

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
MEDIA RESEARCH CENTER,)	
)	
Plaintiff,)	
)	Civil Action
v.)	No. 10-2013 (ESH)
)	
U.S. DEPARTMENT OF JUSTICE;)	
THE SOLICITOR GENERAL)	
OF THE UNITED STATES,)	
)	
Defendants.)	
_____)	

DECLARATION OF VALERIE H. HALL
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Valerie H. Hall, declare the following to be true and correct:

1. I am the Executive Officer of the Office of the Solicitor General (“OSG”), United States Department of Justice (“DOJ”). I have served in this role since December 2009.
 - (a) In my position as Executiver Office of the OSG, I am responsible for the day-to-day administrative operations of the OSG. I am responsible for managing the administrative functions of the office, including human resources, information technology (“IT”), personnel security, financial management and budget, and property management.
 - (b) I also serve as the Freedom of Information Act (“FOIA”) Officer for the OSG. In this role, I am responsible for managing the FOIA requests submitted to the OSG, and ensuring our response to those requests. This includes meeting with the OSG staff member(s) to whom a request has been assigned for response, supervising the development and execution of a strategy and individualized approach for

responding to each FOIA request, and ensuring cooperation from OSG staff and officials at every level of the OSG whenever necessary.

(c) Prior to joining OSG as Executive Office, I was employed with another executive branch federal agency for 23 years, where I worked the areas of administration, management and litigation support, and financial management and budget.

2. I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

Office of the Solicitor General of the United States

3. The Office of the Solicitor General of the United States is primarily responsible for conducting litigation on behalf of the United States and its agencies in the Supreme Court of the United States, determining whether the government will appeal or seek further review in cases involving the United States in the lower federal courts, and generally supervising the government's handling of litigation in the federal appellate courts. The general functions of the Office are: (1) to conduct or assign and supervise all Supreme Court cases, including appeals, petitions for writs of *certiorari* and briefs in opposition thereto, and merits briefs and oral arguments; (2) to determine whether, and to what extent, the government will seek review in any appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of extraordinary writs); (3) to determine whether the government will file a brief as *amicus curiae* or whether the government will intervene in any appellate court or in any trial court in which the constitutionality of an Act of Congress is challenged; and (4) to assist the Attorney General and the Deputy Attorney General in the development of broad Department of Justice program policy. *See* 28 CFR § 0.20.

4. The Solicitor General of the United States is nominated by the President of the United States and confirmed by a vote of the United States Senate. President Barack Obama nominated Elena Kagan as Solicitor General; the Senate voted to confirm Ms. Kagan as Solicitor General on March 19, 2009. Ms. Kagan served as Solicitor General from March 20, 2009, when she took the oath of office as Solicitor General, until August 7, 2010, when she was sworn in as Associate Justice of the United States Supreme Court, a position for which President Obama nominated Ms. Kagan on May 10, 2010. From May 12, 2010, until August 7, 2010, while Ms. Kagan was preoccupied by the U.S. Senate confirmation process, Neal Katyal served as Acting Solicitor General on matters in litigation. After August 7, 2010, he became Acting Solicitor General and he continues to hold that position as of the date of this declaration.
5. The Solicitor General of the United States is assisted in the conduct of the legal work of the OSG by staff attorneys who participate in the preparation of petitions, briefs, and other papers filed by the government in the Supreme Court.
 - (a) There are four Deputy Solicitors General, one of whom is designated as the Principal Deputy Solicitor General. The remaining staff attorneys in the OSG are Assistants to the Solicitor General and five recent law-school graduates who serve is one-year positions.
 - (b) The name of the Solicitor General (or Acting Solicitor General) appears in the signature block of every document that the OSG files in the Supreme Court. For many filings with the Court, the signature block also contains the names of a Deputy Solicitor General and an Assistant to the Solicitor General; the signature blocks for these filings may also contain the name or names of other Department

of Justice attorneys and the name or names of attorneys within other federal government components the interests of which may be affected by the Supreme Court's resolution of the case. For some filings, however, only the name of the Solicitor General (or Acting Solicitor General) appears in the signature block. Moreover, even where the name of a Deputy Solicitor General and/or an Assistant to the Solicitor General appears in the signature block, the signature block of a particular brief may not always contain the name of each staff attorney in the OSG who made meaningful contributions to the brief.

Plaintiff's FOIA Request

6. By letter dated May 25, 2010, Terence P. Jeffrey, editor in chief of CNSNews.com, a division of the Media Research Center ("MRC" or "the requestor"), submitted a FOIA request to the OSG seeking records that the request described as:
 - (a) "Any communication to or from Solicitor General Elena Kagan and any record or notation of any meeting attended personally or electronically by Solicitor General Elena Kagan in which the administration's health-care reform plan was a topic";
 - (b) "Any communication to or from Solicitor General Elena Kagan and any record or notation of any meeting attended personally or electronically by Solicitor General Elena Kagan in which [any] legal challenge[] to the health-care reform bill signed by President Barack Obama was a topic";
and
 - (c) "Any communication to or from Solicitor General Elena Kagan and any record or notation of any meeting attended personally or electronically by

Solicitor General Elena Kagan in which the question of whether Solicitor General Elena Kagan ought to recuse herself from involvement in any particular case in her role as [S]olicitor [G]eneral due to the prospect that it might later come before her were she to be confirmed to a seat on a federal court was discussed.”

See Ex. 1 to Compl. This letter was received, via electronic mail, by the OSG on May 25, 2010.

7. By letter dated June 22, 2010, I responded to Mr. Jeffrey at CNSNews.com, stating that Mr. Jeffrey’s “request had been denied,” explaining that the OSG had “determined that any documents [Mr. Jeffrey] seek[s] are exempt from disclosure for the following reason: 5 U.S.C. [§] 552(b)(5): Information consists of inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” *See* Ex. 2 to Compl.
8. By letter dated June 25, 2010, sent by U.S. mail and electronic mail, I advised Mr. Jeffrey that the letter dated June 22, 2010 containing her signature, and “stating that the records [Mr. Jeffrey] seek[s] are exempt . . . was sent in error.” *See* Ex. 3 to Compl.¹ By the June 25, 2010 letter, I asked Mr. Jeffrey to clarify two aspects of his May 25, 2010 FOIA request. *Id.* First, I asked Mr. Jeffrey to clarify the phrase “the administration’s health-care reform plan” in the first category of records sought by his request. *Id.* Second, I

¹ The letter dated June 25, 2010, containing my signature, contains a typographical error. According to the June 25, 2010 letter, the June 22, 2010 letter stated that the records Mr. Jeffrey seeks “are exempt under 5 U.S.C. [§] 552(b)(2).” *See* Ex. 3 to Compl. However, the June 22, 2010 letter actually stated that the records Mr. Jeffrey seeks are exempt under 5 U.S.C. § 552(b)(5). The reference to 5 U.S.C. § 552(b)(2) was in error.

indicated that “it [was] unclear from [Mr. Jeffrey’s] request whether the third category of records, like the other two, focuses on health-care, and whether the particular cases referred to in that third category thus are cases concerning the health-care legislation” and sought “clarification of the scope of [Mr. Jeffrey’s] request on this point.” *Id.*

9. By letter dated June 25, 2010, in response to my letter of the same date, Mr. Jeffrey clarified the first and third categories of his request. With respect to the first category, Mr. Jeffrey stated that his request sought: “Any communication to or from Solicitor General Elena Kagan and any record or notation of any meeting attended personally or electronically by Solicitor General Elena Kagan in which then-pending legislative health-care proposals were discussed.” *See* Ex. 4 to Compl. With respect to the third category, Mr. Jeffrey clarified that this category of his request “does not focus solely on cases concerning health-care legislation but literally on ‘any particular case.’” *Id.*

The Search for Records Responsive to MRC’s FOIA Request

10. The search for records responsive to MRC’s FOIA request was conducted in two stages. The first stage occurred on or around June 24, 2010. The second stage occurred in January and February 2011.
11. MRC’s FOIA request sought only two general types of documents: “communication[s]” and “record[s] or notation[s] of . . . meeting[s.]”
 - (a) At the OSG in recent years, including during the time period at issue in this request, most written communications and most records of meetings or appointments are typically in electronic rather than paper format. The OSG does not generally retain paper copies of these electronic documents.
 - (b) When an individual employed at OSG ends her employment at OSG, that

individual's computer account on the Department of Justice computer system is deactivated and placed into an electronic file archive. All of the files created by that individual on her user drive, that have been saved and not deleted at that time, are downloaded into a protected folder. Access to these files is limited to authorized systems administrators or individual employees on an as-needed basis, when granted official permission.

- (c) When an individual employed at OSG ends her employment at OSG, that individual's email address and account on the Department of Justice email system is deactivated and the emails in the account are placed in the Enterprise Vault ("EV"), an email archive. The EV maintains the email account of any former OSG employee as it was on the date that employee's employment at OSG was terminated. The EV also serves as an archive for any emails that current OSG and other Department of Justice employees choose to remove from their active electronic mailboxes; any email a current employee chooses to move into the EV remains accessible to that employee at all times but does not take up space in the employee's active electronic mailbox.
- (d) When an individual employed at OSG ends her employment at OSG, that individual's paper files are sorted and preserved according to federal government and Department of Justice document retention policies.

12. On or after June 24, 2010, an OSG employee who served as the confidential assistant to then-Solicitor General Kagan conducted a search of Ms. Kagan's email system for records responsive to MRC's FOIA request.

- (a) As a result of this search, 115 pages of material potentially responsive to the

request was located. The OSG employee who performed this search ended her employment with the Department of Justice in August 2010. The OSG later determined that it did not have sufficiently detailed documentation specifying the scope of the search conducted by this former employee.

- (b) On or after June 24, 2010, then-Solicitor General Kagan's confidential assistant conducted a manual search of Ms. Kagan's paper files. This search did not result in the identification of any additional potentially responsive material.

13. In fall 2010, current OSG employees began processing these documents for responsiveness and to apply relevant redactions to information covered by one of the FOIA's nine statutory exemptions. However, due to the lack of sufficient documentation concerning the search described in paragraph 12(a), *supra*, on January 23, 2011, the OSG initiated a new search for records responsive to MRC's FOIA request. This search was completed on February 7, 2011.

- (a) For the reasons explained in paragraph 12(a), *supra*, the OSG determined that a search of the email and computer files, including the electronic calendar files, of Ms. Kagan, her confidential assistant, and then-Principal Deputy Solicitor General Neal Katyal was reasonably calculated to locate any material responsive to MRC's request.
- (b) The OSG determined that all responsive records would be dated on or before August 7, 2010, the date on which then-Solicitor General Kagan became Associate Justice Kagan, thereby terminating her employment with the DOJ. Therefore, the search sought records dated no later than August 7, 2010.

- (c) To search the three email accounts, OSG conducted a search of each official's email in the Enterprise Vault ("EV") and a search of Mr. Katyal's active email account.
- (d) The searches of the email accounts and computer files of Ms. Kagan and her confidential assistant at OSG were conducted using the following search terms: "recus*" (through the use of the wildcard character, a search using this term would capture any records containing words beginning with "recus" including, but not limited to, recuse, recused, recusal, and recusing); "healthcare"; "health care" (a search using this term also would capture any records containing the compound word "health-care"); "affordable care"; "patient protection"; "ACA" (a search using this term also would capture any records containing the acronyms "PPACA" and "PPAACA," both common acronyms for the health-care reform legislation considered by Congress, including the version passed by Congress and signed by President Obama); and "PPA" (a search using this term also would capture any records containing the acronyms "PPACA," "PPAC," "PPAACA," and "PPAAC," common acronyms for the health-care reform legislation considered by Congress, including the version passed by Congress and signed by President Obama).
- (e) The search of the email account and computer files of Mr. Katyal was conducted in two stages. In the first stage, the search was conducted using the same search terms described in paragraph 14(d), *supra*, in combination with the term "Elena." In the second stage, the search was conducted using the same search terms described in paragraph 14(d), *supra*, in combination with the term "Kagan."

14. The new search was completed on February 7, 2011. Because the new search was conducted using broad search terms, as described in paragraph 14(d), *supra*, the search resulted in the identification of approximately 1400 pages of potentially responsive material. Upon review of the potentially responsive material, OSG staff determined that the vast majority of the materials captured by the new search were not relevant to MRC's request.

(a) Also upon review of the potentially responsive material, OSG staff confirmed that all 115 pages that were initially located by then-Solicitor General Kagan's confidential assistant were also identified in the new search.

(b) Within the set of documents identified as potentially responsive, OSG staff determined that 36 pages consisted of emails sent to or received by Ms. Kagan in her individual capacity as a nominee to the United States Supreme Court.² These personal emails were communications between Ms. Kagan and the members of the White House staff who were responsible for preparing Ms. Kagan for the confirmation process at the U.S. Senate. Department of Justice policy recognizes that some emails sent or received by Department employees using an email address on the Department of Justice email system are personal. In fact, the Department of Justice specifically authorizes Department of Justice employees to

² Although the emails consisted of 36 printed pages, 35 of the 36 pages consist of an email conversation among a group of people. These 35 pages actually represent 17 email transmissions which are largely repetitive of each other because each email contains a new message as well as the set of messages that preceded the new message. The Agency has identified, and listed in the attached *Vaughn* index, the 12 pages out of the 35 pages that together comprise all of the unique messages contained in the 17 email transmissions. *See Vaughn* Index, attached hereto as Exhibit A.

use their email account on the Department of Justice email system for limited personal use. As DOJ Order 2740.1A (attached heret as Exhibit B) provides, “some personal use of government computer systems is permitted in accordance with existing policy on personal use of government property, where there is negligible cost to the government and no interference with official business.” *See* Ex. B (DOJ Order 2740.1A (Dec. 2, 2008)), at 2. This policy was in effect from December 2, 2008 through November 30, 2010, a time period that includes the entire time of Ms. Kagan’s tenure as Solicitor General of the United States.³ Under DOJ Order 2740.1A, “government computer systems” are considered to “includ[e] but not [be] limited to Internet e-mail, departmental e-mail, word processing systems, and connections to Internet sites.” *Id.*

- (i) Thirty-five of the 36 pages comprised an email exchange relating to meetings and hearings that it was anticipated Ms. Kagan would have with U.S. Senators. In this email exchange, Ms. Kagan and the White House staff members formulated and revised a draft answer to an anticipated question that Ms. Kagan might have been asked by Senators during the confirmation process. The anticipated question and draft answer related to Ms. Kagan’s recusal decisions as Solicitor General. OSG staff reviewed the record of Ms. Kagan’s hearing before the Senate Committee on the Judiciary, including the questions to the record posed by members of the

³ On November 30, 2010, DOJ Order 2740.1A (Dec. 2, 2008) was replaced with DOJ Order 2740.1A (Nov. 30, 2010) (attached hereto as Ex. C). The November 30, 2010 version of the policy does not alter the Department’s policy permitting “some personal use of government computer systems.”

Committee, and ascertained that Ms. Kagan was not asked the question contemplated in the email exchange and that Ms. Kagan did not provide any version of the draft answer during the confirmation process.

- (ii) The remaining page of the 36 pages consists of a one-page email sent by Ms. Kagan's confidential assistant on Ms. Kagan's behalf to a member of the White House staff containing a draft answer to a question from a Judicial Nomination Questionnaire, a form of which all nominees to the U.S. Supreme Court must complete and submit to the U.S. Senate as part of the confirmation process. OSG staff compared this draft answer to the final version of Ms. Kagan's Judicial Nomination Questionnaire, available online at <http://judiciary.senate.gov/nominations/SupremeCourt/SupremeCourt.cfm>, and ascertained that the version in the email is, in fact, a draft version that was not adopted as final.

- (c) In conducting the new search of former Solicitor General Kagan's paper files, OSG staff reviewed a document listing the contents of those archived files. Upon review of this contents list, OSG staff determined that none of the contents of former Solicitor General Kagan's paper files would be responsive to MRC's request. Also, based upon the review of the electronic files identified in the new search as potentially responsive to MRC's request, OSG staff determined that former Solicitor General Kagan's paper files were not reasonably likely to contain any material responsive to MRC's request.

15. On March 15, 2011, the OSG released to MRC records responsive to MRC's request. The OSG explained that the agency records that include at least some material responsive to the FOIA request constitute a total of 86 pages of records. Twenty (20) pages of those records were released to MRC in full, and 25 pages were released to MRC with some material redacted. The remaining 41 pages were withheld in full. On that date, the OSG, in its discretion, also released to MRC 18 pages of documents that are not responsive to MRC's request. Three (3) of these pages were released in full, and 15 were released to MRC with redactions applied pursuant to one or more of FOIA's exemptions. The OSG did not release to MRC any of the 36 pages of documents that consist of Ms. Kagan's personal emails, as described in paragraph 14(b), *supra*. See Letter from Valerie H. Hall, Executive Officer, Office of the Solicitor General, U.S. Department of Justice, to Terence P. Jeffrey, CNSNews.com (March 15, 2011), attached hereto as Exhibit D.

Explanation of Withheld Material

16. Accompanying this Declaration is a *Vaughn* Index that explains the FOIA exemptions that apply to material the OSG has withheld in response to MRC's FOIA request. See *Vaughn* Index, attached hereto as Exhibit A. As set out more fully in the attached *Vaughn* Index, the following FOIA exemptions apply to documents withheld from the material that the OSG provided to MRC in response to the FOIA request at issue in this litigation.

A. FOIA Exemption 2—Internal Administrative Matters

17. Portions of certain documents were withheld pursuant to Exemption 2. FOIA Exemption 2 exempts from mandatory disclosure "information related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). It is my

understanding that FOIA Exemption 2 has been held to protect trivial administrative matters of no genuine public interest and encompasses information that both relates to an agency's rules and practices dealing with employee relations or human resources and contains information that is internal; that is, that the agency typically keeps the information to itself for its own use.

18. The OSG has withheld two types of Exemption 2 information concerning trivial administrative matters of no genuine public interest:
 - (a) An internal office telephone number. The telephone number withheld is a number not published in any public directory.
 - (b) Email addresses. The email addresses withheld are not published in any public directory.

All of the information that the OSG has withheld pursuant to Exemption 2 has also been withheld pursuant to Exemption 6 as described in paragraph 22, *infra*.

B. FOIA Exemption 5—Privileged Inter- and Intra-Agency Communications

19. Portions of certain documents were withheld pursuant to Exemption 5. FOIA Exemption 5 exempts from mandatory disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). It is my understanding that, under FOIA Exemption 5, the protections from disclosure traditionally afforded certain documents pursuant to evidentiary privileges (such as the attorney-client, attorney work product, or deliberative process privileges), in the context of civil discovery.
 - (a) To qualify for protection under Exemption 5 pursuant to the deliberative process privilege, the information must be pre-decisional and part of the agency's

deliberative process. I understand that information is considered pre-decisional if it is prepared in order to assist an agency employee in arriving at an official agency decision, and information is considered part of the agency's deliberative process if its disclosure would expose the agency's decision-making process in such a way as to discourage candid discussion within the agency, thereby undermining the agency's ability to fulfill its mission and objectives.

- (b) To qualify for protection under Exemption 5 pursuant to the attorney work-product doctrine, the information protects from disclosure "documents and tangible things that are prepared in anticipation of litigation" *See* Fed. R. Civ. P. 26(b)(3). I understand that information is considered "attorney work-product" if it is prepared by an attorney in the context of ongoing litigation or in reasonable anticipation of future litigation, and prepared because of that actual or threatened litigation.

20. The OSG has withheld the following information that is protected by the deliberative process privilege:

- (a) The OSG has withheld certain documents or portions of documents that contain material reflecting non-final inter- or intra-agency deliberations. The withheld information reflects discussions between Department of Justice employees working to prepare the Department of Justice's analysis and response to proposed legislation. The materials withheld were three different preliminary draft versions of Department responses to members of Congress providing the Department's views on proposed legislation; two versions were in letter form and the third was not. All three drafts were circulated together to Department of Justice officials,

inviting Department officials to make a final decision about the Department's response.

- (b) The OSG has withheld two documents containing an agency's internal analysis of a proposed agency action that was never taken. The two documents contain the agency's detailed analysis, formulated by the agency in consideration of the proposed action.
- (c) The OSG has withheld from four pages of emails material describing predecisional advice from the Office of Legal Counsel to an Executive Branch official on the subject of recusals and reflecting deliberations between a staff member of the Executive Office of the President and the Office of Legal Counsel regarding this predecisional advice.
- (d) The OSG has not released 36 pages of personal emails sent to or received by Ms. Kagan in her individual capacity as a nominee to the United States Supreme Court because they are not "agency records" subject to FOIA. Those records also would come within the deliberative process privilege even if they were agency records because they contain draft answers to a question it was anticipated that Ms. Kagan might have been asked by Senators during the confirmation process, and to a question from the Judicial Nomination Questionnaire that all nominees to the U.S. Supreme Court must complete and submit to the U.S. Senate as part of the confirmation process. As described in paragraph 14(b), *supra*, a review of the record of Ms. Kagan's hearing before the Senate Committee on the Judiciary, including the questions to the record posed by members of the Committee, reveals that the anticipated question was never asked of Ms. Kagan, nor was any version

of the draft answer provided by Ms. Kagan during the confirmation process. Similarly, a review of the final version of Ms. Kagan's Judicial Nomination Questionnaire, reveals that the version in the email is, in fact, a draft version that was not adopted as final. *See* paragraph 14(b), *supra*.

21. The OSG has withheld the following information that is protected by the attorney work-product doctrine: the OSG has redacted from certain documents material reflecting the thoughts of Department of Justice attorneys on legal issues, arguments, and strategy concerning anticipated or ongoing matters in litigation. Some of the material redacted was prepared in the context of actual, ongoing cases before the Supreme Court in which the OSG was involved. The remainder of the material redacted consists of a single word, phrase, or sentence referencing potential categories of legal issues that might be involved in anticipated legal challenges to health-care legislation that had not yet been enacted that Department of Justice attorneys, including those in OSG, believed (at the time of the creation of the redacted information) were reasonably likely to occur.

B. FOIA Exemption 6—Personal Information

22. Portions of certain documents were withheld pursuant to Exemption 6. FOIA Exemption 6 exempts from mandatory disclosure “personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Under FOIA Exemption 6, personal information about individuals located in agency records, if such individual would have a reasonable expectation of privacy that sufficiently outweighs the public interest in the release of that information is protected from mandatory disclosure. I understand that such personal information is protected if it applies to particular individuals and its release

would constitute a clearly unwarranted invasion of their personal privacy. The personal information at issue here appeared in email messages sent to or from agency personnel, and consists of several types of personal information.

23. Some personal information concerning individuals has been redacted from the emails released. In some cases, the personal information consists of the names of private citizens who serve as attorneys for private parties in litigation in which the government is involved. In other cases, the personal information consists of the personal and office contact information of government officials. Federal employees have a protectable privacy interest in not being subjected to annoyance or harassment such as could from release of their private, non-government or non-published government contact information. Finally, in some cases, this personal information consists of the names of non-attorney career employees within the OSG and Assistants to the Solicitor General, who are relatively low in the agency hierarchy, as explained in paragraph 5(a), *supra*. These lower-level career employees have a personal privacy interest in keeping from the public eye their involvement in a particular matter, especially if the employee's role in that matter has not become public, as is always the case for non-attorney employees in the OSG and is often the case for Assistants to the Solicitor General, as explained in paragraph 5(c), *supra*. Because of the high-profile and sometimes controversial nature of health-care reform and related litigation and other litigation in the U.S. Supreme Court, revealing the names of low-level employees who have been involved in working on these issues may expose those employees to undue annoyance or harassment. Where redactions of such personal information of federal employees have been applied, the substance of the communications, to the extent it relates to official government business,

has been released.

Segregability

24. All reasonably segregable information in documents responsive to the FOIA request has been released to the requestor. OSG has conducted a detailed review of all responsive documents and has determined that no non-exempt information can be segregated and disclosed. In many cases, to the extent there is any non-exempt information in the withheld documents, it is inextricably intertwined with the exempt information and, therefore, no portions can be further segregated and disclosed. In some cases, there may be a few non-exempt words and phrases that are dispersed throughout the withheld records; if disclosed, these isolated words and phrases would be meaningless and would not serve the core purpose of FOIA, which is to open agency action to the light of public scrutiny. Additional information about the segregability of each withheld document or partially withheld document is provided in the *Vaughn* index entry for each document.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of March, 2011, at Washington, D.C..

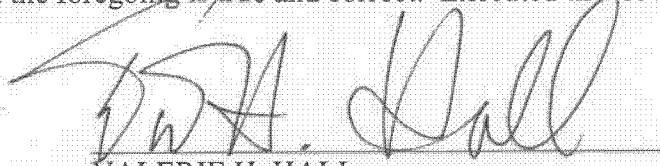

VALERIE H. HALL

EXHIBIT A

Media Research Ctr. v. Department of Justice**Civ. Action No. 10-2013 (D.D.C.)**

Index of Withholdings

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
3	Email chain	Neal Katyal	Thomas Perrelli (cc: Elena Kagan)	Re: Health Care	3/18/2010	(b)(5)	1	The redacted information contains a Department of Justice (DOJ) attorney's thoughts, before the Patient Protection and Affordable Care Act was passed, on what categories of legal arguments may arise and should be prepared in the anticipated lawsuit referenced in the email exchange.
		Thomas Perrelli	Neal Katyal	Re: Health Care	3/17/2010			
		Neal Katyal	Thomas Perrelli	Health Care	3/17/2010			
4-6	Email chain	Neal Katyal	Elena Kagan	Re: Health care litigation meeting	3/21/2010	(b)(5) (b)(6)	3	The redacted information includes a DOJ attorney's thoughts on a legal issue to be discussed in an internal government meeting regarding the expected litigation referenced in the email exchange. In addition, a Justice Department attorney's personal phone number has been withheld for privacy reasons.
		Elena Kagan	Neal Katyal	Re: Health care litigation meeting	3/21/2010			
		Neal Katyal	Elena Kagan	FW: Health care litigation meeting	3/21/2010			
		Thomas Perrelli	Neal Katyal, Ian Gershengorn, Beth Brinkman, Tony West, Brian Martinez, Mala Adiga, Joseph Guerra, Stuart Delery, Jonathan Cederbaum, Chad Golder, Lisa Monaco (cc: Currie Gunn, Joseph Guerra)	Health care litigation meeting	3/21/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
13-17	Email chain	Edwin Kneedler	Elena Kagan	Re: 2 week report	3/22/2010	(b)(5) (b)(6)	5	The redacted information contains thoughts by DOJ attorneys regarding internal government deliberations related to cases that were then pending before the United States Supreme Court. In addition, the names of three DOJ attorneys have been withheld for privacy reasons.
		Elena Kagan	Edwin Kneedler	Re: 2 week report	3/22/2010			
		Edwin Kneedler	Neal Katyal, Elena Kagan, Michael Dreeben, Malcolm Stewart	RE: 2 week report	3/22/2010			
		Neal Katyal	Edwin Kneedler, Elena Kagan, Michael Dreeben, Malcolm Stewart	RE: 2 week report	3/22/2010			
18-19	Email chain	Malcolm Stewart	Elena Kagan	FW: Cipro brief – DOJ comments on Request for comments on S. 369, the Preserve Access to Affordable Generics Act (Reverse Payments)	6/19/2009	(b)(5) (b)(6)	2	The redacted information contains legal analyses and discussions by DOJ attorneys regarding a proposed Senate bill, including a discussion of the DOJ's preliminary views on the proposed legislation and draft material containing the Department's potential responses to Senator Kohl's request for comments on the bill. In addition, the name of a DOJ attorney has been withheld for privacy reasons.
		Marisa Chun	Malcolm Stewart	Cipro brief – DOJ comments on Request for comments on S. 369, the Preserve Access to Affordable Generics Act (Reverse Payments)	6/18/2009			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
18-19 (cont'd)		James Garland	Marisa Chun, Donald Verrilli, Judy Appelbaum, Gene Kimmelman, Tali Farhadian (cc: Robert Potter, Karyn Temple Claggett, Brian Hauck)	RE: Kohl Response – Input from ATR appellate	6/18/2009			
		[Redacted]	Marisa Chun, Brain Hauck, Sam Hirsch, Donald Verrilli, Charlotte Burrows	FOR FINAL APPROVAL – DOJ comments on Request for comments on S. 369, the Preserve Access to Affordable Generics Act (Reverse Payments)	6/11/2009			
20-22	Draft of letter (Attached to Docs. 18- 19)	Ronald Weich, Assistant Attorney General	Senator Herb Kohl (cc: Senator Patrick Leahy, Senator Orrin Hatch)	DOJ's comments on a proposed Senate bill		(b)(5)	3	This document is a draft of a letter from the DOJ to Senator Kohl which expresses the DOJ's views on a proposed Senate bill. Because the letter, which contains an extensive analysis of the bill by DOJ attorneys, was a preliminary draft, it has been withheld pursuant to Exemption 5.
23-25	Draft of letter (Attached to Docs. 18- 19)	Ronald Weich, Assistant Attorney General	Senator Herb Kohl (cc: Senator Orrin Hatch)	DOJ's comments on a proposed Senate bill		(b)(5)	3	This document is a draft of a letter from the DOJ to Senator Kohl which expresses the DOJ's views on a proposed Senate bill. Because the letter, which contains an extensive analysis of the bill by DOJ attorneys, was a preliminary draft, it has been withheld pursuant to Exemption 5.

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
38-39	Draft of memorandum (Attached to Docs. 18-19)	Department of Justice	N/A	DOJ's comments on a proposed House bill.		(b)(5)	2	This document is a draft of a memorandum which expresses the DOJ's views on a proposed House bill. Because the memorandum, which contains an extensive analysis of the bill by DOJ attorneys, was a preliminary draft, it has been withheld pursuant to the deliberative process privilege.
40-42	Memorandum	Neal Katyal	The Solicitor General (Elena Kagan)	Re: Current Cases That [SG Kagan Has] Worked On	5/13/2010	(b)(5) (b)(6)	3	The redacted information contains a DOJ attorney's thoughts on the formulation of the government's litigation position in two cases that were pending before the United States Supreme Court. In addition, the names of two individuals who are not federal employees have been withheld for privacy reasons.
43	Email chain	[Redacted]	Neal Katyal	RE: document	5/13/2010	(b)(6)	1	The name of a DOJ employee has been withheld for privacy reasons.
		Neal Katyal	[Redacted]	document	5/13/2010			
44-47	Memorandum (Attached to Doc. 43)	Neal Katyal	The Solicitor General (Elena Kagan)	Re: Current Cases That [SG Kagan Has] Worked On	5/13/2010	(b)(5) (b)(6)	3	The redacted information contains a DOJ attorney's thoughts on the formulation of the government's litigation position in two cases that were pending before the United States Supreme Court. In addition, the names of two individuals who are not federal employees have been withheld for privacy reasons.

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
48-49	Email Chain	Tracy Schmalzer	Elena Kagan	RE: HCR litigation	5/17/2010	(b)(2) (b)(6)	2	A DOJ attorney's office phone number has been withheld for privacy reasons, and because it is of a trivial administrative nature and is of no genuine public interest. A DOJ employee's name has also been withheld for privacy reasons.
		Neal Katyal	Elena Kagan	RE: HCR litigation	5/17/2010			
		Elena Kagan	Neal Katyal, Tracy Schmalzer	RE: HCR litigation	5/17/2010			
		Neal Katyal	Elena Kagan	FW: HCR litigation	5/17/2010			
		Neal Katyal	Tracey Schmalzer	Re: HCR litigation	5/17/2010			
		Tracey Schmalzer	Neal Katyal	HCR litigation	5/17/2010			
50-51	Email chain	Neal Katyal	Elena Kagan	Fw: connecting you two	6/15/2010	Nonresponsive (b)(5) (b)(6)	2	Six emails in this email chain have been withheld because they do not contain information responsive to plaintiff's FOIA request and, in the alternative, pursuant to Exemption 5. In those emails, a DOJ attorney and an executive branch official discuss the DOJ's strategy regarding a media inquiry that was unrelated to the subjects identified in plaintiff's FOIA request. A DOJ employee's name has also been withheld for privacy reasons.

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
52-53	Email chain	Elena Kagan	Susan Davies, Joshua Earnest	Fw: connecting you two	6/15/2010	Nonresponsive (b)(2) (b)(5) (b)(6)	2	<p>The email addresses of two White House employees have been withheld for privacy reasons, and because they are of a trivial administrative nature and are of no genuine public interest.</p> <p>A DOJ employee's name has also been withheld for privacy reasons.</p> <p>In addition, six emails in this email chain have been withheld because they do not contain information responsive to plaintiff's FOIA request and, in the alternative, pursuant to Exemption 5. In those emails, a DOJ attorney and an executive branch official discuss the DOJ's strategy regarding a media inquiry that is unrelated to the subjects identified in plaintiff's FOIA request.</p>
		Neal Katyal	Elena Kagan	Fw: connecting you two	6/15/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
54-57*	Email chain	Elena Kagan	Neal Katyal	Re: Recusals (not urgent)	5/11/2010	Nonresponsive (b)(5)	4	The redacted information describes and reflects deliberations between a staff member of the Executive Office of the President and the Office of Legal Counsel regarding predecisional advice to another Executive Branch official on the subject of recusals.
		Neal Katyal	Elena Kagan	Re: Recusals (not urgent)	5/11/2010			
		Elena Kagan	Neal Katyal	Re: Recusals (not urgent)	5/11/2010			
		Neal Katyal	Elena Kagan	Recusals (not urgent)	5/11/2010			
58-59*	Email chain	Elena Kagan	Edwin Kneedler	Re: Cvsgs	4/2/2010	Nonresponsive (b)(5) (b)(6)	2	The redacted information includes a DOJ attorney's thoughts on specific legal arguments and strategies relevant to one of the cases cited in the email exchange. In addition, the names of two DOJ attorneys have been withheld for privacy reasons.
		Edwin Kneedler	Elena Kagan	re: Cvsgs	4/2/2010			
		Elena Kagan	Edwin Kneedler	Cvsgs	4/2/2010			
60*	Email chain	Neal Katyal	Brian Hauck	RE: Health Care Defense	1/8/2010	Nonresponsive	1	
		Brian Hauck	Neal Katyal	Health Care Defense	1/8/2010			

* Page numbers marked with an asterisk (*) do not contain information responsive to plaintiff's FOIA request. The agency has, however, decided to release these documents as a matter of its discretion. Even if the Court were to consider these pages to contain information responsive to plaintiff's FOIA request, as this index demonstrates, the agency has released all information not protected from disclosure pursuant to one of the FOIA's statutory exemptions.

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
61*	Email chain	Neal Katyal	Brian Hauck, [Redacted]	RE: Health Care Defense	1/8/2010	Nonresponsive (b)(6)	1	The name of a DOJ attorney has been withheld for privacy reasons.
		Brian Hauck	Neal Katyal	Health Care Defense	1/8/2010			
62-64*	Email chain	Edwin Kneedler	Neal Katyal	RE: CVSGs	5/11/2010	Nonresponsive (b)(6)	3	The names of two DOJ attorneys have been withheld for privacy reasons.
		Neal Katyal	Edwin Kneedler	RE: CVSGs	5/11/2010			
		Edwin Kneedler	Neal Katyal	RE: CVSGs	5/11/2010			
		Neal Katyal	Edwin Kneedler, Malcolm Stewart	CVSGs	5/11/2010			
65-66*	Email chain	Edwin Kneedler	Neal Katyal	RE: Elena's name on briefs, opps, appeal recs	5/12/2010	Nonresponsive (b)(5) (b)(6)	2	The redacted information contains DOJ attorneys' thoughts on the formulation of the government's litigation position in two cases that were pending before the United States Supreme Court and internal legal analysis. Also redacted is another DOJ component's thoughts on DOJ policy. In addition, the names of two DOJ employees have been withheld for privacy reasons.
		Neal Katyal	Michael Dreeben, Edwin Kneedler	FW: Elena's name on briefs, opps, appeal recs	5/12/2010			
		Neal Katyal	Edwin Kneedler, Malcolm Stewart, Michael Dreeben, [Redacted], [Redacted]	Elena's name on briefs, opps, appeal recs	5/12/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
67-68*	Email chain	Tracy Schmalder	Neal Katyal	RE: HCR litigation	5/17/2010	Nonresponsive	2	
		Neal Katyal	Tracy Schmalder, Neal Katyal	RE: HCR litigation	5/17/2010			
		Neal Katyal	Tracy Schmalder	RE: HCR litigation	5/17/2010			
		Tracy Schmalder	Neal Katyal	HCR litigation	5/17/2010			
69-71*	Email chain	Neal Katyal	[Redacted]	Re: Health Care Defense	1/13/2010	Nonresponsive (b)(5) (b)(6)	3	The redacted information includes a question from one DOJ attorney to another on a legal issue related to the litigation referenced in the email; it also includes a DOJ attorney's analysis of legal issues that could arise in that litigation. In addition, the name of a DOJ attorney has been withheld for privacy reasons.
		[Redacted]	Neal Katyal	RE: Health Care Defense	1/13/2010			
		Brian Hauck	Neal Katyal, [Redacted]	RE: Health Care Defense	1/8/2010			
		Neal Katyal	Brain Hauck, [Redacted]	RE: Health Care Defense	1/8/2010			
		Brian Hauck	Neal Katyal	Health Care Defense	1/8/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
72-104	Email and two attachments	Elena Kagan	[Redacted]	Draft brief in <i>Golden Gate Restaurant Association v. City and County of San Francisco</i> , S. Ct. No. 08-1515	2/28/2010	Nonresponsive (b)(5)	Email 1 pg., First attachment 2 pgs., Second attachment 30 pgs.	The body of the email and the first attached document do not contain information responsive to plaintiff's FOIA request. In addition, the first attachment contains an agency's internal analysis of a proposed agency action that was never taken. The second attachment contains the agency's description of the proposed action, including additional analysis of that action. Two paragraphs of the second attachment (at pages 17 and 20-21 of the document) are responsive to plaintiff's FOIA request because those paragraphs indicate that issues related to an agency's internal government proposal might be affected if the then-pending health-care-reform legislation were enacted. The email and its attachments are being withheld under Exemption 5.

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
105 [^]	Email chain	Susan Davies	Ronald Klain, Robert Bauer, Daniel Meltzer, Cynthia Hogan, Elena Kagan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010	Not an agency record (b)(2) (b)(5) (b)(6)	1	<p>These documents consist of an email exchange between Kagan, in her capacity as a nominee to the United States Supreme Court, and staff members of the Executive Office of the President. The email exchange concerns drafting and revising a proposed answer Kagan might give to a possible question she might be asked, during the Senate confirmation process, about recusal decisions as Solicitor General. A review of the hearing record of Ms. Kagan's confirmation by the U.S. Senate reveals that the question at issue in this email exchange was never asked or answered.</p> <p>Even if this document were considered to be an "agency record" subject to the FOIA, the information contained in the document is exempt from disclosure pursuant to Exemption 5; also, the email addresses of the staff members of the Executive Office of the President are exempt from disclosure pursuant to Exemptions 2 and 6.</p>
		Robert Klain	Robert Bauer, Daniel Meltzer, Susan Davies, Cynthia Hogan, Elena Kagan, Joshua Earnest	DRAFT Answer on [Redacted]	5/17/2010			

[^] Page numbers marked with a carrot (^) are not agency records subject to the FOIA.

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
106-108^	Email chain	Elena Kagan	Robert Bauer, Ronald Klain, Joshua Earnest, Susan Davies, Daniel Meltzer, Cynthia Hogan	Re: DRAFT Answer on [Redacted]	5/18/2010	Not an agency record (b)(2) (b)(5) (b)(6)	3	<p>These documents consist of an email exchange between Kagan, in her capacity as a nominee to the United States Supreme Court, and staff members of the Executive Office of the President. The email exchange concerns drafting and revising a proposed answer Kagan might give to a possible question she might be asked, during the Senate confirmation process, about recusal decisions as Solicitor General. A review of the hearing record of Ms. Kagan's confirmation by the U.S. Senate reveals that the question at issue in this email exchange was never asked or answered.</p> <p>Even if this document were considered to be an "agency record" subject to the FOIA, the information contained in the document is exempt from disclosure pursuant to Exemption 5; also, the email addresses of the staff members of the Executive Office of the President are exempt from disclosure pursuant to Exemptions 2 and 6.</p>
		Robert F. Bauer	Ronald Klain, Elena Kagan, Joshua Earnest, Susan Davies, Daniel Meltzer, Cynthia Hogan	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Elena Kagan, Robert Bauer, Joshua Earnest, Susan Davies, Daniel Meltzer, Cynthia Hogan	Re: DRAFT Answer on [Redacted]	5/17/2010			
		Elena Kagan	Ronald Klain, Robert Bauer, Joshua Earnest, Susan Davies, Daniel Meltzer, Cynthia Hogan	Re: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Robert Bauer, Joshua Earnest, Susan Davies, Elena Kagan, Daniel Meltzer, Cynthia Hogan	Re: DRAFT Answer on [Redacted]	5/17/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
106-108^ (cont.)		Robert Bauer	Joshua Earnest, Susan Davies, Ronald Klain, Daniel Meltzer, Elena Kagan, Cynthia Hogan	Re: DRAFT Answer on [Redacted]	5/17/2010			
		Joshua Earnest	Susan Davies, Robert Bauer, Ronald Klain, Elena Kagan, Daniel Meltzer, Cynthia Hogan	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Susan Davies	Robert Bauer, Ronald Klain, Elena Kagan, Daniel Meltzer, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Robert Bauer	Ronald Klain, Elena Kagan, Daniel Meltzer, Susan Davies, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Elena Kagan, Daniel Meltzer, Robert Bauer, Susan Davies, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
106-108^ (cont.)		Elena Kagan	Daniel Meltzer, Ronald Klain, Robert Bauer, Susan Davies, Cynthia Hogan, Joshua Earnest	Re: DRAFT Answer on [Redacted]	5/17/2010			
		Daniel Meltzer	Ronald Klain, Robert Bauer, Susan Davies, Cynthia Hogan, Elena Kagan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Robert Bauer, Daniel Meltzer, Susan Davies, Cynthia Hogan, Elena Kagan, Joshua Earnest	DRAFT Answer on [Redacted]	5/17/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
109-110^	Email chain	Robert Bauer	Susan Davies, Ronald Klain, Elena Kagan, Daniel Meltzer, Cynthia Hogan, Joshua Earnest	re: DRAFT Answer on [Redacted]	5/17/2010	Not an agency record (b)(2) (b)(5) (b)(6)	2	<p>These documents consist of an email exchange between Kagan, in her capacity as a nominee to the United States Supreme Court, and staff members of the Executive Office of the President. The email exchange concerns drafting and revising a proposed answer Kagan might give to a possible question she might be asked, during the Senate confirmation process, about recusal decisions as Solicitor General. A review of the hearing record of Ms. Kagan's confirmation by the U.S. Senate reveals that the question at issue in this email exchange was never asked or answered.</p> <p>Even if this document were considered to be an "agency record" subject to the FOIA, the information contained in the document is exempt from disclosure pursuant to Exemption 5; also, the email addresses of the staff members of the Executive Office of the President are exempt from disclosure pursuant to Exemptions 2 and 6.</p>
		Susan Davies	Robert Bauer, Ronald Klain, Elena Kagan, Daniel Meltzer, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Robert Bauer	Ronald Klain, Elena Kagan, Daniel Meltzer, Susan Davies, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Elena Kagan, Daniel Meltzer, Robert Bauer, Susan Davies, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Elena Kagan	Daniel Meltzer, Ronald Klain, Robert Bauer, Susan Davies, Cynthia Hogan, Joshua Earnest	Re: DRAFT Answer on [Redacted]	5/17/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
109-110^ (cont.)		Daniel Meltzer	Ronald Klain, Robert Bauer, Susan Davies, Cynthia Hogan, Elena Kagan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Robert Bauer, Daniel Meltzer, Susan Davies, Cynthia Hogan, Elena Kagan, Joshua Earnest	DRAFT Answer on [Redacted]	5/17/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
111-112^	Email chain	Cynthia Hogan	Joshua Earnest, Susan Davies, Robert Bauer, Ronald Klain, Elena Kagan, Daniel Meltzer	Re: DRAFT Answer on [Redacted]	5/17/2010	Not an agency record (b)(2) (b)(5) (b)(6)	2	<p>These documents consist of an email exchange between Kagan, in her capacity as a nominee to the United States Supreme Court, and staff members of the Executive Office of the President. The email exchange concerns drafting and revising a proposed answer Kagan might give to a possible question she might be asked, during the Senate confirmation process, about recusal decisions as Solicitor General. A review of the hearing record of Ms. Kagan's confirmation by the U.S. Senate reveals that the question at issue in this email exchange was never asked or answered.</p> <p>Even if this document were considered to be an "agency record" subject to the FOIA, the information contained in the document is exempt from disclosure pursuant to Exemption 5; also, the email addresses of the staff members of the Executive Office of the President are exempt from disclosure pursuant to Exemptions 2 and 6.</p>
		Joshua Earnest	Susan Davies, Robert Bauer, Ronald Klain, Elena Kagan, Daniel Meltzer, Cynthia Hogan	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Susan Davies	Robert Bauer, Ronald Klain, Elena Kagan, Daniel Meltzer, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Robert Bauer	Ronald Klain, Elena Kagan, Daniel Meltzer, Susan Davies, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Elena Kagan, Daniel Meltzer, Robert Bauer, Susan Davies, Cynthia Hogan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
111-112^ (cont.)		Elena Kagan	Daniel Meltzer, Ronald Klain, Robert Bauer, Susan Davies, Cynthia Hogan, Joshua Earnest	Re: DRAFT Answer on [Redacted]	5/17/2010			<p>These documents consist of an email exchange between Kagan, in her capacity as a nominee to the United States Supreme Court, and staff members of the Executive Office of the President. The email exchange concerns drafting and revising a proposed answer Kagan might give to a possible question she might be asked, during the Senate confirmation process, about recusal decisions as Solicitor General. A review of the hearing record of Ms. Kagan's confirmation by the U.S. Senate reveals that the question at issue in this email exchange was never asked or answered.</p> <p>Even if this document were considered to be an "agency record" subject to the FOIA, the information contained in the document is exempt from disclosure pursuant to Exemption 5; also, the email addresses of the staff members of the Executive Office of the President are exempt from disclosure pursuant to Exemptions 2 and 6.</p>
		Daniel Meltzer	Ronald Klain, Robert Bauer, Susan Davies, Cynthia Hogan, Elena Kagan, Joshua Earnest	RE: DRAFT Answer on [Redacted]	5/17/2010			
		Ronald Klain	Robert Bauer, Daniel Meltzer, Susan Davies, Cynthia Hogan, Elena Kagan, Joshua Earnest	DRAFT Answer on [Redacted]	5/17/2010			

Doc #	Document Type	Author/From	To	Subject/Title	Date	Exemption/ Reason for Withholding	Pages	Description of Withheld Information
113*^	Email	Betsy Henthorne	Jonathan Kravis	recusals	5/14/2010	Nonresponsive Not an agency record (b)(5) (b)(6)	1	<p>This document is an email between former Solicitor General Kagan's confidential assistant and a staff member of the Executive Office of the President. The email, sent on Kagan's behalf, consists of a draft version of a response to a question in the Judicial Nomination Questionnaire that Kagan prepared and submitted to the U.S. Senate during the confirmation process; a comparison of the email with the final Judicial Nomination Questionnaire that Kagan submitted to the U.S. Senate reveals that the version in the email is non-final. The question at issue in this email seeks information about cases from which Kagan recused herself as Solicitor General</p> <p>Even if this document were considered to be an "agency record" subject to the FOIA, the information contained in the document is exempt from disclosure pursuant to Exemption 5; also, the email addresses of the staff member of the Executive Office of the President is exempt from disclosure pursuant to Exemptions 2 and 6.</p>

Identification of Key Department of Justice Officials

Office of the Solicitor General

Elena Kagan, then-Solicitor General
Neal Katyal, Acting Solicitor General, then-Principal Deputy Solicitor General
Edwin Kneedler, Deputy Solicitor General
Michael Dreeben, Deputy Solicitor General
Malcolm Stewart, Deputy Solicitor General
Betsy Henthorne, then-Confidential Assistant to the Solicitor General

Office of the Attorney General

Stuart Delery, Senior Counselor to the Attorney General, then-Associate Deputy
Attorney General
James Garland, then-Deputy Chief of Staff and Counselor to the Attorney General
Tali Farhadian, then-Counsel to the Attorney General

Office of the Deputy Attorney General

Lisa Monaco, Principal Associate Deputy Attorney General
Charlotte Burrows, Associate Deputy Attorney General
Donald Verrilli, then-Associate Deputy Attorney General
Karyn Temple Claggett, then-Senior Counsel to the Deputy Attorney General
Chad Golder, then-Counsel to the Deputy Attorney General

Office of the Associate Attorney General

Thomas J. Perrelli, Associate Attorney General
Joseph Guerra, then-Principal Deputy Associate Attorney General
Marisa Chun, Deputy Associate Attorney General
Sam Hirsch, Deputy Associate Attorney General
Brian Hauck, Senior Counsel to the Associate Attorney General
Mala Adiga, Counsel to the Associate Attorney General
Currie Gunn, Office Manager

Office of Legal Counsel

Jonathan Cedarbaum, then-Deputy Assistant Attorney General

Office of Legislative Affairs

Ronald Weich, Assistant Attorney General
Judith Applebaum, Deputy Assistant Attorney General

Office of Public Affairs

Tracy Schmalzer, Deputy Director

Civil Division

Tony West, Assistant Attorney General
Beth Brinkmann, Deputy Assistant Attorney General, Appellate Section
Ian Gershengorn, Deputy Assistant Attorney General, Federal Programs Branch
Brian Martinez, Chief of Staff to the Assistant Attorney General

Antitrust Division

Gene Kimmelman, Chief Counsel for Competition Policy/Intergovernmental Relations
Robert Potter, Chief, Legal Policy Section

EXHIBIT B

DOJ 2740.1A



USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

Approval Date: December 2, 2008

Approved By: Lee J. Lofthus
Assistant Attorney General
for Administration

Distribution: BUR/H-1; OBD/H-1; SPL-23

Initiated by: Justice Management Division
Office of General Counsel

1. **PURPOSE.** This order states the Department's policy on the use of departmental computers and computer systems, the lack of expectation of privacy with respect to such use, and authorized monitoring or access to information on departmental computers and computer systems.
2. **SCOPE.** This policy applies to all classified and unclassified computer systems and peripheral devices (such as Personal Electronic Devices) that are acquired for use by, owned, operated, or managed by a departmental component. A privately-owned computer or device that is connected to a departmental computer system is considered to be a departmental computer system while so connected. This policy applies to all Department components.
3. **POLICY.**
 - a. **Approval for Deviation from Policy.** No component shall issue any less restrictive policy with respect to the acceptable and prohibited use of Department computer systems and Department provided Internet resources (e.g., Internet electronic mail, World Wide Web access, Department Internet Web site) without written approval of the Department Chief Information Officer. Components may issue further implementing guidance on such use consistent with this policy

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without written approval. Components may not deviate from the monitoring and access provisions of this order.

b. Use of Department Computers and Computer Systems.

- (1) Use of departmental computer systems, including but not limited to Internet e-mail, departmental e-mail, word processing systems, and connections to Internet sites, is subject to the same restrictions on use as are other government-furnished resources provided for the use of employees. (See 5 C.F.R. § 2635.101(b)(9) and 2635.704.)
- (2) While departmental computer systems are provided for official use, some personal use of government computer systems is permitted in accordance with existing policy on personal use of government property, where there is negligible cost to the government and no interference with official business. (See 28 C.F.R. § 45.4.)

c. Prohibited Use of Department Computers and Computer Systems.

- (1) The following activities are prohibited on department computers and computer systems during working or non-working hours, except when conducting legitimate departmental business with the express prior permission of the employee's Component Head, Deputy Component Head or Field Office Head:
 - (a) Use of Internet sites that result in an additional charge to the government.
 - (b) Using government office equipment for activities that are illegal, inappropriate, or offensive to fellow employees or the public. Such activities include: hate speech, or material that ridicules others on the basis of race, creed, religion, color, sex, disability, national origin, or sexual orientation.

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- (c) The creation, download, viewing, storage, copying, or transmission of sexually explicit or sexually oriented materials or materials related to illegal gambling, illegal weapons, terrorist activities, and any other illegal activities or activities otherwise prohibited.
- (d) Use that could cause congestion, delay, or disruption of service to any government system or equipment, unless for legitimate departmental business. For example, electronic greeting cards, video, sound or other large file attachments can degrade the performance of the entire network, and should not be viewed or sent on Department computers. Accessing continuous data streams (such as viewing streaming video or listening to streaming audio/radio on a media website) could also degrade the performance of the entire network and is an inappropriate use (except when access is provided by the Department or is otherwise authorized).
- (e) The creation, copying, transmission, or retransmission of chain letters or other unauthorized mass mailings regardless of the subject matter.
- (f) Any use to circumvent security controls on Department or other external systems.
- (g) Knowingly using anonymizer sites (anonymizer sites hide the user's identity from the Internet site being visited; however, in doing so, they also bypass the blocking mechanism designed to protect Department systems from malicious Internet sites).
- (h) Knowingly visiting malicious resources or sites.
- (i) Using peer-to-peer (P2P) file sharing sites on the Internet (e.g., sites dedicated to downloading audio or video files), or using IP telephony sites.

- (j) Use for commercial purposes or in support of "for-profit" activities or in support of other outside employment or business activity (e.g., consulting for pay, sales or administration of business transactions, sale of goods or services).
 - (k) Any otherwise prohibited activity, such as sending out solicitations, participating in any lobbying activity, or engaging in prohibited political activity.
 - (l) Use for posting agency information to external newsgroups, bulletin boards or other public forums without authority. This includes any use that could create the perception that the communication was made in one's official capacity as a Federal Government employee, unless appropriate Agency approval has been obtained, or uses at odds with the agencies mission or positions.
 - (m) Downloading, exchanging, e-mailing, or otherwise using or making available any material (such as computer software or music) in a way that infringes upon any copyright, patent, trademark, trade secret or other proprietary or privacy right of any party.
- (2) Downloading and/or installing any program, software or executable file on department computers is prohibited unless approved in accordance with component IT security policy.
- d. **Proper Representation** It is the responsibility of employees to ensure that they are not giving the false impression that they are acting in an official capacity when they are using government office equipment for nongovernment purposes. If there is expectation that such a personal use could be interpreted to represent an agency, then an adequate disclaimer must be used. One acceptable disclaimer is - "The contents of this message are mine personally and do not reflect any position of the Government or

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

my agency." The Standards of Conduct states - "...an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities..." (5 CFR § 2635.702(b)).

- e. **No Expectation of Privacy.** Individual employees should NOT expect privacy in the use of government computers or computer systems. The Department may access e-mail messages, files, records, or other documents on government computer systems whenever it has a legitimate governmental purpose for doing so.

- f. **Monitoring, Disclosing, or Accessing E-mail or Documents on Computer Systems.** Use of departmental computer systems constitutes consent to monitoring and disclosure of information stored on or transiting the departmental computer system as provided below. The Department routinely conducts monitoring and intercepts communications for security purposes and to detect improper use. Such monitoring and interception includes the use of software tools that examine the content of Internet communications and email, and block access to known or suspected malicious Internet sites. The Department may block or otherwise prevent any improper use or activity prohibited in section 3.c. above.
 - (1) **Authorized Access.** Monitoring, disclosing, and accessing another employee's e-mail messages, Internet activities, documents, files, or other information stored on or transiting the departmental computer system may only be done for authorized purposes. Accessing shared storage (i.e., a server or disk drive intended for shared or public access) does not constitute accessing another employee's computer system.

 - (2) **Authorized Purposes for Monitoring, Disclosing, or Accessing:**
 - (a) For system administration and system security.

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

- (b) For investigatory purposes by, or as authorized by, the Office of Professional Responsibility, the Office of the Inspector General, the Federal Bureau of Investigation, or the Criminal Division.
 - (c) In response to a court order, grand jury subpoena, or search warrant.
 - (d) In order to prevent death or serious injury to any person.
- (3) **Authorizing Officials.** Access to an employee's computer system for any other reason, such as for suspected misconduct not connected with an official investigation by one of the offices listed above, must be authorized by:
- (a) The head of the Bureau where the employee works, for Bureau personnel;
 - (b) The head of the Executive Office for U.S. Attorneys, for U.S. Attorneys personnel;
 - (c) The head of the Executive Office for U.S. Trustees (EOUST), for EOUST personnel;
 - (d) The head of the National Drug Intelligence Center (NDIC), for NDIC personnel; or
 - (e) The Assistant Attorney General for Administration for all other components.

This authority may not be delegated below the level of a principal deputy.

- (4) **Notification of Monitoring and Disclosure.** All components are required to provide adequate notice to their employees that their use of the departmental computer system constitutes consent to monitoring and disclosure. The Standard Warning Banner promulgated by the Department's Chief Information Officer provides such adequate notice.
- (5) **Employee Activities.** Nothing in this policy creates any enforceable rights; however,

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

unauthorized use or monitoring or improper access to an employee's computer system may result in disciplinary action or criminal prosecution. Employees are prohibited from accessing the e-mail, electronic files or documents, or otherwise monitoring the online activities of another employee except in accordance with this policy.

- g. **Sanctions for Misuse.** Unauthorized or improper use of Department office equipment could result in loss of use or limitations on use of equipment, disciplinary or adverse actions, and/or criminal penalties.



/s/ Lee J. Lofthus
Assistant Attorney General
for Administration

EXHIBIT C

DOJ 2740.1A Change 1



USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

Approval Date: November 30, 2010

Approved By: Lee J. Lofthus
Assistant Attorney General
for Administration

A handwritten signature in black ink, appearing to read "Lee J. Lofthus".

Initiated by: Justice Management Division
Office of General Counsel

1. **PURPOSE.** This Order states the Department's policy on the use of departmental computers and computer systems, the lack of expectation of privacy with respect to such use, and authorized monitoring or access to information on departmental computers and computer systems.
2. **SCOPE.** This policy applies to all classified and unclassified computer systems and peripheral devices (such as Personal Electronic Devices) that are acquired for use by, owned, operated, or managed by a departmental component. A privately-owned computer or device that is connected to a departmental computer system is considered to be a departmental computer system while so connected. This policy applies to all Department components.
3. **POLICY.**
 - a. **Approval for Deviation from Policy.** No component shall issue any less restrictive policy with respect to the acceptable and prohibited use of Department computer systems and Department provided Internet resources without written approval of the Department's Chief Information Officer. Components may issue further implementation guidance on such use consistent with this policy without written approval. Components may not deviate from the monitoring and access provisions of this Order.

b. Use of Department Computers and Computer Systems.

- (1) Use of departmental computer systems, including but not limited to Internet e-mail, departmental e-mail, word processing systems, and connections to Internet sites, is subject to the same restrictions on use as are other government-furnished resources provided for the use of employees. (See 5 C.F.R. § 2635.101(b)(9) and 2635.704.)
- (2) While departmental computer systems are provided for official use, some personal use of government computer systems is permitted in accordance with existing policy on personal use of government property, where there is negligible cost to the government and no interference with official business. (See 28 C.F.R. § 45.4.)

c. Prohibited Use of Department Computers and Computer Systems.

- (1) The following activities are prohibited on department computers and computer systems during working or nonworking hours:
 - (a) Downloading and/or installing any program, software or executable file on department computers, unless approved in accordance with component IT security policy.
 - (b) Non-official use that could cause congestion, delay, or disruption of service to any government system or equipment. For example, electronic greeting cards, video, sound or other large file attachments can degrade the performance of the entire network, and should not be viewed or sent on Department computers. Accessing continuous data streams (such as viewing streaming video or listening to streaming audio/radio on a media website) could also degrade the performance of the entire network and is inappropriate when not for official purposes.

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

- (c) Use for commercial purposes or in support of "for-profit" activities or in support of other outside employment or business activity (e.g., consulting for pay, sales or administration of business transactions, sale of goods or services).
 - (d) Sending out solicitations, participating in any lobbying activity, or engaging in prohibited political activity
 - (e) Unauthorized use for posting agency information to external newsgroups, bulletin boards or other public forums. This includes: any use that could create the perception that the communication was made in one's official capacity as a Federal Government employee without appropriate Agency approval, or uses at odds with the agency's mission or positions.
- (2) The following activities are prohibited on department computers and computer systems during working or non-working hours, except when conducting legitimate departmental business with the express prior permission of the employee's Component Head, Deputy Component Head or Field Office Head:
- (a) Use of Internet sites that result in an additional charge to the government.
 - (b) Using government office equipment for activities that are illegal, inappropriate, or offensive to fellow employees or the public. Such activities include: hate speech, or material that ridicules others on the basis of race, creed, religion, color, sex, disability, national origin, or sexual orientation.
 - (c) The creation, download, viewing, storage, copying, or transmission of sexually explicit or sexually oriented materials or materials related to illegal gambling, illegal weapons, terrorist activities, and any other illegal activities.

- (d) Any use to circumvent security controls on Department or other external systems.
 - (e) Knowingly using anonymizer sites (anonymizer sites hide the user's identity from the Internet site being visited; however, in doing so, they also bypass the blocking mechanism designed to protect Department systems from malicious Internet sites).
 - (f) Knowingly visiting malicious resources or sites.
 - (g) Using peer-to-peer (P2P) file sharing sites on the Internet (e.g., sites dedicated to downloading audio or video files), or using IP telephony sites.
 - (h) Any otherwise prohibited activity.
- d. **Proper Representation** It is the responsibility of employees to ensure that they are not giving the false impression that they are acting in an official capacity when they are using government office equipment for nongovernment purposes. If there is expectation that such a personal use could be interpreted to represent an agency, then an adequate disclaimer must be used. One acceptable disclaimer is - "The contents of this message are mine personally and do not reflect any position of the Government or my agency." The Standards of Conduct states - "...an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities..." (5 CFR § 2635.702(b)).
- e. **No Expectation of Privacy.** Individual employees and contractors should NOT expect privacy in the use of government computers or computer systems. The Department may access e-mail messages, files, records, or other documents on government computer systems

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

whenever it has a legitimate governmental purpose for doing so.

- f. **Monitoring, Disclosing, or Accessing E-mail or Documents on Computer Systems.** Use of departmental computer systems constitutes consent to monitoring and disclosure of information stored on or transiting the departmental computer system as provided below. The Department routinely conducts monitoring and intercepts communications for security purposes and to detect improper use. Such monitoring and interception includes the use of software tools that examine the content of Internet communications and email, and block access to known or suspected malicious Internet sites. The Department may block or otherwise prevent any improper use or activity prohibited in section 3.c. above.

- (1) **Authorized Access.** Monitoring, disclosing, and accessing another employee's or contractor's e-mail messages, Internet activities, documents, files, or other information stored on or transiting the departmental computer system may only be done for authorized purposes. Accessing shared storage (i.e., a server or disk drive intended for shared or public access) or accessing e-mails pursuant to sharing permissions does not constitute accessing another employee's or contractor's computer system.
- (2) **Authorized Purposes for Monitoring, Disclosing, or Accessing:**
 - (a) For system administration and system security.
 - (b) Improper activities detected pursuant to system administration and system security may be reported to the appropriate component and Department authorities. Use of such information by the recipient of such reports for official purposes, including disciplinary purposes, constitutes an authorized purpose.
 - (c) For investigatory purposes by, or as authorized by, the Office of Professional

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

Responsibility, the Office of the Inspector General, the Federal Bureau of Investigation, or the Criminal Division.

- (d) In response to a court order, grand jury subpoena, or search warrant.
- (e) In response to a Freedom of Information Act (FOIA) or Privacy Act (PA) request, a system manager may provide access to FOIA/PA professionals, attorneys, or other designated employees for the purpose of responding to the FOIA or PA request with notice to the employee or contractor whose e-mail messages or other information is being accessed. In the case of a former employee or contractor, notice is not required in order to provide access for this purpose.
- (f) At the request of a component head, deputy component head, or assistant bureau director, a system manager may provide access to an employee's or contractor's e-mail messages or other information when necessary for business purposes, with notice to the employee or contractor. In the case of a former employee or contractor, notice is not required in order to provide access for this purpose. A business purpose includes accessing a needed file during an employee's or contractor's illness or absence, but does not include investigating suspected misconduct.
- (g) In response to a litigation hold at the outset of civil litigation against the Department whether actual or reasonably anticipated or a discovery request, a system manager may provide access to attorneys or other designated employees for the purpose of complying with litigation requirements with notice to the employee or contractor whose e-mail messages or other information is being accessed. In the case of a former employee or contractor, notice is not

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

required in order to provide access for this purpose.

- (h) In order to prevent death or serious injury to any person.
- (3) **Authorizing Officials.** Access to an employee's computer system for any other reason, including suspected misconduct not detected in the course of system administration and not connected with an official investigation by one of the offices listed above, must be authorized by:
- (a) The head of the Bureau (as defined in 28 CFR § 0.1) where the employee works, for Bureau personnel;
 - (b) The head of the Executive Office for U.S. Attorneys, for U.S. Attorneys personnel;
 - (c) The head of the Executive Office for U.S. Trustees (EOUST), for EOUST personnel;
 - (d) The head of the National Drug Intelligence Center (NDIC), for NDIC personnel; or
 - (e) The Assistant Attorney General for Administration for all other components.

This authority may not be delegated below the level of a principal deputy.

- (4) **Notification of Monitoring and Disclosure.** All components are required to provide adequate notice to their employees and contractors that their use of the departmental computer system constitutes consent to monitoring and disclosure. The Standard Warning Banner promulgated by the Department's Chief Information Officer provides such adequate notice.
- (5) **Employee Activities.** Nothing in this policy creates any enforceable rights. Unauthorized use or monitoring or improper access to an employee's computer system may result in disciplinary action or criminal prosecution. Employees and contractors are prohibited from accessing the e-

USE AND MONITORING OF DOJ COMPUTERS AND COMPUTER SYSTEMS

mail, electronic files or documents, or otherwise monitoring the online activities of another employee or contractor except in accordance with this policy.

- g. **Sanctions for Misuse.** Unauthorized or improper use of Department office equipment could result in loss of use or limitations on use of equipment, disciplinary or adverse actions, and/or criminal penalties.

/s/ Lee J. Lofthus
Assistant Attorney General
for Administration

EXHIBIT D



Office of the Solicitor General

Executive Officer

Washington, D.C. 20530

MAR 15 2011

Mr. Terence P. Jeffrey
CNSNews.com
325 S. Patrick St.
Alexandria, VA 22314

RE: Freedom of Information Act Request

Dear Mr. Jeffrey:

This is in response to your letters of May 25, 2010, and June 25, 2010, requesting records from the Office of the Solicitor General (Office) regarding certain communications concerning former Solicitor General Elena Kagan. Specifically, as clarified in your letter of June 25, 2010, you request:

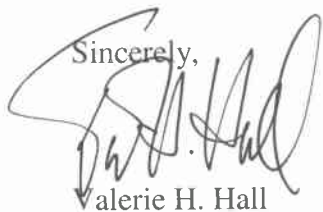
1. Any communications to or from Solicitor General Elena Kagan and any record or notation of any meeting attended personally or electronically by Solicitor General Elena Kagan in which the then-pending legislative health-care proposals were discussed;
2. Any communication to or from Solicitor General Elena Kagan and any record or notation of any meeting attended personally or electronically by Solicitor General Elena Kagan in which any legal challenge to the health-care reform bill signed by President Barack Obama was a topic; and
3. Any communication to or from Solicitor General Elena Kagan and any record or notation of any meeting attended personally or electronically by Solicitor General Elena Kagan in which the question of whether Solicitor General Elena Kagan ought to recuse herself from involvement in any particular case in her role as Solicitor General due to the prospect that it might later come before her were she to be confirmed to a seat on a federal court was discussed.

A search of records in the Office yielded approximately 1400 pages of potentially responsive records. Most of those potentially responsive records were ultimately determined not to be responsive to your request; many others reflect duplicative material within email chains in which the more recent email responses include prior emails that the search separately identified; and some others were not agency records.

The agency records that include at least some material responsive to your request constitute a total of 86 pages of records. Many, if not all, of those records are not subject to mandatory disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552, because they are fully exempt from compelled disclosure under FOIA Exemption 5, 5 U.S.C. 552(b)(5). The Office, however, has determined that it would be appropriate to release significant portions of such records as a matter of agency discretion. The Office accordingly has enclosed 45 pages of agency records responsive to your FOIA request, some of which have been partially redacted under FOIA Exemptions 2, 5, and 6, 5 U.S.C. 552(b)(2), (5), and (6). The remaining 41 pages are being withheld in full under FOIA Exemption 5. Eight of those 41 pages are drafts of letters or views concerning subjects unrelated to your FOIA request but that were attached to a responsive email that has itself been released. The remaining 33 pages are a one-page email with two attachments, nearly all of which is not responsive to your FOIA request (the two paragraphs that are responsive are located in the second attachment and indicate that issues related to an internal agency proposal might be affected if the then-pending health-care-reform legislation was enacted).

In addition to the responsive agency records, the Office identified other agency records during its review of potentially responsive records that appear to concern matters related to the general subject-matter of your FOIA request. Although such additional records are not themselves subject to mandatory disclosure under FOIA because they are not responsive under the terms of your request, and although many if not all of the additional records would be fully exempt from mandatory disclosure under FOIA Exemption 5 if they were responsive to a FOIA request, the Office has determined that it would be appropriate to release such records as a matter of agency discretion. The Office accordingly has enclosed an additional 18 pages of non-responsive agency records, some of which have been partially redacted. If the non-responsive records were to be the proper subject of a FOIA request, the redactions would be warranted under FOIA Exemption 5 and 6.

Sincerely,

A handwritten signature in black ink, appearing to read 'Valerie H. Hall', written over a large, stylized flourish.

Valerie H. Hall

Enclosure(s)

FW: Health Care Defense

Page 1 of 1

Kagan, Elena

From: Kagan, Elena
Sent: Friday, January 08, 2010 11:01 AM
To: Katyal, Neal
Subject: Re: Health Care Defense

You should do it.

From: Katyal, Neal
To: Kagan, Elena
Sent: Fri Jan 08 10:57:38 2010
Subject: FW: Health Care Defense

I am happy to do this if you are ok with it. Otherwise Ed would be the natural person. Or both of us

From: Hauck, Brian
Sent: Friday, January 08, 2010 10:54 AM
To: Katyal, Neal
Subject: Health Care Defense

Hi Neal – Tom wants to put together a group to get thinking about how to defend against inevitable challenges to the health care proposals that are pending, and hoped that OSG could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can.

Thanks,
Brian

7/15/2010

From: Katyal, Neal
Sent: Friday, January 08, 2010 10:58 AM
To: Kagan, Elena
Subject: FW: Health Care Defense

I am happy to do this if you are ok with it. Otherwise Ed would be the natural person. Or both of us

From: Hauck, Brian
Sent: Friday, January 08, 2010 10:54 AM
To: Katyal, Neal
Subject: Health Care Defense

Hi Neal -- Tom wants to put together a group to get thinking about how to defend against inevitable challenges to the health care proposals that are pending, and hoped that OSG could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can.

Thanks,
Brian

Kagan, Elena

From: Katyal, Neal
Sent: Thursday, March 18, 2010 1:37 PM
To: Perrelli, Thomas J.
Cc: Kagan, Elena
Subject: RE: Health Care

Tom, I was just looking at the draft complaint by Landmark Legal Foundation. It is clearly written to be filed when the House approves the reconciliation bill and before the President signs it. See paras 15-17.
[http://www.landmarklegal.org/uploads/Landmark%20Complaint%20\(00013086-2\).pdf](http://www.landmarklegal.org/uploads/Landmark%20Complaint%20(00013086-2).pdf)

Also para 27 says the action is being brought before it is signed by President so that no expectations of regularity can be asserted, etc. As such, we could be in court very very soon.

In light of this, for what it is worth, my advice (I haven't discussed this with Elena, but am cc'ing her here) would be that we start assembling a response, (b) (5) so that we have it ready to go. They obviously have their piece ready to go, and I think it'd be great if we are ahead of the ball game here.

From: Perrelli, Thomas J.
Sent: Wednesday, March 17, 2010 9:25 AM
To: Katyal, Neal
Subject: Re: Health Care

Neal - I tabled it when things looked bleak, but we should do it. I'll get something together in the next week.

From: Katyal, Neal
To: Perrelli, Thomas J.
Sent: Wed Mar 17 09:17:13 2010
Subject: Health Care

Tom, I recall you were going to set up a group to deal with the inevitable challenges to this legislation. Now that this may be coming back, I wanted to circle back and see if you still are developing such a litigation group.
Thanks, N

Health care litigation meeting

Page 1 of 1

Kagan, Elena

From: Katyal, Neal
Sent: Sunday, March 21, 2010 6:19 PM
To: Kagan, Elena
Subject: Fw: Health care litigation meeting

This is the first I've heard of this. I think you should go, no? I will, regardless, but feel like this is litigation of singular importance.

From: Perrelli, Thomas J.
To: Gershengorn, Ian (CIV); Brinkmann, Beth (CIV); West, Tony (CIV); Martinez, Brian (CIV); Adiga, Mala; Guerra, Joseph R.; Delery, Stuart F. (ODAG); Cedarbaum, Jonathan; Golder, Chad (ODAG); Monaco, Lisa (ODAG); Katyal, Neal
Cc: Gunn, Currie (SMD); Guerra, Joseph R.
Sent: Sun Mar 21 18:11:12 2010
Subject: Health care litigation meeting

All -

It sounds like we can meet with some of the health care policy team tomorrow at 4 to help us prepare for litigation. It has to be over there. Can folks send me the waves info (full name, SSN, DOB) of everyone that should attend as soon as possible? WH wants it tonight, if possible. I know we won't get everyone's in tonight.

Also, we need to think about the key issues/questions for the agenda. (b) (5) tops on my list, but I know there are others. Tony/Ian/Beth -- can CIV flesh out what we feel like we need to discuss? Jonathan and OLC may have some ideas as well.

Thanks!

Tom

6/24/2010

Health care litigation meeting

Page 1 of 1

Kagan, Elena

From: Kagan, Elena
Sent: Sunday, March 21, 2010 6:20 PM
To: Katyal, Neal
Subject: Re: Health care litigation meeting

What's your phone number?

From: Katyal, Neal
To: Kagan, Elena
Sent: Sun Mar 21 18:18:45 2010
Subject: Fw: Health care litigation meeting

This is the first I've heard of this. I think you should go, no? I will, regardless, but feel like this is litigation of singular importance.

From: Perrelli, Thomas J.
To: Gershengorn, Ian (CIV); Brinkmann, Beth (CIV); West, Tony (CIV); Martinez, Brian (CIV); Adiga, Mala; Guerra, Joseph R.; Delery, Stuart F. (ODAG); Cedarbaum, Jonathan; Golder, Chad (ODAG); Monaco, Lisa (ODAG); Katyal, Neal
Cc: Gunn, Currie (SMO); Guerra, Joseph R.
Sent: Sun Mar 21 18:11:12 2010
Subject: Health care litigation meeting

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Also, we need to think about the key issues/questions for the agenda. (b) (5) tops on my list, but I know there are others. Tony/Ian/Beth -- can CIV flesh out what we feel like we need to discuss? Jonathan and OLC may have some ideas as well.

Thanks!

Tom

6/24/2010

Health care litigation meeting

Page 1 of 1

Kagan, Elena

From: Katyal, Neal
Sent: Sunday, March 21, 2010 6:22 PM
To: Kagan, Elena
Subject: Re: Health care litigation meeting

(b) (6)

From: Kagan, Elena
To: Katyal, Neal
Sent: Sun Mar 21 18:19:46 2010
Subject: Re: Health care litigation meeting

What's your phone number?

From: Katyal, Neal
To: Kagan, Elena
Sent: Sun Mar 21 18:18:45 2010
Subject: Fw: Health care litigation meeting

This is the first I've heard of this. I think you should go, no? I will, regardless, but feel like this is litigation of singular importance.

From: Perrelli, Thomas J.
To: Gershengorn, Ian (CIV); Brinkmann, Beth (CIV); West, Tony (CIV); Martínez, Brian (CIV); Adiga, Mala; Guerra, Joseph R.; Delery, Stuart F. (ODAG); Cedarbaum, Jonathan; Golder, Chad (ODAG); Monaco, Lisa (ODAG); Katyal, Neal
Cc: Gunn, Currie (SMO); Guerra, Joseph R.
Sent: Sun Mar 21 18:11:12 2010
Subject: Health care litigation meeting

All -

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Also, we need to think about the key issues/questions for the agenda. (b) (5) tops on my list, but I know there are others. Tony/Ian/Beth -- can CIV flesh out what we feel like we need to discuss? Jonathan and OLC may have some ideas as well.

Thanks!

Tom

6/24/2010

Kagan, Elena

From: Dreeben, Michael R
Sent: Wednesday, March 24, 2010 2:31 PM
To: Kagan, Elena; Kneeder, Edwin S
Subject: Fw; Health care challenges

Elena and Ed,

Re the message below, several USAs volunteered that they hoped that our office would be involved in structuring the government's defense of health care. For all I know, we are involved. Just wanted to pass this on.

Thanks,

Michael

----- Original Message -----
From: Dreeben, Michael R
To: Brinkmann, Beth (CIV)
Sent: Wed Mar 24 14:25:55 2010
Subject: Health care challenges

Hi Beth,

I spoke at the US Attorney's conference today in Tempe AZ and several of them came up to me afterwards to ask how the Department is coordinating responses to the state AG lawsuits. They'd like to know what if anything they should say publicly in response and equally important who should they communicate with about defending these suits. I assume that Civil is going to take the lead in the defense of these cases, no? Is there a task force or lead person to whom I should refer the USAs? If we haven't already done so, it seems to me that we (the Department) should take the initiative to contact the USAs in the districts where states have sued to let them know what the process and lines of responsibility will be. My apologies if this has already been done. If it has, some USAs haven't gotten the word.

Michael

Kagan, Elena

From: Dreeben, Michael R
Sent: Wednesday, March 24, 2010 2:32 PM
To: Kagan, Elena; Knesdler, Edwin S
Subject: Fw: Health care challenges

Beth's response.

----- Original Message -----
From: Brinkmann, Beth (CIV)
To: Dreeben, Michael R
Sent: Wed Mar 24 14:29:59 2010
Subject: RE: Health care challenges

Michael,

Yes, Ton, Ian and I had a nationwide conference call yesterday with the Civil Chiefs. A memo also went out the day before. I am forwarding right after this. Let's discuss if you have ideas about what more to do.

Beth

-----Original Message-----
From: Dreeben, Michael R
Sent: Wednesday, March 24, 2010 2:26 PM
To: Brinkmann, Beth (CIV)
Subject: Health care challenges

Hi Beth,

I spoke at the US Attorney's conference today in Tempe AZ and several of them came up to me afterwards to ask how the Department is coordinating responses to the state AG lawsuits. They'd like to know what if anything they should say publicly in response and equally important who should they communicate with about defending these suits. I assume that Civil is going to take the lead in the defense of these cases, no? Is there a task force or lead person to whom I should refer the USAs? If we haven't already done so, it seems to me that we (the Department) should take the initiative to contact the USAs in the districts where states have sued to let them know what the process and lines of responsibility will be. My apologies if this has already been done. If it has, some USAs haven't gotten the word.

Michael

Kagan, Elena

From: Dreeben, Michael R
Sent: Wednesday, March 24, 2010 2:32 PM
To: Kagan, Elena; Kneedler, Edwin S
Subject: Fw: Health care challenges

More.

----- Original Message -----
From: Brinkmann, Beth (CIV)
To: Dreeben, Michael R
Sent: Wed Mar 24 14:29:59 2010
Subject: RE: Health care challenges

Michael,

Yes, Ton, Ian and I had a nationwide conference call yesterday with the Civil Chiefs. A memo also went out the day before. I am forwarding right after this. Let's discuss if you have ideas about what more to do.

Beth

-----Original Message-----
From: Dreeben, Michael R
Sent: Wednesday, March 24, 2010 2:26 PM
To: Brinkmann, Beth (CIV)
Subject: Health care challenges

Hi Beth,

I spoke at the US Attorney's conference today in Tempe AZ and several of them came up to me afterwards to ask how the Department is coordinating responses to the state AG lawsuits. They'd like to know what if anything they should say publicly in response and equally important who should they communicate with about defending these suits. I assume that Civil is going to take the lead in the defense of these cases, no? Is there a task force or lead person to whom I should refer the USAs? If we haven't already done so, it seems to me that we (the Department) should take the initiative to contact the USAs in the districts where states have sued to let them know what the process and lines of responsibility will be. My apologies if this has already been done. If it has, some USAs haven't gotten the word.

Michael

Kagan, Elena

From: Kneedler, Edwin S
Sent: Wednesday, March 24, 2010 3:38 PM
To: Dreeben, Michael R; Kagan, Elena
Subject: RE: Health care challenges

Thanks.

-----Original Message-----

From: Dreeben, Michael R
Sent: Wednesday, March 24, 2010 2:32 PM
To: Kagan, Elena; Kneedler, Edwin S
Subject: Fw: Health care challenges

More.

----- Original Message -----

From: Brinkmann, Beth (CIV)
To: Dreeben, Michael R
Sent: Wed Mar 24 14:29:59 2010
Subject: RE: Health care challenges

Michael,

Yes, Ton, Ian and I had a nationwide conference call yesterday with the Civil Chiefs. A memo also went out the day before. I am forwarding right after this. Let's discuss if you have ideas about what more to do.

Beth

-----Original Message-----

From: Dreeben, Michael R
Sent: Wednesday, March 24, 2010 2:26 PM
To: Brinkmann, Beth (CIV)
Subject: Health care challenges

Hi Beth,

I spoke at the US Attorney's conference today in Tempe AZ and several of them came up to me afterwards to ask how the Department is coordinating responses to the state AG lawsuits. They'd like to know what if anything they should say publicly in response and equally important who should they communicate with about defending these suits. I assume that Civil is going to take the lead in the defense of these cases, no? Is there a task force or lead person to whom I should refer the USAs? If we haven't already done so, it seems to me that we (the Department) should take the initiative to contact the USAs in the districts where states have sued to let them know what the process and lines of responsibility will be. My apologies if this has already been done. If it has, some USAs haven't gotten the word.

Michael

Kagan, Elena

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:19 PM
To: Kagan, Elena
Subject: FW: HCR litigation

This is what I told Tracy about health care

-----Original Message-----

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:04 PM
To: Schmalzer, Tracy
Subject: RE: HCR litigation

No, she never has been involved in any of it. I've run it for the Office, and have never discussed the issues with her one bit.

-----Original Message-----

From: Schmalzer, Tracy
Sent: Monday, May 17, 2010 1:03 PM
To: Katyal, Neal
Subject: HCR litigation

Has Elena been involved in any of that to the extent SG office was consulted? Know you've been point but expect I'll get this q.

Kagan, Elena

From: Kagan, Elena
Sent: Monday, May 17, 2010 1:20 PM
To: Katyal, Neal
Cc: Schmalzer, Tracy
Subject: Re: HCR litigation

This needs to be coordinated. Tracy, you should not say anything about this before talking to me.

----- Original Message -----

From: Katyal, Neal
To: Kagan, Elena
Sent: Mon May 17 13:18:45 2010
Subject: FW: HCR litigation

This is what I told Tracy about health care

-----Original Message-----

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:04 PM
To: Schmalzer, Tracy
Subject: RE: HCR litigation

No, she never has been involved in any of it. I've run it for the Office, and have never discussed the issues with her one bit.

-----Original Message-----

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Sent: Monday, May 17, 2010 1:03 PM
To: Katyal, Neal
Subject: HCR litigation

Has Elena been involved in any of that to the extent SG office was consulted? Know you've been point but expect I'll get this q.

Kagan, Elena
From: Kneedler, Edwin S
Sent: Monday, March 22, 2010 7:40 PM
To: Katyal, Neal; Kagan, Elena; Dreeben, Michael R; Stewart, Malcolm L
Subject: RE: 2 week report

I have no merits filings in the next two weeks.

Invitations:

1. Williamson: now that (b) (6) is finished with Asian Carp, he is turning back to this case and plans to get me the draft in the next few days.
2. Golden Gate: (b) (6) plans to turn to this after his argument. He has requested from DOL by early next week an insert for the brief identifying the provisions of the health care bill (as it will be reconciled) that are relevant to the preemption issue in this case.

From: Katyal, Neal
Sent: Monday, March 22, 2010 12:39 PM
To: Kagan, Elena; Dreeben, Michael R; Kneedler, Edwin S; Stewart, Malcolm L
Subject: RE: 2 week report

1. CVSGs

Candeleria -- I will receive from (b) (6) on March 29, and I will provide to you later that week after your argument.

Pfizer -- not looking good. (b) (5)
(b) (5) So I fear this one is still a ways off.

Carmichael (CVSG, political question, Iraqi contractor case) -- (b) (6) and I are holding meetings with the parties on March 29 at 2pm, that Ed may join. I think the issues aren't sufficiently crystallized for you to come to this one.

2. Merits

None

3. Other

Witt/DADT may present some issues. I will continue to monitor.

I will be away from tomorrow late in the afternoon through the weekend. Michael has graciously agreed to monitor my inbox, but I don't anticipate anything.

RE: 2 week report

Page 1 of 2

Kagan, Elena

From: Kagan, Elena
Sent: Monday, March 22, 2010 8:14 PM
To: Kneeder, Edwin S
Subject: Re: 2 week report

Thanks, Ed. And is (b) (5) on Golden Gate?

From: Kneeder, Edwin S
To: Katyal, Neal; Kagan, Elena; Dreeben, Michael R; Stewart, Malcolm L
Sent: Mon Mar 22 19:39:50 2010
Subject: RE: 2 week report

I have no merits filings in the next two weeks.

Invitations:

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Sent: Monday, March 22, 2010 12:39 PM
To: Kagan, Elena; Dreeben, Michael R; Kneeder, Edwin S; Stewart, Malcolm L
Subject: RE: 2 week report

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2. Merits

None

3. Other

6/24/2010

RE: 2 week report

Page 2 of 2

Witt/DADT may present some issues. I will continue to monitor.

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6/24/2010

RE: 2 week report

Page 1 of 2

Kagan, Elena

From: Kneedler, Edwin S
Sent: Monday, March 22, 2010 8:16 PM
To: Kagan, Elena
Subject: Re: 2 week report

I don't think so. Let me check.

From: Kagan, Elena
To: Kneedler, Edwin S
Sent: Mon Mar 22 20:13:37 2010
Subject: Re: 2 week report

Thanks, Ed. And is (b) (5) on Golden Gate?

From: Kneedler, Edwin S
To: Katyal, Neal; Kagan, Elena; Dreeben, Michael R; Stewart, Malcolm L
Sent: Mon Mar 22 19:39:50 2010
Subject: RE: 2 week report

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Invitations:

1. Williamson: now that (b) (6) is finished with Asian Carp, he is turning back to this case and plans to get me the draft in the next few days.
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Sent: Monday, March 22, 2010 12:39 PM
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Subject: RE: 2 week report

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6/24/2010

RE: 2 week report

Page 2 of 2

2. Merits

None

3. Other

Witt/DADT may present some issues. I will continue to monitor.

I will be away from tomorrow late in the afternoon through the weekend. Michael has graciously agreed to monitor my inbox, but I don't anticipate anything.

6/24/2010

From: Stewart, Malcolm L
Sent: Friday, June 19, 2009 10:26 AM
To: Kagan, Elena
Subject: FW: Cipro brief - DOJ comments on Request for comments on S. 369, the Preserve Access to Affordable Generics Act (Reverse Payments)

Importance: High

Attachments: Kohl S. 369 reply 061509.wpd; s. 369. Reverse Payments. Kohl. 6.10.2009.DOC; S. 369 Preserve Access to Generics.pdf; Kohl letter 04.21.09 Gen Drug DOJ.pdf; h.r. 1706. DOJ comments. 6.9.2009.DOC

Elena,

Here's the e-mail chain I received yesterday, which contains two versions of the letter. The first one you get to (the WordPerfect document is a more generic version, which (b) (5) (b) (5) The second one (the Word document right below the e-mail from (b) (6)) is the one that (b) (5) (b) (5) I'll ask Marisa how satisfied/unsatisfied they would be with a letter that expressed opposition to a per se rule but didn't identify a specific alternative, and I'll ask Cathy O'Sullivan to tell the agencies to focus on this immediately.

Malcolm

From: Chun, A Marisa
Sent: Thursday, June 18, 2009 6:47 PM
To: Stewart, Malcolm L
Subject: Cipro brief - DOJ comments on Request for comments on S. 369, the Preserve Access to Affordable Generics Act (Reverse Payments)
Importance: High

Malcolm, Thanks very much for your time on this and for offering to speak to the Solicitor General about this. Attached at the bottom are the Senate and House versions of bills which would make these 'reverse payments' settlements per se illegal, the letter from Sen. Kohl to the AG, and the original response prepared by OLA, before we spoke to you. After our initial conversation with you, (b) (5) (b) (5) I've also pasted below the latest communication this afternoon from Sen Leahy's folks inquiring when DOJ would be sending over our letter articulating our 'different view.' Thanks and look forward to hearing from you. Marisa



Kohl S. 369 reply
061509.wpd (...)

-----Original Message-----

From: Garland, James
Sent: Thursday, June 18, 2009 3:42 PM
To: Chun, A Marisa; Verrilli, Donald; Appelbaum, Judy; Kimmelman, Gene; Farhadian, Tali
CC: Potter, Robert; Temple Claggett, Karyn; Hauck, Brian
Subject: RE: Kohl Response - Input from ATR appellate

Good plan, Marisa, thanks.

I spoke again this morning to Leahy's antitrust counsel. He called to ask whether the Committee should expect to hear from DOJ on the proposed bill.

(b) (5)

He also said that there is a desire not to let this bill get swept up into the broader healthcare legislation effort, which is why they're pushing to mark it up this Thursday.

I said that we were still considering our position over here, (b) (5)

(b) (5)

and asked when they needed to hear from us. He said as soon as possible, but that early next week (Monday/Tuesday) would be okay. I asked

(b) (5)

I noted that we had not been formally asked by Senator Kohl to provide our views; he suggested that we could still send a letter to the Committee leadership (although the Chairman would not formally request such a letter, insofar as that would be perceived by Senator Kohl as an effort to sabotage the bill).

Please let me know if there's anything we can do to help move this along. Thanks.

From: (b)(6)
Sent: Thursday, June 11, 2009 10:57 AM
To: Chun, A Marisa; Hauck, Brian; Hirsch, Sam; Verrilli, Donald; Burrows, Charlotte
Subject: FOR FINAL APPROVAL -- DOJ comments on Request for comments on S. 369, the Preserve Access to Affordable Generics Act (Reverse Payments)
Importance: High

Attached is a draft letter comprised of comments received from ATR on S. 369. Senator Kohl has requested DOJ's views on S. 369. (see attached). These comments are similar to ones submitted to OMB on H.R. 1706 (also attached). Please let me know if the letter can be sent to OMB for approval to send to the Hill.



s. 369. Reverse Payments. Kohl...



S. 369 Preserve Access to Gene...



Kohl letter 04.21.09 Gen Drug ...



h.r. 1706. DOJ comments. 6.9.2...

pages 20 through 25
have been withheld in full
pursuant to (b)(5)

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
STEPHANIE A. MIDDLETON, *Republican Staff Director*
NICHOLAS A. ROSSI, *Republican Chief Counsel*

April 21, 2009

The Honorable Eric Holder
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Holder:

On April 6, 2009, the Court of Appeals for the Second Circuit invited the Justice Department, through the Solicitor General, to address whether certain patent settlements involving generic drugs violate the antitrust law. I am writing to request that the Justice Department respond by advising the Court that these settlements are contrary to antitrust law.

As you may know, I have introduced legislation to ban payments from brand name drug companies to generic drug companies to settle patent cases which are designed to delay the entry of generic drug competition (what are commonly known as "reverse payments"), the Preserve Access of Affordable Generics Act, S. 369. The President has made clear that these types of patent settlements are anti-competitive, declaring in his proposed budget that "[t]he administration will prevent drug companies from blocking generic drugs from consumers by prohibiting anticompetitive agreements and collusion between brand name and generic drug manufacturers intended to keep generic drugs off the market." Office of Management and Budget, *A New Era of Responsibility: Renewing America's Promise*, at 28.

Reverse payments in patent settlements significantly delay the entry of generic competition to brand name drugs and cost consumers and taxpayers billions of dollars. Generic drugs save consumers between \$ 8 and \$ 10 billion each year. In 2007, the average retail price of a generic prescription drug was \$ 34.34, while the average retail price of a brand name drug was \$ 119.51.¹ Under the Hatch-Waxman Act, Congress encouraged the entry of generic pharmaceuticals by providing an incentive – a 180 day exclusivity period – for generic drug makers to successfully challenge a patent and enter the market prior to expiration of the patent.

Until recently this system worked well to promote entry by generic drug competition. In 2002, the FTC reported that generic drug companies prevailed in more

¹ Generic Pharmaceutical Association, *Facts at a Glance*, available at <http://www.gphaonline.org/about-gpha/about-generic-facts>.

than 73% of pharmaceutical patent cases litigated to conclusion.² However, in recent years pharmaceutical manufacturers began to offer settle patent cases brought by generic firms by making large cash payments -- sometimes valued at hundreds of millions of dollars -- in exchange for a promise to keep the competing generic drugs off the market for many years. The Federal Trade Commission has sought to pursue legal actions against such settlements, contending they are contrary to antitrust law.

However, two court of appeals decisions in 2005 and 2006 (the Eleventh Circuit in Schering-Plough v. FTC, 403 F.3d 1056 (11th Cir. 2005) and the Second Circuit in In Re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187 (2d Cir. 2006)) rejected the FTC's claims that these reverse payment patent settlement violated antitrust law. The effect of these court decisions has been stark. In the two years after these two decisions, the FTC has found, half of all patent settlements involved payments from the brand name from the generic manufacturer in return for an agreement by the generic to keep its drug off the market. In the year before these decisions, not a single patent settlement reported to the FTC contained such an agreement.

These reverse payment patent settlements are anti-competitive and should be banned, and that is why I have introduced legislation to expressly state these settlements violate antitrust law. The Second Circuit Court of Appeals is now considering a case involving the settlement of patent litigation involving generic drugs, In re Ciprofloxacin Hydrochloride Antitrust Litigation. As recited in the April 6, 2009 letter from Catherine O'Hagan Wolfe, Clerk, U.S. Court of Appeals for the Second Circuit, the case involves a patent settlement in which the "generic manufacturers conceded the validity of Bayer's Cipro patent in exchange for \$ 49.1 million, and either (1) a license to manufacture Cipro or (2) quarterly payments of between \$ 12.5 and 17.125 million for the duration of the patent except for the last 6 months, and finally, a guaranteed license for six months prior to the Cipro patent's expiration."

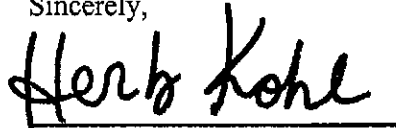
The Second Circuit specifically requests "the Executive Branch to address . . . whether settlement of patent infringement lawsuits violate the federal antitrust laws when a potential generic drug manufacturer withdraws its challenge to the patent's validity, which if successful would allow it to market a generic version of a drug, and the brand-name patent holder, in return, offers the generic manufacturer substantial payments." I urge the Justice Department to answer this inquiry by stating that these settlements -- settlements that directly eliminate competition and which cost consumers billions of dollars -- do violate the federal antitrust laws. They are simply agreements between competitors in which one competitor agrees to delay entry into a market in exchange for a payment. As such, they should be viewed as per se violations of antitrust law. Such an answer is essential to advance the President's agenda, to protect consumers, and to vindicate the Justice Department's mission in preventing harm to competition.³

² See Federal Trade Commission, "Generic Drug Entry Prior to Patent Expiration: An FTC Study," at 16 (July 2002).

³ In making this recommendation, I express no opinion regarding the facts underlying this litigation nor the outcome of the litigation. I write only regarding the legal issue about which the Second Circuit requested the Justice Department's views.

Thank you for your attention to this matter.

Sincerely,

Handwritten signature of Herb Kohl in black ink, written in a cursive style.

HERB KOHL

Chairman, Subcommittee on Antitrust,
Competition Policy, and Consumer
Rights

cc: Hon. Elena Kagan, Solicitor General
Hon. Christine Varney, Assistant Attorney General, Antitrust Division

111TH CONGRESS
1ST SESSION

S. 369

To prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3, 2009

Mr. KOHL (for himself, Mr. GRASSLEY, Mr. FEINGOLD, Mr. DURBIN, and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Preserve Access to Af-
5 fordable Generics Act”.

6 **SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF**
7 **PURPOSES.**

8 (a) **FINDINGS.**—The Congress finds that—

1 (1) prescription drugs make up 10 percent of
2 the national health care spending but for the past
3 decade have been one of the fastest growing seg-
4 ments of health care expenditures;

5 (2) 67 percent of all prescriptions dispensed in
6 the United States are generic drugs, yet they ac-
7 count for only 20 percent of all expenditures;

8 (3) generic drugs, on average, cost 30 to 80
9 percent less than their brand-name counterparts;

10 (4) consumers and the health care system
11 would benefit from free and open competition in the
12 pharmaceutical market and the removal of obstacles
13 to the introduction of generic drugs;

14 (5) full and free competition in the pharma-
15 ceutical industry, and the full enforcement of anti-
16 trust law to prevent anticompetitive practices in this
17 industry, will lead to lower prices, greater innova-
18 tion, and inure to the general benefit of consumers;

19 (6) the Federal Trade Commission has deter-
20 mined that some brand name pharmaceutical manu-
21 facturers collude with generic drug manufacturers to
22 delay the marketing of competing, low-cost, generic
23 drugs;

24 (7) collusion by pharmaceutical manufacturers
25 is contrary to free competition, to the interests of

1 consumers, and to the principles underlying anti-
2 trust law;

3 (8) in 2005, two appellate court decisions re-
4 versed the Federal Trade Commission's long-stand-
5 ing position, and upheld settlements that include
6 pay-offs by brand name pharmaceutical manufactur-
7 ers to generic manufacturers designed to keep ge-
8 neric competition off the market;

9 (9) in the 6 months following the March 2005
10 court decisions, the Federal Trade Commission
11 found there were three settlement agreements in
12 which the generic received compensation and agreed
13 to a restriction on its ability to market the product;

14 (10) the FTC found that $\frac{1}{2}$ of the settlements
15 made in 2006 and 2007 between brand name and
16 generic companies, and over $\frac{2}{3}$ of the settlements
17 with generic companies with exclusivity rights that
18 blocked other generic drug applicants, included a
19 pay-off from the brand name manufacturer in ex-
20 change for a promise from the generic company to
21 delay entry into the market; and

22 (11) settlements which include a payment from
23 a brand name manufacturer to a generic manufac-
24 turer to delay entry by generic drugs are anti-com-
25 petitive and contrary to the interests of consumers.

1 (b) PURPOSES.—The purposes of this Act are—

2 (1) to enhance competition in the pharma-
3 ceutical market by prohibiting anticompetitive agree-
4 ments and collusion between brand name and ge-
5 neric drug manufacturers intended to keep generic
6 drugs off the market;

7 (2) to support the purpose and intent of anti-
8 trust law by prohibiting anticompetitive agreements
9 and collusion in the pharmaceutical industry; and

10 (3) to clarify the law to prohibit payments from
11 brand name to generic drug manufacturers with the
12 purpose to prevent or delay the entry of competition
13 from generic drugs.

14 **SEC. 3. UNLAWFUL COMPENSATION FOR DELAY.**

15 (a) IN GENERAL.—The Clayton Act (15 U.S.C. 12
16 et seq.) is amended by inserting after section 28 the fol-
17 lowing:

18 **“SEC. 29. UNLAWFUL INTERFERENCE WITH GENERIC MAR-**
19 **KETING.**

20 “(a) It shall be unlawful under this Act for any per-
21 son, in connection with the sale of a drug product, to di-
22 rectly or indirectly be a party to any agreement resolving
23 or settling a patent infringement claim in which—

24 “(1) an ANDA filer receives anything of value;
25 and

1 “(2) the ANDA filer agrees not to research, de-
2 velop, manufacture, market, or sell the ANDA prod-
3 uct for any period of time.

4 “(b) Nothing in this section shall prohibit a resolu-
5 tion or settlement of patent infringement claim in which
6 the value paid by the NDA holder to the ANDA filer as
7 a part of the resolution or settlement of the patent in-
8 fringement claim includes no more than the right to mar-
9 ket the ANDA product prior to the expiration of the pat-
10 ent that is the basis for the patent infringement claim.

11 “(c) In this section:

12 “(1) The term ‘agreement’ means anything that
13 would constitute an agreement under section 1 of
14 the Sherman Act (15 U.S.C. 1) or section 5 of the
15 Federal Trade Commission Act (15 U.S.C. 45).

16 “(2) The term ‘agreement resolving or settling
17 a patent infringement claim’ includes, any agree-
18 ment that is contingent upon, provides a contingent
19 condition for, or is otherwise related to the resolu-
20 tion or settlement of the claim.

21 “(3) The term ‘ANDA’ means an abbreviated
22 new drug application, as defined under section
23 505(j) of the Federal Food, Drug, and Cosmetic Act
24 (21 U.S.C. 355(j)).

1 “(4) The term ‘ANDA filer’ means a party who
2 has filed an ANDA with the Food and Drug Admin-
3 istration.

4 “(5) The term ‘ANDA product’ means the
5 product to be manufactured under the ANDA that
6 is the subject of the patent infringement claim.

7 “(6) The term ‘drug product’ means a finished
8 dosage form (e.g., tablet, capsule, or solution) that
9 contains a drug substance, generally, but not nec-
10 essarily, in association with one or more other ingre-
11 dients, as defined in section 314.3(b) of title 21,
12 Code of Federal Regulations.

13 “(7) The term ‘NDA’ means a new drug appli-
14 cation, as defined under section 505(b) of the Fed-
15 eral Food, Drug, and Cosmetic Act (21 U.S.C.
16 355(b)).

17 “(8) The term ‘NDA holder’ means—

18 “(A) the party that received FDA approval
19 to market a drug product pursuant to an NDA;

20 “(B) a party owning or controlling enforce-
21 ment of the patent listed in the Approved Drug
22 Products With Therapeutic Equivalence Eval-
23 uations (commonly known as the ‘FDA Orange
24 Book’) in connection with the NDA; or

1 “(C) the predecessors, subsidiaries, divi-
2 sions, groups, and affiliates controlled by, con-
3 trolling, or under common control with any of
4 the entities described in subclauses (i) and (ii)
5 (such control to be presumed by direct or indi-
6 rect share ownership of 50 percent or greater),
7 as well as the licensees, licensors, successors,
8 and assigns of each of the entities.

9 “(9) The term ‘patent infringement’ means in-
10 fringement of any patent or of any filed patent ap-
11 plication, extension, reissue, renewal, division, con-
12 tinuation, continuation in part, reexamination, pat-
13 ent term restoration, patents of addition and exten-
14 sions thereof.

15 “(10) The term ‘patent infringement claim’
16 means any allegation made to an ANDA filer,
17 whether or not included in a complaint filed with a
18 court of law, that its ANDA or ANDA product may
19 infringe any patent held by, or exclusively licensed
20 to, the NDA holder of the drug product.”.

21 (b) REGULATIONS.—The Federal Trade Commission
22 may, by rule promulgated under section 553 of title 5,
23 United States Code, exempt certain agreements described
24 in section 29 of the Clayton Act, as added by subsection
25 (a), if the Commission finds such agreements to be in fur-

1 therance of market competition and for the benefit of con-
 2 sumers. Consistent with the authority of the Commission,
 3 such rules may include interpretive rules and general
 4 statements of policy with respect to the practices prohib-
 5 ited under section 29 of the Clayton Act.

6 **SEC. 4. NOTICE AND CERTIFICATION OF AGREEMENTS.**

7 (a) NOTICE OF ALL AGREEMENTS.—Section
 8 1112(c)(2) of the Medicare Prescription Drug, Improve-
 9 ment, and Modernization Act of 2003 (21 U.S.C. 3155
 10 note) is amended by—

11 (1) striking “the Commission the” and insert-
 12 ing “the Commission (1) the”; and

13 (2) inserting before the period at the end the
 14 following: “; and (2) a description of the subject
 15 matter of any other agreement the parties enter into
 16 within 30 days of an entering into an agreement
 17 covered by subsection (a) or (b)”.

18 (b) CERTIFICATION OF AGREEMENTS.—Section 1112
 19 of such Act is amended by adding at the end the following:

20 “(d) CERTIFICATION.—The Chief Executive Officer
 21 or the company official responsible for negotiating any
 22 agreement required to be filed under subsection (a), (b),
 23 or (c) shall execute and file with the Assistant Attorney
 24 General and the Commission a certification as follows: ‘I
 25 declare under penalty of perjury that the following is true

1 and correct: The materials filed with the Federal Trade
2 Commission and the Department of Justice under section
3 1112 of subtitle B of title XI of the Medicare Prescription
4 Drug, Improvement, and Modernization Act of 2003, with
5 respect to the agreement referenced in this certification:
6 (1) represent the complete, final, and exclusive agreement
7 between the parties; (2) include any ancillary agreements
8 that are contingent upon, provide a contingent condition
9 for, or are otherwise related to, the referenced agreement;
10 and (3) include written descriptions of any oral agree-
11 ments, representations, commitments, or promises be-
12 tween the parties that are responsive to subsection (a) or
13 (b) of such section 1112 and have not been reduced to
14 writing.’.’.

15 **SEC. 5. FORFEITURE OF 180-DAY EXCLUSIVITY PERIOD.**

16 Section 505 of the Federal Food, Drug and Cosmetic
17 Act (21 U.S.C. 355(j)(5)(D)(i)(V)) is amended by insert-
18 ing “section 29 of the Clayton Act or” after “that the
19 agreement has violated”.

○

4

pages 38 through 39
have been withheld in full
pursuant to (b)(5)

May 13, 2010

MEMORANDUM FOR THE SOLICITOR GENERAL

FROM NEAL KATYAL

RE: CURRENT CASES THAT YOU HAVE WORKED ON

The below contains a list of cases in which we feel that you have substantially participated. It is organized by Deputy. We have not done an exhaustive search, so this should not be used as the basis for deciding recusals, should you be confirmed. It is simply a document that you may use to guide your decisions about which cases to participate in pending your nomination.

I. ED

A. CVSGs:

Holy See Elena chaired meetings with counsel for both sides.

Golden Gate Ed discussed with Elena several times (b) (5)

B. Merits briefs:

NASA v. Nelson our merits brief is now due May 20. Elena's name is on the petition, and has been heavily involved in that case.

Montana v. Wyoming the recommendation OSG has received from ENRD (b) (5)

hat recommendation has not been submitted to Elena. Such a brief would not be due until late June or early July. She has been substantively involved in the case.

Bruesewitz an amicus brief supporting respondents would be due July 30. We filed a CVSG last fall in a related case taking the position that supports the respondent's position in Bruesewitz, and we told the Court to grant in Bruesewitz. Elena's name was on that brief.

U.S. v. Tohono O'Odham Nation. Our brief is due in late June. Elena's name is on the petition in that case.

C. Recommendations:

OPEC (CA5 invited the U.S. to file on act of state and political question in this antitrust case against corporations owned or controlled by OPEC members) Civil is seeking a 30-day extension. Ed discussed the case with Elena last summer when the defendants were urging the U.S. to file uninvited.

II. Michael

A. CVSGs. None.

B. Merits Briefs.

Michael has no merits matters due until July and only one merits case in July.

Abbott and Gould (due July 15). Elena has not worked on this case, but she did work on the petition in U.S. v. Williams on the same issue.

C. Oppositions

Lance and Dotson (child pornography case). Separately discussed. Neal will handle.

D. Recommendations

Broadcom (U.S. v. Nicholas and Samuelli). Michael discussed it in some depth with Elena, but she neither attended meetings or read paper on it. (b) (6) did call her about the case, on behalf of Samuelli.

E. Tobacco

1. Our cert reply is due approximately June 4. You worked heavily on it.
2. We have to file opps from the industry petitions around May 25. Due to the relationship with our cert petition, it might fall into the category of cases in which you have worked. The issue on which we filed a petition has to do with remedy for a RICO violation by the tobacco industry. The industry cert petitions all deal with liability in the first instance with only a sliver of attention to remedy, and they range over a wide array of complex first amendment, RICO, extraterritoriality, and procedural questions on which she's not had reason or occasion to focus. (Some of them were discussed at our meeting with the tobacco lawyers and summarized in the cert memos, so they are not entirely new.) To the extent that remedy is at issue in the industry petitions, it has to do with the form of the injunction and the interaction with the new tobacco legislation. The first of those is not addressed in any way in our cert. petition and the second only in a brief footnote.

III. Malcolm

A. CVSGs. None. All are ones in which Elena hasn't had substantial involvement.

B. Merits Briefs. None.

C. Oppositions

Henderson v. United States, No. 09-1036, which is due on May 28. Elena previously chaired a meeting in which petitioner's counsel (b) (6) urged us to acquiesce.

D. Appeals

In Re Ciprofloxacin Hydrochloride Antitrust Litigation, Nos. 05-2852, 05-2852 (2d Cir.). Elena will handle this.

Republican National Committee v. FEC, No. 09-1287. Our response to the RNC's jurisdictional statement is due May 24. Malcolm briefly explained to Elena what the case is about, but has had no meaningful substantive discussions of the merits. However, the RNC filed a motion that pertained solely to the timing of the Court's consideration of the case, and Elena decided that we would not oppose the motion (basically we agreed that we would not seek an extension of the time to file our response to the J.S.). So in that case, Elena has actually made a decision, even though the decision went solely to the position we would take on the opposing party's timing-related motion.

IV. Neal

A. CVSGs.

Candeleria v. Chamber of Commerce. Very heavy participation by Elena.

Pfizer v. Abdullah (Alien tort statute, Nigeria). Elena chaired meetings with both sides and has been involved in some issues with the State Department.

Carmichael (injury to servicemember in Iraq, political question doctrine, contractor liability). Elena has been informed about aspects of the case.

Thompson v. North American Stainless (Title 7 retaliation against fiancé). Elena has been involved and chaired a decisional meeting.

B. No merits briefs, opps, or appeals in which Elena has been substantially involved.

Katyal, Neal (SMO)

From: (b) (6)
Sent: Thursday, May 13, 2010 7:41 PM
To: Katyal, Neal
Subject: RE: document
Attachments: CURRENT CASES OF SG.wpd

Neal:

Attached is your memo to the SG.

From: Katyal, Neal
Sent: Thursday, May 13, 2010 7:13 PM
To: (b) (6)
Subject: document



U.S. Department of Justice

Office of the Solicitor General

Principal Deputy Solicitor General

Washington, D.C. 20530

May 13, 2010

MEMORANDUM FOR THE SOLICITOR GENERAL

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II. **Michael**

A. CVSGs: None.

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Michael has no merits matters due until July and only one merits case in July,

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C. Oppositions:

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Thompson v. North American Stainless (Title 7 retaliation against fiancé). Elena has

4

been involved and chaired a decisional meeting.

B. No merits briefs, opps, or appeals in which Elena has been substantially involved.

(b) (6)

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:24 PM
To: Kagan, Elena
Subject: RE: HCR litigation

Got it. I have been receiving a plethora of inquiries, from Tracy, Ali, Kravis, etc. about a whole variety of things like the below for several days now. Most of them aren't that sensitive so I don't pass them on to you. I am very happy to just stay out of this and have you field these inquiries if you'd like. Just let me know.

Also, I'd like to discuss Witt with you when you have a moment. I'm at (b) (2); (b) (6)

Neal

-----Original Message-----

From: Kagan, Elena
Sent: Monday, May 17, 2010 1:20 PM
To: Katyal, Neal
Cc: Schmalzer, Tracy
Subject: Re: HCR litigation

This needs to be coordinated. Tracy, you should not say anything about this before talking to me.

----- Original Message -----

From: Katyal, Neal
To: Kagan, Elena
Sent: Mon May 17 13:18:45 2010
Subject: FW: HCR litigation

This is what I told Tracy about health care

-----Original Message-----

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:04 PM
To: Schmalzer, Tracy
Subject: RE: HCR litigation

No, she never has been involved in any of it. I've run it for the Office, and have never discussed the issues with her one bit.

-----Original Message-----

From: Schmalzer, Tracy
Sent: Monday, May 17, 2010 1:03 PM
To: Katyal, Neal
Subject: HCR litigation

Has Elena been involved in any of that to the extent SG office was consulted? Know you've been point but expect I'll get this q.

(b) (6)

From: Schmaler, Tracy
Sent: Monday, May 17, 2010 2:27 PM
To: Kagan, Elena; Katyal, Neal
Subject: RE: HCR litigation

Sure - no one has asked yet ... Just expecting it.

-----Original Message-----

From: Kagan, Elena
Sent: Monday, May 17, 2010 1:20 PM
To: Katyal, Neal
Cc: Schmaler, Tracy
Subject: Re: HCR litigation

This needs to be coordinated. Tracy, you should not say anything about this before talking to me.

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Sent: Monday, May 17, 2010 1:03 PM
To: Katyal, Neal
Subject: HCR litigation

Has Elena been involved in any of that to the extent SG office was consulted? Know you've been point but expect I'll get this q.

(b) (6)

From: Katyal, Neal
Sent: Tuesday, June 15, 2010 12:54 PM
To: Kagan, Elena
Subject: Fw: connecting you two

Fyi.

Also AG just told me that he expects a big story coming out shortly about whether you are recused in health care litigation. I went over the timing and that you have been walled off from Day One.

(b) (5)

Not responsive

(b) (5)

Not responsive

(b) (6)

From: Kagan, Elena
Sent: Tuesday, June 15, 2010 1:33 PM
To: (b) (2); (b) (6)
Subject: Fw: connecting you two

Fyi

From: Katyal, Neal
To: Kagan, Elena
Sent: Tue Jun 15 12:54:17 2010
Subject: Fw: connecting you two

Fyi.

Also AG just told me that he expects a big story coming out shortly about whether you are recused in health care litigation. I went over the timing and that you have been walled off from Day One.

(b) (5)

Not responsive

(b) (5)

Not responsive

Kagan, Elena

From: Katyal, Neal
Sent: Tuesday, May 11, 2010 7:38 PM
To: Kagan, Elena
Subject: Recusals (not urgent)

Dan M called me to talk further about this [REDACTED] (b)(5); not responsive

I raised 2 issues:

- 1) There are a bunch of items in the Office where you have had minimal involvement, such as a Deputy telling you something about a case, such as an agency position on the case, or perhaps even just a brief description of the Question Presented or a description of the lower court opinion. There are several such CVSGs. Does that constitute new or old work? I think this is a matter just for you to decide. My recommendation (gulp) is that it constitutes new work and that I should do it as Acting.
- 2) More important: I raised with Dan the issue of whether time constraints would be the basis for recusal and how it would work. For example, the opp certs do not currently take much (if any) of your time, with Arar-like opps being the exception. If the basis for recusal is time commitments, there might be someone who says those opps don't take much time. On the other hand, any of the opps could trigger your recusal should the Court grant a case, and you might be asked about any of the opps that our office is signing over the next few months. So I think it worth thinking through this issue some more. My recommendation -- but I am no expert -- would be that you treat all opps as new work and recuse, but that there be two different reasons for the recusal, not simply time constraints but also the need, should you be confirmed, to participate in as many cases at the Court as possible/presumption against recusal, etc.

Neal

6/24/2010

Kagan, Elena

From: Kagan, Elena
Sent: Tuesday, May 11, 2010 10:03 PM
To: Katyal, Neal
Subject: Re: Recusals (not urgent)

Thanks, Neal. I agree on the first question. As to the second, I think the basic time rationale is right -- I don't think we should do case by case analysis of what will and won't require real time.

From: Katyal, Neal
To: Kagan, Elena
Sent: Tue May 11 19:37:40 2010
Subject: Recusals (not urgent)

Dan M called me to talk further about this.

(b)(5); not responsive

I raised 2 issues:

- 1) There are a bunch of items in the Office where you have had minimal involvement, such as a Deputy telling you something about a case, such as an agency position on the case, or perhaps even just a brief description of the Question Presented or a description of the lower court opinion. There are several such CVSGs. Does that constitute new or old work? I think this is a matter just for you to decide. My recommendation (gulp) is that it constitutes new work and that I should do it as Acting.
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Neal

6/24/2010

Kagan, Elena

From: Katyal, Neal
Sent: Tuesday, May 11, 2010 10:15 PM
To: Kagan, Elena
Subject: Re: Recusals (not urgent)

Agreed with you on 2. But do you want all opps now converted over to me as acting? Sorry to belabor this, just want to be clear.

N

From: Kagan, Elena
To: Katyal, Neal
Sent: Tue May 11 22:02:56 2010
Subject: Re: Recusals (not urgent)

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Neal

6/24/2010

Kagan, Elena

From: Kagan, Elena
Sent: Tuesday, May 11, 2010 10:16 PM
To: Katyal, Neal
Subject: Re: Recusals (not urgent)

Yes (sorry!)

From: Katyal, Neal
To: Kagan, Elena
Sent: Tue May 11 22:14:52 2010
Subject: Re: Recusals (not urgent)

Agreed with you on 2. But do you want all opps now converted over to me as acting? Sorry to belabor this, just want to be clear.

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Neal

6/24/2010

Kagan, Elena

From: Knéedler, Edwin S
Sent: Friday, April 02, 2010 1:33 PM
To: Kagan, Elena
Subject: RE: Cvsgs

I received the draft from (b) (6) in Williamson this morning. I haven't started looking at it yet, but I will plan on getting it to you next week.

(b) (6) said he thought he could get the draft in Golden Gate to me by early the week after next.

(b) (5)

-----Original Message-----

From: Kagan, Elena
Sent: Friday, April 02, 2010 8:03 AM
To: Knéedler, Edwin S
Subject: Cvsgs

Ed -- could you give me time of arrival on (b) (6) and (b) (6)? Thanks. Elena

Kagan, Elena

From: Kagan, Elena
Sent: Friday, April 02, 2010 1:45 PM
To: Kneeder, Edwin S
Subject: Re: Cvsgs

Ok, let me know

----- Original Message -----

From: Kneeder, Edwin S
To: Kagan, Elena
Sent: Fri Apr 02 13:32:40 2010
Subject: RE: Cvsgs

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To: Kneeder, Edwin S
Subject: Cvsgs

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Katyal, Neal (SMO)

From: Katyal, Neal
Sent: Friday, January 08, 2010 10:57 AM
To: Hauck, Brian
Subject: RE: Health Care Defense

Absolutely right on. Let's crush them. I'll speak with Elena and designate someone.

From: Hauck, Brian
Sent: Friday, January 08, 2010 10:54 AM
To: Katyal, Neal
Subject: Health Care Defense

Hi Neal -- Tom wants to put together a group to get thinking about how to defend against inevitable challenges to the health care proposals that are pending, and hoped that OSG could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can.

Thanks,
Brian

Katyal, Neal (SMO)

From: Katyal, Neal
Sent: Friday, January 08, 2010 1:05 PM
To: Hauck, Brian; (b) (6) SMO
Subject: RE: Health Care Defense

Brian, Elena would definitely like OSG to be involved in this set of issues. I will handle this myself, along with an Assistant from my office, (b) (6) and we will bring Elena in as needed.

I am out of town from Jan 12-15 though, so if we could do it the following week it'd be ideal. If so, I can do almost anytime from Jan 19-21, except 10-1115 on the 19th, and 1030-1230 on the 20th, which is when our office is in arguments at the Court.

N

From: Hauck, Brian
Sent: Friday, January 08, 2010 10:54 AM
To: Katyal, Neal
Subject: Health Care Defense

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Thanks,
Brian

Katyal, Neal (SMO)

From: Kneedler, Edwin S
Sent: Tuesday, May 11, 2010 1:28 PM
To: Katyal, Neal
Subject: RE: CVSGs

I don't think she has had any involvement at all in the Commonwealth of Virginia case, in which she now has a draft. She also has had no involvement that I know of in the Providence Hospital case in which I have a draft from (b) (6) or in the Amara ERISA invitation, in which we have just received a draft from Labor.

The Golden Gate case presents special considerations because of the possible nexus to the Health Care bill. I think I did have some minimal discussions with her about that case.

From: Katyal, Neal
Sent: Tuesday, May 11, 2010 1:23 PM
To: Kneedler, Edwin S; Stewart, Malcolm L
Subject: CVSGs

As I understand it, Elena is going to recuse from all new cases. Are there any CVSGs you have due by cutoff in which she has not participated at all (either in meetings, phone calls, discussions with you, etc.)? She has participated in all of mine, what about yours?

Neal

Katyal, Neal (SMO)

From: Katyal, Neal
Sent: Tuesday, May 11, 2010 1:29 PM
To: Kneeder, Edwin S
Subject: RE: CVSGs

Thanks so much. That is the full range of your cvsgs due by cutoff? 4?

From: Kneeder, Edwin S
Sent: Tuesday, May 11, 2010 1:28 PM
To: Katyal, Neal
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Neal

Katyal, Neal (SMO)

From: Kneedler, Edwin S
Sent: Tuesday, May 11, 2010 1:30 PM
To: Katyal, Neal
Subject: RE: CVSGs

I have one more – Holy See – in which Elena chaired a meeting with counsel for each side. I have (b) (6)s draft in that case.

From: Katyal, Neal
Sent: Tuesday, May 11, 2010 1:29 PM
To: Kneedler, Edwin S
Subject: RE: CVSGs

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Neal

Katyal, Neal (SMO)

From: Kneedler, Edwin S
Sent: Wednesday, May 12, 2010 6:31 PM
To: Katyal, Neal
Subject: RE: Elena's name on briefs, opps, appeal recs

CVSGs:

Holy See -- Elena chaired meetings with counsel for both sides.

Commonwealth of Virginia, Providence Hospital, and the consolidated Amara and Cigna cases -- Elena has had no substantive involvement in, as far as I know.

Golden Gate -- I discussed with Elena several times [REDACTED] (b) (5) [REDACTED] Especially now that health care has passed, she may not want to be involved in that brief.

Merits briefs:

NASA v. Nelson -- our merits brief is now due May 20. Elena's name is on the petition, so she obviously has been heavily involved in that case.

Montana v. Wyoming -- the recommendation OSG has received from ENRD [REDACTED] (b) (5) [REDACTED] That recommendation has not been submitted to Elena. Such a brief would not be due until late June or early July. She has been substantively involved in the case.

Bruesewitz -- an amicus brief supporting respondents would be due July 30. We filed a CVSG last fall in a related case taking the position that supports the respondent's position in Bruesewitz, and we told the Court to grant in Bruesewitz. Elena's name was on that brief.

U.S. v. Tohono O'Odham Nation. Our brief is due in late June. Elena's name is on the petition in that case.

Kasten -- an amicus brief supporting petitioner would be due June 24. Elena has no been involved in that case.

Flores-Villar -- the government's brief as respondent is due in Late August. Elena has not been involved in that.

Recommendations:

OPEC -- (CA5 invited the U.S. to file on act of state and political question in this antitrust case against corporations owned or controlled by OPEC members) Civil is seeking a 30-day extension. I think I discussed the case with Elena last summer when the defendants were urging the U.S. to file uninvited.

From: Katyal, Neal
Sent: Wednesday, May 12, 2010 5:33 PM
To: Dreeben, Michael R; Kneedler, Edwin S
Subject: FW: Elena's name on briefs, opps, appeal recs

I really need your list shortly. This is important.

From: Katyal, Neal

Sent: Wednesday, May 12, 2010 9:53 AM

To: Kneeder, Edwin S; Stewart, Malcolm L; Dreeben, Michael R; [REDACTED] (b) (6)

Subject: Elena's name on briefs, opps, appeal recs

From now on, until the outcome of her pending confirmation hearing, Elena will not be participating in new cases. All opps, appeal recs, etc., will not have her name on them, and [REDACTED] (b) (5) we should use my name as Acting SG.

There is a small universe of cases in which Elena has substantially participated already (this includes CVSGs where she chaired meetings, etc.). As to those cases, she very well may sign the briefs. With this email, I'd ask each Deputy sometime today to send me a full list of cases that you think fall into that category. Exclude matters in which you have had short conversations with her. This isn't a list regarding her recusals at the Supreme Court should she be confirmed; rather it is a list for her so that she knows what cases she might be signing briefs in.

Thanks,

Neal

Katyal, Neal (SMO)

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:05 PM
To: Katyal, Neal; Schmalzer, Tracy
Subject: RE: HCR litigation

Hcr is health care reform, right? If so, then my previous answer stands

-----Original Message-----

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:04 PM
To: Schmalzer, Tracy
Subject: RE: HCR litigation

No, she never has been involved in any of it. I've run it for the Office, and have never discussed the issues with her one bit.

-----Original Message-----

From: Schmalzer, Tracy
Sent: Monday, May 17, 2010 1:03 PM
To: Katyal, Neal
Subject: HCR litigation

Has Elena been involved in any of that to the extent SG office was consulted? Know you've been point but expect I'll get this q.

Katyal, Neal (SMO)

From: Schmalzer, Tracy
Sent: Monday, May 17, 2010 1:11 PM
To: Katyal, Neal
Subject: RE: HCR litigation

Yes - thanks.

-----Original Message-----

From: Katyal, Neal
Sent: Monday, May 17, 2010 1:05 PM
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Katyal, Neal (SMO)

From: Hauck, Brian
Sent: Friday, January 08, 2010 1:25 PM
To: Katyal, Neal (b) (6) (SMO)
Subject: RE: Health Care Defense

Great. We may end up having to go ahead with the meeting next week without you, but it will be more of a table-setting meeting -- so worst case is that (b)(6) or we catch you up as work gets moving.

From: Katyal, Neal
Sent: Friday, January 08, 2010 1:05 PM
To: Hauck, Brian (b) (6) (SMO)
Subject: RE: Health Care Defense

Brian, Elena would definitely like OSG to be involved in this set of issues. I will handle this myself, along with an Assistant from my office, (b) (6) and we will bring Elena in as needed.

I am out of town from Jan 12-15 though, so if we could do it the following week it'd be ideal. If so, I can do almost anytime from Jan 19-21, except 10-1115 on the 19th, and 1030-1230 on the 20th, which is when our office is in arguments at the Court.

N

From: Hauck, Brian
Sent: Friday, January 08, 2010 10:54 AM
To: Katyal, Neal
Subject: Health Care Defense

Hi Neal -- Tom wants to put together a group to get thinking about how to defend against inevitable challenges to the health care proposals that are pending, and hoped that OSG could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can.

Thanks,
Brian

Katyal, Neal (SMO)

From: (b) (6) (SMO)
Sent: Wednesday, January 13, 2010 7:11 PM
To: Katyal, Neal
Subject: RE: Health Care Defense

I attended the meeting today - Tom P. led it, and there were folks from Civil, OLC, and Antitrust. The basic plan is to do some anticipatory thinking about claims that will be asserted and how we will defend against them. It turns out that Civil has already started this, and hopes to produce some model briefs or memos. The big areas of possible litigation are (b) (6)

(b) (5)

the expectation is that a bill could pass and be signed by mid-February, so we could be in litigation soon after. There is the possibility of both well-financed, sophisticated challenges, as well as numerous pro se and frivolous claims.

Ian G. and Tony West will make a recommendation to Tom on how to structure the process going forward, i.e., should there be weekly meetings, etc. I spoke to Ian afterwards and told him we would like to be involved and to please keep us in the loop.

Please let me know if you have any questions or want to discuss.

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Katyal, Neal (SMO)

From: Katyal, Neal
Sent: Wednesday, January 13, 2010 7:16 PM
To: (b) (6) (SMO)
Subject: Re: Health Care Defense

Great. I appreciate it. I want to make sure our office is heavily involved even in the dct. Also one random q- (b) (5)
(b) (5)

From: (b) (6) (SMO)
To: Katyal, Neal
Sent: Wed Jan 13 19:11:22 2010
Subject: RE: Health Care Defense

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1/25/2011

pages 72 through 104
have been withheld in full
pursuant to (b)(5)
and as not responsive