Political Law

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D.C. Circuit Upholds 44-Year-Old Ban

The answer is still "no" for individual federal contractors wishing to contribute to federal candidates and parties

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On July 7, 2015, in Wagner v. Federal Election Commission*, the U.S. Court of Appeals for the District of Columbia Circuit upheld the ban on individual federal contractor contributions to federal candidates and political parties. The court did not address the ban on federal contributions by corporate federal contractors or whether federal government contractors may make independent expenditures or contributions to Super PACs.*

Brief Overview

The Federal Election Campaign Act of 1971, as amended, prohibits federal government contractors from making contributions or expenditures, either directly or indirectly, to any federal political party, committee or candidate for federal office. 52 U.S.C. § 30119(a)(1). In *Wagner v. FEC*, three federal contractors, all individuals, challenged § 30119(a)(1) as violating the First Amendment and the Equal Protection guarantee of the Fifth Amendment.

The D.C. Circuit's Decision

The U.S. Court of Appeals for the District of Columbia Circuit unanimously upheld the ban on individual federal contractor contributions to federal candidates and political parties. In its opinion, the Court examines whether, with respect to § 30119, the government has "'demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 25).

The two interests asserted by the Federal Election Commission (FEC), each of which has been accepted by the Supreme Court as sufficient to warrant appropriate restrictions on First Amendment rights, are: (1) protection against quid pro quo corruption and its appearance, and (2) protection against interference with merit-based public administration.

Congress enacted § 30119 in the aftermath of a national scandal involving a pay-to-play scheme for federal contracts. The Court's opinion recounts numerous examples of these types of scandals at the federal and state level (apparently cited by the FEC). The opinion asserts that the statute was itself the outgrowth of a "decades-long congressional effort to prevent corruption and ensure the merit-based administration of the national government."

Accordingly, the Court concluded that the federal ban on contributions by federal individual contractors is not an unconstitutional restraint on First Amendment rights or a violation of the Equal Protection Clause.

Although the decision is limited to individuals who are federal contractors, it is reasonably clear that the same result would ensue if the ban were challenged by non-individual entity federal contractors.

What the Decision Means for Government Contractors

This *en banc* decision by the D.C. Circuit is significant because it reaffirms the *Buckley* court's distinction between contributions and independent expenditures. Because contributions raise the specter of corruption or its appearance, they can be limited or banned in appropriate cases, unlike independent expenditures.

All federal government contractors continue to be prohibited from making contributions to national political parties, federal committees or candidates for federal office. The Courts have yet to address whether federal government contractors may make independent expenditures or contributions to independent expenditure-only committees/Super PACs; however, federal government contractors should assume the ban on such activities still applies until the FEC says otherwise, or a court strikes down the ban as unconstitutional.

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