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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, *Selective 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,

A handwritten signature in black ink, appearing to read 'Richard W. Painter', with a large, sweeping flourish extending to the right.

Richard W. Painter

S. Walter Richey Professor of Corporate Law