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STAFF DIRECTOR

June 14, 2011

Mr. Lafe E. Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

Dear Mr. Solomon:

Thank you for your June 10, 2011, letter. I look forward to your testimony at the Committee's June 17, 2011, hearing in North Charleston, South Carolina. The hearing is scheduled to begin at 12:00 p.m. EST.

The due process rights of litigants are of significant importance to the Committee. However, the reasoning offered to support your position that your testimony before the Committee could jeopardize these rights is based on a flawed analysis of the law. I write to assure you that your concerns are misplaced. As you recognized, Congress has a Constitutional obligation to exercise its oversight responsibility. Flowing from this basic tenet, courts adopt a narrow view of who is a decision-maker in quasi-judicial actions when analyzing due process rights related to Congressional activity.

Your concerns regarding your participation in the hearing are misplaced for several reasons. In your capacity as Acting General Counsel for the National Labor Relations Board (NLRB), you are not a decision-maker within the scope of *Pillsbury Company v. Federal Trade Commission*,¹ the leading case on Congressional intervention in agency decision-making. In addition, the hearing is focused on understanding the policy implications of your decision to bring suit against Boeing for unfair labor practices. You have already filed the Complaint; therefore, Congress cannot interfere with your decision. Finally, while I do not believe this Committee's oversight has any implications for the due process rights of the litigants, to the extent that it may, such a claim is for the affected parties to raise, not the agency, in federal court after a decision has been rendered by the agency.

¹ 354 F.2d 952 (5th Cir. 1966).

As to the question of whether as Acting General Counsel you are a “decision-maker” within the scope of *Pillsbury*, your analysis omits key facts.² While it is correct that in the *Pillsbury* case, in addition to the Federal Trade Commission (FTC) Chairman, “other FTC officials,” including “the then general counsel,” were also questioned during Congressional Committee proceedings, your letter fails to include a very important and determinative fact that the then-general counsel later became Chairman of the FTC who “wrote the final [FTC] opinion” from which the issue in *Pillsbury* generated.³ Further, it is clear that the holding of the case rests on the questions posed to the Chairman at the time, as well as the other Commissioners “who actually participated in the [FTC’s] final decision.”⁴ As participants in the *final* decision, they determined the ultimate outcome. In the NLRB’s case against Boeing, you will not determine the ultimate outcome. As you stated in your June 10, 2011, letter, “ultimately, the administrative law judge, the National Labor Relations Board, and the courts will *decide* [the merits of] Boeing’s actions.”⁵ (emphasis added). Accordingly, under the precedent established in *Pillsbury*, your testimony before the Committee does not threaten the rights of the litigants.

In other cases cited in your letter, you fail to clearly identify the capacity in which certain decision-makers have served when the courts have analyzed whether they were influenced by Congressional intervention. Such facts are crucial to a proper analysis of whether these cases are analogous to the circumstances before us. In the case of *Peter Kiewit Sons’ Co. v. U.S. Army Corps of Engineers*,⁶ the Brigadier General was the Assistant Judge Advocate General for Civil Law, and, as such, was the “only official empowered to *order* debarments.” (emphasis added). Therefore, the Brigadier General was the “ultimate decision-maker.”⁷ In *D.C. Federation of Civic Associations v. Volpe*,⁸ the Secretary of Transportation was the ultimate decision-maker who allowed a bridge project to be part of an Interstate System.⁹ By contrast, your role in the Boeing case is not analogous to the ultimate decision-makers in the cases you cite. Finally, in *SEC v. Wheeling-Pittsburgh Steel Corp.*,¹⁰ the court did not conduct a *Pillsbury* analysis, nor did it analyze due process rights. In fact, the court does not cite *Pillsbury* at all, and the lower court specifically rejected its relevance.¹¹

²See Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board to Rep. Darrell Issa, Chairman, House Oversight and Government Reform Committee (June 10, 2011), [hereinafter Solomon Letter June 10].

³ *Pillsbury*, 354 F.2d at 955.

⁴ *Id.* at 956.

⁵ Solomon Letter June 10, *supra* note 2.

⁶ 714 F.2d 163 (D.C. Cir. 1983).

⁷ *Id.* at 165, 170.

⁸ 459 F.2d 1231 (D.C. Cir. 1971).

⁹ *Id.*

¹⁰ 648 F.2d 118 (3rd Cir. 1981).

¹¹ *SEC v. Wheeling-Pittsburgh Steel Corp.*, 482 F. Supp. 555 (D. Pa. 1979), *vacated and remanded*, 648 F.2d 118 (3rd Cir. 1981).

Your assertion that I incorrectly characterized *Koniag v. Andrus*¹² as declining to extend *Pillsbury* to agency employees or advisors is also misplaced.¹³ The D.C. Circuit did not expressly hold that *Pillsbury* applies to agency employees or advisors. Instead, it noted, in dicta, that “one possible exception was a close advisor to the Secretary [of Interior];”¹⁴ however, it did not necessarily “assum[e]” the advisor was a decision-maker for the purposes of *Pillsbury* as you state.¹⁵ (emphasis added). In fact, a focus of the lower court’s analysis, which was reversed in part by the D.C. Circuit, was on that same advisor to the Secretary.¹⁶

It is clear that as Acting General Counsel charged with overseeing litigation, you are not a decision-maker for *Pillsbury* purposes. Moreover, to the extent that a court may find otherwise, your decision to file the Complaint has already been made. This is relevant because courts are “concerned when congressional influence shapes [an] agency’s determination of the merits.”¹⁷ Courts consider the “decision-maker’s input, not the legislator’s output,” and they analyze whether “extraneous factors intruded into the calculus of consideration of the individual decision-maker.”¹⁸ Here, you received input from the International Association of Machinists and Aerospace Workers, not Congress, when you considered the merits of Boeing’s actions before filing the Complaint. The courts presume that any further decision you make concerning the case will be executed knowing that you are a “[man] of conscience and intellectual discipline capable of judging a particular controversy fairly on the basis of its own circumstances.”¹⁹ This principle of course applies to the Administrative Law Judge and the members of the National Labor Relations Board as well. Further, the courts recognize that elected representatives are permitted to ask questions of and demand information from agency officials when conducting Congressional oversight.²⁰ Indeed, courts have held that “communications between Congress and agencies help to guarantee the political accountability of unelected agency decision-makers.”²¹ Such interaction is part of the “vigorous engagement that gives rise to the system of checks and balances in our government.”²²

You represented to me in your June 3, 2011, letter that one of the reasons you could not testify at the Committee’s hearing is because you would be “overseeing the

¹² 580 F.2d 601 (D.C. Cir. 1978).

¹³ Solomon Letter June 10, *supra* note 2.

¹⁴ *Koniag*, 580 F.2d at 610.

¹⁵ Solomon Letter June 10, *supra* note 2.

¹⁶ *Koniag, Inc. v. Kleppe*, 405 F.Supp. 1360 (D.D.C. 1975), *affirmed in part, reversed in part, Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978).

¹⁷ *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522, 1528 (D.C. Cir. 1994).

¹⁸ *Id.*

¹⁹ *Gulf Oil Corp. v. Federal Power Com.*, 563 F.2d 588, 612 (3rd Cir. 1977).

²⁰ *See ATX, Inc.*, 41 F.3d at 1528.

²¹ *United States of America v. Mardis*, 670 F.Supp.2d 696, 703 (D. Tenn. 2009); *Sokaogon Chippewa Community v. Department of Interior*, 929 F.Supp. 1165 (D. Wis. 1996).

²² *Mardis*, F.Supp.2d at 703.

litigation in Seattle” at that time.²³ Subsequent to that letter, your office informed my staff that you will be in Washington, D.C., during the week of the Committee’s hearing.²⁴ I do not know the reason for this apparent change of events, but the fact that you will not be in attendance at the hearing before the Administrative Law Judge further affirms that you are not a decision-maker for *Pillsbury* purposes.

With respect to your view that agencies are in a position to raise claims of Congressional intervention, it is telling that each case you cite is the result of a claim initiated by a private party, not a federal agency. Therefore, you provide no legal precedent to support your position.²⁵ Even if it were hypothetically appropriate for an agency to raise a claim of Congressional intervention related to the due process rights of litigants, the time to bring such a claim is after a final agency decision is rendered.²⁶ This is because a court’s analysis will turn on whether the decision-maker was in fact influenced by Congress.²⁷ As you know, this case is pending. As for the other issues of privilege you raise, it is the practice of the U.S. Senate and the U.S. House of Representatives, grounded in Congress’ constitutional power to investigate, to leave to the Congressional committee the determination of whether to recognize claims of attorney/client privilege or attorney work product.²⁸

You proclaim your efforts to avoid testifying are guided by an attempt to prevent a “negative impact on the rights of the litigating parties;”²⁹ yet, when it comes to the impact on South Carolina employees whose jobs are at risk, you seem less concerned. Indeed, you opposed a motion by three current Boeing employees to intervene in the case, stating that those employees have “no cognizable interest...sufficient to justify their intervention.”³⁰ Further, you believe that allowing their participation “would merely delay and complicate” the proceeding.³¹ To the contrary, I believe that these employees, the people of South Carolina, and the rest of the citizens of the United States have a right to know the public policy implications of your actions.

In your June 10, 2011 letter, you mention that the administrative process should take “its usual course;” however, there is nothing usual about your present course of action. As you know, 16 Attorneys General from both right-to-work states and non-right-

²³ See Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board to Rep. Darrell Issa, Chairman, House Oversight and Government Reform Committee (June 3, 2011).

²⁴ NLRB Staff to Committee Staff, Telephone Conversation, June 9, 2011.

²⁵ Solomon Letter June 10, *supra* note 2.

²⁶ See *Kiewit*, 714 F.2d at 169.

²⁷ *Id.*

²⁸ CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg.

²⁹ Solomon Letter June 10, *supra* note 2.

³⁰ Acting General Counsel’s Opposition to Motion to Intervene by Dennis Murry, Cynthia Ramaker, and Meredith Going, Sr., *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-34231.

³¹ *Id.*

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to-work states filed an amicus brief in the case and called the proceedings “unprecedented.”³² They believe the NLRB’s actions will not only harm “[their] States’ ability to attract new employers and jobs for [their] citizens, but [will] also...harm the interests of the very unionized workers whom [your] Complaint seeks to protect.”³³ The policy implications of your interpretation of the National Labor Relations Act (NLRA), coupled with the corresponding impact on jobs, are far too great for Congress to ignore. Therefore, as recognized by the Supreme Court, the Committee is appropriately inquiring about your administration of an existing law.³⁴

As you know, the NLRB is an agency that was created by Congress and is accountable to Congress.³⁵ Further, taxpayers have a strong interest in how the NLRB is carrying out its legislative mandate under the NLRA. Therefore, I must insist you appear before the Committee to testify in South Carolina on June 17, 2011. If you have any questions, please contact Rob Borden or Kristina Moore of the Committee staff at 202-225-5074.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

³² Amicus Curiae Brief of Sixteen State Attorneys General in Support of Respondent the Boeing Company, *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-34231.

³³ *Id.*

³⁴ See *Watkins v. United States*, 354 U.S. 178 (1957).

³⁵ 29 U.S.C. § 153.