BRENNAN CENTER FOR JUSTICE

ANALYSIS

Election Spending 2014: Outside Spending in Senate Races Since *Citizens United*

By Ian Vandewalker

Brennan Center for Justice *at New York University School of Law*

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The statements made and views expressed in this report are the sole responsibility of the Brennan Center. Any errors are the responsibility of the author.

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INTRODUCTION

The Brennan Center analyzed outside spending in Senate elections since 2010, the year the Supreme Court's decision in *Citizens United v. FEC* shook the campaign finance world.[1] We focused on the Senate because in each of the three election cycles since 2010, it was widely considered possible that party control of the Senate might change hands. When a chamber of Congress is up for grabs, we expect to see elevated levels of outside spending — the kind of spending deregulated by *Citizens United*.

The story that emerges is that outside spending has exploded in the last three federal elections and is highly focused on competitive races. In 80 percent of competitive 2014 races, outside spenders outspent the candidates — sometimes by more than double. Because outside groups like super PACs and political nonprofits can take contributions of unlimited size, the increasing dominance of outside money is giving the wealthiest few Americans more and more control over the political process. The highest-spending super PACs depend overwhelmingly on large donations in the five- and six-figure range, amounts out of reach for all but a few Americans.

Outside groups' greater spending power also threatens to eviscerate two cornerstones of the regulation of money in politics: contribution limits and transparency. The most recent midterms saw more activity by single-candidate groups. These organizations take unlimited donations and spend the money exclusively in support of one candidate, making a mockery of longstanding contribution limits that guard against the danger of corruption through large contributions. And spending by groups that do not fully disclose their donors — "dark money" — has more than doubled since 2010. Dark money too is focused on competitive races, where it comprises well over a quarter of total expenditures reported to the FEC. When the source of election spending is hidden, voters cannot evaluate the trustworthiness of the messages they see, and the public cannot police potentially corrupting relationships between elected officials and their secret benefactors.

Key findings include:

Outside spending by a tiny number of mega-rich donors has played an increasingly important role in each federal election since Citizens United.

- Outside spending on Senate elections has **more than doubled since 2010, increasing to $486 million in 2014**. (As with any analysis based on FEC numbers, the totals we report underestimate spending, since they do not include amounts spent on sham issue ads that are not required to be reported.)
- Outside groups spent more than candidates in 2014's closest races.
    - Across the 10 competitive races that we have candidate spending data for, **outside groups accounted for the greatest share of spending, or 47 percent**. Candidates lagged behind with 41 percent, and parties accounted for 12 percent.
    - Candidates were outspent by outside groups and parties together in eight of the 10 races. In four of the contests (Alaska, Colorado, Iowa, and North Carolina), candidates made only a third or less of the total expenditures.
    - Nonparty groups alone spent more than the candidates in seven of the 10 states.
- Super PACs are funded by an exclusive few.
    - Of the 10 highest-spending super PACs in the most competitive Senate races in 2014, **all but two got less than one percent of their individual contributions from small donors of $200 or less**. Average contributions from donors of more than $200 were in the five- and six-figure range.
    - Across all federal elections since *Citizens United* was decided in 2010, there has been more than $1 billion in super PAC spending. Just 195 individuals and their spouses gave almost 60 percent of that money — more than $600 million.

The wealthy have used single-candidate groups to support candidates far in excess of federal contribution limits.

- In the 11 competitive Senate races in 2014, 16 candidate-specific groups each spent more than $1 million in Senate elections, twice as many as in the last election. Five of these groups spent more than $3 million; three of them beat the previous cycle's record high of $5.9 million.
- Single-candidate groups depend heavily on donors who have donated the legal limit to the favored candidate — several get all or almost all of their contributions from these double-dipping donors. Together, the 2014 buddy groups in toss-up races took in $14.2 million from individuals, of which **$9.2 million came from people who maxed out to the favored candidate** with either $2,600 (the limit for one election) or $5,200 (the limit for giving to both a candidate's primary and general election campaigns).
- The biggest double-dipping donors gave half a million dollars to single-candidate groups — almost 100 times the limit for candidate contributions.

Dark money played a critical role in funding a new Senate.

- **Dark money in Senate elections has more than doubled since 2010**, from $105 million in inflation-adjusted dollars, to $226 million in 2014.
- Almost half of the $1 billion in 2014 dollars that outside spenders plowed into Senate elections over the last three cycles, $485 million, was dark money.
- In the 11 most competitive races in 2014, **dark money comprised 59 percent of nonparty outside spending**. In the 10 competitive races that we have candidate spending data for, dark money comprised 28 percent of total spending (candidate, party, and outside group).
- **The winners in the 11 most competitive races in 2014 together had more than $131 million in dark money supporting them** — 71 percent of the nonparty outside spending in their favor.

Methodology

Our analysis is based on independent expenditures and electioneering communications reported to the Federal Election Commission. We use the term "outside spending" to refer to all expenditures reported to the FEC made by anyone other than the candidates themselves, including by parties. Figures that exclude party spending are described as "nonparty outside spending."

We examined spending in all Senate races in 2010, 2012, and 2014. In each of these election years, it was widely considered possible that control of the Senate might change hands.[2] The comparison is not perfect, of course. In 2010, greater attention was paid to the House, which switched from Democrat to Republican control. The GOP picked up seats in the Senate, but did not wrest control from the Democrats. In 2012, the presidential election may have affected spending in Senate elections. Democrats ended up increasing their Senate majority. In 2014, neither the House nor the White House was at play while the Senate was considered likely to change hands, ensuring that the greatest part of federal spending focused on Senate elections. Nevertheless, comparing these three cycles allow us to identify trends following the significant changes to the regulation of outside spending caused by *Citizens United* and the creation of super PACs, both in 2010.

We conducted a more detailed analysis of 11 of the 2014 Senate contests that were especially competitive, based on polls: Alaska, Arkansas, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Michigan, North Carolina, and New Hampshire. All were listed as "toss-ups" by the Cook Political Report in late September or early October.[3] In 10 of these 11 competitive contests, we were able to obtain complete candidate spending data (excluding Louisiana), allowing for comparisons between candidate and outside spending. We also used archival ratings from the Cook Political Report to select competitive races from the 2010 and 2012 cycles.[4]

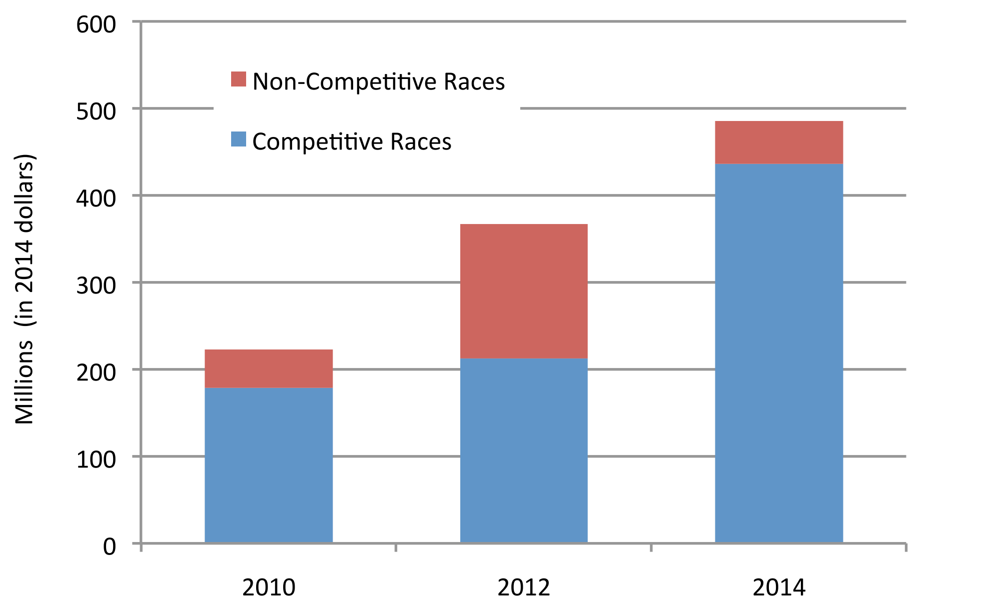
We used analysis by the Center for Responsive Politics to categorize outside spenders' disclosure. CRP categorizes spenders as providing full disclosure, partial disclosure, or no disclosure, and we followed those categorizations gleaned as of Election Day. We consider groups in the partial disclosure and no disclosure categories to be dark-money groups. We consider spenders to be single-candidate groups if they have made expenditures favoring only one candidate or attacking that candidate's opponent during this election cycle. A few of the single-candidate groups have spent in support of other candidates in past cycles.

I. OUTSIDE SPENDING PLAYS A GREATER ROLE

Outside spending — expenditures reported to the FEC made by anyone other than a candidate — in all Senate races in 2014 totaled $486 million. This was more than double the amount of outside spending in 2010's midterms, which was $220 million in inflation-adjusted dollars.[5] The cumulative total of spending on elections for the chamber over three cycles was more than $1 billion in 2014 dollars. As outside spending in federal elections continues to increase, candidate spending has not kept pace, meaning outside groups account for a bigger and bigger slice of the pie.[6]

Three 2014 races beat the previous record for highest outside spending in a Senate election, which was $52 million in Virginia in 2012.[7] North Carolina shattered the record with $80 million in outside spending, while Colorado saw $68 million and Iowa $59 million. Next in line after the top three was Alaska, which even without any major media markets managed to rack up $41 million in outside spending.

Figure 1: Outside Spending by Election Cycle, Senate Races



Levels of outside spending are far from uniform; the vast majority targets races considered the most competitive. In 2014 Senate elections, nearly 90 percent of outside spending was aimed at one of the 11 races rated as toss-ups, which comprise only one-third of the Senate seats up for election.[8] Less than $50 million of the $486 million in outside spending in Senate contests went to the 22 noncompetitive races.

This pattern was evident in past cycles as well. In 2010, 81 percent of expenditures on Senate elections were made in the 11 races considered toss-ups in early October.[9] In 2012, the proportion was smaller; 59 percent went to 10 toss-up contests.[10] This may have been because presidential election siphoned off some of the biggest outside money.

It is worth noting that high spending is attracted by the *perception* of competitiveness in the months leading up to Election Day, a perception driven largely by early polls that may not be borne out. Our list of races that were deemed toss-ups in September and October saw the highest outside spending by far, and several of them ended up with close results. But the closest Senate election was in Virginia, where incumbent Mark

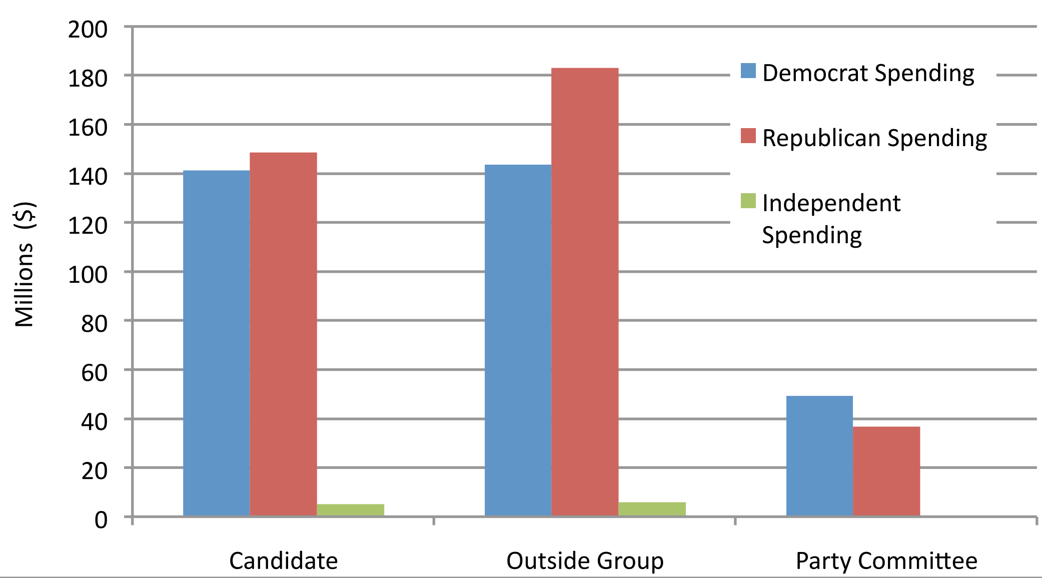
Warner (D) won by less than one percentage point. That race was never considered close by pollsters, and it attracted less than $3 million in outside expenditures.

On the other side of the coin, the races in Kentucky and Arkansas were decided by more than 15 points on Election Day. Yet Cook Political Report listed Kentucky and Arkansas as toss-ups in September, and both races saw well over $30 million worth of outside spending, placing them in the top quintile of 2014 Senate races. Races that ended up being significantly closer, but weren't competitive according to the polls, had a tiny fraction of their spending. These include Illinois, Minnesota, and New Mexico, none of which topped $3 million in outside spending. All of this is consistent with the hypothesis that outside spending focuses on close races because the spenders believe they can affect the outcome.

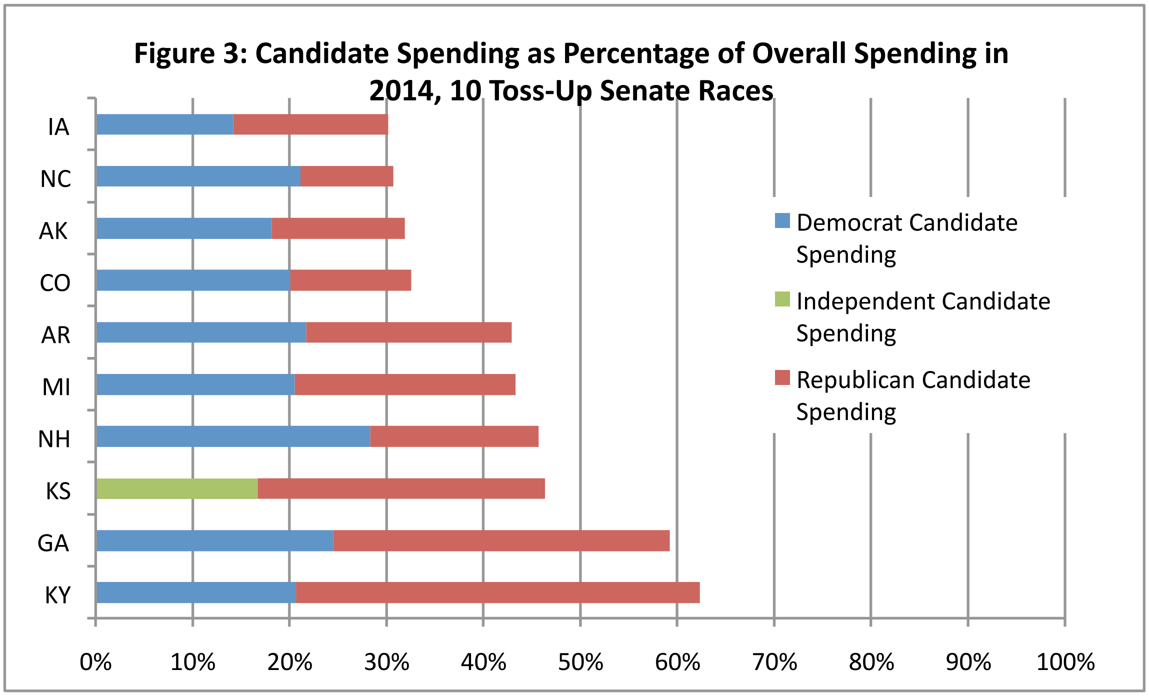
A. Candidates Were Outspent by Outside Groups

As noted above, candidate spending in federal elections has not increased at the same rate as outside money, giving greater relative importance to outside expenditures. In 2014, across the 10 toss-up races for which candidate spending data is available, outside groups accounted for the greatest share of spending, or 47 percent. Candidates lagged behind with 41 percent, and parties accounted for 12 percent.

Figure 2: Overall Spending by Candidates, Outside Groups, and Party Committees in 2014, 10 Toss-Up Senate Races

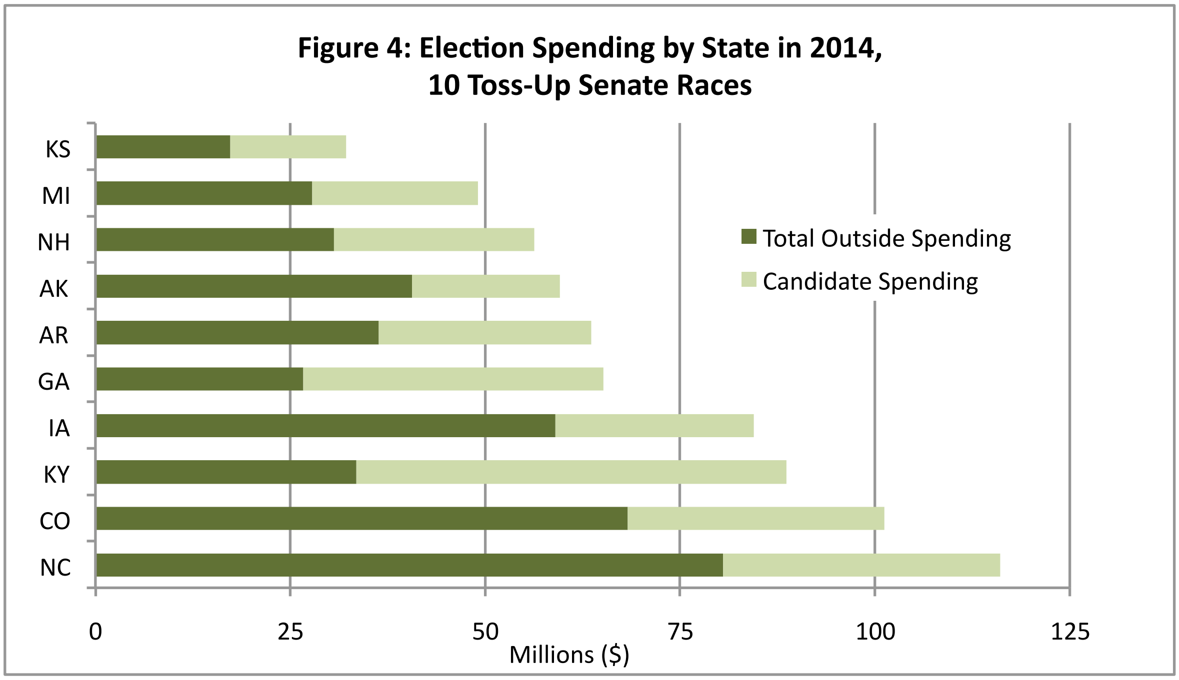


Candidates were outspent by outside spending (parties and outside groups together) in eight of the 10 races we examined. In four of the contests — Alaska, Colorado, Iowa, and North Carolina — candidates made only a third or less of the total election expenditures.



Nonparty groups alone spent more than the candidates in seven of the 10 states. The dollar difference was greatest in North Carolina, where nonparty outside expenditures were $26 million higher than candidate spending. Colorado was not far behind; there, nonparty groups outspent candidates by $21 million. The exceptions were Georgia, Kentucky, and New Hampshire. In Kentucky, even an impressive $33 million in nonparty outside spending was overshadowed by massive candidate spending totaling $55 million.

Since this sample includes both candidate and outside spending, it also highlights the heights overall election spending reached in the midterms. North Carolina's contest was likely the most expensive legislative election in U.S. history at $116 million.[11] The prior record, adjusting for inflation, was probably the 2000 New York Senate race, which cost more than $100 million in 2014 dollars.[12] Other 2014 races at the top in overall spending include Colorado ($101 million), Kentucky ($89 million), and Iowa ($84 million).



B. Super PACs Depend on a Few Wealthy Donors

Super PACs drove much of the high outside spending: they comprised half of 2014's top 10 Senate election spenders, as demonstrated in Table 1, below. This money comes from a small number of donors who give massive amounts. In contrast to candidates and parties, super PACs can accept contributions of unlimited size, and they tend to depend on six- and seven-figure contributions for the greatest part of their revenue. In the three federal elections held since *Citizens United*, there has been more than $1 billion in super PAC spending. Just 195 individuals and their spouses gave almost 60 percent of that money — more than $600 million.[13] The pattern is not limited to super PACs; in the 2014 elections, the 100 biggest donors to all types of political committees together gave $323 million, almost matching the $356 million in small donations that came from an estimated 4.75 million people.[14]

These facts belie past claims of super PAC apologists who have painted them as good for democracy because they allow citizens to pool limited resources.[15] Other types of political committees that could perform that function, traditional PACs for example, have existed for decades. The distinguishing characteristic of super PACs is their ability to accept contributions of unlimited size. This feature can only be taken advantage of by the wealthiest donors, who use super PACs to funnel unlimited contributions into politics.

The super PACs that were responsible for the highest expenditures in the most competitive Senate races all received only a tiny percentage of their funds from small donors of $200 or less as of Election Day. In fact, none of the super PACs among the 10 highest-spending groups in our sample got more than one-tenth of 1 percent of their individual contributions from small donors.[16]

The average contributions from donors of more than $200 for the top super PACs are significantly more than the mean household income in the U.S. of $73,000.[17] The top-spending super PAC, Senate Majority PAC, had an average large contribution of more than twice the national average household income. The second highest-spending super PAC, Ending Spending, had an average large contribution of over half a million dollars, more than six times the average American household's income.

Due to their secretive nature, there is no way of knowing how much the dark-money groups raise from small donors or how few donors provide their funding. They may be even more dependent on a few major donors than super PACs.

Not all of the top outside spenders depend so heavily on big money. Both parties' Senate committees take in tens of millions of dollars from small donors, and two traditional PACs that made high independent expenditures in Senate elections took in 90 percent of their contributions from small donors. Unlike super PACs, these organizations are all governed by contribution limits. Super PACs, too, could be used to pool small donations, but their ability to take contributions of unlimited size has made them a vehicle for high spending by the few who can afford it.

Table 1: Top Outside Spenders – 11 Toss-Up Senate Races

Organization Name	*Expenditures in 11 Most Competitive Races*	*Organization Description*	*Disclosure*	*Contributions from donors of $200 or Less*[18]	*Average Contribution by Donors of More than $200*[3]
Democratic Senatorial Campaign Committee	$54,588,995	Democratic party committee	Full	44%	$1,334
Senate Majority PAC	$46,578,851	Democratic-aligned super PAC	Full	0.06%	$170,525
National Republican Senatorial Committee	$38,248,720	Republican party committee	Full	29%	$2,342
Crossroads GPS	$24,399,512	Conservative 501(c)(4) group	None	Unknown	Unknown
U.S. Chamber of Commerce	$23,257,643	Conservative 501(c)(6) trade organization	None	Unknown	Unknown
Ending Spending Action Fund	$19,889,332	Conservative super PAC	Partial	0.01%	$502,188
NextGen Climate Action Committee[19]	$19,022,208	Liberal super PAC	Full	0.01%	$2,479,691
Freedom Partners Action Fund	$18,264,534	Conservative super PAC	Partial	0.1%	$203,626
American Crossroads	$16,700,009	Conservative super PAC	Partial	0.08%	$111,080
National Rifle Ass'n of America Political Victory Fund	$10,447,559	Conservative PAC	Full	87%	$242

II. SINGLE-CANDIDATE GROUPS WEAKEN CONTRIBUTION LIMITS

Single-candidate groups, or "buddy groups" are outside spenders devoted exclusively to electing a specific candidate. These groups can accept contributions of unlimited size and spend every penny to support their favored candidate. Their expenditures are not subject to contribution limits as long as they are made independently of the candidate's campaign, that is, as long as there is no coordination with the candidate. But the rules governing coordination are weak, and candidates have many ways of controlling the spending of nominally independent groups.[20]

In 2014 Senate races, buddy groups were a more important piece of campaign-finance weaponry than ever before. In 2012, seven Senate-focused buddy groups spent more than $1 million, with the biggest spender hitting $5.9 million.[21] In the 2014 midterms, 16 candidate-specific groups each spent more than $1 million in Senate elections, twice as many as in the last election. Five of these groups spent more than $3 million; three of them beat the previous cycle's record high.

The biggest-spending buddy group was Put Alaska First, which spent more than $10 million in aid of Democrat Mark Begich's unsuccessful reelection campaign. Well over $9 million came from the Democratic Party-aligned Senate Majority PAC, which funneled its spending in the state through Put Alaska First rather than making direct expenditures in the state. The number two and three top buddy groups were both pro-McConnell organizations: the dark-money group Kentucky Opportunity Coalition, with $8.2 million, and the super PAC Kentuckians for Strong Leadership, with $6.4 million. If the two — which have overlapping leadership[22] — were combined, they would surge to the top spot with $14.6 million in spending.

The most active buddy groups often avoid transparency: six of the top 10 single-candidate spenders in our sample hide some or all of their donors. Because they offer the advantage of secrecy, single-candidate dark money groups may become even more common than single candidate super PACs, which are required to report their donors.

Single-candidate groups often hold their fire until late in the election. The Committee to Elect an Independent Senate was formed on October 6 and attracted only six donors. It managed to spend $3.9 million in Kansas in aid of Greg Orman in just the final month before Election Day. Arkansas Horizon, devoted to Republican Tom Cotton, didn't start spending until October 14, but it managed to rack up $1.8 million in expenditures in the last three weeks of the election. A group that supported Republican winner Joni Ernst, Priorities for Iowa, was formed in September and spent $1.2 million. Each of the three groups had fewer than 10 donors.

Table 2: Top Spending Single-Candidate Groups – 11 Toss-Up Senate Races

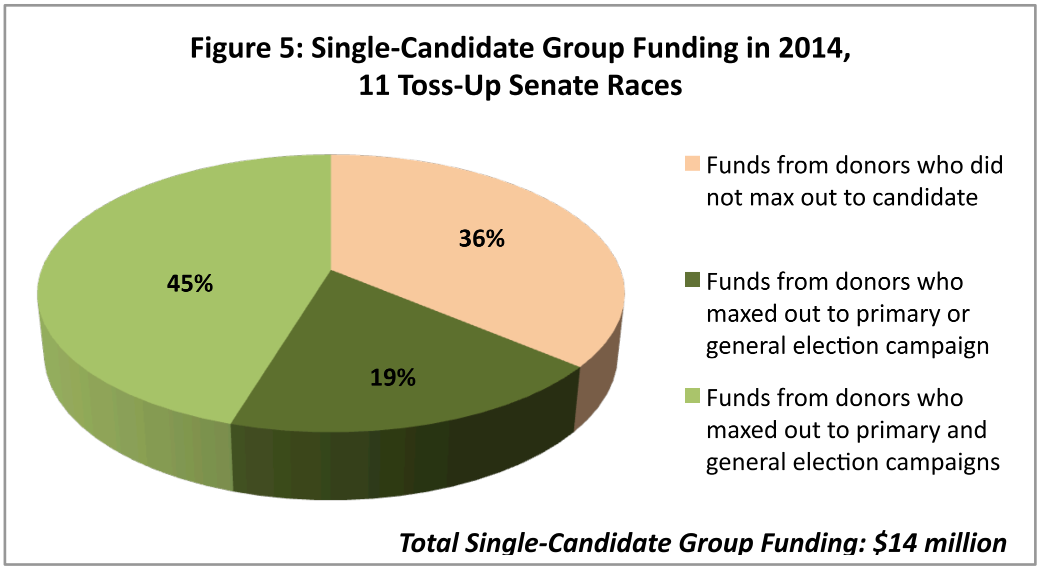
Organization	*Expenditures*	*Description*	*Disclosure*
Put Alaska First PAC	$10,196,237	Pro-Begich (D-AK) super PAC	Full
Kentucky Opportunity Coalition	$8,209,237	Pro-McConnell (R-KY) 501(c)(4) social welfare group	None
Kentuckians for Strong Leadership	$6,417,623	Pro-McConnell (R-KY) super PAC	Full
Committee To Elect An Independent Senate	$3,880,562	Pro-Orman (I-KS) super PAC	Full
Carolina Rising	$3,179,626	Pro-Tillis (R-NC) 501(c)(4) social welfare group	None
Citizens for a Working America PAC	$2,162,656	Pro-Perdue (R-GA) super PAC	Partial
Alaska SalmonPAC	$1,924,592	Pro-Begich (D-AK) super PAC	None
Arkansas Horizon	$1,805,900	Pro-Cotton (R-AK) super PAC	Full
Priorities for Iowa Political Fund	$1,201,275	Pro-Ernst (R-IA) super PAC	Partial
Government Integrity Fund Action Network	$1,047,880	Pro-Cotton (R-AK) super PAC	Partial

A. Double-Dipping Donors can Evade Contribution Limits

Single-candidate groups tend to depend heavily on donations from people who have made the maximum contribution to the favored candidate's campaign — "double-dipping donors." The contribution limit for federal candidates is indexed to inflation and raised every two years. For the 2014 elections it was $2,600 per election, and primary and general elections are considered separate elections, allowing Senate candidates to accept $5,200 in a six-year cycle from a single donor.[23] But there is no limit on contributions to super PACs or political nonprofits. Corporations and unions are prohibited from contributing directly to candidates at all, but they are allowed to give to outside groups.

In our sample of 11 competitive races from 2014, we found 136 donors to single-candidate groups who had also given the maximum to the favored candidate's primary or general campaign, or both.[24] Most double-dippers give in the five-and six-figure range. The biggest checks were worth half a million dollars: three single-candidate groups each benefited from a $500,000 donation from a double-dipper — two from the same donor. Those donations are almost 100 times larger than the maximum direct contribution in a typical election cycle.

Looking only at contributions from individual people (as opposed to unions, corporations, or other entities), most of the buddy groups in our sample received the great majority of their contributions from double-dipping donors. Of the 18 groups that took money from individuals at all, five collected all of their individual contributions from double-dippers. Another five got more than 80 percent of their individual-contributor money from double-dipping donors. Together, the buddy groups took in $14.2 million from individuals, of which $2.7 million came from people who gave the favored candidate $2,600, and $6.5 million came from donors who gave the candidate $5,200 — altogether almost two-thirds of the single-candidate groups' combined contributions.



Kentuckians for Strong Leadership, devoted to reelecting Mitch McConnell (R), was far and away the biggest beneficiary of double-dipping donors. Of its 100 individual donors, 58 maxed out to McConnell's primary or general campaign, or both. These double-dippers together gave the super PAC just over $4 million of its $6.1 million in individual contributions, or 66 percent. Kentuckians for Strong Leadership tied our sample's record for largest double-dipping donation with $500,000 from Florida venture capitalist Lawrence DeGeorge.

The biggest double-dipper in our sample is Houston Texans owner Robert McNair, who combined a $2,600 candidate contribution with $500,000 to the super PAC backing that candidate for two Republicans: Thom Tillis and Grow NC Strong, and Scott Brown and Independent Leadership for New Hampshire. McNair also gave $500,000 each to four other single-candidate groups without making direct contributions to the favored candidates.

Several candidate-specific groups were funded largely or entirely by a single person or a very small group. An organization called New Hampshire PAC to Save America, which supported Jim Rubens' unsuccessful run for the Republican nomination in New Hampshire, existed for only four months. Its sole donor, the wife of a former senator that Rubens worked for,[25] gave the super PAC $140,000 in addition to giving the maximum $2,600 to Rubens' primary campaign. Georgia One PAC, which favored Republican David Perdue, took $100,000 of its $125,000 from one double-dipper, and the remainder came from a single corporation. A group in favor of Michigan Republican Terri Lynn Land, called Pure PAC, took in $153,000 of its $155,000 revenue from a single double-dipping individual. Another group, Kansans Support Problem Solvers, which formed in September to support unsuccessful independent candidate Greg Orman, collected $750,000 from just three people, one of whom was a $200,000 double-dipper.

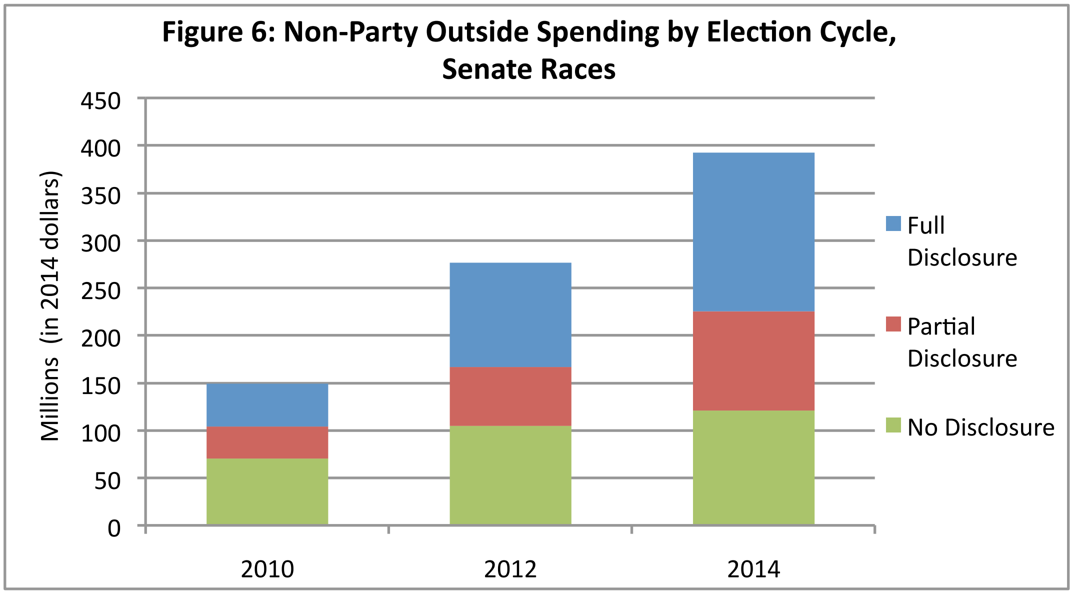
B. Corporations and Unions Can Evade the Ban on Contributions

Corporations and unions are completely prohibited from contributing directly to candidates.[26] But single-candidate groups allow these entities to give unlimited sums that offer great value to candidates. Several single-candidate super PACs in our sample accepted large donations from corporations or unions (it is unknown how much the single-candidate dark-money groups collected from corporations and unions). In addition to its many individual contributions, Kentuckians for Strong Leadership took in hundreds of thousands of dollars from corporations. The biggest corporate contribution to the pro-McConnell group was $300,000 from Murray Energy Corporation, which has faced allegations that the CEO pressured company employees to donate to candidates chosen by the company.[27]

Some buddy groups have taken no money at all from individuals, such as Citizens for a Working America, funded by $2.2 million from two nonprofits and two limited liability corporations; Michigan for All, funded by $1.3 million from labor groups; and Alaska SalmonPAC, funded by $1.8 million from environmentalist nonprofits.

III. DARK MONEY RISES

Expenditures by groups that do not fully disclose their donors in Senate elections have more than doubled since 2010, from $105 million in inflation-adjusted dollars, to $167 million adjusted for inflation in 2012, to $226 million in 2014. Almost half of the $1 billion in 2014 dollars that outside spenders plowed into Senate elections over the last three cycles, or $485 million, was dark money.



Like all outside spending, dark money seeks out competitive contests. The 11 most competitive races in 2014 saw $205 million worth of spending by groups that hide some or all of their donors. In contrast, there was only $20 million worth of dark money in the 22 noncompetitive Senate races — less than 10 percent of the total from the 11 closest-polling races. Moreover, the proportion of dark money was higher in the toss-ups: 59 percent of nonparty outside spending in competitive races was dark money, compared to 44 percent in noncompetitive races.

In the 10 competitive races for which candidate spending data is available, dark money comprised 28 percent of total spending (candidate, party, and outside group). With outside spending on the rise in relation to candidate expenditures, it is likely that dark money will become an even bigger part of election spending future cycles.

In North Carolina, the $40 million worth of dark money actually exceeded candidate spending by $4 million dollars. In Colorado, $33 million in dark money just barely edged out candidate spending by half a million, and in Alaska, $19 million from dark-money groups was just $214,000 less than candidate expenditures.

A. 2014's Winners Were Supported by Tens of Millions in Dark Money

In the competitive races excluding Kansas, where the general election pitted a Republican against an independent, dark-money support was more than twice as strong for Republicans, at $138 million, than Democrats, at $59 million. Pro-Republican nonparty outside spending was 77 percent dark money, while that in favor of Democrats was 39 percent dark money.

That party disparity, combined with a wave of Republican victories, means that most of the winners in our sample were heavily favored by dark money. Thom Tillis (R) of North Carolina and Cory Gardner (R) of Colorado each benefitted from more than $22 million in dark money. Overall, the nonparty outside spending in favor of the winners in our sample was 71 percent dark money.

Table 3: Winners' Dark Money Support – 11 Toss-Up Senate Races

Winning Candidate	*Dark Money in Support*	*Dark Money as Percent of Nonparty Outside Spending in Support*
Tillis (R-NC)	$23,176,738	82%
Gardner (R-CO)	$22,438,090	88%
Ernst (R-IA)	$17,531,531	73%
McConnell (R-KY)	$13,919,905	63%
Cotton (R-AR)	$12,489,921	71%
Perdue (R-GA)	$11,114,757	85%
Sullivan (R-AK)	$10,849,706	85%
Roberts (R-KS)	$8,322,398	80%
Peters (D-MI)	$4,369,996	29%
Cassidy (R-LA)	$3,624,853	65%
Shaheen (D-NH)	$3,383,436	33%
Total	**$131,221,335**	**71%**

B. FEC Data Omits Unreported Spending

Spending calculations based on FEC data leave out tens — perhaps hundreds — of millions of dollars in unreported spending on elections; the true amount is unknown. FEC rules do not require the reporting of expenditures on sham issue ads, which attack or praise candidates without explicitly instructing viewers how to vote. When these ads are aired within 60 days before a general election or 30 days before a primary election, the spending is required to be disclosed to the FEC as an "electioneering communication."[28] But outside those time periods, sham issue ads are unregulated.[29]

As a prior entry in this series explained, we found evidence of tens of millions in unreported spending in some of the races in our sample.[30] In North Carolina, the amount of unreported spending was almost as much as the candidates had collectively spent through the end of September. Reliable totals for this doubly dark money cannot be calculated, but there is clearly enough of it to make every dollar and percentage calculation of dark money based on FEC data significantly underestimate the true extent of the phenomenon.

The Center for Public Integrity examined TV ads in several Senate contests to estimate the portion coming from dark-money groups. This method depends on monitoring TV spots as they are aired, rather than FEC data, so it captures some sham issue ads missed by our method.[31] The analysis found that more than one in four TV ads in North Carolina, Arkansas, and Colorado were paid for with dark money, and another three states saw more than one in five TV spots funded by dark money.[32]

IV. POLICY RECOMMENDATIONS

With *Citizens United* and other cases, the U.S. Supreme Court dismantled many longstanding regulations of our campaign finance system.[33] The Court has painted a rosy picture of this deregulated world, but its predictions have proved wrong. Instead of the full and immediate disclosure the Court envisioned, dark money is a powerful force that continues to gain in currency. Instead of outside groups that pose no threat of corruption because of their independence from candidates, outside expenditures are carefully choreographed to assist campaigns, raising the possibility that unlimited outside money is as valuable to candidates (and to donors hoping to buy influence) as the direct contributions that our system strictly limits.[34]

In order to determine how to interpret a message, voters need to know who the speaker is and what political agenda is being served, which dark-money spending precludes. Moreover, dark money enables spenders who are hidden from the public, but not from the political networks and candidates they back, to gain secret influence. Voters who know that their elected representatives are beholden to some special interest can vote them out, but secret donations disrupt such democratic responsiveness. As Supreme Court Justice Anthony Kennedy put it in approving of disclosure as a constitutional way of regulating campaign spending, disclosure means that "citizens can see whether elected officials are in the pocket of so-called moneyed interests. . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[35]

Outside groups' ability to fundraise in unlimited amounts makes them a tempting vehicle for evading the limits on direct contributions to candidates and parties.[36] Supposedly independent groups cooperate with the campaigns they support in many ways, walking right up to the line of illegal coordination. Campaigns reach out to donors who have maxed out and suggest they give to a friendly super PAC, or they share donor lists prior to publicly reporting the information.[37] The effect can be vividly observed in the donations to single-candidate super PACs, where most of the money comes from donors who also hit the contribution limit to the candidate.

Super PACs' reliance on large donors and the ever-increasing role of outside spending threaten to leave average people who cannot afford large donations out of the political process. If they were working as intended, contribution limits would prevent candidates from funding their campaigns solely with massive donations from a few individuals. This prevents corruption and helps to ensure candidates have a broad base of support — and make public policy decisions based on the interests of thousands of constituents. But candidate-specific groups can raise money in unlimited amounts, creating the risk that candidates will depend on a few major donors — donors whom a winning candidate will want to keep happy as an elected official.

The Supreme Court put us on the path toward these problems. It must recognize its mistakes and overturn its decisions interpreting the Constitution to forbid common-sense regulations that give average people the opportunity to participate meaningfully in our representative democracy. But Congress and the federal agencies also have the power to move the campaign finance system away from the dangers of deregulation. *Citizens United* allowed the creation of new legal mechanisms for big money to influence elections and elected officials, but it did not mandate them.

There are various policy options available even under the Court's current misguided jurisprudence.[38] These include legislation like the DISCLOSE Act,[39] which would eliminate dark money as we know it, and the Empowering Citizens Act,[40] which would clamp down on the ability of outside groups to cooperate with candidates in violation of the spirit of contribution limits. Public campaign financing, included in the Empowering Citizens Act and other legislative proposals, would increase the participation and power of small donors, helping to ensure elected officials are responsive to all of their constituents instead of just wealthy special interests.

Federal agencies can also improve transparency, even without legislation. The IRS is considering a reform that would clarify the rules governing political spending by nonprofits, which are currently the channel for the hundreds of millions in dark money spent on our elections.[41] The SEC is considering a petition for a rule to improve transparency for corporate political spending.[42] The Federal Communications Commission has the mandate to require that political ads disclose the true identity of the person paying for them, and should exercise it.[43]

Finally, disclosure could be improved without either legislation or independent agency action. The president could issue an executive order requiring government contractors disclose their political contributions.[44] There is an especially pressing need for transparency concerning political spending by contractors because of the unique risk of pay-to-play decisions in procurement. Under the status quo, it is likely that contractors and government decision makers both know who has given how much, but the public doesn't. A vast array of businesses contract with the federal government. Disclosure of their spending would dramatically increase political spending transparency and close one of the most glaring windows for corruption.

ENDNOTES

[1] 558 U.S. 310 (2010).

[2] *See, e.g.,* Jay Newton-Small, *GOP Takes a Page Out of Democrats' Senate Playbook*, TIME, Jan. 21, 2014, http://swampland.time.com/2014/01/21/gop-takes-a-page-out-of-democrats-senate-playbook/ ("Pundits have been predicting for the last two election cycles that Republicans would take control of the Senate.").

[3] *2014 Senate Race Ratings for October 17, 2014*, COOK POLITICAL REPORT, http://cookpolitical.com/senate/charts/race-ratings/7937; *2014 Senate Race Ratings for October 10, 2014*, COOK POLITICAL REPORT, http://cookpolitical.com/senate/charts/race-ratings/7900; *2014 Senate Race Ratings for September 29, 2014*, COOK POLITICAL REPORT, http://cookpolitical.com/senate/charts/race-ratings/7857.

[4] In 2010, the toss-ups were: California, Colorado, Connecticut, Illinois, Kentucky, Missouri, Nevada, Pennsylvania, Washington, West Virginia, and Wisconsin. *2010 Senate Race Ratings, October 7, 2010*, COOK POLITICAL REPORT, http://cookpolitical.com/archive/chart/senate/race-ratings/2010-10-07_12-25-13. In 2012: Arizona, Connecticut, Indiana, Maine, Massachusetts, Montana, Nevada, North Dakota, Virginia, and Wisconsin. *2012 Senate Race Ratings for October 4, 2012*, COOK POLITICAL REPORT, http://cookpolitical.com/senate/charts/race-ratings/4859.

[5] In 2010, 37 Senate elections were held, including 3 special elections.

[6] Russ Choma, *Money Won on Tuesday, But Rules of the Game Changed*, CENTER FOR RESPONSIVE POLITICS, Nov. 5, 2014, http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/; *see also Estimated Cost of Election 2014*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/overview/cost.php (showing the total cost of congressional elections staying the same over the last three cycles).

[7] *2012 Outside Spending, by Super PAC*, CENTER FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=R&pty=A&type=S. This amount is not adjusted for inflation.

[8] The races we studied were listed as toss-ups by the Cook Political Report in late September or October: Alaska, Arkansas, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Michigan, New Hampshire, and North Carolina.

[9] Those races, which Cook Political Report listed as toss-ups on October 7, 2010, were California, Colorado, Connecticut, Illinois, Kentucky, Missouri, Nevada, Pennsylvania, Washington, West Virginia, and Wisconsin. *2010 Senate Race Ratings, October 7, 2010*, COOK POLITICAL REPORT, http://cookpolitical.com/archive/chart/senate/race-ratings/2010-10-07_12-25-13.

[10] The Cook Political Report listed 10 toss-ups on October 4, 2012: Arizona, Connecticut, Indiana, Maine, Massachusetts, Montana, Nevada, North Dakota, Virginia, and Wisconsin. *2012 Senate Race Ratings for October 4, 2012*, COOK POLITICAL REPORT, http://cookpolitical.com/senate/charts/race-ratings/4859.

[11] As explained below, this figure underestimates spending because it does not include expenditures not reported to the FEC, of which there were tens of millions in North Carolina.

[12] Philip Bump, *The Most Expensive Senate Race Ever, in 2014 Dollars? Probably Hillary Clinton's*, WASH. POST, Oct. 21, 2014, http://www.washingtonpost.com/blogs/the-fix/wp/2014/10/21/the-most-expensive-senate-race-ever-in-2014-dollars-probably-hillary-clintons/.

[13] According to our analysis of data collected by the Center for Responsive Politics, available at *2014 Top Donors to Outside Spending Groups*. CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/summ.php?disp=D.

[14] Kenneth P. Vogel, *Big Money Breaks Out*, POLITCO, Dec. 29, 2014, http://www.politico.com/story/2014/12/top-political-donors-113833.html.

[15] Bradley A. Smith, *Super PACs Level the Playing Field*, USA TODAY, Jan. 13, 2012, http://www.usnews.com/debate-club/are-super-pacs-harming-us-politics/super-pacs-level-the-playing-field; Jacob Sullum, *The Rap Against Super PACs*, REASON, Jan. 12, 2012, http://reason.com/blog/2012/01/12/the-rap-against-super-pacs.

[16] These calculations are based on data current through Election Day. As used in this section, "individual contributions" excludes money from political committees and other sources of revenue like loans, following FEC usage. Only contributions from entities other than political committees, such as individual persons, corporations, partnerships, tribes, and unions, are counted. For more data on super PACs' reliance on small donors, see Ian Vandewalker, *Outside Spending and Dark Money in Toss-Up Senate Races: Post-Election Update*, BRENNAN CENTER FOR JUSTICE, Nov. 10, 2014, http://www.brennancenter.org/analysis/outside-spending-and-dark-money-toss-senate-races-post-election-update.

[17] CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013, 23 (2014), http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf.

[18] The figures in this table exclude revenue from political committees and other sources of revenue like loans. Only contributions from entities other than political committees, such as individual persons, corporations, partnerships, tribes, and unions, are counted. This is true of both the numerator and the denominator for percentage calculations as well as all values included in average calculations.

[19] Tom Steyer gave NextGen $56 million, or 94 percent of the group's revenue, which skews the average contribution upward.

[20] *See* IAN VANDEWALKER, BRENNAN CENTER FOR JUSTICE, ELECTION SPENDING 2014: 9 TOSS-UP SENATE RACES 12-13 (2014), http://www.brennancenter.org/publication/election-spending-2014-9-toss-Senate-races; CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CENTER FOR JUSTICE, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES (2014), http://www.brennancenter.org/sites/default/files/publications/After_Citizens_United.pdf.

[21] PUBLIC CITIZEN, SUPER CONNECTED (2014) 10-11 (2014), http://www.citizen.org/documents/super-connected-2014-citizens-united-outside-groups-report.pdf (listing only groups that spent more than $100,000); PUBLIC CITIZEN, SUPER CONNECTED 51-53 (2013), http://www.citizen.org/documents/super-connected-march-2013-update-candidatesuper-pacs-not-independent-report.pdf (listing only groups that spent more than$100,000).

[22] Paul Blumenthal, *Karl Rove's Network Lurks Behind Local Kentucky Groups Backing Mitch McConnell*, HUFFINGTON POST, Mar. 1, 2014, http://www.huffingtonpost.com/2014/03/01/mitch-mcconnell-crossroads_n_4875987.html.

[23] A runoff is treated as a separate election, meaning a candidate who faces a runoff can raise an additional $2,600.

[24] Most gave to both: 98 were $5,200 donors, and 38 were $2,600 donors.

[25] John DiStaso, *Pro-Rubens PAC Disbands, but Humphreys Still Back Him*, N.H. JOURNAL, Aug. 25, 2011, http://nhjournal.com/pro-rubens-pac-disbands-but-humphreys-still-back-him/.

[26] 11 C.F.R. § 114.2.

[27] Emily Atkin, *Former Murray Energy Worker: I Was Fired Because I Wouldn't Donate To GOP Politicians*, THINKPROGRESS, Sept. 10, 2014, http://thinkprogress.org/climate/2014/09/10/3565587/murray-energy-employee-lawsuit/; Alec MacGillis, *Coal Miner's Donor*, THE NEW REPUBLIC, Oct. 4, 2012, http://www.newrepublic.com/article/politics/108140/coal-miners-donor-mitt-romney-benefactor.

[28] 11 C.F.R. § 104.20(b).

[29] The Federal Communications Commission does require that documents relating to political ad buys be made available for public inspection. 47 C.F.R. § 25.701(d).

[30] VANDEWALKER, *supra* note 20, at 18.

[31] However, the CPI method misses local cable, internet, and radio ads. *Who's Buying the Senate*, CENTER FOR POLITICAL INTEGRITY, http://www.publicintegrity.org/2014/09/02/15447/whos-buying-senate#whatsmissing.

[32] *'Dark money'-funded TV ads in Senate Races*, CENTER FOR PUBLIC INTEGRITY, http://www.publicintegrity.org/2014/11/05/16218/dark-money-funded-tv-ads-senate-races.

[33] VANDEWALKER, *supra* note 20, at 19.

[34] Documents from the Republican Governors Association revealed a price schedule telling corporate donors how much to give in order to be granted meetings with elected officials. Jonathan Weisman, *G.O.P. Error Reveals Donors and the Price of Access*, N.Y. TIMES, Sept. 24, 2014, http://www.nytimes.com/2014/09/25/us/republicans-corporate-donors-governors.html. One political donor in an interview explained that a donor would give to a party-aligned outside group like Senate Majority PAC "to 'get credit with' the party's elected officials, who saw lists of donors after the election." DANIEL P. TOKAJI & RENATA E.B. STRAUSE, THE NEW SOFT MONEY 47 (2014), http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf.

[35] *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (internal quotation marks and citations omitted).

[36] LEE ET AL., *supra* note 20, at 11-12.

[37] TOKAJI & STRAUSE, *supra* note 34, at 68.

[38] VANDEWALKER, *supra* note 20, at 19-21.

[39] Democracy Is Strengthened by Casting Light On Spending in Elections Act of 2014, S. 2516, 113th Cong. (2014).

[40] Empowering Citizens Act, H.R. 270, 113th Cong. (2013).

[41] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013) (to be codified at 26 C.F.R. Part 1). After a multitude of comments on the first draft, the IRS decided to revise the proposal and give the public another opportunity to weigh in after the revision. Nicholas Confessore, *I.R.S. Delays New Rules on Taxation for Activists*, N.Y. TIMES, May 22, 2014, http://www.nytimes.com/2014/05/23/us/politics/irs-delays-new-rules-on-taxation-for-activists.html.

[42] Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities, No. 4-637 (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

[43] *See* BRENNAN CENTER FOR JUSTICE, 15 EXECUTIVE ACTIONS 14 (2014), http://www.brennancenter.org/publication/15-executive-actions.

[44] *See id.* at 12.

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