



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.

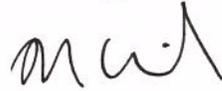
Moreover, any questions about participation in cases by sitting Justices are more properly addressed in the context of specific litigation, where the parties have an opportunity to seek recusal if they choose to do so. In that regard, we note that many of the Members who signed the letter to you have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

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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