Written Statement of

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Hearing on
"Examining the Allegations of Misconduct Against
IRS Commissioner John Koskinen, Part II"

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As someone who has devoted his professional life to studying and understanding our Constitution and the great institution of which you all are a part, I can think of no greater honor and privilege than the opportunity to appear before your committee to discuss important questions of constitutional law. As you know, I appear today solely on my own behalf, and I speak only for myself. I hope my understanding of federal impeachment law will be helpful to you.

What I will share with you today is not something new. As many of you know, the law of impeachment is not a new subject for either this distinguished committee or for me. Many of you have known me from my having appeared before you, more than once, to address constitutional issues related to the federal impeachment process, including the constitutional standard for impeachment. I explored this and other issues relating to impeachment in my second law review article, written and published nearly 30 years ago;[1] and the federal impeachment process was the subject of my first book, published 20 years ago.[2] It has been the focus of several law review articles that I have written over the past few decades[3] and of work I have done as a legal adviser to members of both chambers of this great institution. What I will share with you is, I hope, consistent with what I have said and written about the federal impeachment process – and the questions you consider today -- over the years.

The constitutional framework for impeachment governs whom you may impeach and on what grounds. The constitutional standard for impeachment and removal, which is an integral part of this framework, is not Democratic; it is not Republican. It is the constitutional standard that has governed this process since the beginning of the Republic, regardless of the era or composition of this body.

The starting point for any analysis of the impeachment is, of course, with the constitutional text itself. The Constitution provides, in pertinent part, that "the President, Vice-President, and all other civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors."[4] One question, which I understand is of interest to the Committee, is whether sub-cabinet officials are "officers of the United States" and are therefore subject to impeachment. There is widespread consensus that this provision makes impeachable not only presidents and vice-presidents but also Supreme Court justices, other Article III judges, and cabinet members. But, as

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[1] *See* Michael J. Gerhardt, "The Constitutional Limits to Impeachment and its Alternatives," 68 Tex. L. Rev. 1 (1989).
[2] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis (Princeton University, 1st edition, 1996) (University of Chicago Press, revised edition, 2000).
[3] *See*, *e.g.*, Michael J. Gerhardt, "The Lessons of Impeachment History," 67 Geo. Wash. L. Rev. 603 (1999); "Chancellor Kent and the Search for the Elements of Impeachable Offenses," 74 Chicago-Kent L. Rev. 91 (1998).
[4] U.S. Const., Article II, section 4.

we all know, the Congress has never impeached, much less removed, a sub-cabinet level official. As the Congressional Research Service reported, "Historical precedent provides no examples of the impeachment power being used against lower-level executive officials."[5] This might have been because of the uncertainty over whether such officials are impeachable or because there have been other, effective means for holding such officials accountable, including dismissing them. Perhaps, it could be because of a combination of these things. Nonetheless, the Congressional Research Service concluded, after its careful examination of this question, that an executive branch official who exercises "substantial responsibility," such as the head of an agency or a commission, may indeed be impeachable. But, because impeaching a sub-cabinet level official is unprecedented, the House is moving into unchartered waters, which should give everyone pause. Impeachment is supposed to be a last resort and therefore each of you may wish, in the course of these proceedings, to consider what other means are available to hold a sub-cabinet official accountable and whether you trust -- or why you don't trust -- these other alternatives to work in the instant circumstances.

Assuming the Commissioner of the Internal Revenue Service is an official who may be properly subject to impeachment, then a second question is whether he has committed the kind of offense for which he may be impeached and removed from office -- "Treason, bribery, or other high crime or misdemeanor." I gather no one is charging the Commissioner of the Internal Revenue Service with either treason or bribery, which are well defined and well understood. Rather, the critical question is whether, assuming Commissioner Koskinen has engaged in any misconduct, the misconduct in question qualifies as a "high crime or misdemeanor."

Over the course of American history, that phrase has been subject to considerable scrutiny in academia and in Congress. The best work on the historiography on its meaning, including Charles Black's seminal treatise on the subject,[6] suggests that "high crimes or misdemeanors" are terms of art, which refer to "political crimes," which in turn encompass serious abuses of power, or serious breaches of the public trust. I hasten to add that none of the terms I have just mentioned were meant to have broad constructions; the Founders selected the language "Treason, bribery, or other high crimes or misdemeanors" to define a finite range of impeachable offenses for which certain officials may be impeached and removed from office. Indeed, the Founders considered but rejected making certain high-ranking officials impeachable on broader grounds such as "maladministration."[7] The Founders did not want high-ranking officials in the executive or judicial branches to be subject to impeachment for their mistakes in

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[5] Jared P. Cole & Todd Garvey, CRS Report: Impeachment and Removal, October 29, 2015, at 4.

[6] *See* Charles L. Black, Impeachment: A Handbook (reissued 1998).

[7] In several different publications, I discuss the Founders' deliberations over and discussions of the scope of impeachable offenses. *See, e.g.,* Gerhardt, "Chancellor Kent," *supra* note 3, at 109-112.

office; and the historical practices of this great institution – the Congress including both its chambers – support construing more narrowly the terms "or other high crimes or misdemeanors," than the term "maladministration," to achieve several purposes, including distinguishing the newly ratified constitutional process for impeachment from the British system in which anyone could be impeached for any reason *and* ensuring that the misconduct had to be serious and deliberate and not merely a mistake in judgment or policy or partisan differences or a difference of opinion between the Congress and the officials under consideration for impeachment.

The constitutional standard is not different for different kinds of officials. It does not change depending on whose conduct is being questioned. There is, in other words, only one impeachment standard, which is, to be sure, adapted to the particular duties of the officials who are subject to impeachment. The standard is not meant nor designed to be lower for some officials than for others. Impeachable officials, as high as the President or the Chief Justice or as not quite so high as the head of a department or the Internal Revenue Service, are subject to the same constitutional standard.

The Framers chose terms – and designed a process – to make certain high-ranking officials impeachable and removable for serious misconduct in office, and the serious misconduct in office must have, at least in my judgment, two essential elements that are relevant to the instant proceedings. These elements derive from the common law, on which the Framers modeled the language used in the Constitution to reference impeachable offenses. At common law, crimes consisted of the essential elements of *mens reus* and *actus reus*. Put more colloquially, the Constitution requires both a bad (or malicious) intent *and* a bad act as the basis for an impeachment. As I explained on a previous occasion, "While there is ample evidence to suggest that the Founders did not intend for the impeachment process to track the criminal law in all essential respects, the criminal law did provide a backdrop, as did the impeachment experiences in England and the states, for the drafting of the Constitution. The influence of these disparate sources on the [impeachment] clauses is evident in both the language adopted and post ratification historical practices."[8] Both original meaning and historical practices, including Alexander Hamilton's commentary on impeachment in *The Federalist Papers* and Justice Joseph Story's revered *Commentaries on the U.S. Constitution*, have long held that "the bad acts constituting impeachable offenses are what the Founders understood to be political crimes."[9] Political crimes include serious offenses against the State, which include not only serious offenses, which are indictable, but also serious breaches of the public trust, which might not be indictable. In the article quoted above, I referenced the debates at the constitutional convention and during the ratification campaign, which make clear that the Founders had adopted this language (which had first been suggested by James Madison) to narrow the scope of

[8] Id. at 108 (footnote omitted).
[9] Id.

impeachable offenses to include great offenses, which seriously injured the Republic and were not easily – or perhaps at all – actionable in other forums.

As I have suggested, a principal concern among the Founders was to distinguish the federal impeachment process from the English one, in which anyone could be impeached for any reason. Narrowing the scope of impeachment was thought to be an important safeguard against its abuse. Even then, the Constitution provides other safeguards, including dividing the impeachment authority between the House and the Senate and requiring that at least two-thirds of the Senators approve conviction and removal. These safeguards are integral to the constitutional framework for impeachment and removal and the standards for this committee and the House to follow whenever it considers the possible impeachment of a high-ranking official of our government. The fact that the Senate has convicted and removed from office barely more than half of the people, whom the House has impeached, further reflect the Constitution's safeguards at work, particularly the high thresholds that must be satisfied prior to removal of a high-ranking government official for serious misconduct in office.

I hasten to stress that, while the scope of impeachable offenses is not limited strictly to indictable offenses, this does not mean that, when it comes to impeachment, anything goes. That is simply not the case. Nor has it ever been. As the bipartisan staff of the House's impeachment inquiry against President Nixon noted in its report, the language "'High misdemeanors' referred to a category of offenses that subverted the system of government." The ensuing discussion tracks this same theme when characterizing the "category of offenses" comprising permissible grounds for impeachment as including breaches of duties and the public trust and undermining "constitutional government" and its integrity.[10]

I gather from prior proceedings that at least some House members believe that the constitutional standard for impeachment should not be restricted to instances in which an official, who is potentially subject to impeachment, has a bad intent or is acting in bad faith. They believe, instead, grounds for impeachment may include gross negligence or gross incompetence. Respectfully, I disagree. I believe that lowering the constitutional standard for impeachment – a critical, indispensable threshold (which, like other constitutional standards, is fixed) -- is fraught with problems. To begin with, I believe the Framers' rejection of "maladministration" as a basis for impeachment was, in effect, a rejection of a standard that allowed for too broad a basis for impeachment and lacked prerequisites such as bad faith as elements. Every example of permissible impeachment given during the constitutional convention and ratification conventions included bad faith, or something akin to it, as an element of an impeachable offense. Moreover, such a standard would, as you know, make

[10] "Constitutional Grounds for Presidential Impeachment," Report by the Staff of the Impeachment Inquiry," Committee on the Judiciary, U.S. House of Representatives, 98rd Congress, 2nd Session, at 23-25 (February 1974).

impeachment much easier than it has ever been in our constitutional system, which was purposely designed to make impeachment and removal difficult.

The instant circumstances demonstrate the problems with lowering the constitutional standard for impeachment, as it would also allow the House to loosen the evidence or proof of an impeachable offense. Direct evidence of bad intent might not be easy to come by, but being relieved of having to demonstrate, through evidence, that an official acted with bad faith or malicious intent and committed a seriously bad act actually makes it easier to abuse the impeachment process. By deliberate design, impeachments are supposed to be difficult to achieve. In circumstances in which an official's misconduct does not rise to the level of being an impeachable offense, there are usually other means of recourse.

In concluding, I hope you will allow me to share a few final thoughts. First, the critical burdens of proof and persuasion rest on the House of Representatives and, if it becomes necessary, the Senate, not on the possible target of an impeachment proceeding. That is true here, as it is true in every other instance in which the House is considering the impeachment of an official. Satisfying those burdens requires more than rhetoric. Satisfying them requires more than suspicion or skepticism or distrust. None of those displace or satisfy the need to find credible proof or evidence of both bad faith and a seriously bad act in order for an impeachable official to have been found of committing an offense for which he may be both properly impeached and removed from office.

Second, I understand from news reports that there is some interest in the House's consideration of a censure resolution against the IRS Commissioner. Though many other scholars do not agree with my analysis, I have long been on record as believing that censure is constitutionally permissible, as long as it takes the form a resolution that does nothing more than merely express an attitude or opinion about something.[11] The challenge is to ensure that the resolution does nothing more than express a sentiment. If it does anything more than that and seeks to impose any kind of sanction or tangible punishment on an individual, it ceases to be a harmless resolution and becomes a bill of attainder, which the Constitution expressly prohibits.[12]

Third, an important question to consider before you ever undertake a serious action, such as impeachment, is what kind of precedent are we setting? We all know, as I have said, that it is unprecedented for the House to be considering the impeachment of a sub-cabinet level official, and such officials are usually held accountable through other means. Even so, it is a dangerous precedent for the House to adopt a lower standard of impeachment than the Founders intended and the House has ever used before.

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[11] *See, e.g.*, Michael J. Gerhardt, "The Constitutionality of Censure," 33 U. of Richmond L. Rev. 33 (1999).

[12] *See* U.S. Const., Art. I, sections 9 & 10.

It is worth remembering that we are all subject to the same scrutiny, and I do not mean just by the American people. In the words of the song from the Pulitzer and Tony award winning musical Hamilton, “History has its eyes on you.”