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Part 1

CONDEMNING AND CENSURING JOHN A. KOSKINEN, THE COMMISSIONER OF INTERNAL REVENUE

JUNE 21, 2016.—Ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H. Res. 737]

The Committee on Oversight and Government Reform, to whom was referred the resolution (H. Res. 737) condemning and censuring John A. Koskinen, the Commissioner of Internal Revenue, having considered the same, report favorably thereon with an amendment and recommend that the resolution as amended be agreed to.

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The amendment is as follows:

Amend the preamble to read as follows:

Whereas the Committee on Oversight and Government Reform issued a subpoena to John A. Koskinen, Commissioner, Internal Revenue Service, on February 14, 2014, which compelled him to produce, among other things, "all communications sent or received by Lois Lerner, from January 1, 2009, to August 2, 2013.";

Whereas on March 4, 2014, Internal Revenue Service employees in Martinsburg, West Virginia, magnetically erased 422 backup tapes, destroying as many as 24,000 of Lois Lerner's emails responsive to the subpoena;

Whereas Commissioner Koskinen violated a congressional subpoena by failing to locate and preserve relevant records and by losing key pieces of evidence that were in the agency's possession, and destroyed, on his watch;

Whereas Commissioner Koskinen betrayed the trust and confidence of the American people as an Officer of the United States;

Whereas Commissioner Koskinen failed to live up to the promise he made to the Senate Committee on Finance during his confirmation hearing to: "Be transparent about any problems we run into; and the public and certainly this committee will know about those problems as soon as we do.";

Whereas as early as February 2014, and no later than April 2014, Commissioner Koskinen was aware that a substantial portion of Lois Lerner's emails were missing and could not be produced to Congress, but did not notify Congress of any problem until June 13, 2014, when he included the information on the fifth page of the third enclosure of a letter to the Senate Committee on Finance;

Whereas Commissioner Koskinen offered under oath a series of false and misleading statements utterly lacking in honesty and integrity;

Whereas on March 26, 2014, Commissioner Koskinen was asked during a hearing before the Committee on Oversight and Government Reform, "Sir, are you or are you not going to provide this committee all of Lois Lerner's emails?" and he falsely answered, "Yes, we will do that.";

Whereas on June 20, 2014, Commissioner Koskinen testified falsely that "since the start of this investigation, every email has been preserved. Nothing has been lost. Nothing has been destroyed.";

Whereas on June 20, 2014, before the House Committee on Ways and Means Commissioner Koskinen testified falsely that the Internal Revenue Service had "confirmed that backup tapes from 2011 no longer existed because they have been recycled, pursuant to the Internal Revenue Service normal policy" and on July

23, 2014, during a different hearing in the Committee on Oversight and Government Reform, Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs, Commissioner Koskinen testified "confirmed means that somebody went back and looked and made sure that in fact any backup tapes that had existed had been recycled.";

Whereas on June 20, 2014, Commissioner Koskinen testified that the Internal Revenue Service had "gone to great lengths" to retrieve all of Lois Lerner's emails, but in fact failed to search disaster backup tapes, Lois Lerner's Blackberry, the email server, backup tapes for the email server, and Lois Lerner's temporary replacement laptop, which the Treasury Inspector General for Tax Administration subsequently found to contain more than 1,000 of Lerner's emails;

Whereas Commissioner Koskinen's false statements delayed and otherwise interfered with congressional investigations into the Internal Revenue Service targeting of Americans based on their political affiliation; and

Whereas the aforementioned conduct of Commissioner Koskinen caused the House of Representatives to lose confidence in his ability to administer and supervise the execution and application of the internal revenue laws: Now, therefore, be it

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

The resolution documents that the House of Representatives has lost confidence in Commissioner John A. Koskinen's ability to administer and supervise the execution and application of the internal revenue code. Therefore, the House of Representatives censures and condemns John A. Koskinen for a pattern of conduct while Commissioner of the Internal Revenue Service that is incompatible with his duties and inconsistent with the trust placed in him as an officer of the United States. It is the sense of the House of Representatives that John A. Koskinen, Commissioner of Internal Revenue, should: (a) immediately resign from office, and if he does not so resign, the President should remove him from office; and (b) be required to forfeit any rights to any annuity for which is eligible under chapter 83 or chapter 84 of title 5, United States Code.

BACKGROUND AND NEED FOR LEGISLATION

I. Executive Summary

On May 15, 2013—one day after the Treasury Inspector General for Tax Administration released a report that found the Internal Revenue Services (IRS) targeted taxpayers on the basis of their political beliefs—President Obama stated the targeting program was "inexcusable and Americans have the right to be angry about it." Additionally, the President said, "[O]ur administration has to make sure that we are working hand in hand with Congress to get this thing fixed."

This acknowledgment came five days after Lois Lerner, Director of the Exempt Organizations Division, stated about the targeting, "that was wrong, that was absolutely incorrect, insensitive and inappropriate." For the past two years, several congressional committees investigated the IRS's targeting of conservative groups.

IRS Commissioner John Koskinen, however, remained unapologetic about the targeting program and unwilling to work with Congress in the manner the President directed. Rather than cooperate with Congress, Commissioner Koskinen obstructed the congressional investigations of the targeting program by: (1) allowing 24,000 emails relevant to the investigation, and covered by a

congressional subpoena and internal preservation order, to be destroyed on his watch; and (2) failing to testify truthfully and providing false and misleading information to Congress.

Commissioner Koskinen's posture with respect to the various congressional investigations of the IRS caused 52 Members of the House of Representatives to sign a letter on July 27, 2015 that called on President Obama to exercise his authority under 26 U.S.C. Section 7803(a)(1)(D) to remove Mr. Koskinen as Commissioner of the IRS. The President took no action, and the House of Representatives was therefore left to consider alternative means to remove or otherwise hold Commissioner Koskinen accountable.

It is necessary to condemn and censure Commissioner Koskinen because his failure to comply with a subpoena and failure to testify truthfully permanently deprived the American people of a complete understanding of the IRS targeting scandal. Commissioner's Koskinen's complete disregard for Congress's oversight obligations and the American people's right to know the truth about the IRS targeting program caused a deficit of confidence in the nation's tax collecting agency. His continued leadership of the IRS is an insurmountable obstacle to restoring that confidence. Mr. Koskinen cannot continue in his role as Commissioner and the House of Representatives should make it clear that his actions are intolerable.

This report provides additional details with respect to the various reasons that the House of Representatives should condemn and censure Mr. Koskinen. Briefly, those reasons are:

• **Commissioner Koskinen failed to comply with a subpoena resulting in destruction of key evidence.** Commissioner Koskinen failed to locate and preserve IRS records in accordance with a congressional subpoena and an internal preservation order. The IRS erased 422 backup tapes containing as many as 24,000 of Ms. Lerner's emails—key pieces of evidence that were in the agency's possession, and destroyed, on Koskinen's watch.

• **Commissioner Koskinen failed to testify truthfully and provided false and misleading information.** Commissioner Koskinen testified the IRS turned over all emails relevant to the congressional investigation, including all of Ms. Lerner's emails. When the agency determined Ms. Lerner's emails were missing, Commissioner Koskinen testified the emails were unrecoverable. Neither of these statements was true.

• **Commissioner Koskinen failed to notify Congress that key evidence was missing.** The IRS knew Ms. Lerner's emails were missing in February 2014. In fact, they were not missing; the IRS destroyed the emails on March 4, 2014. The IRS did not notify Congress the emails were missing until June 2014—four months later, and well after the White House and the Treasury Department were notified.

II. Introduction

John Koskinen was confirmed as IRS Commissioner in December 2013 during the 113th Congress. Then-Chairman Darrell Issa reissued a subpoena for Ms. Lerner's emails to him on February 14, 2014.[1] Chairman Issa served Commissioner Koskinen another sub-

[1] The original subpoena was served on Treasury Secretary Jack Lew on August 2, 2013, because no permanent IRS Commissioner was in place.

poena on June 17, 2014 for any computer hardware containing Ms. Lerner's emails. Both subpoenas were reissued by Chairman Jason Chaffetz on March 4, 2015 in the 114th Congress.

During his confirmation hearing, Commissioner Koskinen pledged to fully cooperate with the ongoing congressional investigations.[2] His actions have fallen well short of fulfilling that pledge. As commissioner, Mr. Koskinen repeatedly assured the Committee that the IRS was working to gather Lois Lerner's emails and that the IRS would provide these emails to the Committee. For instance, in testimony before the Committee on March 26, 2014, Commissioner Koskinen stated the IRS would produce all of Lois Lerner's subpoenaed emails.[3] It did not. In fact, under Commissioner Koskinen's leadership, the IRS destroyed thousands of emails covered by the Committee's subpoenas.

After he learned that thousands of Ms. Lerner's emails were missing from the IRS's archiving system, the Treasury Inspector General for Tax Administration (TIGTA) found that Commissioner Koskinen and his staff failed to look in five of the six places where the emails could potentially be recovered. The IRS only examined Lerner's hard drive, which apparently crashed in 2011. TIGTA examined all the places where Lerner's emails might have been preserved, including Lerner's Blackberry devices, email server, backup email server, loaner laptop, the IRS's own backup tapes, and Lerner's hard drive.[4] TIGTA's more thorough investigation recovered over 1,000 emails the IRS previously failed to produce to Congress.[5]

The malfeasance of Commissioner Koskinen extends beyond investigative indifference into destruction of evidence. The Counselor to the Commissioner, Catherine Duval, learned of gaps in the Lerner email production on February 2, 2014. Yet, on March 4-a month later—IRS employees on the midnight shift in Martinsburg, West Virginia magnetically erased 422 backup tapes, destroying as many as 24,000 Lois Lerner emails responsive to the subpoenas. No one will ever know what was contained in those emails.

After the backup tapes were destroyed, Commissioner Koskinen made a series of false and misleading statements to Congress while under oath. On June 20, 2014, Commissioner Koskinen testified: "Since the start of this investigation, every email has been preserved. Nothing has been lost. Nothing has been destroyed."[6] That testimony was subsequently disproven by a TIGTA investigation that found 422 magnetically backup tapes were erased.[7]

Commissioner Koskinen also testified at a congressional hearing on June 20, 2014 that the IRS made a genuine effort to recover the missing Lerner emails. He stated, "We've gone to great lengths to spend a significant amount of money trying to make sure that

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[2] *Nomination of John Koskinen: Hearing Before the S. Comm. on Finance,* 113th Cong. (2013) (question and answer with Ranking Member Orrin Hatch).

[3] *Examining the IRS Response to the Targeting Scandal: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong., at 27 (Mar. 26, 2014) (question and answer with Rep. Chaffetz) [hereinafter Mar. 26, 2014 Hearing].

[4] Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss,* (June 30, 2015) (hereinafter "TIGTA report").

[5] *Id.*

[6] *Recent Developments in the Committee's Investigation into the Internal Revenue Service's Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations: Hearing Before the H. Comm. on Ways & Means*, 113th Cong. (2014).

[7] TIGTA report, *supra* note 4, at 2.

there is no email that is required that has not been produced."[8] That statement was also proven false by TIGTA, and by Commissioner Koskinen's own subsequent testimony.

In addition, Commissioner Koskinen testified that the backup tapes were never sent to a lab for professional forensic analysis. That statement also proved false.[9]

Commissioner Koskinen engaged in a systematic effort to obstruct, undermine, and discredit Congress's investigative function. His actions caused the destruction of documents covered by a subpoena and permanently deprived the American people of a complete understanding of the scope and purpose of the IRS targeting program. In the course of doing so, he made false and misleading statements to Congress. For these reasons, and others, Commissioner Koskinen should be condemned and censured.

III. Authority

The authority to censure or otherwise condemn the actions of government officials has come to be recognized and accepted in congressional practice as extending to cases of "misconduct," even outside of Congress, which the House finds to be reprehensible, and therefore, worthy of condemnation or rebuke.[10] According to the Congressional Research Service, "In the case of . . . federal officials, censure would be an exercise of the implicit power of a deliberative body to express its views, just as Congress may also express judgments of other persons or events."[11]

The earliest attempt to censure an official is believed to be a series of resolutions proposing the censure and disapproval of Secretary Alexander Hamilton in 1793, the texts of which were considered by historians to have been drafted by Thomas Jefferson.[12]

Either chamber may adopt a resolution to censure or condemn a federal official.[13] There were 31 resolutions to censure, condemn, or express a loss of confidence, submitted from the 93rd through 109th Congresses (1973–2006) and directed against federal officials.[14]

IV. Background on the Committee's Investigation

In February 2012, the Committee received reports the IRS inappropriately scrutinized certain applicants for 501(c)(4) tax-exempt status. Since then, the Committee has engaged in a comprehensive investigation of the IRS's process for reviewing applications for tax-exempt status. As part of this investigation, the Committee reviewed more than 1.3 million pages of documents, conducted more than 50 transcribed interviews of current and former IRS officials, and held over a dozen public hearings.

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[8] *IRS Commissioner John Koskinen: Hearing Before the H. Comm. on Ways & Means* (June 20, 2014).

[9] Transcribed interview of Steven Manning, Internal Revenue Serv., in Wash., D.C. (April 6, 2015).

[10] Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, CONG. RESEARCH SERV. (May 2, 2013) (RL31382).

[11] Richard S. Beth, *Censure of Executive and Judicial Branch Officials, Legislation Proceedings,* Cong. Research Serv. (Oct. 2, 1998) at 6.

[12] Jack Maskell and Richard S. Beth, *"No Confidence" Votes and Other Forms of Congressional Censure of Public Officials*, CONG. RESEARCH SERV. (June 11, 2007) (RL34037).

[13] *Id.*

[14] *Id.*

Documents and testimony show the IRS targeted conservative-aligned applicants for tax-exempt status by scrutinizing them in a manner distinct—and more intrusive—than other applicants. Critical questions remain regarding the extent of this targeting, and how and why the IRS acted—and persisted in acting—in this manner. Commissioner Koskinen's failure to comply with the Committee's subpoenas and to cooperate fully with the Committee's investigation has caused many key questions to remain unanswered.

A. IRS TARGETING OF TAX-EXEMPT APPLICATIONS FROM CONSERVATIVE GROUPS

In late February 2010, a screener in the IRS's Cincinnati office identified a 501(c)(4) application connected with the Tea Party. Due to "media attention" surrounding the Tea Party, the application was elevated to the Exempt Organizations Technical Unit in Washington, D.C.[15] When officials in the Cincinnati office received several similar applications in March 2010, the Washington, D.C. office asked for two "test" applications, and ordered the Cincinnati employees to "hold" the remainder of the applications, which prevented the applications from moving forward in the review process.[16] A manager in the Cincinnati office asked his screeners to develop criteria for identifying other Tea Party applications so the applications would not "go into the general inventory."[17] By early April 2010, Cincinnati screeners began to identify and hold any applications that met certain criteria. Applications that met the criteria were removed from the general inventory and assigned to a special group.

In late spring 2010, Carter Hull, based in the Washington, D.C. IRS office, was assigned to work on the test applications.[18] Hull, a federal employee with almost fifty years of experience, was a recognized expert in 501(c)(4) applications that showed indicia of political activity.[19] He issued letters to the test applicants requesting additional information or clarification about certain information contained in their applications for tax-exempt status.[20]

Meanwhile, through the summer and into fall 2010, applications from other conservative-aligned groups were also held. As the Cincinnati office awaited guidance from Washington regarding those applications, a backlog developed. By fall 2010, the backlog of applications held in the Cincinnati office had grown to 60.

On February 1, 2011, Lois Lerner, who served as Director of Exempt Organizations (EO) at IRS from 2006 to 2013,[21] wrote an email to Michael Seto, the manager of the Technical Office within the EO business division. The EO Technical Office was staffed by approximately 40 IRS lawyers who provided advice to IRS agents

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[15] Email from Cindy Thomas, Manager, Exempt Organizations Determinations, IRS, to Holly Paz, Manager, Exempt Organizations Technical Unit, IRS (Feb. 25, 2010) [IRSR 428451].

[16] Transcribed Interview of Elizabeth Hofacre, Revenue Agent, Exempt Orgs. Determinations Unit, IRS (May 31, 2013) [hereinafter Hofacre Tr.].

[17] Transcribed Interview of John Shafer, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 6, 2013).

[18] Transcribed interview of Carter Hull Internal Revenue Serv., in Wash., D.C. (June 14, 2013).

[19] *Id.*

[20] IRS, *Timeline for the 3 exemption applications that were referred to EOT from EOD*, [IRSR 58346–49].

[21] *The IRS: Targeting Americans for Their Political Beliefs: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong., at 22 (May 22, 2013) (H. Rpt. 113–33) (statement of Lois Lerner, Director, Exempt Orgs., IRS).

across the country. Lerner wrote, "Tea Party Matter very dangerous" and asked the Office of Chief Counsel to get involved.[22] She advised Seto that "Cincy [Cincinnati] should probably NOT have these cases," implying they should be handled at IRS headquarters in Washington.[23] Seto testified to the Committee that Lerner ordered a "multi-tier" review for the test applications, a process that involved her senior technical advisor and the Office of Chief Counsel.[24]

On July 5, 2011, Lerner became aware the backlog of Tea Party applications pending in Cincinnati had swelled to "over 100."[25] Lerner also learned of the specific criteria used to screen the cases that were caught in the Tea Party backlog, which included the terms "Tea Party," "Patriots," and "9/12."[26] She believed the term "Tea Party"—a term that triggered additional scrutiny under the criteria IRS personnel developed-was "pejorative."[27] Lerner ordered her staff to adjust the criteria.[28] She also directed the Technical Unit to conduct a "triage" of the backlogged applications and to develop a guide sheet to assist agents in Cincinnati with processing the cases.[29]

In November 2011, the draft guide sheet for processing the backlogged applications was complete.[30] By then, there were 160–170 pending applications in the backlog.[31] After the Cincinnati office received the guide sheet from Washington, officials in the EO division began to process the applications in January 2012. IRS employees drafted questions to solicit information from the applicants pursuant to the guide sheet. The questions asked for information about the applicant organizations' donors, volunteers, board membership, and political affiliation, among other things.[32]

By early 2012, questions about the IRS's treatment of these backlogged applications attracted public attention. Committee staff met with Ms. Lerner on February 24, 2012 regarding the IRS's process for evaluating tax-exempt applications.[33] Ms. Lerner never informed the Committee about the true nature of the IRS's treatment of the applications from conservative groups. Instead, Ms. Lerner told Committee staff that the IRS's criteria for evaluating tax-exempt applications had not changed. Ms. Lerner also mentioned the guide sheet developed by the Washington office and used by revenue agents to process applications.

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[22] Email from Lois Lerner, Director, Exempt Orgs., IRS to Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (Feb. 1, 2011) [IRSR 161810].

[23] *Id.*

[24] Transcribed Interview of Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS (July 11, 2013) [hereinafter Seto Tr.].

[25] Transcribed Interview of Justin Lowe, Technical Advisor to the Commissioner, Tax Exempt and Gov't Entities Division, IRS (July 23, 2013).

[26] *Id.*

[27] Transcribed Interview of Holly Paz, Director, Exempt Orgs., Rulings and Agreements, IRS (May 21, 2013).

[28] *Id.*

[29] Seto Tr. at 121–23.

[30] Email from Michael Seto, Manager, Exempt Orgs. Technical Unit, IRS, to Cindy Thomas, Manager, Exempt Orgs. Determinations Unit, IRS (Nov. 6, 2011) [IRSR 69902].

[31] Transcribed Interview of Stephen Daejin Seok, Group Manager, Exempt Orgs. Determinations Unit, IRS (June 19, 2013).

[32] *Id.*

[33] Briefing by Lois Lerner, Director, Exempt Orgs., IRS, to H. Comm. on Oversight & Gov't Reform Staff (Feb. 24, 2012).

Committee staff subsequently met with TIGTA representatives on March 8, 2012.[34] Shortly thereafter, TIGTA began an audit of the IRS's process for evaluating tax-exempt applications.

In late February 2012, after Ms. Lerner briefed Committee staff, then-IRS Deputy Commissioner Steven Miller requested a meeting with her to discuss these applications. Ms. Lerner informed Mr. Miller of the backlog and advised that the IRS had asked applicant organizations for donor information.[35] Deputy Commissioner Miller relayed this information to IRS Commissioner Douglas Shulman.[36] On March 23, 2012, Mr. Miller convened a meeting of his senior staff to discuss these applications. Mr. Miller launched an internal review of potentially inappropriate treatment of Tea Party 501(c)(4) applications "to find out why the cases were there and what was going on."[37]

The internal IRS review took place in April 2012. Mr. Miller realized there was a problem and that the application backlog needed to be addressed.[38] IRS officials designed a new system to process the backlog, and Mr. Miller received weekly updates on the progress of the backlog throughout the summer 2012.[39]

In May 2013, in advance of the release of TIGTA's audit report on the IRS's process for evaluating applications for tax-exempt status, the IRS planned to acknowledge publicly that certain tax-exempt applications were inappropriately targeted.[40] On May 10, 2013, at an event sponsored by the American Bar Association (ABA), Ms. Lerner responded to a question she planted with a member of the audience prior to the event. A veteran tax lawyer asked:

> Lois, a few months ago there were some concerns about the IRS's review of 501(c)(4) organizations, of applications from tea party organizations. I was just wondering if you could provide an update.[41]

In response, Ms. Lerner stated:

> So our line people in Cincinnati who handled the applications did what we call centralization of these cases. They centralized work on these in one particular group.[42]

Ms. Lerner also stated:

> However, in these cases, the way they did the centralization was not so fine. Instead of referring to the cases as advocacy cases, they actually used case names on this list.

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[34] Briefing by Treasury Inspector Gen. for Tax Admin. staff, to H. Comm. on Oversight & Gov't Reform Staff (May 2013).

[35] Transcribed Interview of Steven Miller, Deputy Commissioner, IRS (Nov. 13, 2013) [hereinafter Miller Tr.].

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Email from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Lois Lerner, Director, Exempt Orgs., IRS (Apr. 23, 2013) [IRSR 189013]; Miller Tr. At 154-56; Transcribed Interview of Sharon Light, Senior Technical Advisor to the Director, Exempt Orgs., IRS (Sept. 5, 2013); Email from Nicole Flax, Chief of Staff to the Deputy Commissioner, IRS, to Adewale Adeyemo, Dept. of the Treasury (Apr. 22, 2013) [IRSR 466707].

[41] Eric Lach, *IRS Official's Admission Baffled Audience at Tax Panel*, TALKING POINTS MEMO, May 14, 2013.

[42] Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 a.m.), *available at* http://electionlawblog.org/?p=50160 (last visited Oct. 23, 2015).

> They used names like Tea Party or Patriots and they selected cases simply because the applications had those names in the title. That was wrong, that was absolutely incorrect, insensitive, and inappropriate—that's not how we go about selecting cases for further review. We don't select for review because they have a particular name.[43]

Ms. Lerner's statements during the ABA panel, entitled "News from the IRS and Treasury," were the first public acknowledgement that the IRS had inappropriately scrutinized the applications of conservative-aligned groups. Within days, the President and the Attorney General expressed serious concerns about the IRS's actions. The President stated:

> It's inexcusable, and Americans are right to be angry about it, and I am angry about it. I will not tolerate this kind of behavior in any agency, but especially in the IRS, given the power that it has and the reach that it has into all of our lives.[44]

At the same press conference, the Attorney General announced a Justice Department investigation.[45]

As a result of Ms. Lerner's announcement at the ABA panel, and for other reasons, the Committee scheduled a hearing where Ms. Lerner would appear and answer questions about how and why the IRS processed conservative-aligned applicants for tax-exempt status. On May 14, 2013, Chairman Issa invited Ms. Lerner to testify at a hearing on May 22, 2013.[46] Ms. Lerner, through her attorney, confirmed she would appear at the hearing,[47] and that she planned to invoke her Fifth Amendment rights and not answer questions.[48]

Since Ms. Lerner would not testify voluntarily at the May 22, 2013 hearing and because her testimony was critical to the Committee's investigation, Chairman Issa authorized a subpoena to compel her to appear. The subpoena was served on May 20, 2013.

At the hearing, after being sworn, Ms. Lerner made a voluntary opening statement. She stated (in pertinent part):

> I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee. And while I would very much like to answer the Committee's questions today, I've been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have de-

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[43] *Id.*

[44] Statement by the President, May 15, 2013, *available at* https://www.whitehouse.gov/the-press-office/2013/05/15/statement-president (last visited Oct. 23, 2015).

[45] *Holder Launches Probe into IRS Targeting of Tea Party Groups*, FOXNEWS.COM, May 14, 2013.

[46] Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Lois Lerner, Director, Exempt Orgs., IRS (May 14, 2013) (letter inviting Lerner to testify at May 22, 2013 hearing).

[47] Email from William W. Taylor, III, Zuckerman Spaeder LLP, to H. Comm. on Oversight & Gov't Reform Majority Staff (May 17, 2013).

[48] Letter from William W. Taylor, III, Zuckerman Spaeder LLP, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 20, 2013).

> cided to follow my counsel's advice and not testify or answer any of the questions today.[49]

Following her statement, Chairman Issa explained he believed she had waived her right to assert a Fifth Amendment privilege and asked her to reconsider her position on testifying.[50] In response, Ms. Lerner stated: "I will not answer any questions or testify about the subject matter of this Committee's meeting."[51] The hearing was placed in recess so the Committee could consider whether Lerner had in fact waived her Fifth Amendment rights.

At a business meeting on June 28, 2013, the Committee approved a resolution rejecting Ms. Lerner's Fifth Amendment privilege claim based on her waiver at the May 22, 2013, hearing. The hearing was reconvened on March 5, 2014. Ms. Lerner again refused to answer questions, and the Committee initiated the process to hold her in contempt of Congress.

Meanwhile, the Committee's investigation continued. Documents and testimony obtained by the Committee confirmed that Lerner was a central figure in the IRS's inappropriate scrutiny of certain applicants for tax-exempt status. The Committee therefore focused investigative resources on obtaining documents—including emails—that would help investigators understand the full extent of her role in the targeting program.

B. LOIS LERNER'S EMAILS ARE CRITICAL TO THE COMMITTEE'S INVESTIGATION

Since Ms. Lerner refused to testify, her emails are vital to establish her precise role in the targeting. Without access to the entirety of her communications, especially those that occurred when the IRS's program to target conservative applicants for tax-exempt status was active, the full extent of her role cannot be known.

Ms. Lerner was, when the targeting occurred, the Director of the EO business division of the IRS. The EO business division contains the two IRS units responsible for executing the targeting program: the EO Determinations Unit in Cincinnati; and the EO Technical Unit in Washington, D.C.

Ms. Lerner has unique, first-hand knowledge of how, and why, the IRS scrutinized applications for tax-exempt status from conservative-aligned groups. The IRS sent letters to 501(c)(4) application organizations, signed by Ms. Lerner, that included questions about the organizations' donors. These letters went to applicant organizations that met certain political criteria. Ms. Lerner later described the selection of these applicant organizations as "wrong, [] absolutely incorrect, insensitive, and inappropriate."[52]

In addition to being in a position to control and direct the targeting, the incomplete set of Ms. Lerner's emails obtained by the Committee makes clear she was personally motivated to target conservative-oriented tax-exempt organizations. In 2010, while IRS employees were screening applications, Ms. Lerner and her col-

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[49] *The IRS: Targeting Americans for Their Political Beliefs: Hearing before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 22 (May 22, 2013) (H. Rpt. 113–33) (statement of Lois Lerner, Director, Exempt Orgs., IRS).

[50] *Id.*

[51] *Id.*

[52] Rick Hasen, *Transcript of Lois Lerner's Remarks at Tax Meeting Sparking IRS Controversy*, ELECTION LAW BLOG (May 11, 2013, 7:37 AM), http://electionlawblog.org/?p=50160.

leagues contemplated concerns about the "hugely influential Koch brothers."[53] Ms. Lerner advised that her unit should "do a c4 project next year" focusing on existing organizations.[54] She went on to acknowledge the potential scrutiny the effort could receive and stated that it should be engineered so as not appear to be a "per se political project."[55]

As left-leaning groups pressured the IRS to investigate conservative nonprofits, Ms. Lerner wrote on August 31, 2010: "We won't be able to stay out of this—we need a plan!"[56] Later, in October 2010, Ms. Lerner spoke of the intense pressure on the IRS to "fix the problem" resulting from the Supreme Court's decision in *Citizens United v. Federal Election Commission*, saying, "Everybody is screaming at us right now: 'Fix it now before the election. Can't you see how much these people are spending?'"[57]

Ms. Lerner played a central role in the IRS's disparate treatment of certain tax-exempt groups. She was extensively involved in handling the Tea Party cases—from directing the review process to receiving periodic status updates.[58] She created roadblocks to delay the approval of certain organizations' tax-exempt applications. Ms. Lerner directed the manager of the IRS's EO Technical Unit to subject Tea Party cases to a "multi-tier review" system out of concern the applications could extend the *Citizens United* decision to nonprofit law.[59] The system Ms. Lerner helped implement and manage eventually led to the significant delay of Tea Party 501(c)(4) applications by subjecting these applications to an unprecedented level of scrutiny.[60]

Ms. Lerner refused to testify before Congress about her role in the IRS targeting scandal. Ms. Lerner's refusal to cooperate with the Committee's investigation rendered her contemporaneous emails even more important to the congressional effort to understand the extent of the IRS targeting program and her role in it.

V. The IRS Significantly Delayed Production of Documents Pursuant to the Committee's First Subpoena

For more than two years, the Committee has sought all of Ms. Lerner's emails from the IRS.[61] On June 4, 2013, the Committee wrote to Mr. Koskinen's predecessor, Acting IRS Commissioner Daniel Werfel, to request "[a]ll documents and communications sent by, received by, or copied to Lois Lerner" from January 1, 2009 to the present.[62]

Because the IRS did not comply with the Committee's requests for information, on August 2, 2013, then-Chairman Issa issued a

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[53] Email from Paul Streckfus to Paul Streckfus (Sep. 15, 2010) (EO Tax Journal 2010–130) [IRSR 191032–33].

[54] Email from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sep. 15, 2010) [IRSR 191032–33].

[55] Email from Lois Lerner, IRS, to Cheryl Chasin et al., IRS (Sep. 16, 2010) [IRSR 191030].

[56] Email from Lois Lerner, IRS, to Sarah Hall Ingram, IRS (Aug. 31, 2010) [IRSR 632342].

[57] Lois Lerner Discusses Political Pressure on IRS in 2010," *available at* https://www.youtube.com (last visited July 31, 2014) (transcription by Committee).

[58] Justin Lowe, IRS, Increase in (c)(3)/(c)(4) Advocacy Org. Applications (June 27, 2011). [IRSR 2735]; Email from Judith Kindell, IRS, to Lois Lerner, IRS (July 18, 2012). [IRSR 179406].

[59] Seto Tr., at 34.

[60] *See e.g.,* Transcribed Interview of Carter Hull, Tax Law Specialist, Exempt Orgs. Technical Unit, IRS, at 38–44, 44–51 (June 14, 2013) [hereinafter Hull Tr.]; Hofacre Tr. at 24–25.

[61] Letter from Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Daniel Werfel, Acting Commissioner, IRS, June 4, 2013.

[62] *Id.*

subpoena to Treasury Secretary Jacob Lew, as the custodian of IRS documents.[63] Paragraph 1 on the subpoena schedule requested "[a]ll communications sent or received by Lois Lerner, from January 1, 2009, to August 2, 2013."[64] The subpoena described eight discrete categories of documents to allow the IRS to identify and produce responsive documents in an efficient way.[65]

On August 2, 2013, Acting Commissioner Werfel testified under oath regarding the IRS's effort to produce all of Lerner's emails to the Committee. He testified:

> Rep. JORDAN. So I just want to be clear then. Every single email of Lois Lerner's that we have asked for, you have sent to us?
>
> Mr. WERFEL. No. But we've provided hundreds of her emails. But, again, this is a process.
>
> Rep. JORDAN. No, no, no, no, no, no. It's pretty simple. You go to her computer and you get her emails.

Eventually, Werfel committed to produce Lerner's emails. He testified:

> Rep. JORDAN. We have a specific request. We want every bit of correspondence from Lois Lerner and you won't give it to us. Here is the lady who broke the story with the planted question. Here is the lady who took the Fifth. Here is the lady who is at the center of this storm. And we want every bit of email from her, and you won't give it to us.
>
> Mr. WERFEL. I will tell you I'm committed to.
>
> Rep. JORDAN. And you have had 3 months to do it.
>
> Mr. WERFEL. I will tell you what we're committed to. We're committed to reviewing every one of Lois Lerner's emails, and providing the response.

Acting Commissioner Werfel reiterated his commitment to produce Ms. Lerner's emails later during his testimony. He stated:

> Mr. WERFEL. Yeah, I know. A couple of other responses. First, Lois Lerner's emails are on the top of our list and we are working through it. But we're also producing——
>
> Rep. JORDAN. That's not good enough. That's not. We want them and we wanted them.[66]

Despite making the production of Ms. Lerner's emails the IRS's "top" priority, Mr. Werfel did not disclose there were problems with the preservation and collection of the entirety of Ms. Lerner's emails. In fact, contrary to Acting Commissioner Werfel's claim that the IRS was "aggressively working to share, gather and provide information" to the Committee, the agency continued to ob-

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[63] Comm. on Oversight & Gov't Reform Subpoena to Jacob Lew, Sec'y. Dep't of the Treasury (Aug. 2, 2013).

[64] *Id.*

[65] *Id.*

[66] *Examining the Skyrocketing Problem of Identity Theft Related Tax Fraud at the IRS: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight & Gov't Reform*, 113th Cong., at 81–83 (2013) (testimony of Hon. Daniel Werfel, Principal Deputy Comm'r, Internal Revenue Serv.).

struct the Committee's investigation even after a new permanent commissioner was appointed.[67]

VI. Commissioner Koskinen's Obstruction of Congressional Investigations

President Obama nominated John A. Koskinen to be the permanent IRS Commissioner on August 1, 2013.[68] During his confirmation hearing, Koskinen pledged to cooperate with several congressional investigations examining the targeting scandal.[69] He stated, "[W]e will be transparent about any problems we run into; and the public and certainly this committee will know about those problems as soon as we do."[70] On December 23, 2013, John Koskinen was sworn in as the 48th IRS Commissioner.[71]

Commissioner Koskinen was on notice from his earliest days in office regarding the need to preserve documents relevant to the IRS targeting scandal. When Commissioner Koskinen became the head of the agency, a Committee subpoena had been in place for more than four months, since August 2, 2013. The subpoena covered "[a]ll communications sent or received by Lois Lerner, from January 1, 2009, to August 2, 2013."[72] The Committee reissued that subpoena to Commissioner Koskinen on February 14, 2014, seven weeks after he was sworn in.[73]

The subpoena made clear the legal obligation for Mr. Koskinen, as the Commissioner of the IRS, to produce all eight categories of documents covered by the subpoena, including emails to and from Lois Lerner. Despite this, Mr. Koskinen failed to make the Committee aware that thousands of emails covered by the subpoena were missing.

The chain of events that ultimately caused many of Ms. Lerner's emails to be unavailable to the Committee began in June 2011, when Ms. Lerner's computer crashed. On February 2, 2014, Catherine Duval, Counselor to the Commissioner, noticed a massive gap in the batch of Ms. Lerner's emails that were being collected for production to the Committee.[74] Ms. Duval noticed there were no custodial emails (emails extracted from Ms. Lerner's computers) from before 2011 because the hard drive that contained those messages crashed.[75] Ms. Duval realized that emails from the period in question may have been recoverable on backup tapes and made an

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[67] Letter from Hon. Daniel Werfel, Principal Deputy Comm'r, Internal Revenue Serv., to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform & Hon. Jim Jordan, Chairman, Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs (Aug. 2, 2013).

[68] The White House, Press Release, *President Obama Announces His Intent to Nominate John Koskinen as Commissioner of the Internal Revenue Serv*. (Aug. 1, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/01/president-obama-announces-his-intent-nominate-john-koskinen-commissioner (last visited July 31, 2014).

[69] *Nomination of John Koskinen: Hearing Before the S. Comm. on Finance*, 113th Cong. (2013) (question and answer with Ranking Member Orrin Hatch). Mr. Koskinen's nomination makes clear his term expires on November 12, 2017.

[70] *Nomination of John Andrew Koskinen, to be Commissioner, Internal Revenue Service: Hearing Before the S. Comm. on Finance*, 113th Cong. (2013).

[71] Internal Revenue Serv., *Commissioner John Koskinen*, http://www.irs.gov/uac/Commissioner-John-Koskinen (last visited July 31, 2014).

[72] H. Comm. on Oversight & Gov't Reform Subpoena to Jacob Lew, Sec'y, Dep't of the Treasury (Aug. 2, 2013).

[73] H. Comm. on Oversight & Gov't Reform Subpoena to John Koskinen, Comm'r, Internal Revenue Serv. (Feb. 14, 2014).

[74] Transcribed interview of Thomas Kane, Deputy Assoc. Chief Counsel, Procedure & Administration, Office of Chief Counsel, Internal Revenue Serv. (July 17, 2014).

[75] *Id.*; Letter from Leonard Oursler, Internal Revenue Serv., to Ron Wyden & Orrin Hatch, S. Comm. on Finance, encl. 3 at 6 (June 13, 2014).

inquiry with the Office of the Chief Information Officer.[76] Steven Manning, IRS's Deputy Chief Information Officer, informed Ms. Duval and Thomas Kane, a lawyer in the Chief Counsel's Office, that the IRS's "disaster recovery tapes" (also called backup tapes) are reused every six months, and that the previous information is written over.[77]

According to Commissioner Koskinen's own testimony at a hearing on July 23, 2014, he became aware that thousands of Ms. Lerner's emails were missing in February 2014, shortly after Ms. Duval and Mr. Kane learned backup tapes that might contain the missing emails are routinely overwritten.[78] In fact, Commissioner Koskinen testified that Mr. Kane learning this information was tantamount to the entire agency being aware that Ms. Lerner's emails were missing. Commissioner Koskinen testified: "If you told me now that Tom Kane said he knew in February, I would henceforth say we, as the IRS, knew in February."[79]

Commissioner Koskinen—despite knowing that thousands of emails covered by a congressional subpoena were missing and in jeopardy of being permanently lost—took no meaningful action to retrieve them. And so, on March 4, 2014, IRS employees working the midnight shift at a facility in Martinsburg, West Virginia, magnetically erased 422 backup tapes that contained the missing Lerner emails.[80] The backup tapes that were destroyed contained as many as 24,000 Lerner emails responsive to the subpoenas.[81]

Commissioner Koskinen did not reveal to Congress that thousands of Ms. Lerner's emails were missing until June 20, 2014,[82] despite a series of opportunities to do so.

A. COMMISSIONER KOSKINEN TESTIFIED THE AGENCY WOULD COMPLY WITH THE COMMITTEE'S SUBPOENA

Rather than notify the Committee that thousands of emails covered by a subpoena were missing, Commissioner Koskinen devised a series of excuses for the IRS's inability to produce Ms. Lerner's emails. At a Committee hearing on March 26, 2014, Commissioner Koskinen blamed the scope of the subpoena for the IRS's failure to comply. He asserted the subpoena covered "not thousands, but millions of documents."[83] Mr. Koskinen never mentioned that any IRS officials' emails were missing or destroyed. When asked specifically whether the IRS would respond to the subpoena, he responded that the agency would do so. He testified:

> Rep. CHAFFETZ. You have a duly issued subpoena. Are you or are you not going to provide this committee the emails as indicated in this subpoena, yes or no?
>
> Mr. KOSKINEN. We have never said we weren't——

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[76] Transcribed interview of Thomas Kane, Deputy Assoc. Chief Counsel, Procedure & Administration, Office of Chief Counsel, Internal Revenue Serv. (July 17, 2014).

[77] *Id.*

[78] *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the H. Comm. on Oversight & Gov't Reform Subcomm. on Econ. Growth, Job Creation & Reg. Affairs*, 113th Cong. (2014).

[79] *Id.*

[80] Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss 2* (June 30, 2015).

[81] *Id.*

[82] *"Recent Developments in the Committee's Investigation into the Internal Revenue Service's Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations": Hearing Before the H. Comm. on Ways & Means*, 113th Cong. (2014).

[83] Mar. 26, 2014 Hearing, *supra* note 3, at 27.

Rep. CHAFFETZ. I am asking you yes or no.

Mr. KOSKINEN. We are going to respond to the subpoena——

Rep. CHAFFETZ. No, no. Sir——

Mr. KOSKINEN. Yes, we are going to respond to the subpoena. I am just telling you to respond fully to the subpoena, we are going to be at this for years, not months.[84]

During the same hearing, Commissioner Koskinen testified under oath that the IRS would produce all of Ms. Lerner's emails to the Committee.[85] He stated:

Rep. CHAFFETZ. And I don't understand that. Just specific to item one, Lois Lerner——

Mr. KOSKINEN. Lois Lerner's emails——

Rep. CHAFFETZ. Sir, are you or are you not going to provide this committee all of Lois Lerner's emails?

Mr. KOSKINEN. We are already starting——

Rep. CHAFFETZ. Yes or——

Mr. KOSKINEN. Yes, we will do that.[86]

In a later exchange, Commissioner Koskinen again stated that he would provide the subpoenaed documents.

Rep. CUMMINGS. Well, reclaiming just for a second. I just want us to be clear. I mean, time is precious, money is precious. Just tell us. I mean, you talk about relevance. You said if a lawyer were to see this subpoena, they would have some concerns. I just want to be clear. I mean, it sounds like, again, I am saying what I said before, you seem to have an understanding and we seem to have an understanding, and they don't seem to be the same. So are you going to provide the documents for Lois Lerner?

Mr. KOSKINEN. Yes.

Rep. CUMMINGS. That were subpoenaed.

Mr. KOSKINEN. Yes.[87]

Like Acting Commissioner Werfel before him, Commissioner Koskinen promised to produce all of the emails Ms. Lerner sent or received during the period in question. At the hearing, Mr. Koskinen made no mention of the fact that the IRS did not possess thousands of emails responsive to the subpoenas.

B. COMMISSIONER KOSKINEN'S SENIOR ADVISORS PROMISED TO COMPLY

Following Commissioner Koskinen's testimony before the Committee, his senior advisors assured Committee staff the IRS would produce Ms. Lerner's emails. In a bipartisan staff meeting on April 4, 2014, two of Commissioner Koskinen's senior advisors, Catherine Duval and Leonard Oursler, discussed the IRS's response to the Committee's subpoena.[88] Ms. Duval stated the IRS had identified and set aside all of Ms. Lerner's emails as part of its document production process.[89] Neither Ms. Duval nor Mr. Oursler disclosed

[84] *Id.* at 30 (testimony of John Koskinen, Comm'r, Internal Revenue Serv.).
[85] *Id.*
[86] *Id.*
[87] *Id.* at 31.
[88] Meeting between H. Comm. on Oversight & Gov't Reform Staff & Catherine Duval & Leonard Oursler, Internal Revenue Serv. (Apr. 4, 2014).
[89] *Id.*

that the IRS had already destroyed a significant cache of Ms. Lerner's emails.

VII. Commissioner Koskinen's False Claim that Key Evidence was Lost or Destroyed Prolonged the Investigation

According to the IRS, Ms. Lerner's laptop computer crashed in June 2011. When technicians reviewed the hard drive after the crash, they determined the data on her hard drive was unrecoverable.[90] An investigation by TIGTA concluded Ms. Lerner's hard drive most likely crashed on June 11, 2011, a Saturday. Efforts to determine who had access to Ms. Lerner's office at the time were unsuccessful because the security badge entry and exit logs from that day were also destroyed.[91] Aaron Signor, an IRS IT specialist, initially examined Ms. Lerner's hard drive.[92] Mr. Signor provided computer-related assistance to the EO Division. Mr. Signor removed the computer from Ms. Lerner's office and determined that a problem existed with the computer's hard drive.[93] Mr. Signor attempted unsuccessfully to retrieve data from the hard drive before discarding it in a cardboard box containing roughly thirty other crashed drives.[94] That was the extent of Mr. Signor's attempt to restore data on the hard drive and he closed the matter on June 21, 2011.[95]

In July or August 2011, Mr. Signor received a phone call from Lillie Wilburn, an IT manager, asking whether he still had Ms. Lerner's hard drive.[96] She asked Mr. Signor to ship the hard drive to another technician for additional examination.[97] John Minsek, a senior investigative analyst in the IRS's Criminal Investigations (CI) unit, eventually received Ms. Lerner's hard drive.[98] Mr. Minsek understood the hard drive was from "a computer of importance" and there was a "sense of urgency" to recover data.[99] Using the CI unit's digital forensic facilities, Mr. Minsek opened the hard drive and conducted additional tests.[100] Once he opened the hard drive, Mr. Minsek noticed "well-defined scoring creating a concentric circle in the proximity of the center of the disk."[101] According to Mr. Minsek, the scoring covered less than one percent of the surface of the disk.[102]

Following Mr. Minsek's examination, he determined he was unable to recover the data and returned the hard drive to the IRS's IT team.[103] In a subsequent conversation with IRS IT personnel, Mr. Minsek raised the possibility the IRS could send Ms. Lerner's hard drive to a data recovery service, believing it was "possible that they had techniques, methods, perhaps proprietary tools that

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[90] Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden & Hon. Orrin Hatch, S. Comm. on Finance (June 13, 2014).
[91] TIGTA report, *supra note* 4, at 9.
[92] Transcribed interview of Aaron Signor, Internal Revenue Serv. (Aug. 1, 2014).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Transcribed interview of John Minsek, Internal Revenue Serv. (July 24, 2014).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

I did not have."[104] Instead, Ms. Lerner's hard drive was sent to an IRS facility and recycled by an outside contractor.[105]

The destruction of Ms. Lerner's hard drive in June 2011 occurred during a pivotal time in the IRS's targeting of conservatives. Just four months earlier, in February 2011, Ms. Lerner called the Tea Party applications "very dangerous" and ordered the cases undergo an unprecedented "multi-tier" review.[106] In early June 2011, Ms. Lerner requested a copy of the tax-exempt application filed by the prominent conservative group Crossroads GPS for review by her senior technical advisor.[107]

Witnesses testified Ms. Lerner stored a significant amount of information on her computer's hard drive. According to Mr. Signor, the IT technician who regularly serviced Ms. Lerner's computer, Ms. Lerner maintained a large volume of data on the hard drive of her computer.[108] Mr. Signor recommended Ms. Lerner back up her data on a network server. He testified:

> Q. Do you recommend your end users to save data onto the [network shared] drive?
>
> A. Yes.
>
> Q. That's something you do in the normal course of your work?
>
> A. Yes.

Despite that recommendation, Mr. Signor was told Ms. Lerner did not have the time or responsibility to save her data. Mr. Signor testified:

> Q. You stated at the onset of the last round that you would recommend to end users that they back up their work. Do you recall that?
>
> A. Yes.
>
> Q. Did you have occasion to make that recommendation to Ms. Lerner prior to working on her laptop in the summer of 2011?
>
> A. Yes.
>
> Q. When?
>
> A. There were probably several occasions between 2007 and 2011. I couldn't say exactly when.
>
> Q. Do you know in what context?
>
> A. It would have been in the context of another ticket where I was working on her computer and maybe noticed the volume of data and suggested it.
>
> Q. Do you have reason to know whether she followed your suggestion or not?
>
> A. Yes.
>
> Q. What do you know?
>
> A. I was told that she didn't have backups at one point.

Mr. Signor later clarified the point further:

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[104] *Id.*

[105] Transcribed interview of Thomas Kane, Internal Revenue Serv. (July 17, 2014).

[106] Email from Lois Lerner, Internal Revenue Serv., to Michael Seto, Internal Revenue Serv. (Feb. 1, 2011) [IRSR 161810].

[107] Email from Holly Paz, Internal Revenue Serv., to Cindy Thomas, Internal Revenue Serv. (June 1, 2011) [IRSR 69914–15].

[108] Transcribed interview of Aaron Signor, Internal Revenue Serv. (Aug. 1, 2014).

> Q. And when you say you told her about backups, what exactly do you remember telling Ms. Lerner's assistant about backups?
>
> A. There was one day where she and I were in Lois's office. I can't remember if Lois was present or not. But I had said, you know, "Lois has plenty of data. We really should get backups of her data." And her response was, "Well, I don't think that Lois has the time to do it, and it's not her responsibility." That's what was said, something—I'm not quoting exactly, but something like that would have been said.[109]

On September 5, 2014, the IRS notified Congress it could not find emails from five other records custodians, in addition to Ms. Lerner.[110] The IRS lost emails sent and received by Judy Kindell, Ms. Lerner's senior technical advisor and expert on non-profit political speech; Ronald Shoemaker, a Washington manager who oversaw work on the applications; and Julie Chen and Nancy Heagney, two Cincinnati-based Determinations Specialists.[111] Some of the missing emails were sent and received during key periods of the IRS's targeting of conservative tax-exempt applicants. For instance, Judy Kindell's missing emails were from August 2010, when the IRS began to receive media inquiries related to the President's critical rhetoric of *Citizens United* and political speech by conservative non-profit groups. According to the IRS, Ms. Kindell was instructed to save old emails on her computer's hard drive and "when her hard drive failed, she lost email that resided on that drive."[112]

In June 2011, after her emails were destroyed, Ms. Lerner emailed David Fish, who also experienced a hard drive failure. "No one will ever believe," she wrote, "that both your hard drive and mine crashed within a week of each other!"[113]

A. COMMISSIONER KOSKINEN PROMISED TO PRODUCE LOIS LERNER'S EMAILS EVEN AFTER HE KNEW SOME WERE MISSING

Commissioner Koskinen's continually evolving and misleading statements about Lois Lerner's emails compounded the challenges created by their destruction. For several months, Mr. Koskinen's unwillingness to provide accurate and straightforward information about the missing emails unnecessarily delayed and hindered the Committee's fact-finding efforts.

On March 26, 2014, Commissioner Koskinen appeared before the Committee to testify about the IRS's compliance with congressional subpoenas and document requests.[114] As described above, during the hearing, Mr. Koskinen was repeatedly asked whether he would commit to producing all of Ms. Lerner's emails. Commissioner Koskinen testified repeatedly that he would.

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[109] *Id.*

[110] Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Dave Camp, Chairman, H. Comm. on Ways & Means (Sep. 5, 2014).

[111] *Id.*

[112] *Id.*

[113] Email from Lois Lerner, Internal Revenue Serv., to David Fish & Nikole Flax, Internal Revenue Serv. (June 29, 2011) [IRSR 903314].

[114] *Examining the IRS Response to the Targeting Scandal: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).

The Committee subsequently obtained testimony that the IRS knew Ms. Lerner's emails had been destroyed at the time of Commissioner Koskinen's appearance in March 2014. In particular, IRS Deputy Associate Chief Counsel, Thomas Kane—who had responsibility for the IRS's document production process in response to congressional requests—testified that senior IRS leadership became aware of problems with Ms. Lerner's emails in early February 2014.[115] Mr. Kane testified that on February 2, 2014, Catherine Duval, Counselor to the Commissioner, noticed a discrepancy in the number emails gathered from Ms. Lerner's account.[116] The IRS had gathered 16,000 emails from the period after April 2011 and "less than 100" from the period before April 2011.[117]

After becoming aware of the discrepancy in the number of emails, Mr. Kane asked a subordinate, Paul Butler, to look into the matter.[118] Two days later, on February 4, senior IRS leadership learned that Ms. Lerner's hard drive had crashed in 2011 from her former administrative assistant, Dawn Marx.[119] Mr. Kane testified:

> Q. And so do you remember precisely when you became aware of the hard drive crash?
>
> A. We were—Paul Butler had talked to someone who worked for Lois at about the time when the emails had a great discrepancy and was told by her that there had been a hard drive crash at that particular point in time.
>
> Q. Do you know the name of the person that Mr. Butler spoke with?
>
> A. Dawn Marx. Marx with an "x."

Later, Mr. Kane testified:

> Q. Do you know, sir, when Ms. Marx informed Mr. Butler about the hard drive crash?
>
> A. February 4th.
>
> Q. Of 2014?
>
> A. Correct.
>
> Q. And why does that date stand out to you in your memory?
>
> A. The date stands out to me because we first found out about it on February 2nd, and it was only 2 days afterwards.

When asked whether it took long to figure out what happened, Mr. Kane stated:

> A. It didn't take us long to figure out that it was reported that there was a hard drive crash at or about the time that the discrepancy in the emails took place.

Once Mr. Kane discovered the crash, he communicated up the chain of command to Catherine Duval. Mr. Kane testified:

> Q. And upon learning on February 4th of the hard drive crash, who did you communicate that to?

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[115] Transcribed interview of Thomas Kane, Internal Revenue Serv. (July 17, 2014).
[116] *Id.*
[117] *Id.*; Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance encl. 3 at 6 (June 13, 2014).
[118] Transcribed interview of Thomas Kane, Internal Revenue Serv. (July 17, 2014).
[119] *Id.*

A. That was relayed to Kate [Duval].

Q. By who?

A. I would have been the one to do it, yes.[120]

Mr. Kane also told the Committee that senior IRS leadership became aware in mid-February 2014 that Ms. Lerner's hard drive had been recycled and any emails on the hard drive were "unrecoverable." Mr. Kane stated:

> Q. And do you recall when Mr. Butler gave you that information, the hard drive had been recycled?
>
> A. I don't recall a specific date or time period, or time, but it certainly would have been within the period of time when he was actively interacting with the IT people, in early to mid-February.[121]

Mr. Kane also testified about the process that rendered the hard drive unrecoverable. He stated:

> Q. Do you have an understanding now as to what that term, "recycled," means?
>
> A. I do have some knowledge as to what happened to the hard drive.
>
> Q. What happened to the hard drive?
>
> A. After the CI forensic analysis determined that it was—that the material on it was unrecoverable, it was returned to the IT people, who at some point in time degaussed it to make sure that if there was anything else on it, particularly from a 6103 perspective, that it would not be recovered. It was then sent to New Carrollton again. A lot of our IT functions are housed out there, and they have a recycling function out there where material is eventually recycled to an outside contractor. And I have no idea what the outside contractor does with these materials.[122]

From mid-February 2014 to April 2014, the IRS attempted to recover some of the missing Ms. Lerner emails by other means.[123] However, it is clear from Mr. Kane's testimony that the IRS knew no later than mid-February 2014 that a portion of Ms. Lerner's emails were missing. In fact, Commissioner Koskinen acknowledged during a July 23, 2014 hearing: "If you told me now that Tom Kane said he knew in February, I would henceforth say we, as the IRS, knew in February."[124] Moreover, Mr. Koskinen himself stated that he personally knew about problems with Ms. Lerner's emails in February. Commissioner Koskinen testified:

> Rep. DESANTIS. So if the senior IRS officials knew in mid-February that the emails could not be recovered off the hard drive, why did you tell this committee that you would produce them?
>
> Mr. KOSKINEN. As I have testified before, when I testified at previous hearings, when I testified in March, I said we would provide all Lois Lerner emails, as I have also

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[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the Subcomm. on Econ. Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014).

> testified since then. I did not mean to imply that if they didn't exist, we would somehow magically provide them. We have provided you all the Lois Lerner emails we have.
>
> With regard to when officials at the IRS knew the impact of the hard drive crash, as I have testified several times in the 11 hours of hearings since June 13th, what I was advised and knew in February was that when you took the emails that had already been provided to this committee and other investigators, and, instead of looking at them by search terms, looked at them by date, it was clear that there were fewer emails in the period up through 2011 and subsequently. And there was also, I was told, there had been a problem with Ms. Lerner's computer. It was not described to me in any greater detail than that.[125]

Despite knowing about the missing emails in February, Commissioner Koskinen failed to mention anything during his sworn testimony on March 26, 2014.[126] Instead, he promised the Committee the IRS would produce all of Ms. Lerner's emails. In addition, Counselor to the Commissioner, Catherine Duval, and the IRS's National Director for Legislative Affairs, Leonard Oursler, failed to mention any problems with Ms. Lerner's emails during a meeting with bipartisan Committee staff on April 4, 2014.[127] Ms. Duval requested this meeting specifically to discuss how the IRS would execute the Commissioner's promise to produce the subpoenaed Lerner emails, but did not use this opportunity to inform the Committee of any issues related to Ms. Lerner's emails.

Even when the IRS finally acknowledged the missing emails on June 13, 2014, it failed to provide full and complete information to the Committee. First, the IRS stated it "confirmed" that backup tapes from the relevant period had been destroyed.[128] Commissioner Koskinen repeated this information during his sworn testimony to the House Committee on Ways and Means on June 20, 2014. He testified:

> In light of the hard-drive issue, the IRS took multiple steps over the past months to assess the situation and produce as much email as possible for which Ms. Lerner was an author or recipient. We retraced the collection process for her emails. We located, processed and included email from an unrelated 2011 data collection for Ms. Lerner. We confirmed that backup tapes from 2011 no longer existed because they have been recycled, pursuant to the IRS normal policy. We searched email from other custodians for material on which Ms. Lerner appears as author or recipient.[129]

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[125] *Id.*

[126] *Id.*

[127] Meeting between Committee staff and Catherine Duval & Leonard Oursler, Internal Revenue Serv. (Apr. 4, 2014).

[128] Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance encl. 3 (June 13, 2014).

[129] *Recent Developments in the Committee's Investigation into the Internal Revenue Service's Use of Inappropriate Criteria to Process Applications of Tax-Exempt Organizations: Hearing Before the H. Comm. on Ways & Means,* 113th Cong. (2014) (statement of John Koskinen, IRS Commissioner).

Commissioner Koskinen later defended his claim that he confirmed these backup tapes were destroyed. In a July 2014 hearing before the Committee, he testified:

> Rep. GOWDY. What does the word "confirmed" mean to you?
>
> Mr. KOSKINEN. Confirmed means that somebody went back and looked and made sure that in fact any backup tapes that had existed had been recycled.[130]

Confirmation, by Mr. Koskinen's or any definition, never occurred. TIGTA was able to establish that several backup tapes from this timeframe had not, in fact, been recycled. Moreover, Commissioner Koskinen did not divulge in June 2014 that the normal policy had not applied since May 22, 2013. In fact, Mr. Koskinen withheld from Congress that a notice to preserve backup tapes had been in place for over a year and that the IRS had deleted backup tapes containing as many as 24,000 emails during that time.[131]

Commissioner Koskinen also testified the IRS went to "great lengths" to recover Ms. Lerner's emails. He stated:

> Rep. MCDERMOTT. Is there anything you can see in the time that you've been there that they didn't—that the IRS did not do to try and get all?
>
> Mr. KOSKINEN. There's no indication. I have said, we've gone to great lengths. We've retraced the process for producing her email twice just to make sure that no email was missing. We understand the importance of this investigation. We've gone to great lengths to spend a significant amount of money trying to make sure that there is no email that is required that has not been produced.[132]

The Committee subsequently learned that, contrary to Commissioner Koskinen's assertions, some backup material did exist. TIGTA informed the Committee on July 29, 2014, that at least some backup tapes were not overwritten by the IRS.[133] TIGTA also told the Committee it located Microsoft Exchange server drives from the relevant period the IRS had not searched because it was under the mistaken belief the drives had been destroyed.[134] The IRS never bothered to determine whether the drives had in fact been destroyed.

Additionally, Steven Manning, the Deputy Chief Information Officer at the IRS from 2009 until March 2015, stated that the IRS made no effort to recover information from the backup tapes. Mr. Manning was the point person on issues related to the IT component of e-discovery. He testified:

> Q. Did the Commissioner ever ask for the backup tapes to be forensically examined?

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[130] *An Update on the IRS Response to Its Targeting Scandal: Hearing Before the Subcomm. on Econ. Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov't Reform,* 113th Cong. (2014).

[131] Email from Terrance Milholland, Internal Revenue Serv. to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

[132] *IRS Commissioner John Koskinen: Hearing Before the H. Comm on Ways and Means,* 113th Cong. (2014).

[133] Conference call between Treasury Inspector Gen. for Tax Admin. and Cong. Staff (July 29, 2014).

[134] *Id.*

A. Not to me. Not that I recall—not to me.[135]

For four months, from February 2014 to June 2014, Commissioner Koskinen withheld vital information about the IRS's ability to comply with the Committee's subpoena for all of Ms. Lerner's emails. Even after claiming Ms. Lerner's emails were missing, Commissioner Koskinen continued to provide incomplete and misleading information about the IRS's efforts to recover them. As recently as September 12, 2014, Mr. Koskinen insisted Ms. Lerner's emails were permanently missing. In a letter to Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs Chairman Jim Jordan regarding whether Ms. Lerner's emails might be recoverable from backup tapes maintained by the IRS, Commissioner Koskinen wrote: "We have seen no indication that any email data from the June 2011 timeline exists or is accessible on these [backup] tapes." [136]

This statement by Commissioner Koskinen was false. On November 21, 2014, TIGTA notified congressional investigators that it located a significant portion of Ms. Lerner's "missing" emails.[137] TIGTA found the emails among hundreds of "disaster recovery tapes" that were used to back up the IRS email system.[138]

B. THE COMMITTEE LEARNED LOIS LERNER'S EMAILS ARE LOST

Following months of noncompliance with the Committee's subpoenas, the IRS finally informed Congress on June 13, 2014 that it had lost a portion of Ms. Lerner's emails. The IRS cited a hard drive crash in 2011 as the cause for the loss.[139] The apparent hard drive crash compromised Ms. Lerner's emails from January 2009 to April 2011, a time period critical to the Committee's investigation.[140] Four days later, the IRS contacted Congress again, this time to explain that it had also lost the emails of other IRS officials. All were relevant figures in the Committee's investigation.[141]

The chain of events that eventually led the IRS to disclose the missing emails began on April 23, 2014, when the Committee wrote to the Justice Department about a new revelation that Richard Pilger, Director of the Justice Department's Election Crimes Branch, spoke with Ms. Lerner about coordinating with the IRS to prosecute tax-exempt applicants.[142] The Committee's letter included a request for "[a]ll documents and communications between or among Lois Lerner and employees of the Department of Justice for the period of January 1, 2009, through the present." [143]

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[135] Transcribed interview of Steven Manning, Internal Revenue Serv., in Wash., D.C. (April 6, 2015).

[136] Letter from John Koskinen, Internal Revenue Serv., to Rep. Jim Jordan, Chairman, Subcomm. on Economic Growth, Job Creation, and Regulatory Affairs (Sep. 12, 2014).

[137] Rachel Bade, *Thousands of lost Lois Lerner IRS emails found by IG*, POLITICO, Nov. 23, 2014.

[138] Susan Ferrechio, *30,000 missing emails from IRS' Lerner recovered*, WASH. EXAMINER, Nov. 22, 2014.

[139] Letter from Leonard Oursler, Nat'l Dir. for Legislative Affairs, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, S. Comm. on Finance & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance (June 13, 2014), encl. 3, at 7 (carbon copy to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform) [hereinafter June 13, 2014 Letter].

[140] *Id.*

[141] Rachael Bade, *GOP: IRS Lost More Emails in Tea Party Affair*, POLITICO, June 17, 2014 [hereinafter Bade, *IRS Lost More Emails*].

[142] Letter from Members, H. Comm. on Oversight & Gov't Reform, to Hon. Eric Holder, Attorney Gen., U.S. Dep't of Justice (Apr. 23, 2014) [hereinafter Apr. 23, 2014 Letter]; Email from Richard Pilger, Dir., Election Crimes Branch, U.S. Dep't of Justice, to Lois G. Lerner, Internal Revenue Serv. (May 8, 2013). [IRSR 209188].

[143] Apr. 23, 2014 Letter, *supra* note 138.

On May 20, 2014, the Committee subpoenaed the Justice Department for the documents described in the April 23, 2014 letter.[144] A May 28, 2014 production from the Justice Department included additional emails sent between Mr. Pilger and Ms. Lerner.[145] These emails were not contained in any prior document production from the IRS to the Committee. After the Committee obtained emails that demonstrated the IRS's production of emails in response to the subpoena was incomplete, the IRS came clean.[146]

Late in the afternoon on Friday, June 13, 2014, the IRS notified Congress that due to a hard drive crash, Lois Lerner's emails to and from other IRS employees from January 2009 to April 2011 were missing.[147] According to the IRS, because Ms. Lerner's hard drive had crashed in mid-2011, an unknown number of federal records were permanently destroyed.[148] The IRS, therefore, was unable to recover the emails Ms. Lerner sent and received during that key period. This admission was the first time that the IRS gave any indication it did not possess all of Ms. Lerner's emails covered by the subpoena. The White House and Treasury Department learned that Ms. Lerner's emails were missing months earlier.[149]

In written testimony submitted to the Committee in advance of a June 23, 2014 hearing, Commissioner Koskinen explained that IRS officials first discovered the possibility that Ms. Lerner's computer may have malfunctioned in February 2014 when gathering emails responsive to congressional requests.[150] It was at this point that IRS officials first noticed a discrepancy in the distribution of the dates on her emails.[151] According to testimony obtained from Thomas Kane, IRS Deputy Associate Chief Counsel for Procedure and Administration, senior IRS leadership first became concerned about the possibility that Ms. Lerner's emails were missing on February 2, 2014, and confirmed that her hard drive had crashed just two days later.[152] IRS officials then briefed Commissioner Koskinen in February about this issue.[153] Commissioner Koskinen testified in June 2014 that IRS Information Technology professionals "learned additional facts regarding Lerner's computer crash in mid-2011" during a search for Ms. Lerner emails in mid-March 2014.[154] Commissioner Koskinen's written and oral testimony not only indicate that IRS employees knew about a potential problem with Ms. Lerner's computer at least four months before telling Con-

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[144] Subpoena from H. Comm. on Oversight & Gov't Reform to Hon. Eric Holder, Attorney Gen., U.S. Dep't of Justice (May 20, 2014).

[145] Letter from Peter J. Kadzik, Principal Deputy Asst. Attorney Gen., U.S. Dep't of Justice, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (May 28, 2014).

[146] June 13, 2014 Letter, *supra* note 133.

[147] *Id.*

[148] *Id.*

[149] *IRS Obstruction: Lois Lerner's Missing Emails, Part I: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong., at 170 (June 23, 2014) (question and answer with Rep. Jordan) [hereinafter June 23, 2014 Hearing]; Josh Hicks, *IRS Email Controversy Continues this Week with Two Hearings*, WASH. POST, June 23, 2014; Rachel Bade, *IRS Chief Defiant on Lois Lerner Email Loss*, POLITICO, June 20, 2014.

[150] H. Comm. on Oversight & Gov't Reform, Written Testimony of John A. Koskinen, Comm'r, Internal Revenue Serv. (June 23, 2014), at 2 [hereinafter Koskinen Written Testimony, June 23, 2014].

[151] *Id.*

[152] Kane Tr. at 45.

[153] June 23, 2014 Hearing, *supra* note 143, at 38 (question and answer with Rep. Mica).

[154] Bade, *IRS Chief Defiant, supra* note 135.

gress, but also before Commissioner Koskinen's March 26, 2014 testimony before the Committee.

Despite receiving questions during the Committee's March 26, 2014 hearing directly pertaining to the collection of Ms. Lerner's emails, Commissioner Koskinen assured Members that the IRS "was already starting" to gather Ms. Lerner's emails—never mentioning the possibility that any of her emails were irretrievable.[155] Commissioner Koskinen testified under oath that the IRS would respond to the subpoena, again failing to mention the possibility that some documents covered by the subpoena were lost.[156] Months later, however, during testimony before the Committee, Commissioner Koskinen admitted that at the time of the Committee's March 26, 2014 hearing, "he knew there'd been a problem" with Ms. Lerner's emails.[157]

C. COMMISSIONER KOSKINEN FAILED TO DISCLOSE KNOWLEDGE OF ADDITIONAL HARD DRIVE CRASHES

On June 17, 2014—four days after the IRS admitted that an unknown number of Ms. Lerner's emails were lost—the agency informed Congress that it was not able to produce emails for other key officials at the center of the Committee's investigation.[158] Specifically, the IRS informed Congress that six more employees' hard drives failed, causing the agency to lose emails for officials who were central to the IRS targeting investigation.[159] Commissioner Koskinen later adjusted the number of affected employees to eight.[160] Even more troubling, the IRS remained unsure if additional employees' hard drives crashed, raising questions as to the extent to which the Committee received all emails relevant to its investigation.[161] Commissioner Koskinen testified before the Committee that the IRS is "still looking" into whether additional hard drives crashed, and that he is unaware as to "what the final number will be."[162]

The IRS apparently lost emails for Supervisory Public Affairs Specialist Michelle Eldridge, Agent Kimberly Kitchens, Agent Julie Chen, Supervisory Agent Tyler Chumny, and Agent Nancy Heagney.[163] According to the IRS, the missing data for seven of the eight officials came from the period under investigation.[164] The IRS explained that it relied on employees to archive emails themselves on their personal computers, rather than preserving records by automatically backing up emails or by other means.[165]

Despite the Committee's frequent, ongoing correspondence with the IRS regarding its document productions pursuant to the Committee's subpoena, the IRS never mentioned—until thirteen months after the Committee's initial document request—the possibility that it would not fully produce Lois Lerner's emails or those of any other IRS official.

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[155] Mar. 26, 2014 Hearing, *supra* note 3, at 30.
[156] *Id.*
[157] June 23, 2014 Hearing, *supra* note 143, at 31 (question and answer with Chairman Issa).
[158] Bade, *IRS Lost More Emails, supra* note 135.
[159] *Id.*
[160] Koskinen Written Testimony, June 23, 2014, *supra* note 144, at 4.
[161] Bade, *IRS Chief Defiant, supra* note 135.
[162] June 23, 2014 Hearing, *supra* note 143, at 137 (question and answer with Rep. Chaffetz).
[163] Bade, *IRS Lost More Emails, supra* note 135.
[164] *Id.*; Koskinen Written Testimony, June 23, 2014, supra note 144, at 4.
[165] Bade, *IRS Lost More Emails, supra* note 135.

Even when asked directly whether there were any other anomalies in the data retrieval for the Committee's requests, Commissioner Koskinen testified that he was not aware of any. He testified:

> Rep. MASSIE. And what I want to ask you now is: Are there any other anomalies in the data or in the retrieval of emails that you can think of now so we can avoid having a second hearing on this in 6 months?
>
> Mr. KOSKINEN. That's a fair question, a good question. I'm not aware of any.
>
> Rep. MASSIE. Okay. So there's nothing like somebody came to you——
>
> Mr. KOSKINEN. Other than we're pursuing the other custodians.
>
> Rep. MASSIE. Right. The other eight hard drives that have crashed.
>
> Mr. KOSKINEN. Right. That's what we knew last week. We're still looking. I don't know what the final number will be.
>
> Rep. MASSIE. Okay. So you understood my question?
>
> Mr. KOSKINEN. I understand your question.
>
> Rep. MASSIE. A hint of bad news that was similar to the bad news we had in February, I'm asking you to just share it now.
>
> Mr. KOSKINEN. And I've said I do not know of any other bad news, as you put it.[166]

The Committee later learned, however, that the IRS became aware of additional hard drive crashes one week before the June 23, 2014 hearing. During a transcribed interview with Committee staff, Thomas Kane, the IRS Deputy Associate Chief Counsel for Procedure and Administration, testified that the IRS learned of as many as twenty additional hard drive crashes on June 16, 2014. Commissioner Koskinen, however, failed to disclose the extent of these additional crashes, or that there were complications of any kind with respect to the agency's efforts to comply with the Committee's subpoenas. Mr. Kane testified:

> Q. Sir, according to a news report, there were hard drive failures from other IRS custodians; is that right?
>
> A. Yes. There were—well, there are—were identified potential hard drive problems, yes.[167]

Mr. Kane later testified that he became aware of the additional hard drive failures on June 16, 2014. He testified:

> Q. And, sir, when did you personally become aware of those other hard drive problems?
>
> A. On the Monday morning before that that first briefing took place.
>
> Q. The briefing with Ways and Means?
>
> A. Yes.
>
> Q. So June 16?

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[166] June 23, 2014 Hearing, *supra* note 143, at 136–37 (question and answer with Rep. Massie).
[167] Kane Tr. at 165.

A. That's right. I believe it was on Monday morning.[168]

Mr. Kane further testified:

> Q. Do you know how many custodians, in addition to the seven or eight identified at Ways and Means?
>
> A. I don't recall the exact number. It was less than 20, and again, some of these people were identified without any—these people were identified without any real investigation as to knowing, you know, what was reported or why and what the consequences of anything that may have been wrong.[169]

Mr. Kane explained that the IRS officials whose hard drives crashed included Andy Megosh, a group manager in EO Guidance, Kimberly Kitchens, an IRS revenue agent in Cincinnati, Justin Lowe, the Technical Advisor to the Commissioner of Tax-Exempt and Government Entities, and David Fish, Manager of EO Guidance—all relevant figures to the Committee's inquiry.[170]

When Commissioner Koskinen appeared before the Committee on June 23, 2014, he had a responsibility to provide a candid account of the additional hard drive crashes and whether the crashes could interfere with the agency's ability to respond to the subpoenas. Commissioner Koskinen's testimony that there were no other anomalies in the data collection indicates that he failed to fully disclose to the Committee all of the details the IRS knew at that time about the extent of the additional hard drive crashes.

D. THE IRS MADE NO EFFORT TO RECOVER LOIS LERNER'S EMAIL ARCHIVE

Commissioner Koskinen testified that in 2011, the IRS maintained a disaster recovery system designed to back up computer contents for six months.[171] During a June 23, 2014 Committee hearing, Commissioner Koskinen explained that the IRS made no effort to recover Ms. Lerner's email archive from the six-month backups after she initially detected problems with her computer in June 2011.[172]

When the IRS informed Congress of Ms. Lerner's hard drive crash, the agency stated that IT professionals tried "multiple processes to recover the information stored on her computer's hard drive," but the "hard drive was determined at the time to be unrecoverable by the IT professionals."[173] IT professionals, however, never attempted to recover her emails from the backup tapes.[174] According to Commissioner Koskinen, the IRS failed to pursue recovery because it was "costly."[175] He testified:

> Rep. CHAFFETZ. Thank the chairman. My understanding is that the backup of emails was only—only lasted for 6 months. Is that correct?

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[168] *Id.* at 165–66.
[169] *Id.* at 169.
[170] *Id.* at 172.
[171] June 23, 2014 Hearing, *supra* note 133, at 92–93 (question and answer with Rep. Chaffetz).
[172] *Id.*
[173] June 13, 2014 Letter, *supra* note 133.
[174] *Id.*
[175] June 23, 2014 Hearing, *supra* note 143, at 93 (question and answer with Rep. Chaffetz).

Mr. KOSKINEN. Yes. It's actually a disaster recovery system, and it backs up for 6 months in case the entire system goes down.

Rep. CHAFFETZ. And that was in place in 2011?

Mr. KOSKINEN. That was the rule in 2011, policy.

Rep. CHAFFETZ. So when Lois Lerner figured out on June 13 that her computer crashed and you've—there have been emails showing that she was going to great lengths to try to get that recovered, why didn't they just go to that 6-month tape?

Mr. KOSKINEN. Because that 6-month tape is a disaster recovery tape that has all of the emails on it and is a very complicated tape to actually extract emails for. But I have not seen any emails to explain why they didn't do it. So I—it would be difficult, but I don't know why they didn't.

Rep. CHAFFETZ. But you said that the IRS was going to extraordinary lengths to give it to the recovery team.

Mr. KOSKINEN. That's correct. That's correct.

Rep. CHAFFETZ. But it's back up on tape?

Mr. KOSKINEN. For 6 months. Yes.

Rep. CHAFFETZ. And that was within the 6-month window. So why didn't you get them off the backup?

Mr. KOSKINEN. All I know about that is that the backup tapes are computer recovery tapes that put everything in one lump and extracting individual emails out of that is very costly and difficult and it was not the policy at the time.

Rep. CHAFFETZ. Did anybody try?

Mr. KOSKINEN. I have no idea—indication that they did.

Rep. CHAFFETZ. So you have multiple emails showing that she was trying to recover this. The testimony of the IRS that they were trying desperately—in fact, you got a forensic team to try to extract this. You went to great lengths. You made a big point over the last week about all the efforts you were going through. But they were backed up on tape and you didn't do it?

Mr. KOSKINEN. As far as I know, they did not. But they did have, as I noted in the email, she had 3 months' worth of emails at that time going from April—or 2 months from April to—[176]

Despite the IRS's policy in 2011 to retain six-month backup tapes of the contents of employees' computers, IT professionals apparently neglected to use all available resources at that time to retrieve Ms. Lerner's emails, including forgoing any attempt to recover her emails from the agency's own disaster recovery system.

E. COMMISSIONER KOSKINEN'S MISLEADING STATEMENTS THAT NO BACKUP TAPES EXIST

Subsequently, the Committee learned that contrary to Commissioner Koskinen's assertions, some backup material did exist. TIGTA informed the Committee on July 29, 2014, that at least

[176] *Id.* at 92–93.

some backup tapes were not overwritten by the IRS.[177] TIGTA also told the Committee it located Microsoft Exchange server drives from the relevant period, and that the IRS had not searched those drives because agency staff were under the mistaken belief the drives had been destroyed.[178] The IRS never bothered to determine whether this was true.

In fact, TIGTA located a number of backup tapes that yielded some emails within fifteen days. Timothy Camus, the TIGTA Deputy Inspector General for Investigations, testified:

> Rep. CHAFFETZ. Start to finish, how long did it take for you to find the tapes when you started in June? I believe it was June of 2014.
>
> Mr. CAMUS. Correct. We took possession of—740—the initial set of backup tapes on July 1, roughly 15 days after we started our investigation.[179]

Had the IRS taken immediate steps to locate backup tapes concurrent with the discovery of the gap in Ms. Lerner emails in February 2014, tapes containing up to 24,000 emails may not have been destroyed on March 4, 2014.

1. POOR IRS LEADERSHIP LED TO DESTRUCTION OF BACKUP TAPES

The IRS information technology department records backups incrementally on a daily basis, with a full backup performed weekly.[180] Before May 2013, the IRS reused and recycled backup tapes every six months as a cost saving measure.[181]

On May 22, 2013, the IRS Chief Technology Officer Terence Milholland sent an email directive to senior staff ordering the preservation of electronic email media indefinitely.[182] That email, titled "Information Retention Policy Revision," changed the previous policy of keeping backup tapes only for six months.[183] Mr. Milholland's order stated:

> Given the current environment and ongoing investigations, do not destroy/wipe-reuse and of the existing backup tapes for email, or archiving of other information from IRS personal computers. Further, do not reuse or refresh or wipe information from any personal computer that is being reclaimed/returned/refreshed/updated from any employee or contractor of the IRS. Finally, effective immediately, the email retention policy for backups is to be indefinite rather than 6 months.[184]

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[177] Conference call between Treasury Inspector Gen. for Tax Admin. and Cong. Staff (July 29, 2014).

[178] *Id.*

[179] *IRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform,* 114th Cong. (2015).

[180] TIGTA report, *supra* note 4, at 12.

[181] *Id.* at 12.

[182] Email from Terrance Milholland, Internal Revenue Serv., to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

[183] TIGTA report, *supra* note 4, at 4.

[184] Email from Terrance Milholland, Internal Revenue Serv., to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

Mr. Milholland continued: "In other words, retain everything to do with email or information that may have been stored locally on a personal computer." [185]

In an interview with TIGTA, Mr. Milholland stated he was "blown away" at the revelation that backup tapes were degaussed in March 2014, ten months after he issued this directive.[186]

Despite the need to preserve documents for the ongoing investigations by Congress, the Department of Justice, and TIGTA, IRS senior leadership made no effort to ensure the IRS IT department and lower level personnel understood the impact of, or complied with, the preservation order. Commissioner Koskinen was made aware of the existence of the preservation order shortly after his appointment as IRS Commissioner.[187] Yet, he did nothing to ensure that his staff complied. He neither reissued it nor sent out an email reminding IRS personnel of its importance. In fact, he took no action of any kind with respect to the order. When asked by TIGTA if the email directive was sufficient, Mr. Koskinen acknowledged the matter "probably could have been handled differently." [188]

Commissioner Koskinen repeatedly missed opportunities to ensure compliance with the preservation order. Mr. Koskinen failed to raise the issue in February 2014 upon learning of the gap in emails; he failed to ensure that the Media Management Midnight Unit (the team that destroyed the backup tapes) properly understood the order; and failed to make certain that individuals who ordered the destruction of the specific media, in this instance the backup tapes, properly understood the preservation order.[189] Mr. Camus testified:

> Rep. WALBERG. So based on your investigation, what efforts did the IRS, Terry Milholland or anyone else, make to ensure that the CTO's email notice to cease routine destruction of electronic records was actually followed by low-level employees?
>
> Mr. CAMUS.There is very much confusion, and I'm not certain there was appropriate management oversight of that directive.[190]

In February 2014, upon learning that emails may be missing, the IRS should have investigated whether backup tapes existed, and whether the instruction not to destroy documents was properly understood and executed throughout the agency. Counselor to the Commissioner, Catherine Duval, testified her first reaction upon discovering the gap in the Ms. Lerner production on February 2, 2014, was to revisit the preservation order. During a transcribed interview, Ms. Duval testified:

> Q. Now, Mr. Kane testified before us that you first noticed a discrepancy in the number of Lois Lerner emails in early February 2014. Is that right?

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[185] *Id.*
[186] *Id.*
[187] Id at 1272.
[188] *Id.*
[189] *Id.* at 16.
[190] *AIRS: TIGTA Update Part II: Hearing Before the H. Comm on Oversight and Gov. Reform,* 114th Cong. (2015).

> A. I came into the office, confess something now. I came into the office on Super Bowl Sunday instead of watching the Super Bowl. That's my confession. At that time, I looked at a list of the Lois Lerner emails that had been produced to Congress. And in looking at that, I saw a disproportionate distribution of dates.
>
> Q. Okay. What was your reaction?
>
> A. My reaction was the next day I talked to the IT people and other folks in the Office of Chief Counsel about the need to look for backup tapes from the relevant time period, to secure Ms. Lerner's laptop, to do a quality control check on the document preservation and collection process. And to learn what we could learn about that.[191]

Despite her instinct to confirm agency-wide compliance with the document preservation order, it does not appear that occurred. Had Ms. Duval taken action, the destruction of the backup tapes would have halted. When TIGTA investigated the missing emails, however, the gross mismanagement of the preservation notice came to light. TIGTA found a breakdown in communications following Mr. Milholland's email directive resulted in the failure to preserve backup tapes. Had IRS managers taken simple steps to ensure compliance with the order, the tapes likely would not have been destroyed.

At any point between May 2013 and March 4, 2014, Mr. Koskinen could have confirmed the preservation order was properly distributed to those whose job it is to destroy backup tapes, hard drives, and other media. The Media Management Midnight Unit, the team that destroyed the backup tapes, failed to understand the scope of the preservation order. IRS leadership should have ensured these individuals in particular knew that backup tapes were not to be destroyed.

Robert Lyewsang, an IT specialist at the IRS, told TIGTA he never received a copy of the preservation order, nor did anyone in his chain of command explain the need to preserve the backup tapes. Because of this, he sent the Form 3210 to the Media Management Midnight Team formally authorizing the destruction of the backup tapes.[192]

Mr. Lyewsang authorized the destruction of the tapes because Steve Warren, the manager of IT backup equipment nationwide, told him the tapes were not needed and the room where they were located needed to be cleaned out. Mr. Warren told Mr. Lyewsang the agency no longer needed the backup tapes sometime in the fall of 2013.[193] Mr. Lyewsang told TIGTA that the IRS wanted to remodel the space to house a new network operations center, and he was being pressured to move the backup tapes.[194] Mr. Lyewsang's intern testified under oath about the disorganized cleaning process, specifically that the room in question had been a year overdue for clearing out to reduce computer space.[195]

As Commissioner Koskinen acknowledged, verifying that IRS employees understood the directive to preserve all backup tapes could,

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[191] Transcribed interview of Catherine Duval, Internal Revenue Serv. (July 31, 2014).
[192] *Id.* at 964, 967.
[193] *Id.* at 963.
[194] *Id.*
[195] *Id.* at 1202.

and should, have been done differently. Upon becoming commissioner, Mr. Koskinen should have taken steps to ensure that IRS employees knew of and were properly following the preservation order. At a minimum, after learning about the missing emails, Commissioner Koskinen should have directed his subordinates to make sure the people on the ground—the people who most needed to know about the preservation directive—were aware of the need to preserve backup tapes. Instead, IRS employees did not understand the preservation order and failed to preserve relevant backup tapes.

In June 2014, after the IRS acknowledged the missing Lerner emails, the agency stated that it "confirmed that backup tapes from 2011 no longer exist because they have been recycled" but failed to disclose when this occurred.[196] Commissioner Koskinen repeated this information during his sworn testimony to the House Committee on Ways and Means on June 20, 2014, where he testified that the IRS went to "great lengths" to recover Ms. Lerner's emails.

The Committee learned these statements were false. Not only did the IRS fail to "confirm" the tapes had been destroyed, the backup tapes were swiftly recovered by TIGTA when it became aware of the issue in June 2014. Further, had the IRS either abided by its preservation notice of May 22, 2013 or looked for backup tapes upon learning of the problems in the email production in February 2014, up to 24,000 additional Lerner emails may have been recovered. The IRS, however, failed on both accounts.

2. THE CURRENT IRS EMAIL SYSTEM BACKUP TAPES

In May 2011, the IRS migrated its email backup system from New Carrollton, Maryland, to Martinsburg, West Virginia.[197] At that time, and until May 22, 2013, IRS policy was to recycle the backup tapes every six months.[198] On May 22, 2013, IRS Chief Technology Officer Terence Milholland issued a policy directive via email titled "Information Retention Policy Revision," changing the backup tape recycle policy to an indefinite retention period.[199]

TIGTA learned about Lois Lerner's hard drive crash and resulting gaps in the IRS's production on June 13, 2014, the same day Congress and the American public learned of the problem, but months after the IRS discovered the missing emails.[200] TIGTA promptly opened an investigation to determine whether the emails the IRS reported as lost could be recovered.

Two weeks later, on June 30, 2014, TIGTA requested the IRS provide any backup tapes that could contain Lerner's emails from January 1, 2008, through December 31, 2011.[201] In response to this request, the IRS provided 744 tapes that may have been used to

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[196] Letter from Leonard Oursler, Internal Revenue Serv., to Hon. Ron Wyden, Chairman, & Hon. Orrin Hatch, Ranking Member, S. Comm. on Finance, encl. 3 (June 13, 2014).

[197] *IRS: TIGTA Update Part II, Hearing Before the H. Comm. on Oversight & Gov't Reform,* 114th Cong. 4 (2015) (written testimony of Hon. J. Russell George and Timothy P. Camus, TIGTA) (hereinafter "June 25 TIGTA testimony").

[198] TIGTA report, *supra* note 4, at 4.

[199] Email from Terrance Milholland, Internal Revenue Serv. to Lauren Buschor, Karen Freeman, Daniel Chaddock, David Stender, and Anne Shepherd, (carbon copy to Stephen Manning, Gina Garza, Tracey Babcock, and Kathleen Walters, Internal Revenue Serv.) (May 22, 2013).

[200] TIGTA report, *supra* note 4, at 1.

[201] *Id.* at 13.

back up Lerner's email account.[202] From these tapes, TIGTA found five sets of weekly backups of Lerner's email beginning on November 20, 2012, approximately six months before Milholland's backup tape retention policy directive took effect.[203] According to TIGTA, these tapes are the oldest known Lerner email account backups available.[204]

TIGTA compared the Lerner emails it recovered from these backup tapes to the IRS's production to Congress and found over 1,000 new emails the IRS never produced.[205]

Timothy Camus, the TIGTA Deputy Inspector General for Investigations, explained to the Committee how TIGTA found the backup tapes for the current IRS email system: "To the best we can determine through the investigation, they just—*they simply didn't look for those emails.* So for the 1,000—over 1,000 emails that we found on the backup tapes—*we found them because we looked for them*."[206] In fact, TIGTA determined the agency failed to look in five of the six possible sources of "electronic media, all of which the IRS had in their possession."

3. THE DECOMMISSIONED EMAIL SERVER BACKUP TAPES

When the IRS moved the email server from New Carrollton, Maryland to Martinsburg, West Virginia, it turned off the old email server but left it in place.[207] In December 2011, IRS IT employees disassembled the server and treated the server hard drives and backup tapes as junk.[208] In April 2012, most, but not all, of these parts were destroyed by an IRS contractor. In December 2013, months after the preservation order was issued, the remaining servers and backup tapes were shipped to Martinsburg for destruction.[209] These servers and tapes remained in Martinsburg until March 2014 until Mr. Lyewsang sent the proper paperwork to destroy the hard drives and backup tapes.[210]

On or about March 4, 2014, one month after the IRS realized it did not have all of Ms. Lerner's emails, IRS employees on the Media Management Midnight Unit in Martinsburg, West Virginia, magnetically erased, or degaussed, 422 backup tapes that likely contained full, weekly backups of Lerner's email account dating back to late November or December 2010.[211] During its investigation, TIGTA found and examined these tapes, but they contained no recoverable data.[212] As discussed above, the employees did not destroy the server hard drives shipped with the backup tapes because they incorrectly believed the preservation order only applied to hard drives.[213]

Notwithstanding Mr. Milholland's May 2013 directive not to destroy any of the backup tapes for email, the IRS continued to

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[202] *Id.*
[203] *Id.* at 14.
[204] *Id.* at 14.
[205] *Id.* at 15.
[206] *IRS: TIGTA Update Part II, Hearing Before the H. Comm. on Oversight & Gov't Reform,* 114th Cong. (2015) (emphasis added).
[207] June 25 TIGTA testimony, *supra* note 191, at 4.
[208] TIGTA report, *supra* note 4, at 3.
[209] *Id.*
[210] *Id.*
[211] *Id.* at 17.
[212] June 25 TIGTA testimony, *supra* note 191, at 7.
[213] TIGTA report, *supra* note 4, at 17.

degauss backup tapes until approximately June 2014.[214] TIGTA estimates the IRS's failure to comply with the May 2013 preservation order and congressional subpoenas resulted in the loss of up to 24,000 Lerner emails.[215] Mr. Camus testified before the Committee about the destruction of these tapes. He stated:

> Rep. JORDAN. How in the world, with the preservation order and the subpoena did they destroy 422 tapes, containing, according to your investigation, potentially 24,000 emails? How does that happen, Mr. Camus?
>
> Mr. CAMUS. *It's an unbelievable set of circumstances that would allow that to happen.*[216]

Despite the known gaps in Ms. Lerner's emails identified in February 2014, the IRS never asked any of the employees in question to look for backup tapes or the server hard drives associated with the decommissioned server.[217] TIGTA made the first request for these tapes in June 2014. TIGTA found, if the IRS had actually conducted a search for backup tapes for Ms. Lerner's email account, the agency would have probably identified the tapes before they were degaussed in March 2014.[218]

Though Commissioner Koskinen testified the IRS made "extraordinary efforts" to recover Ms. Lerner's emails, TIGTA's investigation shows this is not the case. Mr. Camus testified:

> Rep. WALBERG. Given the IRS's failure to attempt the methods TIGTA used to recover the missing emails, would you characterize the IRS efforts as extraordinary?
>
> Mr. CAMUS. I would not.[219]

In fact, TIGTA found IRS's lack of due diligence extended beyond the backup tapes. Mr. Camus testified the IRS failed to search five of six potential sources for Lerner emails. He stated:

> Rep. WALBERG. How many potential sources for recovering Lerner's emails existed for the IRS?
>
> Mr. CAMUS. We believe there were six.
>
> Rep. WALBERG. Namely?
>
> Mr. CAMUS. The hard drive would have been a source, Blackberry source, backup tapes a source, server drives a source, the backup tapes for the server drives, and then finally the loaner lap tops.
>
> Rep. WALBERG. How many of these six did the IRS search?
>
> Mr. CAMUS. We're not aware that they searched any one in particular. They did—it appears they did look into initially whether or not the hard drive had been destroyed, but they didn't go much further than that.[220]

The lack of due diligence with respect to retrieving Ms. Lerner's missing emails was compounded by a stunning ignorance of where

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[214] *Id.* at 17.
[215] June 25 TIGTA testimony, *supra* note 191, at 8.
[216] *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform,* 114th Cong. (2015) (emphasis added).
[217] TIGTA report, *supra* note 4, at 18.
[218] *Id.*
[219] *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform,* 114th Cong. (2015).
[220] *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform,* 114th Cong. (2015).

those missing emails might reside. On June 20, 2014, after the email problems became public, Commissioner Koskinen testified he was not even aware as to whether or not Ms. Lerner had a Blackberry. He testified:

> Rep. PRICE. Do you [know]—if Lois Lerner had a Blackberry or an iPhone?
>
> Mr. KOSKINEN. I do not know.
>
> Rep. PRICE. Can you find out if Lois Lerner had an—had an iPhone or a Blackberry for us?
>
> Mr. KOSKINEN. I can find that out and be happy to let you know.[221]

Commissioner Koskinen's posture with respect to the Committee's efforts to obtain Ms. Lerner's emails delayed the Committee's investigation. Commissioner Koskinen's credibility was further damaged when TIGTA found approximately 1,000 missing Lerner emails that Commissioner Koskinen previously claimed were permanently lost. In fact, TIGTA located a number of backup tapes that yielded some emails within fifteen days. Timothy Camus, the TIGTA Deputy Inspector General for Investigations, testified:

> Rep. CHAFFETZ. Start to finish, how long did it take for you to find the tapes when you started in June? I believe it was June of 2014.
>
> Mr. CAMUS. Correct. We took possession of—740—the initial set of backup tapes on July 1, roughly 15 days after we started our investigation.[222]

Had the IRS taken immediate steps to locate backup tapes upon the discovery of the gap in Lerner emails in February 2014, tapes containing up to an additional 24,000 emails may not have been destroyed on March 4, 2014. Mr. Camus further testified:

> Rep. CHAFFETZ. Mr. Camus, the IRS had these emails. And you said they didn't purposely destroy them, but what did they do with these emails?
>
> Mr. CAMUS. To the best we can determine through the investigation, they just simply didn't look for those emails. So for the 1,000—over 1,000 emails that we found on the backup tapes—we found them because we looked for them.[223]

VIII. Commissioner Koskinen Should be Censured and Condemned

More than two years have passed since Congress began investigating the IRS's mistreatment of conservative tax-exempt groups. After reviewing more than one million pages of documents, conducting more than 50 transcribed interviews, and holding over a dozen public hearings, the American people still do not have a complete accounting of the IRS's deprivation of American citizens' first Amendment rights.

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[221] *IRS Commissioner John Koskinen: Hearing Before the H. Comm. on Ways and Means*, 113th Cong. (2014).

[222] *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2015).

[223] *IRS: TIGTA Update Part II: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2015) (emphasis added).

The IRS's destruction of up to 24,000 relevant emails in the face of a congressional subpoena and preservation order is inexcusable. Had the IRS taken the necessary steps to educate employees on the preservation notice, or undertaken any sort of investigation once the agency learned of the missing emails, it could have stopped the destruction of these important documents. In the absence of Lois Lerner's testimony, these documents are critical to the Committee's attempt to determine fully what went wrong at the IRS. Commissioner John Koskinen's false and misleading statements to Congress about the destruction of these emails has compounded the problem. His unwillingness to present accurate information about the missing emails has delayed and hindered the Committee's efforts, perhaps permanently so.

The IRS is one of the most powerful federal agencies and must be trustworthy. It is not possible to move past the agency's willful targeting of conservative tax-exempt applications as long as the agency refuses to take responsibility for its actions. As leader of the IRS, Commissioner Koskinen has repeatedly failed to take responsibility for the destruction of evidence by the agency and the numerous misstatements he made to Congress about this matter. Because of his actions, and the actions of others at the agency he leads, the American people may never know the complete truth about the IRS' targeting of conservative tax-exempt applications.

For these reasons, the Committee recommends that Commissioner Koskinen be censured and condemned; resign or be removed from office; and forfeit all rights to any annuity for which he is eligible under chapter 83 or chapter 84 of title 5, United States Code.

LEGISLATIVE HISTORY

The Committee's full investigation and oversight of the need to censure and condemn John A. Koskinen is documented above. H. Res. 737, condemning and censuring John A. Koskinen, the Commissioner of Internal Revenue, was introduced on May 18, 2016 by Congressman Jason Chaffetz (R–UT) and referred to the Committee on Oversight and Government Reform. The bill was also referred to the Committee on the Judiciary and the Committee on Ways and Means. On June 15, 2016, the Committee on Oversight and Government Reform ordered H. Res. 737 favorably reported, as amended, by a roll call vote of 23 to 15.

EXPLANATION OF AMENDMENTS

During Full Committee consideration of the resolution, Ranking Member Elijah E. Cummings (D–MD) offered an amendment to the resolution to strike specific portions of the resolution he believed to be inaccurate. Chairman Jason Chaffetz (R–UT) offered an amendment to the Cummings amendment to clarify the date of a statement made by John A. Koskinen. The Chaffetz second degree amendment was adopted by voice vote, and the Cummings amendment, as amended, was adopted by voice vote.

Congressman Matt Cartwright (D–PA) offered an amendment to the resolution to strike and replace the entire preamble and replace the text with new clauses related to the current Inspector General for Tax Administration, the Honorable J. Russell George. The amendment also would strike and replace all text following the re-

solved clause and insert language suggesting "Commissioner Koskinen is an honorable public servant who has been extraordinarily cooperative with Congress." The Cartwright amendment was not adopted by a roll call vote of 15 to 21.

COMMITTEE CONSIDERATION

On June 15, 2016 the Committee met in open session and ordered reported favorably the resolution, H. Res. 737, by roll call vote, a quorum being present.

ROLL CALL VOTES

There were two roll call votes during consideration of H. Res. 737:

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
114TH CONGRESS
ROLL CALL

Vote #: 1

Vote on: H. Res. 737 – Cartwright Amendment Date: 6-15-16

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) *(Chairman)*		X		MR. CUMMINGS (MD) *(Ranking)*	X		
MR. MICA (FL)				MRS. MALONEY (NY)	X		
MR. TURNER (OH)		X		MS. NORTON (DC)	X		
MR. DUNCAN (TN)		X		MR. CLAY (MO)	X		
MR. JORDAN (OH)		X		MR. LYNCH (MA)	X		
MR. WALBERG (MI)		X		MR. COOPER (TN)	X		
MR. AMASH (MI)		X		MR. CONNOLLY (VA)	X		
MR. GOSAR (AZ)		X		MR. CARTWRIGHT (PA)	X		
MR. DesJARLAIS (TN)		X		MS. DUCKWORTH (IL)	X		
MR. GOWDY (SC)				MS. KELLY (IL)	X		
MR. FARENTHOLD (TX)		X		MS. LAWRENCE (MI)	X		
MRS. LUMMIS (WY)				MR. LIEU (CA)			
MR. MASSIE (KY)		X		MRS. WATSON COLEMAN (NJ)	X		
MR. MEADOWS (NC)		X		MS. PLASKETT (VI)			
MR. DeSANTIS (FL)		X		MR. DeSAULNIER (CA)	X		
MR. MULVANEY (SC)		X		MR. BOYLE (PA)	X		
MR. BUCK (CO)		X		MR. WELCH (VT)			
MR. WALKER (NC)		X		MS. LUJAN GRISHAM (NM)	X		
MR. BLUM (IA)		X					
MR. HICE (GA)		X					
MR. RUSSELL (OK)		X					
MR. CARTER (GA)		X					
MR. GROTHMAN (WI)							
MR. HURD (TX)		X					
MR. PALMER (AL)		X					

Roll Call Totals: Ayes: 15 Nays: 21 Present:

Passed:____ Failed: __X__

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
114TH CONGRESS
ROLL CALL

Vote #: 2

Vote on: H. Res. 737 – Report to House Favorably, Amended Date: 6-15-16

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. CHAFFETZ (UT) *(Chairman)*	X			MR. CUMMINGS (MD) *(Ranking)*		X	
MR. MICA (FL)				MRS. MALONEY (NY)		X	
MR. TURNER (OH)	X			MS. NORTON (DC)		X	
MR. DUNCAN (TN)	X			MR. CLAY (MO)		X	
MR. JORDAN (OH)	X			MR. LYNCH (MA)		X	
MR. WALBERG (MI)	X			MR. COOPER (TN)		X	
MR. AMASH (MI)	X			MR. CONNOLLY (VA)		X	
MR. GOSAR (AZ)	X			MR. CARTWRIGHT (PA)		X	
MR. DesJARLAIS (TN)	X			MS. DUCKWORTH (IL)		X	
MR. GOWDY (SC)	X			MS. KELLY (IL)		X	
MR. FARENTHOLD (TX)	X			MS. LAWRENCE (MI)		X	
MRS. LUMMIS (WY)				MR. LIEU (CA)			
MR. MASSIE (KY)	X			MRS. WATSON COLEMAN (NJ)		X	
MR. MEADOWS (NC)	X			MS. PLASKETT (VI)			
MR. DeSANTIS (FL)	X			MR. DeSAULNIER (CA)		X	
MR. MULVANEY (SC)	X			MR. BOYLE (PA)		X	
MR. BUCK (CO)	X			MR. WELCH (VT)			
MR. WALKER (NC)	X			MS. LUJAN GRISHAM (NM)		X	
MR. BLUM (IA)	X						
MR. HICE (GA)	X						
MR. RUSSELL (OK)	X						
MR. CARTER (GA)	X						
MR. GROTHMAN (WI)	X						
MR. HURD (TX)	X						
MR. PALMER (AL)	X						

Roll Call Totals: Ayes: 23 Nays: 15 Present:

Passed: X Failed: _____

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this resolution is to condemn and censure John A. Koskinen, the Commissioner of Internal Revenue.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this resolution establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this resolution does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the resolution does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has not received a cost estimate for this measure from the Director of Congressional Budget Office. The Committee on Oversight and Government Reform estimates that the resolution would have no cost.

MINORITY VIEWS

On October 27, 2015, Chairman Chaffetz and 18 other Republican Committee Members introduced House Resolution 494 to impeach John Koskinen, the Commissioner of the Internal Revenue Service (IRS), for "high crimes and misdemeanors." [1]

They introduced their resolution only days after the Department of Justice (DOJ) reported to Congress that it "found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives that would support criminal prosecution." The Department of Justice also "found no evidence that any official involved in the handling of tax-exempt applications or IRS leadership attempted to obstruct justice." [2]

Republicans also introduced their impeachment resolution after the Republican Treasury Inspector General for Tax Administration (TIGTA) reported that he identified no evidence of politically motivated targeting, no evidence that anyone at the IRS obstructed Congress, and no evidence of any order to destroy or conceal documents. In testimony before the House Committee on Oversight and Government Reform, the Inspector General agreed that he found "no evidence that IRS employees were politically motivated in their creation or use of the inappropriate screening criteria" or that "any IRS employees had been directed to destroy or hide information from Congress, the DOJ, or TIGTA." [3]

Despite these findings, Oversight Committee Members Jim Jordan and Mark Meadows reportedly approached House Speaker Paul Ryan in a private meeting last month and threatened to force a vote on their impeachment resolution on the House floor.[4] Speaker Ryan reportedly discouraged their campaign for impeachment. He argued that the IRS "has not been led well" and "needs to be cleaned up," but "[a]s far as these other issues," his preference would be to focus on efforts to "reform the tax code." [5]

Shortly after the meeting with Speaker Ryan, Chairman Jason Chaffetz introduced a new resolution to censure Commissioner Koskinen.[6] The resolution was referred to the Committee on the Judiciary and the Committee on Ways and Means, and, because it also proposed stripping Commissioner Koskinen of his pension, it was referred to the Oversight Committee as well.

Judiciary Committee Chairman Bob Goodlatte announced that he would hold several hearings on these issues.[7] The first hearing, entitled "Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen, Part I," took place on May 24, 2016. Chairman Goodlatte invited Chairman Chaffetz and Representative Ron DeSantis to testify at that hearing. Chairman Goodlatte scheduled "Part II" of the hearing for June 22, 2016.

Instead of waiting for the Judiciary Committee to conclude its hearings, Chairman Chaffetz rushed to hold a business meeting with the Oversight Committee on June 15, 2016, to leapfrog over

the Judiciary Committee and proceed with a vote on his censure resolution. The Oversight Committee approved the resolution along party lines. Democrats strongly oppose the Chairman's censure resolution for the reasons set forth below.

Republicans conceded during the markup that their censure resolution was inaccurate

At the Oversight Committee business meeting on June 15, 2016, Committee Republicans were forced to admit that their resolution was inaccurate after Ranking Member Elijah E. Cummings offered an amendment to correct its factual inaccuracies.

For example, the resolution misleadingly spliced together two statements made by the Commissioner, making it appear as though he made them together. In fact, he made these statements on different dates before different Committees.[8]

Ranking Member Cummings made the following statement in support of his amendment:

> Mr. Chairman, I want to make clear that I am not suggesting that you deceived the House when you included these inaccuracies in this resolution. I am not alleging that you were dishonest. I recognize that you were likely relying on what others told you. The same is true of Commissioner Koskinen.[9]

Chairman Chaffetz acknowledged the inaccuracy, and Ranking Member Cummings' amendment on this provision was adopted.

The resolution Republicans voted out of Committee continues to include obvious factual inaccuracies

Despite correcting one inaccuracy, Republicans refused to correct several others during the markup.

For example, paragraph ten of the resolution asserts that Commissioner Koskinen should be fired in part because he did not check Lois Lerner's BlackBerry to retrieve additional emails after her hard drive crashed. Ranking Member Cummings offered an amendment to strike that language because TIGTA took possession of her BlackBerry six months before Commissioner Koskinen joined the IRS.

On June 30, 2013, the Inspector General's office issued a report stating that it "took possession of LERNER's BlackBerry on June 10, 2013, after she left the IRS."[10] Mr. Koskinen was not sworn into his position as Commissioner until December 23, 2013.[11]

Republicans refused to acknowledge these facts and voted against correcting this inaccuracy in their resolution. Chairman Chaffetz stated during the markup: "The record is clear that in terms of the BlackBerry, it was not checked."[12] However, the Inspector General's report indicates that in fact it was checked:

> Forensic examination of the BlackBerry provided 2,972 readable e-mails. A manual comparison to de-duplicate these items against the IRS production to Congress resulted in the discovery of 190 new e-mails that had not been previously provided to Congress, the DOJ or to TIGTA; 169 of the e-mails are from after 8:30 AM on May 16, 2013; six of the e-mails mentioned EO matters, but nothing responsive to Congress' request.[13]

It remains unclear what Chairman Chaffetz expected Commissioner Koskinen to do with Ms. Lerner's BlackBerry when he joined the IRS six months later in December 2013, particularly since the Inspector General had already taken possession of the BlackBerry and later conducted a forensic investigation.

The resolution is inaccurate in stating that Commissioner Koskinen knew as early as February 2014 that a substantial portion of Lois Lerner's emails were missing

Paragraph six of the resolution states that Commissioner Koskinen knew "as early as February 2014" that Ms. Lerner's emails were missing and could not be produced to Congress. This assertion is also wrong.

Commissioner Koskinen did not learn of the hard drive failure until April 2014, when he was advised about it by staff and informed that a hard drive failure did not necessarily mean a loss of data.[14] Commissioner Koskinen testified to this effect before the Oversight Committee.[15] Republicans refused to acknowledge these facts and voted against correcting this inaccuracy in the resolution.

The majority has presented no evidence that Commissioner Koskinen was aware of the hard drive failure prior to April 2014. They argue that he must have learned about the hard drive failure earlier because it furthers their baseless conspiracy theory that he intentionally withheld information and was complicit in, or even ordered, the destruction of back-up tapes that occurred in March 2014.

The Justice Department reported that as soon as IRS officials discovered the hard drive failure, "IRS attorneys and officials spent that time exercising due diligence to determine what had occurred, mitigating heavily against criminal intent."[16]

The resolution mischaracterizes Commissioner Koskinen's previous testimony

The censure resolution mischaracterizes Commissioner Koskinen's testimony at a June 20, 2014, hearing before the House Committee on Ways and Means. The resolution refers to his testimony at this hearing as "false" because Commissioner Koskinen stated: "Since the start of this investigation, every e-mail has been preserved. Nothing has been lost. Nothing has been destroyed."[17]

In fact, during that same hearing, Commissioner Koskinen made clear: "At this time, it is too early to know if any e-mails have been lost on those hard drives."[18] In addition, he made these statements a year before he learned that backup tapes had been degaussed by low-level employees in West Virginia.

The resolution completely disregards the conclusions of the Republican Inspector General of the IRS

When Republicans launched their investigation, they relied heavily on Inspector General J. Russell George. Inspector General George is a holdover appointee who was chosen by President George W. Bush and who previously served as the Republican staff director of a subcommittee of the Oversight Committee.

Inspector General George conducted an extensive investigation to determine whether IRS employees intentionally targeted conserv-

ative applicants for tax-exempt status for political reasons. His staff interviewed more than 100 witnesses and searched tens of thousands of documents, and his office spent more than $2 million on this investigation.[19] At the conclusion of this investigation, Inspector General George identified no politically motivated targeting, no obstruction of justice, and no effort to conceal information from Congress.

Rep. Matthew Cartwright offered an amendment during the Oversight Committee markup to include Inspector General George's findings in the censure resolution. As he stated when he introduced his amendment, "The bottom line is that in order to vote for this censure resolution, you would have to believe Inspector General George is lying."[20]

Republicans opposed the amendment and voted it down.

The Republican Inspector General found no politically motivated targeting

After Inspector General George's exhaustive multi-year investigation, he identified no evidence that anyone at the IRS targeted any group for political reasons.

Testifying before two different committees in May 2013, Inspector General George agreed that he found "no evidence that IRS employees were politically motivated in their creation or use of the inappropriate screening criteria."[21]

Inspector General George's findings were confirmed by the Oversight Committee's own investigation. In June 2013, an IRS Screening Manager who worked at the IRS for 21 years and described himself as a "conservative Republican" objected to any suggestion that he or his team unfairly targeted conservative groups.[22]

During the Oversight Committee's markup, Republicans defeated Rep. Cartwright's amendment to include this finding in the resolution.

The Republican Inspector General found no order to destroy any documents

The Inspector General's office interviewed 118 witnesses and reviewed employee emails in Martinsburg, West Virginia, where two low-level employees recycled, or "degaussed," backup tapes that included emails from Ms. Lerner.

The Inspector General concluded: "No evidence was uncovered that any IRS employees had been directed to destroy or hide information from Congress, the DOJ, or TIGTA."[23] One witness interviewed by the Inspector General stated:

> Nobody in particular would have made the decision to destroy the tapes/hard drives, degaussing/destruction is just part of the process. Nobody specifically instructed [NAME REDACTED] to destroy the tapes/hard drives and nobody told him to do it because of the content on the tapes/hard drives. [NAME REDACTED] said he never knows the content of the tapes or hard drives the group destroys, to include this particular shipment.[24]

During the Oversight Committee's markup, Republicans defeated Rep. Cartwright's amendment to include this finding in the resolution.

The Republican Inspector General found no evidence that any IRS employees erased backup tapes to conceal responsive emails

The Inspector General's office conducted its own analysis of whether any data could be salvaged from the backup tapes and produced to Congress, finding that 422 server backup tapes that were believed to have contained Lois Lerner's e-mails had been degaussed on March 4, 2014.

The Inspector General concluded that "the investigation did not uncover any evidence that the IRS and its employees purposely erased the tapes in order to conceal responsive documents from Congress, the DOJ, and TIGTA."[25]

The Inspector General reported that two low-level employees working in Martinsburg, West Virginia degaussed the backup tapes so they could be reused. The Chief Technology Officer of the IRS issued a policy directive to preserve all electronic backup media in May 2013, but the Inspector General found that the "employees who destroyed the backup tapes misinterpreted the directive."[26]

During the Oversight Committee's markup, Republicans defeated Rep. Cartwright's amendment to include this finding in the resolution.

The Republican Inspector General testified that Commissioner Koskinen has been "extraordinarily cooperative"

The censure resolution accuses Commissioner Koskinen of failing to locate and preserve emails from Ms. Lerner that were lost due to her hard drive failure, and of making false and misleading statements to Congress. These allegations have been directly contradicted by the Inspector General and others.

On June 25, 2015, Inspector General George appeared before the Oversight Committee and testified that Commissioner Koskinen was "extraordinarily cooperative" with the investigation.[27]

Senator Orrin Hatch, the Chairman of the Senate Committee on Finance, agreed with Inspector General George, stating that "for the most part" Commissioner Koskinen has "been very cooperative with us."[28]

During the Oversight Committee's markup, Republicans defeated Rep. Cartwright's amendment to include this finding in the resolution.

The Department of Justice found no politically motivated targeting or obstruction of justice

As part of a lengthy investigation of their own, career officials at the Justice Department reported to Congress that they "found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives that would support criminal prosecution."[29]

The Justice Department also "found no evidence that any official involved in the handling of tax-exempt applications or IRS leadership attempted to obstruct justice."[30]

In collaboration with the Inspector General and the Federal Bureau of Investigation, the Justice Department conducted more than 100 witness interviews, collected more than one million pages of IRS documents, and examined potential criminal liability for IRS employees under civil rights, tax administration, and obstruction statutes.

The Justice Department specifically examined "whether any IRS official attempted to obstruct justice with respect to their reporting function to Congress, the collection and production of documents demanded by the Department and Congress, and the delayed disclosure of the consequences of Ms. Lerner's hard drive crash, or the March 2014 erasure of electronic backup tapes."[31]

The Justice Department found "no evidence of such an intent by any official involved in the handling of tax-exempt applications or the IRS's response to investigations of its conduct."[32]

There is no evidence that the degaussed backup tapes contained "key" evidence

Paragraph 3 of the resolution suggests that the backup tapes that were degaussed contained "key pieces of evidence," but Ms. Lerner's hard drive crashed before she learned that any inappropriate criteria were being used. The IRS Technology Asset Management System indicates that Ms. Lerner filed a helpdesk ticket with regard to her hard drive failure on June 13, 2011.[33] This is approximately two weeks before a June 29, 2011, briefing when she learned about language contained in the "Be on the Lookout" listing inappropriate criteria. She instructed that the criteria be revised immediately.[34]

On June 25, 2015, Inspector General George testified to the Oversight Committee that, after extensive efforts, his office was able to recover more than 1,000 emails from Ms. Lerner's hard drive. However, after examining those emails, he concluded: "A review of these new e-mails did not provide additional information for the purposes of our investigation."[35]

Instead, these so-called "new" emails were completely irrelevant. For instance, one of the recovered emails that the Inspector General produced to Congress was a December 25, 2012, email from eBay advertising holiday shopping deals. Another newly discovered email was from FlowerShopping.com a few days before.

On October 23, 2015, the Justice Department sent a letter to the Committee concluding that "we are confident that we were able to compile a substantially complete set of the pertinent documents."[36] The Department stated:

> The IRS collected documents from more than 80 employees—many more employees than were regularly and directly involved in the matters under investigation—making exceedingly remote the chance that a hard drive crash or other technical failure experienced by any particular employee could cause the permanent loss of any relevant email or other document.[37]

The resolution has no legal effect whatsoever

The resolution to censure Commissioner Koskinen is a simple House resolution that merely expresses "the sense of the House of

Representatives."[38] This resolution has no practical effect and lacks the force of law. House resolutions are "considered only by the body in which they were introduced," and are "not presented to the President for action."[39]

Legal scholars agree that even if the House passes H. Res. 737, it would have no legal effect. For example, according to the Congressional Research Service: "Simple resolutions require no action by the other house of Congress, and since they contain no legislative matters are not presented to the President and 'have no legal effect.'"[40]

Chairman Chaffetz is inaccurate when he says his resolution would "require" Commissioner Koskinen to forfeit his pension

When Chairman Chaffetz introduced his resolution censuring Commissioner Koskinen, he stated that it "requires the forfeiture of his pension."[41] At the June 15, 2016, business meeting to consider the censure resolution, Chairman Chaffetz again asserted that H. Res. 737 "requires forfeiture of his government pension and any other federal benefits for which he is eligible."[42]

Legal scholars agree that Chairman Chaffetz's public statements are inaccurate. Because H. Res. 737 is a House resolution with no legal effect, it does not require Commissioner Koskinen to forfeit his pension.

On June 20, 2016, Richard Briffault, the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, sent a letter to the Oversight Committee stating, "The provision of H. Res. 737 concerning Commissioner Koskinen's pension is just such a 'sense of the House' statement. It cannot bind persons or property outside the House."[43]

It would be fundamentally unfair and potentially unconstitutional to take away Commissioner Koskinen's vested pension for his previous government service

Commissioner Koskinen has devoted many years of his career to public service in the federal government. Even though the resolution to censure Commissioner Koskinen has no legal effect, it would be fundamentally unfair to strip Commissioner Koskinen of the vested pension he previously earned for more than a decade of government service based on unfounded allegations that are unrelated to that service.

In addition, the Supreme Court has held that any legislative act that "determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial" is an unconstitutional Bill of Attainder.[44] As the Judiciary Committee concluded when considering the proposed impeachment of President Clinton, "a law formally and publicly expressing condemnation by the legislature directed at a specific individual—confronts squarely the prohibition on Bills of Attainder."[45]

Members of Congress and other officers and employees of the federal government can be required to forfeit the federal retirement annuities for which they had qualified only if they are convicted of specific federal offenses.[46] Commissioner Koskinen has not been charged or convicted of any crime, and there is no other legal

mechanism under which the House, acting alone, would have the authority to remove his pension.

On June 17, 2016, Richard W. Painter, the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School, sent a letter to the Oversight Committee stating: "A legislative enactment that sought to take away the pension or other property of a particular individual would be a bill of attainder specifically prohibited by the Constitution."[47]

Professor Painter's letter cites the Heritage Foundation Guide to the Constitution, which states: "As James Madison said in *The Federalist* No. 44, 'Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation.'"[48]

Professor Painter's letter concludes:

> I should furthermore note that over the past several years your Committee has spent millions of taxpayer dollars on this investigation. This is essentially a dispute between the IRS and Members of Congress about the 501c4 organizations that further the objectives of political campaigns, including campaigns of Members of Congress. The IRS is charged with determining whether the activities of these organizations comply with the Internal Revenue Code and it is not proper for Congress to seek to intimidate the IRS in the discharge of its duties.[49]

Commissioner Koskinen is an honorable man who has served the public on behalf of Democrats and Republicans

Commissioner Koskinen is a dedicated and well-respected public servant who has worked for both Democrats and Republicans throughout his long and distinguished career. He agreed to come out of retirement in 2013 to lead the IRS during a period of significant turmoil.[50]

Commissioner Koskinen has a long and respected history of taking on difficult jobs. He began his career in public service working for Republican Mayor John V. Lindsay of New York. In 1994, he was asked by the Clinton Administration to become the "Y2K Czar," tasked with preparing the government in the lead-up to the year 2000.

Commissioner Koskinen was called on by President George W. Bush's administration to become Freddie Mac's new chairman in the midst of the financial crisis. According to President Bush's chief housing-finance administrator, James B. Lockhart III, Commissioner Koskinen was selected because "Freddie needed some stronger management." Mr. Lockhart has stated that the Bush Administration was "thankful" that Commissioner Koskinen accepted the position.[51]

This resolution has no binding authority and will have no legal effect. This Committee has done a great deal of bipartisan work on investigations and legislation. The Chairman and Ranking Member have sent more than 600 bipartisan letters in this Congress. But this partisan investigation is founded on conspiracy theories that

undermine the credibility and integrity of the Oversight Committee.

ELIJAH E. CUMMINGS,
Ranking Member.

ENDNOTES

[1] H. Res. 494.

[2] Letter from Peter J. Kadzik, Assistant Attorney General, Department of Justice, to Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Oct. 23, 2015) (online at http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2015-10-23%20DOJ%20to%20HOGR%20%28IRS%29%20-%20Chmn%20Chaffetz%20RM%20Cummings.pdf).

[3] House Committee on Oversight and Government Reform, *The IRS: Targeting Americans for Their Political Beliefs*, 113th Cong. (May 22, 2013) (online at https://oversight.house.gov/hearing/the-irs-targeting-americans-for-their-political-beliefs/); Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss* (June 30, 2015) (#54-1406-008-I) (online at http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/TIGTA%20Report.pdf).

[4] *Conservatives Force Leadership's Hand in IRS Impeachment*, The Hill (May 18, 2016) (online at http://thehill.com/policy/finance/280334-conservatives-force-house-gop-leaderships-hand-in-irs-impeachment).

[5] *Ryan Stops Short of Backing Effort to Impeach IRS Chief*, Roll Call (Apr. 14, 2016) (online at www.rollcall.com/news/politics/ryan-wont-back-effort-impeach-irs-commissioner).

[6] H. Res. 737.

[7] *Conservatives Force Leaderships Hand in IRS Impeachment*, The Hill (May 18, 2016) (online at http://thehill.com/policy/finance/280334-conservatives-force-house-gop-leaderships-hand-in-irs-impeachment).

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[9] House Committee on Oversight and Government Reform, Statement of Ranking Member Elijah E. Cummings, *Full Committee Business Meeting to Consider H. Res. 737, Condemning and Censuring John A. Koskinen, the Commissioner of Internal Revenue* (June 15, 2016) (online at http://democrats.oversight.house.gov/news/press-releases/republicans-concede-inaccuracies-in-resolution-to-censure-irs-commissioner-but).

[10] Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss* (June 30, 2015) (#54-1406-008-I) (online at http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/TIGTA%20Report.pdf).

[11] *Koskinen Sworn in as IRS Commissioner*, The Hill (Dec. 23, 2013) (online at http://thehill.com/policy/finance/193917-john-koskinen-sworn-in-as-irs-commissioner).

[12] House Committee on Oversight and Government Reform, Statement of Chairman Jason Chaffetz, *Full Committee Business Meeting to Consider H. Res. 737, Condemning and Censuring John A. Koskinen, the Commissioner of Internal Revenue* (June 15, 2016) (online at https://oversight.house.gov/markup/full-committee-business-meeting-37/).

[13] Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss* (June 30, 2015) (#54-1406-008-I) (online at http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/TIGTA%20Report.pdf).

[14] *Id*.

[15] House Committee on Oversight and Government Reform, *Hearing on IRS Obstruction Part I*, 113th Cong. (June 23, 2014).

[16] Letter from Peter J. Kadzik, Assistant Attorney General, Department of Justice, to Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Oct. 23, 2015) (online at http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/

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[18] *Id.*

[19] Email from Treasury Inspector General for Tax Administration Staff to House Committee on Ways and Means Staff (Apr. 15, 2015).

[20] House Committee on Oversight and Government Reform, Statement of Rep. Matthew Cartwright, *Full Committee Business Meeting to Consider H. Res. 737, Condemning and Censuring John A. Koskinen, the Commissioner of Internal Revenue* (June 15, 2016) (online at https://oversight.house.gov/markup/full-committee-business-meeting-37/).

[21] House Committee on Oversight and Government Reform, *Hearing on The IRS: Targeting Americans for Their Political Beliefs*, 113th Cong. (May 22, 2013).

[22] House Committee on Oversight and Government Reform, Interview of Screening Group Manager (June 6, 2013) (online at http://democrats.oversight.house.gov/news/press-releases/first-hand-account-cummings-releases-full-transcript-of-conservative-republican).

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] House Committee on Oversight and Government Reform, *Hearing on IRS: TIGTA Update, Part Two* (June 25, 2015).

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[29] Letter from Peter J. Kadzik, Assistant Attorney General, Department of Justice, to Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Oct. 23, 2015) (online at http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2015-10-23%20DOJ%20to%20HOGR%20%28IRS%29%20-%20Chmn%20Chaffetz%20RM%20Cummings.pdf).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Treasury Inspector General for Tax Administration, *Report of Investigation: Exempt Organizations Data Loss* (June 30, 2015) (#54-1406-008-I) (online at http://democrats.oversight.house.gov/news/press-releases/new-irs-inspector-general-report-finds-no-evidence-that-lerner-intentionally).

[34] Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 3013) (#2013-10-053) (online at www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf).

[35] House Committee on Oversight and Government Reform, Testimony of J. Russell George, Treasury Inspector General for Tax Administration, and Timothy P. Camus, Deputy Inspector General for Investigations, Treasury Inspector General for Tax Administration, *Hearing on IRS: TIGTA Update, Part Two* (June 25, 2015).

[36] Letter from Peter J. Kadzik, Assistant Attorney General, Department of Justice, to Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform (Oct. 23, 2015) (online at http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2015-10-23%20DOJ%20to%20HOGR%20%28IRS%29%20-%20Chmn%20Chaffetz%20RM%20Cummings.pdf).

[37] *Id.*

[38] H. Res. 737.

[39] Congress.gov, *How Our Laws Are Made—Learn About the Legislative Process* (online at www.congress.gov/resources/display/content/How+Our+Laws+Are+Made+-+Learn+About+the+Legislative+Process#HowOurLawsAreMade-LearnAbouttheLegislativeProcess-SimpleResolutions) (accessed June 16, 2016); United States House of Representatives, *The Legislative Process* (online at www.house.gov/content/learn/legislative_process/) (accessed June 16, 2016).

[40] Memorandum from Congressional Research Service to House Committee on Oversight and Government Reform Staff, *Effect of House Censure Resolution on a Federal Official's Pension* (June 20, 2016).

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[43] Letter from Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law School, to House Committee on Oversight and Government Reform (June 20, 2016).

[44] *Nixon v. Administrator of General Services,* 433 U.S. 425, 433 (1977) (citing United States v. Lovett, 328 U.S. 303, 315-216).

[45] House Committee on the Judiciary, *Impeachment of William Jefferson Clinton, President of the United States,* 105th Cong. (1998) (H. Rept. 105–830) (online at www.congress.gov/105/crpt/hrpt830/CRPT-105hrpt830.pdf).

[46] Congressional Research Service, *Loss of Federal Pensions for Members of Congress Convicted of Certain Offenses* (Sept. 12, 2013) (96-530) (online at www.fas.org/sgp/crs/misc/96-530.pdf).

[47] Letter from Richard W. Painter, S. Walter Richey Professor of Corporate Law, University of Minnesota Law School, to House Committee on Oversight and Government Reform (June 17, 2016).

[48] Heritage Foundation, *The Heritage Guide to the Constitution, Bill of Attainder* (online at http://www.heritage.org/constitution/#!/articles/1/essays/62/bill-of-attainder)

[49] *Id.*

[50] *Head of I.R.S., Facing Censure, Relishes a Job Few Could Love,* New York Times (June 14, 2016) (online at www.nytimes.com/2016/06/15/us/politics/irs-impeachment-john-koskinen.html?__r=1).

[51] *Id.*

Richard W. Painter
University of Minnesota Law School
[redacted]

June 17, 2016

To the Members of the United States House of Representatives Committee on Oversight and Government Reform:

I write to you concerning the specific question of whether H.Res.737, if passed by the House would "require" IRS Commissioner Koskinen to forfeit his pension. For the reasons set forth below it would not. I also believe that for the House to pass such a resolution with the expectation that it would legally affect Koskinen's pension would demonstrate a dangerous attempt by the House to exceed its powers under the United States Constitution.

At the outset, I should point out that many of the constitutional questions discussed below have not yet arisen because the resolution at this stage is simply a resolution of one chamber, the House of Representatives. After passage by the House, it would have to be passed by the Senate and then signed by the President, or passed again by both chambers in a veto override, in order for it to have the legally binding effect of a bill that becomes law. Only then would the constitutional questions come into play. For the reasons discussed below I believe that, even if the resolution were to go through the steps required to become law, it would still be unconstitutional.

Federal government pensions, like other debt obligations of the United States, are contractual commitments that cannot be repudiated. These debts can be avoided only by a contractual or statutory provision that exists before the obligation was incurred and that sets forth the conditions upon which the United States shall be relieved of payment.

A legislative enactment that sought to take away the pension or other property of a particular individual would be a bill of attainder specifically prohibited by the Constitution.

As set forth in the 1998 Congressional Research Service report on censure that was issued in connection with the impeachment of President Clinton,

> "In addition to the general absence of authority and practice of a legislative institution in the United States to fine persons who are not members of that legislature, the levying of a fine or other such punishment, such as loss of pay, pension or other remuneration or benefits, may directly implicate the Bill of Attainder Clause of the Constitution."

The purpose of the Bill of Attainder Clause is discussed in a wide range of scholarly commentary, but probably the most succinct explanation appears in the Heritage Foundation Guide to the Constitution:

> "The Constitution prohibits both the federal government (in this clause) and the states (in Article I, Section 10, Clause 1) from passing either bills of attainder or ex post facto laws. The Framers considered freedom from bills of attainder and ex post facto laws so important that these are the only two individual liberties that the original Constitution protects from both federal *and*state intrusion. As James Madison said in *The Federalist* No. 44, "Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation."
>
> In common law, bills of attainder were legislative acts that, without trial, condemned specifically designated persons or groups to death. Bills of attainder also required the "corruption of blood"; that is, they denied to the condemned's heirs the right to inherit his estate. Bills of pains and penalties, in contrast, singled out designated persons or groups for punishment less than death, such as banishment or disenfranchisement. Many states had enacted both kinds of statutes after the Revolution.
>
> The Framers forbade bills of attainder as part of their strategy of undoing the English law of treason, and to contend with what they regarded as the most serious historical instances of legislative tyranny by state or national legislatures. Professor Raoul Berger argues that the bill of attainder clauses (*see also* Article I, Section 10, Clause 1) protect only against legislative actions that affect the *life* of the individual, not his property, which was the province of bills of pains and penalties. Beginning with Chief Justice John Marshall, however, the Supreme Court has insisted that "a Bill of Attainder may affect the life of an individual, or may confiscate his property, or may do both." *Fletcher v. Peck* (1810).
>
> Marshall and his successors saw the Bill of Attainder Clause as an element of the separation of powers. As the decisions of the Court in *Marbury v. Madison* (1803) and *United States v. Klein* (1871) made clear, only a court can hold a trial, evaluate the evidence, and determine the merits of the claim or accusation. The Constitution forbade the Congress from "exercis[ing] the power and office of judge." *Cummings v. Missouri* (1867). In *United States v. Brown* (1965), the Court specifically rejected a "narrow historical approach" to the clauses and characterized the Framers' purpose as to prohibit "legislative punishment, of any form or severity, of specifically designated persons or groups."
>
> Even with an expansive definition, the Bill of Attainder Clause provides only limited protection against retroactive civil legislation. The modern Court rarely invokes the clause's protection; it has not invalidated legislation on bill-of-attainder grounds since 1965. Moreover, the only laws that the Court has

invalidated as bills of attainder have been bars on the employment of specific individuals or groups of individuals.

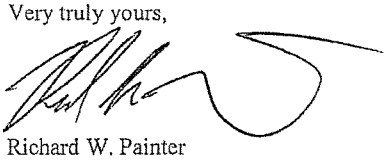
The Court devised a three-part test to determine when a piece of legislation violates the Bill of Attainder Clause: such legislation specifies the affected persons (even if not done in terms within the statute), includes punishment, and lacks a judicial trial. Because of the Court's relatively narrow definition of punishment, however, it rarely, if ever, invalidates legislation on this basis. For example, the Court has held that the denial of noncontractual government benefits such as financial aid was not punishment, S*elective Service System v. Minnesota Public Interest Research Group* (1984), nor did an act requisitioning the recordings and material of President Richard M. Nixon and several of his aides constitute punishment. *Nixon v. Administrator of General Services* (1977). Exclusion from employment, however, is a form of punishment. *United* States v. Brown (1965)."

http://www.heritage.org/constitution/#!/articles/1/essays/62/bill-of-attainder

Although, as pointed out by the Heritage Foundation, such bills of attainder are very rare, this particular House resolution meets all three parts of the three part test: it specifies the affected person (Mr. Koskinen), it includes a punishment (taking away his pension), and it lacks a judicial trial. This resolution is clearly a Bill of Attainder within the meaning of the Constitutional prohibition. I urge the House not to pass this resolution and, if the House does pass it, I urge the Senate not to consider it. This is a dangerous overreaching on the part of the legislature of the very sort that our founding fathers believed to be anathema to a representative democracy.

I should furthermore note that over the past several years your Committee has spent millions of taxpayer dollars on this investigation. This is essentially a dispute between the IRS and members of Congress about the 501c4 organizations that further the objectives of political campaigns, including campaigns of members of Congress. The IRS is charged with determining whether the activities of these organizations comply with the Internal Revenue Code and it is not proper for Congress to seek to intimidate the IRS in the discharge of its duties.

Very truly yours,



Richard W. Painter
S. Walter Richey Professor of Corporate Law

From: "Brand, Stan" [redacted]
Date: June 20, 2016 at 4:35:31 PM EDT
To: [redacted]
Subject: Pension forfeiture

You have asked me to address the effect of a simple House resolution purporting to require the Commissioner of the Internal Revenue Service to forfeit his pension based on a "censure" of the Commissioner for alleged failure to comply with Committee subpoenas and other alleged infractions. First a simple one House resolution does not have binding legal effect on any person outside the House of Representatives. This has been clear at least since the Supreme Court decision in Chadha v INS which established that any law having the purpose or effect of governing the conduct of persons outside the legislature is subject to the constitutional requirements of bicameral passage and presentment to the President. Accordingly any House resolution purporting to impact Commissioner Koskinen's federal pension rights would be of no binding legal effect on officers of the federal government. Moreover even a bicameral resolution if enacted and signed by the President would be subject to constitutional challenge as a prohibited bill of attainder barring the imposition of pains and penalties by the legislature as a "trial" affecting the rights of an individual. These types of judgments are reserved to federal courts under controlling Supreme Court jurisprudence.

Stanley Brand
Former counsel to the US House of Representatives
(1976-1983)
Distinguished Fellow in Law and Government
Penn State Dickinson School of Law

Washington University in St. Louis
SCHOOL OF LAW

21 June 2016

Hon. Jason Chaffetz, Chairman
Hon. Elijah E. Cummings, Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings,

Last week, the House Committee on Oversight and Government Reform reported out House Resolution 737 regarding John A. Koskinen, the Commissioner of Internal Revenue. I understand that during last week's markup, a question arose regarding whether the Resolution would actually require Mr. Koskinen to forfeit his government pension. I am writing you now to address that question.

House Resolution 737 consists of 13 "whereas" clauses outlining allegations about the Internal Revenue Service and Mr. Koskinen; a paragraph that would "censure and condemn" Mr. Koskinen; and a paragraph indicating that "it is the sense of the House of Representatives" that Mr. Koskinen should resign or be removed by the President, and that Mr. Koskinen should "be required to forfeit" his government pension.

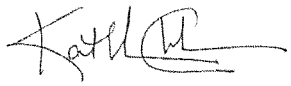
House Resolution 737 is a simple resolution, meaning that it will be presented to the House of Representatives for a vote but it will not go before the Senate, nor will it be presented to the President for his signature. This kind of simple "sense of the House" resolution gives members of the House of Representatives an opportunity to express themselves on an issue, and thus may be a useful political device. But a simple resolution does not have any legal effect outside the chamber that passes it.

Article I, section 7, clause 2 of our Constitution indicates that in order for a bill to become a law, the bill must be passed by both houses of Congress and be presented to the President for his approval. A simple resolution like House Resolution 737 will not go through this process, will not become law, and will not have any legal effect.

In other words, House Resolution 737 is a legislative device that enables members of the House of Representatives to take a political stand even where they are not seeking a change in the law, which would require the support of a majority of both Houses of Congress and the President's approval.

Please let me know if you have any questions. You can reach me at [redacted]

Sincerely,



Kathleen Clark
Professor of Law

Washington University in St. Louis [redacted]

Columbia University in the City of New York *New York, N.Y. 10027*

RICHARD BRIFFAULT
Joseph P. Chamberlain
Professor of Legislation

SCHOOL OF LAW

June 20, 2016

Committee on Oversight and Government Reform
United States House of Representatives

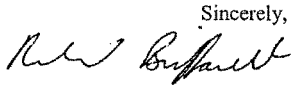
To the Members of the Committee:

Can a House Resolution, specifically H.Res. 737 as passed by the Committee on Oversight and Government Reform, require Commissioner of Internal Revenue John A. Koskinen to "forfeit all rights to any annuity for which he is eligible under chapter 83 or chapter 84 of title 5, United States Code?

The short answer is "no" – a House Resolution cannot have any such effect on the property rights of a private individual. House Resolutions can affect the rules and operations of the House and can express the "sense" of the House concerning a subject of interest to the House. The provision of H.Res. 737 concerning Commissioner Koskinen's pension is just such a "sense of the House" statement. It cannot bind persons or property outside the House. That would require a law, which, as the Constitution provides, Art. I, sec. 7, cl. 2, would require the approval of both the Senate and the House, and presentation to the President. H.Res. 737, even if passed by the full House, would not be a law and, so, would have no effect on Commissioner Koskinen's government benefits.

In addition, even if the annuity forfeiture provision were to be enacted as a law it could be challenged as a bill of attainder, in violation of Art. I, sec. 9, cl. 3, of the Constitution. In *United States v. Lovett*, 328 U.S. 303 (1946), the Supreme Court ruled that a law that purported to deny any salary or compensation to certain named government employees was an unconstitutional bill of attainder. The Court determined that "legislative acts, no matter what their form, that apply . . . to named individuals . . . in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." Id. at 315. As the Court explained, "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts." Id. at 317. "When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. " Id. at 318.

Sincerely,



MEMORANDUM June 20, 2016

To: House Committee on Oversight and Government Reform
Attention: [redacted]

From: [redacted]
Legislative Attorney
American Law Division

Subject: **Effect of House Censure Resolution on a Federal Official's Pension**

This memorandum is submitted in response to the Committee's request, as discussed with [redacted], for a legal analysis of the effect of a House Resolution, such as H. Res. 737, 114th Congress, on the right of an individual officer or employee of the federal government to receive his pension annuity under the Federal Employee Retirement System (FERS).

The resolution in question, H. Res. 737, 114th Congress, expresses the "sense of the House of Representatives" that a named officer in the executive branch of government "should" resign immediately, or be removed from office by the President, and "should – be required to forfeit all rights to any annuity for which he is eligible under chapter 83 or chapter 84 of title 5, United States Code."

The legislative vehicle in which the House would "censure and condemn" the official, and would express its opinion that such official forfeit his pension annuities, is a one-house, or "simple resolution." As noted by parliamentary authorities, simple resolutions of one house of Congress (or concurrent resolutions by both houses) are commonly employed for certain "nonlegislative" matters, such as to express the opinion or the "sense of" the Congress or of one house of Congress on a public matter.[1] Simple resolutions require no action by the other house of Congress, and since they contain no legislative matters are not presented to the President and "have no legal effect."[2]

The provisions and language in the simple resolution regarding the pension annuities of the executive branch official are therefore simply hortatory, are not legally binding, and would have no mandatory impact upon the right of the officer to his government pension.[3] An attempt to "legislate" with respect to

[1] "Simple resolutions are used in dealing with nonlegislative matters such as expressing opinions or facts ...." 7 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES [hereinafter DESCHLER'S PRECEDENTS], ch. 24, § 6.1, at. p. 363. "[Concurrent resolutions] are not used in the adoption of general legislation. ... [They] are used in ... expressing the sense of Congress on propositions .... A concurrent resolution does not involve an exercise of the legislative power under article I of the Constitution in which the President must participate." *Id.* at § 5. Brown, Johnson, and Sullivan, HOUSE PRACTICE, 112th Congress, 1st Sess., at 164: "Simple or concurrent resolutions are used ... to express facts or opinions, or to dispose of some other nonlegislative matter." See also Riddick & Frumin, Riddick's Senate Procedure, 1202 (1992).

[2] DESCHLER'S PRECEDENTS, *supra* at ch. 24, § 6.1, p.363.

[3] Pension annuities of federal executive officers and employees may be forfeited under the provisions of the so-called "Hiss Act" upon conviction of the officer or employee of treason, espionage, or other similar national security related offenses. See P.L. 83-769, 68 Stat. 1142 (Sept. 1, 1954), as amended; now 5 U.S.C. §§ 8311 *et seq.* The list of covered offenses is at 5 U.S.C. § 8312.

the rights and benefits of those outside the purview of the House of Representatives in a simple, one-house resolution may run afoul of the constitutional requirements of bicameralism and presentment.[4]

If, on the other hand, there were an attempt to place the pension forfeiture provision regarding a named individual in a House bill, to be approved by the Senate, and presented to the President to be enacted into law, such legislation would then appear to run afoul of the provision of the United States Constitution which prohibits the Congress from enacting a "Bill of Attainder."[5] The provision of the Constitution forbidding Congress from adopting a "Bill of Attainder" is directed at what are generally described as legislative punishments.[6] Taking away an employee's or former employee's pension in such circumstances (*i.e.*, in response to perceived employee misconduct) has been characterized in the past as "punitive"[7]; and Congress targeting specific employees for reductions of pay or benefits as a punitive measure either in permanent legislation or in appropriations laws has been found by the Supreme Court to constitute an impermissible "Bill of Attainder."[8]

[4] U.S. CONST., art. I, §7, cl. 2 and 3. INS v. Chadha, 462 U.S. 919, 948-956 (1983).

[5] U.S. CONST., art. I, §9, cl. 3.

[6] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977); Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 847 (1984).

[7] Hiss v. Hampton, 338 F. Supp. 1141, 1148 - 1152 (D.D.C. 1972).

[8] United States v. Lovett, 328 U.S. 303 (1946).