UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WENDY WAGNER, *et al.*, **Plaintiffs,** **v.** **FEDERAL ELECTION COMMISSION,** **Defendant.**	**Civil Action No. 11-1841 (JEB)**

CERTIFICATION ORDER

Three federal contractors brought this action seeking a declaration that the Federal Election Campaign Act's prohibition on individual contractors' political contributions, see 2 U.S.C. § 441c(a)(1), is unconstitutional. After this Court granted summary judgment to the Federal Election Commission, see Wagner v. FEC, 901 F. Supp. 2d 101 (D.D.C. 2012), Plaintiffs appealed. The Court of Appeals determined that, under 2 U.S.C. § 437h, only the *en banc* D.C. Circuit has jurisdiction to decide Plaintiffs' constitutional claims. See Wagner v. FEC, – F.3d –, 2013 WL 2361005, at *8 (D.C. Cir. May 31, 2013). The district court's role is simply to find facts and certify the constitutional questions to the *en banc* Court of Appeals. Id.

On Friday, May 31, accordingly, the Court of Appeals issued an Opinion remanding this case to this Court "to make appropriate findings of fact, as necessary, and to certify those facts and the constitutional questions to the *en banc* court of appeals within five days." Id. Bearing this accelerated timetable in mind, this Court that same day held a conference call with the parties, in which it required them to submit by Monday, June 3, any facts to which they could stipulate or, if they were unable to do so, separate proposed findings of fact. The parties apparently could not agree and ultimately submitted four pleadings on June 3-4: Plaintiffs'

Proposed Certification as to Constitutional Questions Presented and Facts (ECF No. 46), FEC Filing Regarding Constitutional Questions Presented and Proposed Findings of Facts (ECF No. 47), Plaintiffs' Response to Defendant's Proposed Facts Dated June 3, 2013 (ECF No. 48), and Defendant FEC's Reply to Plaintiffs' Filing Regarding Proposed Findings of Fact (ECF No. 50). Adhering to the deadline of June 5, the Court now complies with the mandate of the Court of Appeals.

As the Court of Appeals panel explained, § 437h assigns three tasks to this Court:

> First, it must develop a record for appellate review by making findings of fact. See Bread Political Action Comm. v. FEC, 455 U.S. 577, 580 (1982) (Bread PAC); Buckley v. Valeo, 519 F.2d 817, 818-19 (D.C. Cir. 1975) (en banc) (per curiam). Second, the district court must determine whether the constitutional challenges are frivolous or involve settled legal questions. See Cal. Med. Ass'n v. FEC, 453 U.S. 182, 192 n.14 (1981) (CalMed); Khachaturian v. FEC, 980 F.2d 330, 331 (5th Cir. 1992) (en banc) (per curiam); Goland v. United States, 903 F.2d 1247, 1257 (9th Cir. 1990). Finally, the district court must immediately certify the record and all non-frivolous constitutional questions to the *en banc* court of appeals. See CalMed, 453 U.S. at 192 n.14; see also Mariani v. United States, 212 F.3d 761, 769 (3d Cir. 2000) (en banc).

2013 WL 2361005, at *1. Before the final certification, the first two tasks (reversed below for ease of consideration) each demand brief discussion.

This Court must first "determine whether the constitutional challenges are frivolous or involve settled legal questions." Certainly the legal questions remain unsettled – indeed, the Supreme Court and D.C. Circuit have yet to face these constitutional issues. Nor, despite the FEC's protests, are the challenges frivolous. Even under a heightened standard for frivolousness, the *en banc* Third Circuit has said that "a genuinely new variation on an issue raised under a particular section of the FECA that already has been challenged and upheld may give rise to a nonfrivolous challenge to that section." Mariani, 212 F.3d at 769. Far beyond variations, this

case presents two constitutional challenges to a section of FECA that so far has evaded all appellate review, even though it imposes "one of the harshest contribution restrictions in the U.S. Code." Wagner, 901 F. Supp. 2d at 103.

Second, the parties disagree about the scope of the "findings of facts" that the Court should be making. Plaintiffs wish the Court to limit its findings to facts about the parties and contracting generally, see Plaintiff's Proposed Certification at 2-11, while the FEC submits over 100 additional proposed paragraphs of facts, including "facts" about corruption contained in legislative history, reported cases, legal treatises, congressional testimony, and media reports. See FEC Filing at 11-55. In a recent § 437h case, Judge James Robertson explained the difficulty with the FEC's approach:

> Most of the [parties'] proposed findings, and nearly all of the supporting material, centered on the question of whether or not the challenged provisions are necessary to ward off corruption – or the appearance of corruption – in federal elections. To my mind, the facts needed to answer that question are the kind of "facts" that legislatures find. They are not the kind of facts that can be determined in a judicial forum on the basis of a cold paper record full of hearsay and opinion.

Speechnow.org v. FEC, No. 08-cv-248, 2009 WL 3101036, at *1 (D.D.C. Sept. 28, 2008). Similarly, the "facts" needed for appellate review here are the adjudicative facts particular to this case, not the legislative facts relevant to the parties' legal positions. See Advisory Committee Notes to Fed. R. Evid. 201(a) ("Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."); Kenneth Culp Davis, Judicial Notice, 55 Colum. L. Rev. 945, 952-59 (1955) (explaining distinction).

The Court, therefore, will limit its findings to facts about Plaintiffs, their particular circumstances, and some background about the federal contracting process. Such a determination does not prejudice the FEC inasmuch as it may still cite public documents discussing corruption – *e.g.*, legislative history, legal treatises, or media reports – in its appellate briefing. The Court's findings of fact appear in Section II, *infra*, following the certified constitutional questions in Section I.

I. Constitutional Questions for Appeal

The Court certifies the following two constitutional questions to the *en banc* Court of Appeals for the D.C. Circuit:

1. Does 2 U.S.C. § 441c(a)(1), which prohibits any person holding a federal contract from making a contribution in connection with a federal election, violate the First Amendment?
2. Does 2 U.S.C. § 441c(a)(1) violate the Fifth Amendment's equal-protection guarantee as applied to individual contractors?

II. Findings of Fact

The Court makes the following findings of fact:[1]

1. Plaintiffs Wendy Wagner, Lawrence Brown, and Jan Miller are individuals who currently have contracts with federal agencies under which they are providing personal services to an agency and for which payments are made from funds appropriated by Congress. Decl. of Wendy E. Wagner, ¶ 3, J.A. 50-51; Decl. of Lawrence M.E. Brown, ¶¶ 4-5, J.A. 55; Decl. of Jan W. Miller, ¶¶ 4-5, J.A. 64-66.

[1] Other than references to Plaintiffs' lengthy contracts, all citations refer to the Joint Appendix (J.A.) that was filed in the appeal in No. 12-5365. Citations to the contracts refer to Plaintiffs' Appendix ("Appx.") to their Motion for Summary Judgment filed in this Court (ECF 30), giving page numbers from the ECF document.

2. Each Plaintiff has, prior to becoming a government contractor, made contributions to candidates for federal office, political parties, or political committees in connection with elections for federal offices, either individually or jointly with his or her spouse. Wagner Decl., ¶ 6, J.A. 52-53; Brown Decl., ¶ 6, J.A. 55; Miller Decl., ¶ 7, J.A. 66-67. Each Plaintiff desires to make contributions in connection with future federal elections, but is barred from doing so by section 441c and will not do so unless it is lawful. Wagner Decl., ¶ 6, J.A. 52-53; Brown Decl., ¶¶ 6-8, J.A. 55-56; Miller Decl., ¶ 7, J.A. 66-67.

3. Each Plaintiff is a registered voter and was eligible to vote in federal elections in 2012. Wagner Decl., ¶ 6, J.A. 52-53; Supp. Decl. of Wendy E. Wagner, ¶ 2, J.A. 80; Brown Decl., ¶ 1, J.A. 54; Supp. Decl. of Lawrence M.E. Brown, ¶ 1, J.A. 83; Miller Decl., ¶ 1, J.A. 64.

4. The contracts under which Plaintiffs are performing personal services for their agencies were negotiated and signed by officials of those agencies. None of those officials were elected to their positions. There is no evidence in the record that the President, the Vice President, any Member of Congress, or any official of any political party or political committee had any role in the negotiation, approval, or implementation of the contracts under which Plaintiffs are performing personal services for their federal agencies. Wagner Decl., ¶ 3, J.A. 50-51; Brown Decl., ¶ 5, J.A. 55; Miller Decl., ¶ 6, J.A. 66.

5. Plaintiff Wagner is a law professor who entered a contract with the Administrative Conference of the United States, which began in March 2011 and was scheduled to end in April 2012. Wagner Decl., ¶¶ 2-3, J.A. 50-51. She was required to write a report on the intersection of science and regulation, but the contract term is not considered complete until ACUS discusses and accepts her report. Id., ¶ 3, J.A. 51. Her contract has been continued so that the agency may discuss her study. Second Supp. Decl. of Wendy E. Wagner, ¶ 2, J.A. 81-

82. ACUS is scheduled to discuss and take action on the recommendation that was based on her study on June 13-14, 2013. 58th Plenary Session, Admin. Conf. of the U.S., http://acus.gov/meetings-and-events/plenary-meeting/58th-plenary-session (last visited June 4, 2013). Although Wagner currently has no other federal contracts, she anticipates having future contracts because of her area of expertise. Wagner Decl., ¶ 4, J.A. 51.

6. Wagner was approached about conducting her study by Jonathan Siegel, then Research Director of ACUS. Before signing her contract, she discussed it with ACUS Chairman Paul Verkuil, who was appointed to his position by President Obama and was confirmed by the United States Senate. Initially, ACUS had no budget for this study, and Wagner agreed to work for $1. After ACUS obtained its budget from funds appropriated by Congress, her contract was amended to increase her pay to $12,000, plus up to $4,000 for travel and research assistance expenses. Id., ¶ 3, J.A. 50-51.

7. Plaintiff Brown, after retiring from federal employment and while collecting a federal government pension, entered into a two-year personal services contract, with three one-year optional extensions, as a human resources adviser with the United States Agency for International Development, by which he had been previously employed. That contract began in October 2011 and has a total estimated contract cost (for five years) of $865,698. Brown has held personal services contracts with USAID since October 2006. Brown Decl., ¶¶ 2-5, J.A. 54-55; Brown Contract, Appx. 113-14; Brown Resp. to FEC Requests for Admission ("RFA"), ¶¶ 12-14, J.A. 91.

8. Plaintiff Miller is an attorney who, after retiring from USAID in 2003 and while collecting a government pension, negotiated and signed a two-year contract as an annuitant-consultant. After that, Miller negotiated and executed a personal services consulting contract

with a different office of USAID that began in June 2010 and will end in June 2016; the total budgeted value of his contract is $884,151, although he works only part-time for USAID and also works part-time as an employee of, not a contractor for, the Peace Corps. Miller Decl., ¶¶ 2-5, J.A. 64-66; Miller Contract, Appx. 212; Miller Resp. to FEC RFA, ¶¶ 12-14, J.A. 97.

9. Along with Plaintiffs, evidence in this case comes from three other declarants. Steven Schooner is a professor of government procurement law and the Co-Director of the Government Procurement Law Program at George Washington University Law School and has previously entered federal contracts. Decl. of Steven L. Schooner, ¶¶ 1, 3, J.A. 72-73. Jeffrey Lubbers was the Research Director of ACUS for 13 years and now serves as a special consultant there. Decl. of Jeffrey S. Lubbers, ¶ 2, J.A. 68-69. Jonathan Tiemann is the president of an LLC that holds a contract with the Department of Labor. Decl. of Jonathan Tiemann, ¶¶ 1, 4-5, J.A. 76-78.

10. Government personal services contracts are of three main types: (i) contracts held by corporations that provide individuals who perform services for an agency, (ii) contracts held by individuals to perform services on a regular basis for an agency, and (iii) contracts held by individuals or limited liability companies set up by individuals to perform specific tasks for an agency. Schooner Decl., ¶¶ 5-7, J.A. 73-74. The first and third categories are basically distinguished by the "size and complexity" of the services being provided. Dep. of Steven L. Schooner at 105, J.A. 210.

11. Plaintiffs Brown and Miller appear to have the second type of contract described by Schooner. Schooner Decl., ¶ 6, J.A. 74. This category includes retired annuitants whose federal agencies have authority to hire them back. Schooner Dep. at 85-86, J.A. 205. A personal services contract is akin to a "services arrangement" whereby an agency hires an individual to

perform specific services on a regular basis for the agency. Id. at 90, J.A. 206; Schooner Decl., ¶ 6, J.A. 74. Retired FBI agents, who are regularly hired to do background checks for persons needing security clearances, are in the same category of contractors. Schooner Dep. at 65-66, 88, J.A. 200, 205.

12. The contract forms for Brown and Miller include a "Special Note" indicating that the contractor, if a U.S. citizen, is considered to be an employee of the United States for purposes of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2396(a)(3), and Title 26 of the United States Code, which subjects the individual to withholding for both FICA and federal income tax. The individual is not an employee for purposes of laws administered by the Office of Personnel Management, such as Title 5 of the U.S. Code. Brown Contracts, Appx. 64, 107; Miller Contracts, Appx. 152, 205. Title 5 includes the statutory protections afforded to federal employees by the Merit Systems Protection Board, 5 U.S.C. §§ 1201-1209.

13. Plaintiffs Brown and Miller work directly with employees of their agencies and perform the same kinds of services that employees perform. Brown Decl., ¶ 4, J.A. 55; Miller Decl., ¶ 6, J.A. 66.

14. Wagner's contract with ACUS appears to be the third type of contract described by Professor Schooner, under which the government enters into an agreement with an individual to perform specific tasks for a limited duration, such as serving as an expert witness or as an alternative-dispute-resolution mediator. Federal agencies regularly enter into contracts with both individuals and corporations, including LLCs that are essentially one-person entities that have been incorporated. Schooner Decl., ¶¶ 3, 7-8, J.A. 73-75.

15. Plaintiffs Wagner, Brown, and Miller negotiated the terms of their current contracts with their federal agencies. Wagner Resp. to FEC RFA, ¶ 11, J.A. 86; Brown Resp. to FEC RFA, ¶ 11, J.A. 91; Miller Resp. to FEC RFA, ¶ 11, J.A. 97.

16. During the process of negotiating for, executing, and performing under her contract with ACUS, Wagner has interacted with at least one political appointee, Chairman Paul Verkuil, as required by her contract. Wagner Resp. to FEC RFA, ¶¶ 14-15, J.A. 87; Wagner Contract, Appx. 51. Plaintiffs Brown and Miller have also both had interactions with at least one political appointee in the course of performing their current contracts. Brown Resp. to FEC RFA, ¶ 18, J.A. 92; Miller Resp. to FEC RFA, ¶ 18, J.A. 98.

17. Wagner's contract provides that ACUS has property rights over all materials produced under the performance of her contract and that the ACUS chairman or contracting officer has the authority to control and deny the publication of the final report. Wagner Contract, Appx. 53. When Lubbers was Research Director, ACUS rarely if ever denied permission to publish. Lubbers Decl., ¶ 4, J.A. 69.

18. The ACUS Council, which serves as an unpaid governing board, is comprised of a chairman and ten other members all appointed by the President. No more than five of them may be officials within the executive branch of government. The Research Director, a staff attorney, and, in some cases, the Chairman review the draft reports of contractors. Id., ¶¶ 3, 5, J.A. 69-70.

19. If a Plaintiff established an LLC or other similar corporate entity, and if the Plaintiff's agency were willing to have its contract be with the Plaintiff's LLC and not with the Plaintiff individually, only the LLC would remain subject to section 441c. There are costs involved in establishing and maintaining an LLC, which include the fee charged by the state for

incorporation, fees charged by lawyers or others (if any) to do the incorporation, annual fees paid to the state for retaining the corporate license, fees charged by accountants or others (if any) to prepare the tax returns for the LLC, and any taxes that the LLC might owe in addition to the taxes owed by the owner of the LLC. The one-time fee for establishing an LLC in Maryland is $141, and it can be accomplished using a one-page form. Md. Dep't of Assessments & Taxation, Articles of Organization for Limited Liability Company Form and Instructions, available at http://www.dat.state.md.us/sdatweb/artorgan.pdf. When Tiemann established an LLC in California, he paid a filing fee of $70 to the state. Tiemann Decl., ¶ 3, J.A. 76-77.

20. In Professor Schooner's experience, federal agencies are generally indifferent to whether a contract to provide services to the agency is with the individual who will perform such services or with his or her LLC, provided it is clear that the individual will provide the services requested. Schooner Decl., ¶ 8, J.A. 75; Schooner Dep. at 118-19, J.A. 213. It is "very common" to have a large corporation, a small business, and an individual compete against each other for a contract, he says, and "[a]s a general rule the government as consumer doesn't care" which one it hires. Schooner Dep. at 106, J.A. 210. An attorney from the Department of Labor once told Tiemann that it made no difference to the Department whether he entered his contract personally or as president of his LLC. Tiemann Decl., ¶ 5, J.A. 78. A former Research Director of ACUS indicated that if a request for a contract came from an LLC rather than an individual, he knew of "no reason why ACUS would not have made the contract with it, as long as it was clear that the work would be done by the individual consultant who had been chosen for his or her expertise." Lubbers Decl., ¶ 8, J.A. 71.

21. Professor Schooner believes that, in most years, the Government awards more money in grants than in contracts. Schooner Dep. at 38-39, J.A. 193. Federal loans and loan

guarantees include loans and guarantees for homes given by the VA and FHA, as well as "small business" and "economic injury disaster loans" that can be as large as $2 million. Housing Loans, GovLoans.gov, http://www.govloans.gov/loans/type/6 (last visited June 4, 2013); Loan Details: 7(a) Small Business Loan, GovLoans.gov, http://www.govloans.gov/loans/loan-details/1497 (last visited June 4, 2013); Loan Details: Economic Injury Disaster Loans, GovLoans.gov, http://www.govloans.gov/loans/loan-details/1504 (last visited June 4, 2013). Plaintiff Wagner has a grant of $45,721 from the National Science Foundation, Wagner Decl., ¶ 4, J.A. 51-52, but that does not bar her from making political contributions.

22. According to Professor Schooner, the trend over the last two decades "has very heavily tilted to what we call an out-sourced government or blended work force so the ratio of contractor personnel to full-time government personnel has increased." Schooner Dep. at 36, J.A. 192. He says that "there are some studies that would suggest we are getting closer to 50-50 or there may be more contractors" than federal employees. Id. at 35, J.A. 192.

23. The federal employees tasked with awarding contracts are known as "contracting officers." Id. at 24, J.A. 189. These contracting officers are specially trained for their positions, and their decisions are supposed to be made independently, insulated from political pressure. Id. at 24, 51-60, 92-98, 109-17, 134-37, J.A. 189, 196-98, 206-08, 211-13, 217-18. In carrying out their contracting responsibilities, contracting officers utilize the expertise and information supplied by the agency officials for whom the services will be performed, who are not elected officials, to determine the needs of the agency. Id. at 110-16, J.A. 211-12. Although not the "common scenario," this input into contracting decisions may sometimes be provided by political appointees. Id. at 115, J.A. 212.

24. Normal competitive bidding procedures for contracts may be bypassed in some cases. Professor Schooner describes "a fundamental group of core exemptions," which includes "the classic public interest and national security exemptions." Id. at 27-28, J.A. 190. Other exemptions apply when "there is an industry where prices are set by law or regulation" and when an agency awards a contract to an expert witness or an ADR mediator. Id. at 24-30, J.A. 188-91. The agencies contracting with Wagner, Tiemann, and Schooner initiated the contact, and at least Schooner had no prior knowledge that he was being considered for a contract. Wagner Decl., ¶ 3, J.A. 50-51; Tiemann, ¶ 4, J.A. 77; Schooner Dep. at 130-32, J.A. 216. Professor Schooner's understanding is that most contracts in the second category he described – contracts held by individuals to perform services on a regular basis for an agency – "are not covered by the Federal Acquisition Regulation. In other words, they would not be subject to full and open competition and the full range of rights and responsibilities that follow that." Schooner Dep. at 89, J.A. 206. The award and performance of these contracts is not evaluated by a contracting officer. Id. at 104, J.A. 209. Furthermore, "there are many types of smaller contracts that have very flexible award authorities." Id. at 108, J.A. 210. Contracts up to $150,000 (or higher in some instances) fall under the Simplified Acquisition Threshold, which allows "streamlined competitions, where the government can call two or three people on the phone and operate in a very informal manner." Id. at 107-08, J.A. 210. Plaintiff Wagner obtained her contract under "the provisions for simplified acquisition procedures in the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 427." Wagner Contract, Appx. 50.

25. Despite the precautions in the procurement process to insulate contracting decisions from political pressure, Professor Schooner says it is not uncommon for dissatisfied contractors or potential contractors to allege that they were mistreated due to political influence,

although such mistreatment is rarely proven. Schooner Dep. at 59, J.A. 198. Officials of political parties have been "sanctioned, punished, prosecuted and sent to jail for attempting to [influence the award of a contract]." Id. at 138, J.A. 218.

26. The normal benefits that accompany federal employment are not typically given to contractors: "[A]s a general rule, a contractor, even if they worked for the government before, would not accrue years of services, would not be part of the retirement package, would not be able to participate in the thrift savings program, all those types of things . . . ." Id. at 75, J.A. 202.

27. According to Schooner, "government contractors have extensive compliance regimes with regard to drug-free workplace, child labor, human trafficking, obviously issues related to occupational safety and health, the union and wage, minimum wage requirements," and others. Id. at 40, J.A. 193.

28. Contractors working for the federal government are often required to have e-mail addresses and badges that distinguish them from employees, and they can even be required to answer the telephone in a different manner. Id. at 73-74, J.A. 202.

III. Conclusion

The Court, therefore, ORDERS that the above constitutional questions and findings of fact are hereby CERTIFIED to the *en banc* Court of Appeals for the District of Columbia Circuit.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: June 5, 2013