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JOHN CONYERS, JR., Michigan
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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

July 6, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

On June 24, 2011, I received the enclosed letter from 49 Members of Congress. On their behalf, I write to request relevant documents and witness interviews in order to properly understand U.S. Supreme Court Associate Justice Elena Kagan's involvement in health care legislation or litigation while serving as United States Solicitor General.

In recent weeks, questions have been raised about whether Justice Kagan's prior work on what became the Patient Protection and Affordable Care Act (PPACA) while serving as Solicitor General should disqualify her from hearing challenges to its constitutionality. All parties agree the critical question is the extent of her involvement, as Solicitor General, in formulating the Administration's legal position on the PPACA, which was signed into law by President Obama on March 23, 2010.

During her Senate confirmation, then-Solicitor General Kagan answered "no" when questioned about whether she had ever been "asked about [her] opinion" or "offered any views or comments regarding the underlying legal or constitutional issues related to any proposed health care legislation...or...potential litigation resulting from such legislation."¹ Yet, documents released by the Department in response to recent Freedom of Information Act requests raise questions about that unequivocal denial.

¹ *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (written response of Elena Kagan to supplemental questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn) available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-QFRs.pdf>.

The Honorable Eric H. Holder, Jr.
July 6, 2011
Page 2

Based on a review of these released documents, and in order to properly understand any involvement by Justice Kagan in matters relating to health care legislation or litigation while she was Solicitor General, I request that the Department produce the following materials from the period between March 20, 2009 and August 7, 2010:

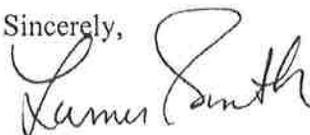
1. All documents referring to any meetings or conversations (personal or electronic) about potential or actual health care legislation or litigation in which Solicitor General Kagan was involved, mentioned or copied.
2. All documents referencing potential or actual health care legislation or litigation in which Solicitor General Kagan was involved, mentioned or copied.
3. All documents referencing excluding Ms. Kagan from any matters involving health care legislation or litigation while she was Solicitor General.
4. All documents referencing possible recusal by Solicitor General Kagan from any matters relating to health care legislation or litigation if she were to be confirmed as a Supreme Court Justice.

In addition, the Committee seeks to interview:

1. Neal Katyal, departing Principal Deputy Solicitor General
2. Tracy Schmalzer, Deputy Director, Office of Public Affairs

Given the speed with which PPACA litigation is proceeding I ask that these materials be provided and arrangements for the interviews be made by July 29, 2011. Thank you for your attention to this important matter.

Sincerely,



Lamar Smith
Chairman

cc: The Hon. John Conyers, Jr.

Enclosure

Congress of the United States
Washington, DC 20515

June 24, 2011

The Honorable Lamar S. Smith
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member, House Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Conyers:

We respectfully call upon the House Judiciary Committee to promptly investigate the extent to which U.S. Supreme Court Justice Elena Kagan was involved in preparing a legal defense of the Patient Protection and Affordable Care Act (PPACA) during her tenure as Solicitor General. Contradictory to her 2010 confirmation testimony before the Senate Judiciary Committee, recently released Department of Justice (DOJ) documents indicate that Justice Kagan actively participated with her Obama Administration colleagues in formulating a defense of PPACA.

This revelation raises serious questions about Justice Kagan's ability to exercise objectivity in *any* case relevant to PPACA that comes before the Supreme Court. As you know, Section 455 of Title 28 of the United States Code establishes unambiguous conditions in which federal judges must recuse themselves from proceedings in which their impartiality might be reasonably questioned. According to the law, a justice should recuse themselves in cases "*where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy.*" Even from the limited number of DOJ emails released to date through a Freedom of Information Act (FOIA) lawsuit, it is evident that Justice Kagan was involved in PPACA defense activities to a degree that warrants her disqualification from related proceedings as specified by Section 455.

Regrettably the Justice Department has been uncooperative to date with repeated FOIA requests that seek the full body of relevant emails from the Office of the Solicitor General that would reveal the scope of Justice Kagan's involvement in PPACA defense activities. As numerous challenges to PPACA are rapidly progressing through the federal courts, it is increasingly likely that the Supreme Court will be called upon to decide the constitutionality of the law in the near future. This Congress, and the American people, deserve to have confidence in the integrity and impartiality of our Supreme Court and its justices. Towards that end, we ask that the Committee act expeditiously to investigate this matter to the fullest extent possible.

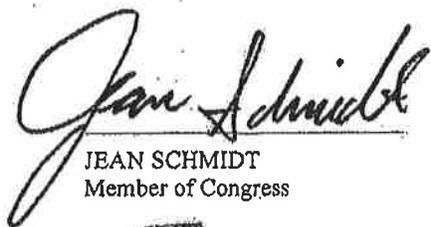
Sincerely,

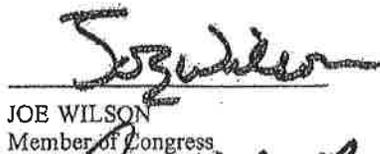

JOHN FLEMING, M.D.
Member of Congress

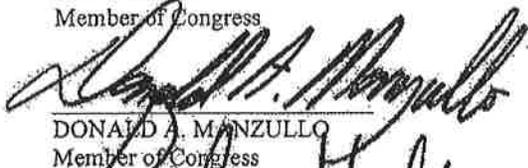

MARSHA BLACKBURN
Member of Congress

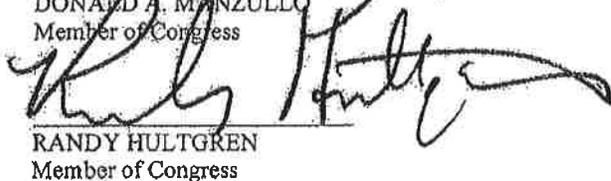

JOSEPH PITTS
Member of Congress

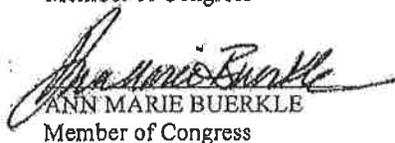

SAM JOHNSON
Member of Congress


JEAN SCHMIDT
Member of Congress

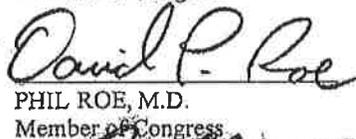

JOE WILSON
Member of Congress

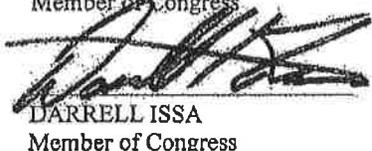

DONALD A. MANZULLO
Member of Congress

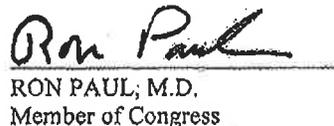

RANDY HULTGREN
Member of Congress

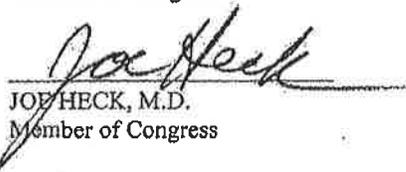

ANN MARIE BUERKLE
Member of Congress

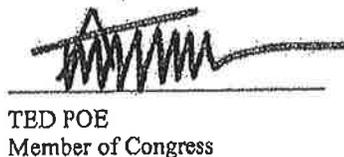

ROSCOE BARTLETT
Member of Congress

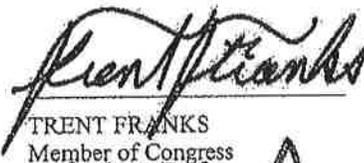

PHIL ROE, M.D.
Member of Congress

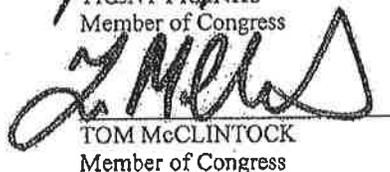

DARRELL ISSA
Member of Congress

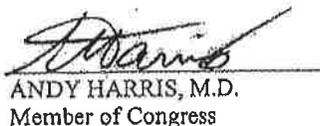

RON PAUL, M.D.
Member of Congress

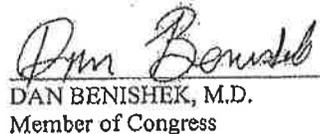

JOE HECK, M.D.
Member of Congress


TED POE
Member of Congress

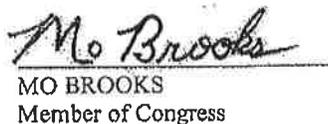

TRENT FRANKS
Member of Congress

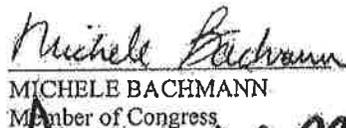

TOM McCLINTOCK
Member of Congress

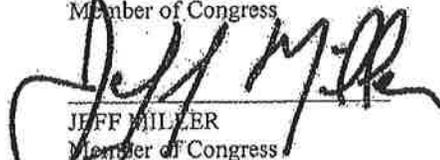

ANDY HARRIS, M.D.
Member of Congress


DAN BENISHEK, M.D.
Member of Congress

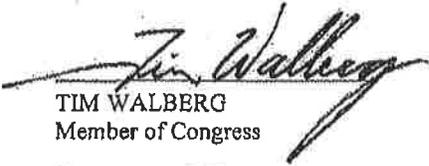

DIANE BLACK
Member of Congress

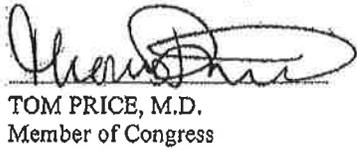

MO BROOKS
Member of Congress

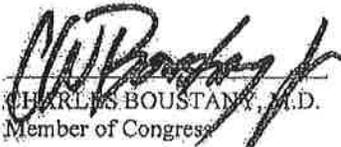

MICHELE BACHMANN
Member of Congress


JEFF MILLER
Member of Congress

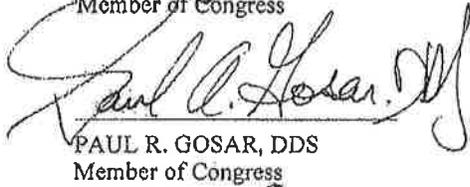

STEVEN C. LATOURETTE
Member of Congress

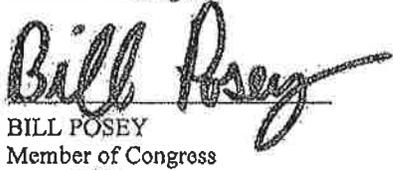

TIM WALBERG
Member of Congress


TOM PRICE, M.D.
Member of Congress

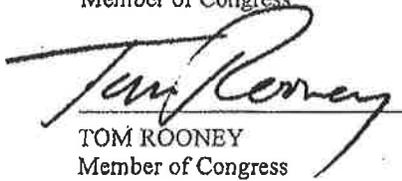

CHARLES BOUSTANY, M.D.
Member of Congress

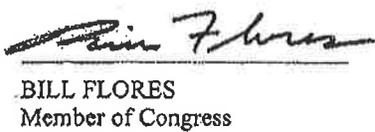

LARRY BUCHANON, M.D.
Member of Congress

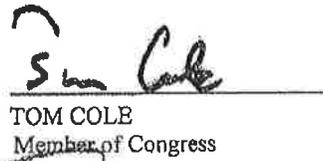

PAUL R. GOSAR, DDS
Member of Congress

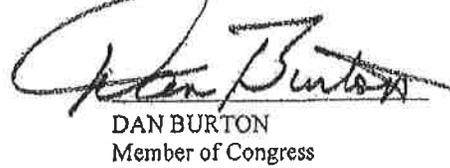

BILL POSEY
Member of Congress

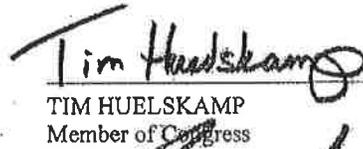

ROB BISHOP
Member of Congress

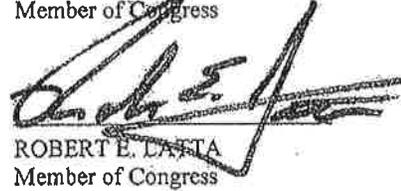

TOM ROONEY
Member of Congress

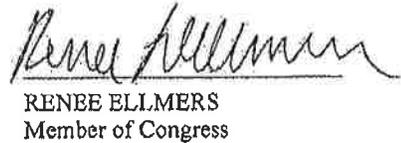

BILL FLORES
Member of Congress


TOM COLE
Member of Congress

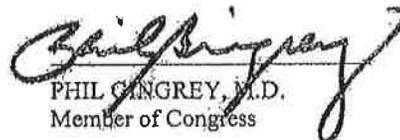

DAN BURTON
Member of Congress


TIM HUELSKAMP
Member of Congress

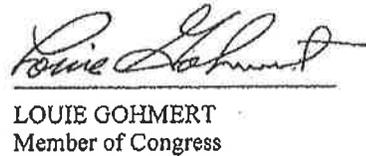

ROBERT E. Latta
Member of Congress

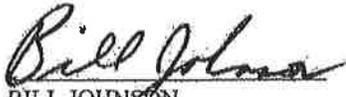

RENEE ELLMERS
Member of Congress

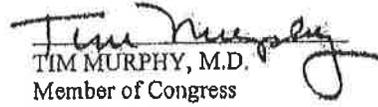

BILLY LONG
Member of Congress


PHIL GINGREY, M.D.
Member of Congress

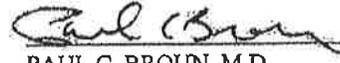

STEVE KING
Member of Congress


LOUIE GOHMERT
Member of Congress

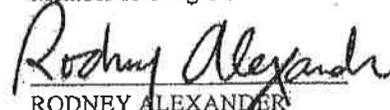

BILL JOHNSON
Member of Congress


TIM MURPHY, M.D.
Member of Congress


JEFFERY LANDRY
Member of Congress


PAUL C. BROWN, M.D.
Member of Congress


ALAN NUNNELEE
Member of Congress


RODNEY ALEXANDER
Member of Congress


DOUG LAMBORN
Member of Congress



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 27, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter to the Attorney General, dated July 6, 2011, on behalf of 49 Members of Congress who wrote to you requesting that you seek documents and other information about activities of Supreme Court Associate Justice Elena Kagan while she served as the Solicitor General of the United States.

As noted in the letter you received from your colleagues, the Department has disclosed records relating to the Patient Protection and Affordable Care Act (PPACA) in response to three Freedom of Information Act (FOIA) requests, two of which were consolidated in *Media Research Center v. Department of Justice* (D.C.D.C.). The U.S. District Court for the District of Columbia recently granted the government's motion for summary judgment in that case. The documents disclosed by the government in the case include records from the Office of the Solicitor General. If you are not already in possession of these documents, we would be pleased to provide them to you upon request. We are not aware of any information in the documents that "raise(s) questions" about then Solicitor General Kagan's statements in the confirmation process.

We have grave concerns about the prospect of a congressional investigation into the pre-confirmation activities of a sitting Supreme Court Justice. The Senate confirmation process is a rigorous, in-depth inquiry into the background and activities of nominees, particularly for the Supreme Court. As you note, then-Solicitor General Kagan answered questions about the topics described in your letter during the course of her confirmation. We are unaware of any precedent for Congress to conduct a post-confirmation investigation regarding the pre-confirmation activities of a sitting Justice, and we would regard such a course of action as an unseemly encroachment on the judicial branch of government.

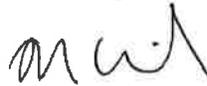
Moreover, any questions about participation in cases by sitting Justices are more properly addressed in the context of specific litigation, where the parties have an opportunity to seek recusal if they choose to do so. In that regard, we note that many of the Members who signed the letter to you have signed amicus briefs challenging the constitutionality of the legislation.

The Honorable Lamar Smith
Page 2

For these reasons, we respectfully decline to produce the documents and access to individuals requested in your letter. We would be pleased to discuss this further with Committee staff if that would be helpful.

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'RW', written in a cursive style.

Ronald Weich
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Member

LAMAR S. SMITH, Texas
CHAIRMAN

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
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DANIEL E. LUNGREN, California
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
MIKE PENCE, Indiana
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STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TIM GRIFFIN, Arkansas
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
DENNIS ROSS, Florida
SANDY ADAMS, Florida
BEN QUAYLE, Arizona
MARK AMODEI, Nevada

JOHN CONYERS, JR., Michigan
RANKING MEMBER

HOWARD L. BERMAN, California
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
MIKE QUIGLEY, Illinois
JUDY CHU, California
TED DEUTCH, Florida
LINDA T. SANCHEZ, California
(Vacancy)

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

October 28, 2011

The Honorable Eric H Holder
Attorney General
United States Department of Justice
Washington, DC 20530

Dear Attorney General Holder,

I am writing with regard to the October 27, 2011, letter I received from Assistant Attorney General Ronald Weich responding to my July 6, 2011, letter to you in which, on behalf of 49 members of Congress, I requested that the Department produce certain documents and make two individuals available to the Committee. This request was made in connection with U.S. Supreme Court Associate Justice Elena Kagan's involvement in healthcare legislation or litigation while serving as United States Solicitor General.

After waiting nearly four months for a response, the Department, in a one page response, denied both my request for documents and authorization to interview the two individuals. In so doing, the Department did not assert any legal privilege to support the decision, but instead concluded it would be "unseemly" to comply with my request.

This is not an acceptable basis for denying my request. Accordingly, I ask that the Department produce the documents and make the two individuals available by Friday, November 4, 2011.

If the Department does intend to assert a legal privilege as a basis for denying the Committee access to the requested information, then I ask that I be so advised by November 4.

I look forward to your response.

Sincerely,



Lamar Smith
Chairman

CC: The Honorable John Conyers, Jr.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 10, 2011

The Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter dated October 28, 2011, which followed up on our previous correspondence regarding your July 6, 2011 request on behalf of 49 Members of Congress who wrote to you asking that you seek documents and other information about activities of Supreme Court Associate Justice Elena Kagan while she served as the Solicitor General of the United States. We regret that you are dissatisfied with our response of October 27, 2011.

We have carefully reconsidered your request, but we must again respectfully decline to comply with your requests because of the significant concerns articulated in our October 27 letter, in addition to the confidentiality interests implicated by your request. While we appreciate the Committee's oversight role regarding Department activities, the practical impact of this particular request would be to probe whether a Supreme Court Justice should participate in a case pending before the Court. As we previously stated, we are concerned that such an inquiry would pose an unacceptable risk of inappropriate encroachment upon the judicial branch and we believe that any questions regarding participation by a Justice in a pending case should be addressed in the context of the case itself.

In any event, based upon the record searches we have conducted in response to Freedom of Information Act (FOIA) requests, we are not aware of any information that raises questions about then-Solicitor General Kagan's statements during the confirmation process regarding the topic framed in your July 6 letter. As you know, the Department previously released documents under the FOIA relating to this matter, and we have enclosed here additional documents that were released yesterday, none of which changes our view. The materials withheld under FOIA implicate substantial Executive Branch confidentiality interests relating to internal deliberations.

The Honorable Lamar S. Smith
Page 2

While we must respectfully disagree with you on this matter, we would be pleased to confer with you about it further if that would be helpful.

Sincerely,

A handwritten signature in black ink, appearing to read 'R Weich', written in a cursive style.

Ronald Weich
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Member