

## **INDEPENDENT EXPENDITURES**

### **Introduction**

The Federal Election Campaign Act (FECA) defines “independent expenditure” as spending for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in “cooperation, consultation, or concert with” or at the request or suggestion of a candidate or a political party committee, and is not coordinated with any candidate or political party committee. In theory, independent expenditures are not contributions to a candidate and, therefore, cannot constitute a quid pro quo exchange, the only form of corruption that the U. S. Supreme Court recognizes in the political sphere

In practice, the boundaries between candidates and organizations making independent expenditures are porous, and reformers question how much benefit a candidate can receive without becoming beholden to them. Moreover, since independent expenditures may be made with “dark money” from organizations with undisclosed donors, voters may not know to whom a candidate is beholden.

The explosive growth of independent expenditures is the largest and most visible effect of the Supreme Court’s decision in *Citizens United v. FEC*, which cleared the way for corporations of all types – from giant for-profit international corporations to local charitable groups, from trade associations to labor unions – to spend unlimited amounts of money in candidate elections.

### **Evolution of Campaign Finance Regulation Relating to Independent Expenditures**

Regulation of independent campaign expenditures evolved piecemeal over the years. The current election campaign finance regulatory structure dates from Federal Election Campaign Act of 1971, as amended (FECA). Originally, FECA only restricted campaign expenditures on media; limited candidate self-funding; required public disclosure of donations and expenditures; and incorporated pre-existing bans on campaign expenditures by labor unions and corporations.

In response to public anger at apparent influence peddling during President Nixon’s 1972 campaign for re-election, Congress amended FECA in 1974. The 1974 amendments set both contribution limits and expenditure limits for campaigns, individuals, and political committees. It also created the Federal Election Commission to enforce the rules. In 1976, the Supreme Court disallowed the limits on campaign expenditures and independent expenditures as infringing on freedom of speech in the case *Buckley v. Valeo*. Disclosure rules and limits on direct contributions to campaigns survived the decision.<sup>1</sup>

In 2002, Congress enacted the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold bill, which closed the “soft money” loophole that allowed unlimited contributions to political parties and banned “electioneering communications” by corporations and labor unions within 60 days of a general election or 30 days of a primary election. The FECA defines electioneering communications as paid advertisements on broadcast media targeted toward a relevant electorate which clearly identifies a candidate. In addition, labor unions, other membership organizations, and corporations may incur “communication costs” -- expenditures in connection with educating their members, shareholders, executives and

administrative staff, and families on election issues. Electioneering communications and communication costs must be reported to the FEC.

In 2003, the Supreme Court affirmed the key provisions of BCRA in *McConnell v. FEC*, including the ban on electioneering communications in the relevant period preceding an election. The Court balanced free speech rights against preventing not only actual corruption but “the eroding of public confidence in the electoral process through the appearance of corruption.”<sup>2</sup>

In 2006, the Court’s composition changed and, in 2010, the Supreme Court reversed itself in a closely decided opinion and ruled in *Citizens United v. FEC* that the prohibition on electioneering communications by corporations impermissibly chilled constitutionally protected political speech.<sup>3</sup> The Court argued that its recent decision in *McConnell v. FEC* derived from old law holding that political speech by corporations could be banned, which the Court expressly overruled. Subsequent decisions by the Supreme Court have continued to be skeptical of campaign finance regulation. Creative political operatives have exploited uncertainties in the law to expand the use of unlimited political expenditures.

### **Organizations Making Independent Expenditures**

The distinguishing feature of independent expenditures is non-coordination with candidates’ campaigns. Individuals and organizations of all kinds may make independent expenditures. The regulations governing contributions to and expenditures by such organizations differ, however, depending on the nature of the organization making the expenditure.<sup>4</sup>

FECA created “Political Action Committees” (PACs) in 1971 as a means for corporations and labor unions to make contributions to candidate campaigns by aggregating voluntary contributions from owners, executives, employees, and members, but their use expanded to encompass any political committee organized for the purpose of raising and spending money to elect or defeat candidates. PACs must register with the FEC, and both contributions to PACs and expenditures by them are limited and disclosed. PACs may make independent expenditures, but because both contributions and expenditures are limited, they often create affiliated “super PACs” from which unlimited independent expenditures can be made.

The Supreme Court’s 2010 decision in *Citizens United* made it possible for all organizations that do not coordinate with campaigns for the election of candidates to receive unlimited contributions and make unlimited independent expenditures. Called “super PACs,” these organizations must register with the FEC and publically disclose both contributions and expenditures. In addition, some super PACs have affiliated IRC 501(c)(4) organizations, which can provide donor anonymity.

The degree to which super PACs operate independently of candidates is questionable. Many super PACs are run by individuals with close ties to candidates or political parties or only support a single candidate or political party.<sup>5</sup> In 2011, the DC District Court ruled that a PAC that is not a political party or candidate committee, or established by a corporation or labor union, may establish a segregated bank account receiving contributions solely for the purpose of making independent expenditures which may accept unlimited contributions even though it maintains other bank accounts for the purpose of making coordinated political expenditures.<sup>6</sup>

Certain tax exempt organizations that do not have political activity as their primary purpose may also make independent expenditures. Labor unions (IRC 501(c)(5) organizations) and trade associations (IRC 501 (c)(6) organizations) have long done so. More recently, “social welfare”

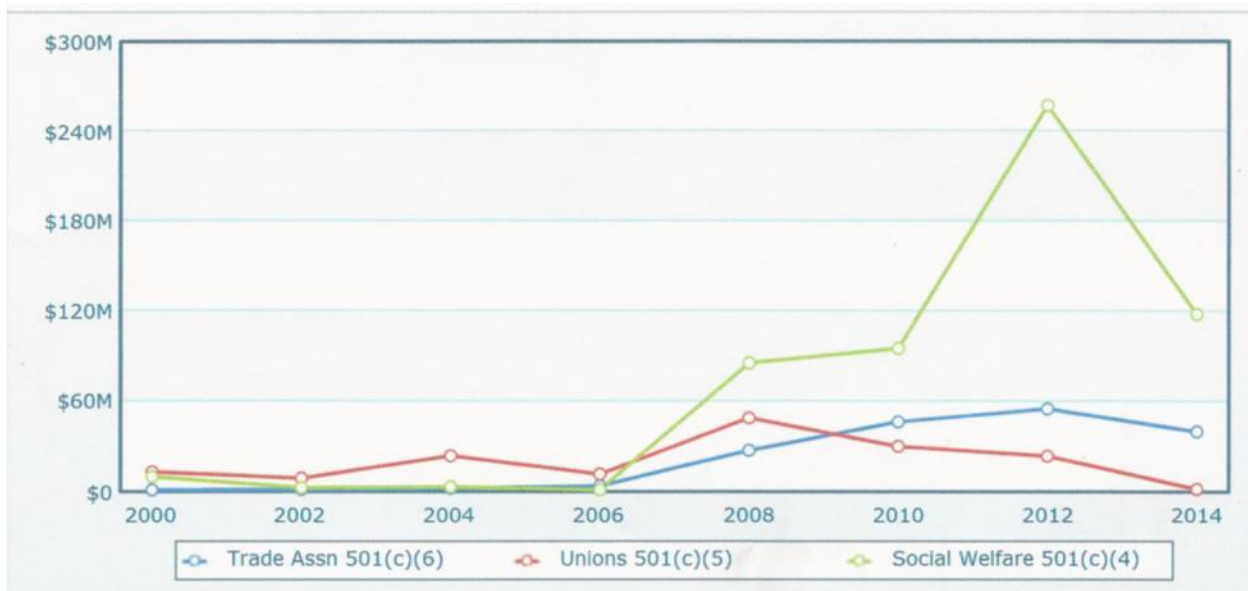
organizations (IRC 501(c)(4) organizations) have become important players. Indeed, there has been an explosion of independent spending from (c)(4) organizations. In general, there are no limits on the contributions these organizations can receive and only limited disclosure of donors.

Contributions for the specific purpose of making independent expenditures must be disclosed to the FEC, which causes donors to give general purpose money to avoid disclosure. Contributions aggregating more than \$5,000 must be disclosed to the IRS but, by law, the identity of the donor is not made public. Contributions to labor unions aggregating more than \$5,000 must also be disclosed to the U.S. Department of Labor. Independent expenditures and electioneering expenses must be reported to the FEC in excess of \$10,000 in any election, and labor union expenditures for political purposes are subject to an array of additional regulations requiring reports to the Department of Labor, the IRS, and the FEC.

Tax law does not require IRS approval before an organization operates under 501(c)(4) tax exempt status, and there is no authoritative list of all 501(c)(4) organizations. The IRS polices compliance by auditing a small number of returns annually. However, an organization may request IRS approval, and the number of applications increased significantly between 2010 and 2012 as organizations sought official sanction for keeping their donors secret. Allegations of improper political bias by the IRS against Tea Party conservatives resulted in congressional hearings in 2013.<sup>7</sup>

Independent political expenditures by trade associations increased dramatically after 2006, while those by labor unions spiked in 2008 and declined markedly thereafter. The most dramatic increase in independent political expenditures by 501(c) organizations occurred among 501(c)(4) social welfare organizations, which enjoyed the benefits of unlimited expenditures, donor anonymity, and loose oversight.

501(c) Spending, Cycle to Date, by Type<sup>8</sup>



The Internal Revenue Code has always recognized tax exemption for civic leagues operated for social welfare purposes, and many venerable organizations enjoy 501(c)(4) status, including the League of Women Voters. Social welfare organizations often have political inclinations, and they may lobby extensively, but direct or indirect participation in political campaigns on behalf of a candidate are not allowable social welfare activity. However, beginning in 1959, regulators successively interpreted the statutory requirement that an organization operate *exclusively* for the promotion of social welfare to mean *primarily* for the promotion of social welfare, and *primarily* has come to mean only 50.1 percent of its program.

The distinction between permitted issue advocacy and prohibited campaigning can be difficult to discern, and some organizations fulfill the 501(c) social welfare requirement with questionable issue advocacy.<sup>9</sup> Furthermore, creative political operatives can leverage campaign expenditures by donating 50.1 percent of a 501(c)(4) organization's receipts to an affiliated 501(c)(4) organization in order to establish a social welfare primary purpose. The second social welfare organization then has a larger contribution base on which to determine its 49.9 percent maximum permitted campaign expenditures.<sup>10</sup>

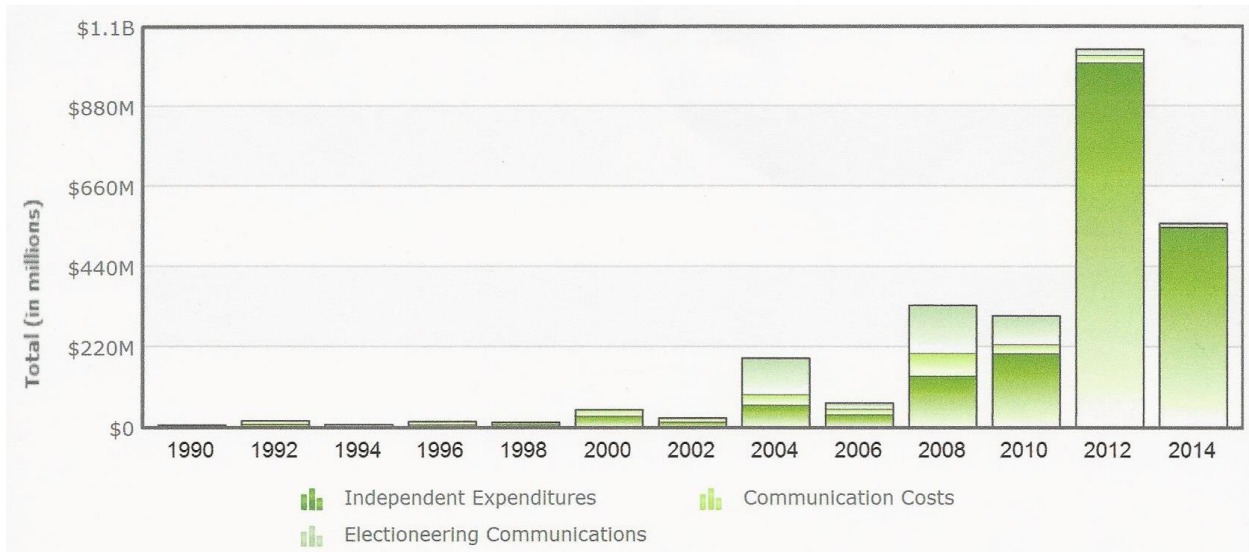
In other words, IRS misinterpretations and shrewd political operatives have built 501(c)(4) into a giant loophole for independent expenditures, often undisclosed. The IRS is now reconsidering the regulations setting limits on political activity by 501(c) organizations.

The last type of organization that may conduct independent spending campaigns are "527" organizations, named after Section 527 of the Internal Revenue Code. This is the tax category for political committees, including the political parties, political committees of issue organizations, PACs, and super PACs. Political committees with a federal candidate focus must register with the FEC. Other political committees must file reports with the IRS that publicly disclose contributions and expenditures, unless substantially similar public reports are filed with the state on behalf of state focused committees.

### **Recent Trends**

Political expenditures by organizations independent of political parties and candidate campaigns are sometimes called "outside spending" which includes independent expenditures, electioneering communications, and communication costs. Outside spending has increased dramatically since 2004, but the preferred vehicle has varied with changes in the regulatory environment. Data is incomplete because of the narrow definition of electioneering communications, but the trend is clear. Since 2010, "independent expenditures" have increased greatly while "electioneering communications," which require reporting to the FEC the size of the expenditure and identification of people involved with the expenditure, have decreased.<sup>11</sup>

Total Outside Spending by Election Cycle, Excluding Party Committees<sup>12</sup>



In comparing independent expenditures between election cycles, it is important to remember that expenditure patterns are different in presidential election years (2008 and 2012) than in non-presidential election years (2010 and 2014). Nonetheless, it is clear that outside spending is increasing overall, and it is increasing most in presidential years. Total independent expenditures excluding party committees increased from \$143.6 million in 2008 to \$1 trillion in 2012, and from \$205.5 million in 2010 to \$550 million in 2014. A shift in the type of entity making expenditures also occurred after 2010, with the introduction of super PACs and increased use of 501(c)s. Increasingly, independent expenditures are being made through entities that permit unrestricted contributions and expenditures, and that require a minimum of disclosure.

These trends are likely to continue. On January 26, 2015, Freedom Partners, which is at the center of a related group of entities that make independent political expenditures directed by billionaire brothers Charles and David Koch, announced that it intended to raise \$889 million in unrestricted funds to spend in the 2016 election cycle. Freedom Partners is a non-profit 501(c)(6) organization, and an affiliated super PAC formed in 2014. Organizations from all across the political spectrum are also gearing up for 2016.

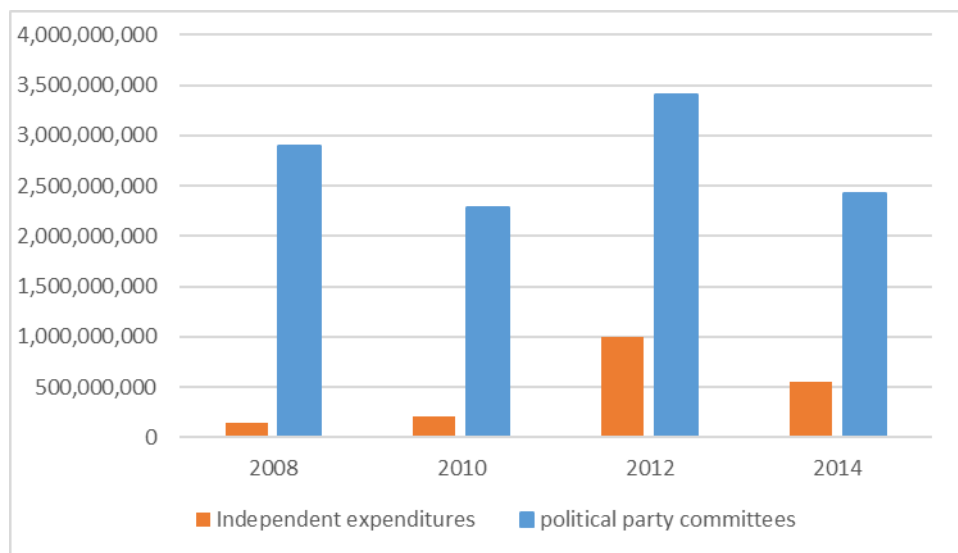
### Does It Matter?

The traditional concern of campaign finance reformers – corruption of government policy – is particularly acute for independent expenditures because of their size. As larger and larger expenditures have become possible, outside groups can ensure that they have access to legislators and government officials, and the prospect of large expenditures for or against a candidate can cause that person, when elected, to make policy in keeping with the interests of the outside group. It takes a very courageous public official to act against the interests of a group that can put millions of dollars into her or his election, either for or against.

Although unregulated and undisclosed money in politics is increasing, the vast majority of campaign expenditures are still made through political organizations regulated by the FEC. Therefore, the question arises: Do independent expenditures affect election outcomes? The

answer is unclear. Because the regulatory environment is changing rapidly, there is not much data on which to measure the extent to which independent expenditures may influence elections. The Center for Responsive Politics observes that conservatives outspent liberals in both 2012 and 2014 but achieved their objectives only in 2014.<sup>13</sup>

Campaign Expenditures by Source<sup>14</sup>



Independent expenditures may affect election outcomes by being focused on the few elections that are competitive and have large political consequences. A recent research study by the Brennan Center discloses that in 8 of the 10 competitive senate races in 2014 that determined partisan control of the senate, candidates were outspent by outside groups. In all, outside groups accounted for the largest share of total spending in those elections (47 percent) followed by candidate spending (41 percent) with party spending trailing at 12 percent.

Independent expenditures are made by a very small group of people. Since the Supreme Court decided *Citizens United* in 2010, \$1 billion has been spent through super PACs, and 60 percent of that was given by only 195 individuals and their spouses. This gives them tremendous potential influence. Furthermore, much of that money came from organizations with undisclosed donors, also known as dark money. Dark money in Senate elections doubled between 2010 and 2014, to \$226 million in 2014. The Brennan Center study also found extensive use of single candidate organizations, some of which relied on dark money. Single candidate PACs tend to be funded overwhelmingly by individuals who have reached the contribution limits on their favored candidate.<sup>15</sup>

Unlimited independent expenditures have the potential to distort the political process in many ways. Large donors can secure preferential treatment if politicians believe they can affect

elections whether they do so in fact. If a small number of large donors sufficiently dominate campaign finance, they may be able to determine election outcomes by selecting the slate of candidates who will have the resources to run for elective office. If they can remain anonymous and their expenditures undisclosed, the public may be unaware of the extent to which the ideal of free and fair elections has been compromised.

### **What Can Be Done?**

Reformers concerned about independent expenditures have a number of strategies that can deal with the issue. First, the fact that many “independent” expenditures are not really uncoordinated with candidate campaigns -- are actually made in “cooperation, consultation, or concert with” campaigns -- offers an approach. Both the Congress and the FEC have authority to define what is truly independent, and a strict definition that excludes spending by an organization started by a candidate’s family member or former staffer, for example, would cut down on many, if not most, “independent” expenditures. Other considerations could be the coordination of messaging with a campaign or shared consultants.

A second approach is to deal with the undisclosed contributions. See the “dark money” paper in this series. Because many donors to “independent” expenditure campaigns like to give in secret, requiring disclosure of all contributors could cut back considerably on the independent expenditures that give contributors special access to government officials. (The Supreme Court has been very clear that there is no constitutional right to make undisclosed political contributions.)

A third approach focuses on the IRS. Since IRS regulations determine how much political activity is allowed for 501(c) organizations, and the statutory law calls for very limited political activity, the IRS can curb abuse of such organizations by issuing new, reformed regulations. Strictly limiting the size of political spending by 501(c) groups would cut deeply into independent expenditures. And if properly done, it could end, or substantially reduce the 501(c)(4) loophole that has fueled the explosion of such spending in recent years.

A fourth approach would be to challenge the Supreme Court’s opinion that independent expenditures can’t corrupt because they are truly independent of candidates. . Supreme Court opinions can be overturned by changing the opinion of at least one member of the Court, changing the composition of the Court, or by constitutional amendment. See the paper in this series “Role of the Supreme Court in Interpreting the Constitution.”

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<sup>1</sup> For more information see History of US Campaign Finance in Primer. *Buckley v. Valeo* may be found at <http://www.law.cornell.edu/supremecourt/text/424/1>

<sup>2</sup> *McConnell v. FEC* may be found at <http://www.law.cornell.edu/supct/html/02-1674.ZO.html>.

<sup>3</sup> *Citizens United v. FEC* may be found at <http://www.law.cornell.edu/supct/html/08-205.ZS.html>

<sup>4</sup> For more information on the rules governing entities making independent expenditures, see <https://www.opensecrets.org/outsidespending/rules.php>

<sup>5</sup> Public Citizen, “Super Connected: Outside Electioneering Groups’ Ties to Candidates and Parties Discredit Foundational Premise of U.S. Supreme Court’s 2010 *Citizens United* Decision (January 2015) found at <http://www.citizen.org/documents/super-connected-2014-citizens-united-outside-groups-report-updated.pdf> , accessed 02/05/2015.

<sup>6</sup> *Carey v. FEC*, see <https://www.opensecrets.org/outsidespending/rules.php> at footnote 29.

<sup>7</sup> US Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, “IRS and TIGTA Management Failures related to 501(c)(4) Applicants engaged in Campaign Activity, Majority Staff Report with Minority Staff Dissenting Views (September 2014), found at

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<http://www.hsgac.senate.gov/subcommittees/investigations/media/subcommittee-releases-report-and-dissenting-views-on-irs-handling-of-501c4-applications>, 12-13, 21-29.

<sup>8</sup> Center for Responsive Politics, found at

[https://www.opensecrets.org/outsidespending/nonprof\\_summ.php](https://www.opensecrets.org/outsidespending/nonprof_summ.php). This chart reports independent expenditures reported to the FEC and is current to January 28, 2015.

<sup>9</sup> US Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, “IRS and TIGTA Management Failures related to 501(c)(4) Applicants engaged in Campaign Activity, 14-19.

<sup>10</sup> For example, see Thomas B. Edsall, “Who Needs a Smoke-Filled Room: Karl Rove, the Koch Brothers and the End of Political Transparency,” *New York Times*, September 9, 2014, found at <http://www.nytimes.com/2014/09/10/opinion/karl-rove-the-koch-brothers-and-the-end-of-political-transparency.html>

<sup>12</sup> Center for Responsive Politics, found at <https://www.opensecrets.org/outsidespending>.

<sup>13</sup> <https://www.opensecrets.org/news/2014/11/more-outside-spending-earlier-primaries-special-elections-led-to-higher-outlays-at-cycles-start/>

<sup>14</sup> The chart is prepared from information obtained from the Center for Responsive Politics, found at: <https://www.opensecrets.org/outsidespending/>; <https://www.opensecrets.org/parties/index.php?cmte=&cycle=2008>. See Appendix.

<sup>15</sup> Ian Vandewalker, “Election Spending 2014: Outside Spending in Senate Races since 2010,” Brennan Center for Justice, New York University School of Law, 1915, found at <http://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf>

## WORKS CITED

Center for Responsive Politics, <https://www.opensecrets.org> , accessed 02/05/2015.

Edsall, Thomas B., “Who Needs a Smoke-Filled Room: Karl Rove, the Koch Brothers and the End of Political Transparency,” *New York Times*, September 9, 2014, <http://www.nytimes.com/2014/09/10/opinion/karl-rove-the-koch-brothers-and-the-end-of-political-transparency.html> , accessed 02/05/2015.

Public Citizen, “Super Connected: Outside Electioneering Groups’ Ties to Candidates and Parties Discredit Foundational Premise of U.S. Supreme Court’s 2010 Citizens United Decision (January 2015), <http://www.citizen.org/documents/super-connected-2014-citizens-united-outside-groups-report-updated.pdf> , accessed 02/05/2015.

US Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, “IRS and TIGTA Management Failures related to 501(c)(4) Applicants engaged in Campaign Activity, Majority Staff Report with Minority Staff Dissenting Views (September 2014), found at <http://www.hsgac.senate.gov/subcommittees/investigations/media/subcommittee-releases-report-and-dissenting-views-on-irs-handling-of-501c4-applications> , accessed 02/05/2015.

Vandewalker, Ian, “Election Spending 2014: Outside Spending in Senate Races since 2010,” Brennan Center for Justice, New York University School of Law, 1915, <http://www.brennancenter.org/sites/default/files/analysis/Outside%20Spending%20Since%20Citizens%20United.pdf> , accessed 02/05/2015.