. It's a character. They have a big screen up, and they go to the Internet. This is a company now owned by AOL, and they are encouraging Internet use. So half the stories on the *Morning Show* now are about the Internet. We have to play by those rules; so it is definitely a problem in terms of the breadth of the debate and what issues can be raised.

MATTHEW MYERS:

David, let me just say that this reality is our challenge. We should be talking about how we are going to communicate with large numbers of people given the reality of media concentration and bias, even while we worry about what to do about that reality. Therefore, we need to be developing improved strategies to use the Internet and other grassroots

28. *Time Warner Entm't Co. v. Fed. Communications Comm'n*, 240 F.3d 1126 (D.C. Cir. 2001).

mechanisms. If, in fact, AOL-Time Warner decides they do not want to cover our issue or they do not want to cover it when we want them to cover it, we still have built up a network and a means of communication that are not as dependent on them as we have traditionally been. I think we can do that, but we need to be creative. Again, not another skill they teach in law school.

DAVID VLADECK:

I want to switch gears for a moment. There is a question from a law student who is prompted by something that Wendy said about the way that law students view public interest opportunities. To make a very long question short—apart from a few fellowships, how does one break into public interest law, particularly public interest law that has a legislative component to it? Wendy, why don't you take the first crack at this?

WENDY WENDLANDT:

I spend time recruiting graduating law students to come do work for PIRG—and some of them are attorneys, some are not; we have mixed feelings about it. People have noted we have to beat out of young lawyers some of the things they are taught in law school. But it is possible, it has happened. So we definitely hire graduating law students to do advocacy.

In an organization like PIRG, with about 400 staff members around the country, having attorneys on staff is important; everything from serving as legal counsel to the program side, being in the legislature, helping to write the laws and craft them so they pass muster if later tested in court. So PIRG certainly hires graduating law students, and I know that we are one of the few organizations willing to take people and train them. We have a fairly rigorous training program to teach people. But then, as Gene said, it is really on-the-job training, learning how to do it. I know that there are not that many other organizations. But my advice is: find the organizations that do what you like and intern with them in the summers. I know that means less money, but there are fellowships out there. Get the experience. Some of those other organizations that would not traditionally hire somebody right out of law school will hire you if you worked there for the summer. But I leave that to my fellow panelists to confirm.

GENE KIMMELMAN:

We have just instituted a fellowship program. We only have one slot now in our Washington, D.C. office. Our San Francisco office has traditionally had fellowships. Our Texas office has tried. What we are

trying to do now is to go to foundations to support the training of advocates. I have one slot created that way through a Ford Foundation grant in telecommunications. So it is very difficult, but we are trying to make some opportunities available, and there ought to be a lot more. This is one of the areas requiring foundation help.

JAMIE COURT:

We are hiring. I would say to the law students that there are so few public interest lawyers in America that if you work really hard and really care, you can make a big difference. It is one of the few professions you could go into where you get your phone, your computer, your territory, and you can change an awful lot of lives. It is really worth doing.

MATTHEW MYERS:

David, there is a piece of it that no one has mentioned. There are an enormous number of good legislators, people who are trying to do the right thing, who are looking for staff on a regular basis.

JAMIE COURT:

Did you say an enormous number?

MATTHEW MYERS:

Nationwide, you add them all up together and there are a dozen or so. No, there really are, and there are terrific opportunities working with a legislator—with somebody inside the process. It is a different way of being an advocate. But do not kid yourself, the amount of good that can be done and the skills that can be developed in that process are often very substantial.

JAMIE COURT:

But if the legislator frustrates you, do not think that is really the public interest world. The games played as a legislative aide often times are not the games played in the public interest world. There is a big difference. I do think it is a good learning experience, but you have to be careful whom you choose.

DAVID VLADECK:

I have two questions about the democratic process. I would like to direct at least the first to Charlie. Both questions ask about the renewal of democracy. One asks the question about whether other means of

voting, such as to try to get away from the winner takes all theory of our electoral system, might ultimately improve the electoral process. The other question asks a related question: voters are having a difficult time identifying candidates who genuinely have public interest roots. There is no truth in advertising when it comes to political candidates. What measures do you think can be used, other than those the Supreme Court recently struck down regarding term limits, so voters have a better sense of where candidates stand on issues that are important to them?

CHARLES HALPERN:

This is the moment for serious public debate about a range of alternatives, such as the multimember district, proportional representation and the like, also electronic voting, the idea of an election day holiday—a forty-eight-hour voting period which would make it easier for people to get to the polls, and same day registration—where you can register on election day. Six states now have same day registration in place²⁹ and, not surprisingly, they are among the states with the highest voter participation. So there is a lot of experimentation that can be done, and I think it is very much in the interest of all public interest lawyers to participate in that experimental process.

With regard to truth in advertising in the electoral process, my first impulse is to have a kind of a First Amendment response, because that is a hazardous business to try to police. I would go very slowly toward doing that. Tracy Weston in Santa Monica has pioneered a very interesting system of getting fuller information available about candidates on the Internet. He has an ingenious system that he has been working out over the last few years. That seems to be a good idea, and then voters will have a richer information base on which to make their own judgments.

DAVID VLADECK:

I have one last question. Would it be helpful to open the lawmaking process by creating an Internet file for each bill where people could register their views on it?

WENDY WENDLANDT:

Sure, that would be great. Let's do it!

DAVID VLADECK:

Do you see any impediments to doing it? Do you think the legislatures in your states would warmly embrace this kind of proposal?

29. The six states are: Maine, Minnesota, Idaho, New Hampshire, Wisconsin, and Wyoming.

WENDY WENDLANDT:

They would hate it.

MATTHEW MYERS:

As a concept, it is a terrific idea. Anything that allows the public to communicate directly and effectively helps. I don't think we should kid ourselves about how quickly the corporate world would also figure out how to use it and would flood it—as they did with the 800 numbers. So the concept of allowing more direct, frequent, and effective communication is a vitally important one, but it needs to be thought about carefully.

WENDY WENDLANDT:

I was reading a story the other day about the volume of e-mail that Congress receives, and the percentage that is responded to or even read now is incredibly small. So that is the problem with e-mail; there is a sort of tally system about how many come in, but as soon as its importance is reduced to numbers, it is easy for somebody to just send out a manipulated and false registration of public will.

MATTHEW MYERS:

You know, David, if you remember when we were doing the McCain tobacco legislation in 1998, the tobacco companies spent tens of millions of dollars to flood congressional offices. So it's a system that can be worked for both good and bad.

GENE KIMMELMAN:

I can't think of a bill I ever worked on in Congress where it ever went to a vote without having a substitute amendment introduced hours, if not minutes, before it was actually brought up for consideration. It could be a change in five words or it could be entirely different. So the obstacles are enormous to achieving the public input goal.

MATTHEW MYERS:

Let me give each of the panelists just one minute to wrap up. Wendy, why don't you start.

WENDY WENDLANDT:

I want to talk about two things in closing. One of which I have said throughout, which is "little *d*" democracy. I think there is a real danger

that the public interest community forgets its roots and forgets that our power is with the people. The more the process, at whatever stage, puts power in the hands of the people, the better it is for us.

The second thing is that the challenge of our work is largely about building institutions that can continue to take on these issues as they come up. I work on the genetic engineering issue a lot. We did not even know that issue existed fifteen years ago. Suddenly, it is an important issue, and having institutions that can take on issues year after year as they arise is extremely important. Those are my two closing thoughts.

GENE KIMMELMAN:

On top of institution building, which I do think is critical, we are missing a tremendous opportunity to try to develop greater intensity to the public, not just in crisis, but regarding things we know people care about. We need to bring them into the process. So what we need to do is to reach out to the institutions that exist. To reach out to people who identify themselves by family, we need to appeal to the interests of their children or their parents that they care about. We need to reach out to people who identify themselves ethnically, people who identify themselves through community leaders, through religion. We need to make our message fit with how those people perceive themselves. Otherwise, I do not think our institutions will work.

CHARLES HALPERN:

I would like to see steps taken to build a greater sense of community in the public interest law world. We need the kind of institutional network in the public interest law world that will increase our long term capacity, our capacity to renew ourselves by recruiting and training new people. I would like to see us in the public interest law world try to assure a contemplative dimension in our work, in our institutions, and in our personal lives so that our zeal to do good does not lead us to trample the kinds of behavior that are important to our own well being, to our families, and, in the long term, to the cause that we want to serve.

JAMIE COURT:

I think we need to work together to build capacity, to share messages, and to build messages. We have many different skills in this community, and when we take on a legislative agenda, we have to cover all the components: the meeting, the message, and the lobby. Sometimes litigation is a big part of that. Sometimes we can file cases that further an issue. We have to find ways to build capacity and to work together.

Then the big thing we really need to think about is the message—finding a new vocabulary to communicate to this world that has been overrun with corporate messages for twenty-five years, messages that have been unanswered. We need to find a way to answer Ralph’s question: how do we talk about corporate expansion and the taking over of social rules, ethical customs, and the law? Until we find that vocabulary, we are going to be on the treadmill; so, when we find it, I hope we all use it.

MATTHEW MYERS:

I think the fact that we have devoted so much of this session to something other than talking about the rules of change is an honest and accurate reflection of the relative importance of the different issues we have discussed.

I have two specific closing thoughts, including one we have not even mentioned. But given the hybrid nature of influencing the legislative process, it is important. It is directly tied to the real democratic process: we as a public interest law movement need to look more like America. We need to look less White, less male. We need to, as the earlier topic on campaign finance reform noted, not be “doing for others,” but rather all working together. That needs to be a high priority and one that would lead toward Charlie’s goal of a public interest community.

Finally, I think we do have to remember the critical fact that, even more than in the judicial process or the agency process, legislatures are guided by an electoral system that involves winning over a broad base of support from a large number of people. That lodestar is essential for the kind of public interest change we want. It is absolutely critical even for sustaining the agency change or the changes we want in the courtrooms, because it is too easy to overturn them if we do not cover the broader base. As public interest lawyers,

whether our skills fit the courtroom or the legislative arena, the broader lessons of this session need to be front and center in all the work we do.

I want to thank the panelists, who I felt were terrific, and I appreciate everything you brought to the session today.