



END DARK MONEY

The Assault on Clean Election Laws

The Well-Funded Campaign to Legalize
Coordination in Wisconsin and Nationwide

CENTER FOR MEDIA AND DEMOCRACY
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Introduction

A legitimate bipartisan effort to enforce Wisconsin's long-standing campaign finance laws has been contorted beyond recognition into a "partisan witch hunt" by a well-funded legal and media campaign.

This campaign has included well-funded legal battles involving judges with conflicts-of-interest, media outlets with powerful financial ties to the same groups facing criminal liability, and a healthy dose of cynical political theater. Those involved have twisted the facts, turned the tables, and used trumped-up allegations to deter further investigations and blow an even bigger hole in what remains of limits on big money in politics.

For over two years, Republican and Democratic prosecutors in Wisconsin have been part of a criminal investigation into whether Governor Scott Walker's campaign coordinated with "independent" electoral groups, particularly Wisconsin Club for Growth, which spent \$9.1 million on the recall elections and funneled millions more to other groups, and which is led by top Walker campaign advisor and friend, R.J. Johnson.

Yet, the groups under investigation have fought back. Hard.

Thanks to a growing network of right-wing "news" outlets with financial ties to the groups facing criminal liability, heavy-hitter Washington, D.C., attorneys filing a barrage of lawsuits, and ethically-challenged judges issuing ideological decisions despite clear conflicts-of-interests, they may have beaten back the investigation for good—and are now going after what remains of campaign finance laws.

This is about more than a particular politician: this torrent of cash to cover another torrent of cash matters because of the threat it poses to the future of a representative and transparent democracy, in Wisconsin and across the country.

All indications are that proponents of more secret money in politics aim to use this case nationally to argue against any campaign finance regulation whatsoever, and to intimidate regulators from enforcing the laws that remain on the books.

The Wall Street Journal editorial board, in one of its eighteen pieces on the Wisconsin probe, has described the investigation as proof that "campaign-finance laws have become a liberal weapon to silence political opponents," and portrayed the investigation as an "effort by Democratic prosecutors to criminalize political speech in Wisconsin."¹ *The Journal* editorial board has stated explicitly that "the legal backlash to the probe offers a rare chance to dismantle" what it calls Wisconsin's "regulatory machine."²

George Will, writing in the *Washington Post*, claimed that the probe demonstrates that:

Campaign regulation, although invariably swathed in lofty rhetoric, is designed to disguise regulation's low purpose, which is to handicap political rivals. If Wisconsin is serious about eliminating political corruption, it can begin by eliminating corrupt prosecutors and processes, and the speech regulations that encourage both.³

But both of these depictions are premised on a fantasy.

Contrary to these distorted portrayals of the investigation as a politically-motivated "witch hunt" by Democrats against Republicans, the criminal probe is in fact led by Republicans, and involves the enforcement of settled Wisconsin law.

This report seeks to correct the record, describe how such a warped portrayal came into existence, and warn that if this attack on the enforcement of campaign finance laws is successful, it could have significant consequences for transparency and anti-corruption laws in elections in Wisconsin and around the nation.

The investigation—conducted under Wisconsin’s “John Doe” process—is officially a five-county effort, involving five District Attorneys, from both the Republican and Democratic parties. The Special Prosecutor leading the probe, Francis Schmitz, voted for Scott Walker in 2012, was on George W. Bush’s shortlist to be named the chief federal prosecutor in the state as U.S. Attorney, and has been a member of the Republican Party.

The investigation was unanimously approved by Wisconsin’s Government Accountability Board (GAB), which consists of a bipartisan panel of retired judges appointed by the Governor and confirmed by the Senate.⁴ Some of the GAB judges, including the board chair, are former Republican legislators.

And, Wisconsin law—passed with bipartisan support in the post-Watergate era—is unambiguous that coordinated expenditures count as in-kind campaign contributions, subject to the same disclosure requirements and contribution limits that apply to a candidate’s campaign contributions.⁵ These coordination rules apply regardless of whether an electoral ad expressly tells viewers how to vote.⁶

The reason for anti-coordination rules are clear.

If a candidate, from any party, can coordinate with an “independent” group that—in the wake of *Citizens United*—can accept secret, unlimited donations, then the contribution and disclosure limits that still apply to candidates are rendered meaningless.

A million-dollar donation to Wisconsin Club for Growth would be effectively the same as a donation to Walker himself, with the same potential for corruption and undue influence. And, because the contribution would be kept secret, the public would never discern whether such influential donors later receive special treatment or have their policy agenda pushed into law.

Yet, these facts have been spun into a nearly unrecognizable right-wing fantasy with conjured-up notions of jack-booted speech police.

Key to the spin surrounding the probe has been the Franklin Center for Government and Public Integrity’s “Wisconsin Reporter” website, which cites unnamed sources to attack the investigation in the course of producing more than 160 stories (and counting) in the series called “Wisconsin’s Secret War.”⁷ It has played a major role in reshaping public discourse around the investigation and has even been footnoted as a source in a federal judge’s decision halting the probe.

Yet Franklin Center has largely failed to disclose that the organization was launched and funded by Eric O’Keefe, WiCFG’s director and the chief plaintiff in the lawsuits challenging the probe. Nor has Franklin Center disclosed that its Director of Special Projects, John Connors, is also president of Citizens for a Strong America, another group facing criminal liability in the investigation and which is almost entirely funded by WiCFG. Additionally, Wisconsin Reporter’s funding has come in large part from the Bradley Foundation, which is led by Walker campaign chair Michael Grebe. Both O’Keefe and Connors also have close ties to operations of the Koch brothers.

The conflicts-of-interest don’t end there.

The federal judge who issued an extraordinary ruling halting the investigation in May of 2014, Judge Rudolph Randa, has regularly attended all-expenses-paid “judicial junkets” funded by, among others, the Charles G. Koch Charitable Foundation and the Lynde and Harry Bradley Foundation—financial interests directly tied to the groups under investigation, as the Center for Media and Democracy first reported.⁸ (Notoriously, Randa ordered the prosecutors to destroy the evidence obtained in the probe in a decision filled with radio show-like rhetoric that was quickly stayed on appeal.) Randa is the only federal judge in Wisconsin to attend these summits.

Judge Randa “never should have allowed himself to be involved in that case,” Monroe Freedman, a Hofstra Law School professor and judicial ethics expert, told Madison’s *Capital Times*.⁹

Although Randa failed to step back from the case, a Seventh Circuit federal appeals court panel led by Judge Frank Easterbrook, a Ronald Reagan appointee and respected conservative jurist, nonetheless reversed Randa's decision on the merits (or lack thereof).

The Seventh Circuit unanimously struck down Randa's remarkable declaration that Republican and Democratic prosecutors were conducting a baseless and politically motivated investigation against Republicans. And the panel rejected Randa's claim that circumventing campaign finance laws should be celebrated as a means of "promoting political speech."

Easterbrook, writing for the panel, ordered Randa to throw out the federal lawsuit filed by O'Keefe and WiCFG, declaring that a federal court should never have interfered with an ongoing state criminal investigation, being conducted under state law, and overseen by state courts.

The future of the investigation now rests with the Wisconsin Supreme Court.

But some of the Wisconsin Supreme Court's justices also face a significant conflict of interest: two of the primary groups potentially facing criminal liability in the probe have been the dominant spenders in Wisconsin Supreme Court elections in recent years, spending over \$10 million to elect the Court's Republican majority.

WiCFG and Wisconsin Manufacturers & Commerce (WMC) played a key role in electing the four justices in the majority, in most cases spending more than the candidates themselves. Some of the elections were decided by just a handful of votes.

In other words, the future of the investigation—and with it, Wisconsin campaign finance laws—could be decided by justices who were elected to the bench by precisely the same organizations facing criminal liability.

Unless these state justices recuse themselves, they are essentially in a position to decide whether the deep pockets that helped them win election should face criminal liability.

I. Post-*Citizens United*, anti-coordination rules are one of the few remaining bulwarks against a completely lawless campaign finance landscape

Coordination between campaigns and outside groups that take unlimited and undisclosed funding is the next frontier in an effort to eradicate limits on money in politics.

The issue has grown particularly pronounced after the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC* struck down limits on independent political spending. That ruling paved the way for Super PACs, which can raise and spend unlimited funds but disclose their donors, and so-called "dark money" groups, which are nonprofits organized under 501(c)(4) or 501(c)(6) of the tax code that raise and spend unlimited funds for elections but keep their donors secret.

Spending from these outside groups has exploded in the five years since *Citizens United*, both on the federal and the state levels.

Yet, even as independent fundraising and spending have grown exponentially in recent years, in most states direct donations to candidates are still subject to regulation. *Citizens United* upheld the contribution limits and disclosure requirements that apply to candidates as a constitutional means of preventing corruption.

As a result, anti-coordination rules are one of the few remaining bulwarks against a completely lawless campaign finance landscape.

After all, if a candidate can coordinate with an "independent" group that takes unlimited, secret donations, then the candidate contribution limits and disclosure requirements are rendered meaningless.

For politicians who want to raise more money—and to keep it secret—working closely with third-party groups provides obvious benefits. Donors who max-out on their campaign contributions under long-standing

statutory limits would have another conduit for giving money. Special interests seeking political favors—but not public scrutiny—could curry favor with candidates without questions from the media.

And this is precisely why the U.S. Supreme Court has long recognized the importance of anti-coordination rules: as a means of maintaining the integrity of candidate contribution limits. Even as a slim majority of the Court has chipped away at limits on political spending for PACs and non-profits, it has done so with the express proviso that these groups are "independent" and their activities not coordinated with candidates.

In *Citizens United*, for example, the Court's right-wing majority struck down corporate independent spending limits—but upheld limits on direct contributions to candidates—under the long-standing theory that "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate."

In other words, if a candidate is coordinating with a third-party group, that group's spending is obviously of great value to the campaign. And because "independent" third-party groups can now take secret, million-dollar donations, anti-coordination rules are needed to prevent evasion of the contribution limits and disclosure requirements that still apply to candidates.

This doesn't mean that many haven't tried to get around the coordination rules.

The post-*Citizens United* era has seen the rise of single-candidate Super PACs and dark money groups, in many cases formed by former aides of the candidate they support.

In the 2012 elections, President Barack Obama's Prior-

ities USA and Mitt Romney's Restore Our Future were both formed by former staffers, and raised and spent over \$230 million. In the 2014 midterm elections, Super PACs formed to support a single candidate raised \$68 million, according to a Center for Responsive Politics analysis.¹⁰ And single-candidate Super PACs have already been formed to support likely 2016 presidential candidates.¹¹

Still, these "independent" groups claim that they go to great lengths to comply with the letter of the law and to maintain independence from the official campaign. Some operatives have claimed to unfriend people on Facebook or skip parties to avoid discussion over campaign strategy in a manner that could be considered coordination.¹²

Others have tested the bounds of coordination, however, by publicly releasing campaign strategy documents or background footage that anybody can access and use, but which are intended for use by outside groups that will support the candidate.

In 2014, for example, Senator Mitch McConnell's campaign quietly uploaded a video to Youtube featuring the senator smiling at the camera in a variety of poses, providing footage for outside groups to produce ads featuring McConnell, but without McConnell actually "coordinating" or directly communicating with those groups.¹³ The tactic took on the name "McConnelling" and was pilloried by the likes of the Daily Show—but it ultimately resulted in a \$1.8 million ad campaign by a supportive group that used the footage.

Some have gone even further.

Former Utah Attorney General John Swallow, for example, raised funds to support his 2012 campaign from payday lenders by routing their donations through "independent" dark money nonprofits that were formed by Swallow's campaign staff.¹⁴

This scheme allowed Swallow to publicly keep a distance from the unpopular payday loan industry—

which Swallow quietly pledged to regulate lightly—while secretly depending on their substantial financial support.

Swallow's campaign staff formed nonprofit groups with names like the "Proper Role of Government Education Association" that raised more than \$450,000 from the payday lenders, and ran "issue ads" attacking Swallow's opponents, but didn't explicitly tell viewers how to vote.¹⁵

Detecting coordination between a campaign and an independent group is notoriously difficult, absent a leak or an inside source. On the federal level, the FEC has conducted just three investigations into coordination since 1999—not necessarily because it hasn't happened, but because it is so hard to detect.¹⁶

For those reasons, the Utah case was unique. As *Businessweek* noted, "the most remarkable thing about the evidence may be that it was uncovered at all."¹⁷

Swallow's scheme came to light indirectly, as the result of a separate investigation into a Utah businessman facing a Federal Trade Commission lawsuit for internet scams.¹⁸ Two weeks after Swallow was sworn-in as Attorney General, the *Salt Lake Tribune* published a report, based on a recorded conversation, suggesting Swallow had taken \$250,000 from the businessman with the promise that he would make the investigation go away with a scheme to bribe a U.S. Senator.¹⁹

The reports pressured the state government to hire an outside law firm to investigate potential campaign finance law violations. Prosecutors would later allege that Swallow destroyed computers, deleted incriminating emails, and altered his calendar in an apparent attempt at a cover-up.²⁰

"It cost Utah's taxpayers millions of dollars to get at the truth of what happened here," said Steven Reich, a former Justice Department prosecutor who was hired as special counsel for the investigation, in an interview with *Businessweek*. "The facts were hidden and not in

plain view. Without the committee’s subpoena power and commitment of resources, we never would have uncovered the true story.”

Swallow resigned from his post, and now faces 12 felonies and two misdemeanors, including racketeer-

ing, bribery, accepting gifts and falsifying government records.

But in Wisconsin, in contrast, the targets of a probe into another instance of campaign coordination have managed to turn the tables.

II. Bipartisan Wisconsin investigation into coordination is supported by compelling evidence

Republican and Democratic prosecutors allege that WiCFG and the Walker campaign were engaged in a wide-ranging criminal scheme to evade state campaign finance disclosure requirements and contribution limits by secretly coordinating their fundraising and spending.

The evidence of coordination between the Walker campaign and outside groups was apparently uncovered indirectly, through a separate investigation into illegal campaign activity on public time by Walker’s staff during his time as Milwaukee County Executive. As the evidence mounted, Milwaukee County District Attorney John Chisholm, a Democrat, enlisted the participation of prosecutors from four other counties—two Republicans and two Democrats—all of whom found that the evidence of coordination was sufficient to warrant the investigation.²¹

On September 5, 2012, Judge Barbara Kluka authorized the commencement of the investigation under Wisconsin’s “John Doe” statute, an investigatory process overseen by a judge and conducted in secret that allows prosecutors to compel people to testify and produce documents.²² It is analogous to a grand jury investigation, but conducted in front of a judge rather than a jury.

Judge Kluka appointed a Special Prosecutor named Francis Schmitz, a retired U.S. Army Colonel and thirty-year prosecutor who not only voted for Walker in the recall election, but also investigated threats against

Walker in his role as Assistant U.S. Attorney at the U.S. Department of Justice.

This bipartisan group of prosecutors allege that Walker and his campaign sought to “circumvent” state disclosure laws by soliciting donations to WiCFG, which keeps its donors secret.²³ And, they allege that WiCFG made millions of in-kind campaign contributions—in the form of coordinated electoral “issue ad” expenditures—in excess of state contribution limits, and without reporting those contributions as required by Wisconsin law.²⁴

The full set of evidence that prosecutors are relying on in the investigation is not publicly known, and remain under seal thanks to the John Doe secrecy order. However, some documents have been made public and provide an outline of the case.

Special Investigator Robert Stelter alleged in an affidavit in support of initiating the investigation that:

“During 2011 and 2012, R.J. Johnson, Governor Scott Walker, Keith Gilkes, and others, conspired to use WiCFG to coordinate political activity in response to recall elections against Wisconsin state senators, as well as Governor Walker.”²⁵

The investigation “is about a candidate and his personal campaign committee failing to disclose the funding of such coordinated advocacy,” Stelter wrote.

The allegations revolve around campaign activity during Wisconsin's hotly-contested 2011 and 2012 recall elections, when Walker and nine state senators faced recall following the introduction of Walker's controversial anti-union Budget Repair Bill.

Johnson, a paid Walker campaign advisor, was also a paid advisor to WiCFG, and, according to Special Prosecutor Schmitz, "used WiCFG as the hub for the coordinated activities involving 501(c)(4) organizations and [the Walker campaign]" during the recall elections.²⁶ In Walker's autobiography, *Unintimidated*, he refers to Johnson as a friend for more than 20 years and his key campaign strategist and operative.²⁷

According to an affidavit from Government Accountability Board investigator Dean Nickel:

R.J. Johnson was directly involved with operations of the Friends of Scott Walker (FOSW) campaign, as well as Wisconsin Club for Growth . . . essentially coordinating the campaign activities of both entities . . . As a gubernatorial recall candidate, Scott Walker raised funds for his personal campaign committee (FOSW) and simultaneously personally raised funds for WiCFG which was also involved in political activity to his benefit . . . During 2011 and 2012, WiCFG became the means for coordinating the political activities of WiCFG with other 501(c)(4) organizations and the personal political campaign committee of Governor Walker.²⁸

In advance of the 2011 senate recall elections, on May 4, 2011, Governor Walker sent an email to Karl Rove extolling Johnson's importance, writing:

Bottom-line: R.J. helps keep in place a team that is wildly successful in Wisconsin. We are running 9 recall elections and it will be like running 9 Congressional markets in every market in the state (and Twin Cities).²⁹

When the bipartisan judges on the Government Accountability Board unanimously approved a civil investigation in July of 2013—after providing advice

to prosecutors for months—they passed a resolution stating: "the investigation's purpose is to learn if there is probable cause to believe that Governor Scott Walker, FOSW . . . Wisconsin Club for Growth . . . and other individuals, organizations, and corporations" violated Wisconsin campaign finance law.

For purposes of campaign finance law, "coordination" is present if a communication is made at the request or suggestion of a campaign, or when, according to Wisconsin's elections board, "there has been substantial discussion or negotiation" over a communication's contents, timing, audience, or placement.³⁰

"Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners," the board has advised.

Based on available records, prosecutors appeared to have gathered evidence suggesting coordination occurred.

In advance of the 2012 gubernatorial recall elections, internal emails between Walker and his staff referred to fundraising for WiCFG for the purposes of "raising money for Walker's possible recall efforts."³¹

Walker was instructed that, when fundraising for WiCFG, "Stress that donations to WiCFG are not disclosed and can accept corporate donations without limits," and to "Let [donors] know that you can accept corporate contributions and it is not reported."³²

The reason for raising money for WiCFG, according to Walker's fundraiser Kate Doner, was that the governor "want[ed] all the issue advocacy efforts run thru one group to ensure correct messaging."³³

A set of fundraising talking points for Walker referred to WiCFG as "your 501c4."³⁴ One check to WiCFG, from billionaire commodities king Bruce Kovner, even notes in the memo line that its purpose was for "501c4-Walker."³⁵

In addition to directly spending at least \$9.1 million influencing Wisconsin elections, WiCFG acted as a “hub” for funneling at least \$9,624,000 to other 501(c)(4) groups that would support Wisconsin Republicans’ election efforts.³⁶ The 501(c)(4) Citizens for a Strong America (CFSA), for example, was almost entirely funded by grants from WiCFG in 2011 and 2012, and in turn spent millions on electoral ads and funneled millions more to additional groups that engaged in political intervention.³⁷

WiCFG never ran ads explicitly supporting Walker, but it funneled money to groups that did, such as almost \$3 million to Wisconsin Manufacturers & Commerce.³⁸ WiCFG’s donations coincided with WMC’s payments to an ad agency that produced ads supporting Walker and attacking his opponent.³⁹

Johnson, Walker’s campaign advisor, also appears to have been involved with the expressly pro-Walker ads from WMC.

The firm that created the ads for WMC, the Virginia-based Ten Capitol Inc, paid Johnson \$50,000 around the time WMC’s ads were run, which prosecutors say was “consistent with a commission for ad placement.”⁴⁰

Investigators also discovered secret donations to WiCFG from corporate interests with a stake in pending legislation, which had the effect of keeping the public in the dark during important policy debates.

After Walker won his 2012 recall election, his top legislative priority for the 2013 legislative session was to pass a mining bill that was drafted by an out-of-state mining corporation called Gogebic Taconite.^{41, 42}

During the hotly-contested debate over the proposed rewrite of Wisconsin’s environmental laws—a proposal met with protest from environmental groups, conservationists, and Native American tribes—Wisconsinites never knew that the same corporation that stood to profit from the law’s passage had secretly donated \$700,000 to WiCFG.⁴³ Walker claims not to have solicited the funds.

The secret \$700,000 donation was nearly 22 times more than the roughly \$32,000 that Gogebic Taconite had disclosed in donations to Wisconsin candidates in 2011 and 2012.⁴⁴ The donation didn’t become public until two years later, and was only known at all because of the John Doe investigation.⁴⁵

III. Bipartisan probe spun as a partisan witch hunt by right-wing outlets with financial ties to the groups facing criminal liability

A. Wisconsin Reporter: founded, funded, and led by individuals under investigation in the case

After *Milwaukee Journal Sentinel* reporter Dan Bice first reported on the “John Doe” in October 2013, interest in the investigation was high, but thanks to the John Doe’s strict secrecy rules, details were hard to come by.

The Virginia-based Franklin Center for Government & Public Integrity and its Wisconsin Reporter website quickly filled the void.

The Franklin Center, publisher of the website “Watchdog.org,” has funded outlets in 40 states to cover state government with a right-wing bent, and boasts that it now “provides 10 percent of all daily reporting from state capitals nationwide.”⁴⁶

Franklin Center’s Wisconsin branch, Wisconsin Reporter (watchdog.org/Wisconsin) launched its “Wisconsin’s Secret War” series in October of 2013, citing unnamed sources to reveal for the first time that Wisconsin Club for Growth, Americans for Prosperity, and the Republican Governors Association had received subpoenas in the probe.⁴⁷ (It also claimed that “Multiple sources tell Wisconsin Reporter that CMD [the Center for Media and Democracy]’s claim [about unlawful election coordination] is the basis of the Milwaukee DA’s investigation into about 100 people representing some 29 conservative and libertarian groups.”)

Thanks to an unknown number of its well-placed, unnamed sources going on-the-record about an investigation cloaked in confidentiality, Wisconsin Reporter was afforded a position of prominence in covering the probe. It used this new platform to spin the facts and recast the John Doe investigation as “an abuse of prosecutorial powers” with “the apparent goal of bringing down Gov. Scott Walker.”

“This is a taxpayer-funded, opposition-research campaign,” an anonymous source told the Wisconsin Reporter in one of its early stories.

How did it get such access? Perhaps because the outlet has deep financial ties to the groups under investigation, which it has failed to regularly disclose.⁴⁸

Eric O’Keefe—the WiCFG director and face of the John Doe opposition—helped launch the Franklin Center’s operations in 2009. Franklin Center’s Director of Special Projects, John Connors, is president of a group entirely funded by WiCFG and which is under investigation in the probe.

O’Keefe was CEO and Chairman of the Sam Adams Alliance when it launched and funded the Franklin Center in 2009. According to an O’Keefe bio from 2013: “Under his leadership, the Sam Adams Alliance (SAM) has established some of the most active and respected organizations in the freedom movement, including American Majority and the Franklin Center.”⁴⁹

O’Keefe’s Sam Adams Alliance acted as the Franklin Center’s “sponsoring organization” until the group obtained its 501(c)(3) status.⁵⁰ According to the *Milwaukee Journal Sentinel*, much of the \$2.9 million Franklin Center raised in its first year came from the Sam Adams Alliance.⁵¹

Additionally, Franklin Center’s President, Jason Stverak, worked as Regional Field Director for O’Keefe’s Sam Adams Alliance, after leading the South Dakota Republican Party for six years.⁵²

Others on the right speak of O’Keefe and Stverak in the same breath. For example, in the acknowledgment section of James O’Keefe’s book, the undercover videographer whose heavily-edited videos helped bring down ACORN (and who is not related to Eric O’Keefe) thanks “Eric O’Keefe and Jason Stverak for their role in the citizen journalism movement.”⁵³

The close ties between the Franklin Center, O’Keefe, and others facing criminal liability in the investigation don’t end there.

The Franklin Center’s “Director of Special Projects” is a man named John Connors, who is President of Citizens for a Strong America—a dark money group almost entirely funded by WiCFG in 2011 and 2012 and which is implicated in the alleged coordination scheme.⁵⁴ The Center for Media and Democracy was one of the first to report on Citizens for a Strong America and the big money it had injected into the state election process in 2011, and documented Connors’ work for David Koch’s Americans for Prosperity in Wisconsin as a college student and recent college graduate.⁵⁵

Between 2011 and 2012, WiCFG gave Connors’ Citizens for a Strong America \$6,640,000, which amounted to 99.9% of its revenue for those years.⁵⁶ Citizens for a Strong America spent some of that money influencing Wisconsin Supreme Court and senate recall elections,⁵⁷ and passed millions more to other groups that were active in the recall elections.⁵⁸

Although Connors was the group's president, prosecutors allege that Citizens for a Strong America was the creation of Walker campaign advisor R.J. Johnson and his partner Deb Jordahl. Johnson's wife, Valerie, was the treasurer and a signatory on the group's bank account.

The Citizens for a Strong America group was central to the alleged coordination scheme. As described by Government Accountability Board Special Investigator Dean Nickel:

R.J. Johnson directed activities of Wisconsin Club for Growth (WiCFG), Citizens for a Strong America (CFSA), and Friends of Scott Walker (FOSW), and through WiCFG and CFSA, provided funding for other 501(c)(4) organizations . . . that ran ads supporting Governor Scott Walker, criticizing his opponent, or were involved in activities assisting Republican senate recall elections.

Additionally, according to Special Investigator Stelter:

Jordahl and R.J. Johnson were involved with the activities of CFSA that functioned as a conduit for funded activities of other organizations in support of Governor Walker against the recall.

Throughout the 160-and-counting stories it has written about the investigation over the past year, Franklin Center/Wisconsin Reporter has never disclosed the fact that one of its leaders could face criminal liability in that same investigation.

In addition to being the Franklin Center's "Director of Special Projects"—part of its "leadership team," according to the organization's website—Connors registered Wisconsin Reporter's "Watchdog.org" web domain.⁵⁹

To add insult to injury, O'Keefe's federal lawsuit cited to Franklin Center/Wisconsin Reporter stories as "evidence" that the investigation was politically motivated. Judge Randa, in his now-overturned decision halting the probe, also cited Wisconsin Reporter articles in support of his ruling.

B. The Bradley Foundation, led by Walker's campaign chair, bankrolled media groups attacking the investigation

Although the Franklin Center's funding comes primarily from Donors Trust⁶⁰—a donor-advised fund that channels money from donors like the Kochs and their partners to right-wing groups⁶¹—Wisconsin Reporter's funding in recent years has come in large part from the Milwaukee-based Bradley Foundation, whose president and CEO is Walker's campaign chair, Michael Grebe.

Bradley gave \$480,400 to the Franklin Center between 2010 and 2012, \$380,400 of which was designated for "state-based reporting efforts in Wisconsin" and "to support Wisconsin Reporter."

Bradley also bankrolls other right-wing outlets in Wisconsin. It has donated \$635,000 to the John K. MacIver Institute for Public Policy between 2008 and 2012, a State Policy Network affiliate that also operates the "MacIver News Service." \$388,000 of the \$881,220 Bradley has donated to American Majority between 2010 and 2012 has been earmarked for the website Media Trackers.

The Bradley ties don't end there.

A few weeks after Franklin Center/Wisconsin Reporter first began attacking the investigation, O'Keefe allegedly violated the John Doe secrecy order and spoke with the *Wall Street Journal* editorial board, which revealed new information about the investigation and asserted that the John Doe was a "Political Speech Raid."⁶² O'Keefe's series of strategic leaks to the *Wall Street Journal*'s editorial board put Wisconsinites in the odd position of reading breaking news about their state on the opinion pages of the national right-wing outlet. Since November 2013, the *Journal*'s right-wing editorial board has published at least eighteen editorials assailing the probe.⁶³

In late May 2014, the Bradley Foundation announced the four recipients of its annual "Bradley Prizes," awards of a quarter-million dollars each to, in its

view, “formally recognize individuals of extraordinary talent and dedication who have made contributions of excellence in areas consistent” with the foundation’s mission.⁶⁴

Two of the four \$250,000 “Bradley Prizes” in 2014 went to *Wall Street Journal* columnists, Kim Strassel and Terry Teachout. Strassel is on the *Wall Street Journal* editorial board. In 2009, *Wall Street Journal* editorial page editor Paul Gigot also received one of the \$250,000 awards.⁶⁵ These are enormous awards in the field of print news journalism.

In May of 2014, George Will used his *Washington Post* column to attack the probe, describing the bipartisan investigation as “an especially egregious example of Democrats using government power to suppress conservatives’ political speech.”⁶⁶

Ignoring the role of Republican prosecutors in the investigation, Will wrote that “the Democratic prosecutors’ . . . aim is mayhem, not law enforcement. Their activity is entirely about suffocating conservative activity.”

Will has been on the board of directors of the Bradley Foundation since 2008.⁶⁷ He, too, is a “Bradley Prize” recipient, having received the \$250,000 award in 2005.⁶⁸

C. Legal Newline: outlet owned by U.S. Chamber, whose Wisconsin affiliate is under investigation, push outrageous claims about Milwaukee prosecutor

In September 2014, a website called “Legal Newline” cited an unnamed source to “break the news” that Milwaukee District Attorney Chisholm “may have had personal motivations for his investigation,” since Chisholm’s wife was a public school teacher and union member who “frequently cried when discussing the topic of the union disbanding” as a result of Walker’s signature Act 10 legislation.⁶⁹

The “weeping wife” allegation quickly spread across

conservative media in Wisconsin and around the country.

The *Wall Street Journal* editorial board repeated the Chamber-backed claims, as did Wisconsin’s Bradley Foundation-funded media sites: Media Trackers called it a “bombshell revelation,” while the Wisconsin Reporter asked whether the John Doe is “colored with a bit of ‘Macbeth.’”

“Wife’s weeping over anti-union law drove Democratic DA to target Republican governor’s staff and conservative activists,” a headline from British tabloid the *Daily Mail* proclaimed.⁷⁰

“The Milwaukee DA’s wife, a union operative infuriated by Walker’s policies, was behind the whole thing,” Breitbart wrote.⁷¹

Yet, the source for the “weeping wife” claim, Legal Newline, is owned by the U.S. Chamber of Commerce—and the Chamber’s Wisconsin affiliate, Wisconsin Manufacturers and Commerce (WMC), is under investigation in the John Doe.

According to prosecutors, during 2011 and 2012 WMC was involved in campaign-related conference calls with the governor and was part of the dark money shell game orchestrated by WiCFG.

In 2012, WiCFG transferred \$2,984,000 to WMC’s 501(c)(4) “action” wing, the Wisconsin Manufacturers & Commerce Issues Mobilization Council. WMC-IMC spent an estimated \$4 million on “issue ads” that year supporting Walker’s reelection.⁷²

According to prosecutors, the transfers from WiCFG to WMC-IMC corresponded with WMC-IMC’s ad buys, which Walker advisor Johnson may have placed. It appears that WiCFG’s grants to WMC-IMC were earmarked for the purpose of funding WMC-IMC’s pro-Walker ads, prosecutors suggest.

The “bombshell” story fell apart when the *Milwaukee Journal Sentinel*’s Dan Bice broke the news that the unnamed source described as a “former staff prosecu-

tor” in Chisholm’s office was actually a former unpaid intern who previously made death threats to the prosecutor and his family.

In any case, a “weeping wife” doesn’t explain why the non-partisan GAB—a panel of retired judges appointed by the governor and confirmed by the legislature—voted unanimously to approve the probe, or why Republican prosecutors from across the state found that the investigation had legal and factual merit.

The timeline is also questionable. According to the Chamber report, the “unnamed source” claims that an investigation that started in 2009 was motivated by anger over Walker’s anti-union legislation—which was introduced in 2011.

Despite these issues, publications from the *Wall Street Journal* editorial board to Wisconsin Reporter have continued to repeat the allegations as fact.

IV. State law (and federal law) is clear: coordinated issue ads are a campaign contribution, which is supported by U.S. Supreme Court precedent

For years, Wisconsin law has been interpreted to count coordinated electoral “issue ad” expenditures as in-kind campaign contributions, subject to the same disclosure requirements and contribution limits that apply to a candidate’s campaign contributions.

The same is true in federal elections, under federal law.

Prosecutors allege that WiCFG made millions of in-kind campaign contributions in the form of coordinated issue ads, in excess of state contribution limits, and without reporting those contributions as required by Wisconsin law.⁷³

The reason for these anti-coordination rules are clear.

If Walker or another candidate can coordinate with a third-party group, then candidate contribution limits and disclosure requirements are rendered meaningless, since “independent” groups (after the U.S. Supreme Court’s decision in *Citizens United*) can accept unlimited donations and avoid disclosure.

If coordination is present, a million-dollar donation to Wisconsin Club for Growth would be effectively the same as a donation to Walker himself, and pose the same risk of corruption and undue influence. Plus,

because the contribution would be secret, the public could never discern whether the donor later receives special treatment or has their policy agenda pushed into law.

Even as a slim majority of the U.S. Supreme Court has chipped away at campaign finance limits for PACs and non-profits, it has done so with the express proviso that these groups are “independent” and their activities not coordinated with candidates.

The Supreme Court has long taken a two-tiered approach to campaign finance regulation, largely upholding limits on direct contributions to candidates, but more closely scrutinizing regulation of groups like PACs that spend independently of a candidate and their campaign.

Part of the theory behind the two-tiered assessment is that truly independent expenditures pose less risk of corruption than money going directly to a candidate. Yet the lynchpin in that two-tiered distinction is that the expenditures are not coordinated. Once coordination is present an expenditure is no longer “independent.”

For example, the controversial *Citizens United vs. FEC* decision struck down corporate independent spend-

ing limits under the theory that “[t]he absence of pre-arrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate.”

In other words, if a candidate is coordinating with a third-party group, that group’s expenditures are of value to the campaign — and the contribution limits and disclosure requirements that apply to candidates would be rendered meaningless if politicians can work closely with a group that takes secret, million-dollar donations.

As the U.S. Supreme Court noted in 2001, “coordinated expenditures are as useful to the candidate as cash,” as the presence of coordination demonstrates that a candidate perceives an expenditure as valuable to their campaign.⁷⁴

And, despite claims by WiCFG, the U.S. Supreme Court has never imposed a constitutional express advocacy test for a coordinated ad to be considered an in-kind contribution. The mere omission of words like “vote for” or “vote against” in coordinated ads does not put them beyond the reach of regulation.

In fact, in 2003 the court explicitly upheld a provision of the McCain-Feingold Bipartisan Campaign Reform Act that treats issue ads that air near federal elections (called “electioneering communications”) as in-kind contributions if coordinated with a candidate. That holding has never been overturned.

The Court in *McConnell v. FEC* held “there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures.”⁷⁵

Indeed, as Judge Easterbrook observed in September 2014 when rejecting WiCFG’s legal arguments and reversing Judge Randa’s decision halting the probe:

“Until [Judge Randa’s] opinion in this case, neither a state nor a federal court had held that Wisconsin’s (or any other state’s) regulation of coordinated fund-

raising and issue advocacy violates the First Amendment.”⁷⁶

Even if the Walker camp believed that coordinated issue ad spending shouldn’t be counted as contributions, or that at some point in the future, a court might overrule existing precedent, this subjective belief didn’t give them license to ignore well-established law during the 2012 elections.

Walker and Wisconsin Club for Growth cannot claim that they didn’t know the rules.

In the high-profile 1999 case *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*,⁷⁷ the Wisconsin Court of Appeals rejected arguments identical to those being made by Walker and Club for Growth, and held that issue ads coordinated with a campaign will count as contributions to the campaign.

The Court held that, as is the case under federal law, Wisconsin law counts issue ad “expenditures that are ‘coordinated’ with, or made ‘in cooperation with or with the consent of a candidate. . . as campaign contributions.” And, the Court held, such “contributions to a candidate’s campaign must be reported whether or not they constitute express advocacy.”

The decision in that case green-lighted a state elections board investigation into illegal coordination between Jon Wilcox’s successful 1997 campaign for Supreme Court and an independent group that sent issue ad postcards to voters in the final days of the election. Affirming a decision from the Dane County Circuit Court, the appellate court rejected claims that Wisconsin law only covers communications that expressly advocate for the election or defeat of a candidate.

“If the mailing and the message were done in consultation with or coordinated with the Justice Wilcox campaign, the [content of the message] is immaterial,” the state appellate court found.

That 1999 probe into issue ad coordination resulted

in a high-profile settlement where Wilcox's campaign manager Mark Block was fined \$15,000 and barred from politics for three years. Block later went on to lead the Wisconsin chapter of David Koch's Americans for Prosperity and managed Herman Cain's 2012 presidential run, where he appeared in the quirky "smoking man"⁷⁸ campaign ad and later was the subject of IRS complaints alleging he funneled charitable donations to Cain's campaign, including one from the Center for Media and Democracy.⁷⁹

Wilcox won his election, and as a sitting Wisconsin Supreme Court Justice, he expressed remorse for the fact that his campaign coordinated with an issue ad group.

Justice Wilcox did not claim that the enforcement action was legally unjustified or a violation of free speech. In fact, despite the elections board finding that Wilcox had no personal knowledge of the illegal issue ad coordination, he agreed to personally pay a \$10,000 fine, stating that he was ultimately responsible for the conduct of his campaign staff.

This case was no secret.

It was one of the highest-profile and highest-dollar enforcement actions in state history. The *Wisconsin Coalition for Voter Participation* case is explicitly cited in the notes to the Wisconsin statutes, which provide guidance on the prevailing interpretations of Wisconsin law for candidates such as Walker and the raft of lawyers who advise him.⁸⁰

Plus, the case roiled opponents of campaign finance reform at the time, with right-wing media personality Charlie Sykes attacking the Coalition for Voter Participation investigation in 1999 using rhetoric nearly indistinguishable from that used to attack the John Doe today.⁸¹

Again, Walker and WiCFG cannot claim they were unaware of Wisconsin law on issue ad coordination.

Additionally, the state elections board, which under

Wisconsin law is tasked with interpreting and applying the state's campaign finance statutes, has long advised candidates and the public that coordinated issue ads may be construed as a contribution under Wisconsin law. In a 2002 opinion that was reaffirmed in 2008—just three years before WiCFG began running the ads in question—the Board wrote:

“Coordination with a candidate or candidate committee transforms . . . purportedly independent disbursements and even true ‘issue ads’ into in-kind or monetary contributions to a candidate.”

“[S]peech which does not expressly advocate the election or defeat of a clearly identified candidate may, nevertheless, be subject to campaign finance regulation.”⁸²

Under Wisconsin statutes, such opinions have the force and effect of law.⁸³

Despite claims from WiCFG's lawyers and Walker's allies, it is not the case that federal or state courts had overturned the *Wisconsin Coalition for Voter Participation* precedent or rendered its holding unenforceable in advance of the recall elections, when the coordination is alleged to have occurred.

Just ask Wisconsin's former Republican Attorney General, J.B. Van Hollen.

As thousands of people were occupying the Wisconsin capitol in 2011—sparking a movement that would lead to the recall elections of Walker and state senators—then-Attorney General Van Hollen was citing *Wisconsin Coalition for Voter Participation* in court briefs as controlling precedent.⁸⁴

Just months later, with recall elections heating up, prosecutors believe the Walker campaign and Club for Growth began working together, an alleged violation of the Wisconsin Court of Appeals' interpretation of state law that Van Hollen had recently endorsed.

Even if the Walker campaign and Wisconsin Club for Growth believed or hoped the courts were “moving” towards a different interpretation of Wisconsin law, that didn’t give them free license to defy the law as it currently existed. The governor is endowed with many powers, but he cannot single-handedly rewrite the law or reverse appellate precedent.

Instead, according to prosecutors, they flaunted the law, and then they claimed that the enforcement of Wisconsin’s well-established coordination rules was a “partisan witch hunt” that violated their First Amendment rights.

V. Barrage of lawsuits by dark money groups succeeds in tying-up investigation

Just weeks after the investigation’s first subpoenas in the probe were issued in October 2013, the Walker campaign, WiCFG, and Wisconsin Manufacturers and Commerce moved to halt the probe, and challenged the subpoenas before the judge overseeing the John Doe proceeding.

Judge Kluka recused herself from the case for unknown reasons, and was replaced by Judge Gregory Peterson. In early January 2014, Judge Peterson sided with arguments from the Walker campaign, WMC, and WiCFG and quashed subpoenas on grounds that the statutes do not explicitly address coordination between campaigns and issue ad groups.

However, two weeks later, Judge Peterson stayed his own order, acknowledging the *Wisconsin Coalition for Voter Participation* precedent and writing that the state’s theory “is an arguable interpretation of the statutes,” and asking that an appellate court resolve the dispute.

The appellate court still has not resolved the dispute.

As Special Prosecutor Schmitz was appealing the decision to the Wisconsin Court of Appeals in February, O’Keefe and WiCFG sued in federal court to stop the investigation. O’Keefe’s attorney was David Rivkin, a partner at the Washington D.C. firm Baker Hoestetler who is perhaps best known for defending torture techniques by claiming they don’t constitute “torture.”⁸⁵

Meanwhile, two unnamed parties asked the Wisconsin

Supreme Court to accept a challenge to the probe, and in April, Walker’s campaign did, too.⁸⁶

In its federal suit, WiCFG hit the jackpot when it landed Judge Rudolph Randa, a George H.W. Bush appointee and a member of the Milwaukee Federalist Society’s board of advisors.

A. Federal judge who regularly attends Koch- and Bradley-funded junkets temporary halts investigation, but is overruled by conservative Seventh Circuit panel

On May 6, without holding a single hearing, Randa halted the investigation in an extraordinary ruling that deployed a strained and results-oriented reading of the law and facts of the case.⁸⁷ His decision ignored the role of Republican prosecutors in leading the investigation, and the years of Wisconsin precedent and practice barring issue ad coordination. It amounted to a federal court creating its own interpretation of state law to halt an ongoing state investigation, violating judicial principles of comity and federalism.⁸⁸

And, incredibly, he ordered the destruction of evidence in the probe—an extreme measure in any criminal case, but an especially extraordinary step in the context of a preliminary injunction, which is an intermediate order that is only supposed to halt the investigation while the court case proceeds. The Seventh Circuit quickly reversed this order.

As CMD was first to report, Randa has regularly attended all-expenses-paid “judicial junkets” funded by, among others, the Charles G. Koch Charitable Foundation, the Lynde and Harry Bradley Foundation, and the U.S. Chamber of Commerce—financial interests directly tied to the groups under investigation.⁸⁹ Randa attended the George Mason University-hosted junkets in 2006, 2008, 2012, and 2013, according to available records, and is the only federal judge in Wisconsin to attend these all-expenses-paid trips.

The Koch political network has funded WiCFG, which filed the case before Judge Randa, and also funded other groups under investigation in the probe.⁹⁰ The Bradley Foundation’s President and CEO, Michael Grebe, has long chaired Scott Walker’s gubernatorial campaigns, including the 2012 campaign under investigation. The U.S. Chamber of Commerce’s Wisconsin affiliate, Wisconsin Manufacturers and Commerce, is under investigation in the probe.

The content of the seminars have a decidedly pro-corporate bent, and the expensive gifts raise concerns about improper influence when the corporate sponsors have a stake in a case before the judge.⁹¹

Given Judge Randa’s regular participation in these junkets, he “never should have allowed himself to be involved in that case,” Monroe Freedman, a Hofstra Law School professor and judicial ethics expert, told Madison’s *Capital Times*.⁹²

Additionally, Randa’s judicial assistant is Cary Biskupic, the wife of Walker’s campaign lawyer Steven Biskupic, a former U.S. Attorney.⁹³ Walker was not a party to the federal lawsuit although he would clearly be impacted by the ruling.

Although Randa failed to recuse, a conservative Seventh Circuit Court of Appeals panel nonetheless reversed his decision on the merits (or lack thereof).

The Seventh Circuit unanimously struck down Randa’s remarkable declaration that Republican and Democratic prosecutors were conducting a baseless and politically motivated investigation against Re-

publicans. And the panel rejected Randa’s claim that circumventing campaign finance laws should be celebrated as a means of “promoting political speech.”

“Until the district court’s opinion in this case, neither a state nor a federal court had held that Wisconsin’s (or any other state’s) regulation of coordinated fundraising and issue advocacy violates the First Amendment,” wrote Judge Frank Easterbrook, a Ronald Reagan appointee and prominent conservative jurist.⁹⁴

Randa “waded into a vexed field of constitutional law needlessly,” he added.⁹⁵

Judge Easterbrook, writing for the three-judge panel, held that Randa’s ruling halting the investigation was “imprudent,” “unnecessary” and “an abuse of discretion.” He ordered Randa to throw out the federal lawsuit filed by Wisconsin Club for Growth and its director, Eric O’Keefe, declaring that the judge never should have taken the case in the first place.

Randa acted improperly when he interfered with an ongoing state criminal investigation, being conducted under state law, and overseen by state courts, Easterbrook wrote.

“State courts are free to conduct their own litigation, without ongoing supervision by federal judges, let alone threats by federal judges to hold state judges in contempt,” Easterbrook wrote.⁹⁶

The future of the investigation now rests with the Wisconsin Supreme Court.

B. Wisconsin Supreme Court majority to decide whether its biggest supporters could face criminal liability—not to mention the future of Wisconsin campaign finance law

The Wisconsin Supreme Court finally took up challenges to the probe in December—nearly a year after the probe was effectively put on hold—and will likely decide the matter in the coming months.

The Court's decision will likely set the bounds for how money can be raised and spent in state elections, and potentially open the door to unprecedented levels of secret money and closed-door, backroom deals. The court will also determine whether some Wisconsin's biggest political players could face criminal liability for their conduct during the 2011 and 2012 recall elections—including some of the justices' biggest supporters.

Two of the groups under investigation, WiCFG and Wisconsin Manufacturers and Commerce, have been the dominant spenders in Wisconsin Supreme Court elections in recent years, spending over \$10 million to elect the Court's Republican majority, in most cases spending more than the justices' own campaigns.

According to data from the Wisconsin Democracy Campaign, WiCFG spent at least \$1,770,000 on the last four Supreme Court races, and Citizens for a Strong America, which WiCFG almost entirely funded, spent \$985,000 more. WMC has spent at least \$7.25 million electing the court's conservative majority, based on its own estimates. In three out of the four Supreme Court races since 2007 where WMC has been active, it alone has spent more than the candidate it supported.⁹⁷

Some have expressed concern that the Court couldn't function if justices had to recuse from all cases that might affect their contributors. Yet, it is a different story when a judge effectively owes his or her reelection to the same groups potentially facing criminal liability in a case they will decide.

This particular case is distinguishable from other litigation that might only indirectly affect a judge's electoral supporters, such as a civil justice matter that WMC's members are concerned about, or a case that might have an indirect impact on the interests of a WiCFG donor.

This probe could involve criminal liability for precisely the same organizations that put these justices on the bench.

In Wisconsin, the decision to recuse rests solely with the justices themselves.⁹⁸ And the Wisconsin Supreme Court has been criticized for its lax recusal practices.

In 2010, the Court's four-justice conservative majority voted to adopt new rules stating that the fact of a campaign contribution alone would not require recusal—but the rules were literally written by none other than WMC,⁹⁹ as well as the Wisconsin Realtors Association, which gave over \$1 million to Wisconsin Club for Growth in its 2010-2011 fiscal year.¹⁰⁰

In other words, WMC wrote the rules requiring that the justices WMC has elected not recuse in a case involving WMC's election activities.

The fact that WMC wrote the Court's recusal rules could certainly have an impact on the public's trust in the justices' impartiality in a case involving WMC.

Yet, the Wisconsin Supreme Court's WMC-drafted rules may not be the final word on the matter. The level of spending by the groups in this case—and their direct stake in the outcome—could demand recusal under the U.S. Constitution, following the 2009 U.S. Supreme Court decision in *Caperton v. Massey*.¹⁰¹

In that decision, the U.S. Supreme Court held that a West Virginia Supreme Court justice should have recused himself from a case involving Massey Coal, after the justice received \$3 million in campaign support from the company's President & CEO, Don Blankenship. Blankenship had given \$2.5 million to a PAC supporting the justice, and spent another \$500,000 on independent expenditures.

“In an election decided by fewer than 50,000 votes, Blankenship's campaign contributions—compared to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the outcome,” the Court wrote, also noting that the donations were given shortly in advance of the case appearing before the court.

“And the risk that Blankenship's influence engendered

actual bias is sufficiently substantial that it ‘must be forbidden if the guarantee of due process is to be adequately implemented.’”

The facts in that case echo those facing some justices on the Wisconsin Supreme Court:

- **Justice David Prosser:** In 2011, Justice Prosser narrowly won reelection by just 7,000 votes, in a race widely viewed as a referendum on Governor Walker’s controversial union-busting legislation. Prosser’s campaign spent only \$700,000.¹⁰² WMC spent \$2 million helping reelect Prosser, according to its own numbers.¹⁰³

A new front group, Citizens for a Strong America (headed by John Connors), came out of nowhere and spent \$985,000 backing Prosser and attacking his opponent.¹⁰⁴ Donations to the group were not disclosed and it was only discovered years later that Citizens for a Strong America was 99.9% funded by Wisconsin Club for Growth.¹⁰⁵ Wisconsin Club for Growth (steered by Eric O’Keefe) itself spent an estimated \$520,000 supporting Prosser.¹⁰⁶

Together those groups spent five times as much as the Prosser campaign, in an election decided by just 7,000 votes. None of their funding sources were publicly disclosed.

- **Justice Michael Gableman:** Justice Gableman won his 2008 election by around 20,000 votes. The Gableman campaign spent only \$411,000¹⁰⁷ —but WMC spent \$2.25 million in undisclosed dark money getting Gableman elected, nearly five-and-a-half times as much as the justice’s own campaign, according to WMC’s own numbers.¹⁰⁸

Wisconsin Club for Growth also surpassed Gableman’s spending, dropping over \$500,000 in undisclosed spending to help put the justice on the bench.¹⁰⁹ Another phony issue

ad group, Coalition for America’s Families, which received funding from Wisconsin Club for Growth and shared a board member, spent \$480,000 supporting Gableman that year.¹¹⁰

- **Justice Annette Ziegler:** The 2007 elections marked a turning point for big money in judicial races. Justice Ziegler’s campaign spent \$1.4 million.¹¹¹ WMC made an eye-popping \$2.5 million in undisclosed expenditures supporting Justice Ziegler’s campaign, according to its own numbers, making it the biggest spender in the race.¹¹² Wisconsin Club for Growth added \$400,000 in dark money.¹¹³ Together they more than doubled the amount spent by Ziegler’s own campaign.

Ziegler faced ethics charges from the Wisconsin Judicial Commission in 2007, for failing as a circuit court judge to recuse herself from cases involving a bank whose board included her husband.¹¹⁴ The Supreme Court had the final word on the matter—after Ziegler had been elected to the court—and issued the first public reprimand of a fellow justice in the court’s history, calling her failure to recuse “serious,” “inexcusable,” and a “bright-line” violation of judicial ethics, although many viewed the verbal penalty as a slap on the wrist.¹¹⁵

- **Justice Patience Roggensack:** In 2013, WMC spent an estimated \$500,000 supporting Justice Roggensack’s reelection, and Wisconsin Club for Growth spent \$350,000.¹¹⁶ Together they outspent the \$652,318 spent by the justice’s own campaign.

WMC issued a special Supreme Court edition of its “Business Voice” magazine in advance of the election, with page after page warning that if Roggensack were to lose, “all of the reforms of Governor Scott Walker and the business community would hang in the balance.”¹¹⁷ WMC’s president described the

group's efforts to "elect 'strict constructionist' judges to the high court," and Justice Ziegler penned an op-ed endorsing Roggensack.

If the four Republican justices step aside, the Court would lack the four-judge quorum needed to hear the case. Unlike most other states, Wisconsin does not have a mechanism for substituting retired jurists or court of appeals judges for justices who recuse themselves. That means that any decision by the Wisconsin Court of Appeals would be the last word.

This is a new problem.

Wisconsin Supreme Court elections were relatively sleepy affairs until WMC went all-in on Justice Ziegler's election in 2007, and the elections have been dominated by big money ever since, particularly after *Citizens United* opened the floodgates to massive spending.

The increase in spending on judicial races—and the accompanying conflicts for some justices—is part of a national trend. Judicial elections cost \$56 million in the 2011-2012 election cycle, according to a report from Justice At Stake, the Brennan Center, and the National Institute on Money in State Politics.

VI. Wisconsin's GAB and Supreme Court Chief Justice next on the chopping block

The 2014 elections helped Republicans expand their majorities in the Wisconsin Assembly and Senate and, in response to the John Doe investigation, they intend to use their power to eliminate or alter the GAB and to unseat the Wisconsin Supreme Court's Chief Justice, Shirley Abrahamson.

Some Republicans have bought the "partisan witch hunt" claims and blame the GAB or its staff for the John Doe investigation. Assembly Speaker Robin Vos claim that "the GAB routinely doesn't follow the law and there's no accountability whatsoever,"¹¹⁸ and that the GAB's general counsel Kevin Kennedy "has to go."¹¹⁹ Sen. Alberta Darling called the GAB a "rogue agency."

The GAB was created with broad bipartisan support in 2008 to replace an ineffective and partisan Elections Board, following the 2007 "caucus scandal" that sent legislative leaders to jail for using their taxpayer-funded offices to campaign on the public dime.

Instead of partisan appointees working to protect the party who appointed them, the six-member GAB is

led by a nonpartisan board of retired judges, from both parties, appointed by the governor and confirmed by the senate.

Notably, the current board chair, Thomas Barland, is a former Republican state legislator. The vice-chair, Harold Froehlich, is a former Republican Congressman.

The GAB has been hailed nationally as a model for other states. It has been called "America's Top Model" for election administration by Ohio State University law professor Daniel Tokaji¹²⁰ with others noting that the Wisconsin GAB "achieves something that up until now has been a rarity in the United States: election administration that is independent of partisan politics."¹²¹

Yet apparently being "independent of partisan politics" has its limits. As the John Doe investigation has continued, Republicans who control the Wisconsin legislature have called for killing their own watchdog.

"We suspect the current calls for reform of the GAB are simply a partisan power grab at a time when one

party has the majority needed to defang the agency's watchdog function and craft an elections agency that can be easily manipulated for partisan gain," noted Andrea Kaminski, Executive Director of the League of Women Voters of Wisconsin.¹²²

Amidst this political pressure, it may be little surprise that the Board voted to end its participation in the probe in August: the Board's own existence and the future of nonpartisan election administration was at stake.

It is hard to understate the pressure facing the GAB.

For over a year the board of Republican and Democratic retired judges had been looking at serious, possibly criminal violations of Wisconsin campaign finance law involving the state's highest elected official, Scott Walker. The vote came after WiCFG and its allies had filed no less than four separate lawsuits against the GAB and prosecutors, and in the midst of Republican legislative leaders leading a drumbeat for the GAB's elimination.

Although the GAB's investigation has ended, there is no indication that any county district attorneys have given up on the criminal investigation into Walker's campaign and WiCFG.

Another top priority for the new legislature is removing Wisconsin Supreme Court Chief Justice Shirley Abrahamson, just as the Court takes up the challenge to the John Doe investigation.

Abrahamson, the first woman to sit on the Wisconsin Supreme Court and the state's first female Chief Jus-

tice, is one of the most respected jurists in the country and the leader of the Court's liberal wing. She was appointed to the state Supreme Court in 1976 and has been re-elected three times since then, most recently in 2009; her term doesn't end until 2019.

Rep. Tom Tiffany, who has gained notoriety for his close ties to an out-of-state mining company seeking to limit state regulation of a controversial mine in Northern Wisconsin, is promoting a measure to alter how the Chief Justice is appointed.¹²³ Under Wisconsin's Constitution the title is given to the longest serving member, but Tiffany is hoping to amend the process so the chief would be decided by a vote among the justices every two years.¹²⁴ The measure will likely go before voters in April.

Additionally, Rep. Dean Knudson, a veterinarian originally from North Dakota, is promoting legislation to set a maximum age for judges that appears aimed at unseating the 81-year-old Abrahamson. (Knudson is also one of the legislature's most vocal critics of the GAB.¹²⁵) If the bill passes and Abrahamson is removed, Governor Walker could have an opportunity to appoint her replacement.

"The real question is whether the legislative proposals can retroactively nullify the popular vote of the people who elected a chief justice and justices for 10-year terms," said Wisconsin Justice Ann Walsh Bradley in a statement. "To suggest that the Legislature can or should adopt either measure appears to elevate politics over law."

Elevating politics over law, unfortunately, has become routine in Wisconsin.

Conclusion

After months of trying to depict Wisconsin's bipartisan investigation into campaign coordination as a partisan "witch hunt," the *Wall Street Journal* editorial board has recently been portraying coordination between campaigns and independent groups as protected First Amendment activity.

In October of 2014, the *Wall Street Journal* editorial board claimed that "the new liberal target is "coordination" between politicians and independent groups," and that Wisconsin "is on the front lines."

"This is dangerous stuff," it added.¹²⁶

Regulating "coordination" between candidates and independent groups is not a new theory, and it is certainly not a liberal construct. It has been a key concept in campaign finance law for decades, and repeatedly upheld by Supreme Court justices from across the political spectrum.

And coordination laws have become vital in the post-*Citizens United* world, where "independent" political organizations are raising and spending unlimited funds for elections but keeping their donors a secret.

Rules against candidates coordinating with those groups are one of the few remaining bulwarks against an entirely lawless campaign finance landscape, where candidate contribution limits and disclosure requirements are rendered meaningless.

But that, it seems, is the goal.

Although the *Journal* and allies like Wisconsin Club for Growth claim to be decrying the concept of "coordination" laws, they are really arguing against any campaign finance regulation at all.

That truly is "dangerous stuff."

Endnotes

1. <http://online.wsj.com/news/articles/SB10001424052702304885404579547790710504208#sthash.aFQ444OQ.dpuf>
2. <http://www.wsj.com/articles/scott-walkers-friends-1401233872>
3. http://www.washingtonpost.com/opinions/george-will-wisconsin-prosecutors-abuse-the-law-for-partisan-ends/2014/05/09/1d8ed3d6-d6cf-11e3-8a78-8fe50322a72c_story.html#sthash.aFQ444OQ.dpuf
4. The GAB is the state agency charged with the administration and enforcement of Wisconsin's election and campaign finance laws. Wis. Stat. § 5.05(1).
5. See *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis.2d 670, 679, 605 N.W.2d 654, 659 (Wis. Ct. App. 1999) (“Contributions to a candidate’s campaign must be reported whether or not they constitute express advocacy.”); El. Bd. Op. 00-2 at 8–13 (“Coordination with a candidate or candidate committee transforms . . . purportedly independent disbursements and even true ‘issue ads’ into in-kind or monetary contributions to a candidate.”).
6. Id.
7. <http://watchdog.org/series/wisconsins-secret-war/>
8. <http://www.prwatch.org/news/2014/05/12489/federal-judge-who-halted-walker-dark-money-criminal-probe-attends-koch-judicial>
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12. <http://www.politico.com/news/stories/0511/55911.html>
13. http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/14/how-mcconnelling-came-to-be/?tid=pm_politics_pop.143
14. Utah House of Representatives, Report of the Special Investigative Committee (Mar. 11, 2014), <https://www.documentcloud.org/documents/1088927-utah-house-special-investigation-committee-final.html>.
15. <http://www.nytimes.com/2014/03/18/us/politics/a-campaign-inquiry-in-utah-is-the-watchdogs-worst-case.html>
16. <http://www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce>
17. <http://www.businessweek.com/articles/2014-03-19/a-long-frustrating-search-for-dark-money-in-utah-politics>
18. <http://www.nytimes.com/2013/06/16/business/in-utah-a-local-hero-accused.html?pagewanted=all>
19. <http://www.sltrib.com/sltrib/home3/55598812-200/johnson-swallow-rawle-attorney.html.csp>
20. <http://www.businessweek.com/articles/2014-03-19/a-long-frustrating-search-for-dark-money-in-utah-politics>
21. A 2007 Wisconsin law requires that campaign finance violations be prosecuted in the counties where defendants reside. See 2007 Wisconsin Act 1.
22. Wis. Stat. § 968.26. See also Marcus H. Bergahn, “What is a John Doe Anyway,” Hurley Burish & Stanton website, http://www.hb-lawfirm.com/articles_display.php?id=72
23. Additionally, prosecutors allege that the level of coordination between the Walker campaign and WiCFG may have been such as to render WiCFG a “subcommittee” of the Walker campaign under Wis. Stat. § 11.10(4).
24. See Def. Francis Schmitz Supplemental Opp’n to Pl.’s Mot. For Prelim. Inj., Document 114-1, *O’Keefe v. Schmitz*, E.D. WI. Case 2:14-cv-00139-RTR, Filed Feb. 15, 2014; see also State’s Consol. Resp. to Mot. to Quash Subpoenas Ducas Tecum, *In the Matter of John Doe Proceedings*, Milwaukee Co. Case No. 12JD000023, Filed Dec. 9, 2013.
25. Schmitz Supp. Opp’n at 4-5.
26. States Consol. Resp. at 9.
27. Scott Walker with Marc Thiessen, *Unintimidated: A Governor’s Story and a Nation’s Challenge* (2013). See also <http://expressmilwaukee.com/article-22198-john-doe-2-looking-at-walker-s-campaign-committee-and-dozens-of-conservative-groups.html>
28. Schmitz Supp. Opp’n at 9.
29. States Consol. Resp. at 10.
30. http://gab.wi.gov/sites/default/files/opinions/29/00_02opelbd_pdf_17587.pdf#sthash.mPPvstYc.dpuf
31. Schmitz Supp. Opp’n at 4.
32. Id.
33. Id.
34. Id.
35. Id. Oddly, WiCFG director Eric O’Keefe asserted in court filings that “none of WCFG’s . . . donations related to Walker’s campaign efforts.”
36. WiCFG had an estimated \$12,606,477 in total expenditures in 2011, and \$8,035,883 in 2012, according to its tax returns from those years.
37. States Consol. Resp. at 7, 9, 10; see also <http://www.prwatch.org/node/12309>
38. Schmitz Supp. Opp’n at 10-11.
39. Id.
40. Schmitz Supp. Opp’n at 10.
41. http://host.madison.com/news/local/govt-and-politics/gov-walker-s-state-of-the-state-speech-transcript/article_1281c782-5f75-11e2-b2e7-001a4bcf887a.html
42. <http://www.jsonline.com/news/wisconsin/mining-firm-has-role-in-drafting-bill-9h8invg-189008511.html>
43. <http://www.propublica.org/article/in-wisconsin-dark-money-got-a-mining-company-what-it-wanted>
44. <http://www.prwatch.org/news/2014/08/12582/Walker-Undermine-Criminal-Probe>

45. <http://www.propublica.org/article/in-wisconsin-dark-money-got-a-mining-company-what-it-wanted>
46. <http://franklincenterhq.org/about/>
47. <http://watchdog.org/113017/conservatives-wisconsin/>; http://host.madison.com/news/local/writers/jack_craver/wisconsin-reporter-says-new-john-doe-investigation-focused-on-conservative/article_b3c94a06-40b2-11e3-bda1-001a4bcf887a.html
48. <http://www.prwatch.org/news/2013/12/12344/why-franklin-center-wisconsin-reporter-attacking-john-doe>
49. <http://www.libertyguide.com/resources/9-how-understanding-politics-helps-in-policy/>
50. <http://talkingpointsmemo.com/muckraker/the-group-em-behind-em-the-group-behind-that-sketchy-wisconsin-poll?ref=fpa>
51. <http://www.jsonline.com/watchdog/noquarter/127152603.html>
52. <http://franklincenterhq.org/jason-stverak/>
53. James O'Keefe, *Breakthrough: Our Guerilla War to Expose Fraud and Save Democracy*, 334 (2013).
54. <http://franklincenterhq.org/about/staff/>
55. <http://prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad>
56. In 2011, WiCFG made a \$4,620,000 grant to Citizens for a Strong America. This amounted to CFSA's entire budget that year, save for a separate \$25 donation. In 2012, WiCFG reported granting \$2,020,000 to CFSA. This again amounted to CFSA's entire 2012 budget, save for a separate \$28 donation. See Exhibit A.
57. See Wisconsin Democracy Campaign, "David T. Prosser Jr, Wisconsin Supreme Court 2011 campaign profile," available at <http://www.wisdc.org/pro11-100823.php>
58. For example, CFSA funneled \$916,045 to the 501(c)(4) Wisconsin Family Action in 2011, which was over 90 percent of the grants that group received that year. CFSA gave an additional \$253,000 to Wisconsin Family Action in 2012. Wisconsin Family Action then spent an estimated \$850,000 on the Senate recall elections in 2011 and 2012, and an additional undisclosed amount on the Supreme Court race. See "WI Club for Growth, Target of Walker Recall Probe, at Center of Dark Money Web," PRwatch.org, November 18, 2013, <http://www.prwatch.org/news/2013/11/12309/new-john-doe-investigation-probes-dark-money-wisconsin-recall-elections-club>
59. A review of Franklin Center's recent tax filings shows that it has paid \$235,157 to Connors' Milwaukee-based consulting firm, J Connors & Co (\$114,930 in 2012 and \$119,227 in 2011). A close Connors associate, Claire Milbrant, who has worked at J Connors & Co since its founding in 2009, was also hired by the Franklin Center in late 2013 as its Executive Assistant to the President.
60. http://www.cjr.org/united_states_project/the_koch_brothers_media_invest.php?page=all
61. <http://www.publicintegrity.org/2013/02/14/12181/donors-use-charity-push-free-market-policies-states>
62. <http://online.wsj.com/news/articles/SB10001424052702304799404579155953286552832>
63. See: <http://online.wsj.com/news/articles/SB10001424052702304799404579155953286552832>
<http://www.wsj.com/articles/SB10001424052702304149404579322692324504038>
64. <http://www.bradleyprizes.org/>
65. <http://www.bradleyprizes.org/recipients/paul-a-gigot>
66. http://www.washingtonpost.com/opinions/george-will-wisconsin-prosecutors-abuse-the-law-for-partisans/2014/05/09/1d8ed3d6-d6cf-11e3-8a78-8fe50322a72c_story.html
67. <http://www.bradleyfdn.org/Who-We-Are/Our-People/Board-of-Directors>
68. <http://www.bradleyprizes.org/recipients/george-f-will>
69. <http://legalnewslines.com/news/251647-district-attorneys-wife-drove-case-against-wis-gov-walker-insider-says>
70. <http://www.dailymail.co.uk/news/article-2750225/Report-Crying-wife-drove-Democratic-DA-target-Republican-governor-s-staff-conservative-activists-five-year-investigation.html>
71. <http://www.breitbart.com/Big-Government/2014/09/09/DA-s-Union-Member-Wife-Drove-Witch-Hunt-Against-Gov-Walker-and-Conservative-Groups>
72. See Wisconsin Democracy Campaign, "Recall Race for Governor Cost \$81 Million"
73. Additionally, prosecutors allege that the level of coordination between the Walker campaign and WiCFG may have been such as to render WiCFG a "subcommittee" of the Walker campaign, under Wis. Stat. § 11.10(4).
74. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 446, 121 S.Ct. 2351, 150 L.Ed.2d 670195586080
- 670195586080
- <http://www.wsj.com/articles/SB10001424052702304558804579375140949853368>
- <http://www.wsj.com/articles/SB10001424052702304756104579451301145002122>
- <http://www.wsj.com/articles/SB10001424052702304512504579491340045747178>
- <http://www.wsj.com/articles/another-john-doe-disclosure-1402265159>
- <http://www.wsj.com/articles/scott-walkers-friends-1401233872>
- <http://www.wsj.com/articles/walkers-too-clever-reply-1401493533>
- <http://www.wsj.com/articles/SB10001424052702304885404579547790710504208>
- <http://www.wsj.com/articles/a-free-speech-scheme-1403308776>
- <http://www.wsj.com/articles/political-diary-wisconsin-education-follies-1403521121>
- <http://www.wsj.com/articles/hyperventilating-in-wisconsin-over-scott-walkers-fund-raising-1408920214>
- <http://www.wsj.com/articles/a-first-amendment-education-1409872299>
- <http://www.wsj.com/articles/judging-wisconsin-prosecutors-1410478467>
- <http://www.wsj.com/articles/prosecutors-donate-to-democrats-1414107297>
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- <http://www.wsj.com/articles/wisconsin-targets-the-media-1419206363>

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75. 540 U.S. 93, 96 (2003).
 76. *O'Keefe v. Chisholm*, — F.3d —, 2014 WL 5088077 at 8 (7th Cir. Sept. 24, 2014).
 77. 231 Wis.2d 670, 679, 605 N.W.2d 654, 659 (Wis. Ct. App. 1999).
 78. <https://www.youtube.com/watch?v=qhm-22Q0PuM>
 79. <http://www.prwatch.org/news/2011/11/11111/cmd-requests-irs-investigate-charity-accused-fronting-private-jets-presidential-c>
 80. <https://docs.legis.wisconsin.gov/statutes/statutes/11/06>
 81. <http://www.wpri.org/WIInterest/CSykes9.2.pdf>
 82. El. Bd. Op. 00-2 at 8–13.
 83. Wis. Stat. § 13.92(6a). On a related note, one of the goals of the new Wisconsin legislature appears to be eliminating the independence of the GAB.
 84. http://www.wispolitics.com/1006/WPN_v_Myse_Respondent_filings_02_23_11.pdf
 85. <http://harpers.org/blog/2008/12/what-motivates-the-torture-enablers/>
 86. <http://www.prwatch.org/news/2014/04/12448/walker-asks-wi-supreme-court-review-john-doe-dark-money-probe>
 87. *O'Keefe v. Schmitz*, — F. Supp. 2d, 2014 WL 1795139 (E.D. WI., May 6, 2014),
 88. http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/the_scott_walker_case_in_wisconsin_could_shred_the_remaining_limits_on_influencing.html
 89. <http://www.prwatch.org/news/2014/05/12489/federal-judge-who-halted-walker-dark-money-criminal-probe-attends-koch-judicial>
 90. <http://www.prwatch.org/news/2013/11/12309/new-john-doe-investigation-probes-dark-money-wisconsin-recall-elections-club>
 91. <http://abcnews.go.com/2020/story?id=124086>
 92. http://host.madison.com/news/local/writers/steven_elbow/experts-weigh-in-on-john-doe-judge-s-koch-funded/article_e8ac0b40-e90e-5671-b2db-d97dbdf11966.html
 93. http://host.madison.com/news/local/govt-and-politics/on-politics/on-politics-john-doe-lawsuit-judge-s-assistant-married-to/article_75ae0b25-1f32-5d07-8a2c-568db205b906.html
 94. *O'Keefe v. Chisholm*, — F.3d —, 2014 WL 5088077 at 8 (7th Cir. Sept. 24, 2014).
 95. *Id.* at 6-7.
 96. *Id.* at 5.
 97. <http://www.prwatch.org/news/2014/10/12617/justices-walker-criminal-probe-face-conflict-interest>
 98. <http://wisconsinwatch.org/2012/03/aint-nobodys-business-but-their-own/>
 99. <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874>
 100. <http://wisconsinwatch.org/2012/08/realtors-gave-1-million-to-state-club-for-growth/>
 101. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009)
 102. <http://www.wisdc.org/pro11-100823.php>
 103. http://www.prwatch.org/files/wmc_big_stakes_for_supreme_court_election_wmc.pdf
 104. <http://www.wisdc.org/pro11-100823.php>
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 116. <http://www.wisdc.org/pro13-103267.php>
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 118. <http://www.jsonline.com/news/a-gop-attack-on-the-government-accountability-board-b99410301z1-286233451.html>
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 120. Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, (Jan. 16, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201587.
 121. <http://www.jsonline.com/news/opinion/wisconsins-partisans-want-to-kill-their-own-watchdog—the-government-accountability-board-b99410744z-286369141.html>
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 123. <http://www.jsonline.com/news/wisconsin/mining-firm-has-role-in-drafting-bill-9h8invg-189008511.html>
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