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Political Law Alert

November 2012

Federal Ban on Government Contractor Political Contributions Upheld

On November 2, 2012, the District Court for the District of Columbia, two days after oral argument, upheld the long-standing ban on political contributions from federal government contractors. In *Wagner v. Federal Election Commission* ("Wagner"), three independent contractors with various federal agencies argued that the ban on federal contractor contributions in section 441c of the Federal Election Campaign Act ("FECA") violated their First and Fifth Amendment rights. A copy of the opinion is [available here](#).

The ruling keeps federal contractors outside the bounds of the Supreme Court's decision in *Citizens United*. Unlike other corporations, federal contractors may not make contributions, either directly or in-kind, to independent expenditure-only committees, commonly known as Super PACs. In addition, while officers and employees of federal contractors are free to make personal political contributions, and to establish and donate to federal PACs, an individual who IS the federal contractor may not make contributions to federal candidates, national political parties or federal Super PACs.

Background

The challenged FECA section prohibits any person who (a) enters into any contract with the United States for "personal services, or the furnishing of any materials, supplies, or equipment...or for selling any land or building [where] payment for the performance...is to be made in whole or in part from funds appropriated by the Congress" (b) from making or soliciting a contribution to "any political party, committee, or candidate for public office or to any person for any political purpose or use."¹ Section 441c is thus a federal-level "pay-to-play" ban: it seeks to guard against federal contractors using political donations to help secure more business. The plaintiffs in *Wagner* have limited duration consulting contracts with federal agencies. All want to make contributions to federal races during the current election cycle but are subject to the ban.

Analysis

First Amendment Claim

While political contributions are protected by the First Amendment, here the court concluded that preventing corruption is a sufficiently important government interest to justify the ban. The court noted that section 441c was originally passed in the 1940s in response to federal contractors being required to buy campaign books at higher prices to obtain government business. The court also pointed to more recent examples, such as a 2005 Connecticut contractor contribution ban passed after the governor awarded over \$100 million in state contracts to a large donor.

The plaintiffs argued that the ban is too broad, as it applies to persons at low risk for corruption, including those who do not receive their contracts through a bidding process. The court, however, held that Congress has considerable flexibility in deciding how to address corruption given the importance of the government interest in preventing it.

Equal Protection Claim

The plaintiffs argued that section 441c violates their rights under the Equal Protection clause of the Fifth Amendment because they are treated more harshly with respect to political contributions than are federal employees and the officers, directors, shareholders and employees of corporations that contract with the government.

Applying an "intermediate" standard of scrutiny, the court found that government contractors are different from federal employees and from corporate government contractors in significant ways that justify the ban. Federal contractors are reasonably treated differently but not necessarily more harshly than federal employees, who may (generally) make contributions, but not solicit them. The plaintiffs

also argued that section 441c unfairly penalizes holders of personal services contracts. Corporate federal contractors are subject to the 441c ban, but directors, officers, employees and shareholders are not. Corporate contractors may also form political action committees ("PACs"). The court found that employees, stockholders, directors, officers, and corporate PACs that make contributions are acting as individuals or as different entities, and thus it is acceptable to treat them differently.

Impacts of Wagner and Effects on Contributions to Super PACs

Following *Wagner*, the 441c ban still applies to all funds under the dominion and control of the **individual** government contractor, not just to payments received from the government.

On the **corporate** side, a government contractor may still create a federal PAC, and its directors, officers, employees and shareholders may make contributions to the PAC and directly to federal candidate campaigns and other political committees. But if the federal contractor is an individual, such individual may not make contributions in connection with federal elections. Moreover, the FEC's position, confirmed in this case, is that while *Citizens United* permits corporations to make independent expenditures in support of or in opposition to candidates, the ruling does not apply to corporate federal contractors because of section 441c. This means that a corporate government contractor, while it can still form its own PAC:

- **Cannot donate to a PAC that makes only independent expenditures (i.e., a Super PAC).** In *Wagner*, the court noted that there is "substantial doubt" about whether this position is constitutional after *Citizens United and SpeechNow.org v. Federal Election Commission*. However, the FEC's position is that federal contractor contributions to Super PACs are prohibited.²
- **Must avoid in-kind contributions to Super PACs (and Super PACs must be careful not to accept such contributions).** This means, for example, that a federal contractor should not allow use of its office space, employees or other resources (such as a mailing list) by a federal candidate committee, political party or even a Super PAC.
- **Must still be careful to comply with state and local "pay-to-play" laws.** This case addresses only contributions made by federal government contractors to federal candidates and PACs, and national political parties. As a separate matter, many states and localities restrict or prohibit political contributions by government contractors and their principals, or require such persons and entities to file public reports disclosing their political contributions.

Please contact **Larry Norton** or **Ron Jacobs**, Co-Chairs of **Venable's Political Law Practice Group**, with any questions or comments.

¹ 2 U.S.C. § 441c(a).

² The FEC also took this position in footnote 1 in a press release on *Carey v. Federal Election Commission*, issued in October 2011 and available here: <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.