Written Statement

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"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"

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I. Introduction

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at The George Washington University Law School, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the options available to Congress in addressing the alleged misconduct of IRS Commissioner John Koskinen.

Since today's hearing is focused on the options rather than the merits of congressional action against Commissioner Koskinen, I will be solely addressing the range of remedies available to the Congress under the Constitution. Having served as lead counsel before the Senate in an impeachment trial and represented the House of Representatives as an institution in a federal challenge to executive overreach, I do not take such remedies lightly. Congress, however, is facing an unprecedented erosion of its authority vis-à-vis the Executive Branch. The increasing obstruction and contempt displayed by federal agencies in congressional investigations reflects the loss of any credible threat of congressional action. Congress has become a paper tiger within our tripartite system—a branch that often expresses outrage, yet fails to enforce its constitutional authority. The rise of a dominant and increasingly unchecked executive branch has resulted in a dangerous shift of power in our system. The vacuum left by years of passivity by Congress has left the system unstable and often dysfunctional.

Without delving into the details of the current controversy, the underlying allegations are manifestly serious. Various groups have accused the Obama Administration of effectively weaponizing the IRS to target critics, particularly Tea Party groups. The use of the IRS to target political opponents is expressly prohibited, and President Obama himself has called the targeting of such groups by the IRS outrageous:

> "It's inexcusable and Americans are right to be angry about it. I will not tolerate this kind of behavior in any agency, but especially the IRS, given the power that it has and the reach that it has into all of our lives."[1]

Thus, the investigation by Congress into the IRS is recognized as being based on an alleged core violation of federal law and is a legitimate matter for congressional investigation. As part of its Article I powers, Congress has a right to obtain documents and information from responsible officials. Commissioner Koskinen stands accused of lying to Congress and actively obstructing a congressional investigation. While I will assume these allegations are true for the purposes of constitutional analysis, let me stress that I do not have a dog in this fight. I have testified for both parties in the past and, while I voted for President Barack Obama, I have criticized every president in my adult life for executive overreach, including both President George W. Bush and President Barack Obama. Yet, in seeking evidence from the IRS, Congress was engaged in a well-founded exercise of its investigative authority and that investigation was obstructed in terms of misleading statements and lost or missing evidence. I will proceed from that standpoint in exploring the scope and basis for the different options for Congress.

I have previously written,[2] testified,[3] and litigated[4] in the area of impeachment. I have also written about what I view as a rapid and dangerous diminishment of

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[1] Statement of President Barack Obama, The White House, May 15, 2013 (available at https://www.whitehouse.gov/the-press-office/2013/05/15/statement-president).

[2] Jonathan Turley, *"From Pillar to Post": The Prosecution of Sitting Presidents*, 37 AM. CRIM. L.REV. 1049 (2000); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1 (1999); Jonathan Turley, *The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791 (1999); Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735-790 (1999) (Symposium); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439 (1999) (Symposium); *see also* Jonathan Turley, *Five Myths About Impeachment*, Washington Post (Sunday), August 3, 2014.

[3] United States Senate, Senate Impeachment Committee, Pre-Trial Motions and Issues in the Impeachment of Judge Thomas Porteous, August 4, 2010 (testimony of Jonathan Turley, lead counsel to Judge Porteous); United States House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, on "The Background and History of Impeachment," November 9, 1998 (testimony of Jonathan Turley); United States Senate, Committee on the Judiciary, Subcommittee on Constitution, Federalism, and Property Rights on "Indictment or Impeachment of the President," September 9, 1998 (testimony of Professor Jonathan Turley).

[4] Senate Trial, Impeachment of Judge Thomas Porteous (lead counsel Jonathan Turley); United States Senate, Senate Impeachment Committee, Pre-Trial Motions and Issues in the Impeachment of Judge Thomas Porteous, August 4, 2010 (testimony of Jonathan Turley, lead counsel to Judge Porteous).

congressional authority in our system.[5] Through years of congressional passivity and acquiescence, presidents have acquired the very concentration of power that the Framers expressly warned against in the drafting and ratification of our Constitution.[6] This shift of power has also coincided with the rise of a "Fourth Branch" of federal agencies that exercise increasingly unilateral and independent powers.[7] The controversy over Commissioner Koskinen falls at the very crossroads of expanding executive power, diminishing congressional authority, and the rise of the Fourth Branch. Indeed, it embodies the current crisis perfectly in an agency refusing clear and proper congressional oversight demands.

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[5] The President's Constitutional Duty to Faithfully Execute the Laws *Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Jonathan Turley). I also testified in 2012 on the controversy surrounding these recess appointments. *See Executive Overreach: The President's Unprecedented "Recess" Appointments Before the H. Comm. on the Judiciary*, 112th Cong. 35-57 (2012) (statement of Professor Jonathan Turley)

[6] *See* Jonathan Turley, *A Fox In The Hedges: Vermeule's Optimizing Constitutionalism For A Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Jonathan Turley, United States House of Representatives, Committee on the Judiciary, "Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution," May 30, 2006.

[7] *See* United States Senate, Committee on Homeland Security and Governmental Affairs, "*The Administrative State: An Examination of Federal Rulemaking,*" April 20, 2016 (testimony of Professor Jonathan Turley); "*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*," United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, March 15, 2016 (testimony of Professor Jonathan Turley); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Professor Jonathan Turley); *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (prepared statement of Professor Jonathan Turley); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Professor Jonathan Turley); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Professor Jonathan Turley). *See also* Turley, *Madisonian Tectonics, supra*, 83 GEO. WASH. L. REV. at 305; Turley, *A Fox in the Hedges, supra*, 93 B.U. L. REV. at 1523; Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Turley, *Constitutional Adverse Possession, supra*, 2013 WIS. L. REV. at 965.

What is most notable, and alarming, about the current state of our government is that private litigants like Judicial Watch have been more successful in securing information from the Administration than the United States Congress. Thus, the relatively weak Freedom of Information Act (FOIA) has proven more effective than Article I of the Constitution in forcing disclosures about alleged governmental misconduct. That is a state of affairs that the Framers would never have anticipated, nor condoned. The Administration has effectively foreclosed avenues like the referral of criminal contempt and other sanctions that should be imposed for providing misleading statements to Congress. That leaves Congress with "nuclear options" in seeking to bring this agency to heel. In my view, Congress should not shy away from such a conflict with an agency refusing to cooperate with a congressional investigation.

The current controversy shows vividly the lack of functional deterrence for executive overreach in today's imbalance of power. In economics, deterrence is often achieved by balancing of the rate of detection with the level of a sanction. A rational actor considers both the chances of detection *and* the expected penalty from misconduct. As the rate of detection increases, a lower sanction is needed to reach the optimal level of deterrence. Conversely, when detection is low, sanctions are often increased to achieve the same level of deterrence. What is fascinating is that, in the constitutional setting, the level of detection in these types of conflicts is near one hundred percent—at least for high-profile controversies. When a president exceeds his authority, or a federal agency obstructs Congress, there are often political critics and media reports to flag the violation. The penalty for such violations, sadly, has become more rhetorical than actual. Thus, under the same rational actor theory, there is little reason for an agency to cooperate, much less take difficult actions to conform to congressional demands. The agency head is often looking at potentially high political or legal costs in complying with Congress, while refusing to cooperate avoids those costs at little risk of sanction or penalty. The decision for the rational agency actor is easy: do not cooperate with Congress, unless the cooperation itself carries benefits.

Congress does have the ability to fight back and regain the authority that it has lost. Its remedies include classic legislative measures directed at the executive branch to force compromise, measures such as appropriation denials, legislative showdowns, confirmation delays or denials, and oversight investigations. However, these measures have lost much of their effectiveness in the last few decades. There are also measures that are directed at individual officials who are committing violations, including impeachment, contempt proceedings, censure, and fines. In my view, all of the latter options are available to Congress as a constitutional matter in the Koskinen controversy. Indeed, as the authority of Congress is curtailed vis-à-vis the President and federal agencies, these individualized measures become more compelling as a vehicle of reasserting congressional checks and balances.

II. The Constitutional Options Available To Congress In Responding To Official Misconduct or Contempt.

The very heart of our constitutional system is the Separation of Powers doctrine. The Separation of Powers sought to combat the central, overriding danger foreseen by the Framers: the concentration of power in one person or one branch. To achieve balance

between the branches, the Framers gave each branch essential powers to protect its inherent powers. In Federalist No. 51, James Madison explained the essence of the separation of powers—and the expected defense of each branch of its constitutional prerogatives and privileges:

> "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

While Madison had a very practical view of political and factional interests, he did not anticipate the degree to which partisan affiliation would overwhelm institutional interests in modern politics. He assumed that "ambition" would work to defend the institutional prerogatives of each branch. That has certainly been the case with the Executive Branch, which has historically resisted any encroachment of Article II powers while actively seeking to usurp traditional legislative powers. Conversely, Congress has become passive in the assertion of its own authority, particularly in the last few decades. The degree to which members of Congress have become the agents of their own obsolescence is staggering. Members now routinely applaud their own circumvention, and oppose efforts to force officials to conform to the system of checks and balances.[8]

The defining power given to Congress within this system is the power of the purse. While the President may control the machinery of the state, it is Congress that supplies the gas needed to run those machines. The power of the purse, however, has become something of a constitutional myth in modern government. Presidents know that Congress is unlikely to cause a cascading failure by cutting off all funding for an agency or even a sub agency office. More importantly, the Executive Branch routinely moves billions of dollars around in discretionary or undesignated funding. Cutting off funding to a given part of the government does not have immediate impacts, and may in fact not prevent funding as intended. An example that I have previously discussed is the health care budget. As the *Washington Post* reported, "[t]he Obama administration plans to use $454 million in Prevention Fund dollars to help pay for the federal health insurance exchange. That's 45 percent of the $1 billion in Prevention Fund spending available [in 2013]."[9] Even leading Democratic members denounced this act as "a violation of both

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[8] It was not long ago that Congress fought jealously for its institutional rights. Thus, during the Reagan Administration, the Congress held EPA Administrator Anne Gorsuch Burford in contempt for failing to turn over documents related to the Superfund program. HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, CONTEMPT OF CONGRESS, H.R. REP. NO. 968, 97th Cong., 2d Sess. 7 (1982). The documents were eventually turned over and Burford resigned. Rita Lavelle, who headed the Superfund program, was also held in contempt in 1983 and later indicted for lying to Congress. She was sentenced to six months in jail. Cass Peterson, *House Finds Rita Lavelle in Contempt*, Wash. Post, May 19, 1983.

[9] Sarah Kliff, *The Incredible Shrinking Prevention Fund*, WASH. POST, April 9, 2013.

the letter and spirit of this landmark law."[10] However, that open disregard of the power of the purse resulted in nothing of consequence for the Administration. Likewise, when President Obama declined to ask Congress for authority to go to war in Libya, the Administration funded an entire military campaign by shifting billions in money and equipment without asking Congress for a cent. President Obama not only said that he alone would define what a war is in circumvention of the declaration power, but also unilaterally funded the war as just another discretionary expense. Federal appropriations have become so fluid, and discretionary spending so lax, that presidents are now more insulated than ever before from the threat of de-funding. This is not to say that the power of the purse has no potential hold on Administrations. Congress needs to be more specific on the use of funds, while also reducing the degree to which funds are given for discretionary uses, particularly during periods of circumvention and tension.

Congress has also found that direct legislative action is often unavailing when an administration is already circumventing Congress. Moreover, courts routinely bar access to judicial review through artificially narrow standing rules. When such measures are thwarted, Congress often must consider more direct action against federal officials who violate the law.

A. Contempt Sanctions.

One of the most disturbing areas of erosion of congressional remedy is the effective loss of the ability to hold executive officials in contempt without the approval of the Administration.[11] The Justice Department has declined to submit contempt cases to the grand jury in the cases of Environmental Protection Agency Administrator Anne Gorsuch Burford (1982), White House Counsel Harriet Meirs (2008); White House Chief of Staff Joshua Bolten (2008), and Attorney General Eric Holder (2012). The case against former Attorney General Eric Holder is a prototypical example. The current Administration refused to turn over material to oversight committees, and the House moved to hold Holder in contempt. In my view, this was in flagrant contempt of Congress. The Justice Department however blocked any prosecution of its own Attorney General—refusing to even submit the matter to a grand jury. Thus, while the executive branch has long insisted that only it can prosecute such offenses, it has used this authority to block its own investigation or prosecution. The Administration then tried to block any lawsuit by Congress to enforce a subpoena against Holder.[12] This case is another

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[10] Statement of Sen. Tom Harkin, *The Importance of the Prevention Fund to Save Lives and Money*, May 7, 2013 ("Mr. President, I was deeply disturbed, several weeks ago, to learn of the White House's plan to strip $332 million in critical funding from the Prevention and Public Health Fund and to redirect that money to educating the public about the new health insurance marketplaces and other aspects of implementing the Affordable Care Act.")

[11] I previously discussed the need to revisit contempt procedures and powers in the Senate Judiciary hearing on the nomination of Attorney General Loretta Lynch. *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Professor Jonathan Turley).

[12] *See Comm. on Oversight and Gov't Reform v. Holder*, 2013 WL 5428834 (D.D.C.

example of how the executive branch has gutted the oversight power by taking control over all contempt prosecutions.

The blocking of any referral to the grand jury in the Holder matter (and other cases) represents a classic bait and switch. Congress has the right to find officials in "inherent contempt" and actually hold trials to that effect.[13] Indeed, an inherent contempt proceeding was held as recently as 1934.[14] The Justice Department has long bristled at the notion of contempt proceedings handled by the legislative branch, while supporting the use of the criminal contempt process, created in 1857, whereby a house approves a contempt citation, at which point either the Speaker of the House or Senate President certifies the citation to the United States Attorney for the District of Columbia under 2 U.S.C. § 194 (2000). This system is based on assurances from the Justice Department that it would be a neutral agent in advancing such claims. In recent years, however, the Justice Department has shown that it is not fulfilling its duty to be a neutral agent when asked to prosecute officials in its own Administration.

The inherent powers of Congress, while long dormant, remain capable of enforcement. Indeed, the Supreme Court has long recognized the inherent contempt power. In *Anderson v. Dunn*,[15] the Court dismissed a civil action brought by a contumacious witness. The Court noted in a statement, which now seems tragically prophetic, that the denial of such inherent authority would lead:

> … to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the

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Sept. 30, 2013). In *Holder*, the House Committee on Oversight and Government Reform sought to enforce a subpoena seeking information related to the "Fast and Furious" operation by the Bureau of Alcohol, Tobacco and Firearms. Notably, the House of Representatives then passed authorization of the Chairman of the Oversight and Government Operations Committee to initiate the civil lawsuit and the court refused to deny the lawsuit on standing grounds. The Court ruled that "[t]o give the [executive] the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint." *Id* at 8.

[13] This investigatory authority admittedly got off to a rocky start in *Kilbourn v. Thompson*, 103 U.S. 168, 189 (1880), where the Supreme Court questioned "the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges." *Kilbourn*, however, involved a private business venture in which the federal government had invested. That case involved the imprisonment of a businessman, who was later released by a federal court. However, by 1927, in *McGrain v. Daugherty*, , the inherent authority of Congress to pursue such investigations was strongly affirmed in its handling of the Teapot Dome scandal.

[14] MORTON ROSENBERG & TODD B. TATELMAN, CONG. RESEARCH SERV., RL34114, CONGRESS'S CONTEMPT POWER: A SKETCH 7 (2007).

[15] 19 U.S. (6 Wheat) 204 (1821).

> majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every corner of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.[16]

While the courts would curtail inherent contempt authority to keep its use confined to legislative matters,[17] it was affirmed as inherent to the legislative investigatory powers that must be exercised by Congress.

In 1927, the Supreme Court in *McGrain v. Daugherty* reaffirmed the inherent authority of Congress, as well as the insufficiency of having legislative authority without such means of enforcement:

> "While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change, and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period, the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."[18]

This authority includes the prosecution of witnesses who refuse to answer questions or supply information to Congress.[19] The courts have continued to recognize that authority, even as the Executive Branch has assumed effective control over its use.[20]

In one of the most recent confrontations, it was a Democratically controlled House of Representatives that sought prosecution for contempt of Bush Administration officials. Following the dismissal of nine United States Attorneys in 2006, both the House and Senate Judiciary Committees sought testimony and documents to address allegations that the dismissals were politically motivated. While the Bush White House

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16 *Id.*

17 *See, e.g.*, *Marshall v. Gordon*, 243 U.S. 521, 536 (1917).

18 273 U.S. 135, 174-75 (1927).

19 *Sinclair v. United States*, 279 U.S. 263 (1929).

20 *See, e.g., Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) ("In short, there can be no question that Congress a right – derived from its Article I legislative function – to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.").

offered interviews conducted behind closed doors for former White House Counsel Harriet Miers and other officials, it would not agree to transcribed interviews, nor to the release of all of the documents sought by the committees. On June 13, 2007, the House Judiciary Committee issued two subpoenas. The first named Miers to both give testimony and produce documents.[21] The second was directed to White House Chief of Staff Joshua Bolten for the production of documents. President George W. Bush then asserted executive privilege to withhold both the testimony and the documents. That led on July 25, 2007, to the adoption of recommendation for contempt citations for Bolten and Miers by the full House Judiciary Committee and, on February 14, 2008, to a vote of contempt by the full House.[22] After certification by then Speaker Nancy Pelosi of the contempt vote to then United States Attorney for the District of Columbia Jeffrey Taylor, the Attorney General announced that (because the Administration was deemed correct in its use of Executive Privilege), "the [Justice] Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers."[23] This led to the Miers litigation. The refusal to bring the claim to the grand jury captured the breakdown of the agreement between the branches over the use of statutory criminal contempt procedures. The Executive Branch has steadily expanded its view of the Executive Privilege, and even cited its own view to bar the investigation of its own officers.

This same circular process was seen in the Fast and Furious controversy. The Obama Administration claimed that material may be withheld from Congress under a dubious deliberative process claim " regardless of whether a given document contains deliberative content" because release of such material would raise "significant separation of powers concerns." So, the Administration (with the guidance of the Justice Department) first invokes overbroad executive privilege claims and then, when Congress seeks contempt prosecution, it cites its own overbroad executive privilege claims as the basis for refusing to give the matter to a grand jury. What is particularly breathtaking is that the Administration, itself, would confirm the non-privileged status of documents wrongly withheld from Congress, while still insisting that no grand jury could find such conduct the basis for a contempt charge.

The current status of contempt powers in Congress is clearly untenable. In my view, the Justice Department is in flagrant violation of its assurances to Congress in seeking a statutory contempt process. It has taken roughly 200 years since *Anderson v. Dunn*, but the Justice Department has achieved in statutory criminal contempt what the Court feared with regard to inherent contempt: "the total annihilation of the power of the House of Representatives to guard itself from contempts, and leave[] it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it." In gutting the contempt enforcement powers of Congress, the Justice Department has forced Congress to repeatedly consider more extreme measures, including impeachment, for cases that should have been addressed through the contempt process.

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21 *Miers*, 558 F. Supp. 2d at 61.

22 154 Cong. Rec. H962 (Feb. 14, 2008) (registering a final vote of 223 to 32).

23 Letter from Attorney General Michael B. Mukasey to Representative Nancy Pelosi, Speaker of the House 2 (Feb. 29, 2008), online at http://judiciary.house.gov/hearings/pdf/Mukasey080229.pdf (visited Sept 1, 2009).

B. Censure.

When presented with situations of misconduct, but unwilling to vote for impeachment or removal, some members have sought to use the lesser measure of censure. This was the case during the Jackson and Clinton scandals, where members sought to avoid impeachment through such censures. The Constitution does not mention censure as an alternative to impeachment, and the impeachment clause is the only reference to the power of Congress to punish members of the executive and judicial branches. The case for censure has been defended on the notion that the lesser is included in the greater: if Congress can remove an official, it can also take lesser steps like censure in responding to misconduct. To be clear, I do not favor censure measures as part of impeachment proceedings. If wrongdoing is sufficient to justify impeachment, the official should stand trial in the Senate. Censure is something of a "cheat" if it is framed as a type of "impeachment-lite" alternative. Moreover, if the House is proceeding under a derivative of impeachment, the question is whether the other procedures inherent to the impeachment clause also apply. This includes the need for both Houses to act before any measures are taken against an official.

I do not, however, believe that censure should be treated as a creature of impeachment rather than part of the inherent power of Congress. After all, the investigatory powers of Congress and the right to hold individuals in contempt are viewed as inherent authority under Article I. Just as courts have wide inherent powers in dealing with false testimony or obstructive behavior (from fines to referrals to jailing), Congress presumably has a similar range of options. Indeed, it is ironic to see the same Executive Branch officials who have argued for expansive readings of Article II powers object that a vote of censure of a house is impermissible absent express textual authority. Advocates of executive power have little difficulty in finding sweeping implied powers for presidents in carrying out their duties under Article II. Yet, when Congress must use devices like censure or fines to address misconduct in congressional investigation, the Constitution suddenly becomes a strictly textualist matter for those same advocates.

Censure is also consistent with long-standing practices of Congress in carrying out its role in areas of foreign relations and oversight. Both houses regularly express the sentiment of their body on the actions of countries or individuals. Censure is first and foremost a condemnation, a finding of a house that an official has violated his or her duties as a federal officer. A censure is a finding as to an individual's actions as opposed to that of an agency. Unlike a parliamentary vote of "no confidence," a censure vote in the United States does not force a removal from office and does not alone impose a material form of punishment. As such, it is not a power resting in the impeachment clause under Article I, Section 2. Dozens of such measures expressing no confidence, condemnation, "reproof,"[24] or censure have been passed in Congress.[25]

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[24] It was "reproof" that the House used to describe the conduct of President Buchanan for alleged kickbacks in Navy contracts. Congressional Globe, 36th Congress, 1st Sess. 2951 (June 13, 1860) ("*Resolved,* That the President and Secretary of the Navy, by receiving and considering the party relations of bidders for contracts with the United States, and the effect of awarding contracts upon pending elections, have set an example dangerous to the public safety, and deserving the reproof of this House.").

In my view, either house can move to a censure or no confidence resolution at any time. Indeed, should an impeachment fail in the House, or an acquittal occur in the Senate, members could move for such a statement of condemnation to be made in the regular course of business. Ideally, it would not be treated as part of those impeachment or trial proceedings. This may seem a precious distinction, but I believe that it is a valid one. First and foremost, it discourages members from creating *ad hoc* penalties within the context of an impeachment to avoid the serious and difficult decision left to the House under the Constitution. To be frank, my concern is that impeachment votes would go the same way as declarations of war. Once Congress allowed itself to avoid declarations in favor of loosely worded authorizations, the clarity and commitment sought by the Framers for war was lost.

Of course, when faced with such a limited choice, the result may prove highly disadvantageous for the accused. For example, members moved for the censure of U.S. District Court Judge Harold Louderback as an alternative to impeachment in 1933. That move was criticized by Rep. Earl Michener of Michigan, who objected "I do not believe that the constitutional power of impeachment includes censure."[26] Whether the body agreed with the jurisdictional point, or just felt Louderback warranted impeachment, the censure measure was defeated and the House impeached Louderback. Although a case can be made for the "lesser included in the greater" penalty, it is a better practice to separate the two measures. Impeachment in the House is meant to determine if sufficient grounds exist for trial and possible removal. The Senate trial is meant to determine if there is sufficient evidence for conviction and removal. A censure is an act of either, or both houses, to express condemnation as part of their inherent authority. It can be based on the full record, including the record produced in any impeachment proceeding.

Thus, while I have qualms over the use of censure as part of the impeachment process, a vote of censure in my view is well founded as within the inherent powers of Congress. Congress has oversight authority over executive agencies and exercises investigatory authority over violations of federal laws. To say that a house cannot vote to censure federal officials is to suggest that it can never presume to criticize or condemn a president or federal official. For these academics, it is either impeachment or silence. Thus, a house can condemn agencies and it can condemn actions. Yet, it is somehow barred from condemning individuals? Congress represents citizens through legislative findings and actions. To voice the sense of a house on the conduct of either a federal agency or official is a traditional legislative act. It is part of the open and deliberative exchange, not only between the branches, but also between the branches and the American people. Thus, I believe that, if the House finds that Commissioner Koskinen has given false testimony, or obstructed its investigation, or simply engaged in gross

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[25] Jack Maskell & Richard S. Beth, *"No Confidence" Votes and Other Forms of Congressional Censure of Public Officials*, Congressional Research Service 4 (June 11, 2007).

[26] 3 *Deschler' s Precedents of the U.S. House of Representatives* [*Deschler's Precedents*], Ch. 14, §1.3, p. 400 (1977).

mismanagement or negligence, it has the authority to censure him for such alleged misconduct.

C. Fines and Financial Penalties.

Congress can also impose fines or other financial penalties for conduct that does not rise to the level of an impeachable or a criminal offense as part of a statutory scheme or as part of its implied authority. For federal employees, pensions and salaries can be conditioned on neutral and generally applied performance standards. Congress could, for example, pass legislation that denies salary or pension payments to officials found in contempt of Congress. A more difficult question is the imposition of fines for acts of contempt. In my view, a strong argument can be made for such inherent authority. Congress exercises many implied powers necessary to carry out its legislative functions. For example, Congress can compel the appearance of witnesses and the production of documents, despite the lack of any express authority under Article I for such measures.[27] As noted above, Congress retains the power to prosecute contempt, and once exercised, also retains its right to jail violators. Given the history and recognized functions, the analogy to the implied court powers is compelling.[28] Like courts, Congress could claim the same inherent authority in dealing with obstructive or contemptuous conduct. Fines, moreover, would appear well within the scope of congressional power previously accepted by the courts. I have strongly encouraged Congress to hold a comprehensive hearing on both creating new means for addressing contempt as well as exploring long dormant means. Ideally, Congress would deal comprehensively with such powers, including the loss of contempt prosecutions, as part of a long-overdue examination of this area with a possible eye toward legislation.

When resolutions of censure are combined with fines or loss of pensions, additional issues arise. The latest version of the bill says only that Commissioner Koskinen "should" lose his pension, but it does not appear to actually negate those benefits. If a pension has vested interest under laws like the Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS), such action can run afoul of due process or bill of attainder[29] protections. Article I, Section 9, clause 3, is an express limitation on Congress that "No Bill of Attainder or ex post facto Law shall be passed." I was lead counsel in the last successful bill of attainder challenge in striking down the Elizabeth Morgan Act.[30] The *ex post facto* problems even came up with regard to the Hiss Act in a challenge by Alger Hiss.[31] Any punishment or penalties must be carefully considered and part of a neutral, generally applicable law. The Congress has

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27 *See McGrain v. Daugherty,* 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178, 187, 200 (1957)

28 *See, e.g., Spallone v. United States*, 493 U.S. 265, 276 (1990) (upholding implied powers of courts to enforce orders in cases of); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (reaffirming the inherent power of a court to assess attorney's fees).

29 *See* U.S. Const., Art. I, sections 9 & 10.

30 *Foretich v. U.S.*, 351 F.3d 1198 (D.C. Cir. 2003).

31 *Hiss v. Hampton*, 338 F. Supp. 1141, 1148-1149 (D.D.C. 1972) ("The question is simply whether the Constitution permits Congress to deprive them of their annuities by retroactive penal legislation. We conclude that it does not.").

passed laws, like the Hiss Act, which allow for the loss of pensions and benefits of federal employees.[32] That Act was designed, however, to address criminal acts like those involving Alger Hiss, who was accused of perjury and spying. An act of censure does not constitute a criminal conviction. That does not mean that Congress cannot establish non-criminal conditions for the loss of pensions, but once such pensions have vested, the removal of such benefits raise legitimate issues. Financial penalties move censure measures into a different and more challenging framework for analysis, particularly if attempted retroactively rather than prospectively.

D. Impeachment.

The ultimate authority in addressing such misconduct is found in the impeachment power. I have written extensively on my views of the history and meaning of the impeachment power. Without repeating that previously cited research and testimony, I would like to address two issues which have been raised with regard to the Koskinen controversy. As an initial matter, three impeachment provisions are at issue in such cases:

> **Article I, Section 2**: The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.
>
> **Article II, Section 4**: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.
>
> **Article I, Section 3**: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

It is Article II, Section 4 that concerns today's discussion as constituting the standard for impeachment in the House of Representatives.

1. The Alleged Necessity of A Crime For Impeachment. Some have argued that Commissioner Koskinen must be accused of criminal conduct to be impeached. Indeed,

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[32] P.L. 83-769, 68 Stat. 1142 (Sept. I, 1954), see now 5 U.S.C. §§ 8311 et seq. *See also* the Honest Leadership and Open Government Act of2007, P.L. 110-81, 121 Stat. 735 (September 14, 2007), and amended by the STOCK Act in 2012, P.L. 112-105, 126 Stat. 301-303 (April 4, 2012) (loss of pensions by members of Congress).

some have argued that impeachment requires a felony or serious crime as a precondition. In my view, this is a long-standing misconception of the standard. It was raised unsuccessfully in the impeachment proceedings with regard to President Bill Clinton. As I have previously written, the impeachment standard requires no such threshold showing. Indeed, in my representation of Judge Thomas Porteous in the last impeachment trial in the Senate, we faced a variety of claims that were not crimes and, in some cases, were arguably not violations of the judicial ethics rules in place at the time.

I have previously discussed how "American impeachments stand on English feet."[33] Historically, impeachments in England for high crimes and misdemeanors encompassed a wide range of conduct traditionally considered noncriminal.[34] Under this standard:

> "Persons have been impeached for giving bad counsel to the king; advising a prejudicial peace; enticing the king to act against the act of parliament; purchasing offices; giving medicine to the king without advice of physicians; preventing other persons from giving counsel to the king, except in their presence... Others ... were founded in... malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad."[35]

Impeachments were viewed as a critical check or tool against executive encroachments and abuse.[36] This included the grounds of "maladministration" and other noncriminal acts.[37]

The Framers relied heavily on the English precedent in crafting our own impeachment standard, though the constitutional convention debates do not clearly answer many of the questions raised over the decades on the meaning of "high crimes and misdemeanors." The most relevant exchanges occurred on a single day, and are found on only a couple pages of record. There was an effort to add the term "or maladministration" after "bribery."[38] Here is the exchange:

> "The clause referring to the Senate, the trial of impeachments agst. the President, for Treason & bribery, was taken up.
>
> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offense. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined - As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.
>
> He movd. to add after 'bribery' 'or maladministration.'

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33 Turley, *Senate Trials and Factional Disputes*, *supra*, at 9.

34 *Id.* at 9-15.

35 2 Joseph Story, Commentaries on the Constitution of the United States 798, at 269 (Fred B. Rothman & Co. rev. ed. 1991) (1883).

36 *Id.* at 21.

37 *Id.* at 20.

38 *Id.* at 34-36.

> Mr. Gerry seconded him -
>
> Mr. Madison[.] So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> Mr. Govr Morris[.] It will not be put in force & can do no harm - An election of every four years will prevent maladministration.
>
> Col. Mason withdrew 'maladministration' & substitutes 'other high crimes & misdemeanors' ('agst. the State').
>
> On the question thus altered [Ayes - 8; Noes - 3]"[39]

Thus, Madison objected to the standard and ultimately favored the English standard of "high crimes and misdemeanors." However, as I have previously written, Madison later interpreted the impeachment standard to include "maladministration." Indeed, maladministration would be repeatedly cited in impeachment cases extending into the twentieth century. Likewise, Madison described impeachment as a way of addressing "the incapacity, negligence or perfidy of the chief Magistrate."[40] Similarly, Alexander Hamilton referred to impeachable offenses as "those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust."[41]

Of course, it is easy to dismiss any guiding standard since an impeachment vote is effectively unreviewable by the courts. Thus, many have cited the seemingly dismissive statement of Gerald Ford when he was a member of the House that "[a]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."[42] While I do not believe that Ford was as flippant as many have suggested,[43] it is certainly true that each member must decide if the conduct of a federal official rises to the most serious levels of misconduct to warrant impeachment. The standard was left generalized, but not open-ended for members. Members take an oath to faithfully adhere to the Constitution, and they are obligated to ensure that federal officials are not impeached for mere policy disagreements or relatively common conflicts between the branches. Impeachment is a vital protection against abuse and tyranny, but it

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39 *See generally id.* at 36.

40 *Id.* at 36-37.

41 The Federalist No. 65, at 396.

42 116 Cong. Rec. 11,913 (daily ed. April 15, 1970). The whole quote is "[a]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results in whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."

43 Ford later added, "[t]o remove [the President and Vice President] in midterm ... would indeed require crimes of the magnitude of treason and bribery." *Id.*

can also become the very thing that it was designed to combat. Impeachment power can become a type of tyranny of the majority when used to simply express anger or disagreement with an Administration.

The question of whether Commissioner Koskinen's conduct amount to a "high crime and misdemeanor" would depend on the view of members as to his intent in supplying allegedly false information to Congress, or his failing to act in accordance with congressional subpoenas. There should be no question that an act of perjury or obstruction of Congress would constitute impeachment offenses. These cases can become more difficult when an official is acting under a mistaken view of his duties vis-à-vis Congress. The courts have made an unholy mess of the area of executive privilege and presidential powers. To the extent that an official acts according to such interpretations, it would be difficult to view such actions as reaching the level of an impeachable offense. A distinction can be drawn with the Holder controversy. I viewed Holder's arguments of privilege to be transparently weak and opportunistic.

A case for impeachment can also become more difficult when an official is claiming negligent, but not intentional, misconduct. It will sometimes fall to members to decide whether such actions are truly negligent, or rather acts of "willful blindness." The failure to fully preserve evidence or fully comply with a subpoena is still obstruction if an official intentionally avoids learning of information or withholds necessary orders to comply with Congress. Congress has previously treated willful blindness or deliberate indifference as the same as knowledge in criminal provisions.[44] A subpoena does not allow for a passive aggressive response. The recipient is expected to take the necessary steps to fulfill his or her obligations of preservation and disclosure. I have been counsel in cases where government officials have engaged in willful blindness in the loss of critical evidence. It is for this reason that courts often extend the scienter or intent element in both crimes and torts to include reckless conduct. Thus, a drunk driver may not have intentionally killed a family in a DUI accident, but he is still guilty of the crime if he showed carelessness or a reckless disregard for the safety of others. Impeachable offenses may be based on the same recklessness or willful blindness in the carrying out of public duties.

2. The Limitation of Impeachment To Presidents, Vice Presidents, and Cabinet Officers. It has also been suggested that impeachment does not extend to subcabinet officers like Commissioner Koskinen. This view is fundamentally mistaken and, in my view, finds no support in the text or the history of the impeachment. Article II of the United States Constitution states in Section 4 that "The President, Vice President, and all civil Officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." It does not confine the language to cabinet members. That view was also reflected in the comments of critical figures like Joseph Story, who wrote:

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[44] H.R. REP. NO. 610, 100th Cong., 2d Sess. 6 (1988) (noting that "the concept of willful blindness or deliberate ignorance" is consistent with "the normal 'knowing' standard used in many Federal and state criminal statutes." (citing 18 U.S.C. §§ 1028, 1341, 1344 (1988)).

> "All officers of the United states [] who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment."[45]

While there were those who expressed concern over the potential wide scope of officials subject to impeachment,[46] the broader view of the clause as extending beyond department heads is well established in the text and history of the Constitution.

While it is clearly "unprecedented" to impeach a non-cabinet member, it was unprecedented until 1876 to impeach anyone other than a president or judge. We have had only one such case: the impeachment of Secretary of War William Belknap for corruption.[47] Belknap was charged with accepting bribes for contracts associated with the Indian Territory. He was charged with having "disregarded his duty as Secretary of War, and basely prostituted his high office to his lust for private gain."[48]

Putting aside the clear language covering "all civil Officers," the use of the cabinet as a limiting principle would be arbitrary and bizarre. The makeup of the cabinet has changed over time, as has the definition of a "department." George Washington had only four cabinet members, and the number of both departments and cabinet members have fluctuated over time. The Constitution does refer to the "principal Officer in each of the executive Departments"[49] or "Heads of Departments"[50] in discussing Article II offices. These are not part of the impeachment provisions, and should be read in their historical and textual context. In 1790, the federal government had 1,000 non-military members.[51] That makes the entire federal government smaller than the headquarters of the Internal

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45 Joseph Story, II Commentaries on the Constitution of the United States §790 (1833).

46 Raoul Berger, *Impeachment of Judges and Good Behavior Tenure*, 79 YALE L. J. 1475 (1970) (statement of Archibald Maclaine) (""[i]t appears to me ... the most horrid ignorance to suppose that every officer, however trifling his office, is to be impeached for every petty offense ... I hope every gentleman ... must see plainly that impeachments cannot extend to inferior officers of the United States.").

47 Belknap was notable for another reason. Belknap resigned just before the House's impeachment vote, but was still impeached. See House Comm. on the Judiciary, 93rd Cong., Selected Materials on Impeachment 143 (Comm. Print 1973). He argued at his Senate trial that his resignation meant he was no longer a civil officer subject to impeachment, but that defense was rejected and a majority voted for conviction.

48 Staff of House Comm. on the Judiciary, 93rd Cong., Constitutional Grounds for Presidential Impeachment 49-50 (Comm. Print 1974) [hereinafter Constitutional Grounds] (quoting the third article of impeachment).

49 See Article II, Section 2, Clause 1

50 See Article II, Section 2, Clause 2. Likewise, the Twenty-fifth Amendment refers to "principal officers of the executive departments."

51 WALTER VOLKOMER, AMERICAN GOVERNMENT (11th ed. 2006).

Revenue Agency. Today we have over a dozen departments, almost six-dozen agencies[52], and hundreds of non-military sub agencies.[53] What constitutes a "department" to be listed in 5 U.S.C. § 101 is a meaningless criterion. Massive agencies are not technically headed by a "secretary" but exercise sweeping and largely independent authority over parts of the country and its economy. To suggest that the IRS Commissioner does not constitute a high enough official for the purposes of impeachment ignores the realities of the modern regulatory state. The Commissioner has authority over roughly 90,000 employees collecting roughly $2.5 trillion in tax collection from almost 250 million returns each year. Commissioner Koskinen was appointed by the President and confirmed by the Senate. To say that such a person is not a "civil officer" for the purposes of impeachment is a dubious claim. While there is an open question of how far impeachment would reach a lesser functionary, there is no question in my view as to Commissioner Koskinen.

The attempt to exclude agency heads from the range of impeachable officials defeats the purpose of the impeachment power. In the 1876 trial of Secretary of War William Belknap, Senator Maxey of Texas stressed that "this Supreme punishment is . . . inflicted not only to get rid of a bad man in office... but chiefly, by fearful example, to teach all men that American institutions and the perpetuation of free government, of the people, by the people, and for the people, demand purity in office."[54] The Framers wanted to leave Congress with the ability to remove executive officials who were abusing their authority, rather than wait four years in hopes of a changing administration. These were practical and thoughtful men. They would not have created such a power and then coupled it with criteria that would produce arbitrary results. Indeed, a president could insulate his Administration from the threat of impeachment by going back to a handful of departments. While Commissioner Koskinen may have compelling defenses to the counts of impeachment, a threshold challenge based on the status of his agency in the structure of government would be unavailing in my view.

V. Conclusion

John Stuart Mill wrote:

> "[T]he proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust . . . to expel them, and either expressly or virtually appoint their successors."[55]

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[52] UNITED STATES GOVERNMENT, INDEPENDENT AGENCIES & GOVERNMENT CORPORATIONS, http://www.usa.gov/Agencies/Federal/Independent.shtml (last visited July 9, 2012).

[53] OFFICE OF PERS. MGMT., FEDERAL AGENCIES LIST, http://www.opm.gov/Open/Apps/Agencies/ (last visited July 9, 2012).

[54] Michael J. Broyde & Robert A. Schapiro, Impeachment and Accountability: The Case of the First Lady, 15 Const. Commentary 479, 489 n.52 (1998).

[55] J.S. Mill, Considerations on Representative Government 42 (1875).

One of the most defining duties of the House is to protect the public from abuse, corruption, and, in the most extreme circumstances, tyranny. It has the ability to expose wrongdoing and to force accountability from government officials. Yet, over the last few decades, Congress as a whole has allowed its authority to atrophy. The combination of executive overreach, legislative passivity, and judicial avoidance has now created a dangerous imbalance in our system. There is a lack of deterrence that is evident today in the routine refusals of agencies to produce information to Congress and the defiance of federal officials in the face of congressional investigations.

If our system is to function, Congress must matter. Congressional subpoenas must be enforceable and contemptuous conduct must be punishable. Commissioner Koskinen has every right to be heard fully on these allegations of misconduct. Congress, however, has the means to punish misconduct if it determines that these allegations are substantiated. The question is not the means, but the will to use them.

Thank you again for the honor of testifying before you today. I am happy to answer any questions that you may have.

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