COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

July 24, 1990

The Honorable Kenneth Carr
Chairman
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Chairman:

Enclosed please find a memorandum prepared by the General Counsel of the U.S. House of Representatives regarding the refusal of Nuclear Regulatory Commissioners Carr, Rogers, Curtiss and Remick to answer questions posed by Representative Markey during the March 14, 1990 hearing before the House Interior Committee Subcommittee on General Oversight and Investigations.

According to the House General Counsel, "Review of the pertinent legal authorities. . . reveals that the legal analysis in (the NRC General Counsel's March 16) justification memo is seriously flawed in several regards and that there is no legal justification for the Commissioner's refusals to answer Representative Markey's question."

As Chairman of the Subcommittee, I wholeheartedly endorse the finding of the House General Council. Moreover, I believe the Counsel's finding extends to related questions on evacuation planning. Accordingly, I hereby direct the Commission to answer the question posed by Mr. Markey at the hearing and, in addition, the questions enclosed herein.

Given the considerable amount of time which has lapsed since the hearing, I would ask that you provide the Subcommittee with the Commission's answers no later than Friday, August 10, 1990.

With all good wishes,

Sincerely,

Peter H. Kostmayer
Chairman
Subcommittee on General
Oversight and Investigations

Questions from Rep. Edward J. Markey

1) Under current criteria can the NRC license a plant for which the minimum estimated evacuation time is eight hours? 12 hours? 24 hours? 2 weeks? Please explain.

2) Does the NRC use criteria for determining "reasonable and feasible dose reduction under the circumstances?" Please detail these criteria if they exist.

3) Could the NRC license a plant for which the emergency plan offered no dose savings during a conceivable postulated accident? Please explain.

4) Could the NRC license a plant under which members of the public could receive, during a conceivable postulated accident, a radiation dose of 1 REM? 25 REM? 100 REM? 500 REM? Please explain.

5) Should emergency plans seek to avoid life threatening radiation doses? Please explain?

a. Is this a requirement of current emergency plans? Please detail any requirements if they exist.

b. If the answer is yes, what criteria does the NRC use to determine the effectiveness of emergency plans in this regard?

6) Should emergency plans seek to avoid significant risk of fatal cancers? Please explain.

a. Is this a requirement of current emergency plans? Please detail any requirements if they exist.

b. If the answer is yes , what criteria does the NRC use to determine the effectiveness of emergency plans in this regard?

7) Should emergency plans seek to avoid significant risk of non-fatal cancers? Please explain.

a. Is this a requirement of current emergency plans? Please detail any requirements if they exist.

b. If the answer is yes, what criteria does the NRC use to determine the effectiveness of emergency plans in this regard?

8) Is it "reasonable and feasible", pursuant to the Atomic Energy Act, to shelter the populations near Nuclear Power Plants, such as the beach population at Seabrook, to achieve significant dose reductions?

a. Do such issues require resolution before full-power of nuclear power plants? Why or why not? Please explain.

9) The National Academy of Sciences Beir-V Report, issued in December 1989, indicates that the risks of low levels of radiation exposure are from three to fourteen times higher than the academy believed as recently as 1980 -- when current emergency planning guidelines (such as NUREG-0654) were promulgated. Does the Commission believe that its emergency planning requirements should be re-evaluated in light of Beir-V? Why or Why not? Please explain.

10) The NRC/FEMA guidance for emergency plans requires that there be available a public alert and notification system which is capable of notifying the public within ten miles of a plant within fifteen minutes after off-site authorities are notified. Given this requirement for prompt notification, on what basis does the Commission conclude that the times to evacuate are irrelevant in accessing the adequacy of emergency plans?

11) Has the Commission issued a full power operating license to an applicant who did not have an NRC- approved emergency plan at the time the license was issued? In the Seabrook issue, did the Appeal Board conclude that the New Hampshire plan could not be approved without a sheltering plan component? Please explain.

a. Has the Commission reversed that conclusion of the Appeal Board?

12) Please list all the instances in which an operating license has been issued to an applicant who did not have an NRC-approved emergency plan.

13) Has the NRC determined that the lack of a sheltering plan for the beach population at Seabrook is not "safety significant," and therefore allowed the plant to proceed while the sheltering plan was being developed? If so what was the rationale for this finding? Why isn't the lack of a sheltering plan a reason for withholding the license?

14) Can a properly sited plant be denied an operating license because the emergency plans are inadequate with regard to site specific factors such as population size and proximity? evacuation times? effective sheltering? Please explain for each.

15) Is there outstanding a viable decision from the Appeals Board that concludes that the "B" planning standards for Seabrook have not been met? Please explain.

16) Does the Licensing Board finding that the remanded issues on the New Hampshire Emergency Plan were not significant cite 10 C.F.R. 50.47(C)(1)? Why or why not?

17) Were the parties to the proceeding given an opportunity to be heard on the issue of whether or not the deficiencies found by the Appeal Board were significant? Please explain.

18) What is the basis of the Commission's determination that the deficiencies are not significant for Seabrook?

19) In 1981 the NRC promised in a brief the D.C. Court of Appeals that no operating license would be issued for Seabrook if emergency planning was "infeasible". What standards have been used to determine that the Seabrook Emergency Plan is feasible?

20) Please list all the instances that the Commission has decided that compliance with the 16 "B" standards was sufficient to establish adequacy.

21) 10 C.F.R. 50.47(A)(1) requires that "no operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protective measures can and will be taken" and this section does not indicate that compliance with the "B" standards establishes "adequacy". On what basis, therefore, did the Commission determine that mere compliance with the planning standards establish adequacy?

22) Can compliance with the planning standards, themselves, be achieved independent of the particular risks at specific sites? If so why does the Commission permit litigation of emergency planning contentions in its licensing proceedings?

Donnald K. Anderson
Clerk

Steven R. Ross
General Counsel

Office of the Clerk
U.S. House of Representatives
Washington, DC 20515-6601

May 17, 1990

MEMORANDUM

TO: The Honorable Peter H. Kostmayer, Chairman
Subcommittee on General Oversight and Investigations of the House Committee on Interior and Insular Affairs

FROM: Steven R. Ross
General Counsel to the Clerk

Robert M. Long
Assistant Counsel to the Clerk

RE: Refusal of Nuclear Regulatory Commissioner to Answer A Question During Hearings Before The Subcommittee on General Oversight and Investigations of the House Committee on Interior and Insular Affairs (March 14, 1990).

You have asked for a legal evaluation of the refusal of Nuclear Regulatory Commissioners Carr, Rogers, Curtiss and Remick to answer a question posed by Representative Markey during recent hearings before the House Interior Subcommittee on General Oversight and Investigations regarding nuclear power safety issues. Representative Markey's question was: "If there is no minimum evacuation time for a nuclear power plant, could the NRC license a plant for which the minimum estimated evacuation time is 8 hours or 12 hours?"

To justify the Commissioners' refusals to answer this question the General Counsel of the Nuclear Regulatory Commission prepared a post hoc memorandum dated March 16, 1990 ("the justification memo"). This justification memo purports to be a legal analysis

explaining why the refusals to answer the question were "legally justified." Id. at 1.

Review of the pertinent legal authorities, however, reveals that the legal analysis in this justification memo is seriously flawed in several regards and that there is no legal justification for the Commissioners' refusals to answer Representative Markey's question. First the memo attempts to extract a privilege against Congressional questioning from several court cases regarding due process requirements for administrative adjudications. See e.g., Pillsbury v. FTC, 354 F. 2d 952 (5th Cir. 1956); American Public Gas Ass'n v. FPC, 567 F. 2d 1016 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978). None of these cases even suggest, little alone recognize, such a privilege against Congressional questioning. Instead later cases in applying Pillsbury explicitly recognize the importance of Congressional oversight and are careful not to impinge on this Constitutional power of the Congress. Sierra Club v. Costle, 657 F. 2d 298, 409 (D.C. Cir. 1981); Gulf Oil Corp v. FPC, 563 F. 2d 588, 610 (3rd Cir. 1977).

Furthermore supplying an answer to Representative Markey's question in this instance would not trigger the administrative due process problems addressed in those cases. They explicitly indicate that administrative due process problems only arise from extensive Congressional prodding, and criticism, of the administrative decisionmakers regarding a specific adjudication pending before an agency -- Congressional pressure aimed at forcing the administrative decisionmakers to make "prejudgment[s]. . . of

factual questions then pending." Gulf Oil at 611. Representative Markey's single question regarding the ability of the Commission to license a nuclear power facility with a slow evacuation capability simply does not implicate the due process concerns by the courts in these cases. The refusals to answer Representative Markey's question have no legal support.

A. THE NRC COMMISSIONERS DO NOT HAVE A PRIVILEGE AGAINST CONGRESSIONAL QUESTIONING

Citing the 5th Circuit Court of Appeal's opinion in Pillsbury, supra, the justification memo attempts to construct a privilege against questioning by Congressional Committees. That case, however, does not recognize any such privilege.

In Pillsbury the appeals court held that because there had been extensive Congressional prodding and criticism of certain Federal Trade Commissioners regarding a specific adjudication, for which they were the administrative decisionmakers, they were "required. . . to disqualify themselves" Pillsbury at 963, from that matter in order to preserve a "fair tribunal." Id. at 965. Since the Commissioners that had been pressured had not disqualified themselves, the Court remanded the adjudication back to the FTC in order for it to determine the appropriate steps to take to ensure a fair tribunal. Id. The Pillsbury court did not hold that the Commissioners could refuse to answer the Congressional inquiries posed to them.

Furthermore in all the later decisions by the courts applying the Pillsbury case there has never been any suggestion that such

power of Congress, as a separate and co-equal branch of the government, to oversee executive agencies and operations, including the power to compel testimony.

The Supreme Court has recognized Congressional oversight as an essential constitutional attribute of the legislative function. Congress's investigatory powers are "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Barenblatt v. United States, 360 U.S 109, 111 (1959).

> The power of the Congress to conduct investigations is inherent in the legislative process. . . . It comprehends probes into the departments of the Federal Government to expose corruption, inefficiency or waste.

Watkins v. United States, 354 U.S. 178, 187 (1957). See also, McGrain v. Daugherty, 273 U.S. 135, 175 (1926): Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

Congress's oversight powers stem directly from the English Parliament's historic investigatory functions -- "We [the House of Commons] are called the Grand Inquest of the Nation, and as such it is our duty to inquire into every Step of public management, either Abroad or at Home, in order to see that nothing has been done amiss," Chandler Common Debates vol. XIII p. 172, (remarks of William Pitt, 1742) -- and in America have been said to be more important than legislating. Woodrow Wilson Congressional Government 303 (1901) ("The informing function [oversight power] of Congress should be preferred even to its legislative function").

Thus in applying Pillsbury the courts have been careful not to impinge on this Congressional authority. For example, in D.C. Federation of Civic Assn's v. Volpe, 459 F. 2d 1231, 1249 (D.C. Cir 1972) although the court held, as in Pillsbury, that an administrative decision (regarding the construction of a bridge) be remanded to the agency for an impartial redetermination because of intense Congressional pressures the Court emphasized that it was not challenging the Congressional actions.

> To avoid any misconceptions about the nature of our holding, we emphasize that we have not found -- nor, for that matter, have we sought -- any suggestion of impropriety or illegality in the actions of Representative Natcher and others who strongly advocate the bridge. . . we indicate no opinion on their authority to exert pressure on Secretary Volpe.

Id. at 1249.

Similarly other courts have also recognized Congress' oversight authority in this context. See e.g., Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng., 714 F. 2d 163, 170 (D.C. Cir. 1983) ("Congressional oversight serves a vital control on the quality and propriety of low visibility executive decisionmaking."); Sierra Club 657 F.2d at 400 n. 502 (D.C. Cir 1981) ("Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends. . . upon the openness. . . to the public" and "'[d]emocratic ideology requires control of administrative action by elected representatives of the people.'") (quoting Scher, Conditions for Legislative Control, 25 J. Politics 526 (1963)); Gulf Oil 563 F.2d at 610 ("We also are sensitive to the legislative importance of Congressional committees on oversight

and investigation and recognize that their interest in objective and efficient operation of regulatory agencies serves a legitimate and wholesome function with which we should not lightly interfere."); United States v. Armada Petroleum Corp., 526 F. Supp. 43, 50 (S.D. Tex. 1982) ("Courts have recognized the importance of Congressional committees on oversight and investigation, and they are sensitive to Congress's interest in the objective and efficient operation of regulatory agencies."); United States v. Phoenix Petroleum Co., 571 F. Supp. 16, 20 (S.D. Tex. 1982).

Consequently in the few instances[1] when the courts have concluded that an agency's decisionmaking has not afforded the parties due process because of Congressional pressures the remedy has always been to remand the decision back to the agency for a fresh, and impartial, redetermination. Pillsbury, supra.; Volpe, supra.; Texas Medical Association v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976). In fact in this context, twice district courts have been reversed by the appeals courts when they have attempted to decide the underlying issues or impose remedies other than remand to the agency. Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601, 604 (D.C. Cir. 1978) (district court reversed for

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[1] Most of the time the courts have concluded that the Congressional actions regarding matters before the agencies have not created due process problems. See e.g., Peter Kiewit Sons' supra; Sierra Club supra; Koniag, Inc. Village of Uyak v. Andrus, 580 F.2d 601 (D.C. Cir 1978); American Public Gas supra; Gulf Oil supra; United States ex rel. Parco v. Morris, 426 F. Supp. 976 (E.D. Penn. 1977); Phoenix Petroleum Co. supra; Armada Petroleum Corp. supra; Texas Oil & Gas Corp. v. Andrus, 498 F. Supp. 677 (D.D.C. 1980); Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650 (D.D.C. 1978).

ordering preliminary agency determinations reinstated) ("we hold that the proper remedy is a remand to the Secretary to redetermine these cases."); Peter Kiewit Sons' Co. v. U. S. Army Corp of Eng., 714 F.2d 163 (D.C. Cir. 1983) (district court determination on contractor debarment reversed and district court instructed to remand to the agency).

The attempt in the justification memo to derive a testimonial privilege against Congressional questioning from Pillsbury and related cases fails. Those cases stand merely for the proposition that an administrative proceeding that has been the subject of intense Congressional pressure may have to be reconducted in order to meet administrative due process requirements. They do not mention, let alone, create a privilege against testifying at congressional hearings.

B. REPRESENTATIVE MARKEY'S QUESTION WOULD NOT RAISE THE DUE PROCESS CONCERNS ADDRESSED IN PILLSBURY AND ITS PROGENY

Aside from the fact that the Pillsbury cases, and those that follow it, do not recognize any privilege against Congressional questioning of administration officials as claimed in the justification memo, the single question posed by Representative Markey does not even constitute Congressional pressure that would give rise to administrative due process problems at the agency under those cases. Pillsbury and the later cases make it clear that only intense Congressional pressure aimed at pushing the agency decisionmakers into predeterminations of matters pending before the agency give rise to the due process problems that may require a second agency proceeding and redetermination.

Representative Markey's single question regarding the authority of the NRC to license a nuclear power plant under certain circumstances[2], does not give rise to the administrative due process concerns addressed in the Pillsbury line of court cases.

In Pillsbury the court noted that the specific case pending before the agency "was referred to more than 100 times during the several [congressional] hearings", Pillsbury 354 F.2d at 962, and the court reproduced over five pages of the congressional transcripts in its opinion finding that the FTC decisionmaker had been:

> subject[ed]. . . to a searching examination as to how and why he reached his decision in a case still pending before him, and criticize[d] for reaching the 'wrong' decision [by] the Senate subcommittee. . . .

Id. at 964 (emphasis added). The Pillsbury court concluded that the congressional investigation "focus[ed] directly and substantially upon the mental decisional processes [of an agency] in a case which is pending before it". Id.

The circumstances which lead the court in Pillsbury to believe that there might be administrative due process problems have been

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[2] Representative Markey's question was whether the NRC "could" license a nuclear power plant with a slow evacuation capability. This question was not directed at any particular facility, or proceeding pending before the agency, but rather was a generalized inquiry regarding the NRC's legal criteria and operations.

This inquiry is mischaracterized in the analysis portion of the justification memo as one aimed at the mental decisionmaking process of the Commissioners. "The question asked by Congressman Markey was whether the Commission would license a plant [with a slow evacuation capability]." Justification Memo at 4 (emphasis added).

described by later courts variously as "intense congressional pressure" News America Pub., Inc. v. F.C.C., 844 F.2d 800, 816 (D.C. Cir. 1988), as "legislative intrusions. . . into the [agency's] decisional process", Gulf Oil Corp 563 F.2d at 611 as "legislative interference with an administrative agency's decision-making process" Armada Petroleum Corp. 562 F. Supp. at 50 and as "extensive and severe criticism by [Congressional members]" American Public Gas 567 F.2d at 1068.

In deciding if Congressional actions regarding administrative decisions create the administrative due process problems recognized in Pillsbury, later courts have consistently indicated that the congressional involvement must rise to a intense level of actual pressure aimed at a specific result in a specific matter under consideration by an agency. Thus in Peter Kiewit Sons' supra the court indicated that:

> the proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communication and the adjudicator's decisionmaking process. A court must consider the decisionmaker's input, not the legislator's output. The test is whether "extraneous factors intruded into the calculus of consideration" of the individual decisionmaker. . . .
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> Pressure must be evaluated in the context of a concrete decisional process.

Id. at 170 (quoting D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d at 1246). Furthermore that pressure must be aimed at the administrative decisionmaker in the particular matter. Koniag Inc., 580 F.2d at 610 ("we think the Pillsbury decision is not

controlling here because none of the persons called before the subcommittee was a decisionmaker in the case.").

The courts have only rarely concluded that congressional involvement has reached the degree of interference or pressure to cause a due process problem at the agency, Pillsbury, supra., Volpe, supra., Texas Medical Association supra and more often have concluded that the congressional involvement has not caused a due process concern. See e.g., Peter Kiewit Sons', supra; Sierra Club, supra; Koniag, Inc., supra; American Public Gas, supra; Gulf Oil, supra; United States ex rel. Parco v. Morris, 426 F. Supp. 976 (E.D. Penn. 1977); Phoenix Petroleum Co., supra; Armada Petroleum Corp., supra; Texas Oil & Gas Corp. v. Andrus, 498 F. Supp. 677 (D.D.C. 1980); Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650 (D.D.C. 1978). Not surprising the justification memo does not attempt to analyze any of the latter cases.

In American Public Gas, supra, although a congressional subcommittee "attack[ed]", Id. at 1068, an agency's rationale for a decision then pending for review on rehearing (as in Pillsbury the court reproduced many pages of the congressional transcript "illustrat[ing] the hostility of [the subcommittee] Chairman and counsel", Id. at 1070), the court nonetheless in reviewing the "whole setting" Id. at 1069, and the "character and scope of the interference alleged" Id. 1070, determined that the "possibility of influence upon the Commission is too intangible and hypothetical a basis for this court. . . to nullify [the agency decision]". Id. Thus in this case the court concluded that the degree of

congressional pressure was not substantial enough to raise due process problems.

On the other hand, in Gulf Oil Corp, supra., the court concluded that although "the subcommittee's interest in this case [was] substantial. . . [i]t was avowedly directed not at the FPC's decision on the merits. . .", and therefore could only be construed as "incidental intrusions" that the "Commission was fully capable of withstanding". Id. at 611. The court further indicated that Pillsbury was concerned with "factual prejudice" and not legislative interference regarding legal issues. Id. at 611. Consequently the court determined that the congressional involvement in the issue had not provoked due process problems.

Under either tack, both the degree and nature of the congressional involvement, Representative Markey's question regarding the authority of the NRC to issue a license for a nuclear power plant with a slow evacuation capability cannot be construed as the type of congressional involvement that has lead to administrative due process problems under the Pillsbury line of cases. Representative Markey's single question does not even begin to present the degree and type of congressional activity addressed in Pillsbury and the later cases. Environmental Defense Fund, supra ("the degree of congressional interference in this case pales in comparison to that which occurred in the cases cited by plaintiff [i.e., Pillsbury, D.C. Federation, etc.]").

Moreover, it was not aimed at the merits of a pending matter but rather was a generalized inquiry regarding the authority and

operations of the NRC. The entire issue of nuclear power, is of course, of great concern to the members of Congress and the public they represent. Congressional oversight in this realm is particularly critical. Congressman Markey's question is precisely the type of inquiry which Congressmen must make in performing their oversight responsibilities.

C. THE REFUSALS TO ANSWER BY THE COMMISSIONERS THAT WERE NOT DECISIONMAKERS IN THE PERTINENT MATTER ARE PARTICULARLY GROUNDLESS

As discussed there was no legal justification for any of the NRC officials to refuse to answer Representative Markey's question. The Pillsbury line of cases does not recognize a privilege against congressional inquiry; furthermore Representative Markey's question is not congressional pressure which would give rise to the administrative problems identified in those cases. The refusals by the two Commissioners that are not participating in the pertinent adjudicatory proceeding[3] to answer the question posed are particularly groundless.

As noted Pillsbury and its progeny stand for the proposition that congressional pressure on agency decisionmakers on a particular matter pending before that agency may require the agency to make a second agency determination to allay due process

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[3] Commissioner Curtiss promised in 1988 to abstain from participating in Commission decisions on contested emergency planning issues in the Seabrook operating license proceeding -- the issue identified as the ongoing adjudication which justifies the Commissioners refusals to answer. Justification Memo at 1 & 6. Commissioner Remick disqualified himself last year from voting on contested issues on the Seabrook matter. Id. Neither, however, would answer Representative Markey's question at the March hearings.

concerns. When the courts find that the agency decision has been improperly influenced by congressional communications they remand the decision back to the agency for a fresh evaluation. In Pillsbury the court indicated the proper means for the agency to avoid due process problems -- "some of the members [of the Commission] in addition to the chairman [should have] disqualify[ed] themselves." Pillsbury, 354 F.2d at 963. According to Pillsbury, the disqualification of the decisionmaker from the matter over which he received congressional pressure is sufficient to cure any due process problems.[4]

Further the subsequent cases stress that it is the congressional pressure on the decisionmaker that will be deciding the pertinent matter that can give rise to due process problems, not pressure on non-decisionmakers. Koniag, Inc., 580 F.2d at 610 (Pillsbury not controlling "because none of the persons called

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[4] The justification memo refers to two cases in arguing that disqualification would not be sufficient. Cinderella Career and Finishing Schools v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Antonin v. SEC, 877 F.2d 721 (8th Cir. 1989). Neither is on point.

In Cinderella, supra, the court determined that the Administrative process in reaching a decision was not in accord with due process principles because one of the participating Commissioners (who had not disqualified himself) had prejudged the matter as apparent in a prior public speech. Similarly in Antonin, supra, the court reached the same conclusion because it determined that a decisionmaker had prejudged the matter, as apparent in a prior public speech, and had participated in the administrative proceeding. The decisionmaker had "recused himself" only prior to the "final decision." Id. at 726. Consequently the court could not know[] how [his] participation affected the Commissioner's deliberations." Id.

In this instance, both Commissioners at the NRC had disqualified themselves long before the Subcommittee hearings and they are not participating in the matter that the justification memo cites as creating the due process problem. Furthermore, neither is being called upon to prejudge any issues.

before the subcommittee was a decisionmaker in these cases"); Peter Kiewit Sons' 714 F.2d at 170 (D.C. Cir. 1983) ("responsible official's 'calculus of consideration' or 'mental decisional processes' [must be] clearly tainted by congressional pressure").

Thus it is apparent that the refusals to answer Representative Markey's question by the Commissioners that had previously disqualified themselves from the pertinent pending matter do not square with the very cases cited to justify the refusals of the active Commissioners. Indeed Pillsbury itself indicates that the disqualification of a decisionmaker with regard to the matter allegedly being pressured by members of Congress is the very solution for any due process problems. The Commissioners that were already disqualified simply have no basis for invoking Pillsbury as a reason for their refusals to testify.