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SHOULD CAMPAIGN CONTRIBUTIONS BY LOBBYISTS BE BANNED?

***Donald L. Buresh, Ph.D., Esq**

Morgan State University, Maryland.

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ABSTRACT

In this essay, the topic is: A law banning lobbyists from giving campaign contributions. The country is the United States. The United States has a federalist system with multi-layers of federal, state, and local government organizations. If there is a law banning lobbyists from giving campaign contributions, it is important to understand whether it is federal law, a state law, or a local law. The problem is that if a law should exist that bans lobbyists from giving campaign contributions, is that that law is too broad on its face? It needs to be qualified and the conditions under which the law applies should be clearly specified so as to not violate any individual First Amendment rights. More importantly, the conditions need to be expressly stated under which the ban does not apply. This is the problem that this essay hopes to address. In doing so, a better understanding of the statement may hopefully be provided.

Keywords: First Amendment, Lobbyist Campaign Contributions, U.S. Sentencing Guidelines, 18 U.S.C. § 666, U.S.S.G. § 2C1.1,U.S.S.G. § 2C1.2.

INTRODUCTION

In this essay, the topic is: *A law banning lobbyists from giving campaign contributions.* The country is the United States. The United States has a federalist system with multi-layers of federal, state, and local government organizations. If there is a law banning lobbyists from giving campaign contributions, it is important to understand whether it is federal law, a state law, or a local law.

If there is a federal law, then it is important to understand under what conditions the federal law hold does. Does the ban prevent a lobbyist from giving campaign contributions to a presidential candidate? Does the ban only apply to individuals seeking public office in the congressional district where the lobbyist resides? If so, does the law ban the lobbyist making campaign contributions to the two senators in the state that the lobbyist resides? Does the law ban a lobbyist from providing campaign contributions to representatives who represent congressional districts where the lobbyist does not reside? What about individuals who are currently not members of the House or Senate, but desire to run for federal office? Does the ban include these individuals?

What about state governors, state representatives and state senators? If the ban is a federal law, does it encompass a prohibition from giving campaign contributions to candidates running for governor, state representative, or state senator? Again, if the ban is a federal law, does it address giving campaign contributions to local government officials, including state judges when state law requires them to be elected?

There is a similar set of questions exist if the ban is a state law. If so, does the ban affect federal campaign contributions by lobbyists to individuals running for President of the United States, members of the House of Representations or members of the Senate? If the ban is a local law, does it prevent lobbyists from contributing to individuals who are running for federal or state office? Also, would the ban violate any fundamental rights, such as the rights specified in the First Amendment as applied to federal election campaigns, and does the ban apply to rights stated in the First Amendment via the Fourteenth Amendment that deal with state elections?[1]

The problem is that if a law should exist that bans lobbyists from giving campaign contributions, is that that law is too broad on its face? It needs to be qualified and the conditions under which the law applies should be clearly specified so as to not violate any individual First Amendment rights. More importantly, the conditions need to be expressly stated under which the ban does not apply. This is the problem that this essay hopes to address. In doing so, a better understanding of the statement may hopefully be provided.

INITIAL CONDITIONS

Given the volume of questions that were listed in the introduction, and assuming that a lobbyist is banned from making campaign contributions in federal elections, this essay focuses on when campaign contributions are banned when a lobbyist is involved with lobbying legislators of a particular state. The federal campaign contribution issues are beyond the scope of this essay. If the federal campaign contributions were to be described, the probable outcome would likely be that the discussion would be overly complex and would certainly be a candidate for a law journal article in its own rite.

The instance where a lobbyist gives campaign contributions to individuals who are running for public office in another state will not be addressed. Also, there is no discussion forthcoming when a lobbyist makes campaign contributions to individuals who are running for local elected positions, such as county clerk or county coroner. By dealing only with state campaign contribution issues, the essay appears to be sufficiently focused so that an effective argument can be presented without it being too vague.

LOBBYIST ACTIVITIES IN A SPECIFIC STATE REGARDING A SPECIFIC ISSUE

Here, it is assumed that a lobbyist is lobbying a state legislator to help pass a bill that would promote the best interests of the lobbyist's

[1]LII Staff, First Amendment, *Legal Information Institute* (n.d.), *available at*https://www.law.cornell.edu/constitution/first_amendment.

client. The lobbyist would likely be making their pitch to both members of the assembly and the senate. The lobbyist could also be attempting to lobby the governor to ensure that the governor signs the bill into law. In other words, all legislative members and the governor, including members of their respective staffs, are candidates for the lobbyist's lobbying efforts. Thus, given this scenario, the question can now be effectively posed: *Should there be a law preventing a lobbyist from giving campaign contributions to lawmakers and the governor in a particular state?*

TIMING OF A POTENTIAL CAMPAIGN CONTRIBUTION

For the sake of argument, suppose that a lobbyist makes a campaign contribution to a particular lawmaker's campaign. Would the campaign contribution be made before the bill under consideration is passed into law, or would the campaign contribution be made after the bill under consideration is passed into law? The timing of the campaign contribution matters. A bribe is defined as "money or favor given or promised in order to influence the judgment or conduct of a person in a position of trust."[2] According to the Supreme Court in *Snyder*, the Court opined that the federal anti-corruption statute, 18 U.S.C. § 666, criminalized bribes involving a corrupt *quid pro quo* agreement before an official act, but was inapplicable to after-the-fact gratuities given to government officials.[3] It could be construed that a campaign contribution provided to a legislator before the aforementioned bill was passed into law was actually a bribe.

If the campaign contribution was given to a lawmaker after the specific bill was passed into law, the campaign contribution could be viewed as a gratuity or a reward for transforming the given bill into law, where a gratuity is defined as the "tendering, giving, or providing anything of more than nominal monetary value including, but not limited to, cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind."[4] A gratuity is basically "something given without claim or demand."[5] In this case, the campaign contribution was assumed to be given after the specific bill was passed into law. The campaign contribution could be thought of as a reward for a lawmaker doing the right thing.

An illegal gratuity is defined as a "gift or benefit provided to an official with the intent to influence their actions in their official duties. This can include anything of value given to judges, public officials, or voters during elections."[6] It should be remembered that an illegal gratuity, unlike a bribe, there does not have to be a *quid pro quo*. It is sufficient that an improper incentive results in legal consequences.[7] The main federal statute that governs illegal gratuities is 18 U.S.C. § 666(a)(1)(B), which deals with corruptly soliciting and accepting of benefits by public officials.[8] Furthermore, the U.S. Sentencing Guidelines sections U.S.S.G. § 2C1.1 and § 2C1.2 also address to bribery and gratuities, respectively.[9][10]

For example, if a business gives a judge a gift card to a local store after a receiving a favorable ruling, this might be considered as an illegal gratuity. Also, if a campaign donor significantly contributes to a legislator's campaign with the understanding that the donor will obtain favorable treatment in future legislation, this too could be thought of as an illegal gratuity.[11] If a legislator were to return some of the campaign contribution to the lobbyist after the bill had been passed into law, this would constitute a kickback, where a kickback is the "return of a part of a sum received often because of confidential agreement or coercion."[12]

ARGUMENT IN FAVOR OF BANNING CAMPAIGN CONTRIBUTIONS

Given the information above, if a campaign contribution looks like a bribe or an illegal gratuity, a lobbyist should not be able to give the money to a legislator. By preventing a lobbyist from giving a campaign contribution to state lawmaker before a specific bill is passed into law (potential bribe) or after a specific bill is passed into law (potential illegal gratuity), this ensures that a lobbyist does commit an illegal act or gives the appearance of committing an illegal act. Campaign contribution laws exist to promote integrity, honesty, and fairness in the legislative process. Bribery and illegal gratuity laws make sure that undue influence is minimized, if not completely eliminated. By doing so, the citizenry maintains its belief that government exists for the benefit of the people, and not necessarily for the advancement of special interests. It should be remembered that once the public loses confidence in its government, individuals are likely to do what they will, even if such actions are illegal. Society is built on good governance, and things that encourage good governance should be treasured, and not held in disdain or contempt. Society is fragile, and respect and obedience to laws that are seen as promoting the rights of all should be of foremost importance to everyone.

FIRST AMENDMENT ISSUES

The First Amendment is one of the bulkheads of American society. The First Amendment protects the five core freedoms of religion, speech, the press, assembly, and petition, and it is the freedom of speech and petition that are the crux of the issue.[13] A lobbyist, like any other citizen, has the right to express their concerns to their government representatives. Also, a lobbyist, like any other citizen, has the right to contribute to the political campaigns of the candidates of their choice. The problem arises when First Amendment rights

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[2] Bribe, *Meriam-Webster Dictionary* (n.d.), *available at*https://www.merriam-webster.com/dictionary/bribe.

[3] *Snyder v. United States*, 603 U.S. ___ (2024), *available at* https://supreme.justia.com/cases/federal/us/603/23-108/#tab-opinion-4907762.

[4] GratuityDefinition, *Law Insider* (n.d.), *available at*https://www.lawinsider.com/dictionary/gratuity.

[5] Gratuity, *Dictionary.com* (n.d.), *available at*https://www.dictionary.com/browse/gratuity.

[6] USLegal Staff, ExploringIllegalGratuity: Legal Definitions and Implications, *USLegal*(n.d.), *available at*https://legal-resources.uslegalforms.com/i/illegal-gratuity.

[7] *Id.*

[8] LII Staff, 18 U.S. Code § 666 - Theft or BriberyConcerning Programs ReceivingFederal Funds, *Legal Information Institute* (n.d.), *available at* https://www.law.cornell.edu/uscode/text/18/666.

[9] USSC Staff, §2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe;Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials;Conspiracy to Defraud by InterferencewithGovernmentalFunctions, *United States Sentencing Commission* (Nov. 1, 2025 amendment 836), *available at*https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?APP_GL_ID=§2C1.1.

[10] USSC Staff, §2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity, *United States Sentencing Commission* (Nov. 1, 2015 amendment 791), *available at*https://guidelines.ussc.gov/apex/r/ussc_apex/guidelinesapp/guidelines?APP_GL_ID=§2C1.2.

[11] USLegal Staff, *supra*, note 6.

[12] Kickback, *Merriam-Webster Dictionary* (n.d.), *available at* https://www.merriam-webster.com/dictionary/kickback.

[13] LII Staff, *supra*, note 1.

come in conflict with behaviors that could be construed to be attempts to unduly influence legislators who pass laws that benefit the interests of the lobbyist's clients or rewards legislators for passing laws that benefits the lobbyist's clients without taking into consideration the benefits to the public.

In *Harriss*, the Supreme Court upheld the Federal Regulation of Lobbying Act of 1946 when opining thatthe registration and disclosure requirements on paid lobbyists did not violate the First Amendment, provided that the law strictly applies strictly to direct communication with lawmakers regarding legislation.[14]In *Cammarano*, the Court held that the First Amendment does not require the government to subsidize lobbying by upholding Treasury regulations that denied business expense deductions that were spent on publicity aiming at defeating legislation.[15] In *Regan*, the Court reaffirmed *Cammarano* by opining that Congress can condition tax-exempt 501(c)(3) status of an entity refraining from substantial lobbying, observing that tax exemptions are a form of government subsidy.[16]

In *Brinkman*, a federal court ruled that a one-year uncompensated lobbying ban for former Ohio legislators was facially unconstitutional under the First Amendment, demonstrating that restrictions on post-office political advocacy may be illegal.[17] Because of *Autor*, the Obama administration scaled back its ban on registered lobbyists serving on federal advisory committees after the D.C. Circuit Court of Appeals reinstated a First Amendment legal challenge.[18] In *Calzone*, theEighth Circuit ruled that Missouri's lobbyist registration law violated the First Amendment when a lobbyist was not paid by their client and who spent no money.[19] In this instance, where the lobbyist was not paid by their client and spent no money, the lobbyist should have been able to contribute to the campaigns that were conducted by the candidates of their choice. The reason was because the lobbyist was not a registered lobbyist. In *Miller*, the Eighth Circuit opined that Missouri's two-year revolving door lobbying ban for former lawmakers and staff was unconstitutional because the state did not demonstrate a compelling anti-corruption interest and the ban was not narrowly tailored, thereby violating the First Amendment.[20]

The result is that lobbyist bans on multi-year all on post service are frequently struck down and challenged. However, rules that prevent officials from lobbying before the exact agencies or department where the lobbyist previously worked have survived initial judicial scrutiny.[21] The reason is because courts perceive lobbying as a form of petitioning the government that is protected by the First Amendment. For a ban to remain, the government must show that there is a direct link that prevents corruption, where the rules are narrowly tailored.[2223]

The same likely holds true for campaign contributions by lobbyists. Any attempt to ban campaign contributions will probably run afoul of the First Amendment. The reason will likely be that the government would have to show that there is a substantial or important, but not necessarily a compelling, interest to prevent campaign contributions by lobbyists to prevent corruption. The government would also have to show that the rule was narrowly tailored. In other words, the government would have to overcome the elements of exacting scrutiny, where exacting scrutiny is defined as a heightened level of judicial review that is employed by United States courts when evaluating government demands for disclosure of donor or membership associations under the First Amendment.[242526] The elements of exacting scrutiny include:

- ***Sufficiently Important Interest:*** The government must show a substantial or important, but not necessarily compelling, interest underneath the rule or law, such as deterring corruption or preventing charitable fraud.[2728]
- ***Narrow Tailoring:*** The disclosure requirement must be narrowly tailored to correspond the stated interest. It does not require the least restrictive means. A regulation or law fails if it significantly burdens private association or speech rights more than necessary.[2930]

Exacting scrutiny usually applies to laws where political committees or campaigns to reveal contributors are at issue. Courts also employ exacting scrutiny to protect membership privacy and advocacy group donor lists.[313233]

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[14]*United States v. Harriss*, 347 U.S. 612 (1954), *available at*https://supreme.justia.com/cases/federal/us/347/612/.
[15]*Cammarano v. United States*, 358 U.S. 498 (1959), *available at*https://supreme.justia.com/cases/federal/us/358/498/.
[16]*Regan v. Taxation With Representation*, 461 U.S. 540 (1983), *available at*https://supreme.justia.com/cases/federal/us/461/540/.
[17]*Brinkman v. Budish*,692 F. Supp. 2d 855 - Dist. Court, SD Ohio, 2010, *available at* https://scholar.google.com/scholar_case?case=14414119504919881259&q=•+Brinkman+v.+Budish&hl=en&as_sdt=400006&as_vis=1.
[18]*Autor v. Pritzker* (D.C. Cir. 2016), *available at*https://law.justia.com/cases/federal/appellate-courts/cadc/16-5037/16-5037-2016-12-16.html.
[19]*Calzone v. Summers*, 942 F.3d 415 (8th Cir. 2019), *available at* https://caselaw.findlaw.com/court/us-8th-circuit/2029785.html.
[20]*Miller v. Ziegler* (8th Cir. 2024), *available at*https://law.justia.com/cases/federal/appellate-courts/ca8/23-1902/23-1902-2024-07-29.html.
[21] Mary Ellen Klas, Federal Judge Rules that Ban on Lobbying by ElectedOfficialsViolates Free Speech, *Maimi Herald* (Aug. 9, 2023), *available at*https://www.miamiherald.com/news/politics-government/state-politics/article278103222.html.
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[24] David L. Hudson Jr., ExactingScrutiny, *Free Speech Center* (Jul. 2, 2024), *available at*https://firstamendment.mtsu.edu/article/exacting-scrutiny/.
[25]*Americans for Prosperity Foundation v. Bonta*, 594 U.S. ___ (2021), *available at*https://supreme.justia.com/cases/federal/us/594/19-251/ (Here, The Supreme Court struck down a California lawthatrequiredcharities to disclosetheir major donors. The Court opinedthatexactingscrutinystrictlydemandednarrowtailoring, where a blanket collection of donorlistswastoobroadbecauseitgenerated a dramaticmismatchwith the state'sinterest in preventingfraud.).
[26] Jeremy Broggi, Supreme Court Reaffirms First Amendment Protection For AssociationalPrivacy, *Wiley Law* (Jul. 14, 2021), *available at* https://www.wiley.law/newsletter-Supreme-Court-Reaffirms-First-Amendment-Protection-For-Associational-Privacy.
[27] Valerie C. Brannon, Victoria L. Killion, Whitney K. Novak,& L. Paige Whitaker, First Amendment Limitations on Disclosure Requirements, *Congress.gov* (Apr. 26, 2023), *available at*https://www.congress.gov/crs-product/IF12388.
[28]*Americans for Prosperity Foundation v. Bonta*, 594 U.S., *supra*, note 25.
[29]*Id.*
[30] Jeremy Broggi, *supra*, note 26.
[31]*Americans for Prosperity Foundation v. Bonta*, 594 U.S., *supra*, note 25.
[32]*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *available at*https://supreme.justia.com/cases/federal/us/357/449/ (Here, the State of Alabama attempted to force the NAACP to discloseitsmembershiplist. The Court protected the group'sprivacybecauseitrealizedthat by exposing the NAACP membershiplists, the memberscouldbesubject to economicreprisals and physicalharm. therebyviolatingtheirfreedom of association.).

CONCLUSION

In conclusion, although one would like to think campaign contributions by lobbyists should be banned, the reality is that such a ban would probably conflict with the First Amendment. Freedom of speech and the freedom to petition the government, whether the campaign contribution was given to federal, state, or local government officials. Freedom of speech and the freedom to petition the government are fundamental rights that flow through to the states via the Fourteenth Amendment. Based on the arguments made above, a ban on lobbyist campaign contributions would likely fail. It is the nature of our constitutional government.

DONALD L. BURESH BIOGRAPHY

Donald L. Buresh earned his Ph.D. in engineering and technology management from Northcentral University. His dissertation assessed customer satisfaction for both agile-driven and plan-driven software development projects. Dr. Buresh earned a J.D. from The John Marshall Law School in Chicago, Illinois, focusing on cyber law and intellectual property. He also earned an LL.M. in intellectual property from the University of Illinois Chicago Law School (formerly, The John Marshall Law School), an LL.M. in cybersecurity and privacy from Albany Law School, graduating summa cum laude, and an LL.M.in financial compliance and risk management from Albany Law School, graduating summa cum laude. Dr. Buresh received an M.P.S. in cybersecurity policy and an M.S. in cybersecurity, with a concentration in cyber intelligence, both from Utica College. He has an M.B.A. from the University of Massachusetts Lowell, focusing on operations management, an M.A. in economics from Boston College, and a B.S. from the University of Illinois-Chicago, with a major in mathematics and philosophy. Dr. Buresh is a member of Delta Mu Delta, Sigma Iota Epsilon, Epsilon Pi Tau, Phi Delta Phi, Phi Alpha Delta, and Phi Theta Kappa. He has over 25 years of paid professional experience in Information Technology and has taught economics, project management, negotiation, business ethics, business law, quality management, and cybersecurity at several universities. Dr. Buresh is an avid Chicago White Sox fan and keeps active by fencing épée, foil, and now sabre at a local fencing club. Dr. Buresh is a member of the Florida Bar.

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[33]*Buckley v. Valeo*, 424 U.S. 1 (1976), *available at*https://supreme.justia.com/cases/federal/us/424/1/ (Here, the Supreme Court heldthatlimits on politicalcampaignexpendituresviolate the First Amendment.However, the Court upheldlimits on direct candidate contributions. It created the notion that money is speech.).

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