DRAWING A ROADMAP TO UPHOLD BCRA

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Of the three judges on the district court, Judge Kollar-Kotelly was the most sympathetic to the Bipartisan Campaign Reform Act of 2002 ("BCRA").[1] She would have upheld all its central parts and have struck down only three of its peripheral provisions: (1) those banning contributions from minors, (2) those forcing political parties to choose between coordinated and independent spending for their candidates, and (3) those requiring broadcasters to keep and disclose particular records. Her opinion is also the most detailed and the most grounded in evidence. That is not necessarily a virtue, of course, if you believe, as Judge Henderson did, that the evidence was either flawed or irrelevant. Most interestingly, Judge Kollar-Kotelly's opinion is the most "realistic" of the three individual opinions. More than the other judges, she tried to get at how the political process actually works and to understand the operation of BCRA's provisions in that light. Such a pragmatic approach is good, of course, unless one thinks she misunderstands politics. As Bob Bauer said in the first panel, many are suspicious of *any* court's ability to really understand it.

Despite its virtues, I think the opinion will have exactly the same impact as the other judges', which is to say little to none. It is not going to affect greatly what the Supreme Court does. Certainly Justices, like Scalia and Thomas, who believe that *Buckley v. Valeo*[2] was wrongly decided and should be rethought from the bottom up, are not going to be swayed by it. To anyone who is deeply suspicious of campaign finance regulation, it will make no difference at all. To those Justices, on the other hand, who are disposed to stay within the *Buckley* framework or rethink it in the opposite direction, the opinion will offer many arguments worthy of consideration and provide one possible roadmap to decision. But, if only because it largely represents the views of a single judge, Judge Kollar-Kotelly's opinion in no way manages to present the case in a way that will structure the Supreme

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[1] Pub. L. No. 107-155, 116 Stat. 81.

[2] 424 U.S. 1 (1976) (per curiam).

Court's decision making. For that matter, neither do the other judges' opinions.

My job is to give an idea of what the opinion says about BCRA's two central provisions—issue advocacy and soft money. And since our panel is entitled "Critique," I will offer at the end some brief criticism and suggest where Judge Kollar-Kotelly's opinion is most vulnerable. My critique will be, for the most part, internal. I will accept most of Judge Kollar-Kotelly's general understanding of the First Amendment and then challenge her reasoning within that understanding. One could, of course, offer an external critique and criticize from a different First Amendment perspective, much as Judge Henderson did. Because that larger debate about First Amendment principles is so vast and well-covered elsewhere, I will work within Judge Kollar-Kotelly's own perspective.

BCRA took a novel approach to issue advocacy. Building on a line of cases that allows government more power to regulate spending by corporations and unions than by individuals,[3] BCRA prohibited spending on electioneering communications by the first group and required only disclosure of such spending by the second. The critical issue was one of coverage. What exactly does "electioneering communication" comprehend? Congress had found that the "magic words" test previously applied by the courts to distinguish express advocacy, which was regulable, from issue advocacy, which was not, was unworkable. Under this test, any communication that did not contain express words of advocacy like "vote for," "elect," "vote against," or "defeat" counted as an issue advertisement. The absence of a few particular words, then, shifted speech from the regulated to the unregulated category and, predictably, corporations, unions, and individual speakers tailored their campaign speech accordingly.

Congress took a new approach in BCRA. It first created a primary definition of "electioneering communication." This definition carves out those advertisements that (1) refer to a clearly identified candidate for federal office (2) on satellite, broadcast, or cable media (3) within sixty days of a general or thirty days of a primary election while (4) targeting the candidate's jurisdiction.[4] Thus, a print ad appearing seventy days before a federal election outside a candidate's district would not be covered even if it expressly exhorted its audience to vote for the particular candidate, while a television ad appearing

[3] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (upholding a Michigan law prohibiting corporations from using corporate treasury funds for independent expenditures in state elections); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (holding unconstitutional a federal statute requiring corporations to make independent political contributions only through segregated funds, as applied to a nonprofit organization).

[4] BCRA § 201.

twenty days before a federal election in a candidate's district would be covered so long as it identified the candidate—even if it did not request the audience to vote for or against him.

Judge Kollar-Kotelly found BCRA's primary definition of electioneering communication constitutional. To my mind, the most important strategic move in her opinion was getting beyond the "magic words" test. Most other courts had suggested that the "magic words" test was constitutionally required. These other courts, looking to small passages in *Buckley*[5] and *Massachusetts Citizens For Life ("MCFL")*,[6] had found that without express words urging the defeat or election of a candidate an ad escapes the traditional source and disclosure requirements that apply to political spending. What Judge Kollar-Kotelly pointed out was that these two Supreme Court cases nowhere made magic words a constitutional requirement. Instead, she argued, the Supreme Court used the test only as an aid to statutory construction. These express terms, she claimed, represented nothing more than a narrowing construction of the actual statutory terms, a construction that the Supreme Court adopted only in order to avoid void-for-vagueness difficulties. She found no evidence that the Supreme Court believed the First Amendment required these words.

After making this move, Judge Kollar-Kotelly applied strict scrutiny. She inquired whether BCRA's handling of electioneering communications under the primary definition was a narrowly tailored means of achieving a compelling governmental purpose. No problem there, she found. The purpose here was preventing corruption or the appearance of corruption, which the Supreme Court had long held compelling. That part was easy. The narrow tailoring requirement, by contrast, required much more attention. This is where her opinion gets very interesting and, to some people's minds, most troubling. It relies extensively on the record and, in particular on two *Buying Time* studies of advertising in the 1998 and 2000 elections.[7]

These reports surveyed television ads from the 1998 and 2000 election cycles and concluded that very few issue ads would be affected by BCRA's primary definition. The 1998 study, for example, concluded, in part, that only 7 percent of all issue ads televised that year met BCRA's primary definition.[8] Plaintiffs vigorously attacked these studies—and still do. They are now claiming in the Supreme Court, for example, that "the *Buying Time* reports were entirely and

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[5] 424 U.S. at 41-44 & n.52.

[6] 479 U.S. at 248-50.

[7] CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (2001); JONATHAN S. KRASNO & DANIEL E. SELTZ, BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS (2000).

[8] KRASNO & SELTZ, *supra* note 7, at 109.

irredeemably biased,"[9] and that "the reports' conclusions about BCRA's insignificant effect on so-called 'genuine' issue ads are insupportable."[10]

Although Judge Kollar-Kotelly agreed that there were some problems with the *Buying Time* studies, she thought that the problems were overall not serious. She described plaintiffs' attempts to discredit the studies as "a piñata party: if one hits the piñata enough, it will eventually crack apart."[11] But she thought that in the end the plaintiffs had failed to crack the piñata. Like Judge Leon, Judge Kollar-Kotelly extensively relied on the studies' central findings. She also thought the plaintiffs' failure to do any independent studies or even to try to replicate the study they criticized highly significant:

> Although some of [the piñata] "hits" have merit . . . neither Plaintiffs nor [their expert] have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contradictory results from such a study would have been far more persuasive than the recalculations of incorrect versions of the *Buying Time* data sets and the often conjectural and speculative criticism proffered by Plaintiffs and [their expert].[12]

Judge Kollar-Kotelly also strongly rejected any claim of bias. "I would not," she found, "discount the [*Buying Time*] studies because they were approached with a particular result in mind. The testimony shows that policy perspectives and effective scientific research are not mutually exclusive."[13] And, as to the particular actions which Dr. Gibson, the Plaintiffs' expert, pointed to as evidence of bias—the "cleaning" of data and recoding—Judge Kollar-Kotelly thought that "[t]he 'cleaning' of the data that Dr. Gibson finds suspicious appears . . . to be a necessary function for databases of the size produced for the *Buying Time* reports and not the function of bias. Fixing miscodings and resolving the 'cookie cutter' issues required such actions."[14] She also noted that one of Dr. Gibson's major complaints with the studies, his inability to reproduce their conclusions from the underlying data sets, resulted from his own use of the wrong data set.[15] Judge Kollar-Kotelly believed that this confusion also "under-

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[9] Brief for Appellants/Cross Appellees Senator Mitch McConnell et al. at 53 n.18, McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C.) (three-judge court), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.).

[10] *Id.* at 55.

[11] 251 F. Supp. 2d at 584 (Kollar-Kotelly, J.).

[12] *Id.*

[13] *Id.*

[14] *Id.* (citation omitted).

[15] *Id.* ("[C]onfusion . . . as to the correct database to use to analyze the studies' findings decreases the utility of Dr. Gibson's Expert Report . . . .") (citation omitted).

mines the notion that the *Buying Time* authors manipulated the data in order to achieve their desired results."[16]

Judge Kollar-Kotelly did not, however, accept the *Buying Time* studies completely. In particular she declined to rely on that part of the 1998 study concerning "the impact BCRA would have had on genuine issue advertisements over the course of 1998 or within the final days of the election."[17] Because of a controversy about the underlying coding of data, she could not accept either side's view of this issue.[18] Similarly, because of what she identified as a difficulty in the "authors' perceptions," she did not accept the 2000 study's conclusion that "of all the issue advertisements run within 60 days of the 2000 election that mentioned a candidate, 0.6 percent were genuine advertisements."[19] She did, however, accept as "the most conservative calculation" the figure of 17 percent.[20]

Relying on these and other studies and other evidence presented in the record, Judge Kollar-Kotelly found sufficient support for BCRA's four-part primary definition of electioneering communication. She found (1) that most ads referring to clearly identified candidates promoted their election, not general issues; (2) that very few genuine issue ads appeared in the sixty- and thirty-day periods before general and primary elections; (3) that genuine issue advocacy within those periods would be ineffective in framing the terms of debate on general issues; (4) that since advertising gets more expensive the closer it appears to an election, speakers who want to sway opinion on issues rather than on candidates would want to advertise outside of BCRA's time frames anyway; and (5) that BRCA's targeting prong worked well to separate out issue advocacy from advocacy designed to support particular candidates. Best of all, she thought, the BCRA factors had the advantage of objectivity. By avoiding inquiry into the subjective understanding of the audience and the subjective intent of the speaker, they skirted First Amendment danger. As she put it, "[b]ased on the extensive evidence presented in the record, it is entirely possible to distinguish pure issue advocacy from candidate-centered issue advocacy without relying on the listener/viewer attempting to discern the 'true' intent of the advertisement."[21]

Since the other two judges disagreed with this conclusion, it is not part of the district court's holding. Judge Leon's view was the pivotal one here. He found BCRA's primary definition of electioneering

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[16] *Id.* at 584-85.
[17] *Id.* at 585.
[18] *Id.*
[19] *Id.* at 586.
[20] *Id.*
[21] *Id.* at 587.

communications unconstitutionally overbroad. At the same time, however, he found that BCRA's backup definition (severed of one part) was constitutional. Presumably in order to provide a court majority, Judge Kollar-Kotelly later agreed with Judge Leon's view that the modified backup provision passed muster. But she did so without real discussion. That is a real weakness in her opinion, for Judge Leon's modified backup provision turned out to be broader than the primary definition itself!

The only remaining question was how spending for electioneering communications could be treated. BCRA basically said that individuals could spend for this kind of advertising without limit subject to disclosure. By contrast, it completely barred business corporations and unions and any other corporation that received money from them from engaging in this kind of spending. Judge Kollar-Kotelly believed there was only one real issue: whether applying the law to so-called *MCFL* corporations invalidated it. These are corporations more akin to "voluntary political associations than business firms."[22] In particular, they must satisfy three conditions: (1) they must be "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) they must have no "shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) they must be independent "from the influence of business corporations."[23] Judge Kollar-Kotelly found that barring *MCFL* corporations that receive money from business corporations and unions from spending on electioneering communication did not facially violate the First Amendment. She did leave open, however, the possibility that as applied to particular *MCFL* corporations, BCRA's ban might pose troubling First Amendment issues, which would need to be raised and considered in subsequent suits.

Judge Kollar-Kotelly's approach to BCRA's soft money provisions was even more straightforward. She saw them "as a fund raising restriction aimed at restructuring the failed allocation regime that has produced a campaign finance system so riddled with loopholes as to be rendered ineffective."[24] Applying *Buckley v. Valeo*, she found that soft money was a form of contribution, not of expenditure, and so was subject to something less than strict scrutiny. A law regulating contributions, she said, must be "'closely drawn' to match a 'sufficiently important interest.'"[25]

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[22] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 661 (1990) (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986)).

[23] *Id.* at 662-64.

[24] *McConnell*, 251 F. Supp. 2d at 652 (Kollar-Kotelly, J.).

[25] *Id.* at 664.

As before, she found an important governmental purpose in preventing corruption and the appearance of corruption and also in preventing circumvention of valid contribution limits. And again, looking to the record, she found much to support that purpose. Politicians, she found, knew who gave money to their parties, particularly when it was informally credited to them individually. This allowed donors to obtain special access, which she considered a form of corruption. People often give to political parties to get something in return, she thought, rather than just to get their favorite candidates elected. Judge Kollar-Kotelly also found that the soft money provisions were narrowly tailored "because [they permit] federal candidates and officeholders to . . . fully participate in the political process, but closely circumscrib[e] their activities to prevent the kinds of problems that developed with their solicitation of nonfederal funds."[26] And finally, she dodged one issue that will become important later: whether federalism principles allow Congress to regulate some soft money practices of state political parties. She believed that none of the parties before the district court had standing to raise this particular claim.[27] Only the states, she thought, could.

There are four particular places where some will criticize Judge Kollar-Kotelly's work. First, some will complain of her reliance on the *Buying Time* studies, especially since she herself faulted them in places. In her defense, she would argue that she relied on the studies only where she thought them reliable and relevant and that in most instances other uncontroverted studies or expert testimony backed them up. Second, her failure to justify her finding that Judge Leon's modified version of BCRA's backup definition of electioneering communications was constitutional is a major failing. She accepted Judge Leon's justification uncritically but his reasoning is fairly weak. Perhaps Judge Kollar-Kotelly felt that a rule backed by a majority of the court was necessary on this issue but that the less said about this particular rule the better. Third, when she discusses the treatment of electioneering communications (as opposed to their definition), she really sees only a single issue: whether BCRA has to cut loose all *MCFL* corporations. She largely overlooks other possible issues, like whether requiring *MCFL* corporations to accept funds for such spending only from individuals and then requiring them to carefully segregate those funds within the corporation might represent a less restrictive means of preventing corruption or its appearance. Finally, as for the soft money provisions, Judge Kollar-Kotelly pushes things a bit. She sees obtaining access as a type of corruption. That may be right but the Supreme Court has not yet moved so far.

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[26] *Id.* at 707-08.

[27] *Id.* at 712.