INNOCENT UNTIL PROVEN GUILTY: A DEFENSE OF INTERNAL REVENUE CODE SECTION 7491(a)

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INTRODUCTION

On June 25, 1997, the National Commission on Restructuring the Internal Revenue Service (the "Commission") issued a report[1] calling for major changes in the Internal Revenue Service's operations.[2] The Commission issued its report in the midst of public hearings on IRS reform in which taxpayers testified to IRS abuse.[3] Media coverage of the hearings and of the Commission's report furthered the public's perception of the tax laws as complex and unfair, which in turn strengthened support for IRS reform.[4]

Initially, however, President Clinton and other Democrats resisted calls for reform legislation calling it "extremist."[5] Once public support mounted, however, Clinton and the

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[1] *See* M. Ellen Robb, *Federal Tax Controversies: Current Practice in Audits, Appeals and Trials*, 434 P.L.I. TAX 1095, 1099 (Oct. - Nov. 1998); *see also* Robert B. Nadler, *Treating Qualified Offerers As Prevailing Parties Encourages Settlement*, available in WESTLAW, 98 TNT 247-27, at *5 (1998).

[2] One proposed change included the establishment of an oversight board. The Commission felt that the proposed changes were necessary to remedy the IRS' fragmented structure and the problems that arose as a result. *See* Robb, *supra* note 1, at 1099.

[3] *See* Nadler, *supra* note 1, at *5. The following are just some of the various accounts of IRS abuse which surfaced during the House debate on IRS reform:

> Representative Kenny Hulshof, Republican of Missouri, cited a newspaper article that said some victims of the 1993 floods in the Midwest were being audited because receipts needed for their tax returns had been lost to the high water.
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> Representative Jennifer Dunn, Republican of Washington, said she had heard from one constituent who had difficulty proving that his very-much-alive wife was not dead, and from another who had been drawn into a battle over a 65-cent discrepancy in his tax return.

Richard W. Stevenson, *Legislation Reining in the I.R.S. Clears House on Vote of 426 to 4*, N.Y. TIMES, Nov. 6, 1997, at A1.

[4] *See* Nadler, *supra* note 1, at *5.

[5] *See* William M. Welch, *Clinton to Sign IRS Overhaul*, USA TODAY, July 10, 1998, at 1A.

Democrats quickly renounced their position.[6] Indeed, not long after his initial opposition to such legislation, Clinton noted the overhaul would "create an IRS that respects American taxpayers and respects their values."[7]

Following the brief period of intense Congressional scrutiny of the IRS' operations, Congress, with much new-found bipartisan agreement, passed the Internal Revenue Service Restructuring and Reform Act of 1998.[8] President Clinton later signed the Act into law on July 22, 1998.[9]

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[6] *See id.*; *see also Clinton Signs IRS Reforms, Warns Against Tax Cuts*, CHI. TRIB., July 23, 1998, at N6; Jacob M. Schlesinger, *Shifting Burden of Proof to IRS is Tricky Proposal*, WALL ST. J., Oct. 20, 1997, at A24.

[7] Welch, *supra* note 5, at 1A; *see also Clinton Signs IRS Reforms, Warns Against Tax Cuts*, *supra* note 6, at N6. Fellow chameleon Senate Minority Leader Tom Daschle (D-S.D.) soon found himself uttering: "We need to pass IRS reform. We need to get on with reforming it, restructuring the IRS, sensitizing them." *IRS Bill Expected to Pass in Senate*, CHI. TRIB., May 7, 1998, at C1.

[8] The Senate voted 96-2 in favor of the bill following a 402-8 passage in the House. *See* Welch, *supra* note 5, at 1A. Congress had three goals in mind when enacting this legislation:

> to prepare the IRS for the 21st century by improving its management and giving it the flexibility to recruit and retain high-quality workers; to change its internal culture from that of an insular, law-enforcement-oriented agency to an open, service-oriented one; and to provide taxpayers with new rights in dealing with the IRS.

Albert B. Crenshaw, *The New IRS Law*, WASH. POST, July 23, 1998, at A06.

[9] *See* Pub. L. 105-206, Section 3001, 112 Stat. 685 (1998), codified in relevant part at Section 7491; *see also* Robb, *supra* note 1, at 1099. Key provisions reforming the IRS would: (1) create an independent nine-member board to watch over IRS management; (2) provide new protections for taxpayers pursued by the IRS for taxes run up by their former spouses; (3) stop penalties and interest from accruing after 18 months if the IRS hasn't contacted a taxpayer; (4) ban the IRS from seizing a taxpayer's home without a court order; and (5) shift the burden of proof from taxpayers to the IRS in disputes dealing with income, estate and gift taxes. This paper will focus solely on the last provision. Key provisions unrelated to IRS reform would: (1) reduce from 18 months to 12 months the time a person must hold an investment to qualify for a reduced 20% capital gains tax rate, retroactive to gains realized on or after January 1, 1998; (2) make it easier for elderly taxpayers with incomes near $100,000 to convert from traditional individual retirement accounts (IRAs) to Roth IRAs, where their investments can grow tax free; (3) change foreign trade law language by substituting the term "normal trade relations" for "most favored nation" status; (4) extend the attorney-client privilege to include certain tax-advisors such as certified public accountants and (5) reverse an IRS ruling and establish that employees do not have to pay taxes on meals provided by their employers. *See* Welch, *supra* note 5, at 1A; *see also* Paul Wiseman & William Welch, *IRS Bill Gives New Rights to Taxpayers*, USA TODAY, June 24, 1998, at 7A. Rep. Rob Portman, R-Ohio, an author of the IRS reform bill, noted that the new law will benefit all taxpayers with a more service-oriented IRS. As a result, the IRS allegedly will spend alot less time hunting down tax cheats and instead will focus on assisting taxpayers comply with the tax Code. *See* Paul Wiseman, *New Law Aims to Make IRS Behave Itself*, USA TODAY, July 23, 1998, at 10A.

Under Title III of the Act, better known as the "Taxpayer Bill of Rights 3" ("TBOR III"), Congress introduced the "most extensive taxpayer-protective provisions ever enacted in a single setting."[10] In TBOR III, Congress set out to "introduce a greater level of fairness in dealings with the Internal Revenue Service and [to] strengthen taxpayer rights."[11] The provision shifting the burden of proof to the IRS in certain court proceedings formed the centerpiece of TBOR III.[12]

This paper will begin by briefly analyzing Section 7491(a), the actual burden of proof provision. Next, the paper will discuss the elements of burden of proof in general in order to clarify the nature of ensuing debates concerning this legislation. Following this, the paper will examine the evolution of the burden of proof in tax controversies up to its current state. The paper then will explore the conditions necessary to shift the burden. The paper will subsequently look into the criticisms of the legislation and, finally, offer a defense of the new law.

I. INTRODUCTION TO THE BURDEN OF PROOF PROVISION

Section 7491(a)[13] shifts the burden of proof to the IRS in court proceedings originating from post-July 22, 1998 examinations provided the taxpayer (1) produces credible evidence

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[10] Gerald A. Kafka, *Restructuring and Reforming the IRS and the Code - Congress Takes a Quantum Leap*, 89 J. TAX'N 133, 134 (1998). Initially, Congress' interest in protecting taxpayers' rights against government oppression began about 30 years ago when Congress passed legislation which granted prevailing taxpayers their costs and fees. But it was not until 1988 that Congress enacted the first Taxpayer Bill of Rights (TBOR I), followed in 1996 with the Taxpayer Bill of Rights 2 (TBOR II). *See* Nadler, *supra* note 1, at *4, 5.

[11] Nathan E. Clukey, *Benefits of Shifting the Burden of Proof to the IRS Are Limited*, available in WESTLAW, 1999 TNT 20-136, at *2 (1999).

[12] *See id.*; *see also New Law Revamps IRS but Doesn't Stop There*, 89 J. TAX'N 67 (1998).

[13] I.R.C. § 7491 (1999). Section 7491 provides:

(a) Burden shifts where taxpayer produces credible evidence. -- (1) General rule. -- If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the

regarding any factual issue relevant to ascertaining the taxpayer's liability for any income, estate, gift, and generation-skipping transfer taxes; (2) complies with any substantiation or recordkeeping requirements of the Code;[14] and (3) cooperates with reasonable IRS requests for meetings, interviews, witnesses, information, and documents.[15] The taxpayer bears the burden of establishing that each of the three conditions are satisfied.[16]

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liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

(2) Limitations. -- Paragraph (1) shall apply with respect to an issue only if --

(A) the taxpayer has complied with the requirements under this title to substantiate any item;

(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and

(C) in the case of a partnership, corporation, or trust, the taxpayer is described in Section 7430(c)(4)(A)(ii).

(3) Coordination. -- Paragraph (1) shall not apply to any issue if any other provision to this title provides for a specific burden of proof with respect to such issue.

(b) Use of statistical information on unrelated taxpayers. -- In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

(c) Penalties. -- Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

Effective Dates: (1) In general. -- The amendments made by this Section [enacting this Section] shall apply to court proceedings arising in connection with examinations commencing after the date of the enactment of this Act [July 22,1998].

(2) Taxable periods or events after date of enactment. -- In any case in which there is no examination, such amendments shall apply to court proceedings arising in connection with taxable periods or events beginning or occurring after such date of enactment [July 22, 1998].

[14] The taxpayer is still obligated to substantiate any item he or she sets forth.

[15] *See* I.R.C. § 7491. Note that in Part IV, the paper will exam the ambiguities surrounding the three aforementioned conditions. Also note that the final burden of proof rule is a watered-down version of H.R. 367, sponsored by Rep. James Traficant, D-Ohio, which "would have put the burden of proof on the government with respect to all issues, for all kinds of taxes, in all civil court proceedings." Lee A. Sheppard, *Shifting the Burden or Just Shifting the Blame?* available in WESTLAW, 97 TNT 207-75, at *2 (1997).

[16] *See IRS Releases Service Center Advice on Self-Employment Income and EIC*, available in WESTLAW, 98 TNT 250-28, at *3 (1998).

Section 7491(a) applies to all individuals as well as to corporations, partnerships and trusts that have a net worth less than $7,000,000.[17] Section 7491(a) will not apply, however, when other Code provisions provide for a specific burden of proof to govern.[18]

II. BURDEN OF PROOF

Much debate has ensued over the effect of subsection (a) and precisely what a successful shift in the burden of proof will mean to taxpayers.[19] In order to better understand this debate one must recognize that the burden of proof in the evidentiary sense encompasses two separate elements: the burden of production, also known as the burden of going forward, and the burden of persuasion.[20]

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[17] *See New Law Revamps IRS but Doesn't Stop There*, *supra* note 12, at 67; *see also Edited Transcript of the July 31, 1998 ABA Exempt Organizations Committee Meeting*, available in WESTLAW, 98 TNT 198-45, at *5 (1998). Note, however, that 501(c)(3) organizations are specifically exempted from the $7-million net-worth test. *See id.* (Steve Arkin, associate tax legislative counsel for the ABA Section of Taxation, indicates that this can be confirmed by examining Treasury Regulations under Section 7430).

[18] *See Burden of Proof Shift to IRS is No Panacea*, available in WESTLAW, 98 Fed. (CCH) 48,854, at *1 (1998). While subsection (a) requires the taxpayer to meet certain conditions before the burden will shift, subsections (b) and (c) unconditionally shift the burden to the IRS. Subsection (b) specifically provides that the IRS will always bear the burden of proof if the IRS reconstructed the individual's income solely through the use of statistical information on unrelated taxpayers. *See* I.R.C. § 7491(b). This does not mean that the Service must produce direct evidence of a taxpayer's income however the Service cannot reference statistical information to assert that the taxpayer has income equal to regional statistics without further evidence supporting that assertion. *See Excerpts from IRS Description of Impact of IRS Reform Act with Actions Necessary to Implement Specific Provisions*, available in WESTLAW, 173 DTR L-1, at *4 (1998).

Subsection (c) provides that the IRS will bear the burden of production if the tax dispute involves an individual's liability for a penalty, additions to tax or additional amounts imposed by the Code. *See* I.R.C. § 7491(c). Thus, in any court proceeding the Secretary "must initially come forward with evidence that it is appropriate to apply a particular penalty to the taxpayer before the court can impose the penalty." Senator William V. Roth, Jr., *Finance Committee Report Explanation of Titles III and IV of IRS Reform Bill*, available in WESTLAW, 98 TNT 78-15, at *5 (1998). If the taxpayer believes imposition of the penalty is not appropriate, then the taxpayer is responsible to address this issue. *See id.*

[19] *See* Clukey, *supra* note 11, at *3.

[20] *See id.*; *see also* Sheryl Stratton, *Burden of Proof Shift - Making Sense of a Political Provision*, available in WESTLAW, 98 TNT 164-1, at *2 (1998).

The party bearing the burden of production must first go forward and introduce evidence sufficient enough to find in that party's favor.[21] The taxpayer need not prove that each element in his or her case is more likely than not to be true but merely that a *reasonable person* could find each element to be more likely than not to be true.[22]

The burden of persuasion, on the other hand, signifies the burden of persuading the court that your evidence outweighs the other party's evidence on a particular issue.[23] Assuming this burden is on the taxpayer, the court will rule for the taxpayer only if the evidence is in his or her favor by more than 50 percent, a concept otherwise referred to as "by a preponderance of the evidence."[24] If neither party's evidence outweighs the other's then the court will rule against the party bearing the burden.[25]

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[21] *See* Clukey, *supra* note 11, at *4; *see also* Stratton, *supra* note 20, at *2.

[22] *See* Clukey, *supra* note 11, at *4.

[23] *See id.*; *see also* Stratton, *supra* note 20, at *2.

[24] *See* Clukey, *supra* note 11, at *4; *see also* Stratton, *supra* note 20, at *2.

[25] *See* Clukey, *supra* note 11, at *4; *see also* Stratton, *supra* note 20, at *2.

III. Burden of Proof in Civil Tax Controversies

A. Pre-7491: Taxpayer's Burden of Proof in Civil Tax Cases[26]

Prior to the enactment of Section 7491, there existed a rebuttable presumption that the IRS' determination of tax liability was correct.[27] The legislative history indicates that the presumption served the same purpose as the burden of production, requiring the taxpayer to come forward with evidence.[28] After the taxpayer had eclipsed that procedural hurdle, he or she still carried the burden of persuasion.[29] Once the taxpayer met this burden, the burden finally

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[26] *See* Clukey, *supra* note 11, at *3, n.22:

> Taxpayers who have had a deficiency assessed against them can bring an action in the Tax Court or one of the two refund fora -- the Court of Federal Claims or federal district court. *See* Gerald Kafka and Rita Cavanagh, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES, Section 1.01, 1-2 (2nd ed. 1997) [hereinafter Kafka and Cavanagh]; Casey, *supra* note 19. But because 95 percent of all tax controversies are heard in the Tax Court, this report will confine its analysis to the effect of Section 7491 on proceedings therein. *See id.*; Lederman, *supra* note 8. Although similarities abound in the three fora, a number of significant distinctions exist. For example, before taxpayers may proceed in the Court of Federal Claims and federal district court they must pay all assessments; the Tax Court does not require prepayment. *Id.* For taxpayers to prevail in proceedings before the Tax Court, they need only prove the disputed issues before the court; but in the refund fora, the taxpayer must prove "not only that the assessment was erroneous but that also the amount to which he was entitled," and all deductions claimed. (Helvering v. Taylor, 293 U.S. 507, 534 (1935)). Additionally, a jury trial is available in federal district court, but the Tax Court and Court of Federal Claims permit only bench trials.

Note that the IRS, on the other hand, has always borne the burden of proof in all criminal cases. *See* Tom Herman, *A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., July 15, 1998, at A1.

[27] *See* Roth, Jr., *supra* note 18, at *1. The former rule read as follows:

> This presumption in favor of the Commissioner is a procedural device that requires the plaintiff to go forward with prima facie evidence to support a finding contrary to the Commissioner's determination. Once this procedural burden is satisfied, the taxpayer must still carry the ultimate burden of proof or persuasion on the merits. Thus, the plaintiff not only has the burden of proof of establishing that the Commissioner's determination was incorrect, but also of establishing the merit of its claims by a preponderance of the evidence.

Id. Commentators considered the rebuttable presumption a "cornerstone of the tax system." Sheppard, *supra* note 15, at *1.

[28] *See* Clukey, *supra* note 11, at *6.

[29] *See id.*

shifted to the IRS to provide sufficient evidence to rebut the taxpayer.[30] Thus, taxpayers who wished to challenge the IRS' determination of tax liability under the old law had to satisfy both the burden of production and the burden of persuasion before the burden of proof would even shift to the IRS.[31]

Though a number of rationales existed for placing the burden of proof on the taxpayer, most commentators felt that because "the taxpayer controls the evidence and information necessary to sustain his deductions, he should have the burden of proof."[32] Congress, however, believed that the prior law frequently disadvantaged individuals and small business taxpayers forced to litigate with the IRS.[33] Congress believed that shifting the burden of proof therefore would provide a better balance between the IRS and taxpayers without the encouragement of tax avoidance.[34]

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[30] *See* Stratton, *supra* note 20, at *2.

[31] *See* Roth, Jr., *supra* note 18, at *1; Clukey, *supra* note 11, at *6. Despite the fact that the allocation of burden of proof originated under common law and not statutory edict, Congress acquiesced. *See* Helvering v. Taylor, 293 U.S. 507 (1935); Welch v. Helvering, 290 U.S. 111. (1938); *see also* Clukey, *supra* note 11, at *5 (citing H.R. Rep. No. 105-599 (1998) (Conf. Rep.) (noting that "'the Internal Revenue Code contains a number of civil provisions that explicitly place the burden of proof on the Commissioner in specifically designated circumstances. The Congress would have enacted these provisions only if it recognized and approved of the general rule of presumptive correctness of the Commissioner's determination.'")). Prior to the enactment of Section 7491, numerous federal Courts of Appeals had declared that the allocation of burden of proof on the taxpayer did not violate the Due Process Clause of the Constitution. *See id.* (citing, e.g., Kahn v. United States, 753 F.2d 1208, 1222 (3rd Cir. 1985); May v. Commissioner, 752 F.2d 1301, 1304 (8th Cir. 1985); Rockwell v. Commissioner, 512 F.2d 882 (9th Cir. 1975)).

[32] Clukey, *supra* note 11, at *6; *see also* Michael I. Saltzman, *Full Text: New York Tax Lawyer's Testimony at Finance Hearing on IRS Restructuring*, available in WESTLAW, 98 TNT 25-34, at *1 (1998). It is for this reason that Paul Cherecwich Jr., president of the Tax Executives Institute, criticizes the new burden of proof legislation because, unlike the old law, it does not comport with "the age-old principle that the burden should generally rest with the party who has control of the facts and records -- in this case, the taxpayer." Schlesinger, *supra* note 6, at A24.

[33] *See* Joint Committee on Taxation, *JCT 1998 'Blue Book' Part Two (Part 2 of 3)*, available in WESTLAW, 98 TNT 231-10, *2 (1998); *see also* Roth, Jr., *supra* note 18, at *3.

[34] *See* Joint Committee on Taxation, *supra* note 33, at *3; *see also* Roth, Jr., *supra* note 18, at *3. Congress enacted subsection (b) because it believed that the prior law inappropriately mandated that the IRS "rely solely on statistical information on unrelated taxpayers to reconstruct unreported income of an individual taxpayer." *Id.* Congress enacted subsection (c) because it believed that the IRS "should not be able to rest on its presumption of correctness" absent any evidence produced relating to penalties. *Id.*

B. 7491: Taxpayer's Burden of Proof

Section 7491(a) on its face fails to denote whether "one, both, or a portion of one or both of the burdens is shifted."[35] Citing legislative history, however, IRS Assistant Chief Counsel Deborah A. Butler suggests that "requiring the taxpayer to first introduce credible evidence that would be sufficient on which to base a decision if that evidence were not rebutted, equates to leaving the burden of production on the taxpayer."[36] Butler also notes that the legislative history provides the IRS will lose if the evidence is equally balanced, which Butler "equates to placing the burden of persuasion on the Service."[37] Thus, according to Butler and the IRS, Section 7491(a) shifts the burden of persuasion while the burden of production remains with the taxpayer.[38]

IV. Interpreting the Statutory Conditions

A. Credible Evidence

As mentioned earlier, Section 7491(a) shifts the burden of proof to the IRS in court proceedings provided the taxpayer produces credible evidence regarding any factual issue relevant to ascertaining the taxpayer's liability for any income, estate, gift, and generation-skipping transfer taxes.[39] Although Section 7491 does not define credible evidence, numerous cases have applied the term, interpreting it consistently with the commonly-accepted definition

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[35] Clukey, *supra* note 11, at *3.

[36] Stratton, *supra* note 20, at *2-3.

[37] *Id.* at *3.

[38] *See id.*; Clukey, *supra* note 11, at *3, 6.

[39] *See* I.R.C. § 7491(a).

of "credible," which is "offering reasonable grounds for being believed."[40] Thus, the courts' interpretation of credible evidence as "believable" focuses on the quality of the evidence and not on its weight.[41]

However, Congress' version of "credible" evidence differs to some extent from that of the courts, indicating that credible evidence not only means evidence worthy of belief, but evidence "sufficient upon which to base a decision on the issue if no contrary evidence were submitted."[42] One commentator argues that this sufficient evidence standard introduces a substantial requirement beyond the common-place view of credible evidence as being that worthy of belief.[43]

> To prevail on an issue if no contrary evidence were submitted would require the taxpayer to prove that each applicable fact is more likely true than not. This necessarily would require an ultimate weighing of the evidence -- which effectively invokes the burden of persuasion, not the burden of production -- and would require the burden of persuasion to be satisfied by a preponderance of the evidence. Furthermore, before one can satisfy the burden of persuasion, that party must have already presented sufficient evidence to satisfy the burden of production.[44]

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[40] Clukey, *supra* note 11, at *7.

[41] *See id.*

[42] S. Rep. No. 105-174 (1998); H.R. Rep. No. 105-599 (1998) (Conf. Rep.).; *see* Clukey, *supra* note 11, at *7. The Conference Committee Report defines credible evidence as:

> the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness). A taxpayer has not produced credible evidence for these purposes if the taxpayer merely makes implausible factual assertions, frivolous claims, or tax protester-type arguments. The introduction of evidence will not meet this standard if the court is not convinced that it is worthy of belief. If after evidence from both sides, the court believes that the evidence is equally balanced, the court shall find that the Secretary has not sustained his burden of proof.

S. Rep. No. 105-174 (1998); H.R. Rep. No. 105-599 (1998) (Conf. Rep.).; John J. Tigue, Jr., *Congressional Reform of the IRS*, N.Y. LAW J., at 3 (1998) (quoting Conference Committee Report, pp. 377-78).

[43] *See* Clukey, *supra* note 11, at *7.

[44] *Id.*

Therefore, if one follows this single line in the legislative history the taxpayer will have to "satisfy both burdens at the same time -- before the burden of proof can even be shifted -- as well as overcome the government's presumption of correctness."[45]

Such an interpretation would render the shift almost meaningless not to mention conflict: (1) with the statute's stated purpose of shifting some "burden of proof";[46] (2) with statements of legislators who never intended such an interpretation to result;[47] and (3) arguably with the language in the same document which signifies the Conference Committee's stated reason for the change: "all other things being equal, facts asserted by individual and small business taxpayers who cooperate with the IRS and satisfy relevant record keeping and substantiation requirements should be accepted."[48]

As a result, Congress' tortured interpretation should be rejected in light of the judiciary's sharply contrasting view of "credible" evidence.[49] Credible evidence therefore should be interpreted consistently with the common-place definition as evidence worthy of belief.[50]

B. Substantiation

Recall that taxpayers hoping to reap the benefits of Section 7491(a) must also substantiate any item required by the Code and the regulations.[51] The courts recognize a

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[45] *Id.* at *8.

[46] *See id.* (citing I.R.C. § 7491(a)).

[47] *See id.*

[48] *Id.* (quoting H.R. Rep. No. 105-599 (1998) (Conf. Rep.)).

[49] *See id.*

[50] *See id.*

distinction between general substantiation requirements, which require the taxpayer to provide records or evidence supporting all deductions, and specific, or heightened, substantiation requirements, which demand a greater level of taxpayer compliance.[52] To satisfy specific substantiation provisions, the taxpayer must produce records or evidence *sufficient to corroborate the taxpayer's position.*[53] In other words, the taxpayer must prove that each fact is more likely to be true than not, thus forcing the taxpayer to satisfy the burden of persuasion in addition to the burden of production.[54] It is for that reason that the "heightened substantiation requirements eviscerate the benefits of the burden of proof shift where they are applicable."[55] The general substantiation requirements, on the other hand, will not have the same effect, because in that instance a taxpayer need only meet the credible evidence requirement.[56]

C. Maintain Records

A taxpayer must also maintain records as required by the Code in order to obtain the benefit of Section 7491(a).[57] In other words, the taxpayer must maintain records sufficient to substantiate deductions.[58] This requirement is "necessarily a component" of the substantiation

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[51] *See id.* at *8 (noting that you must keep such records as the Secretary may prescribe to substantiate; for example, charitable contributions or entertainment expenses).

[52] *See id.* at *8-9.

[53] *See id.* at *9.

[54] *See id.*

[55] *Id.*

[56] *See id.*

[57] *See id.* at *10.

[58] *See id.*

requirement, even though the terms are not synonymous.[59] As one commentator observed: "One ordinarily may not substantiate without having maintained records, but one may maintain records and not meet the substantiation requirements, particularly the heightened requirements."[60]

D. Reasonable Cooperation

Finally, a taxpayer must reasonably cooperate with the IRS in order to benefit from Section 7491(a). The legislative history defines reasonable cooperation as follows:

> the taxpayer must cooperate with reasonable requests by the Secretary for meetings, interviews, witnesses, information, and documents (including providing, within a reasonable period of time, access to and inspection of witnesses, information and documents within the control of the taxpayer, as reasonably requested by the Secretary). Cooperation also includes providing reasonable assistance to the Secretary in obtaining access to and inspection of witnesses, information, or documents not within the control of the taxpayer (including any witnesses, information, or documents located in foreign countries [and] providing English translations, as reasonably requested by the Secretary).[61]

Note that while a taxpayer is required to exhaust all administrative remedies in order to satisfy the "reasonable cooperation" element (even though the statute is silent on this matter), a taxpayer need not agree to the extension of the statute of limitations.[62]

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[59] *See id.*

[60] *Id.*

[61] *Id.* at *11 (quoting H.R. Rep. No. 105-599 (1998) (Conf. Rep.); S. Rep. No. 105-174 (1998)).

[62] *See id.*; *see also* Joint Committee on Taxation, *supra* note 33, at *3; Kafka, *supra* note 10, at 135.

V. Criticisms of the IRS Restructuring Legislation

A. General Criticisms of the IRS Reform and Restructuring Act

Some commentators criticize Congress for drafting the Act during the emotionally-charged hearings on IRS abuse,[63] claiming the "anti-IRS" atmosphere resulted in legislation that will damage tax administration.[64]

Others attack Congress for falling short of "its promise for sweeping reform," claiming that the benefits provided in the new law are riddled with exceptions and not worth the exorbitant cost.[65] Indeed, the new laws will cost the Treasury nearly $13 billion over the next ten years, primarily because the taxpayer rights provisions included in the legislation will make it harder for the IRS to collect taxes.[66]

Still others believe the complexity of the tax laws and not the IRS are the real blame for taxpayer difficulties and frustration and thus criticize the Restructuring and Reform Act's failure to "simplify the already unwieldy [Internal Revenue Code]."[67]

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[63] *See* Wiseman, *supra* note 9, at 10A (citing a similar comment from former IRS Commissioner Donald Alexander).

[64] *See id.*; *see also* Tigue Jr., *supra* note 42, at 3: "Riding the wave of anti-IRS sentiment stirred up by the public shaming of the Internal Revenue Service during recent Senate Finance Committee Hearings into its various real and perceived abuses, lawmakers promised widespread legislative reform of the IRS, including its practices and procedures."

[65] Tigue Jr., *supra* note 42, at 3.

[66] *See* Wiseman, *supra* note 9, at 10A.

[67] Tigue, *supra* note 42, at 3; Welch, *supra* note 5, at 1A; Gary Klott, *A Kindler, Gentler IRS? Well, Maybe Someday*, CHI. TRIB., July 30, 1999, at C5.

B. Criticisms of the Burden of Proof Legislation

While politicians have collaborated with the mainstream media to proclaim the new burden of proof legislation "a great victory for the American taxpayer,"[68] numerous practitioners and professors alike have offered the following criticisms:[69]

1. <u>The New Law Will Prove Inapplicable to Many Taxpayers</u>

According to Tax Court Chief Judge Mary Ann Cohen and IRS Assistant Chief Counsel Deborah A. Butler, rarely does a case turn on the burden of proof, such an issue becoming relevant only where the "evidence is evenly balanced."[70] Others note that most IRS actions are done outside of or prior to any court proceeding.[71] As a result, Cohen, Butler, and other critics believe this new legislation will prove inapplicable to many taxpayers.[72] Butler questions why Congress felt it necessary to change the law in the first place considering that "less than one percent of all audits will end up in court and be eligible for the burden shift."[73]

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[68] Gita Khadiri, *The Burden of Proof in Court Proceedings Under IRC Section 7491: Separating Fact from Fiction*, available in WESTLAW, 39 TMM 391, at *1 (1998). Another commentator notes that the IRS will now have to "behave more like a customer-oriented company than a thuggish law enforcer." Jacob M. Schlesinger, *Taxes: IRS Reform Bill Could Change a Dread Ritual*, WALL ST. J., October 23, 1997, at B1.

[69] *See, e.g.*, Tigue, *supra* note 42, at 3 (noting that the general consensus among practitioners and professors is that Section 7491 is overrated).

[70] Stratton, *supra* note 20, at *2. *See also* Mary Ann Cohen, *Burden-of-Proof Provision Could Spur Disputes, Tax Court Chief Judge Says*, available in WESTLAW, 98 TNT 12-58, at *4 (1998) (discussing a December 19, 1997 letter to Senate Finance Committee Chair William V. Roth, R-Del., and Finance ranking Democrat Daniel Patrick Moynihan of New York); Herman, *supra* note 26, at A1; Burgess J.W. Raby & William L. Raby, *Tax Practitioners and Burden of Proof*, available in WESTLAW, 98 TNT 156-71, at *8 (1998) (noting that [t]he facts and not the burden of proof will decide the outcome 98 times out of 100).

[71] *See* John Cunniff, *Taxpayer, the Burden of Proof May Still be Yours: IRS Has Broad Powers Despite Reform Bill*, ASHEVILLE CITIZEN-TIMES, November 16, 1997, at C8. Cunniff notes the following can be accomplished by the IRS without court action: "audit[s] and any administrative action, every appeal, every collection case involving wage levies, bank levies, property seizures, tax liens and business closures." *Id.*

[72] *See* Cohen, *supra* note 70, at *3; Stratton, *supra* note 20, at *3.

[73] Stratton, *supra* note 20, at *3.

2. Issues of Statutory Interpretation Will Arise and Damage the Litigation Process

Dan Pilla, a tax litigation consultant and author of numerous books on the IRS, goes so far as to denounce the burden of proof provision as "an elaborate legislative hoax" which may raise more disputes and questions of interpretation than it will resolve.[74] Issues of statutory interpretation would necessitate mini trials in order to determine whether or not "the taxpayer has met the statutory predicate to shifting the burden of proof to the Commissioner, including the meaning of 'full cooperation,' 'reasonable period of time,' and what is a 'reasonable request' on the part of the IRS."[75] This, in turn, would expand the scope of litigation and likewise increase litigation costs for both the government and the taxpayer.[76]

3. The Burden of Cooperation May Outweigh the Benefit of a Burden Shift

In light of the above, there may be some instances where the burden of cooperation may outweigh the benefit of a burden shift. Critics warn taxpayers that in making the decision to pursue the burden shift, some factors should be taken into consideration. For instance, unlike the prior law which required the taxpayer to prove liability in court,[77] liability under the new rule

[74] Cunniff, *supra* note 71, at C8 (Pilla believes that the law empowers the IRS "to make an endless stream of demands"). *See also* Cohen, *supra* note 70, at *3. One commentator has noted: "When you have a pure question of fact, it may not be that difficult to figure out how the burden-of-proof shift is going to work. When you have a mixed question of law in fact, I predict that the issue will get a little messy." *Edited Transcript of the July 31, 1998 ABA Exempt Organizations Committee Meeting*, *supra* note 17, at *6 (remarks made by Steve Arkin, associate tax legislative counsel for the ABA Section of Taxation). Another commentator has noted that "[i]t is not good for the development of the law to relegate Tax Court judges, an important part of whose job it is to clarify murky and complicated issues of law, to mere fact-finders." Sheppard, *supra* note 15, at *5.

[75] Saltzman, *supra* note 32, at *2. The complications surrounding the new burden shift rule may increase the tax practitioner's exposure to malpractice claims. *See* Raby & Raby, *supra* note 70, at *8.

[76] *See* Saltzman, *supra* note 32, at *2-3.

[77] *See Excerpts from IRS Description of Impact of IRS Reform Act with Actions Necessary to Implement Specific Provisions*, *supra* note 18, at *3.

will hinge to some extent on communications during the audit.[78] Also note that under prior law the IRS would not probe as deeply into a taxpayer's life since the taxpayer was in control of what evidence he or she produced for the court.[79] Now, despite the IRS's assurances to the contrary,[80] many believe it is perfectly plausible, and quite likely, that the revenue agents' requests for interviews and documents will increase in order for the government to document a taxpayer's lack of cooperation.[81] Thus, some feel that the cooperation element will provide the IRS greater leverage in obtaining information from the taxpayer.[82]

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[78] *See id.*

[79] *See* Peter L. Faber ET AL., *Another Tax Attorney Opposes Burden-Shifting Provision,* available in WESTLAW, 98 TNT 29-46, at *2 (1998).

[80] *See Burden of Proof Shift to IRS is No Panacea, supra* note 18, at *2. IRS Assistant Chief Counsel Deborah A. Butler notes that many taxpayers will misunderstand this new rule without grasping its limited scope and she urges taxpayers to recognize that careful recordkeeping and cooperation with the IRS is highly recommended. *See* Stratton, *supra* note 20, at *3. Butler nevertheless cautioned agents while this change should not make audits more intrusive they should develop the facts and document taxpayer cooperation carefully. *See id.* at *4. Butler assures that "[t]he new provision does not mean the IRS will now routinely conduct greatly expanded and exhaustive audits to ensure that if a case ever reaches litigation the agency will be certain to have sufficient evidence to carry its burden of persuasion." *Id.* at *3. Butler continued: "[t]he extent of audits should not change significantly in most cases because taxpayers effectively retain the burden of production." *Id.* Nor does Butler contend that that the burden of proof shift will impact the level of discovery expected in tax litigation. *See id.*

[81] *See* Raby & Raby, *supra* note 70, at *8.

[82] One commentator suspects that:

> the auditors will have to spend much more time digging into a taxpayer's records and, hence, his or her life to develop the facts necessary to meet the government's burden of proof. The result will be an audit process that is infinitely more annoying to taxpayers and violative of their privacy than is the present system. If the purpose of the proposal is to make life easier for taxpayers, I suspect that it will have the opposite effect.

Faber ET AL., *supra* note 79, at *2.

Still other concerns loom:

> It would appear likely that the fact-finding necessary for the court to decide a preliminary motion to determine that the burden of proof has shifted . . . would be so substantial that a court is likely to have the trial proceed and defer decision on the burden-of-proof question until writing the opinion. Not knowing how the court will hold on the burden question, the taxpayer's attorney will have to put on as full a case as if the taxpayer did have the burden. Thus, the burden-shift provision will not reduce, but will possibly increase, the time and thus the expense of trying and briefing tax cases.

Raby & Raby, *supra* note 70, at *5.

4. This Republican Idea Will Benefit Small Business at the Expense of Others

Other commentators like Eric Zorn of the Chicago Tribune criticize Republicans for maintaining that such a provision is necessary for the protection of "middle-income 'working men and working women.'"[83] Zorn suggests these men and women are not as desperate for protection as Republicans would like you to believe; annual reports indicate that the IRS audits less than 1 percent of those who report incomes between $25,000 and $100,000.[84] Less auditing of this group takes place for two reasons: (1) the wages, interest, and dividend income of the "working men and working women" are reported directly to the federal government and (2) these men and women file short, straightforward returns. Thus, as a result, their likelihood of error or non-compliance is minimal.[85]

While the IRS estimates that 99 percent of all wage income is properly reported, "only 83 percent of rent and royalty income, 72 percent of income from the sale of business property and 68 percent of business owners' income are properly reported."[86] Thus, according to Zorn, the taxpayers who make the most money are often more likely to cheat on their tax returns.[87] In

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Finally, the fact that complete cooperation may result in the revenue agent's discovery of adverse facts which prior to cooperation might never have been suspected is yet another concern. *See* Raby & Raby, *supra* note 70, at *7.

[83] Eric Zorn, *For Tax Cheats and the Rich, Dole's Your Man*, CHI. TRIB., Aug. 8, 1996, at N1. Some even feel that Republicans pushed the burden of proof legislation idea as leverage to make a compromise on IRS overhaul more difficult. *See* Schlesinger, *supra* note 6, at A24.

[84] *See* Zorn, *supra* note 83, at N1.

[85] *See id.*

[86] *Id.* Current numbers indicate, however, that most people, relatively speaking, comply with the tax Code. *See* Wiseman, *supra* note 9, at 10A. Statistics for 1996 indicate that the IRS processed 118 million individual tax returns, of which it audited 1.5 million, or roughly 1.3%. *See id.* Only 26,000 cases are filed every year in federal tax court. *See id.*

[87] *See* Zorn, *supra* note 83, at N1.

fact, the IRS estimates that the problem of unreported income lies not with the middle-class "working men and working women" but with independent business people who account for approximately $40 billion in underreported business income, 40 percent of that attributed to small-business owners.[88] Zorn contends that because the hard-working middle-income worker rarely entangles himself or herself with the IRS in contrast to the rich tax cheat the new burden of proof law provides them little benefit, if any.[89] Rather, as other critics contend, "most of the benefits of the new [burden of proof] law will . . . likely fall to small-business owners and independent contractors -- which is the main reason Republicans, heavily dependent on small business for support, started pushing for I.R.S. reform in the first place."[90]

5. Section 7491 Decreases Revenues; Congress' Plan to Replace Lost Revenue is Faulty

The cost of Section 7491 has spawned even more concern. Congress's Joint Committee on Taxation expects that the new provision will cost the Treasury approximately $953 million over five years[91] and about $2.7 billion over ten years.[92] An anticipated increase in settlements is the main reason for the expected loss in revenue.[93]

Even critics of the IRS admit that the new law creates a problem with regard to replacing the lost revenue.[94] Some feared the passage of this law would require unpopular tax hikes.[95]

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[88] *See* Fred Brock, *Off the Rack*, N.Y. TIMES, July 19, 1998, at § 3, page 8.

[89] *See* Zorn, *supra* note 83, at N1.

[90] Brock, *supra* note 88, at § 3, page 8. Middle- and working-class taxpayers with small claims who must battle the IRS will need lawyers to satisfy their burden of production in order to ultimately shift the burden of proof. *See* Cohen, *supra* note 70, at *5.

[91] *See 2 Houses Near Dear Deal on IRS Overhaul*, CHI. TRIB., June 19, 1998, at C1.

[92] *See* Tom Herman, *Preparing Your Return: Many Myths Can Bedevil A Taxpayer*, WALL ST. J., Feb. 23, 1999, at C1.

[93] *See* Herman, *supra* note 92, at C1.

However to replenish the Treasury, Congress settled on a plan which involves new legislation concerning Roth IRAs.[96]

Under the new law, older taxpayers will have an easier time converting a traditional individual retirement account (IRA) into a Roth IRA.[97] Under prior law, taxpayers who withdrew money out of traditional IRAs would be treated as having income.[98] This income would render them ineligible for Roth IRAs if it pushed them over a $100,000 limit.[99] However, under the new law, such money does not count as income for purposes of the $100,000 ceiling.[100]

As a result, Congress expects many taxpayers to pursue such an option considering that money invested in Roth IRAs, unlike that invested in traditional IRAs, grows tax-free.[101] This will result in a short-term windfall for the Treasury as taxpayers withdraw money from traditional IRAs and pay taxes on the withdrawals in order to establish a Roth IRA.[102] Over the long run, however, this change will prove costly because, as mentioned earlier, Roth IRAs are tax-free.[103]

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[94] *See* Schlesinger, *supra* note 6, at A24.

[95] *See id.*

[96] *See* Wiseman & Welch, *supra* note 9, at 7A.

[97] *See id.*

[98] *See id.*

[99] *See id.*

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See id.*

6. Section 7491(a) Will Encourage Dishonest Taxpayers

Both Kenneth J. Kies, former Joint Committee on Taxation Chief of Staff, and John E. Chapoton, former Treasury assistant secretary for tax policy, contend the biggest problem with the burden shift is ensuring that the provision is not "'oversold.'"[104] Kies notes that in many cases the only issues in dispute are legal issues; yet, Kies believes that most people don't understand the burden shift will only affect questions of fact in dispute.[105] Some are concerned that dishonest taxpayers will be encouraged to flout the system if they are under the impression that the government must now prove them wrong.[106] This concern is likewise accompanied by the fear that this will undermine the tax collection process and thus raise the tax burden on the majority of working people who regularly pay their share.[107]

VI. A DEFENSE OF THE NEW BURDEN OF PROOF PROVISION[108]

Despite the above concerns, the author proffers the following defense of Section 7491(a):

1. The Law Will Benefit the Majority of Taxpayers By Increasing Favorable Settlements

To support their argument that the law will not affect many taxpayers, critics carelessly cite: (1) the fact that this provision affects the burden of proof in *court proceedings* and (2) the

[104] *See* Sheryl Stratton, *Kies Defends Burden-Shifting Proposal*, available in WESTLAW, 98 TNT 51-6, at *3 (1998).

[105] *See* Stratton, *supra* note 104, at *2.

[106] *See* Faber ET AL, *supra* note 79, at *2.

[107] *See* Schlesinger, *supra* note 6, at A24.

[108] Note that 7491(c) may have a huge impact on estate and gift tax valuation issues. *See* Jerry A. Kasner, *Why Burden-of-Proof Rules Will Affect Valuation Issues*, 98 TNT 200-41 (1998). But the author will not focus on this in order to remain consistent with the paper's focus on 7491(a).

fact that more taxpayers choose settlement over litigation. However, what the critics fail to recognize is that because the burden of proof provision imposes a litigation risk on the IRS, a more conducive climate for settlements will result[109] which in turn benefits all taxpayers in light of the proclivity for settlement.[110]

2. <u>The Benefits of Section 7491 Outweigh the Fears of a Statutory-Interpretation Morass</u>

The benefits thus reaped by the majority of taxpayers from the new burden of proof provision outweigh any fears of a statutory-interpretation morass. Besides, the statutory interpretation issues arising from this law appear no more significant than those arising under any other new law.

3. <u>Section 7491(a) Will Not Make the IRS More Aggressive</u>

The author also contends that the new burden of proof provision will not make the IRS more aggressive. In support of such contention, the author cites IRS Chief Counsel Stuart L. Brown who recently declared that the IRS "would 'play down the middle' and not ordinarily challenge the shift in the burden of proof 'unless there was good reason to do so.'"[111] Even if

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[109] *See* Schlesinger, *supra* note 6, at A24 (noting that "the way in which cases get settled out of court is influenced by how difficult one believes it's going to be to litigate it."). Tax attorneys will be able to settle cases more easily and on terms more favorable to the taxpayer because now the taxpayer can prevail upon (1) a showing strong enough to satisfy the burden of production and (2) the failure of the government to prove each fact of the case by a preponderance. *See id.* Other commentators note that appeals officers "give more weight to burden of proof than do IRS litigators or Tax Court judges." Raby & Raby, *supra* note 70, at *8. As noted earlier, the taxpayer bears the burden of persuasion, under heightened substantiation requirements, to demonstrate the validity of a deduction. *See* Clukey, *supra* note 11, at *21. Thus, if the Treasury, pursuant to its rightful power to do so, promulgates additional substantiation requirements, the strategic benefits resulting from a shift in the burden of persuasion would be lost. *See id.* at *3, 22.

[110] Thus, contrary to the IRS' belief that a successful shift will only affect a case where the evidence is evenly balanced, the statute gives taxpayers a strategic advantage compared to prior law, provided no heightened substantiation requirements are involved. Even if the statute benefits taxpayers only in the rare case where the evidence is equally balanced, at least some risk will have been placed on the government, thus allowing taxpayers some leverage at the negotiating table. *See* Clukey, *supra* note 11, at *22.

[111] *IRS Chief Counsel Describes Fundamental Changes Made at IRS, Challenges that Lie Ahead*, available in WESTLAW, CCH Tax Day: Federal, at *2, Sept. 28, 1998.

the IRS chooses to challenge the shift "[g]ood auditing and good litigation practice, similar to most determinations in the past, will ordinarily produce sufficient evidence to sustain the burden of proof."[112]

4. Criticism of the Republicans and Small Business Owners is Misplaced

The author agrees with those critics who believe that complicated tax laws are the real blame for taxpayer difficulties and frustration.[113] However, the author finds it offensive that these same critics then refer to IRS estimates of underreported income as "proof" that small business owners cheat on their taxes while ignoring the possibility that such a discrepancy arises because small business owners are just as confused by the tax Code as others.[114] It seems plausible that small business owners account for a larger percentage of underreported income because they, unlike the working class, are entitled to more deductions in the face of numerous complex business and tax planning options. As a result, small business owners bear a higher risk of miscalculation, thus partly explaining the subsequent underreporting of income.

Even so, the fact that the Reform and Restructuring Act does nothing to address the complexity of the tax Code should not result in criticism of the Act itself. Instead, commentators should criticize the tax-and-spend liberals who are not willing to compromise spending levels for fear of jeopardizing their chances for re-election.

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[112] *Excerpts from IRS Description of Impact of IRS Reform Act with Actions Necessary to Implement Specific Provisions*, *supra* note 18, at *2, 3.

[113] *See* Tigue, *supra* note 42, at 3; Welch, *supra* note 5, at 1A; Klott, *supra* note 67, at C5.

[114] Current numbers indicate, however, that most people, relatively speaking, comply with the tax Code. *See* Wiseman, *supra* note 9, at 10A. Statistics for 1996 indicate that the IRS processed 118 million individual tax returns, of which it audited 1.5 million, or roughly 1.3%. *See id.* Only 26,000 cases are filed every year in federal tax court. *See id.*

5. Section 7491(a) Will Not Embolden Dishonest Taxpayers

The author also dismisses the concern that this law will embolden dishonest taxpayers, believing instead that the new law will actually encourage compliance[115] as more and more taxpayers feel the system is not as weighted against them.[116] The author finds it hard to imagine that the majority of Americans, after years of IRS oppression, will fear the ramifications of non-compliance any less than they do now.

6. Criticism of Section 7491(a) Stems from a Fear of Future Reform Legislation

Finally, the author believes that most of the criticism proffered stems from a fear of what reform legislation lies on the horizon. Such reform remains a strong possibility assuming Republicans continue their control of Congress.[117]

In fact, Republicans hope to use the framework of the Restructuring and Reform Act as a springboard for greater reform and expanded taxpayer rights, possibly even eliminating the entire income-tax system and replacing it with a flat tax, a national sales tax or some other alternative.[118] Because these reforms, in turn, could put some tax practitioners out of a job, one can understand the evident hostility toward the Restructuring and Reform Act.

[115] Defenders of the new law agree that shifting the burden of proof in tax cases will end the inconsistency by which "criminals [were] innocent until proven guilty but taxpayers [were] not." Stratton, *supra* note 104, at *1, 2.

[116] It is for that reason, the author is willing to part from the "age-old principle that the burden should generally rest with the party who has control of the facts and records -- in this case, the taxpayer." Schlesinger, *supra* note 6, at A24.

[117] Representative Charles B. Rangel, D-NY, reluctantly concedes that "this is only a first step" in overhauling the IRS. Stevenson, *supra* note 3, at A1.

[118] *See* Robert J. Alter, *Strengthening the Taxpayer's Hand: The IRS Restructuring and Reform Act of 1998*, 154 N.J. Law J. 696 (1998).

CONCLUSION

Congress enacted the new burden of proof provision in order to remove disadvantages to individuals and small business taxpayers forced to litigate with the IRS that were present under the prior law.[119] This shift in the burden of proof according to the IRS is only a shift in the burden of persuasion while the burden of production remains with the taxpayer.[120]

While politicians and the media claim Section 7491(a) to be a victory for taxpayers, tax practitioners raise numerous criticisms. However, these concerns can be readily dismissed. To begin with, because the burden of proof provision imposes a litigation risk on the IRS, a more conducive climate for settlements will result which in turn benefits all taxpayers in light of the proclivity for settlement. These benefits in turn outweigh any fear of a statutory-interpretation morass.

Commentators also note that this shift in the burden of proof may lead to more intrusive audits and more intrusive requests for discovery, since the IRS will have to locate supporting witnesses and documents.[121] However, the image of the IRS issuing more trial subpoenas to the public seems inconsistent with the inspiration of the legislation.[122]

While fears also remain that the law will mislead taxpayers into thinking the burden is always on the Service both in and out of court,[123] thus encouraging greater noncompliance,[124]

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[119] *See* Joint Committee on Taxation, *supra* note 33, at *3; *see also* Roth, Jr., *supra* note 18, at *3.

[120] *See* Clukey, *supra* note 11, at *3, 6.

[121] *See* Robb, *supra* note 1, at 1102, 1103.

[122] *See id.* at 1103.

[123] *See New Law Revamps IRS but Doesn't Stop There*, *supra* note 12, at 67.

[124] *See id.*

the new law will actually encourage compliance as more and more taxpayers feel the system is not as weighted against them. Thus, while the effects of the new law remain to be seen, it is likely that the law, despite its numerous critics, will provide many benefits to a large number of taxpayers.