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IRS, Inc.—The IRS Oversight Board—Effective Reform or Just Politics? Some Early Thoughts from a Corporate Law Perspective

Eric A. Lustig*

During our restructuring process from the public we heard over and over and over from citizens that, because the IRS has 535 members of its board of directors called the Congress, the IRS is not Sears and Roebuck, it is created by law.¹

* * *

I don't believe a Board of Directors is helpful or necessary for the IRS. We need a responsible commissioner who will do a first rate job in administering our tax laws. We should hold the commissioner responsible for a first rate job, if he or she fails, we should get a new one. There is a Board of Directors; it is the Congress. The IRS is not a corporation without a charter, it has a charter and it is the Internal Revenue Code, in which Congress directs what it wishes.²

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I should add the following. This article is much more fact driven in terms of people and events than most tax articles are. This results mostly because the events leading up to and after the formation of the IRS Oversight Board set the stage for the analysis because the central thesis of the article is that the IRS Oversight Board in both design and practice is not at all reflective of the Board of Directors form of corporate governance. In addition, while the article is critical of the creation of and authority granted to IRS Board as a legal institution, no criticism is intended for the individual members or staff, all of whom appear to be both professional and dedicated.

1. *IRS Oversight: Hearings before the Senate Comm. On Finance*, 105th Cong. 2d Sess. 7 (1998) (statement of Sen. J. Robert Kerrey) (hereinafter "1998 Senate Hearings"). Senator Kerrey played a key role as chair of the National Commission on Restructuring the IRS.

2. *Practices and Procedures of the Internal Revenue Service: Hearings before the Senate Comm. On Finance*, 105th Cong. 1st Sess. 100 (1997) (statement of former Commissioner of IRS Sheldon Cohen) (hereinafter "1997 Senate Hearings").

I. INTRODUCTION

Americans have long disliked, and even despised, taxes and tax collectors.³ As the nation's tax collector, the Internal Revenue Service (hereinafter "IRS") provides an easy target for criticism because of its long-standing unpopularity with the American taxpayer.⁴ Indeed, given its unpopular charge of administering and enforcing the nation's tax system,⁵ the IRS is often the lightning rod for political rhetoric of the forces of change to the tax system. And the last two decades have yielded a precipitous decline in public perception of the income tax.⁶

3. For example, taxes and the tax collector are often described in gory terms. Mark Twain posed the following: "What is the difference between a taxidermist and a tax collector? The taxidermist takes only your skin." Jeffery K. Yablon, *As Certain as Death—Quotations About Taxes (Expanded 2000 Edition)*, 86 TAX NOTES 231, 259 (Jan. 10, 2000). In a similar vein, humorist Dave Barry sums up the collective feeling of taxpayers on April 15th as follows: "It's income tax time again, Americans: time to gather up those receipts, get out those tax forms, sharpen up that pencil, and stab yourself in the aorta." *Id.* at 256.

Of course, taxpayer unhappiness is not limited to Americans, as the Beatles sang in their song "Tax Man":

If you drive a car, I'll tax the street.
 If you try to sit, I'll tax your seat.
 If you get too cold, I'll tax the heat.
 If you take a walk, I'll tax your feet.
 Tax man!
 Well, I'm the tax man.
 Yeah, I'm the tax man.

Id. at 233.

Perhaps the dislike is innate. A friend of mine, who was reviewing a draft of this article, mentioned the title to his five-year old, who responded with, "IRS stink" instead of "IRS, Inc."

4. In a telephone poll of 900 respondents, 51 percent indicated that they would prefer a root canal to an IRS audit. ROPER CTR. FOR PUB. OPINION RESEARCH, QUESTION ID: USODFOX. 41100 R3 (2000), available in WESTLAW/POLL. The IRS and its agents have found themselves the butt of many jokes. For example, television comedian David Letterman has skewered the IRS in several of his Late Night Show "Top Ten" lists. Examples include "Hilarious Pranks to Play on the IRS" (April 14, 1999), at <http://www.cbs.com/la...teshow/topten/lists/19990414.shtml>; "Ways the IRS Can Improve It's[sic] Image" (April 1, 1997), at <http://www.cbs.com/la...teshow/topten/lists/19970401.shtml>; "IRS Agent Pet Peeves" (April 17, 1995), at <http://www.cbs.com/la...teshow/topten/lists/19950417.shtml>.

5. One researcher found that "[t]he Internal Revenue Service is frequently cited as the most hated of all government agencies. This aversion goes well beyond a simple dislike of paying taxes. Many Americans feel the IRS uses its vast powers capriciously to enforce a tax code that is unfair and incomprehensible." Daniel J. Mitchell, *Income Tax Unfair? Let me Count the Ways*, 80 CONSUMER'S RESEARCH MAG. 24 (May 1997), available in WESTLAW/MAGAZINE.

6. MICHAEL J. GRAETZ, *THE U.S. INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE* 3-9 (rev'd ed. of "The Decline (and Fall?) Of the Income Tax" 1999). Professor Graetz notes that "in 1971 a plurality of Americans considered the federal income tax the fairest of all taxes used by the various levels of government . . ." *Id.* at 13.

Recently, political action appears to have caught up with the political rhetoric. Congress has pushed the IRS into a sea of change in terms of strategy and approach in enforcing the tax laws. Gone is the big stick of enforcing the tax law by audit and fear.⁷ In its place, the IRS has become a customer-friendly service provider.⁸

The most recent and significant change came when Congress passed the IRS Restructuring and Reform Act of 1998.⁹ The Act, which followed particularly inflammatory hearings,¹⁰ provided a sweeping overhaul of the Internal Revenue Service. The reform of the IRS ranged from procedural provisions involving tax controversies, such as the shifting burden of proof¹¹ and potentially imposing civil damages on IRS for agents' actions,¹² to more structural changes of the organizational framework of the IRS.¹³

As part of the structural changes, Congress created a new IRS Oversight Board (hereinafter "Oversight Board"),¹⁴ which consists of nine members including the IRS Commissioner, the Treasury Secretary and seven outside board members (including one to represent federal employees).¹⁵ The Oversight Board is generally responsible for overseeing the operation of the IRS.¹⁶ Indeed, when the IRS Oversight Board is viewed with other structural changes, the IRS takes on a decidedly corporate look, at least when one considers the rhetoric used by reform proponents as well as the

Professor Graetz further notes that the approval has shifted with the majority of people now believing that the income tax is unfair. *Id.* at 3-4.

7. One study supports the proposition that a less adversarial role could lead to more effective results. The Minnesota Department of Revenue conducted a study of various ways to increase state income tax compliance such as advance notice of audits and better customer service. MINN. DEPT. OF REV., THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT STATE TAX RESULTS (1996).

8. Elliott H. Kajan, *A Kinder, Gentler IRS*, 46 FED. LAW. 36 (1999).

9. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) (hereinafter "Restructuring and Reform Act").

10. The hearings drew public attention by highlighting allegations of abusive practices by the IRS. The substance of the allegations were later brought into doubt when the General Accounting Office was unable to find evidence supporting the allegations. *See infra* text accompanying notes 37-54.

11. *See* I.R.C. § 7491 (providing limited shifting of burden of proof from taxpayer to the government).

12. I.R.C. § 7426(h)(1). Section 1203 of the Restructuring and Reform Act has been labeled as setting forth "10 Deadly Sins' in specifying] 10 acts of misconduct for which an IRS employee must be terminated." Ann Murphy and David Higer, *The 10 Deadly Sins: A Law with Unintended Consequences*, 96 TAX NOTES 871 (2002). The provisions have been criticized as yielding the "unintended consequence" of low audit collection rates. *Id.*

13. Act. Sec. 1001(a)(3).

14. I.R.C. § 7802(a).

15. I.R.C. § 7802(b).

16. I.R.C. § 7802(c)(1).

statutory terms. This corporateness becomes more pronounced when viewed with President Clinton's appointment of information manager Charles Rossotti as IRS Commissioner, a position traditionally filled by prominent tax lawyers.¹⁷ Mr. Rossotti's appointment as Commissioner was widely viewed as transforming that position to a corporate chief executive officer.

This article examines the new IRS Oversight Board as a governance device, particularly in light of corporate governance in the private sector. The article will first trace the history of the IRS and explore past organizational and governance problems. Focus will then shift to the reforms enacted in the 1998 IRS Restructuring and Reform Act, with particular attention paid to the structural changes and establishment of the IRS Oversight Board. The article will then examine the process of seating the initial board as well as its foray into the 2002 IRS budget battle and the search for the new IRS Commissioner. The article will review the IRS Oversight Board from a corporate perspective by examining the role of directors in governing private corporations. The analysis tests the corporate analogy and considers recent criticisms of the corporate board model of governance in light of the current corporate scandals.

This article will conclude that the IRS Oversight Board as a governance mechanism does not approach the reform suggested by the political rhetoric and does not significantly improve governance shortcomings.¹⁸ This article argues that the corporate board analogy is misplaced. The IRS is not a private corporation. Nor is it a government corporation. Moreover, the characteristics which make a private corporation's board of directors effective are not present. Specifically missing is the plenary power of a corporate board of directors.

This article ultimately concludes that to the extent that the creation of the IRS Oversight Board rests on a corporate analogy, its reform power ends up as ineffective and a failure of tax policy.

17. Ryan J. Donmoyer, *Clinton to Tap Info Manager to be Next IRS Commissioner*, 75 TAX NOTES 1287 (June 9, 1997); Louis Lyons, *Ex-Commissioners: New IRS Chief Needs Business Savvy, Tax Expertise*, 74 TAX NOTES 1250 (Mar. 10, 1997).

18. Indeed, another commentator reached a similar conclusion. Wm. Brian Henning, *Reforming the IRS: The Effectiveness of the Internal Revenue Service Restructuring and Reform Act of 1998*, 82 MARQ. L. REV. 405, 427 (1999) (concluding that the Board's improvement of oversight is marginal and fails to significantly increase IRS' accountability to taxpayers).

II. BACKGROUND

A. *A Brief History of the IRS*

The history of the IRS traces back to 1862 and the Civil War. Prior to then taxes were collected by local supervisors, who were appointed by the president and confirmed by the Senate.¹⁹ In order to meet the fiscal demands of the Civil War, Congress imposed income and other taxes and created the Office of the Commissioner of Internal Revenue within the Department of Treasury.²⁰ As tax policy followed the cycle of national events, the Bureau of Internal Revenue's (hereinafter the "Bureau") role diminished until the 1913 passage of the Sixteenth Amendment in which an income tax was imposed on individuals and corporations.²¹ The reimposition of the income tax,²² as well as the fiscal demand from the First World War, imposed heavy demand on the Bureau's task of enforcing the internal revenue laws.²³

Even in its early years, (from 1913 to 1951), the Bureau was beset by organizational problems.²⁴ Initially, the Bureau was centrally structured with a Washington headquarters and 200 field offices, which were organized based upon the type of tax, *e.g.*, income, excise, etc.²⁵ The Bureau was reorganized in 1953 and renamed the Internal Revenue Service.²⁶ All positions below the Commissioner became civil service rather than political.²⁷ The 1952 reorganization established a three-tier organization: a na-

19. JOINT COMM. ON TAXATION, DESCRIPTION AND ANALYSIS OF PROPOSALS RELATING TO THE RECOMMENDATIONS OF THE NAT'L COMMISSION ON RESTRUCTURING THE INTERNAL REVENUE SERVICE, S. 1096, AND H.R. 2676 AS PASSED BY THE HOUSE (JCS-1-98) 3 (Jan. 23, 1998) (hereinafter "*Joint Committee Rep't on Commission's Recommendations*").

20. MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE, § 1.01 at 1-3, n.1 (2d ed. 1991) (hereinafter "SALTZMAN") (citing 12 Stat. 432). Prior to the enactment of the taxes in 1862, government was financed by other forms of revenue such as import duties and sale of public lands. *Id.* See also TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, available at <http://trac.syr.edu/tracirs/findings/aboutIRS/irshistory.html>.

21. SALTZMAN, *supra* note 20, at n.2. See also U.S. CONST. amend. XVI. Although an income tax had been imposed in 1862 to help fund the Civil War, the tax was later attacked on constitutional grounds as an impermissible direct tax because it was not subject to apportionment. The passage of the Sixteenth Amendment cleared the way constitutionally for an income tax. 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL INCOME, ESTATES AND GIFTS 1-6, § 1.1.3 (3d ed. 1999).

22. SALTZMAN, *supra* note 20, at n.2.

23. *Id.* at § 1.01at 1-3.

24. *Id.*

25. *Id.* at n.3 (citing House Comm. on Ways and Means, King Committee Report, HR Doc. No 327, 82d Cong., 2d Sess 3 (1952)).

26. *Joint Comm. Rep't on Commission's Recommendations*, *supra* note 19, at 3.

27. SALTZMAN at § 1.01, 1-4 (citing Reorg. Plan).

tional office; nine regional offices; and district offices within each region.²⁸ The IRS was organized by function, with the operations within each function decentralized within each region and subsidiary districts.²⁹

B. *Governance of the IRS*

The Commissioner heads the National Office.³⁰ The Commissioner is appointed by the President and confirmed by the Senate.³¹ The Treasury Secretary prescribes the Commissioner's duties and responsibilities. The Commissioner has been delegated the power and responsibility to administer and enforce the internal revenue laws.³² At the time of the IRS Restructuring and Reform Act of 1998, the Commissioner's office also included the following: Deputy Commissioner; Chief Inspector; Taxpayer Advocate; Chief of Headquarters Operations; Chief Information Officer; Chief of Management & Administration; Chief Operations Officer; and Chief Financial Officer.³³ The Executive Committee served as the IRS' principal decision and policy maker.³⁴ Additional internal groups included the IRS Investment View Board and the Senior Council for Management Controls.³⁵ The Advisory Group to the Commissioner of the Internal Revenue (hereinafter "CAG") provided private sector advice to the Commissioner.³⁶

C. *Past Problems*

The IRS and its predecessor bureau have long been associated with political abuse.³⁷ In addition, the IRS has been painted as

28. *Joint Committee Rep't on Commission's Recommendations*, *supra* note 19, at 2.

29. *Id.* at 3. The IRS's functions include: customer service; forms processing; examination; collection; and criminal investigation. *Id.*

30. *Id.* at 4.

31. *Id.* at 5 (citing I.R.C. § 7802(a)).

32. *Id.* at 6 (citing T.D.O. No. 150-10 and Rev. Proc. 64-22, 1964-1 C.B. 689).

33. *Joint Committee Rep't on Commission's Recommendations*, *supra* note 19, at 4.

34. *Id.* at 4-5. The following individuals constitute the Executive Committee: the Commissioner; Deputy Commissioner; Chief of Staff; Chief of Taxpayer Service; Chief Compliance Officer; Chief of Management & Administration; Chief Financial Officer; Chief Information Officer; Taxpayer Advocate; Chief Inspector; Chief Counsel; National Director of Appeals; Executive Officer for Service Center Operations; the four Regional Counsels; and the National President of the National Treasury Employees Union. *Id.* at n.11.

35. *Id.* at 4.

36. *Id.* at 5.

37. The history of the IRS has largely been profiled in two books published in the popular press. DAVID BURNHAM, *A LAW UNTO ITSELF—THE IRS AND THE ABUSE OF POWER* (1989); SHELLEY L. DAVIS, *UNBRIDLED POWER* (1997).

being managed within a closed culture of secrecy and abuse, of both taxpayers and employees.³⁸ These problems yielded the perception of an omnipotent, yet hugely inefficient, government bureaucracy.

Allegations of political abuse by the IRS and its predecessor agency date back to the Hoover administration and go up to the Clinton administration. In the midst of the Depression in 1931, the Navy League, a conservative group of arms executives, retired naval officers, and others strongly criticized President Hoover's budget cuts made to the country's shipbuilding program.³⁹ The Navy League's criticisms of President Hoover cut deep with the President.⁴⁰ Although there was no indication that federal laws were broken, the Hoover White House launched an investigation into the Navy League.⁴¹ As part of its investigation, the Federal Bureau of Investigation (hereinafter "FBI") and its young director, J. Edgar Hoover, attempted to obtain membership information through federal tax records.⁴² Although the FBI was unsuccessful in its efforts, its secret examination was not illegal as the president was allowed at that time to inspect tax records for any use.⁴³ Indeed, the ability of the president to use tax records continued until the Watergate scandal of the 1970's and the ensuing reforms and served as the source of much of the perceived political abuse by the IRS and its predecessor agency.⁴⁴

Allegations of political abuse continued over time. President Franklin Roosevelt's administration allegedly attempted to bring criminal tax charges against former Treasury Secretary Andrew Mellon, a political enemy of the president.⁴⁵ The Roosevelt administration also reportedly used a tax investigation against Louisiana Governor Huey Long, another political enemy of the president.⁴⁶ The investigation ended soon after Long's assassination.⁴⁷ Other instances of gathering tax information on political foes also

38. See DAVIS, *supra* note 37.

39. BURNHAM, *supra* note 37, at 226; see also *supra* text accompanying note 37.

40. *Id.* The criticism labeled President Hoover "abysmal[ly] ignoran[t]" about world affairs and as engaging in "almost traitorous" activity with the British prime minister. *Id.* at 226-27.

41. *Id.* at 227.

42. *Id.* at 228.

43. *Id.*

44. BURNHAM, *supra* note 37, at 228.

45. *Id.* at 229-30.

46. *Id.* at 231-34.

47. *Id.* at 234.

were reported.⁴⁸ In addition, Eleanor Roosevelt reportedly initiated an investigation of conservative newspaper publisher Frank Gannett, a harsh critic of the Roosevelt administration.⁴⁹ The investigation centered on the tax-exempt status of Cornell University, with which Gannett had financial dealings and on whose board of governors Mr. Gannett sat.⁵⁰

Perhaps the greatest alleged political abuse was during the Nixon administration:

Our public memory tells us that the IRS sat at Richard Nixon's knee, auditing his enemies and going easy on his friends. Our public memory tells us that these shenanigans continued until White House counsel John Dean gave the country a shocking wake-up call with his testimony before the Senate Watergate Committee in mid-1973, which preceded by barely a year Nixon's abdication from the throne and disgrace.⁵¹

The Special Services Staff was a covert IRS operation that was originally formed to go after dissident groups such as the Black Panthers rather than the Nixon enemies list.⁵² The Special Services Staff was later disbanded by IRS Commissioner Donald Alexander.⁵³

Political scandals continued. More recently, the IRS' investigation of the travel agency involved in the "Travelgate" scandal during the Clinton administration was brought into question.⁵⁴

III. STUDY AND REFORM

A. *National Commission on Restructuring the IRS*

Over time, the IRS had developed a reputation as an inefficient and unaccountable organization. In response to concerns about the state of the IRS, Congress passed a statute creating the National Commission on Restructuring the Internal Revenue Service

48. *Id.* at 235-36.

49. BURNHAM, *supra* note 37, at 236-38.

50. *Id.* at 236.

51. DAVIS, *supra* note 37, at 80-81.

52. *Id.* at 82-84.

53. *Id.* at 95.

54. Lee A. Sheppard, *Was the IRS Involved in Travelgate?*, 59 TAX NOTES 1301 (June 7, 1993).

(hereinafter the "Commission").⁵⁵ Congress based its concern on findings that IRS' Tax Systems Modernization (hereinafter "TSM") efforts had been too expensive and inefficient.⁵⁶ Accordingly, Congress formed the Commission "to examine the organization of the IRS and recommend actions to expedite the implementation of TSM and improve service to taxpayers."⁵⁷

The bipartisan Commission was chaired by Democratic Senator Robert Kerrey and Republican Congressman Rob Portman.⁵⁸ The Commission conducted extensive public hearings and private meetings with citizens, government officials, academics, tax professionals, and business representatives.

A majority of the Commission approved a host of recommendations.⁵⁹ One of the central recommendations was that "Congress should create an independent Board of Directors to oversee the IRS within the Department of Treasury."⁶⁰ The majority based its recommendation on the following reasons and concerns. First, the Treasury Department had generally limited its role with respect to the IRS to tax policy and major problems.⁶¹ This was based in part on keeping the IRS an independent agency amid earlier allegations of its politicization during the 1960's and 1970's.⁶² Thus, the Treasury Department provided little oversight. In addition,

55. P.L. 104-52, 110 STAT. 509 (1995), as amended by P.L. 104-34, 110 STAT. 132 § 2904 (1996) and P.L. 104-208, 110 STAT. 3009 § 643 (1996).

56. *Id.* at § 637(a).

57. *Id.* at § 637(b).

58. NAT'L COMM. ON RESTRUCTURING THE INTERNAL REVENUE SERVICE, REPORT OF THE NAT'L COMM ON RESTRUCTURING THE INTERNAL REVENUE SERVICE 4 (1997) (hereinafter "*National Restructuring Commission Report*"), available at <http://www.house.gov/natcommirs/main.htm>. The Commission's other sixteen members were as follows: Democratic Congressman William J. Coyne (replaced in January 1997 by Congressman Robert T. Matsui); Ernest J. Dronenburg, Jr., Chairman California State Board of Equalization; Fred T. Goldberg, Jr. (a former IRS Commissioner) law firm of Skadden, Arps et. al; Republican Senator Charles E. Grassley; Gerry Harkins, Southern Pan Services Co.; Larry Irving, Assistant Secretary (Communications & Information), U.S. Department of Commerce; David Keating, National Taxpayers Union; Edward S. Knight, General Counsel, U.S. Treasury Department; J. Fred Kubik, Baird, Kurtz & Dobson; Mark McConaghy, Price Waterhouse; George Newstrom, Electronic Data Systems; Grover Norquist, Americans for Tax Reform; Robert Tobias, President, National Treasury Employees Union; Josh S. Weston, Automated Data Processing; James W. Wetzler, Deloitte & Touche; and Margaret Milner Richardson, IRS Commissioner.

59. *Id.* at 7. The majority was comprised of Senator Kerrey, Mr. Dronenburg, Mr. Goldberg, Senator Grassley, Mr. Harkins, Mr. Keating, Congressman Portman, Mr. Kubik, Mr. McConaghy, Mr. Norquist, Mr. Tobias, and Mr. Weston.

60. *Id.* at 12.

61. *Id.* at 12.

62. *Id.*

the IRS received little strategic guidance from Treasury.⁶³ Indeed, any proffered guidance was "limited and chaotic."⁶⁴ Finally, more response was needed to the problem of systems modernization.⁶⁵

The majority recommended a seven-person board made up of the Treasury Secretary (or deputy), National Treasury Employees Union representative, and five private life members.⁶⁶ The private life members were to be appropriately compensated and serve staggered five year terms.⁶⁷ Additionally, the majority recommended that:

It is critical that the members from the private life be high stature, nonpartisan professionals, with expertise particularly relevant to a 100,000 employee organization. These individuals collectively will bring to bear expertise in the following areas: (1) management of large service organizations, (2) customer service, information technology, (4) organization development, and (5) the needs and concerns of taxpayers.⁶⁸

The Commission majority recommended that Congress enumerate the board's power to review and approve various actions of the IRS Commissioner's decisions on planning and budgeting as well as to review the IRS Commissioner's compensation and the compensation of senior IRS executives.⁶⁹

A number of Commission members expressed separate concurring and dissenting views on the establishment of the IRS Board of Directors. Congressman Coyne agreed with the need for additional oversight and accountability but disagreed that it be through a private sector board of directors: "I have reservations about the Commission's recommendation to allow individual taxpayers from the private sector to have final decision-making authority over the IRS administration of the tax laws, including the appointment of the IRS Commissioner."⁷⁰ Moreover, Congressman Coyne expressed concern as to whether oversight authority could be adequately separated from tax policy.⁷¹ As an alternative, Con-

63. *National Restructuring Commission Report*, supra note 58, at 12.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *National Restructuring Commission Report*, supra note 58, at 12.

69. *Id.* at 14.

70. *Id.* at 62.

71. *Id.*

gressman Coyne advanced a private sector advisory board, as then planned by the Clinton administration.⁷²

Mr. Dronenberg, who voted with the majority, added that the IRS should be entirely removed from the Treasury in order to be completely independent.⁷³

Mr. Irving declined to join the majority's report, citing disagreement with granting governance to an outside board of directors:

The Board's power ultimately could extend beyond governance issues to tax policy, law enforcement, and day-to-day management. The line being drawn between oversight and tax policy and management will, in my opinion, be almost impossible to police or maintain, and ultimately will raise serious accountability and jurisdictional questions. After four years of heading a federal government agency, I have experienced the complexities of shared jurisdiction and accountability and the thin line between oversight and management.⁷⁴

Mr. Knight, Mr. Irving, and Mr. Wetzler joined together for a separate report which disagreed with a number of the Commission's recommendations, including the IRS Board of Directors. The core of their opposition also rested on the use of a board drawn from the private sector:

We believe the proposed board structure, the majority's recommended instrument of change, would be ineffective, would violate basic principles of our democracy, and would delay and even derail efforts to improve the agency.

* * *

There is little argument that in most cases boards work in the private sector. Private sector boards have shareholders, director's liability, and the discipline of the marketplace to keep them in check and hold them accountable. But the IRS board recommended by the majority would have none of these private sector incentives or protections. The IRS is not and cannot be an entity that succeeds or fails based on its market per-

72. *Id.*

73. *National Restructuring Commission Report, supra note 58, at 65.*

74. *Id.* at 67.

formance. It performs one of the most essential functions of our government, upon which all others depend.⁷⁵

The dissenting members cited a General Accounting Office (hereinafter "GAO") report to further support that the board was not an appropriate model for running an agency as large as the IRS.⁷⁶ In addition, the dissenters contended that full-time IRS oversight was needed rather than part-time. Moreover, conflicts of interest would be inherent between individual board members and the IRS. Of final concern among the dissenters was the possibility that the majority's recommendations violated constitutional provisions.

B. *IRS Restructuring and Reform Act of 1998*

1. *Hearings and Calls for Reform*

In 1997 and 1998, the Senate convened a series of hearings to examine the IRS.⁷⁷ The IRS was generally portrayed as an unaccountable purveyor of fear:

There is no doubt that the powers of the Internal Revenue Service are extraordinary. The IRS can seize property, paychecks, and even the residences of the people it serves. Businesses can be padlocked, sometimes causing hundreds of employees who are also taxpayers to be put out of work.

* * *

Unfortunately our investigation today has found that in many cases such high standards are not being upheld. Over the course of [these hearings] we are going to see a picture of a troubled agency, one that is losing the confidence of the

75. *Id.* at 77.

76. *Id.* at 77. The dissenters appear to refer to GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SPECIAL COMMITTEE ON AGING, U.S. SENATE: SOCIAL SECURITY LEADERSHIP STRUCTURE FOR AN INDEPENDENT SOCIAL SECURITY ADMINISTRATION (GAO/hRD-89-154 (1989)).

77. 1997 Senate Hearings, *supra* note 2 and accompanying text; *Internal Revenue Service Mismanagement and Ideas for Improvement: Hearing before the Subcomm. on Government, Management, Information and Technology of the Comm. on Government Reform and Oversight of the House of Representatives*, 105th Cong. 1st Sess.(1997); 1998 Senate Hearings, *supra* note 1 and accompanying text.

American people, and one that all too frequently acts as if it were above the law. This is unacceptable.⁷⁸

The hearings produced taxpayers who testified to improper and abusive IRS audits and collections. In addition, some IRS employees also testified as to the pressure placed on them to meet collection quotas. Moreover, testimony suggested an inefficient agency with an entrenched level of senior management with no accountability. Doubt was later raised as the accuracy of the allegations of IRS abuse were subsequently discredited when the GAO reported that it was unable to find evidence supporting the allegations.⁷⁹ The GAO report was not made public by the Senate Finance Committee because the report purportedly contained confidential taxpayer information protected under IRC § 6103.⁸⁰

Pulitzer Prize winning New York Times investigative reporter David Cay Johnston recently described the setting of the hearings as follows:

Behind the [black] curtains sat six IRS employees, identified only by numbers. All had their voices electronically distorted, the way turncoat mobsters who feared their godfathers would have them whacked were allowed to testify. At a time when some members of Congress were describing government law enforcement agents as “jack booted thugs,” the impression that the IRS was a government Mafia that could have you killed for breaking its code of silence was unmistakable.

It was great drama. . . . Over six days in the fall and spring television networks and newspapers gave mostly breathless accounts of a rogue agency ruining lives with abandon until [Senate Finance Committee Chair] Roth came to the rescue.⁸¹

More importantly, Johnston noted that the substance of the hearings was largely unsupported or false:

There was one problem. Most of [the testimony referenced above] wasn't true. But that would not come out for months and when an official inquiry that Roth ordered from . . . the

78. 1997 Senate Hearings, *supra* note 2, at 2 (statement of the Chairman of the Senate Finance Committee William Roth).

79. GENERAL ACCT. OFF., GAO/OSI-99-9R (1999), *reprinted in* TAX NOTES TODAY (Apr. 25, 2000), *available in* WESTLAW 2000 TNT 80-13 (report obtained under the Freedom of Information Act (hereinafter “FOIA”)).

80. Ryan J. Donmoyer, *Secret GAO Report is Latest to Discredit Roth's IRS Hearings*, TAX NOTES TODAY 79-1 (Apr. 21, 2000).

81. DAVID CAY JOHNSTON, PERFECTLY LEGAL 145-46 (2003).

General Accounting Office . . . found little to support what had been presented at the hearings, [Senator Roth] did his best to make sure the public would never see the full report.⁸²

Thus, there was significant disagreement whether the hearings accurately described problems at the IRS as much as they reflected its political vulnerability.

2. *The IRS Oversight Board*

The IRS Restructuring and Reform Act of 1998 reshaped the IRS with a number of structural provisions.⁸³ In enacting the IRS Restructuring and Reform Act of 1998, Congress adopted, with little deviation, the Restructuring Commission's IRS board of directors recommendation.⁸⁴

a. *Power and Responsibility*

The focus of this article is on the establishment of the Internal Revenue Service Oversight Board.⁸⁵ The Oversight Board's responsibilities generally include overseeing the IRS' administration of the tax laws,⁸⁶ as well as ensuring that the IRS carries out its mission.⁸⁷ Additionally, Congress charged the Board with specific responsibilities to provide input and review in the areas of strategic plans, operational plans, management, and taxpayer protection.⁸⁸ The specific charges can be viewed as falling within four

82. *Id.* at 146.

83. The Act also contained numerous other provisions including shifting the burden of proof to the IRS in certain cases, as well as imposing personal liability on certain IRS personnel who violate certain provisions.

84. "I think [Congress] got it 90 percent right That's well above average. I'm happy with it." Amy Hamilton, *How True is Congress to the Vision for a New IRS*, 79 TAX NOTES 1208 (1998) (quoting Commission Co-chair Senator Robert Kerrey). Representative Rob Portman echoed his co-chair's comments: "My view is it is remarkably faithful to the commission's general approach—and even on specifics . . . This in all major respects is faithful to the commission's report, so I'm very pleased." *Id.*

85. I.R.C. § 7802(a).

86. IRC § 7802(c)(1)(A) ("The Oversight Board shall oversee the Internal Revenue Service in its administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party.").

87. I.R.C. at § 7802(c)(1)(B). The IRS Restructuring Act required the IRS to restate its mission statement. Act Sec. 1002. The currently revised mission statement is as follows: Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities by applying the tax law with integrity and fairness to all. <http://www.irs.ustreas.gov/prod/welcome/mission.html>.

88. I.R.C. § 7802(d). The Board's specific duties are as follows:

broad functions. First, the Board oversees long-range operational and strategic planning. This includes reviewing the overall direction of the agency as well as making sure that such direction follows the mission statement. Second, the Board has direct oversight over budgetary matters. The Board reviews and approves the IRS budget and presents it to the Treasury Secretary.⁸⁹ The Board also oversees senior management of the IRS, with the specific power to recommend to the President candidates for appointment as IRS Commissioner, as well as to recommend the removal of the Commissioner.⁹⁰ Finally, the Board is charged with ensuring the proper treatment of taxpayers by the IRS.⁹¹

Notwithstanding its seemingly broad charges of responsibility, the Oversight Board is specifically precluded from authority with respect to direct tax policy or administration.⁹² Thus, the Board is

(1) **STRATEGIC PLANS.** To review and approve strategic plans of the Internal Revenue Service, including:

- (A) missions and objectives, and standards of performance relative to either; and
- (B) annual and long-range strategic plans.

(2) **OPERATIONAL PLANS.** To review the operational functions of the Internal Revenue Service, including:

- (A) plans for the modernization of the tax system;
- (B) plans for outsourcing or managed competition; and
- (C) plans for training and education.

(3) **MANAGEMENT.** To:

- (A) recommend to the President candidates for appointment as the Commissioner of Internal Revenue and recommend to the President the removal of the Commissioner;
- (B) review the Commissioner's selection, evaluation, and compensation of Internal Revenue Service senior executives who have program management responsibility over significant functions of the Internal Revenue Service; and
- (C) review and approve the Commissioner's plans for any major reorganization of the Internal Revenue Service.

(4) **BUDGET.** To:

- (A) review and approve the budget request of the Internal Revenue Service prepared by the Commissioner;
- (B) submit such budget request to the Secretary of Treasury; and
- (C) ensure that the budget request supports the annual and long-range strategic plans.

(5) **TAXPAYER PROTECTION.** To ensure the proper treatment of taxpayers by the employees of the Internal Revenue Service.

Id.

89. I.R.C. at § 7802(d)(4)(A) and (B)

90. I.R.C. at § 7802(d)(3).

91. I.R.C. at § 7802(d)(5).

92. I.R.C. at § 7802(c)(2). The following are specifically carved out from the Oversight Board's authority and responsibility:

EXCEPTIONS. The Oversight Board shall have no responsibilities or authority with respect to:

without responsibility or authority on the development of tax policy, as well as any involvement with law enforcement or compliance activities.⁹³

b. Membership

The IRS Restructuring and Reform Act of 1998 set forth a nine-member board comprised of six outside members,⁹⁴ the Secretary of Treasury or Deputy Secretary,⁹⁵ the Commissioner of the IRS,⁹⁶ and one member who is a full-time federal employee (or representative of employees), for a total of seven appointed private board members and two *ex officio*.⁹⁷ The outside members and the employees' representative are nominated by the President with the advice and consent of the Senate.⁹⁸

The members of the Oversight Board are to be nonpartisan and nominated based upon experience in the following areas:

- (i) management of large service organizations;
- (ii) customer service;
- (iii) Federal tax laws, including tax administration and compliance;
- (iv) information technology;
- (v) organization development;
- (vi) the needs and concerns of taxpayers; [and]

-
- (A) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions;
 - (B) specific law enforcement activities of the Internal Revenue Service, including specific compliance activities such as examinations, collection activities, and criminal investigations;
 - (C) specific procurement activities of the Internal Revenue Service; or
 - (D) except as provided in subsection (d)(3)[related to management issues], specific personnel actions.

Id.

93. *Id.*

94. I.R.C. § 7802(b)(1)(A) ("Six members shall be individuals who are not otherwise Federal Officers or employees and who are appointed by the President, by and with the advice and consent of the Senate.").

95. I.R.C. § 7802(b)(1)(B).

96. I.R.C. § 7802(b)(1)(C).

97. I.R.C. § 7802(b)(1)(D).

98. I.R.C. § 7802(b)(1)(A) and (D).

(vii) The needs and concerns of small businesses.⁹⁹

The Act sets forth a staggered board in which the initial outside and employee directors are appointed for three to five year terms.¹⁰⁰ The effect of this initial staggered board followed by full five-year terms is a perpetually staggered outside board; two new outside members will be appointed three years from the installation of the initial board. Outside and employee board members are limited to two, five-year terms.¹⁰¹ Outside and employee board members are also treated as governmental officers or employees for ethical and financial disclosure purposes under the Ethics in Government Act of 1978.¹⁰²

IV. FROM CONCEPT TO REALITY—GETTING THE IRS OVERSIGHT BOARD OFF THE GROUND

A. *Seating the Board*

The IRS Restructuring and Reform Act of 1998 required that the President present his board nominees to the Senate by January 22, 1999, six months after President Clinton signed the act into law.¹⁰³ It was not until over two years after the act was signed that the IRS Oversight Board was finally sworn in and convened its first meeting in November 2000.¹⁰⁴ The path from the passage of the act to the Board's first meeting proved to be a painfully slow and rocky one.¹⁰⁵ Indeed, some wondered whether the Board would ever be organized: "The Concept of the IRS Oversight Board, ironically, is now dangerously close to morphing into one of those figments of the imagination that gets sucked into the black hole of forgotten history without anyone noticing."¹⁰⁶

A combination of forces contributed to the delay in seating the Board. Initially, the Clinton administration took considerable

99. I.R.C. § 7802(b)(2)(A).

100. I.R.C. § 7802(b)(2)(B).

101. I.R.C. at § 7802(b)(2)(C).

102. I.R.C. at § 7802(b)(3)(A).

103. Act. Sec. 1102(d).

104. George Guttman, *IRS Oversight Board Holds "First" Meeting in Atlanta*, 83 TAX NOTES 995 (2000).

105. Canada also endured a similar rocky start with its recently created board of management for its Department of National Revenue. Robert Goulder, *U.S. and Canadian Tax Oversight Boards Suffer Rocky Starts*, 84 TAX NOTES 520 (July 26, 1999).

106. Amy Hamilton, *Camera Zooms Back, IRS Oversight Board*, 87 TAX NOTES 1183 (2000).

time to finalize its appointments (until the end of 1999). Next, Senate Republicans contested some of the prospective nominees, thus stretching out the process. Finally, when the administration finally made its nominations, there was a further delay as political horse-trading ensued.

The Clinton administration's delay may have been a manifestation of its opposition to the concept of the Board.¹⁰⁷ Although the administration, through the Treasury Department, claimed to be deeply engaged in selecting nominees,¹⁰⁸ the January 22, 1999 deadline came and went without the required nominations.¹⁰⁹ With the Clinton administration's increasing tardiness came building public pressure to name the Board.¹¹⁰ Moreover, the delay in naming the Board affected other reform measures such as the initial annual meeting (required by June 1, 1999)¹¹¹ for a joint session of the six congressional committees with jurisdiction over tax.¹¹²

Other factors contributed to the delay. The White House and Treasury Department found it more difficult than expected to find strong candidates for their dream team. As one commentator noted, "Treasury was not seeking the usual suspects—and has been turned down on more than one occasion by a person who

107. One commentator noted then Secretary of Treasury Robert Rubin's vehement opposition to the creation of the Board. *Id.* (reporting a rift between Secretary Rubin and National Commission on Restructuring the IRS co-Chair Senator J. Robert Kerrey); see also Christopher Bergin, *Looking for Leadership in all the Wrong Places*, 85 TAX NOTES 269 (1999).

108. Ryan J. Donmoyer, *Treasury Working on List of IRS Oversight Board Candidates*, 80 TAX NOTES 882 (1998) (noting that Treasury and IRS Commissioner Rossotti "have been working since before the IRS reform bill creating the law became law July 22 to find the best and brightest candidates for the panel. . . . It's like we're putting a dream team list together.").

109. Amy Hamilton, *Clinton Prepares to Name Nominees to IRS Oversight Board*, 82 TAX NOTES 436 (1999) (reporting that the White House's short list for the six private life members was only one name short).

110. Amy Hamilton, *Clinton Chided Again for Tardy IRS Oversight Board Nominations*, 83 TAX NOTES 359 (1999) (citing National Taxpayer's Union (hereinafter "NTU") (letter to President Clinton chiding the administration for its tardiness when taxpayers who are late filing tax returns are subject to penalties); Ryan J. Donmoyer, *Missed Collections Prime Issue for Overdue IRS Board*, *Tax Writer's Say*, 85 TAX NOTES 275 (1999) (citing published critical comments by National Commission on Restructuring the IRS co-chairs Senator Kerrey and Representative Portman).

111. Ryan J. Donmoyer, *As IRS Struggles to Change, Overseers Skirt Their Roles*, 83 TAX NOTES 9 (1999).

112. *Id.*

failed to see the allure of linking his or her reputation to that of the IRS.¹¹³

By May 1999, the administration finally had assembled most of its choices for the Board appointments, which it then leaked to the media.¹¹⁴ On May 12, 1999, the *Wall Street Journal* published the five prospective nominees: James W. Wetzler, Robert Tobias, Steve Nickles, Karen Hastie Williams, and Larry R. Levitan.¹¹⁵ Mr. Tobias was the prospective nominee designated to represent the IRS employees while the others were for four of the six private life slots.¹¹⁶

Mr. Wetzler was a director in the consulting firm of Deloitte & Touche LLP and a former New York Commissioner of Taxation and Finance.¹¹⁷ He also served as a member of the National Commission on Restructuring the IRS, where he was a strong opponent of the concept of an IRS Oversight Board.¹¹⁸

Mr. Nickles is a Wake Forest University law professor who specializes in bankruptcy and commercial law.¹¹⁹ He had also served as a special assistant in the Arkansas Governor's office during Bill Clinton's tenure as Arkansas Attorney General.¹²⁰

Ms. Williams is a government contracts lawyer with the law firm of Crowel & Moring.¹²¹ She had also served in the administration of President Jimmy Carter and as a chief counsel for the Senate Budget Committee.¹²²

Mr. Levitan is a retired computer services consultant with Andersen Consulting.¹²³ He had also served as a part-time advisor on technology to IRS Commissioner Rossotti.¹²⁴

Mr. Tobias was the president of the National Treasury Employee's Union (hereinafter "NTEU").¹²⁵ He had also served on the National Commission on Restructuring the IRS.¹²⁶ In February

113. Amy Hamilton, *Will Clinton's Legacy Include an IRS Oversight Board?*, 84 TAX NOTES 1237 (noting that two candidates had failed the background test).

114. Amy Hamilton & Ryan J. Donmoyer, *Clinton Administration Leaks Names of Some IRS Board Nominees*, 83 TAX NOTES 935.

115. Tom Herman, *Tax Report* (Weekly Column), WALL ST. J., May 12, 1999, at A1.

116. Hamilton & Donmoyer, *supra* note 114, at 935.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Hamilton & Donmoyer, *supra* note 114, at 935.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Hamilton & Donmoyer, *supra* note 114, at 935.

1999, Mr. Tobias announced that he would not seek reelection as president of the NTEU in order to avoid a potential conflict of interest issue raised by Senate Finance Committee Republicans.¹²⁷

Although the initial reaction to the leaked names was encouraging,¹²⁸ Senate Finance Committee Republicans soon criticized the choice of Messrs. Wetzler and Nickles. In a letter and press release of May 31, 1999, all eleven Senate Finance Committee Republicans voiced their displeasure about two unnamed candidates.¹²⁹ A similar letter was sent by Senators Roth, Grassley, and Chaffee.¹³⁰ While not specifically identified, the criticism clearly addressed Mr. Wetzler and Mr. Nickles.¹³¹ Criticism of Mr. Wetzler centered on his opposition to the creation of the IRS Oversight Board while serving on the National Commission of Restructuring the IRS. As to Mr. Nickles, the Finance Committee Republicans questioned whether his background as a bankruptcy expert fell within the statutory requirements. In addition, the senators questioned whether Mr. Nickles' appointment was truly non-partisan. Furthermore, some senators reportedly were disappointed with the overall quality of the prospective appointments.

In June 1999, Mr. Wetzler withdrew his name from consideration, citing the "low probability that the Senate was going to consent to [his] nomination."¹³² Mr. Wetzler's withdrawal left the administration three names short, which prompted additional concern from Senator Kerrey.¹³³

In August 1999, the White House nominated George L. Farr to the Board.¹³⁴ Mr. Farr, the former vice-chairman of American Express, was targeted as meeting the requirement for "organizational development, and management of a large corporation."¹³⁵ Prior to Mr. Farr's position with American Express, he was a sen-

127. Ryan J. Donmoyer & Amy Hamilton, *Tobias Retirement Could Ease Confirmation as IRS Board Member*, 82 TAX NOTES 1093 (February 17, 1999).

128. *Id.*

129. See Ryan J. Donmoyer, *Finance Committee Republicans Flag Two IRS Board Candidates*, 83 TAX NOTES 1274 (1999).

130. Roth, *Finance Members Write Clinton on IRS Oversight Nominees*, 83 TAX NOTES 1453 (1999).

131. Ryan J. Donmoyer, *supra* note 129, at 1274.

132. Ryan J. Donmoyer, *Wetzler Withdraws His Name from Consideration for IRS Board*, 83 TAX NOTES 1666 (June 21, 1999).

133. *Id.* ("The White House is 'dangerously close' to skirting its statutory responsibility.")

134. Amy Hamilton, *Clinton Eye's American Express Official for IRS Oversight Board*, 84 TAX NOTES 969 (August 16, 1999).

135. *Id.*

ior partner at McKinsey and Co., where he dealt with clients' strategic and operational issues.¹³⁶ Mr. Farr's responsibilities at American Express included overall management of the organization and making strategic operating decisions.¹³⁷

In October 1999, President Clinton nominated Charles L. Kolbe to the Board.¹³⁸ Mr. Kolbe, a cattle rancher, was a director on the board of the National Cattlemen's Beef Association, which represents, and lobbies on behalf of, one million cattle farms and ranches.¹³⁹ Mr. Kolbe's resume includes membership on the National Livestock and Meat Board.¹⁴⁰ President Clinton reportedly nominated Mr. Kolbe on the recommendation of Republican Senator Charles Grassley, a member of the Finance Committee.¹⁴¹

With Mr. Kolbe's nomination, the administration had one more appointment to make. The administration promised to announce the final nominee quickly, which it did.¹⁴² In November 1999, an IRS source reported that Nancy Killefer would be nominated to the final seat on the Board.¹⁴³ Ms. Killefer was the Assistant Secretary for Management and Chief Financial Officer for the Treasury.¹⁴⁴ At the time, Ms. Killefer was reportedly leaving Treasury to return to the consulting firm of McKinsey & Co.¹⁴⁵ Ms. Killefer, a strong proponent of systems modernization and a customer service approach for the IRS, had been actively involved with Treasury's input on other Board nominees.¹⁴⁶

President Clinton's final nominee, Ms. Killefer, was named in November 1999, ten months after the date required by statute and well after one year from the enactment of the IRS Restructuring and Reform Act of 1998. While the White House clearly dragged its heels, the Senate did not do much better as the nominees languished for many months awaiting Senate confirmation.

136. *Id.*

137. *Id.*

138. Amy Hamilton, *Clinton Nominates Cattle Rancher to IRS Oversight Board*, 85 TAX NOTES 415 (Oct. 25, 1999).

139. *Id.* (noting that the association lobbies for tax issues including lowering capital gains rates and repealing the estate tax).

140. *Id.*

141. *Id.* Senator Grassley called Mr. Kolbe "an expert on the needs and concerns of small businesses, and his perspective will be a tremendous asset to the board." *Id.*

142. Barton Massey, *White House Will Act Quickly on Last Nominee for IRS Board*, *Official Says*, 85 TAX NOTES 564 (Nov. 1, 1999)

143. George Guttman, *Killefer to be Nominated to IRS Board*, 85 TAX NOTES 848 (Nov. 15, 1999).

144. *Id.*

145. *Id.*

146. *Id.*

The Senate decided to confirm all of the nominees at one time.¹⁴⁷ According to Senator Grassley's office, a hold on the confirmation of Mr. Kolbe was holding up confirmation for the entire Board.¹⁴⁸ Although the details and identity of the senator (or senators) placing a hold are not required to be disclosed, it was reported that the hold was placed by a Democratic senator who was not a member of the Finance Committee.¹⁴⁹ It also appeared that the unidentified senator(s)'s hold on Mr. Kolbe's nomination was in response to Senator Grassley's hold on two State Department nominations.¹⁵⁰ Senator Grassley's holds were to pressure the administration to help a whistle blower at the United Nations negotiate with the State Department.¹⁵¹ Interestingly, first lady Hillary Rodham Clinton became involved in this political gridlock:

While traveling in Eastern Europe [in the fall of 1999], the first lady visited the Slovak Republic. While there, she phoned Grassley and asked him to stop holding up the nomination . . . for the U.S. Ambassador to Slovakia. Grassley replied he would not lift his hold on [the] nomination—and on two more State Department nominations—until he received a commitment that the White House would intervene to help a whistle blower, who worked at the United Nations, reopen 'good faith negotiations' with the State Department.¹⁵²

There was still no action by the Senate as of June 2000 when Senate Finance Chair William Roth and ranking Democrat Senator Moynihan formally asked Majority Leader Trent Lott to help gain confirmation for the Board.¹⁵³ In late July 2000, just prior to the Senate recess, Senator Grassley lifted his hold on the two ambassadorial nominations.¹⁵⁴ The Senate Minority Leader's office then suggested that the unnamed Democratic senator's hold on

147. Amy Hamilton, *Grassley's Nominee Singled Out in IRS Oversight Board Hold Up*, 2000 TAX NOTES 52-3 (March 16, 2000).

148. *Id.*

149. *Id.*

150. *Id.* Senator Grassley's hold was on the nominees for the U.S. Ambassador to Slovakia and to the Philippines. It was further reported that Senator Grassley did not believe that the holds were related. Amy Hamilton, *Political Showdown Led to Hold on IRS Oversight Board Nominee*, 2000 TAX NOTES 62-5 (March 30, 2000).

151. *Id.*

152. Hamilton, *supra* note 148, at 52-3.

153. Roth, *Moynihan Ask for Senate Leader's Help in IRS Oversight Board Confirmation*, 87 TAX NOTES 1757 (June 26, 2000).

154. Amy Hamilton, *Grassley Removes One Obstacle to IRS Oversight Board*, 88 TAX NOTES 722 (Aug. 1, 2000).

Mr. Kolbe would be lifted.¹⁵⁵ In September 2000, almost one year after President Clinton's nominees were finalized and over two years after the IRS Restructuring and Reform Act of 1998 was enacted, the Senate finally confirmed President Clinton's seven nominees: Mr. Farr, Ms. Killefer, Mr. Kolbe, Mr. Levitan, Mr. Nickles, Mr. Tobias, and Ms. Williams.¹⁵⁶

B. *The Board Enters the Fray*

On September 29, 2000, the IRS Oversight Board was sworn in during a ceremony at the Treasury Department.¹⁵⁷ The Board then elected Mr. Levitan as chairman.¹⁵⁸ Mr. Levitan, a retired consultant, was thought to be able and willing to devote significant time to the Board.¹⁵⁹ In addition, Mr. Levitan already had served as a part-time consultant to Commissioner Rossotti and had spent time meeting with key legislators and other important contacts.¹⁶⁰

The IRS Oversight Board held its inaugural meeting in November 2000.¹⁶¹ The closed meeting broke out into the three subcommittees: modernization (Ms. Killefer, Ms. Williams and Mr. Levitan); personnel and organization (Mr. Farr, Mr. Kolbe and Mr. Nickles); and performance management (Mr. Tobias, Mr. Nickles and Ms. Williams).¹⁶² IRS senior executives then briefed the subcommittees. The Board then reconvened and discussed the IRS 2001 budget, which had not yet been adopted.¹⁶³ The Board was also briefed on Blue Print 2000, the IRS' current modernization plan.¹⁶⁴ The Board then met with various IRS managers and staff.¹⁶⁵

The first test for the IRS Oversight Board came with the fiscal year 2002 budget for the IRS. The IRS initially proposed \$9.8 billion in its proposed 2002 budget submitted to the Office of Man-

155. *Id.*

156. Heidi Glenn, *Two Years Later: Senate Approves IRS Oversight Board*, 88 TAX NOTES 1289 (Sept. 8, 2000).

157. *Id.*

158. *Id.*

159. *Id.* at 596.

160. *Id.*

161. George Guttman, *The New IRS Oversight Board Holds "First" Meeting in Atlanta*, 89 TAX NOTES 995 (Nov. 20, 2000).

162. *Id.*

163. *Id.* at 996.

164. *Id.*

165. *Id.*

agement and Budget (hereinafter "OMB").¹⁶⁶ After review, OMB approved \$9.4 billion, which was an 8 percent increase over the IRS' \$8.7 billion 2001 budget.¹⁶⁷ The Bush administration defended its cuts as a matter of priority and overall philosophy:

The smaller increase should not be viewed as a lack of support for the IRS, which is currently going through a massive reorganization and modernization effort. *Funding decisions were made to advance the president's plan to provide more money for education and defense programs. . . .* The administration was also concerned that the overall growth in funding for government programs was too high. Many of the cuts reflect the OMB's philosophy on funding government costs and services, rather than any bias against the IRS.¹⁶⁸

The budget costs affected modernization and personnel.¹⁶⁹ The IRS requested \$450 million for modernization and OMB authorized \$325 million, resulting in a \$125 million cut.¹⁷⁰ In addition, \$140 million requested for extra funding for the current IRS labor force was rejected as well as \$100 million funding for hiring additional staff under the Staffing Tax Administration for Balance and Equity program (hereinafter "STABLE").¹⁷¹

The IRS Oversight Board met two days before the administration released its budget blueprint and voted for a total IRS budget of \$10.26 million.¹⁷² The vote was 6-0 with Commissioner Rossotti not voting.¹⁷³ The Board was particularly concerned that the "piecemeal funding of modernization" would make it less likely to succeed.¹⁷⁴

The difference between the IRS' request, the Board's request, and the administration's budget led to a political showdown. Board Chair Larry Levitan stated, "We intend to communicate our message as loudly as possible, as frequently as possible . . . Con-

166. George Guttman, *IRS Budget Growth Smaller than Desired, Sources Say*, 90 TAX NOTES 1138 (Feb. 26, 2001).

167. *Id.*

168. *Id.* at 1138 (emphasis added).

169. *Id.*

170. *Id.* Actually, the \$125 million cut will be partially offset by \$70 million received by the IRS for user fees.

171. Guttman, *supra* note 166, at 1138.

172. George Guttman, *Administration's Budget Request May Crimp IRS Hiring Plans*, 90 TAX NOTES 1286, 1287 (Mar. 5, 2001). The official report was issued in April.

173. *Id.*

174. *Id.*

gress put us in place for a specific reason . . . We hope they listen to what we say. Then it's up to them to decide."¹⁷⁵ Nevertheless, Mr. Levitan seemed to harbor no illusion that the Oversight Board would make a difference: "Is it going to make a difference? I don't know. . . . I'll be honest with you, the IRS Board's work might amount to no more than one sentence in the final product."¹⁷⁶

The Oversight Board's advocacy did not seem to sway key Republican lawmakers, who argued that OMB's funding was adequate.¹⁷⁷ Perhaps most surprising, and instructive, was the response of Restructuring Commission member and Finance Committee chair Senator Grassley:

I appreciate the Oversight Board showing its independence from the Bush Administration regarding the budget . . . However, given that the Oversight Board basically embraced the IRS's initial proposed budget, I'm worried that the board may not be showing significant independence from IRS management. It's important that the Oversight Board reach its conclusions based on a rigorous and thorough review of IRS budgetary needs. . . . I look forward to reading the board's justification for its actions.¹⁷⁸

The budget battle spilled over into the May 2001 joint congressional hearings required under the 1988 Restructuring and Reform Act.¹⁷⁹ This was the first joint meeting in which the Oversight Board was able to participate due to the delay in seating the board.¹⁸⁰ Senator Fred Thompson, chair of the Committee on Governmental Affairs, continued to present the Bush administration's position that IRS had received adequate funding, and suggested that the IRS had wasted previous modernization funding.¹⁸¹ Mr. Levitan continued to argue that the \$4 million already spent on

175. Amy Hamilton, *IRS Oversight Board Prepares for Budget Face-Off*, 90 TAX NOTES 1766 (Mar. 26, 2001).

176. *Id.*

177. *Id.* "I believe there is a lot of internal repair that can be done to the agency . . . where we could get a better performance from the agency within the existing budget." *Id.* at 1767 (quoting House Majority Leader Dick Armey).

178. *Id.* at 1767-68.

179. *Congress Wants IRS Modernization Plan to Start Producing Results*, 2001 TAX NOTES 90-2 (May 8, 2001).

180. *See generally* JOINT COMM. ON TAXATION, REPORT OF THE JOINT COMM. ON TAXATION AS REQUIRED BY THE IRS RESTRUCTURING AND REFORM ACT OF 1998 JCX-33-01, (May 4, 2001).

181. 2001 TAX NOTES 90-2.

modernization had not been "wasted."¹⁸² The hearings ended with a call for the various government agencies involved to try to reconcile their differences.

The difficulty of advocating for the funds believed by the Board to be necessary for running the IRS continues to be problematic. The budget controversy continued to fester with Commissioner Rossotti's planned testimony before the House Ways and Means Subcommittee. The testimony was nominally canceled because of a scheduling conflict, although it was reported that the Office of Management and Budget would not approve the testimony because Rossotti was seeking more money than the administration was going to request.¹⁸³

Commissioner Rossotti announced that he would not be seeking another term as IRS Commissioner. The IRS Oversight Board undertook its statutory responsibility to recommend nominees to succeed Commissioner Rossotti. In addition, the White House reportedly performed its own search by hiring a search firm.¹⁸⁴ One commentator noted the following: early indicators are that loyalty to the Bush Administration will be more important in filling the job than management experience.¹⁸⁵ The search firm inadvertently leaked an e-mail that said that the president prefers someone who is "definitely not a tax attorney and does not need to have any in-depth exposure."¹⁸⁶ The Oversight Board's two nominees have thus far languished in the White House despite urging from the Chairman and ranking minority leader of the senate Finance Committee.¹⁸⁷ Some argued that instead of seeking a replacement, the Bush administration should have lobbied Rossotti hard to try to retain him so that he could accomplish the reforms that he had begun.¹⁸⁸

182. *Id.*

183. George Guttman, *OMB Halts Rossotti Testimony at W&M Hearing*, 97 TAX NOTES 38 (Oct. 7, 2002). "By speaking his mind, Rossotti 'would be going off the reservation,' IRS sources said." *Id.*

184. Paul C. Light, *Bush Picks Wrong Time for Leadership Change at IRS*, SAINT PAUL PRESS (Apr. 17, 2002) (reprinted by the Brookings Institution, at <http://www.brookings.org/printme.w...d930b47261ff3b6aacOcOa141465.xml> (last visited June 20, 2002)).

185. *Id.*

186. *Id.*

187. Amy Hamilton & George Guttman, *Finance Leaders Push White House to Nominate IRS Commissioner*, 96 TAX NOTES 1290 (Sept. 2, 2002) (citing letter from Senators Baucus and Grassley to President Bush, 2002 TNT 168-27).

188. *Id.*

In January 2003, President Bush nominated Mark Everson to the position of IRS Commissioner.¹⁸⁹ Mr. Everson was not one of the names forwarded by the Oversight Board.¹⁹⁰ Indeed, Mr. Everson seems to match the criteria leaked to the press earlier: he is not a tax lawyer, and he is someone who is a Bush loyalist.¹⁹¹ Mr. Everson, who began his career as an auditor for Arthur Andersen, has background in information technology and management.¹⁹² He has both government and private sector experience. Mr. Everson served the Reagan administration in the U.S. Information Agency as well as a special assistant to then Attorney General Edwin Meese.¹⁹³ After leaving the Reagan administration, Mr. Everson served as vice-president of finance for two large corporations.¹⁹⁴ He joined the Bush administration in 2001 as Bush's chief management officer, focusing on governmental financial management and technology issues.¹⁹⁵

The Oversight Board achieved its most significant accomplishment of its young existence when it successfully intervened with then Commissioner Rossotti on behalf of the National Taxpayer Advocate.¹⁹⁶ The Board unanimously recommended a reorganization of how appeals from the National Taxpayer Advocate were to be handled, and Commissioner Rossotti changed the IRS's position after something of a showdown.¹⁹⁷

Finally, IRS Oversight Board Chair Levitan announced that he would not seek a second two-year term as Chair. Nancy Killefer was elected new chair.¹⁹⁸

189. Amy Hamilton, *White House Announces Nominee for IRS Commissioner*, 98 TAX NOTES 294 (Jan. 20, 2003).

190. *Id.*

191. *See, Light, supra* note 184 and accompanying text.

192. Hamilton, *supra* note 189 and accompanying text.

193. *Id.*

194. *Id.*

195. Mr. Everson's ties to the Bush administration include his wife's position as an associate general counsel in the Office of White House Counsel. Amy Hamilton, *Nominee for IRS Commissioner Seeks to Enhance Enforcement*, 98 TAX NOTES 1792 (Mar. 24, 2003).

196. Amy Hamilton, *IRS Oversight Board Flexes Real Muscle in First Show of Strength*, 96 Tax Notes 1688 (Sept. 16, 2002). The National taxpayer Advocate was one of the reforms to emerge from the 1998 Act. *Id.* at 1689.

197. *Id.* at 1690.

198. George Guttman, *Rossotti Gives Oversight Board End-of-Term Report*, 96 TAX NOTES 1819 (Sept. 30, 2002).

V. APPLYING AND TESTING THE CORPORATE ANALOGY—AN
INTERIM CRITIQUE OF THE IRS OVERSIGHT BOARD FROM A
CORPORATE LAW PERSPECTIVE

In this section, the corporate analogy is explored. First, the governance structure of the corporation is set forth. The application of corporate structure to government is then discussed. Finally, the application of the corporate analogy to the IRS and its Oversight Board is examined and critiqued.

A. *Corporate Governance Generally*

1. *Governing the Corporation*

The private corporation is one of the basic forms of conducting business in the United States.¹⁹⁹ It is a separate legal entity, which can sue, be sued, and own property. Shareholders own shares of stock in the corporation, which has traditionally represented the ownership interest.²⁰⁰ Shareholders do not have the power to manage the corporation. Rather, shareholders elect a board of directors, which has the power to manage the corporation.²⁰¹

Directors are elected at the annual meeting of shareholders.²⁰² Directors are generally elected by a plurality of all shares entitled to vote, although certain classes may be allowed to elect one or more directors.²⁰³ The directors may be elected for staggered terms.²⁰⁴ Directors are removable by the vote of the shareholders.²⁰⁵

A corporation's board of directors is vested with broad power and authority:

All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation

199. ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 1 (1999).

200. It has been argued that others have an interest in the corporation as well. Such stakeholders would include employees, local communities and the environment. A number of states have enacted "other constituency statutes" which allow the board of directors to consider the effect on such stakeholders when deciding corporate action.

201. MODEL BUS. CORP. ACT §§ 8.01 and 8.04 (1984).

202. *Id.* at § 8.03(c).

203. *Id.* at § 8.04.

204. *Id.* at § 8.06.

205. *Id.* at § 8.08.

managed by or under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement [pursuant to a shareholders agreement].²⁰⁶

The corporate board of directors, particularly in large publicly-traded corporations, delegates the day-to-day management of the corporation to corporate officers.²⁰⁷ In addition, the board of directors often delegates its own remaining responsibilities to committees.²⁰⁸

With respect to large publicly traded corporations, the board of directors typically owns a very small percentage of the corporation's outstanding stock.²⁰⁹ This leads to a separation of ownership and control. One of the advantages of such a separation of ownership and control is that capital can be invested in an efficient manner because stockholders are generally insulated from the liability of the corporation. On the other hand, the separation of liability and control has led to a long-standing problem in which the management of the corporation (officers) acts in ways not in the best interests of the shareholders.²¹⁰ This problem of separation and control arises because of the widely dispersed ownership of shares of stock which leads to little oversight. This problem has led to particular focus on the corporate board of directors which has often been accused of "rubber stamping" the actions of officers.

Among the monitoring devices available to check the separation of ownership and control is the imposition of the fiduciary duty lawsuit.²¹¹ Corporate directors owe a fiduciary duty to the corporation.²¹² The fiduciary duties are the duty of loyalty and the duty of care. The duty of care requires that the board discharge its responsibilities with the requisite care.²¹³ Many directors' actions fall within the protection of the business judgment rule, which presumes that the duty of care is met.²¹⁴ Moreover, many states

206. MODEL BUS. CORP. ACT § 8.01(b).

207. PINTO & BRANSON, *supra* note 199, at § 5.06.

208. *Id.* at § 5.05[A].

209. For example, as a group, the IBM board of directors owns less than one percent of the corporation's outstanding stock. 1999 IBM Proxy Statement.

210. ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933).

211. PINTO & BRANSON, *supra* note 199, at § 8.01

212. *Id.*

213. MODEL BUS. CORP. ACT § 8.30 (1984).

214. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *Schlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. Ct. 1968).

provide that the corporate charter can eliminate liabilities for breach of the duty of care.²¹⁵

The duty of loyalty generally requires that directors put the interests of the corporation ahead of other interests.²¹⁶ Thus, a director generally cannot compete against his or her corporation.

2. *Selecting the Board of Directors*

Corporate law generally does not mandate qualification requirements for corporate directors.²¹⁷ Although not legally prescribed, the National Association of Corporate Directors (hereinafter "NACD") established a Blue Ribbon Commission which studied director professionalism and set forth standards for selecting directors.²¹⁸

The NACD's report provides that all corporate directors possess certain personal characteristics, in addition to satisfying one of their boards' core competencies.²¹⁹ The following personal characteristics should be possessed by corporate board members:

1. Integrity and Accountability;
2. Informed Judgment;
3. Financial Literacy;
4. Mature Confidence; and
5. High Performance Standards.²²⁰

In addition to satisfying the above personal characteristics, each board member should fit within one of the following core competencies and the board as a whole should satisfy all of the core competencies:

1. Accounting and Finance Boards should seek candidates with experience in financial accounting and corporate

215. DEL. CODE ANN. tit. 8, § 102(b)(7) (2003).

216. MODEL BUS. CORP. ACT § 8.30 (1984).

217. *Id.* at § 8.02.

218. NAT'L ASS'N OF CORP. DIRECTORS, REPORT ON THE NACD BLUE RIBBON COMM'N ON DIRECTOR PROFESSIONALISM (2001) (hereinafter "NACD Blue Ribbon Report"). The Report's recommendations were based on extensive surveys.

219. *Id.* at 9-10.

220. *Id.* at 10.

finance, especially with respect to trends in debt and equity markets;

2. **Business Judgment** Boards should seek candidates who have a record of making good business decisions;

3. **Management** Boards should seek candidates who understand and stay current on general management best practices and their application in complex, rapidly evolving business environments;

4. **Crisis Response** Boards should have the ability and time to perform during periods of both short-term and prolonged crises;

5. **Industry Knowledge** Each company's board should have one or more members with appropriate and relevant industry-specific knowledge;

6. **International Markets** Boards of companies that operate or plan to operate in international markets should seek candidates who have business experience in those markets;

7. **Leadership** Boards should seek candidates who understand and possess empowerment skills and who have a history of motivating high-performing talent;

8. **Strategy/Vision** Boards should seek candidates with the skills and capacity to provide strategic insight and direction by encouraging innovation, conceptualizing key trends, evaluating strategic decisions, and continuously challenging the organization to sharpen its vision.²²¹

3. *Recent Corporate Scandals and Corporate Governance*

Commentators have long challenged whether the corporate board of directors actually governs corporations, or whether it is largely a rubber stamp for the chief executive officer, who is often the chairman of the board. The governance of corporations has come under fire recently in light of the corporate scandals involving Enron Corporation and others. Enron was once an "old-line energy company" that had transitioned itself into a "high tech

221. *Id.* at 10-11.

global company" that traded in exotic energy contracts and expanded into new industries.²²² Enron collapsed into bankruptcy in December 2001.²²³ At the time it declared bankruptcy, Enron was regarded to be the nation's seventh largest corporation, with gross revenues exceeding \$100 billion and a worldwide organization of more than 20,000 employees.²²⁴ The collapse of Enron profoundly affected the nation and economy:

The bankruptcy sent shock waves throughout the country, both on Wall Street and Main Street where over half of American families now invest directly or indirectly in the stock market. Thousands of Enron employees lost not only their jobs but a significant part of their retirement. Enron shareholders saw the value of their investments plummet; and hundreds, if not thousands, of businesses around the world were turned into Enron creditors in bankruptcy court likely to receive only pennies on the dollars owed to them.²²⁵

Enron's sudden collapse was fueled by numerous accounting irregularities and undisclosed dealings with companies controlled by Enron executives.²²⁶ Much of the blame for Enron's failure was attributed to a lack of oversight by the Enron Board of Directors.²²⁷ Indeed, the Senate report on the Enron Directors offers an array of alleged failures by Enron directors.²²⁸

As a result of the Enron scandal and others, reform of corporate governance has emerged.²²⁹ The Conference Board recently convened a prestigious, independent commission to address govern-

222. *The Role of the Board of Directors in Enron's Collapse: Rept. Prepared by the Permanent Subcomm. of the Senate Comm. on Governmental Affairs*, 107th Cong. 2d sess. 6 (2002) (hereinafter "Senate Report on Enron Directors").

223. *Id.* at 1.

224. *Id.* at 6

225. *Id.* at 1.

226. *Id.* at 11.

227. Senate Report on Enron Directors, *supra* note 222, at 3.

228. The Senate report alleged that the Enron directors violated their fiduciary duties in five different ways: (1) by allowing Enron to "engage in high risk accounting practices;" (2) by approving of numerous inappropriate conflicts of interest which allowed the company Chief Financial Officer to transact business with the company at its expense; (3) by allowing Enron to make its financial condition appear better than it was by its substantial "off-the-books activity;" (4) by approving excess compensation and failure to monitor a company financed personal credit line for the chairman and chief executive officer; and (5) allowing for a lack of independence among certain board members and the company and for allowing for the company's auditor, Andersen to provide internal auditing and other consulting services while acting as the company's auditor. *Id.* at 3.

The outside Enron directors commissioned their own report of the corporation's collapse. That report absolves the outside directors of fault.

229. Carol Hymowitz, *How to Fix a Broken System*, WALL ST. J., Feb. 24, 2003, at B1.

ance issues arising from the corporate scandals.²³⁰ The Conference Board Commission found that the recent scandals had significantly weakened the trust of the general public and investors in the American system of corporate governance.²³¹ The Commission cited polls that focus on the lack of independent oversight of the board of directors as a continuing theme:

The Commission is profoundly troubled by the corporate scandals in the recent past. The primary concern in many of these situations is that strong CEO's appear to have exerted a dominant influence over their boards, after stifling the efforts of directors to play the central oversight role needed to insure a healthy system of corporate governance. In such circumstances, boards have either lacked the structure and information to perform their roles properly, or they have simply abdicated their responsibilities to provide the oversight required of them.²³²

Among its reform proposals, the Conference Board Commission addressed the role of the dual chief executive officer and chairman of the board. The Commission found that a balancing between the board and senior management needs to exist. Although such a balancing need not be adversarial in most situations, the management functions of senior executives and the oversight functions of the board are necessarily distinct.²³³ Because the chief executive officer is the head of the management team, a potential conflict exists with the board's responsibility of oversight over the company.²³⁴ Accordingly, the Commission recommended that the positions of chief executive officer and chairman of the board be filled by different individuals.²³⁵ Furthermore, the Commission proposed that the chairman be an independent, or outside, director.²³⁶ The Conference Board Commission also went beyond a reform proposal made by the New York Stock exchange and proposed a

230. THE CONFERENCE BOARD, COMMISSION ON PUBLIC TRUST AND PRIVATE ENTERPRISE FINDINGS AND RECOMMENDATIONS PART 2: CORPORATE GOVERNANCE AND PART 3: AUDIT AND ACCOUNTING 2 (2003), available at <http://www.conference-board.org>. The twelve members of the commission included such corporate dignitaries as now Secretary of Treasury and the Chairman and CEO of CSX, Inc.; former president and CEO of TIAA-CREF John Biggs; founder and chairman of Vanguard Group, Inc. John Bogle; former SEC Chairman Arther Levitt, Jr.; and former Chairman of the Board of Governors of the Federal Reserve Paul Volker. *Id.* at 2.

231. *Id.*

232. *Id.* at 18.

233. *Id.* at 18-19.

234. *Id.* at 19.

235. THE CONFERENCE BOARD, *supra* note 230, at 19.

236. *Id.*

“significant majority” of directors be independent, or outside, directors.²³⁷

B. *Blending Government Function and Corporate Governance*

1. *Government Corporations Generally*

The corporate form of business and governance does in fact exist in the federal government. The federal government has long used “Government Corporations” as a way of providing services to citizens.²³⁸ Government Corporations have been described as follows:

The distinguishing characteristic of the government corporation in the American context is that it is an agency of government, established by Congress to perform a public purpose which provides a market-oriented service and produces revenue that meets or approximates its expenditures.²³⁹

The advantages of using a government corporation are their flexibility and responsiveness. Government corporations are often designed to follow a business program and are allowed greater autonomy and flexibility by being relieved of certain governmental restrictions.²⁴⁰

Although government corporation participation in government activity dates back to the early 1800’s, more wide-spread use began at the beginning of the twentieth century with the U.S. government’s purchase of the Panama Railroad Company as well as corporations set up to support the build-up for World War I.²⁴¹

237. *Id.* at 16 n.20 (citing proposed amendments to Sec. 303A of the New York Stock Exchange Listing Standards).

238. CONGRESSIONAL RESEARCH SERVICE, *MANAGING THE PUBLIC’S BUSINESS: FEDERAL GOVERNMENT CORPORATIONS* ix, 1 (1995) (hereinafter “*CRS Report on Government Corporations*”); GENERAL ACCOUNTING OFFICE, *GOVERNMENT CORPORATIONS: PROFILE OF EXISTING CORPORATIONS* 3 (1995) (hereinafter “*GAO Report on Government Corporations*”).

239. *CRS Report on Government Corporations*, *supra* note 238, at xi.

240. [Government Corporations are] established . . . to carry out business-type programs that need more autonomy and flexibility than that provided by a conventional government agency structure. Accordingly, [Government Corporations] may be, but are not always, excepted in part, or in full, from certain federal statutes governing matters such as civil service pay scales and hiring rules, position ceilings, and procurement. These exceptions are intended to allow [Government Corporations] to respond more quickly to changes in the marketplace and, in some cases, to take advantage of cost saving opportunities. *GAO Report on Government Corporations*, *supra* note 238, at 8.

241. *CRS Report on Government Corporations*, *supra* note 238, at 1-2 (citing as examples the Legal Services Corporation and Corporation for National and Community Service).

Government Corporations are generally authorized pursuant to the Government Corporation Control Act.²⁴² Broadly considered, Government Corporations consist of traditionally defined Government Corporations and “quasi government” corporations.²⁴³ The Government Corporations as of 1995 were:

1. Commodity Credit Corporation
2. Community Development Financial Institutions Fund
3. Corporation for National and Community Service
4. Corporation for Public Broadcasting
5. Export-Import Bank
6. Federal Crop Insurance Corporation
7. Federal Deposit Insurance Corporation
8. Federal Financing Bank
9. Federal Prison Industries
10. Government National Mortgage Association
11. Legal Services Corporation
12. National Credit Union Administration Central Liquidity Facility
13. National Railroad Passenger Corporation (AMTRAK)
14. Overseas Private Investment Corporation
15. Pennsylvania Avenue Development Corporation
16. Pension Benefit Guaranty Corporation
17. Resolution Trust Corporation
18. Rural Telephone Bank
19. St. Lawrence Seaway Development Corporation

242. 31 U.S.C. §§ 9101-9110. The statute is a codification and technical repeal of the original Government Corporation Control Act of 1945. *CRS Report on Government Corporations*, *supra* note 238, at 5.

243. *CRS Report of Government Corporations*, *supra* note 238, at xi-xii.

20. Securities Investor Protection Corporation

21. Tennessee Valley Authority

22. United States Enrichment Corporation

23. United States Postal Service²⁴⁴

In addition, as of 1995, quasi-government enterprises include: Federal National Mortgage Association, RAND Corporation, Los Alamos National Laboratory, Manpower Research Demonstration Corporation, National Endowment for Democracy, Small Business Investment Companies, and American Red Cross.²⁴⁵

The interest in Government Corporations was rekindled in the 1990's.²⁴⁶ The resulting debate focused on the proper use of Government Corporations. One criticism has been that Government Corporations include corporations that have no commercial purpose and no revenue raising capacity.²⁴⁷ Moreover, there is concern that the use of the Government Corporation form is being used to avoid "financial and political accountability" as well as statutory requirements.²⁴⁸

2. *The Postal Service By Comparison*

The United States Postal Service (hereinafter "USPS")²⁴⁹ serves as an example for board governance structures of Government Corporations. The USPS provides postal service to the country and is governed by an eleven member Board of Governors.²⁵⁰ The Board of Governors is comprised of nine governors, the Postmaster General and the Deputy Postmaster General.²⁵¹ The nine gover-

244. *CRS Report on Government Corporations*, *supra* note 238, at 79. Because the designation of Government Corporations under the working definition is in part self-reporting, the GAO came up with a list of 22 Government Corporations. *GAO Report on Government Corporations*, *supra* note 238, at 7.

245. *CRS Report on Government Corporation*, *supra* note 238, at xii (citations omitted).

246. *See generally*, *GAO Report on Government Corporation*, *supra* note 238; *CRS Report on Government Corporations*, *supra* note 238.

247. *CRS Report on Government Corporations*, *supra* note 238, at xi.

248. *CRS Report on Government Corporations*, *supra* note 238, at xi-xii.

249. The Congressional Research Service lists the Postal Service as a Government Corporation while the General Accounting Office lists it as a federally funded enterprise (*i.e.*, a quasi-government corporation). *GAO Report on Government Corporations*, *supra* note 238, at 178 n.5. In any event, it is appropriately considered a Government Corporation under the broad view taken by this article.

250. 39 U.S.C. § 101(a). *See generally*, *GAO Report on Government Corporations*, *supra* note 238, at 178-83.

251. *GAO Report on Government Corporations*, *supra* note 238, at 178.

nors are presidentially appointed with the advice and consent of the Senate.²⁵² Of the nine governors, no more than five governors can be from the same political party.²⁵³ The nine governors elect a chairman and appoint the Postmaster General, who is also a member of the Board of Governors.²⁵⁴ The Board of Governors has the power to dismiss the Postmaster General and set terms for his or her pay and service.²⁵⁵ The Governing Board also appoints the Deputy Postmaster General, who is the eleventh member of the Board of Governors.

The autonomy and power of the Postal Service Board of Governors manifested itself in a victorious showdown with President George H.W. Bush during the waning days of his presidency.²⁵⁶ In that case, a controversy arose between the Postal Service's Governing Board and another independent agency, the Postal Rate Commission, over a rate increase set by the Postal Rate Commission.

C. *Testing the Corporate Analogy: IRS, Inc. and Some Early Thoughts on the IRS Oversight Board*

1. *Does the Corporate Analogy Fit?*

a. *The IRS is not Sears and Roebuck*

As a threshold matter, the corporate analogy for the IRS Oversight Board must be examined. During the Senate's Oversight Hearing, Senator Kerrey observed the obvious—the IRS is not Sears and Roebuck.²⁵⁷ From the outset, this seemed clear. The IRS is a governmental agency which discharges the vital function of collecting the revenue with which the funding is sustained. Sears is a multinational corporation with diversified retail and financial services. More importantly, the IRS' mission is to serve the American taxpayer and fairly administer the tax system.²⁵⁸ On

252. GAO Report on Government Corporations, *supra* note 238, at 178.

253. GAO Report on Government Corporations, *supra* note 238, at 179.

254. GAO Report on Government Corporations, *supra* note 238 at 179.

255. GAO Report on Government Corporations, *supra* note 238, at 179.

256. Neal Devins, *Tempest in an Envelope*, 41 UCLA L. REV. 1935 (1994).

257. See *supra* note 1 and accompanying text. Sears is used as an example for obvious reasons although any large, publicly-traded corporation would support the same analysis. Because many of the events in the formation of the IRS Oversight Board took place in 2000, that year is used for the Sears' governance and financial information for comparative purposes.

258. See *supra* note 257 and accompanying text.

the other hand, Sears exists, either exclusively or to a great extent, to maximize the wealth of its shareholders.²⁵⁹

Despite these differences, the two organizations have a number of things in common. Both are very large organizations in terms of personnel. In 2000, the IRS had just under 100,000 employees,²⁶⁰ and Sears had over 300,000 employees.²⁶¹ In terms of revenue, the IRS generates far more than Sears. The IRS collects \$1.7 trillion in tax revenue²⁶² while Sears' 2000 revenue was just under \$41 billion.²⁶³

As to governance, the IRS has its senior executives, the IRS Oversight Board, Department of Treasury and Congress. Sears has its senior executives and the following nine person board of directors:

Alan J. Lacy Chairman of the Board; President and Chief Executive Officer, Sears, Roebuck and Co.

Hall Adams, Jr. former Chairman and CEO, Leo Burness Company (also a director of Moody's Corporation and McDonalds Corporation).

Brenda C. Barnes former president and CEO, Pepsi-Cola North America (also a director of Avon Products, Inc., Lucas Digital Ltd. and Lucas Arts Entertainment Company, The New York Times Company, and TyCom, Ltd.).

Warren L. Batts former Chairman and CEO of Tupperware Corporation and Premark International, Inc. (also a director of The Allstate Corporation, Cooper Industries, Inc., and Sprint Corporation).

James R. Cantalupo Vice-Chairman and President, McDonalds Corporation (also a director of McDonalds Corporation, Rohm & Haas Co., the Chicago Council of Foreign Relations, and the Mid-America Committee).

259. To some degree, a long-standing debate exists among commentators as to whether a corporation exists solely to maximize the wealth of its shareholders or whether other purposes such as social responsibility may also exist.

260. THE POLITICAL SCIENCE REFERENCE ALMANAC, available at <http://www.polisci.com/almanac/exec/treasury/01606.htm>.

261. 2000 SEC FORM 10-K, 8, available at <http://www.sec.gov/Archives/edgar/...25601500010/cleanfinal10-k2000.htm>.

262. INTERNAL REVENUE SERVICE, IRS ORGANIZATION BLUEPRINT 2000, 1-1, available at <http://www.publish.no.irs.gov>.

263. SEARS, ROEBUCK & CO., 2000 ANNUAL REPORT 27 (2001).

W. James Farrell Chairman and CEO Illinois Tool Works, Inc. (also a director of Illinois Tool Works, Inc., The Allstate Corporation, The Federal Reserve Bank of Chicago, and the Quaker Oats Company).

Michael A. Miles former Chairman and CEO, Phillip Morris Companies, Inc. (also a director of The Allstate Corporation, AMR Corporation, AOL Time Warner, Community Health Systems, Dell Computer Corporation, Exult, Inc., The Interpublic Group of Companies, and Morgan Stanley, Dean Witter & Co.).

Hugh G. Price President and CEO, National Urban League (also director of Educational Testing Service, Mayo Clinic Foundation, Metropolitan Life Insurance Company, and Verizon Communication).

Dorothy A. Terrell President, services group, and Vice-President, worldwide sales, Natural MicroSystems Corporation (also a director of General Mills, Inc. and Herman Miller, Inc.).²⁶⁴

As reflected in the foregoing, the Sears board of directors is primarily made up of experienced chief executive officers (and former CEOs) who have vast experience in managing large organizations as well as serving on other corporate boards. Perhaps this is the kind of dream team board of directors that the National Commission envisioned. The appointed members of the IRS Oversight Board, while highly accomplished in their own right, do not appear to have backgrounds that are predominant on boards of large corporations. Indeed, the backgrounds appear to be better suited to render management consulting advice or legal advice rather than overall governance.

In addition to the differences as to directors' backgrounds and qualifications, the power of the boards greatly differs. The Sears board retains the ultimate legal power to govern the corporation. Thus, the Sears board has the ultimate approval of the corporate budget. Moreover, the Sears board possesses the power to enact broad policy shifts with respect to corporate business. When the chief executive officer of Sears is replaced, the board will select a successor. Finally, Sears directors face potential liability in the

264. SEARS, ROEBUCK & CO., 2000 ANNUAL REPORT 49 (2001).

event that a breach of the fiduciary duty of care or duty of loyalty is found.

The IRS Oversight Board plays a more discrete, and limited, role in the governance of the IRS. Instead of broadly overseeing the core business of the enterprise—*i.e.*, administering the country's tax system—it is proscribed by statute from making decisions as to tax policy and administration,²⁶⁵ which is arguably the core business of the IRS. Instead, the Board's power rests with advising on narrower, albeit important, issues such as budgeting, operational and strategic areas. Indeed, in recommending tax simplification, the Board's recent Annual Report reflected the obvious statutory limitations on its authority:

The Board *does not endorse* any particular proposal for tax code simplification, *nor should it*, but feels obligated to remind congress that tax code complexity impedes sound administration and adds to enforcement difficulty. . . . The Board urges congress to consider complexity issues as part of every tax bill, and encourages it to make tax code simplification a theme of future legislation.²⁶⁶

And unlike the Sears board of directors, which has the power to hire and fire the chief executive officer, the IRS Oversight Board has a much more limited role with respect to the IRS' chief executive officer, the IRS Commissioner. The IRS Oversight Board merely has the power to recommend removal of the Commissioner as well as to provide recommendations to the President on candidates for appointing a new Commissioner.²⁶⁷ At the time of the National Restructuring Commission's study, it was contemplated that the Oversight Board might have the power to appoint and compensate the Commissioner. The issue as to whether it would be a violation of the Constitution for the Oversight Board to have the power to appoint the IRS Commissioner itself was unsettled.²⁶⁸

265. Act. Sec. 1001.

266. IRS OVERSIGHT BOARD, ANNUAL REPORT 15 (2003), available at www.irsoversightboard.treas.gov.

267. See generally I.R.C. 7800 et seq.

268. See Congressional Research Service Memorandum to the National Commission on Restructuring the Internal Revenue Service (dated June 4, 1997), reprinted in JOINT COMM. ON TAX., DESCRIPTION OF PROPOSALS RELATING TO THE RECOMMENDATIONS OF THE NATIONAL COMMISSION ON RESTRUCTURING THE INTERNAL REVENUE SERVICE ON EXECUTIVE BRANCH GOVERNANCE AND CONGRESSIONAL OVERSIGHT Appendix B (JCX-44-97). The Congressional Research Service considered three issues: (1) whether the Oversight Board would be within the administrative structuring powers of Congress; (2)

b. *The IRS is not a Government Corporation*

The corporate board model of governance has long been used for Government Corporations and quasi-government corporations. At present, Government Corporations and quasi-government corporations provide market oriented services or business programs.²⁶⁹ Types of activity include: furthering home ownership; developing federally funded research; and providing nonprofit intermediaries.²⁷⁰

Some Government Corporations or quasi-government corporations have direct or indirect commercial competition. For example, the United States Postal Service competes, to some extent, with United Parcel Service, Federal Express, and the Internet.

The IRS does not fit within the types of government function governed as a Government Corporation or quasi-government corporation. Although some of the IRS' activities are certainly able to be privatized,²⁷¹ the IRS provides an inherently governmental function. The tax system provides the financial lifeblood of the government. In administering the tax law, the IRS is privy to privileged and confidential information about the nations taxpayers. Moreover, unlike Government Corporations or quasi-government corporations such as the Postal Service, the IRS has no commercial competition.

Assuming, *arguendo*, that the IRS could fit within a Government Corporation or quasi-government corporation framework, the existing structure for the IRS Oversight Board falls far short by comparison to other Boards—*e.g.*, the Postal Service Board of Governors—in terms of power and autonomy. For example, the Postal Service Board of Governors has the direct power to select and remove the Postmaster General, *i.e.*, C.E.O. In addition, the Postal Service Board of Governors succeeded in its showdown against a sitting U.S. President.

The IRS Oversight Board, on the other hand, merely has advising and recommending powers as to selecting the IRS Commis-

whether the IRS Commissioner is an "inferior officer;" and (3) whether the Oversight Board would be a "Head of Department" capable of appointing inferior officers. *Id.* at 2. The Congressional Research Service opined that it was "likely" that a reviewing court would hold that a structure of the Oversight Board appointing the Commissioner would pass constitutional muster. *Id.*

269. See *supra* notes 238-239 and accompanying text.

270. *CRS Report on Government Corporations*, *supra* note 238, at xii.

271. For example, the IRS is considering privatizing its debt collection activity. Amy Hamilton, *IRS Considers Private Debt Collections*, 95 TAX NOTES 478 (Apr. 22, 2002).

sioner. This power will be observed in the near future as the White House considers the Board's recommendation for the successor to Commissioner Rossotti. In another statutorily authorized area, reviewing and advocating for the IRS budget, the Oversight Board has thus far largely been ignored by the White House and Congress.²⁷²

c. Is the Board Model Effective?

Perhaps the issue of corporate analogy ultimately rests on the question of whether the governing board is an appropriate form of governance mechanism in the first place. Or perhaps the corporate board analogy is applicable and large corporate boards, in effect, have no more power than the IRS Oversight Board. The recent financial implosion of the Enron Corporation has renewed long-standing criticisms of the effectiveness of the corporate board of directors as an effective governance method. One criticism focuses on the separation of ownership and control, that is, the interest of the managers, including the insider directors, was not aligned with that of the shareholders. Additionally, corporate boards of directors have long been criticized for following a country club model of selecting predominately white male chief executive officers and board members.

Although the IRS clearly is not Sears, the IRS Oversight Board reflects some of the post-Enron corporate reform measures.²⁷³ For example, the statutory structure mandates that the chairman of the Board be an outside member.²⁷⁴ Thus, the Board meets the proposed reform of separation of roles of the chairman and chief executive officer (IRS Commissioner).²⁷⁵ Moreover, with its seven outside members (six private plus the designated federal employee), the board is comprised of a substantial majority of independent or outside directors. The board members are not effectively chosen by the current CEO/Chairman to entrench his or her position but are instead chosen for specific backgrounds and tasks that tailor into the goals of the board and IRS. Finally, by serving

272. In an op-ed piece, Professor Paul Krugman suggests that the failure of the Bush White House and corporate activists to truly support corporate reform is analogous to the long-standing under-funding of the IRS. Paul Krugman, *Business as Usual*, N.Y. TIMES (Oct. 22, 2002 electronic edition).

273. See *supra* text accompanying notes 83-102.

274. See I.R.C. § 7800 et seq.

275. See *supra* text accompanying notes 83-102.

five year staggered terms (once phased-in), the board members are more aligned with longer term interests.²⁷⁶

The use of the corporate model of governance in the government sector has been particularly criticized. The nonpartisan Congressional Research Service warned about a blanket application of corporate management to the public sector:

Much of the public management literature today accepts the premise that the governmental and private sectors are similar in their fundamentals, and hence respond similarly to management incentives and processes. [The CSR's study] advances and explores a very different premise: that the governmental and private sectors are dissimilar in their fundamentals and hence respond dissimilarly to management incentives and processes. As [was] observed some years ago, the public and private sectors are alike in the nonessentials, differing only in the essentials. And the essentials for a government corporation are to be found in public law, not in economics or sociology. The management of the executive branch is not like the management of General Electric or the Ritz-Carlton Hotels except in the nonessentials.²⁷⁷

In recommending congressional rejection of the board structure in lieu of an executive director for governing the Social Security Administration, the nonpartisan General Accounting Office (hereinafter "GAO") observed that:

Our work—and the work of others that we have reviewed—suggests, however, that, in practice, the board form of organization has not proven effective in providing stable leadership, in insulating decisions from political pressures, and in assuring that diverse viewpoints are considered in the decision-making process. In the regulatory agencies that we have studied, we have concluded that a single administrator would provide more effective and stable leadership than a board. In our view, the need for stable and effective leadership is more critical in the management of an organization the size and complexity of the [Social Security Administration] than it is in

276. Martin Lipton & Steven A. Rosenbaum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 202, 202-03 (1991).

277. CRS Report on Government Corporations, *supra* note 238, at xiii-xiv (footnotes omitted).

the management of the relatively small regulatory agencies that we have reviewed.²⁷⁸

The GAO concluded that a policy advisory board would address the need to provide bipartisan input for the Social Security Administration.²⁷⁹ When reduced to its essentials, the IRS Oversight Board actually more represents an advisory board than a governing board.

2. *The IRS Oversight Board—Effective Reform or Just Politics?*

a. *The IRS Oversight Board—A Misnomer?*

In structure and reality, the IRS Oversight Board is much more of an advisory board than a governing board analogous to either a private or government corporation board of directors. At one level, the term “oversight” and board of directors rhetoric might suggest a benign misnomer—*i.e.*, a mere semantic difference. Additionally, there is no question that the IRS could benefit from input from the private sector and other constituencies. Indeed, a policy advisory board has been suggested as reform for other federal agencies like the Social Security Administration.

There have been a number of different advisory boards in existence at the IRS, such as the former Commissioners’ Advisory Group. Indeed, the Oversight Board initially had funding issues with respect to other advisory boards—the IRS Management Board and the IRS Citizens Advocacy Panel.²⁸⁰ The IRS Oversight Board is different because its private life members are appointed by the president and the board has a broader, albeit statutorily delineated, scope of responsibility.

As to the misnomer, perhaps Congress is simply following a trend. An oversight board has been a fairly common response of late to perceived high profile organizational failures in the government and private sector. For example, the FBI has been under a review commission as a response to the embarrassing revelations resulting from the arrest and guilty plea of counter-

278. UNITED STATES GENERAL ACCOUNTING OFFICE, SOCIAL SECURITY: LEADERSHIP STRUCTURE FOR AN INDEPENDENT SOCIAL SECURITY ADMINISTRATION (GAO/HRD-89-154) 1-2 (1989) (hereinafter “GAO Report on Social Security Administration”) (footnotes omitted).

279. GAO Report on Social Security Administration, *supra* note 278, at 2.

280. George Guttman, *Is the IRS Stiffing its Oversight Board?* 89 TAX NOTES 846 (Nov. 10, 2000).

intelligence agent Robert Hanssen.²⁸¹ In addition, the consulting and auditing firm of Andersen set up an oversight board headed by former Chairman of the Federal Reserve Paul Volcker. The Andersen oversight committee was set up in response to the allegations of corporate misconduct by Andersen in the Enron debacle (Andersen was the Enron auditor).

In response to corporate accounting scandals at Enron and WorldCom, Congress passed the Sarbanes-Oxley Act.²⁸² Chief among the reform measures was the creation of a new Accounting Oversight Board to oversee the accounting industry. The Accounting Oversight Board was to be appointed by the Securities Exchange Commission. A controversy soon ensued over the appointment of the first chair of the Board. SEC Chairman Harvey Pitt pulled his support for TIAA-CREF chief executive officer John Biggs, who was believed to be a tough proponent of accounting and auditing reform. Pitt ultimately resigned after his selection, former Federal Judge, FBI director and CIA Director, William Webster, became embroiled in a new controversy over his prior service on the auditing committee of a publicly traded company which was subject to charges of accounting irregularities.²⁸³ A subsequent investigation by the General Accounting Office suggested that the controversy over the lack of disclosure came from a breakdown in the process caused by trying to meet a very short statutory deadline.²⁸⁴

b. Ineffective Reform is Bad Tax Policy

If the IRS Oversight Board is not really a governing oversight board, is there a resulting policy harm? The answer may well be yes because the IRS has long suffered negative perceptions in the eyes of the taxpaying public. This negative perception is exacerbated by the politicians' use of the IRS as a scapegoat for what ails the U.S. tax system.

281. Philip Shenon, *A Former Insider Returns to Investigate the Investigators*, N.Y. TIMES, Mar. 12, 2001, at A9.

282. 107 Pub. L. No. 204, 116 Stat. 745 (2002). See generally Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Might Just Work)*, 36 U. CONN. L. REV. 915 (2003). Professor Cunningham observes that "a soberly apolitical view sees the Act as more sweep than reform. . . ." *Id.* at 917.

283. Stephen Labaton, *S.E.C.'s Embattled Chief Resigns in Wake of Latest Political Storm*, N.Y. TIMES, Nov. 6 2002, available at www.nytimes.com.

284. GENERAL ACCOUNTING OFFICE, SECURITIES AND EXCHANGE COMMISSION: ACTIONS NEEDED TO IMPROVE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD SELECTION PROCESS 4 (2002 GAO-03-339).

To the extent that the IRS Oversight Board is not a true governing board, it can hardly be considered an effective reform. This is particularly true in light of the fact that taxpayers were led to believe that a corporate type of board of directors was imposed on the IRS.

Thus, the Oversight Board appears to be merely a political placebo. At least superficially, the Board was created with the veneer of reform. The Board, with its seven private life members, reflects a measure of independence from both the IRS and its parent, the Department of Treasury. This veneer of reform disappears, however, upon further examination of the actual power granted and the process with which the first board was seated. Indeed, the selection and confirmation process reflected an administration not interested in really seating a board²⁸⁵ and a senate not really interested in confirming the board. This lack of interest was predicted by another commentator:

The new IRS Oversight Board was slow in materializing. . . . With many of its operational details yet to be ironed out, including the Board's delicate relationship with the commissioner and Treasury officials, its future role is far from clear. The Clinton Administration's unhurried approach to getting the Board up and running suggests problems, especially in light of the Administrations initial reluctance to support the Oversight Board during legislative debate over the reform bill. Whether the Bush Administration will manifest a different attitude toward the board remains to be seen, but to date the panel has been little more than a paper creation.²⁸⁶

A new president of a different political party²⁸⁷ is now in office and appears to be little concerned with the board appointed by his predecessor.

Ironically, public perception of the IRS has improved. Then-Commissioner Rossotti recently reported significant improvement in customer satisfaction:

I am pleased to report, with respect to the [2001] filing season, that we are, I believe, improving performance across the

285. The administration being referenced refers to the Clinton Administration.

286. Joseph J. Thorndike, *Reorganization of the Internal Revenue Service: Reforming the Internal Revenue: A Comparative History*, 53 ADMIN. L. REV. 717, 778.

287. Republican President George W. Bush.

board; and I think it is important to note that over the last few years our improvement in performance has been recognized by the most important judge of our performance, which is the American public. . . .

I don't mean to put too much focus just on surveys, but I do believe that the public's rating of the IRS is fundamentally important to the health of the tax system.²⁸⁸

The credit for the improvement was directed to Commissioner Rossotti and not the IRS Oversight Board.:

The Commissioner has transformed it from an outdated structure based on geography into a modest customer-focused agency organized around the tax needs of American Citizens. He also laid the groundwork for technological changes that will carry the IRS into the 21st Century. We are just beginning to see the fruits of those innovations today.²⁸⁹

Notwithstanding the perceived improvement in the IRS, its most significant hurdles still remain. As his term neared completion, Commissioner Rossotti reported to the Oversight Board. First, the IRS stills needs to be adequately funded in order to accomplish its reform goals. Second, the problem of tax cheats, such as corporate tax shelters, remain an enormous problem.²⁹⁰

In an interview at the end of his tenure, Commissioner Rossotti noted that the level of oversight by the IRS Oversight Board and others has the potential to provide a distraction from the IRS' main function:

Distraction is still an issue today. . . . Six congressional committees have official oversight of the IRS; Rossotti has testified at 48 congressional hearings since becoming Commissioner. Then there is the IRS Oversight Board, to which the IRS is accountable. And Treasury. And Treasury's Inspector General for Tax Administration, which makes the IRS an agency with its very own inspector general. Then there is the

288. *2002 Tax Return Filing season and the IRS Budget for Fiscal Year 2003: Hearing before the Subcomm. On Oversight of the Comm. On Ways and Means, 107th Cong 2d Sess. (2002)* (statement of Commissioner Charles Rossotti) (hereinafter "Ways and Means Hearings on 2002 Filing Season").

289. Ways and Means Hearings on 2002 Filing Season, *supra* note 288 (statement of Chairman Houghton).

290. George Guttman, *Rossotti Attacks Tax Cheats in End-of-Tenure Report*, 96 TAX NOTES 1687 (Sept. 23, 2002). See also, Op-Ed, *The Taxman Outgunned*, N.Y. TIMES, Oct. 11, 2002.

Office of Management and Budget. And the General Accounting Office. In total, these entities produce 250 Audit Reports of the IRS each year—or one for each business day.²⁹¹

To date, the Oversight Board has largely been ignored by Congress and the Clinton and Bush White Houses. The Oversight Board continues to fall under criticism for not being sufficiently independent of the IRS. Senate Finance Chair, and former member of the Restructuring Commission, Senator Charles Grassley “excoriated the leadership of the IRS Board” as being advocates for the IRS rather than independent:

I worry that the board, particularly under the current leadership, forgets its mission. . . . I worry that the board forgets its role is not to echo IRS management, not to obscure, obfuscate, or otherwise provide cover for IRS actions, but to keep a watchful eye on a very powerful and very important agency . . .²⁹²

Indeed, Senator Grassley again voiced his criticisms of the lack of independence by the Oversight Board: “Inbreeding is not what we want. . . . I’m not sure that people inside the Treasury see the Oversight Board as being as independent as we set it up to be.”²⁹³

The Bush White House conducted its own parallel search process to choose a Bush loyalist to replace Commissioner Rossotti.²⁹⁴ In doing so, neither of the Oversight Board’s recommendations were selected and presumably were never seriously considered.

Finally, a recent meeting of the Oversight Board reflected the effects of turnover within the Bush economic team and delay in filling the IRS Commissioner’s post and Oversight Board vacancies: “[W]ith two vacancies, one member absent, and two attending in acting capacity, only four bona fide members . . . attended the meeting.”²⁹⁵ In hearings on two nominees for Treasury positions, Senator Grassley again repeated his concern. Senator Grassley

291. Amy Hamilton, *Rossotti Reflects on His Tenure as IRS Reform Commissioner*, 96 TAX NOTES 1178, 1179 (2002).

292. Amy Hamilton, *Grassley Sharply Criticizes IRS Oversight Board*, 98 TAX NOTES 1049 (Feb. 17, 2003)

293. Amy Hamilton, *IRS Oversight Board Subject to “Inbreeding—Grassley Says,”* 100 TAX NOTES 615 (2003)

294. See Paul C. Light, *supra* note 282 and accompanying text; Amy Hamilton, *supra* note 293 and accompanying text.

295. George Guttman, *IRS Oversight Board Divided on Outsourcing*, 2003 TNT 55-4 (Mar. 21, 2003).

had placed a hold on the Bush administration's Treasury nominees until the White House acceded to him by nominating IRS Oversight Board member Charles Kolbe of Grassley's home state.²⁹⁶

VI. CONCLUSION

Taxes have always been unpopular. As the government's direct representative in the inherently unpopular task of taxation, the IRS has long been under attack. These attacks and criticisms reached a crescendo with the hearings leading up to the IRS Restructuring and Reform Act of 1998. Those hearings drew significant public attention by highlighting allegations of IRS abuse of taxpayers, much of which were later disproved with little public attention. Nevertheless, the scrutiny of those hearings did reveal other serious problems with the IRS, such as large scale inefficiency and lack of cohesive strategic planning. One of the most heralded reforms was the creation of a corporate style board of directors to oversee the IRS.

Unfortunately, the corporate analogy is misplaced. Senator Kerrey was certainly right—"the IRS is not Sears and Roebuck."²⁹⁷ Although there are some similarities, obvious differences exist between an inherently essential governmental agency and a for-profit publicly held enterprise. On the surface, the IRS Oversight Board resembles a reformed, post-Enron Board of Directors. Its members are supposed to be selected on enumerated qualifications, targeted to specific tasks. The chair's position is separated from that of the chief executive officer. In addition, the board is comprised of a majority of outside members, whose terms are staggered and long enough for a longer vision of the organization.

Despite its outward appearance, the Oversight Board simply does not have the plenary power granted to a corporate board. It does not have the ultimate power to set strategy. Rather, it merely advises. Unlike a corporation, the Oversight Board merely recommends nominees for its company's chief executive officer. To date, the Oversight Board's recommendations have been largely ignored as it has been accused of not being independent of the IRS.

296. *Id.*

297. 1998 Senate IRS Oversight Hearings, *supra* note 1, at 7.

Rather than a governance mechanism, the Oversight Board seems to be a statutorily created advisory board, appointments to which are intensely political. But this does not comport with the reform rhetoric urged on taxpayers. And to the extent that the failed analogy undermines public confidence in the IRS, it undermines confidence in the tax system, which results in bad tax policy.