AMERICAN CIVIL LIBERTIES UNION of the NATION'S CAPITAL

Testimony on behalf of the

American Civil Liberties Union of the Nation's Capital

by
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before the
Committee on Government Operations
of the
Council of the District of Columbia

on
Bill 19-713, the "Campaign Finance Reform Amendment Act of 2012,"
Bill 19-730, the "Money Order Restriction Amendment Act of 2012," and
Bill 19-733, the "District of Columbia Employment and Corporate Contribution Amendment Act of 2012."

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The American Civil Liberties Union of the Nation's Capital appreciates this opportunity to testify on these three bills, two of which raise significant civil liberties issues.

Bill 19-730

Bill 19-730, the "Money Order Restriction Amendment Act of 2012," would prohibit making or receiving a campaign contribution of $25 or more in cash or by money order, presumably because the source of such contributions is untraceable or easily disguised.

Agreeing with Justice Brandeis that in politics, "Sunlight is . . . the best of disinfectants,"[1] the ACLU favors disclosure of the sources of campaign contributions as the proper alternative to overly restrictive limitations on such contributions. We therefore do not oppose Bill 19-730.

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[1] Louis D. Brandeis, OTHER PEOPLE'S MONEY 92 (1914).

Bill 19-733

Bill 19-733 is the "District of Columbia Employment and Corporate Contribution Amendment Act of 2012." According to its long title, it would (1) ban Councilmembers from being employed by current or aspiring District government contractors, (2) require disclosure by a Councilmember's immediate family of any employment by current or aspiring District government contractors, and (3) ban all campaign contributions from corporations. Although omitted from its long title, the bill has an additional major purpose: it would also (4) ban all campaign contributions from District government contractors. We address these items separately.

1. **Prohibiting Councilmembers from being employed by contractors**. We do not feel that there is a civil liberties objection to this proposal. However, the Council should be aware of how broadly it would sweep. For example, if a major local university had a contract with the District government — however small — no member of the Council could be employed by that university as a professor, or even as a part-time adjunct professor, no matter how unrelated the contract might be to the Councilmember's academic field.

2. **Disclosure of employment of Councilmembers' family members by contractors**. We likewise do not feel that there is a civil liberties objection to disclosure of this information to the Ethics Board. However, the proposed definition of "immediate family" is far from "immediate," as it includes such rather remote relatives as the new spouse of a widowed grandparent or of a divorced sibling or grandchild. The Council may wish to substitute a narrower definition.

3. **Prohibiting contributions by contractors**. Banning all contributions from all D.C. government contractors raises more difficult questions. "Pay to play" is not a civil liberty. But not all contributions by contractors are "paying to play," and many contractors are individuals who have First Amendment rights to make political contributions. Bill 19-733 makes no effort to tailor its prohibition to address the "pay to play" problem.

Government contracts come in many varieties, from multi-million dollar contracts with business corporations to small personal service contracts with individuals. Political contributions likewise come in many varieties, from a $2,000 contribution to a mayoral campaign committee to a $25 contribution to a candidate for ANC commissioner. And while some

elected officials have influence over the awarding of certain contracts, others — such as ANC Commissioners — do not.

The category of District government contractors includes, for example, individuals hired by agencies to be sign-language interpreters for public events, or hired by the Attorney General's office to be to be expert witnesses in lawsuits, or hired by the D.C. Council to be its Special Counsel in an investigation. Contractors may include consultants hired to study some aspect of an agency's operations or artists hired to create murals in government buildings. Such individual contractors may be little different from D.C. government employees, who are free to make campaign contributions. And their contracts rarely if ever rise to the level of any politician's attention. A flat prohibition on such people's First Amendment right to support the candidates of their choice cannot be justified as necessary to prevent corruption or the appearance of corruption, which is the only lawful justification for limiting their rights. There is no corruption or appearance of corruption in a $100 political contribution by a Spanish-language interpreter who is contracted by the Office of Hearings and Appeals to assist a witness at a hearing, and whose contract is not approved by or even known about by politicians. That person's contribution is no more corrupting than if the same person were employed by the same agency to provide the same service. Even assuming that some contributions may improperly influence the award of some contracts, it is certainly true that the vast majority of contributions by contractors have no such effect. Bill 19-733 makes no effort to distinguish those that may from those that surely will not.

Additionally, political contributions in the District of Columbia are already subject to very low caps. For election campaigns, the limits are: Mayor, $2,000; Council Chair, $1,500; At-large members, $1,000; Ward members, $500; ANC members, $25. Contributions in such modest amounts — which are becoming a smaller percentage of campaign expenditures from year to year as the cost of campaigns rises — are unlikely to act as bribes.

Indeed, a ban on all contributions by contractors would have the perverse effect of prohibiting ordinary citizens with small contracts from making small contributions to candidates who have no interest in or influence over their contracts, while having no effect at all on large contributions from people who are not themselves contractors but who are connected to entities that have contracts — perhaps large contracts that do attract the interest of politicians. Similarly, an across-the-board ban on contributions by all contractors would treat contractors with personal service

contracts unequally with comparable government employees, who are free to make contributions, subject to the statutory limits.

We therefore believe the proposed absolute ban on all contributions by all contractors is unconstitutional, as it is not narrowly tailored to serve the government's interest in avoiding "pay to play" corruption.

We note that D.C. law already requires all campaign contributions of $50 or more to be disclosed, and in practice virtually all contributions are disclosed because candidates are eager to show how much money they've raised. Additionally, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 requires the mayor to post online a list of all individuals and businesses that have contracts with the D.C. government.[2] Thus, voters and government watchdogs can determine which contributors have contracts and which contractors make contributions. Voters can then decide for themselves whether anything is amiss.

Disclosure could be made even more effective. Even with the publication of a list of contractors, it is not easy for the public to know the connection between an entity that is a contractor and a contributor who is an officer, manager, or major owner of the entity. Thus, if the Council wishes to legislate further in this area, we suggest that it do so by further strengthening the law regarding disclosure. For example, the law could require contributors to disclose, with their contributions, whether they have (or are seeking to obtain) a contract with the District, and whether they are an officer, manager, or major owner of an entity that has (or is seeking to obtain) a contract with the District. Candidates could then be required to disclose that information as part of their public campaign finance reports. Members of the public and the media would then have the easy and immediate ability to see these connections.

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[2] "The Mayor shall develop a list of each business entity transacting any business with the District government, or providing a service to the District for consideration, to include the business name, address, principals, and brief summary of the business transacted within the immediately preceding 6 months. The list shall be available online and published on January 1st and July 1st annually." D.C. Code § 1-1162.24(h). (D.C. Law 19-124, § 224(h), effective April 27, 2012.)

4. **Prohibiting contributions by business corporations**. Banning all contributions from business corporations may be constitutional,[3] but it is also unnecessary, in our view.

As already noted, there are already very low caps on political contributions in the District of Columbia. We think it no more reasonable to believe that a maximum contribution of, for example, $500 to a candidate for a Ward seat on the Council will be corrupting if made by a business corporation than if made by an individual, a nonprofit corporation, or a labor union. We are aware of no evidence that there is more corruption in states that do not prohibit corporate contributions (such as Maryland, Virginia, California, New York, New Hampshire, Oregon and Vermont) than in states that do.

An additional practical consideration that the Council ought to bear in mind is that the Supreme Court's ruling in *Citizens United* — that corporations have a First Amendment right to make independent expenditures in support of or in opposition to a candidate — means that a potential consequence of a ban on corporate contributions is that corporate money will simply be channeled into independent expenditures. A strong case can be made that such channeling would make "the cure worse than the disease," as such expenditures need not be disclosed and enable independent speakers to engage in tactics that candidates would eschew. The law of unintended consequences operates with great force in the campaign finance area, as federal experience during the past four decades proves beyond doubt.

What Bill 19-733 does not address, and that the Council might more profitably address, is the *evasion* of existing contribution limits by coordinated contributions made by affiliated corporations and/or by corporations and their officers, directors and managers an/or by partnerships and their partners. Such evasions may enable a single entity to make contributions large enough to have a corrupting effect.

We pointed out last year, in our testimony on the bill that became the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act, that while the ACLU opposes overly restrictive limitations on campaign contributions, we do not oppose

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[3] Federal campaign finance law and the laws of a number of states prohibit campaign contributions by corporations. We are not aware of any cases addressing the constitutionality of such laws in the wake of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

regulations that make possible the effective enforcement of reasonable limitations. Thus, for example, where a reasonable limit on contributions exists, we have not opposed rules that treat coordinated expenditures as contributions. We therefore would not object to a bill that treated as a single entity, for purposes of enforcing reasonable contribution limitations, two or more corporations, or other entities, that are *in fact* under common control.

An amendment that was proposed to Bill 19-511 on second reading last year made an effort to address this issue, but (as we testified at the time) it was not carefully drafted. We suggested that "[i]f the sponsor wishes to pursue this idea, it should be through the introduction of a separate bill, more carefully drafted, and subjected to thorough public scrutiny at a public hearing." We repeat that suggestion.

Bill 19-713

Bill 19-713, the "Campaign Finance Reform Amendment Act of 2012," would require disclosure by elected officials of their external fundraising activities for non-profit organizations, and would also ban campaign contributions by District government contractors and corporations.

1. **Disclosure of solicitations by elected officials**. Section 2(b) of Bill 19-713 would require the Mayor and Councilmembers to disclose the identities of any nonprofit charitable organizations on whose behalf they have personally solicited donations or other support. We do not think there is a civil liberties objection to that provision.

2. **Prohibition on corporate contributions**. Section 2(e) of Bill 19-713 would make it unlawful for "any entity, as defined in [D.C. Code] § 29-101.02," to "make any campaign contribution or expenditure to or for any candidate." An "entity" therefore means:

(i) A business corporation;
(ii) A nonprofit corporation;
(iii) A general partnership, including a limited liability partnership;
(iv) A limited partnership, including a limited liability limited partnership;
(v) A limited liability company;
(vi) A general cooperative association;
(vii) A limited cooperative association;
(viii) An unincorporated nonprofit association;

(ix) A statutory trust, business trust, or common-law business trust; or
(x) Any other person that has a legal existence separate from any interest holder of that person or that has the power to acquire an interest in real property in its own name.
[But not including:]
(i) An individual;
(ii) A testamentary, inter vivos, or charitable trust, except a statutory trust, business trust, or common-law business trust;
(iii) An association or relationship that is not a partnership solely by reason of § 29-602.02(c) or a similar provision of the law of another jurisdiction;
(iv) A decedent's estate; or
(v) A government or a governmental subdivision, agency, or instrumentality.

Even were we to agree that contributions by business corporations should be prohibited, this provision would go much too far. Under this bill, entities prohibited from making contributions would include not only non-profit corporations such as Emily's List, NARAL, and Greenpeace, but even "unincorporated nonprofit association[s]," which would include a group of friends or neighbors who joined together to make a contribution in the name of "Southeast Citizens for Smart Development" or "Capitol Hill Citizens Against Video Surveillance." A prohibition this broad would be held unconstitutional by the courts.

Additionally, the bill's proposal to prohibit any such entity from making "any campaign . . . expenditure . . . for any candidate" appears to be a straightforward attempt to overrule the Supreme Court's decision in *Citizens United*. If adopted, the only effect of that provision will be to expose the District government to a large bill for attorneys' fees after a losing litigation.

As noted earlier, we suggest that rather than tilting at windmills it would make more sense for the Council to focus on the evasion of existing limitations on contributions, where the real problem appears to lie.

3. **Prohibition on contributions by contractors**. Bill 19-713 has several detailed provisions about contractors, which we discuss separately.

(a). Section 2(d) of the bill provides:

No public official or public employee may solicit campaign

> contributions or investments in exchange for the prior award of a contract or the promise of a contract with the District of Columbia government.

Soliciting money in return for the promise of a future government contract is bribery. It is already a serious crime. *See* D.C. Code §§ 22-704; 22-712. It is not clear why it also needs to be prohibited by the ethics law, but it is certainly not protected conduct. However, prohibiting the solicitation of a campaign contribution "in exchange for the prior award of a contract" seems problematic. Since the contract has already been awarded, the candidate has nothing of value to offer, so there is nothing to "exchange." A request to "please support me; I've been your friend in the past," unconnected from any promise of future action, seems like ordinary politics, not bribery.

(b). Section 2(d) of the bill also provides that

> No person, business, or contractor who has been awarded a contract with the District of Columbia government may invest in a financial venture in which a public official has at least a 5 percent interest, if that official is in a position to vote on or have approval of a contract to such person, business, or contractor.

This seems unobjectionable to us, as it is tailored to situations in which the public official has a significant financial interest and a direct involvement in the financial wellbeing of the contractor.

(c). Section 2(d) of the bill would also ban "contributions, to or for any organization authorized to make contributions to or expenditures for the benefit of candidates who may vote on or have approval of the award of a contract to the District contractor or its affiliate."

Limiting the ban to apply only to contributions to a candidate who (if elected) will have a direct role in approving or awarding a contract to the contributor would be the kind of narrowly tailored approach that is missing from Bill 19-733. Contributions to a candidate's "exploratory committee; . . . legal defense committee; . . . transition committee; . . . inaugural committee; [or] constituent-service program" would appear to fit this description. On the other hand, this provision includes contributions to a Political Action Committee, which could be an independent group planning to run uncoordinated advertisements supporting a particular candidate. That part of the proposed ban is very likely unconstitutional.

(d). However, in apparent contradiction to the relatively narrow ban just discussed, section 2(c) of Bill 19-713 provides that "All contributions within the calendar year in an aggregate amount or value in excess of $50 or more that do not contain a confirmation that the contributing entity is not a District contractor shall be returned." This would have the effect of completely banning all contributions above $50 per year by contractors — even contractors whose contracts involve no political approval or influence — and would render the provision just discussed entirely superfluous. It would be unjustified as a matter of policy, and unconstitutional, for the reasons discussed in our comments on Bill 19-733.

(e). Section 2(d) of Bill 19-713 would also prohibit the District from awarding

> any contract, . . . [even if] chosen through a competitive process, . . . to any person, business, or contractor, and any immediate family, affiliated companies, affiliated persons, or business with which he or she is associated, who has made within the three previous calendar years one or more contributions totaling in aggregate in excess of $2,000, to any organization authorized to make contributions to or expenditures for the benefit of candidates who may vote on or have approval of the award of a contract to such person, business, or contractor, a campaign committee for a candidate for election or reelection to a public office; a political committee; a political party committee; a Political Action Committee; an exploratory committee; a legal defense committee; a transition committee; an inaugural committee; a constituent-service program.

It is commendable that Bill 19-713 attempts to address the "affiliation" problem, but this provision goes much too far. The phrase, "business with which he or she is associated" is defined in the new ethics law to mean "any business of which the person or member of his or her household is a director, officer, owner, employee, or holder of stock worth $1,000 or more at fair market value, and any business that is a client of that person." D.C. Code § 1-1161.01(5). Thus, Marriott International, Inc., would not be allowed to win a contract in a competitive bid process if *any person* who owns (at current value) 26 shares of Marriott stock (of the 331 *million* shares outstanding)[4]

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[4] At current values, 26 shares of Marriott are worth about $1,004, out of a market capitalization of about $12,790,000,000 ($12.79 billion). *See* http://www.nyse.com/about/listed/lcddata.html?ticker=MAR (last visited June 25, 2012).

gives $1,000 a year to a political party committee or a Political Action Committee. And an individual would be prohibited from getting a contract if she owns 26 shares of Marriott stock and Marriott International makes contributions of $1,000 per year. This makes no sense. Nor should a person be barred from winning a contract in a competitive bid process because (under the unrealistic definition of "immediate family") her grandmother's new husband or her brother's wife gives $1,000 a year to a political party committee or a Political Action Committee.

(f). Finally, section 2(d) of the bill also provides that

> No person who has acted as a fundraiser by directly soliciting contributions for the election or reelection campaign of a candidate or public official and secured in excess of $10,000 in contributions in the aggregate during any one election, nor his immediate family, employer, or employee, shall knowingly receive any contract, lease, or appointment to any Board or office with the District of Columbia government within three years of such fundraising.

This proposal addresses what is known as "bundling," and that is a fair issue to address. Again, however, we think the proposed provision sweeps far too broadly. We think it would be quite unreasonable, and arguably unconstitutional, to bar Marriott, PNC Bank, George Washington University, or any other entity from receiving any District government contract for three years because *any one* of their thousands of employees independently exercised her constitutional right to raise $10,001 in lawful contributions for her favorite candidate, as this section would provide.

We appreciate your attention to our comments.