In the Bright Lines Project proposal, is there a place for "facts and circumstances?"

After more than four years of debate and revision, a team of nine tax lawyers that Beth Kingsley and I chaired developed bright line definitions of political intervention to apply across the tax code. This drafting committee operated within a project sponsored by a nonprofit organization – first OMB Watch and now Public Citizen. The regulatory framework has been reviewed at various stages by nonprofit leaders throughout the country and their input has helped reshape the framework.

The project was moving into a new implementation phase under the name the Bright Lines Project, but sped up its timeline in light of the news that the IRS inappropriately targeted tax exempt applications from conservative groups. We launched the BLP proposal with an op-ed in the *Washington Post* on May 24, 2013, which summarized the reforms we propose for consideration by Congress and the IRS. (The summary and full explanation are on the website.) It would correct the serious absence of neutral, objective criteria for determining the nature and extent of political activity that led to instances of ideological bias in IRS review of tax-exempt applications.

We have received lots of interest in the project since it was formally launched a little over a week ago. Bob Bauer of Perkins Coie wrote a response on his blog on May 28th, which praises the BLP model as a "thorough, careful" improvement but also raises concerns about leaving any room for IRS to make political decisions through existing "facts and circumstance" authority. Jeff Yablon of Pillsbury Winthrop was very supportive, adding that the BLP proposal is a "truly thoughtful piece of work."

Overall, we have received quite favorable bipartisan feedback, but invite additional thoughts and comments, which can be sent to lgilbert@citizen.org or directly to me. Based on feedback we receive, I will periodically write responses to engage our community in refining the BLP proposal with the hope that Congress will incorporate the best ideas.

Today, I want to respond to the concern expressed that we would still permit the consideration of "facts and circumstances" in certain cases not resolved by application of bright-line standards.

The BLP proposal sets forth clear rules which would declare the following activities to be political intervention under the Internal Revenue Code:

1. Expressly advocating the election, defeat, etc., of an identified candidate.
2. Expressly advocating the election or defeat of those affiliated with a political party.
3. Expressly advocating the selection of candidates by "litmus" test criteria.
4. Expressly advocating that contributions be made to a candidate, party, etc.
5. Giving resources to another, used for or against a candidate, if foreseeable and preventable.
6. Making reportable contributions to a candidate, party, or political organization.
7. Paid mass media advertising that reflects a view on a candidate, targeted to a close race.

The Bright Lines proposal would also declare the following activities not to be political intervention, protected by a clear safe harbor:

1. Speech that does not refer to or reflect a view on a candidate.
2. Speech about public officials to influence action they may take in their official capacity, such as on pending legislation (but not through paid ads).
3. Debates, voter guides comparing candidates, offering them equal opportunities to participate (but not through paid ads).
4. Self-defense (but not through paid ads), when a candidate comments on an organization or its positions.
5. Personal, oral remarks made at an organization's meeting.
6. Fair market value transactions made without any candidate preference.
7. Activities specifically allowed by a Revenue Ruling or other federal tax authority.

The BLP proposal leaves only two areas in which the IRS would be able to consider facts and circumstances that an organization might raise in its defense:

1. Miscellaneous speech that refers to and reflects a view on a candidate, outside of express advocacy, outside of a safe harbor exception, and outside of paid mass media ads targeted to close races.
2. Miscellaneous uses of resources for or against a candidate, outside of reportable political contributions and outside of the transfers and transactions covered by clear requirements.

It is impossible to anticipate all of the activities that an organization might conduct in relation to candidate elections, and to prescribe an exact rule for each of them. Our Bright Lines proposal captures the worst and most expensive abuses – the paid media attack ads targeted to close races and battleground states. It provides clear rules to govern fourteen different types of activities that arise commonly during election periods.

Given the limited ability for the IRS to use "facts and circumstances," I would say that the concern about retaining aspects of facts and circumstances is overblown.

No proposal will be perfect. However, the BLP proposal would be a vast improvement over current IRS interpretations, in which the "facts and circumstances" approach is used in 90% of the cases that arise. We believe that our system of definitions and exceptions would reduce the area of IRS discretionary review of facts and circumstances to a small number of cases, maybe 10%.

Perhaps the scope of the IRS' facts and circumstances review could be limited to its audit and rulings functions, while routine applications to the IRS for tax-exempt recognition could be reviewed strictly upon the observance of bright-line standards. Organizations seeking greater latitude in election-related speech could apply to the IRS for a private letter ruling, resulting in further guidance visible to the public generally.

The large reduction in use of facts and circumstances will provide certainty to tax-exempt groups who want to legitimately engage in the democratic process, including for 501(c)(3) nonpartisan

activity. But keeping facts and circumstances in the equation on a limited basis allows for unforeseen situations that do not easily fit within the bright lines. After all, we are dealing with First Amendment speech, and where there is not a clear content-neutral standard that can be applied to the speech, the organization should be permitted to offer mitigating considerations in defense of its speech.

Greg Colvin
Chair, Drafting Committee
Bright Lines Project
brightlinesproject.org
colvin@adlercolvin.com