WILLIAM SCHAMBRA: Good afternoon. My name is Bill Schambra and I’m Director of Hudson Institute’s Bradley Center for Philanthropy and Civic Renewal. Kristen McIntyre and I welcome you to today’s panel entitled “IRS + 501(c)(4) = SOS?” As you cannot have failed to notice, the nation’s capital has witnessed a controversy since this past summer, simmering slowly on the back burner, always threatening to move to the front burner, about goings on at the Internal Revenue Services’ Exempt Organizations Division. The redoubtable TaxProf Blog helpfully runs a daily list of links to articles about the controversy and following its daily pattern, the title of today’s list is the IRS Scandal Day 132.

For some observers, scandal is not too strong a word to describe the behavior of the IRS. After all they claim, beginning several years ago, the Exempt Organizations Division pulled aside applications for 501(c)(4) status organizations whose titles included words like Tea Party and
Patriots and after lengthy delays subjected them to onerous and invasive clarifying questions, followed only by further delays. Some still await approval and some have simply abandoned the effort.

Other observers insist that these problems were in fact nothing more than the usual misunderstandings and delays that one would expect from an already underfunded and overburdened bureaucracy faced with a sudden flood of new applications for a particularly ill-defined tax status. Nothing criminal has been done they insist, and anyways the IRS has fessed up and apologized.

Today’s conversation will take off from these immediate issues, but it will no doubt soon raise some larger questions about the need for clearer definitions of the activities under question and perhaps even for a fundamental reorganization of our approach to regulating the nonprofit sector. This stellar panel we’ve assembled to discuss these questions includes Cleta Mitchell of Foley & Lardner, who has filed suit on behalf of some of the groups involved, John Pomeranz of Harmon, Curran, Spielberg & Eisenberg and a key participant in the Bright Lines Project, an effort to clarify standards for tax-exempt status, and Marcus Owens of Caplin & Drysdale and former director of the IRS Exempt Organizations Division. So, Cleta, why don’t you get us underway. Thank you.

CLETA MITCHELL: Thank you very much, Bill, for having us. It’s an honor to be with you today to talk about my favorite topic, and one about which my husband thinks I’ve become obsessed. And I’m also happy to share the podium with good friends, John and Marcus. I particularly want to say to John. There was an old state senator in Oklahoma who used to say, “I’ll be for you or against you, whichever will help you the most.” And so I praise John with some intrepidity as maybe it might hurt his career. John and I participate in a monthly group of attorneys, who represent both liberals and conservatives, Republican and Democratic groups, and sharing common concerns with about agencies and different legal aspects. And John has been particularly, I think, sensitive to some of the things that several of us have raised about the unlawful release of confidential taxpayer information. John took a lead with another attorney in helping to prepare a letter signed by a number of lawyers across ideological and party lines saying to the IRS some time ago, even before all of this became public, about some of these concerns. So I personally am very appreciative of John even though he chastises for being partisan. But [LAUGHTER] --

JOHN POMERANZ: Not like me.

CLETA MITCHELL: -- but in any event, that’s right. But I just want to make a couple of points because I could literally talk about this all afternoon, and I think probably the rest of you have day jobs and so you probably want to get back to them. However I began to realize that something was going on with IRS really in the fall of 2009, certainly by the spring of 2010, because I went back and looked at over the course of the last decade of organizations for which I had represented seeking exempt status, whether it was 501(c)(3), (c)(4) or (c)(6). And the timeframe in requesting and receiving a response from the IRS was weeks and not months, and the questions were normally confined to the application itself. Here is the information that you are required to submit and we have questions about what you have submitted.
And what began to happen in the fall of 2009, I had an organization that was a 501(c)(4) applicant, who did by the way this summer in July finally got his (c)(4) status. It took from October 2009 till July of 2013, and this organization was established really to mobilize grassroots opposition to ObamaCare. We submitted the application in October of 2009 and then I heard nothing. They cashed our check by the way so I knew they got the application, and we heard nothing until June of 2010. And at that time they wanted copies of all of the TV ads that the organization had run against ObamaCare.

Now let’s think about the timeframe. It’s the fall of 2009 and the spring of 2010. What was going on? ObamaCare was moving through the Congress and there was no election. So these were genuinely grassroots lobbying, calls to action. Call your Congressman, tell him or her to vote against ObamaCare. And the IRS wanted a CD rom of all the ads, and I had a conversation with the agent in June of 2010 after I got this letter, and he told me something, now we’ve been through a series of agents. I call them our parole officers because you have to check in with them, you know, I’ve gotten to know them. Hey, I’m checking in, it’s my monthly check-in call, and he told me something that really was startling to me. He said ‘You need to understand something. The people I deal with here don’t understand the difference between (c)(3)’s and (c)(4)’s.’ I said, ‘Oh, come on.’ He said, ‘No, I’m not kidding you.’ He said, ‘I keep trying to remind them that this is a (c)(4) and it can engage in unlimited grassroots lobbying, but they keep thinking that these are (c)(3)’s and, of course, we all know that (c)(3)’s are limited in the amount of lobbying in which they can engage.’

Now Marc may find this hard to believe but I found it quite credible because I have subsequently went through with this particular organization four separate parole officers, and when I would call, finally they changed agents and the woman who was a supervisor, who I notice is listed on one of the Lois Lerner emails that were released last week. And she told me, she said, ‘Well, we’re going to transfer this case to someone who better understands your type of organization.’ And I said, ‘What type would that be?’ And she replied 501(c)(4)’s. I said, ‘So you’re telling me that it is not generally understood by your employees as to what (c)(4)’s and (c)(3)’s do differently?’ She said, ‘That’s right, but we have someone who really kind of better gets what (c)(4)’s do, and we’re going to have her work on this.’ It took another seven months before, and she said, we’re going to expedite this. I guess in IRS speak, that’s expediting.

Then I began to have these same kinds of problems with other organizations. I must tell you at the outset, I blame Chuck Grassley because I figure anything that is wrong with the exempt organization world, it has to be Senator Grassley’s fault. But then when we got all those letters in the spring of 2012, then I knew something was really crazy going on because the kinds of questions that we got had no resemblance to the applications. And I have to tell you, this is still going on because I’ve just gotten another round of letters for some of my clients who refused to take the deal the IRS offered this summer, which is another thing that they totally made up out of whole cloth. But the kinds of questions were pages and pages of subparts and subparts, and I redacted all of them for several clients and took them to the luncheon that John and I attend. And I said, ‘Guys, what is this? See all these letters, see these questions. Are you guys getting any of these letters? Are the liberal organizations getting these kind of letters?’ And then I took
them to the House and Senate staffers and told them that they have got to ask questions about this. Something is going on at the IRS.

So when Lois issued her now infamous apology and blamed these rogue employees in Cincinnati, I knew she was lying. I can’t put anymore lipstick on that pig because that’s a lie. She lied, and we know she lied, and the evidence that keeps coming out is more evidence of the lies. But the first thing she said, ‘Well, this was all happening in Cincinnati.’ Well, you know that group that I told you about that filed in 2009, it was never in Cincinnati. I dealt with Washington from day one always. In the fall of 2011, one of my clients, who had submitted its own makeshift application in July of 2010, came to me a year later and said that they haven’t heard anything and asked for help. So I called the agent in Cincinnati and said we’re going to supplement this application because I could see that they could use some beefing up. And he said, ‘Well, you can send it, but all those decisions are being made in Washington.’ So I sent the letter and the supplement in November of 2011 and I called him back in December and asked him to please forward to whoever in Washington was making the decisions. So I knew she was lying the moment she said, ‘Well, this is something in Cincinnati, I know nothing.’

And so what does that say to us? I mean, this is still ongoing. We are still getting the letters. This is not over. It’s not in the past tense. So what do we do? Three things I want to say. Number one, this is what happens when you depart from the rule of law. There is a standard application. There are instructions. These applications are not on the back of a postcard. They are duly promulgated and published, and they have been in existence for a long time. There has been a process. And what they did was they departed from the standard procedures and they began making it up as they go along. They are still doing that. They call it, ‘Well, we do this by facts and circumstances.’ That’s a lot like I don’t know obscenity, but I know when I see it. That is hardly a legal standard for dealing with the citizenry. So the fact is this is lawlessness, and this is what happens when you get agents in any bureaucracy who behave in a manner that departs from the rule of law.

Number two, it’s still happening. Number three, I don’t care what the majority or minority in the House or Senate say, this was targeting conservatives. I’ll give you the example. I don’t know how many of you saw the document that USA Today published last night, but it is a memorandum from November of 2011 which lists 100 and some odd groups that are in a report. Almost all of them conservative or Tea Party groups. Some of my clients are on that list. I mean they basically describe the language and the issues that the conservative groups want to engage in, in such a way as a lot of campaign rhetoric reference to taking back the country after the elections. The attachment includes emotional rhetoric, nothing objective or informational. Viewpoints and positions unsupported by facts.

Since when does the government get to decide whether our positions are valid or not? I think this is pretty scary stuff. I will point out that on this list of about 180, there are a couple of left or liberal progressive groups. One is Progress Texas, and the comments note that this organization had a lot of anti-Rick Perry rhetoric. They notice, I will point that out, that organization got its (c)(4) status. My clients, who never mentioned a candidate or a campaign, or any kind of campaign intervention, are still waiting for their (c)(4) status or (c)(3) status, and have still gotten additional letters.
So the final thing I will say is my solution. My solution is not to create more regulation or more legal standards. When you’re talking about Bright Lines for 501(c)(4)’s, remember there are 29 separate sections under 501(c). If we’re going to start talking about 501(c)(4) Bright Lines, that needs to apply to 501(c)(5)’s labor unions; 501(c)(6) is trade associations. The labor unions documented by the *Wall Street Journal* between 2005 and 2011, spent $4.4 billion, with a B, on partisan campaign intervention. And somehow all this is focused on 501(c)(4)’s and we have to stop their political activity. Really? Well, we’re going to stop it for everybody or nobody.

And the other fact of the matter is, and I think this is unconstitutional, that 501(c)(4)’s, (5)’s and (6)’s are supposed to pay a tax on their political expenditures. I don’t know how you can say that it is constitutional to tax people on political expression, but that’s the law. Frankly my solution would be to abolish the Exempt Organizations Unit altogether. I think it is so corrupt that it can never be retrieved. I think that the decay and corruption and dishonesty and partisanship is so deeply rooted that it cannot be salvaged. If I want to start an LLC, I don’t have to ask the government’s permission. I just start an LLC. I could be subject to an audit. Audits should actually be on a random basis and not because you gave money or raised money for a Republican presidential candidate. I know that’s a novel thought these days, but what they’re doing now is tantamount to audits in advance of recognition. So I’d just get rid of the whole lot of them, reassign them to some other task or job. I wouldn’t let them go to the audit unit, but I don’t think that this can be saved by adding a bunch more regulations no matter how well intentioned. Thank you. [APPLAUSE]

JOHN POMERANZ: Thank you, Cleta. Cleta and I agree on a lot actually. A lot of what she said I agree with. I think we probably diverge most in the characterization of what happened, but I don’t think there is anybody on this panel who is happy with the fiasco that took place at the IRS. And the only question is whether it’s a departure from standard procedure or not. I think that it is a scandal that clearly the IRS and I would argue some of the groups that were applying for recognition of their tax-exempt status did not understand what the requirements were for the tax-exempt status that they sought or what political activity was. I think it’s a scandal that it takes years and years for a ruling to be issued on whether or not these groups meet this. I think that, Cleta, you’re right that there is a certain amount of trying to audit in the determination process going on, and I don’t think that’s what should happen.

However I also want to say that there is a role for some tax entity, whether it’s the Exempt Organizations Division as it exists now or some new audit function that Cleta will be unhappy with later or some new thing that Marc comes up with, there is going to be a role in the tax system for figuring out what is or is not political activity as long as we want to make a decision in this country as a policy matter of the degree to which we’re going to subsidize partisan political activity, whether we’re going to allow people to give tax-deductible contributions to 501(c)(3)’s and then allow those organizations to engage in some election-related activity, whether we’re going to allow businesses to deduct the expenses they spend on political activity or for that matter lobbying, whether we’re going to allow their dues-paying members or donors to 501(c)(4) or (5) or (6) or (c)(19) veteran’s organizations to deduct as a charitable contribution or a business expense the money that they give to organizations, that those organizations then turn around and use for political activity or lobbying activity. You are going to need a set of
rules for what is political activity if you’re going to have standards that rely on a functional definition of that.

I want to depart from Cleta a little bit and say that this is not the first time we’ve been to this rodeo. If you want to go back 10 or 15 years, there were questions about how the IRS was handling groups that were advocating for lesbian-gay, bisexual and transgender rights. More recently the IRS consolidated and agonized over the applications filed by groups that sought to do journalism from a 501(c)(3) organization. I’ve represented groups like that, Marc, I know has as well. So it’s not unusual for the IRS when faced with something that they don’t understand or don’t do very well to take too long to the detriment of the taxpaying or the not taxpaying organization involved. It’s not the first time that there have been awful, inappropriate questions asked.

Before this most recent nonsense, I had a client who was asked to print out its website and to explain what exactly they meant by the word progressive when they said they were going to work on progressive issues and to produce burdensome responses to multiple rounds of questions. This is not unfortunately unique, and it’s true that the IRS’s staff capacity and their understanding of the laws that they’re charged with enforcing is to put it charitably uneven. I have an ongoing audit that had its original auditor, we’ve been through a couple, not understand the rules governing (c)(3) lobbying to the point where I printed out the IRS training manual on this and said, ‘Here, read this. You guys wrote it.’ The questions about whether or not communications by the organization were emotional or supported by facts actually does have a long-standing tradition. It comes from the Supreme Court slapping down the IRS in the Big Mama Rag case, and the IRS came back and said, ‘Okay, we’re going to come up with this methodology test to determine whether or not something’s educational.’ And one of the criteria being, is what we’re writing, does it appear to be an appeal to a motion or is it substantively, objectively supported by facts that you can document. So this stuff is out there.

The taxation of this activity, it’s actually a tax not on political activity but rather on the lesser of your political activity or your investment income, so as to put tax-exempt organizations on an even playing field with nontax-exempt organizations so that the tax-exempt organizations aren’t subsidized in activities that other organizations are obliged to pay for. And while I’m sort of doing a little fact checking before I get to the meat of this, let me also just say that I want to quibble, Bill, I’m sorry, with the title of the panel. I think that, yes, 501(c)(4)s have been much talked about, but I want to note and Cleta noted that a bunch of those that have been subject to the latest abusive behavior by the IRS were (c)(3)s, a third I believe of those that were consolidated in this advocacy project that we much talked about were 501(c)(3)s.

So we can debate all day about why this occurred, and I don’t think we’ll convince anybody. Some of us believe it was dysfunction of the rules and the IRS, and some believe it had more maligned purposes behind it. I don’t think we’ll ever know, but I do think that we do need to fix this and that there are ways to do that. The group I’ve been a part of, the Bright Lines Project, offers one of them. In the wake of the current IRS scandal, it was apparent that the IRS itself didn’t understand what was meant by intervention in a political campaign. What it was that 501(c)(3)s are prohibited from doing, what it was that (c)(4)s and (5)s and (6)s are not allowed to do too much of, what it is that donors are not allowed to claim as business deductions or else
force their organization to which they donate to pay a proxy tax. What is this political intervention stuff?

Cleta points to the IRS facts and circumstances test and complains about it justifiably so. The IRS says it is a political campaign intervention if based on all the relevant facts and circumstances, it looks like it is political campaign intervention. That is really hard for an organization to act in a compliant fashion. It’s really hard for a low-level IRS employee or a high-level IRS employee to be able to evaluate and tell you whether or not you’re going to be in trouble for engaging in that activity. People have been saying that for years. People have been complaining about the IRS facts and circumstances for years. Some of us have tried to do something about it. Some people have sought to take the IRS to court, to get them to justify their facts and circumstances test. But the IRS tends to wiggle out of those situations.

Marc represented a church out in Pasadena, the All Saints Episcopal, that was subject to an extended audit, and the IRS ultimately sort of gave up and waved their hands and said, ‘Well, we think you did something wrong, but there’s no penalty. We’re out of here.’ Others have had similar circumstances, people on the left, people on the right, people in the middle. A lot of us have complained to the IRS and said, ‘Look, you have rule-making authority. You should write regulations to talk more explicitly about what is and is not a political campaign intervention.’ And to the credit of the IRS, they’ve tried a little bit to help. They’ve offered example-laden revenue rulings over the years, most recently in 2007, that provide some guidance on this. But we are still down to, we know it when we see it.

So about four or five years ago, a bunch of us who practice in this area, pointed-headed tax lawyer types, said, let’s see if we can write the regulations that we have been wishing for if the IRS can’t. Let’s see whether we can write a set of rules that clearly define what is or is not political campaign intervention. This Bright Line Project as it’s now called was led by Greg Colvin of Adler & Colvin, who at the time was the chair of the ABA Tax Section Exempt Organization’s Subcommittee on Lobbying and Political Activity. Greg, with my partner Beth Kingsley, who is now co-chairing that subcommittee, and a bunch of us other wonky types, sat down and started to figure out what are the rules that we could live with. And we took as our model a set of rules that were initially enacted by Congress in 1976 and then flushed out in IRS regulations of 1990 to define what lobbying (c)(3)s can do, and as I’m sure everyone in this room knows, the amount of lobbying is limited for a 501(c)(3) organization.

So we came up with these rules and then we were expecting at some point that there would be that aforementioned court case or some interest in Congress, and we’d be ready to go. Little did we suspect as we sat there in the ABA meeting last May that it would come in the form of a ham-handed disclosure by the IRS of really awful behavior when it came to determinations of politically or arguably political-oriented tax-exempt organizations. But we had that opportunity and we rushed to release the document that we’d be working for these many years.

So let me see if I can briefly summarize the set of rules that we came up with. First of all, it does apply generally. It’s not just for (c)(3)s to determine what they can’t do, and it’s also for (c)(4)s and (5)s and (6)s and everybody else, all the 501(c)s, all of which have some tax impact for how
much political intervention they can do, how much electioneering they can do. The first rule we have is that it’s always going to be treated as political intervention if you do certain things, if you endorse a candidate or a political party: you vote for John Smith for Senator, if you contribute cash or in kind to a candidate or political party or if you offer voters a clear litmus test and urge them to use that test to decide who to vote for. So ‘only vote for people who are going to support a flat tax’ is clear political intervention because you can say who you want people to vote for.

However that only covers a fraction of the communications that a tax-exempt organization is going to make. So beyond that, we need a set of rules. Our threshold question is, are you making a communication that clearly refers to a candidate and expresses a view on that candidate? That threshold question gets you to the point where we have to worry about whether or not you’re engaged in political campaign intervention. But even if you fall within that broad category, we offer several exceptions for speech that we think should not be treated as political campaign intervention. One, if you’re legitimately advocating on a live public policy issue, something that the current office holders might take action on. So if you need to lobby Congress or urge an agency to take action on a rule and you need to criticize an elected official in the course of that, that is still going to be okay. Non-partisan efforts to educate the public on candidates, voter guides are going to be okay as long as you treat the candidates equally on that. You give everybody a chance to hang themselves with the stupid things they say, and in the voter guide, your organization can decide, can announce what policy positions you favor as well. You don’t have to hide the ball when asking the candidate where they stand on the environment or jobs or crime or foreign policy.

You can also make a response if a candidate says something about you or your organization. You don’t have to just be mum when a candidate criticizes you because you’re the dreadfully liberal ACLU or the gun nuts at the NRA. You can respond and it’s not electioneering. And finally, we have one exception that allows preachers at the pulpit or people at the annual meeting of the group to speak truthfully without censuring themselves about what they think about the political situation as long as they isn’t some surreptitious effort to make a broad public statement. This is not something that you can record and put on the Internet and hope will go viral. It’s got to be you talking to a roomful of people, and if you do that, that is not political intervention either.

That seemed like a pretty good set of rules. Most of these exceptions don’t apply if you want to use paid mass media, if you’re going to do a big television campaign and try to wrap it in one of these exceptions. Most of the time that is not going to apply under these rules, but in general that seemed to cover about 70-80% of all of the activities that a tax-exempt organization might do that might be called electioneering.

But let’s say that you’re in that other gray area, the remaining gray area. Well, then we offer a return to facts and circumstances. Just like under the current lobbying rules, we can’t foresee and envision every possible alternative so we suggest that in those rare circumstances the group be allowed to go to the IRS and explain why they did what they did and why it wasn’t electioneering. And either the IRS will agree or they won’t or at least reduce the penalty if they thought they had a good reason.
So let me wrap up and say that that is the basic proposal. The more detailed proposal was in the materials distributed and is also on the website. And if we don’t do something like this, we’re going to have groups that are continuing to flout these rules either because they are ignorant of the rules or because they’re deliberating exploiting the ambiguity and the bad enforcement. You’re going to have the IRS ineffectual at enforcing these rules because they themselves don’t really have a clear idea of what is or isn’t electioneering, and there is a good chance that the courts are going to strike down the facts and circumstances test some day when they can drag the IRS into court. And when that happens, we may be left with anarchy, with the wild west, with some sort of you can do whatever you want tax-exempt organizations or maybe you can do whatever you want as long as you don’t expressly advocate the election of a candidate. I don’t think that is a good solution. I think Bright Lines is and we welcome your suggestions and comments for ways to improve it. However I hope that we’ll see some action in the IRS, in Treasury or in Congress to move it forward. [APPLAUSE]

MARCUS OWENS: I appreciate Cleta and John’s Pollyannaish view of the world. I have a somewhat darker view of what is happening at the IRS. I think the system of oversight is fundamentally broken. It’s not the section 501(c)(4) organizations that there a tiny number of them. The IRS is struggling to process applications from all organizations. I looked at their website this morning, and it announces that they are beginning to process applications for exemption received in April 2012. Well it has said that same thing for about three or four months now, and it took about five months to get away from March 2012. So the number of applications that are hung up in the system somewhere is probably on the order of 40 to 50,000.

I’m filing in tax court today on behalf of one organization. It applied for exemption back in July of 2012, and it is related to the Catholic Church. Its purpose is to raise money to restore monasteries in Jerusalem. That is all they are going to do, and they’re going to keep all of the records on what is done with the money. They’re going to check off the names of the monks in Jerusalem who are going to get the money against the specially designated nationals listed at the Treasury Department. This application has been sitting for over a year at the Internal Revenue Service. There’s nothing there, okay, nothing there.

These problems started showing up back certainly in 2003. In 2003, the training manuals that John was assigning to its IRS agents to read, the IRS stopped publishing those in 2003. What that means is that the training that the IRS was providing took a big step downward. My understanding is they tried to fill in the gap with things like videoconferencing, webinars and things like that. However nothing beat the training that was conducted, which consisted of three days of classroom training with a manual, that was the manual John was referring to, that was written especially for that year and the issues the agents would be using. So the agent would walk away after three days of lectures with a book on how to grapple with the issues. They don’t do that anymore and they haven’t since 2003.

Something has broken down in the communication of issues that are developing in the cases whether it’s applications or audits and the decision makers, the policymakers, who happen to work in Washington. Now I don’t know if Lois Lerner was lying or telling the truth, but my guess is she probably didn’t know what was going on in the field. Some unusual things have been cropping up. In 2004, I represented a taxpayer who received notice of an audit based on a
speech that had been given three months before, three months. The tax year in which the event
occurred that triggered the audit hadn’t closed. The tax return for that year had not been filed yet
and the IRS was beginning an audit. That is like the IRS opening an audit of John here because
they think he’s going to underpay his income tax for 2013. You won’t know if he does or not
until April 2014. However the IRS jumped in, and I had some strong words with IRS area
counsel about that case. It was another example of the IRS, we refuse to give any records, the
Internal Revenue Service takes us to court. And the Department of Justice ultimately decided
they’d rather not go to court and force records out under those circumstances. So something was
wrong there for that case to go forward at that point. The IRS could have waited a year for the
return to be filed and then started the audit, but they didn’t. They jumped in 2004.

John mentions another case. It happened about a year later. The same sort of jumping in. A few
years after that, I had an audit of a nonpolitical organization. The revenue agent thought he’d
save time by not bothering with the issuance of information document requests. That’s the way a
revenue agent in an audit requests information. Instead he went to the Internet and prepared a
revocation letter based on what he’d been able to Google search, without asking for confirmation
from the organization of whether it was true or not, and everything on the Internet is true, of
course, as we all know. That audit went on for three years and I was brought in when a proposed
revocation letter was issued. Three years later they got a no change. In other words, the
organization was cleared completely once the record had been produced, once the records had
been requested. Something was wrong there, and it wasn’t a small thing.

We’re not talking political issues. We are talking the procedure, the process has broken down in
some fundamental ways here. And this has been building for a decade or more. It just so
happens it broke open over 501(c)(4) applications. It could have been anything else frankly. It
just so happens it was (c)(4)s, but there is something wrong here and it goes back, I think,
fundamentally to the fact that Congress has assigned the IRS to grapple with these issues, issues
like what is religion, because religion has a certain preferred place in the Internal Revenue Code.
What is it to be charitable? What is it to advance social welfare? Congress created these
categories, said they have special tax status, but then didn’t bother to go any further and define
what they meant by that. Instead leaving it to the Internal Revenue Service, which is basically a
collection agency. They are the people who go out and grab you by the ankles and shake the
coins out of your pocket to fund the government. That’s what they do. It’s a collection agency.

It is not constructed to decide what is a religion. Those are immense questions requiring Ph.D.s
in philosophy to grapple with something like that. The tax system is not the place where those
questions should be asked. So if we’re going to have any government decision making about
organizations being exempt from tax or not, we have to figure out a way to have that done in a
form that allows for transparency; that is people have to know what the rules are, they have to
know how the rules are made, we have to know how the rules are enforced. It has to be done by
people who are adequately trained. There has to be adequate staffing. They have got to have the
resources. They have got to have computer programmers to create the software to take the form
990 if that’s going to be the return and make it electronically accessible. It takes resources to do
that sort of thing. It doesn’t happen by itself.
If you assign a task of this kind of oversight of a nonrevenue-generating area to an agency that is charged with generating revenue and the IRS Commissioner is given a budget and he or she has to decide how to allocate finite resources and generate revenue to run the government, when it comes time to put resources into tax-exempt organizations which don’t generate revenue, what do you think the rational decision is at that point? The rational decision is to give the dollars to the people who are going to audit multinational corporations that are moving their income offshore. It’s going to be giving it to a function of the IRS that actually collects taxes, real taxes, not to one whose job is to decide whether somebody really is advancing social welfare or not or advancing religion or something of that sort. There’s nothing there for the Internal Revenue Service to do. They are not equipped to deal with it.

So what are some alternatives? It seems to me the time has come for there to be a broad conversation about how the policing of the tax-exempt sector should occur, and I think policing is the right word. What you want is the boundary maintained between legitimate but taxable activity and activity that is found by our elected representatives to be worthy of exemption from tax. And right now about 9% of our gross domestic product is outside the tax system in those section 501 organizations of various kinds. So it’s kind of an important question as to who is inside and who is outside. The system we have now just isn’t giving us what we need. It isn’t drawing that line in a clear fashion, a consistent fashion, and we’re getting a lot of turbulence here.

So what could be done? Well, in my paper, this is a draft I started working on maybe five or six years ago and presented in a couple of places. It’s the latest iteration. I propose something that is not a governmental organization. It’s modeled loosely on the way the securities industry is regulated. Looking back, not at the way it’s done now with FINRA, but when I first came up with this idea, we had the old National Association Securities Dealers which was in essence deputized by the SCC to regulate securities dealers, to pull their license to do business if they did something wrong. It was funded by dues, by fees paid by the securities dealers so they could work, so the NASD had the money to do its job. It didn’t have to wait for Congress to authorize an appropriation. It could hire the talent it needed to hire when it needed to hire it, and it could get the job done.

Now you can quibble about whether it was the best way to accomplish it, but the whole point is it set up a system and sort of a quasi-private, quasi-public system of regulation that was funded, that could generate the rules in a timely fashion, communicate those rules to the affected group and then enforce them. And it seems to me that is what we don’t have now and that is what we ought to have in this area. So with that, I’m proposing that the fix is not to simply write some definitions of what is political campaign activity because the problem’s bigger than that. It’s far bigger than that. It’s not fixing the facts and circumstances test because frankly that is the test used in just about every part of the Internal Revenue Code dealing with tax-exempt organizations. Unrelated business income tax is based on the facts and circumstances. What’s related to an exempt activity? Well it depends on the facts and circumstances.

So it goes back to the way Congress writes its rules in this area, and it suggests to me that the real solution is going to require some significant changes, not patches here and there, not the Commissioner Werfel’s little deal for 501(c)(4)s. That’s not going to do anything. It’s not going
to be writing a few revenue rulings or a few rags. It’s more fundamental than that. So with that, I’ll turn it back to you, Bill.

WILLIAM SCHAMBRA: Great, thank you very much. [APPLAUSE] You know, that deal has been mentioned a couple of times. Could somebody tell the audience what the deal is?

CLETA MITCHELL: Well, I’ll start. The deal that was offered to the dozens and dozens of groups who have been held in abeyance, suspension, legal limbo, whatever you want to call it, purgatory, for some years now was that for 501(c)(4) applicants, if they were willing to swear under penalty of perjury that they would engage in no more than 40% of their expenditures and volunteer activities as being in the nature of political activities or partisan campaign intervention, although they use the term in the letter, political, which is not the term that’s used in the code and in the rags and in the revenue rulings, it is partisan campaign intervention, that then the IRS would in turn grant the (c)(4) status.

I will tell you that my clients, and clients of other attorneys with whom I’ve spoken, the thing that was most bothersome is number one, that that is just a made-up standard, and it did say you have to sign under penalty of perjury and then the organization would be then held to that in their future 990 filings permanently. And it had to be retroactive as well. Normally what we think of as we look at, in terms of measuring the political campaign intervention in which a 501(c)(4) engages, you look at the program expenditures and the idea of trying to figure out how many volunteers and what’s the value of that? Now all of a sudden you’ve added something to the equation and you’re really not sure. Yes, if you’re going to have them out walking for a candidate, well, you could probably say okay, did you have staff time, but how do you measure?

I know the IRS on the 990 asks for how many volunteers did you have and it does ask for voluntary activity, but the thing that began to concern us, so now are these organizations going to have to do what lawyers have to do, which I would not wish on my worst enemy, believe it or not, is that you have to keep track of your time by every day the hours. And so now then trying to say, how many hours are we going to have? I mean if you have a candidate forum, for instance, and you invite the public and people come and they don’t pay, well, is that a volunteer activity and how do you calculate that? So it was really something that number one, the 40% threshold or ceiling was something that was just fabricated out of whole cloth, but that how do you measure, calculate and interpret the volunteer activity as part of program expenditures. I was unwilling to recommend to anybody to sign that under penalty of perjury.

MARCUS OWENS: It’s interesting to note by the way that even under the existing primary purpose test, it’s not at all clear because there isn’t enough guidance that it is an expenditure-based test and indeed volunteer activity. However you define that and however you measure it is probably considered. I actually give the IRS a little credit in offering this safe harbor. They should have acted on these applications a long time ago, and they should act on them immediately now. But they were hoping to at least let some of them who swore up and down that they were not political, to say if you’re really not political then agree to this and we’ll give you the ruling right away. If not, you can hang on and we’ll give you the ruling when we get to it. It should be quicker, but it’s not.
WILLIAM SCHAMBRA: John and Cleta, I’d like to hear from both of you about Marc’s plan. I mean, is this a doable proposition? Oddly, Cleta, you seem to be most optimistic about the capabilities of the current IRS; i.e., they are devilishly clever at pursuing their political enemies. Your other two panelists seem to think that they’re so hapless that they really couldn’t execute the kind of strike on the political opposition that you’ve talked about. Is it necessary at this point to go to something like Marc’s complete overhaul of the system?

CLETA MITCHELL: Well, as I said, I’d abolish the exempt organization unit altogether. I don’t think it can be saved. I’m willing to contemplate Marc’s alternatives. I just think that as we know it, it needs to be uprooted and abolished. We need a fresh start, to start over. Having practiced before the NASD when I was practicing law in Oklahoma City, I can tell you that that actually was a system that worked pretty well for policing.

I want to go to something that John has said, and I don’t disagree with John about this. I don’t think that there is going to be some smoking gun where President Obama picked up the phone and called Lois Lerner and said, ‘Get these guys.’ That just doesn’t exist. However what I do think is problematic is that we have had letters from members of Congress to the IRS and to the Exempt Organizations Unit saying, ‘deny these Tea Party groups their (c)(4) status.’ And we now know from the emails and information released last week by the House Ways and Means Committee that indeed they were reading the statements coming from the President, from the White House Council, from others saying that (c)(4)s were engaging in these secret political activities and something needed to be done about it. One of the articles that was forwarded by one of the IRS staffers to Lois Lerner was an NPR story about the how the Senate was endangered by these shadowy (c)(4) groups.

So do I think they’re hapless? Well, yes, when you have agents that don’t know the difference between a (c)(4) and a (c)(3) and they’re in the Exempt Organizations Unit and my clients’ lives depend on their knowledge. Yes, I think they’re hapless. But look, just because I’m paranoid doesn’t mean they’re not out to get me. And when you represent conservative organizations and you deal with the kinds of things that my clients deal with, whether they are conservative organizations that deal with trying to help college students on college campuses who are literally besieged and mistreated because of the politically correct liberal orthodoxy that exists on college campuses, I mean it is writ large in our society that it is okay to beat up on conservatives because we are all pigheaded, stupid, uninformed and prejudiced, and so we might as well beat up on us because we deserve it. And why should the IRS be any different?

I just say anything big in America is not friendly territory for conservatives, whether it’s a big law firm like mine or a big accounting firm or a big business, big government, big in America is not kind to conservative principles. So I think to deny that that prejudice exists among the leadership of the IRS would just be naïve. But hapless, stupid, incompetent, yes, all of the above, but also prejudiced against conservatives.

JOHN POMERANZ: A brief response. You probably don’t want to listen to me. I’m a starry-eyed liberal whose ideas can be safely ignored in this country. So --

CLETA MITCHELL: I don’t see much ignoring [OVERLAPPING VOICES].
JOHN POMERANZ: I think it’s clear that the current system is dysfunctional for all the reasons that Marc said, and whether or not you fix it in place or you fix it at a new organization, whatever entity is going to regulate the tax-exempt sector, and it needs to be regulated, then that entity is going to have to have a clear set of rules. That is what I’m about.

I worry a little bit, Marc, about industry capture of any regulatory agency, but I’m a starry-eyed liberal. However I think that it can be fixed and I don’t think Marc’s idea is necessarily bad. I just would want to see the details.

CLETA MITCHELL: And I also don’t think it’s mutually exclusive when you’re talking about the things that John is talking about in terms of having bright lines. I actually do believe in Bright Lines. The Supreme Court said in *Buckley v. Valeo* that when you are dealing in the First Amendment and political expression that the Constitution First Amendment Juris Prudence requires bright lines. People have a right to know in advance what speech is going to be subject to regulation by the government and what speech is not.

Lois apologized on Friday and by Monday, Stephen Miller, who was then the Acting IRS Commissioner, was writing an op-ed that appeared in *USA Today* the next day. So Friday Lois apologized, by Tuesday Stephen Miller was saying it never happened, which is interesting. But I noticed that in his testimony to Congress, he uses terms, what we think of as legal terms of our partisan campaign intervention, lobbying, whether it is grassroots lobbying, direct lobbying, and those are things that we advise clients about. He’s missing advocacy. Everybody advocates and to say somehow that if you are an advocacy organization that somehow the antenna should go up, I mean where is advocacy per se as a term of legal art? And so I noticed that he used terms that were not the legal terms of art, and I think that’s a problem.

WILLIAM SCHAMBRA: Let’s go to the audience for Q&A. We have a terrific audience, Gary Bass, from the Bowman Foundation has a question.

GARY BASS: Actually, Bill, what I’d like to do is flip your question the other way around, which is acknowledging, Marc, that there is dysfunction, and, Cleta, you said the same thing, you would get rid of the EO Division. And maybe we should be striving to some alternative regulatory structures as you’re suggesting, Marc, although I wouldn’t call it a charity oversight board if we’re talking about more than (c)(3) so you might want to change your name. But I guess the question I would have for the two of you is, and Cleta, you started it just now, the reaction to the Bright Lines Proposal itself. Ultimately, whatever entity exists, you’re going to have to have some definitions, and I guess my question is do these types of safe harbors make sense and are these types of categories logical? And I’m curious from a conservative point of view as well as from having worked in the IRS, Marc, what your thoughts are?

MARCUS OWENS: Well, I think it makes sense to have Bright Lines, assuming you can get there with the guidance that Congress has provided. The difficulty in writing interpretive rules based on a congressional statute in the tax-exempt organizations area is that Congress doesn’t like to provide the detail from which you can develop the rules. They will use the word educational in section 501(c)(3) and just sort of let it hang there, the word charitable without any
context, and it’s very difficult. You can come up with a generalized definition by looking at the common law definitions from the preamble, the Statute of Charitable Uses in 1601 which is incidentally what the Treasury Department did in 1959 to finally define charitable. But when you have got that kind of ambiguous terminology coming out of Congress, it is really hard to get to the kind of Bright Lines standard that Cleta is legitimately asking for on behalf of her clients and John is proposing with his Bright Lines Project. It’s hard to say there is enough of a legislative hook there. So it becomes a very difficult task from the standpoint of the Treasury Department which writes the regulations incidentally, not the IRS, and for the IRS to come up with anything else.

CLETA MITCHELL: I think that Marc has really hit on something important here. A short answer to your question, Gary. I do think that we need those Bright Lines, and we need them in the campaign finance context. It would be nice if the campaign finance law and the IRS rules somehow matched or were even anywhere close to being similar. And I think in terms of McCain-Feingold, for instance, it’s not the same, but it is, it tells us exactly what Congress does not do properly in this area, and when the Congress directed the Federal Election Commission in 2002 to adopt regulations governing coordinated public communications, they said it doesn’t have to be express agreement to be coordinated.

That’s pretty much about all they said, and the FEC has now been, what are we on our third or fourth set of lawsuits that the FEC promulgates regulations and then Fred Wertheimer takes them to court and the court agrees with him, we go back. We’re back on the third or fourth round. It has been more than a decade, and it is all because of just exactly what Marc said, that Congress completely abdicated its legislative responsibilities. I think that’s a really good point and maybe one of the things that we could all agree is that the first step on a solution to this. And to me, I want to get to the bottom of it, but I really want to get on with fixing it. I don’t need to know any more than I know, which is that my clients have been subjected to horrible mistreatment that still continues to this day. It would be nice to know why, but frankly what difference does it make? Let’s fix it. I’m like Hillary Clinton, what difference does it make? At least people haven’t died yet, but I do think that it would be important for us to maybe get Congress to start with the process and adopt some specifics.

One area that I want to make sure we protect and that is candidate forums because both the FEC and the IRS seem to look askance at candidate forums and somehow those are problematic. I mean if you’re the Nashville Tea Party, you probably are not going to have a lot of Democratic liberal candidates who want to come and talk to you. I always say to just invite everybody, but you’re not responsible if they don’t come. The problem is that sometimes even the fact that they had the forum, both the FEC and the IRS say, ‘Well, yeah, but everybody didn’t come.’ So I want to make sure we protect the right of citizens to gather and hear what candidates have to say. So that is one area I want to really be very protective about because neither the FEC regulations nor the IRS approach these days protect sufficiently in my view candidate forum. And that’s one of the things that consistently I’ve seen questions about in these letters to Tea Party groups that they had judicial candidates or they had a candidate forum for a group of candidates and who came and how much did you spend for that?
SCOTT WALTER: Scott Walter at the Capital Research Center. I have a question for the starry-eyed liberal because, of course, starry-eyed liberalism specializes in unattended consequences and one of them that leaps off the page to me is that you’re allowed to respond to your critics. Now most (c)(3)s and (c)(4)s work enormously hard, both to criticize and to get responses to their own criticism and back and forth, and the more you can do that, the better off you are in fundraising and earned media. Have you really thought through whether that is something you want to encourage further?

JOHN POMERANZ: Yes, we have. This was a very controversial exception and I urge you to read the full explanation of this exception. However it was clear from past experience that candidates will demonize a group or candidates will speak foolishly on a group’s central missions. The thing that they know more in the world about than anybody else, and the group will be muzzled, unable to respond. Cleta talks about advising clients on candidate forums. Those of us who advise tax-exempt organizations on what can you say about that thing the candidate just said are frequently faced with a situation that’s inane. That Republican or that Democrat said something insane about something that we know all about. Why can’t we talk about it? Well it might be electioneering under the facts and circumstances test. So yes, we did think about it and absolutely it’s going to result in situations where there are (c)(3) organizations saying things that make a candidate look dumb. And if that has an impact on elections, we are willing to take that consequence.

CLETA MITCHELL: Congress may not be willing to take it. That may be the problem.

Q: My name is Kim Patton and I’m from the Foundation Center. We teach classes on how to start a nonprofit and all that good stuff. Now with the hybrids that are coming up like LLC’s and B-Corps, I think that the lines are becoming more blurred because the division between the for-profit and the nonprofit, many people are putting together these hybrids, also with more and more nonprofits that are looking at earned income. So I think it is going to be more difficult to have bright lines than less. How would you address that because I think the field is ever evolving and so the lines are less clear for sure?

JOHN POMERANZ: Well, I’ll start. I think there is always a tension between the world of preferred organizations eligible for various flavors of tax exemption and other organizations or clusters of organizations that want to do several of those things in concert. And I don’t know that a Bright Lines Project is going to address that except insofar as some of that work is going to be related to what is or is not political. I sympathize. It is not a new problem. I think that it’s going to require a well-resourced regulatory agency in or outside the IRS to try and grapple with these emerging problems that you described.

CLETA MITCHELL: I had a client who said to me the other day, and her organization is one that’s been waiting since I want to say December of 2010, I didn’t do the application. I think it was December of 2010 when they submitted their application and heard nothing from the IRS until February of 2012. However she said, ‘I don’t know why we don’t just get rid of all these exempt organizations anyway.’ You know, she’s the president of one. She said, ‘You know, an LLC, we get income, we have expenses, why don’t we just get rid of all of this.’ And you know, I was a little bit hard pressed to explain why I thought that was a bad idea.
Contributions to a (c)(4), not tax deductible, it’s charitable contributions. I know very few donors who try to deduct contributions to (c)(4)s business expenses. The contributions, they do that on the left, they don’t do that on the right, but we know we’ll get audited. The --

JOHN POMERANZ: You all give to the Chamber instead.

CLETA MITCHELL: The contributions to the Chamber unless they are membership dues are not deductible. They are not deductible to the extent that they’re spent for lobbying or political expenditures. I’ve had clients who have given me the solicitations, they ask if we can give and I say yes. And it says right on there, this is not deductible. I tell them how to prepare it and that they have got to exclude the amount of dues that are spent for the lobbying percentage. And so when I was thinking about that, I thought, well those expenditures are not tax deductible anyway so maybe that is the answer. Just again get rid of the Exempt Organizations Unit, get rid of exempt organizations all together and let them be LLC’s and pay taxes to the extent that they --

JOHN POMERANZ: Well, tax the churches. Yes, that will work with your people, right?

CLETA MITCHELL: No, I don’t want to do the churches but I’m talking about (c)(4)s, (5)s, (6)s, etc. Churches should just be excluded all together. They are not subject to the review process if they don’t choose to be part of it.

JOHN POMERANZ: They have a special deal.

CLETA MITCHELL: They should have a special deal.

WILLIAM SCHAMBRA: Marc, how would your organization handle this, the blurred lines problem? What do you think?

MARCUS OWENS: Well, that actually is a different problem. The hybrid organizations are for-profit organizations. They have owners and the profits of the enterprise, if there are any, are going to be distributed to the owners. But it’s a for-profit construct that intends to achieve some sort of additional societal goal, whatever that might be, in the eyes of the owners.

So the owners sort of agree among themselves that what they’re going to do is going to be guided by a principle that is not just returning a personal gain, and we’ve seen this for a long time. For example, investment funds that won’t invest in alcohol, tobacco and firearms organizations because that’s anathema to their religious beliefs. They only want to invest in certain kinds of things, and it’s the same idea that your business philosophy is going to be guided by some set of higher standards and --

CLETA MITCHELL: Or different standards, not necessarily higher.

MARCUS OWENS: I’m sure they consider them to be higher [LAUGHTER], but the point being that there has to be a line drawn between those organizations, which fundamentally are businesses and should be filing tax returns, and organizations. One solution that Cleta proposes
is to eliminate tax exemption all together. It then raises a question of whether you shouldn’t also eliminate all the other benefits. I mean my brother-in-law has five kids. He gets five dependent deductions. I only had three. So maybe we should sweep the board clean. What is this accelerated depreciation stuff corporations get? Come on, pay taxes. So there is a certain irrationality to our tax system, and it may be so deeply imbedded in our society that you can’t really unwind it.

Q: Hi, my name’s Brian Zimmer and I am the president of the Coalition for a Secure Driver’s License and my comments are completely personal, not reflecting my organization. I like a lot of the Hudson presentation materials by the way. I complement you on the excellent forums you run because I was quite intrigued by the Bright Lines proposal. I’m a former employee of the Congress in a senior staff position and worked directly with Ways and Means on a number of investigations. So I have a little personal experience, and I work directly with regulators from the IRS.

Despite what Marc just said, the people I met with about IRS regulations were not from the Treasury except to the degree that the Treasury controls the IRS. They were regular GS-15s who had been employed for the IRS their entire lives writing regulations. So it is a novel idea that somebody from Treasury would intervene, but earlier in my career I did work directly with Treasury on a farm tax issue. So I think it varies by the subject matter is my point.

The point at question is you have a very interesting proposal that seems to me to be very lucid, and it fits within existing frame of law in contrast to Marc’s proposal, which is interesting also, but there’s no current legal reference for it. So if you just took existing laws then a bill passed first to the Ways and Means Committee that would then move to action, and by the way, the Congress usually responds pretty favorably to what Ways and Means wants to do. So my question is, are you advocates for your position moving Bright Lines forward, which would help my organization and everybody here make decisions on a day-to-day basis because we frankly are often asked to take political roles and we decline and hide in our research mode because we’re not sure whether we are political or not. So we think that it might be political so we won’t do it.

Now there are other people probably in this room that would say let’s go do it. It is political and we’re going to get ignored by this Administration. We better look out when the next Administration comes to town because, as you pointed out, it depends on who’s in charge, which organizations are looked at and investigated. So let’s have some objective standards that fit no matter who the President is, and I think that’s an excellent idea. So the question is are you going to do something to try to get, let’s say, bipartisan support, which always helps move things through Congress?

JOHN POMERANZ: We are doing something, I’m happy to report. We are meeting with Congressional staff and members on both sides of the aisle and getting a fair amount of interest and hope to look for opportunities to move legislation forward, perhaps in the context of one of the great tax reform bills, if any of those things ever take flight, but if not, perhaps in a more narrowly focused way. But if that fails, I note that as part of the blow back from the IRS fiasco, one of the recommendations of the Treasury Inspector General was that the IRS and Treasury
should come out with better guidance for what exactly is political intervention, and it is on the priority guidance plan. And I think that within the scope of the existing vague Congressional mandate, the Treasury and the IRS do have the authority to promulgate regulations in this area, and we are in conversation with them as well trying to urge them to move it forward.


WILLIAM SCHAMBRA: The Bright Lines material and all the other material referred to here was in fact required reading. You guys know this. It’s required reading. This is not recommended reading. [LAUGHTER]

JOHN POMERANZ: There’s going to be a quiz, right?

WILLIAM SCHAMBRA: Absolutely and we have time for one more quick question. But first, I totally poached this panel. The idea and two-thirds of the personnel for this panel from the Philanthropy Roundtable, Joanne Florino and now she’s about to claim credit for this and I don’t blame her.

JOANNE FLORINO: That’s okay, I love you and so my question actually is to go back to Marc and raise the issue that John started to raise which was it seems to me that despite this latest episode of the IRS, that for the most part, this agency has behaved within the rule of law and in a very professional manner throughout its existence, despite the fact that most taxpayers want to find something wrong, some kind of bias because you didn’t have any children, etc. But when you talk about an independent agency, Marc, I think John’s question was he worried about industry capture, which has been an issue with the SEC and some other agencies. So what kind of guidelines could be put into place? What kind of safeguards could be put into place because my concern would be that there would be people appointed who had biases about, again, the same kinds of things. What is charity? Where does religion fit in? The list of questions goes on. So I’d love to hear you talk about how those safeguards would be ensured?

WILLIAM SCHAMBRA: And as you point out yourself in the paper, you had a criticism of the Independent Sector’s panel for being captured by some kinds of organizations and avoiding others.

MARCUS OWENS: I don’t think there is any way to really build an impermeable barrier to that sort of capture. In fact, the IRS was captured in July of 2011 when members of Congress, Republican members, demanded that audits for gift tax purposes, a gift of 501(c)(4)s be stopped in mid-audit. I’ve never seen that happen. That’s capture of an agency of the first order. There are ways that difficult tax issues are resolved, some go to court, some don’t. But to just have the Deputy Commissioner stop an audit in mid-audit is extraordinary. So I think capture exists. It’s a real phenomenon.

I think the only solution to it is, and I hate to use the word transparency, it kind of makes me want to gag, but all of the proceedings should be open. That’s the only way so that people know what is going on and how the decisions are being made. And then you can judge for yourself whether there is bias creeping in of some kind. But humans are human. They’re going to do
things based on all sorts of motivations. You just got to have a way to understand what is happening so that the public or the government can take steps to rectify it when things happen that are wrong.

WILLIAM SCHAMBRA: Quick final comments?

CLETA MITCHELL: I just want to say, in defense of those Republican Congressmen who sent that letter, what was so objectionable was that the IRS just sort of out of the blue began to creep toward a new tax that has been discussed and sort of potentially hovering and real but not real, assessing gift tax against those who gave contributions to 501(c)(4)s, and did not do it in a transparent manner where they gave everyone notice and explain what was going to happen. We’re going to start assessing gift tax if you give contributions to 501(c)(4)s of more than $11,000 in year of 2013 or whatever it is in a given year. They didn’t do that and so it was a surreptitious non-transparent, sneaky way in which the IRS was going about that that caused a great deal of alarm among some of us who were very grateful that the IRS, caught red handed, stopped what it was doing in mid-process.

MARCUS OWENS: Just for the record, the federal government has prevailed in three court cases on the application of the gift tax, the gift to 501(c)(4)s. It has not lost a single case and an issue to revenue. That doesn’t mean it isn’t an issue that can’t be litigated. It’s just there is a record and the governments won.

CLETA MITCHELL: Well, but let’s also be very clear that it has not been common practice.

JOHN POMERANZ: The lack of enforcement, whether because of the ambiguity or the lack of resources, is certainly problematic but it goes to some of the same issues that we are actually talking about at this panel. I think that what we have with the IRS scandal is something both common in Washington scandals and unusual. It is perhaps unusual in that there’s actually some substance behind it. There actually is a scandal there, the way these groups, Cleta’s clients and some of my clients were treated, and some are continuing to be treated. It is not unusual in that it has become a political football that people on both sides of the aisle are trying to use to score political points. However the most unusual thing about it is there is a real opportunity to solve a real problem here. And I think there are people of goodwill on both sides that are willing to do that, and that is really exciting.

WILLIAM SCHAMBRA: Very good, terrific. All right, let’s give our panel a hand. [APPLAUSE]