

## It's an Election Year: How about those "suspicious" Campaign Contributions?

by J. Christoph Amberger, Director, Ethics Board.

One thing crops up periodically in Citizen complaints to the Ethics Board: Campaign donations. More specifically, campaign donations made by certain citizens to candidates or incumbent elected officials that seem to suggest shady business or influence peddling.

A clear case for the Ethics Board, you'd think?

Not so fast.

The Baltimore City Ethics Law (contained in Art. 8 of the City Code) actually goes to great lengths to **exclude** campaign contributions from the jurisdiction of the Ethics Board. And it all boils down on the definition of what constitutes a "gift" under the Law.

Generally speaking, a (completed) gift is something that is given freely and without "consideration" by a donor and accepted by the recipient. ("Consideration" here means "something that is given in exchange for something": A gift, conversely, is "something for nothing".)

That seems to fit the bill when it comes to political donations, doesn't it?

### **But does a campaign donation constitute a "Gift" under Art. 8?**

Counter-intuitively, the answer here is "no"!

Section 2-17 (b) not only "exempts" but expressly excludes political ("campaign") donations from the scope of the Ethics Law:

#### **§ 2-17. "Gift".**

(a) *In general.*

"Gift" means, except as specified in subsection (b) of this section, the transfer of any thing or any service of economic value, regardless of the form, without adequate, identifiable, and lawful consideration.

(b) *Exclusions.*

**"Gift" does not include the solicitation, acceptance, receipt, or disposition of a political contribution that is regulated under State Election Law Article, Title 13 {"Campaign Finance"} or under any other state law that regulates the conduct of elections or the receipt of political contributions.**

Consequently, because a political contribution is not a "gift" under Art. 8, the prohibitions enumerated under § 6-26 {Solicitation prohibited} and § 6-27 {Acceptance prohibited} also do not apply.

(That doesn't mean that political contributions are not regulated in the State of Maryland: Title 13 of Md. Code Ann., State Election Law §13–201 specifies that “[u]nless otherwise provided by law, this subtitle applies to all campaign finance activity associated with an election under this article.”)

However, as far as the “solicitation, acceptance, receipt, or disposition of a political contribution” that is regulated under Title 13 is implicated, the Ethics Board lacks jurisdiction to address campaign contributions as “gifts” under the Ethics Law.

Why is that?

### **Political contributions as protected speech**

Let's dig a bit deeper into U.S. jurisprudence concerning political contributions in the context of protected political speech:

Political contributions -- or “independent expenditures”-- are lawful monetary or in-kind donations to a candidate or political campaign by a qualifying natural or legal person. These have long been considered political speech protected by the First Amendment.

According to 5 USCS § 7322, the term "political contribution" means

- (A) any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose;
- (B) includes any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose;
- (C) includes any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and
- (D) includes the provision of personal services for any political purpose.

In *Buckley v. Valeo*, the Supreme Court clarified the functional meaning of “contribution” vis-à-vis the First Amendment:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. (...) While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

*Buckley v. Valeo*, 424 U.S. 1, at 21, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). (Emphasis supplied.)

While *Buckley* identified a “sufficiently important governmental interest” in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.

In 2010, the *Citizens United* court adopted and integrated J. Kennedy’s dissent in *McConnell*:

Access in itself, however, shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular. By equating vague and generic claims of favoritism or influence with actual or apparent corruption, the Court adopts a definition of corruption that dismantles basic First Amendment rules, permits Congress to suppress speech in the absence of a *quid pro quo* threat, and moves beyond the rationale that is *Buckley*'s very foundation.

*McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 296, 124 S. Ct. 619, 747, 157 L. Ed. 2d 491 (2003), overruled by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

The mere fact that speakers (i.e., donors) may have influence over or access to elected officials does not mean that these officials are corrupt:

Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

*McConnell*, 540 U.S., at 297, 124 S.Ct. 619 (opinion of KENNEDY, J.).

Reliance on a “generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.” *Id.*, at 296, 124 S.Ct. 619.

*Citizens United* concluded that “[t]he anticorruption interest is not sufficient to displace the speech here in question” and “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.*, 357.

### **But what about corruption?**

In *Sewell v. State*, the Court of Special Appeals (now called Maryland’s Appellate Court) supplemented the meaning of the term:

The word corruption is used in the sense of depravity, perversion or taint. The conduct must be a willful abuse of authority. A mere error in judgment or mistake is not enough to constitute corruption.

*Sewell v. State*, 239 Md. App. 571, 596, 197 A.3d 607, 622 (2018). (Emphasis supplied.)

The term “corrupt[ion]” does not appear in the Ethics Law. Its mission is predicated on furthering fair and impartial conduct and judgment, and the avoidance of conflicts of interest. Art. 8 provides in pertinent part:

**§ 1-1. Findings.**

(a) Trust in government essential.

The Mayor and City Council of Baltimore recognizes that our system of representative government largely depends on the people’s trust in their public servants.

(b) Need for impartiality.

The citizens of Baltimore City rely on their public servants to preserve their safety, health, and welfare through fair and impartial enforcement of laws, imposition of taxes, and expenditure of public funds.

(c) Citizens’ right of reliance.

Each citizen of Baltimore City has a right to be assured of the fair, impartial, and independent judgment of all public servants.

Art. 8 not only pertains to actual conflicts of interest, but also addresses the “appearance of a conflict of interest,” e.g., § 6-12 {Exceptions – Board regulation}, R 06.12.1. {Specific employment and interests exempted by authority of Ethics Code}, or the “appearance of impairing” the [gift] recipient’s impartiality, § 6-29 {Exemption limitations}.

**What about Conflicts of Interest?**

Merriam-Webster’s DICTIONARY OF LAW (1996) defines “Conflict of Interest” as

- (1) a conflict between the private interests and the official or professional responsibilities of a person in a position of trust
- (2) a conflict between competing duties (as in an attorney's representation of clients with adverse interests)

<https://www.merriam-webster.com/dictionary/conflict%20of%20interest>. Access 12/12/22.

Mindful of *Citizens United*’s programmatic conclusion that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” the Ethics Law does not consider “corruption” and “conflict of interest” (or the appearance thereof) in the context of lawful campaign or political donations because “[t]he interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards [...] must give the benefit of any doubt to protecting rather than stifling speech.]” *Citizens United* at 327, 130 S. Ct. 876, 891.

Because of those Constitutional considerations, matters pertaining to the acceptance, solicitation, acceptance, receipt, or disposition of a lawful political contribution by an elected official are outside of the scope of the Baltimore City Ethics Law.