A GLIMPSE INTO THE FUTURE? JUDGE KOLLAR-KOTELLY'S VIEW OF CONGRESSIONAL AUTHORITY TO REGULATE POLITICAL MONEY

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I agree with those who argue that the district court has been unfairly savaged for its decision in *McConnell v. FEC*.[1] My reasons may, however, differ significantly from those of others who have expressed this view. For, as I see it, the problem lies more with the statute[2] than with the district court's construction. If the statute represents—and I believe that it does—some awkward compromises, then it's not surprising that the lower court decision emerging from a review of the statute would be somewhat awkward, and that it would take quite some time for the court to express that awkwardness.

Now for some odd reason, the release of this opinion, which everyone understands will be superseded by the decision of the U.S. Supreme Court, has become the occasion of a massive legal spin war in which each side tries to claim that it was victorious, while at the same time insisting that the decision doesn't mean anything. Only in Washington could such an argument take place. In my view, this was not a very good day for the defendants, for the simple reason that the larger share of the regulatory restrictions directed against the political parties was struck down. And, I also believe that the so-called "backup definition" for electioneering communications approved by the court is, as a constitutional matter, exceptionally fragile, so that over the long run, substituting this vaguer backup definition for the thirty- to sixty-day bright-line test simply dooms that entire enterprise to failure.

So far, much of the commentary has focused on the reasoning of Judge Leon, as the "swing judge," but I would like to direct my remarks to the opinion of Judge Kollar-Kotelly. It is helpful when considering an opinion like this to examine the assumptions behind it and then discuss the consequences of these assumptions for the future of campaign finance regulation specifically. Such an analysis

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[1] *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.).

[2] Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81.

certainly illuminates the choice that the Supreme Court will face as it reviews this decision and decides which direction it wishes to take. Judge Kollar-Kotelly created a very conscientious, comprehensive framework for sustaining a statutory enactment of this kind—a far-reaching effort to tighten and expand the regulation of political activity.

Consider how Judge Kollar-Kotelly stresses the importance of enormous deference, or, in Professor Briffault's words, "great respect," to the decisions that Congress made in constructing this statute. And there are, of course, favorable citations in her opinion to Justice Breyer, reflecting her favorable view of his position that we need to presume Congress's expertise and hence concede its wide authority to regulate political conduct. Judge Kollar-Kotelly takes the Breyer view to something approaching breath-taking, but perhaps also logical, lengths.

Judge Kollar-Kotelly's defense of congressional authority to regulate campaign finance ranges over both Title I and Title II of the BCRA, encompassing restrictions on political parties, unions, and corporations. First of all, she makes it very clear that there really is not much effort required of Congress in establishing that any particular conduct presents the actuality or appearance of corruption. In fact, in the Kollar-Kotelly view, a corruption showing is virtually automatic: it is purchased, if you will, at the deepest discount. She finds that corruption or its appearance is "inherently" in a system of private donor financing:[3] the actual activity of raising and spending money has, in this sense, corruption embedded in it.

She periodically adds an element of purchase-of-access to her analysis of the nature of this corruption.[4] But then again, if one was looking for some rigor in this corruption analysis, this reference to the purchase-of-access will not satisfy the search: Judge Kollar-Kotelly acknowledges that finding purchase-of-access is difficult. In her words, the entire business of purchasing access is "subtle, less open to verification, and therefore less likely to be captured by empirical review."[5] So, while there are findings about access, she acknowledges that we do not have to scratch hard at the surface of political life to conclude that political contributions or expenditures purchase access: it is part of the system, inherent in it.

This is significant, for it leaves Congress with little work to do in extending the range of regulatory controls on the political process. It need show very little, in real terms: the system is revealed to be self-evidently corrupt. And even that feature of the system that may seem

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[3] *McConnell*, 251 F. Supp. 2d at 664 (Kollar-Kotelly, J.).

[4] *Id.* at 497-98.

[5] *Id.* at 672 n.162.

intuitively plausible—that contributors buy access, if not votes—is more assumed than established, even though the assumption is conceded to be "less open to verification" or not easily "captured by empirical review."

This type of claim is sometimes imagined to be consistent with the constitutional framework established by *Buckley v. Valeo*,[6] but it is not. For the Supreme Court then had before it a statute designed to put some effective limits on large contributions to candidates: the "system of private donor financing" was then for all practical purposes unregulated. So the *Buckley* Court identified an "abuse inherent in a regime of large individual financial contributions"[7] to candidates. Judge Kollar-Kotelly casts her analysis far more broadly, finding that the "abuse" infects the totality of a private financing regime, including one operating under contribution limits and other regulatory controls.

This is one significant part of the judge's constitutional jurisprudence. In another, with direct significance for the activities of nonpolitical organizations like corporations or unions, Judge Kollar-Kotelly essentially claims that Congress may act to proscribe campaign fund-raising and spending whenever the political activity under review has some influence on federal elections. In some parts of her opinion, she refers to "significant influence,"[8] while, in other parts of the opinion, she makes simple mention of "influence." In addition, Congress may freely act to prevent an evasion or circumvention of the core limits of the Federal Election Campaign Act.[9] So Congress may react to an activity with a hypothesized influence on elections—such as we have seen recently in the case of issue advertising—and act (1) to protect the integrity of the federal electoral process, or (2) to establish safeguards against loopholes or evasions of the existing statutory scheme.

Two other features of the Kollar-Kotelly view stand out. One of them, the most striking, lies in her analysis of the strict scrutiny requirement that the means employed by Congress, in the protection of its compelling interest, are narrowly tailored to achieve this end.[10] Judge Kollar-Kotelly declares that Congress escapes the problem of narrow tailoring by being very specific and clear about the conduct it does not like. And it did so, for example, with the primary definition in the electioneering communication provisions. There it identified a certain kind of advertising that refers to federal candidates; the

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[6] 424 U.S. 1 (1976) (per curiam).

[7] *Id.* at 27.

[8] *McConnell*, 251 F. Supp. 2d at 639 (Kollar-Kotelly, J.).

[9] Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-442 (2003).

[10] *See McConnell*, 251 F. Supp. 2d at 656-57 (Kollar-Kotelly, J.).

time period within which the advertisements would run, that is, thirty days before a primary election and sixty days before a general election; the medium over which it would be broadcast, i.e., cable broadcast satellite; and the target audience for the advertising.[11] So, in effect, narrow tailoring, which in the traditional jurisprudence is designed to put some limits on congressional regulation of the political process, now becomes an invitation for Congress to regulate actively and freely, so long as it is specific about the activity under attack.

Where does that leave matters? Certainly Congress emerges from this analysis with vast powers to regulate the political process—powers barely bounded by meaningful speech or associational limitations. If Congress identifies an activity with some influence on federal elections, concluding further that the activity implicates in some way the corruption "inherent" in fundraising, or contributes in some way to the erosion of statutory safeguards, it may act on the one condition that it identifies that activity clearly.[12] But how clearly? BCRA does not suggest all that high a level of clarity, and meaningful legislative history is nowhere to be found. For while some of its provisions delineate the activity that Congress sought to restrict, Congress did not offer much in the way of explanation for its choices. There is no "findings" section; and indeed, no Senate report or conference report in the statute. Under the view expounded by Judge Kollar-Kotelly, Congress need do no more, because all of the necessary work has been done beforehand, enshrined in a constitutional doctrine that assumes "corruption" that is "inherent" in the private financing of elections and that Congress possesses broad powers to attack.

As stated to this point, this may seem a powerful claim, but it turns out to be even more potent. For in the jurisprudence I am outlining, Congress may not only act on the basis of learned experience, but also prospectively—looking in advance to political activities that may happen and, if they occurred, would endanger its statutory scheme. In her words, Congress may "exercise latitude in forming predictive judgments about possible evasion and circumvention of the law and is able to act accordingly."[13] How remarkable! Some people have trouble enough with the predictive judgments that Congress makes, for example, in fashioning fiscal policy. There is no reason for skeptics to take more comfort in predictive judgments that Congress may

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[11] 2 U.S.C. § 434(f)(3)(A).

[12] Judge Kollar-Kotelly also cites the broad congressional authority to attack the "appearance of corruption." *McConnell*, 251 F. Supp. 2d at 685 (Kollar-Kotelly, J.). While I do not have the time to address that concern here, particularly because this concern with "appearances" is old news, it is still worthy of continuing attention. That the government has wide-ranging authority to regulate politics in the name of "appearances" should never be taken lightly.

[13] *Id.* at 665.

make about "dangerous" political activities. As a practical example, Judge Kollar-Kotelly sanctions on this theory the way that Congress developed the thirty- and sixty-day preelection issue advertising prohibitions. She upholds Congress's right to assess an organization's "actual intent" behind the ads, with such an assessment being grounded in the nature of the issues covered in their advertisements, among the other relevant facts and circumstances.

This is a most expansive view of what Congress may do to regulate the raising and spending of political money in the United States. It is a very elaborated version of what we've heard from Justice Breyer. And one might ask: how does she—or for that matter, Justice Breyer—get to this point? After all, not too long ago, Congress was thought unfit, because it was too self-interested, to be entrusted with campaign finance reform; and for this reason, some suggested that it give up the responsibility altogether, passing it on to some institution akin to a military base closing commission that would produce a statutory proposal for an "up or down" vote without amendment. Something in the meantime has changed, making it plausible for a jurist such as Judge Kollar-Kotelly, following Justice Breyer, to offer so deferential a view of Congress's authority to engineer the rules for campaign finance.

No doubt the answer lies in part in the result of recent reform deliberations: now that Congress has passed a bill to their liking, proponents of reform are prepared to stand up for Congress's authority to do so. But there is more, and we can perhaps find it in Judge Kollar-Kotelly's conclusion, where she quotes the dissenting opinion of Justice Byron White in *Citizens Against Rent Control v. Berkeley*: "Every form of regulation—from taxes to compulsory bargaining—has some effect on the ability of individuals and corporations to engage in expressive activity."[14] The only question for Congress is the permissible "extent" of the restriction.[15] Notice in that citation the reference to taxes and compulsory bargaining: it makes clear that the standard crafted by Judge Kollar-Kotelly places Congress's power to regulate political activity, and the associated speech and associational issues, on the same plane as regulatory activities directed toward entirely different regulatory concerns: taxes, compulsory bargaining, environmental regulation, defense, and so forth.

So bit by bit, in this view, the courts may relocate campaign finance to the periphery of the privileged domain of First Amendment analysis, and lay it along side any number of other "regulatory problems" over which Congress has extraordinarily expansive authority.

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[14] *Id.* at 708 (quoting Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 310 (1981) (White, J., dissenting)).

[15] *Id.*

This is a sea of change in our view of the power of Congress over the political process, and I would suggest it warrants closer attention than it has received.