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June 7, 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 3, 2011, letter. I appreciate the seriousness you give to the due process rights of litigants in the pending Boeing matter.[1] I too recognize these important rights. However, as acknowledged by the U.S. Supreme Court, Congress' power to investigate is extremely broad,[2] and the rights of litigants can be preserved "without having any adverse effect upon the legitimate exercise of the investigative power of Congress."[3] Indeed, Congressional hearings are not inherently improper by virtue of exploring a pending administrative matter.[4] To the contrary, it is the appropriate role of Congress and the Constitutional duty of this Committee to conduct oversight inquiring about the administration of existing laws.[5]

Notably, in exercising an agency's quasi-judicial functions, its "decision-makers" are generally viewed as adjudicators, not necessarily parties who decide to bring an action.[6] For example, in *Pillsbury Company v. Federal Trade Commission*,[7] the leading case on the issue of Congressional intervention, it was the Chairman of the Federal Trade Commission (FTC) who was called to testify at a Congressional hearing, and he had an

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[1] *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.
[2] *Watkins v. United States*, 354 U.S. 178 (1957).
[3] *Pillsbury Company v. Federal Trade Commission,* 354 F.2d 952 (5th Cir. 1966).
[4] *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389 (D. Conn. 2008) (citing ATX Inc. v. U.S. Department of Transportation, 41 F.3d 1552 (D.C. Cir. 1994), affirmed by *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2nd Cir. 2009).
[5] *Watkins*, *supra* note 2.
[6] *See, e.g., Pillsbury Company v. Federal Trade Commission,* 354 F.2d 952 (5th Cir. 1966); *Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978).
[7] *Pillsbury*, *supra* note 3.

actual role in deciding the ultimate outcome of the pending matter before the FTC.[8] Further, the D.C. Circuit has declined to extend the holding in *Pillsbury* to agency employees or advisors.[9]

In your role as Acting General Counsel, you do not serve as an adjudicator; the Administrative Law Judge will serve that role. You also are removed from the members of the National Labor Relations Board, who will likely be the ultimate adjudicators in the Boeing matter.[10] In fact, you have expressed to me that there has been no communication between the Office of General Counsel and the National Labor Relations Board referring or relating to the investigation of Boeing.[11] Accordingly, the Board should not have been involved in your decision-making process.

Nevertheless, this hearing does not concern your decision-making process or your legal strategy. This hearing will focus on how your actions against Boeing could impact the thousands of Boeing employees at a non-union worksite in South Carolina. You assert that you do not seek to close Boeing's operations in South Carolina;[12] yet, the relief requested would have that exact effect.[13] Indeed, three Boeing employees have filed to intervene in the case, to oppose the lawsuit because of the "draconian remedy that it seeks, which is, in essence, the closure of their work site and their discharge from employment in South Carolina."[14]

Finally, even if an agency is concerned that certain Congressional oversight may border on Congressional intervention, it is not the agency's claim to make.[15] Instead, it is the right of a private party to the agency action's to raise it, in federal court, after the agency renders a final decision.[16] In that instance, courts recognize that Congressional committees serve an important oversight and investigative function, and they have a legitimate interest in the "objective and efficient operation of regulatory agencies…with which [courts] should not lightly interfere."[17] Here, the number of jobs at risk, as a result

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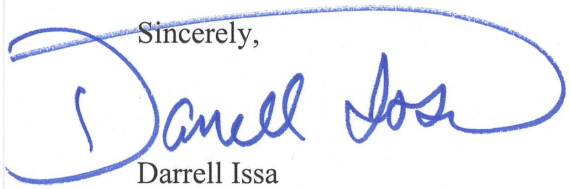
[8] *Id.* (At the Congressional hearing, the Chairman of the FTC announced he would disqualify himself from further participation in the case after questioning involved his mental processes).
[9] *Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978).
[10] National Labor Relations Board, The NLRB Process, *available at* http://www.nlrb.gov/nlrb-process (last visited June 4, 2011).
[11] Letter from Celeste J. Mattina, Acting Deputy General Counsel, National Labor Relations Board to Reps. Darrell Issa, Dennis Ross, and Trey Gowdy (May 27, 2011).
[12] National Labor Relations Board, Fact Check Archives, *available at* http://www.nlrb.gov/news-media/fact-check/fact-check-archives (last visited June 6, 2011).
[13] Letter from J. Michael Luttig, Executive Vice President and General Counsel, Boeing, to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 3, 2011).
[14] Motion to Intervene, *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.
[15] *See* CRS Memorandum, *Application of Pillsbury Doctrine to Congressional Oversight Inquires*, by Todd Tatelman (May 2011).
[16] *Id.*
[17] *Gulf Oil Corp. v. Federal Power Com.*, 563 F.2d 588 (3rd Cir. 1977).

of the Complaint, is certainly a legitimate interest that Congress has the power and duty to investigate.

In light of this information, I ask that you reconsider my invitation to testify at the Friday, June 17, 2011, hearing in North Charleston, South Carolina, and that the Committee will not have to consider the use of the compulsory process. I ask that you respond to this invitation to appear no later than 10:00 a.m., Friday, June 10. 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 Cummings, Ranking Member
Committee on Oversight and Government Reform