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September 16, 2016

The Honorable Robert Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

As you know, Commissioner Koskinen deeply respects the work and authority of the Committee and has agreed to testify under oath on Wednesday, September 21, as requested. He hopes to address some of the confusion regarding basic facts and to explain the reforms that the IRS has implemented during his tenure to address unacceptable practices that took place before he arrived at the agency. We appreciate the professionalism and substantive nature of the Committee's inquiry to date under your leadership and hope that you will find the substance and tone of Commissioner Koskinen's testimony constructive and respectful as well.

We are concerned, however, that some may believe that Commissioner Koskinen's voluntary appearance at this hearing is an appropriate substitute for regular order and the traditional approach to addressing impeachment proceedings. As you know, the scheduled hearing, with an opening statement and timed rounds of Member-directed questions on any topic of their choosing, does not reflect the full range of deliberate and balanced procedures that this Committee has developed to ensure fairness and legitimacy in an actual impeachment inquiry.¹ Those procedures include the right to make opening and closing statements, the right to call and cross-examine witnesses, the right to present evidence, the right to examine all evidence obtained by the Committee, the right to make evidentiary objections for the record, the right to be formally and directly represented in proceedings by counsel, and the right to respond to all evidence cited by the Committee.²

Should the Committee proceed to a formal impeachment inquiry, we would expect to be allowed to exercise those rights to present a robust legal and factual defense to the many false allegations that have been lodged against Commissioner Koskinen. Testimony under oath from a single witness—before he has even been allowed to see any evidence against him and with no

¹ See, e.g., Jefferson's Manual § 606; H. Rep. 111-427 at 11-12 (2010); H. Rep. 111-159 at 13-19 (2010).

² See Jefferson's Manual § 606; H. Rep. 111-427 at 11-12 (2010); H. Rep. 111-159 at 13-19 (2010); III Deschler's Precedents of the U.S. House of Representatives 14 § 6.5.

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right to present corroborating evidence to address false or mistaken allegations—is no substitute. Indeed a process of testimony followed immediately by a floor vote, with no established standards, validated evidence, or findings of fact would be more akin to a foreign show trial than the solemn process contemplated by the Framers and generations of Congressional leaders, including Members of this Committee.

While we have no reason to believe that you would agree with them, we are troubled by the statements of some who appear to be unaware or dismissive of this Committee's established traditions, which are designed to ensure that the extraordinary power of constitutional impeachment is exercised on the basis of solid facts rather than sound bites. Those observers seem to believe that, by allowing Commissioner Koskinen to say a few words and respond to questions under oath, the House can, consistent with regular order, forge ahead to vote on the proposed articles of impeachment without any factual findings based on a formal evidentiary record. For example, a statement was issued yesterday claiming that "the House Judiciary Committee will finally hold impeachment proceedings" and that the hearing will "remove any lingering excuses for those who have been hesitant to proceed." That position, which treats this Committee's traditions as mere excuses, would represent a rejection of time-honored constitutional principles and the dignity the House has consistently sought to uphold under its current leadership.

As noted in Jefferson's Manual, in modern times, committees conducting an impeachment inquiry have "permitt[ed] the accused to explain, present witnesses, cross examine ... and be represented by counsel."³ In its most recent impeachment of an executive branch official, the House extended such rights to then-President Clinton, allowing his counsel to present exculpatory information, call his own witnesses, and cross-examine others.⁴ In the next prior impeachment of an executive branch official, the House in 1874 allowed Secretary Belknap the "opportunity to explain, present witnesses, and cross-examine witnesses."⁵ During the most recent impeachment inquiries of Article III judges, this Committee in 2010 allowed the accused to make evidentiary submissions, call witnesses, and cross-examine others.⁶

Recent leaders of this Committee have embraced that tradition. During the Clinton impeachment, Chairman Henry Hyde insisted on adopting due process rights to "ensure that the impeachment inquiry is fair."⁷ He explained that "we must constantly strive to be fair, thorough,

³ Jefferson's Manual § 606.

⁴ H. Rep. 105-830, p. 126-127.

⁵ III Hinds' Precedents of the U.S. House of Representatives § 2445.

⁶ H. Rep. 111-159, p. 13-19; H. Rep. 111-427, p. 11-12.

⁷ H.R. Rep. 105-795, p. 25-26.

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and expeditious in all that we do.”⁸ Speaking in 2006, former Chairman Jim Sensenbrenner noted that “[o]nly after the House Judiciary Committee has conducted a fair, thorough, and detailed investigation, will Committee members be able to consider whether Articles of Impeachment might be warranted.”⁹ And the Chairman has noted that an impeachment vote by the Committee in 2010 was “the culmination of an exhaustive investigation” by the Committee that included “reviewing the records of past proceedings, rooting out new evidence that was never considered in previous investigations, conducting numerous interviews and depositions with firsthand witnesses and conducting hearings to take the testimony of firsthand witnesses and constitutional scholars.”¹⁰ Before voting on an impeachment that is literally unprecedented, similar care and diligence are surely warranted. It is also necessary before any vote on censure, assuming such a measure is even constitutional.

Even though we assume Wednesday’s hearing is only the last of three in your preliminary inquiry, we believe it would be helpful if consideration were given to providing both the staff of the Judiciary Committee and counsel for the Commissioner immediate access to the transcripts of all of the interviews conducted by the House Oversight and Government Reform Committee during its investigation of the IRS’s use of improper selection criteria before Commissioner Koskinen’s tenure. We understand these transcripts to be among the primary materials serving as a basis for a number of the allegations against Commissioner Koskinen. Access to them could enable Commissioner Koskinen to provide more helpful information to the Committee at Wednesday’s hearing. They are also necessary to answer basic questions about the scope and depth of the investigation, such as what witnesses were interviewed, what questions were asked, what leads were followed, and whether all relevant information was disclosed. We would, of course, agree to any appropriate confidentiality protocols. We also understand that it may ultimately prove too difficult to provide access to these materials until a later date given the short period remaining before the hearing.

We hope that, following Wednesday’s hearing, this Committee will decide against reporting to the House floor a resolution authorizing a formal impeachment proceeding. However, should the Committee take that step, we are fully prepared to assist the Committee in developing a solid and vetted factual and legal record on which Members can rely in exercising their constitutional responsibility. After reviewing whatever documentary evidence the Committee gathers, we would expect to be allowed to make objections, cross-examine each witness that the resolution’s proponents put forward, and call our own witnesses to expose what we believe are blatant factual errors in the resolution. We would also identify the proposed standards for impeachment in the resolution that are inconsistent with the Constitution’s

⁸ H.R. Rep. 105-830, p. 149.

⁹ Statement of F. James Sensenbrenner, Jr., Introduction of H. Res. 916, July 17, 2006.

¹⁰ Statement of Rep. Goodlatte, House Judiciary Committee Business Meeting, January 27, 2010.

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commands. We are confident that a complete record would show that the impeachment of Commissioner Koskinen is wholly unwarranted.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard M. Shapiro". The signature is fluid and cursive, with the first name "Howard" being the most prominent.

Reginald J. Brown
Matthew T. Martens
Howard M. Shapiro

CC: The Honorable Paul Ryan, Speaker of the House of Representatives
The Honorable Nancy Pelosi, Minority Leader of the House of Representatives