BRENNAN CENTER FOR JUSTICE
at New York University School of Law

TRANSCRIPT

Money in Politics 2009 Conference

Pre-Luncheon Keynote Presentation: Lawrence Lessig

Susan Liss:

I'm director of the Democracy Program at the Brennan Center and our campaign finance work falls under our side of the aisle called Democracy. I am incredibly thrilled to be working with fantastic colleagues and I really want to thank all of my colleagues who have put this program together today. My mind is just twirling on the things that we can do and we've only had one panel and two wonderful kickoff speakers. I'm here to introduce our keynote, and we are delighted and honored that professor Lawrence Lessig from Stanford Law School has been willing to fly across the country to share his knowledge with us. I know many of you are very familiar with his contributions to this field already. He is currently a professor of law at Stanford Law School and the founder of the school's Center for Internet and Society. He is one of the foremost intellectuals on intellectual property and intellectual property law and the Internet; from what I understand that tremendous knowledge base has seguewayed into a fascination and interest with these very important underlying issues involving campaign finance reform. He will be moving to Harvard to start a study on ethics and to start a center on ethics and institutional corruption in the fall. We are really very honored and so pleased to welcome him here and thank him for coming. Professor Lessig.

Lawrence Lessig:

Thank you very much. The advertisements for this conference said that the first keynote would provide some statistics and I, quote, "would provide slides" so here I am to provide the slides. I don't know if you saw this film, "Maxed Out." It's a story of credit card debt in the United States. This is an extraordinary problem. Of course, it has many dimensions, but one important source of the problem was a statute called the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. A little bit of a typo. There's no consumer protection in that act at all, but the effect of this statute was to make it effectively impossible for people to discharge credit card debts. So while Bethlehem Steel can escape pension obligations through bankruptcy and Enron can escape power obligations through bankruptcy, you can't get rid of credit card. You will carry these obligations forever. This idea was first proposed during the administration of President Bill Clinton. He was originally in favor of this idea. But then his wife read an op ed in "The New York Times" by Professor Elizabeth Warren and she started referring to, quote “that awful bill”. That's a small “b”, in that statement. And she is credited by Professor Warren with single handedly keeping the bill from becoming law, to her great credit, so to speak. But this statute like Jason in Friday the 13th would not go away, so in 2001 it returned. And by now First Lady Clinton was Senator Clinton, and by now she had received more than $140,000 in contributions from financial services companies. So what did she do now? In 2001, she voted for that awful bill twice. Now why is it she would flip on this bill? Well, of course, she sad it was not the money. Here she is at a bloggers’ conference about two years ago:

" Hillary Clinton: I don't think based in my 35 years of fighting for what I believe in anybody seriously believes I'm going to be influenced by a lobbyist or a particular interest group."

Lawrence Lessig:

The bloggers there did not believe her credit plan.

But I think the bloggers are wrong. I absolutely believe her, and I think you should believe her, too. You don't get to be Hillary Clinton by being pushed around by these kinds of considerations, but put that view of reality aside here. Focus on a perception. What do others think when they hear this story? What do they hear in any discussion you want to have about why Hillary Clinton did what she did after they hear $140,000? Will they trust that she gave the right answer for the right reason? Will they even engage in the conversation about why she did what she did, or will they believe, as 88% of the people in my district in California believe, that money buys results in Congress and this is just another example of that dynamic? I'm not sure if you saw this study just recently released by the University of Kansas, discussing the return on investment for spending money on lobbyists. This was the Tax Repatriation Act or the American Jobs Creation Act that they studied. They concluded that the return on lobbyist expenditures was something like 22,000%. Those are good numbers if you can get them, but they don't obviously always turn out that way, but the study points to an important economy we need to think about, an economy that focuses on the return to lobbyists' investment. Of course, not all such investment produces that kind of return, but many produce substantial return and as conservatives have been talking about forever, what we need to think about is whether the return from investments on lobbyists in Washington exceeds the return on investments in innovation, whether it makes more sense to spend money on lobbyists than to invent the next great mouse trap. Because if it is this dynamic, then they will invest their money here and of course, that's, in fact, exactly what they're doing now. Now there's a perception around here that there's nothing new in this, but I think we need to accept a reality here that there is absolutely a fundamental change in the way this economy of influences is working. Two sources to that change: a new demand and a new supply. A new demand for money that's been produced bid the explosion in costs to run political campaigns, professional political campaigns. And second, a new supply of money, a rise of efficient suppliers of money to these people who demand it to run these extremely expensive campaigns. This story is told by many, but I think none more convincingly than Robert Kaiser's new book, So Damn Much Money, focusing on these efficient suppliers, lobbying or lobbyists who don't of course directly provide this money, but indirectly facilitate this feeding of this dependency that members in Congress have on cash. Not cash to feather their own nests. This is not the old kind of corruption that we've been seeing since Hamilton got the debts of the United States paid and just after the Congress first sat. I agree with Dennis Thompson that most informed observers believe that the legislators' integrity is greater now than at any point in the past. Instead, this is money to secure a certain kind of tenure. Not tenure at a great place like this, but a tenure here, tenure in Washington. It is a kind of corruption, but it's not evil corruption. We could call it a kind of good souls' corruption, legal acts, ethical acts that corrupt because it destroys the faith in the institution that these members serve. It is destroyed because of this dependency. A dependency, think about this dynamic. Because the framers of our Constitution were focused explicitly on this. Here's Jefferson writing in Notes on Virginia. This dependency begets subservience and venality, suffocates the germs of virtue and prepares fit tools for the designs of ambition and these designs here are clear. It is what that paper described. Direct the policy that the clients want, hopefully at a return of 22,000%. It's a policy arbitrage charge that is at the middle of this economy of influence, and I believe this, in fact, has changed. Since President Clinton left office, the number of lobbyists in this city has doubled and the price per hour of lobbyists in this city has doubled. Basic economics tells us if the supply is going up and the price is going up, it can only be because the productivity is going up and the productivity of this system is going up. Now how is it going up? Well, again, I think Kaiser's work is extraordinarily important here. The Democrats have pooh poohed concerns about earmarks but earmarks in my view are in fact, the broken windows of this story. They are the kernel upon which this economy got built, and it's that kernel that then drives the second component, what Representative Cooper described to me as the current state of Congress, which is simply a farm league for K Street, as he put it. Increasingly members, staffers and bureaucrats have a common business model in their head. It is the focus on life after government, a life that is fed by lobbyists. Fifty percent, as Public Citizen describe of Senators, between 1998 and 2004 left the Senate to become office lobbyists, 42% of Representatives, and it is because of this access that they have this opportunity as Kaiser puts it. For lobbyists, access is a saleable commodity. Former members had it and it's that access that drives this economy of influence, the lobbyists delivering something of enormous value to Congress, channeling the money that they need to run their campaigns, businesses channeling an enormous amount of money to the lobbyists and Congress delivering the return. Now this is different, I think, fundamentally different from what kind of corruption we have seen in the past. Again, Kaiser. Money has been part of American politics forever. On occasion in the gilded age of the Harding administration, for example, much more blatantly than recently, but as quoting someone else, the scale of it has just gotten way out of hand. The money may have come in brown paper bags in earlier eras, but the politicians needed and took much less of it than they take through more formal channels today. Indeed, increasingly in D.C. money is the model. Again, Kaiser, in earlier generations, young men came to Washington looking for power and political adventure, often with ambitions to save or reform the country of the world, or the world, that should say. In the last fourth of the 21st century, such aspirations were supplanted by another familiar yearning, to get rich. Now the effect of this economy of influence on policy in America is real. From the most important to the most esoteric, from global warming to copyright, the distortions of this economy of influence are real. So let me talk about responsibility. So I've argued we have a world where the perception is influence is bought, and my view is reality is that policy is bent. The first leads to cynicism in the public. As they look at this institution of government and see no good reason for them to get involved. And the second is, extraordinarily bad policy, so what do we do? Well, obviously, this has to change, right? We need to find a way to restore trust to, make it that nobody can believe that money, is in, fact, buying results and second to end these distortions, distortions inevitable in any economy that looks like this. And of course, one way to do this increasingly my view, the only way to do this, is to follow Teddy Roosevelt's idea from 102 years ago to support citizens' funding of the nation's elections or in a Barack Obama font, it would look like that. And the closest, though I don't think perfect, current instantiation of that is the Fair Elections Now Act. But in my view this is a horrible framing title for this movement. This is not about fairness. Indeed, to evoke the framing of fairness is to ask the Supreme Court, it's to beg the Supreme Court, it's the red towel in front of the bull, it's to beg the Supreme Court to find a reason to strike this down. This is not about fairness. This is about trustworthiness in government. It's a statute designed to make it so that people can once again believe that the government is trustworthy, that what it does it does maybe because it is stupid. Maybe because it's too liberal, maybe because it's too conservative, but it doesn't do what it does because of the money. Now focusing to get this statute passed is the prime objective of the organization I started with Joe Trippi about a year ago called Change Congress, but I need to focus you on a more fundamental issue here. An issue of responsibility, and I want to frame this by putting it at a little different context. You might remember this exchange from the tragedy of the Exxon Valdez.

"Captain Henderson: Valdez, Valdez. [Silence] Captain Henderson: Yeah. It's Valdez. We should be on the radar there. We fetched up north of Goose Island near the reef. And evidently, we're leaking some oil and we're going to be here for a while. Just so you're notified. Over."

Lawrence Lessig:

Of course, an important question was raised about exactly how much Captain Henderson had had to drink that night and the claim was made that he was drunk and he fought that claim vigorously, but there is no debate about the fact that Henderson was an alcoholic and that he confessed to having had drunk what would to ordinary people be a significant amount that night. So he was a captain of an oil tanker that everybody knew was an alcoholic. Now we have a tendency to focus on the Hendersons in this story. The people who are captured by a dependency, a dependency which for many people they simply can't control, but I want you to think about not-the-Henderson. I want you to think about the other senior officers on that ship, who at each moment where they recognized that the captain was an alcoholic thought instead, this is not my problem, my problem is navigation. My problem is whether the oil gets on and off the ship quickly. My problem is the engine room. My problem is not his problem. My problem is my own area. Because we in this debate, all of us, are the equivalent of the crew in that story. We have a responsibility here. Not to blame the addict, but to blame those who allow this addiction to harm, and that has been us. We have not made this issue politically the single most important priority so far, and I want to bring you back to a time where someone tried to get it, the single highest priority. This book includes an extraordinary story of Arnold Hiatt, speaking to President Clinton in a public forum. Hiatt describes, I purposely referred to Franklin Roosevelt because Clinton had shared with me his admiration of Roosevelt. I said 57 years ago, Franklin Roosevelt faced a nation and a Congress that were largely isolationists and there was little or no sentiment for intervention in a war. This would have been, I think, 1939 and a war considered to be foreign and none of our business. No one said it could be done, but using his office and considerable leadership, Roosevelt educated the American people and developed a basis of support for lend lease, and then went to that he campaigned and provided the leadership to lead the nation to conscription. I don't know if you know that, but that vote, Hiatt said, went to the House and it won with a one vote majority. That was 1940. So here was Roosevelt, Hiatt says, taking positions that were not very popular and I, Hiatt says, was leading up to something because I knew where I was going to go. I said that the current campaign financing practices, I thought, were threatening this nation but in a different way, a way no less serious; that money in politics was undermining our democracy. So then I looked at Clinton and I said, “You know, he was in a similar position as someone we all admired and he was in a position to provide the same kind of leadership.” I said not all reforms were created equal and clean money was no exception but it was time for the Democratic Party to move out in front, not to talk about limits on soft money or even limits on hard money but to have an alternative to the current system that had generated the perception of sleaze, public financing. I said this was a great opportunity, but that it took a lot of courage and vision to stand alone. I felt strongly that there was a lot of public support for this. I said in my judgment, you'll make the second greatest contribution to the 20th century. And I said, god this sounds corny right now, Hiatt said, and if you do, you will, quote, save this republic by restoring government to the people. The story then continues. Clinton's response effectively slashed Hiatt to pieces, humiliating him in front of the group. Roosevelt was our transformational presidency. It is what Barack Obama spoke of in Nevada when he spoke of what his presidency was going to be. And I think, though many of us were strong supporters of Clinton, we need to recognize his was a failed transformational presidency. The question we have now is whether Obama's will be the same, because as much as I admire and love this man, our president, there is no sign yet that he recognizes that the fundamental bankruptcy that our nation faces is not GM or Chrysler, even Citibank, it is a bankruptcy here, and this is a bankruptcy not caused by lobbyists. The new cheer, first kill all the lobbyists is just as inane as first kill all the lawyers. Lobbyists are not the problem. It's how campaigns are funded that is the problem. Break that funding mechanism and you break the economy of influence that takes lobbyists who ideally should be providing the information that government needs and turns them into nothing more than maybe better paid lawyers. We can't afford to ignore this dependency in our government anymore. We need to recognize the costs. Again, Jefferson. We should look forward to a time and that is not a distant one, when corruption in this as in the country from which we derive our origin will have seized the heads of government and be spread by them through the bodies of the people. When they will purchase the voices of the people and make them pay the price. Jefferson was not speaking of the 21st century, but that's exactly where we are now. And what this system needs is the courage that Hiatt called upon Clinton to demonstrate. It is the courage to change not the descriptions that we've seen so far but change this. Thank you very much.