

Congress of the United States
Washington, DC 20515

June 16, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

As the Ranking Members of the two House Committees with oversight and legislative jurisdiction over the National Labor Relations Board (NLRB), we write to express our grave concerns about the June 17, 2011, field hearing you have scheduled in South Carolina regarding the NLRB complaint against The Boeing Company (Boeing). These concerns have been heightened by your latest letter to the NLRB's Acting General Counsel, Lafe Solomon, on June 14, 2011.

The timing of the hearing, your insistence on Mr. Solomon's personal appearance, and the nature of your June 14 letter indicate a serious potential for improper interference with a pending case involving private parties and a disturbing disregard for what that interference could mean for the due process rights of those parties.

Your letter also raises new questions about the intent of this hearing. The hearing ostensibly relates to the NLRB Acting General Counsel's case against Boeing. This case opened on Tuesday, June 14 before an Administrative Law Judge, just three days before your scheduled hearing. That timing does not appear to be coincidental. Although you could have held a hearing with any array of experts, you have insisted that the chief prosecutor of the case—the person with ultimate decision-making authority over all prosecutorial decisions in the case—testify at this hearing while the trial is underway. Those prosecutorial decisions do not end with the issuance of a complaint. Significant decisions will continue to be made until the prosecution rests. Yet, you have indicated that you plan to subject this decision-maker to questions about the active case at the hearing.

In the meantime, you have demanded internal deliberative documents from Mr. Solomon that could include, among other things, documents revealing the prosecution's trial strategy. Such information, if disclosed during the pendency of the case, would unfairly advantage the

respondent, Boeing, and disadvantage the prosecution and the charging party. The intrusive nature of your demand for documents, as well as your approach to constitutional concerns in the June 14 letter, indicate that you have every intention at the upcoming hearing of pressing the very kinds of questions that put the due process rights of private parties in jeopardy.

After being invited to testify, Mr. Solomon expressed his serious reservations to you about his appearance and its potential impact on the due process rights of the parties to the case. You overruled those concerns and threatened to use compulsory means to force Mr. Solomon's appearance. Mr. Solomon attempted to accommodate your request by offering the testimony of another NLRB official who has no direct involvement in the pending Boeing case and provide his own written testimony. You rejected these offers.

Mr. Solomon's reservations are clear, and we share those reservations. Rather than entirely dismissing those reservations, you show ultimate disregard for them. In your June 14 letter, you stated:

[W]hile 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 ... in federal court after a decision has been rendered by the agency. ... [T]he time to bring such a claim [of Congressional intervention] is after a final agency decision is rendered. This is because a court's analysis will turn on whether the decision-maker was in fact influenced by Congress. As you know, the case is pending.

In other words, you seem to believe that, even if your conduct amounts to improper interference with constitutional rights, that should not be the Committee's concern and instead should be left to the parties to litigate later.

But it is the Committee's concern, and it is the concern of all Members of Congress that we conduct ourselves in a manner that upholds the Constitution. Recognizing the risk of interference, as well as the risk of the appearance of interference, a responsible chairman would take care to minimize these risks. Rather than creating a new basis for appealing any final agency decision, increasing uncertainty, and shifting the costs of your interference onto private parties, the Committee should wait until the case is no longer pending before calling the chief prosecutor to testify at a hearing about that case.

Oversight should, above all, be a tool for maintaining the integrity of government institutions, their processes, and Americans' constitutional rights. What you are calling oversight here is attempting to do just the opposite. At every turn, it threatens that integrity.

There is still an opportunity for you to demonstrate some modicum of concern about the constitutional and ethical impact of what you are doing. We strongly urge you to be circumspect about the nature of the questions you and other Members pose to the chief prosecutor of this live

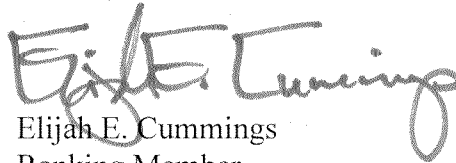
case at the hearing. At a minimum, we ask that you direct Committee Members to limit all questions to Mr. Solomon to general questions about the NLRB and its processes, and not issues related to the ongoing proceeding before the Administrative Law Judge.

There is no dispute that Congress has the authority to conduct rigorous oversight of federal agencies, including the NLRB. But Congress must not abuse this authority. We are confident that the Committee's oversight responsibility can be fulfilled without compromising the integrity of NLRB proceedings or the due process rights of private parties.



George Miller
Ranking Member
Education and Workforce Committee

Sincerely,



Elijah E. Cummings
Ranking Member
Committee on Oversight & Government Reform