



**Judicial  
Watch**  
*Because no one  
is above the law!*

March 22, 2012

The Honorable Justice Elena Kagan  
The Supreme Court  
United States Supreme Court Building  
1 First Street, NE  
Washington, DC 20543

**Re: *Dep't of Health and Human Services v. Florida*, No. 11-398  
*Nat. Fed. Indep. Business v. Sebelius*, No. 11-393  
*Florida v. Dep't of Health and Human Services*, No. 11-400**

Dear Justice Kagan:

Judicial Watch is a conservative, nonpartisan educational organization that seeks to promote integrity, transparency and accountability in government and fidelity to the rule of law. In addition to bringing its own lawsuits and filing *amicus curiae* briefs, Judicial Watch regularly monitors ongoing litigation that it believes is of exceptional public importance. One such exceptionally important lawsuit—actually a set of lawsuits—is the above-referenced litigation over the Patient Protection and Affordable Care Act (“PPACA”).

On June 19, 2010, Judicial Watch served a Freedom of Information Act (“FOIA”) request on the U.S. Department of Justice (“DOJ”) seeking access to records pertaining to your tenure as U.S. Solicitor General and the PPACA. At that time, the U.S. Senate was considering your nomination to the U.S. Supreme Court. Judicial Watch hoped that its request would shed light on your views on the federal government’s powers under the U.S. Constitution and, more directly, whether you or your office had opined on the constitutionality of the various legislative proposals that became the PPACA or participated in formulating a defense to expected legal challenges to the PPACA.

It was not until last spring—nearly a year after Judicial Watch had served its FOIA request and after both Judicial Watch and another organization had filed separate FOIA lawsuits seeking to compel access to the requested records—that at least some responsive records were finally produced.<sup>1</sup> Other responsive records or portions thereof were withheld under various FOIA exemptions. Included among the records made public were e-mails suggesting that, during your tenure as Solicitor General, the Office of the Solicitor General had been more involved in the legal defense of the PPACA than had previously been disclosed. Late last year, another set of records was produced that included an e-mail showing what appeared to be your excitement and support for the passage of the PPACA.

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<sup>1</sup> *Judicial Watch, Inc. v. U.S. Dep't of Justice*, Case No. 11-cv-0426 (D.D.C. Feb. 24, 2011); *Media Research Center v. U.S. Dep't of Justice*, Case No. 10-cv-2013 (D.D.C. Nov. 23, 2010).

Judicial Watch just recently filed a second FOIA lawsuit against the U.S. Department of Justice seeking to compel production of additional records about your tenure as Solicitor General and the PPACA, including your calendars during the relevant time period and those of your deputies in the Solicitor General's Office. Responsive records have yet to be produced.<sup>2</sup>

Judicial Watch also understands that the Chairman of the House Judiciary Committee has repeatedly requested the production of records about your tenure as Solicitor General and the PPACA, only to be rebuffed by the U.S. Department of Justice.<sup>3</sup> Requests by several U.S. Senators for similar records and information also have been ignored by the Justice Department.<sup>4</sup>

The failure of the Justice Department to produce requested records in a timely manner, the dribbling out of requested records over time, the redaction and withholding of other records, and the refusal to respond to requests for records and information from several members of Congress have contributed to the substantial impression that additional details about your tenure as Solicitor General and the enactment and subsequent legal defense of the PPACA are being withheld from the American people. However the Court ultimately rules on the various legal challenges to the PPACA, it would be extraordinarily unfortunate if the Court's decision were overshadowed by controversy over your participation in the matter. It would leave a cloud hanging over the Court's decision and could undermine public confidence in the impartiality and integrity of the Court as an institution.

Judicial Watch is not calling on you to recuse yourself from the PPACA litigation at this time, just as Judicial Watch did not call on Justice Scalia to recuse himself from the litigation involving the National Energy Policy Development Group ("NEPDG")—to which Judicial Watch was a party—in 2004.<sup>5</sup> When a controversy arose during the course of the NEPDG litigation over whether Justice Scalia should recuse himself from that matter, Justice Scalia issued an opinion stating: "The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported."<sup>6</sup> Justice Scalia then provided a comprehensive recitation of the facts "as they existed," not as they were "surmised or reported," and an articulation of the reasoning behind his decision not to recuse himself.

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<sup>2</sup> *Judicial Watch, Inc. v. U.S. Dep't of Justice*, Case No. 12-cv-00277 (D.D.C. Feb. 21, 2012).

<sup>3</sup> Rep. Lamar Smith, "Kagan and Obamacare - still no answers: Stonewalling over justice's obligations to recuse continues," *The Washington Times*, March 19, 2012.

<sup>4</sup> See, e.g., Letter to the Hon. Eric Holder, Attorney General, U.S. Department of Justice from Sens. Mitch McConnell, Chuck Grassley, Jon Kyle, and Mike Lee, dated November 18, 2011; Statement of Sen. Jeff Sessions, "As Troubling Kagan Emails Surface, Sessions Presses Holder for Written Testimony on Kagan's Healthcare Involvement," dated November 15, 2011.

<sup>5</sup> *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913, 914 (2004).

<sup>6</sup> *Id.* at 914-15.

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During your confirmation process, you wrote that you would “consider carefully the recusal practices of current and past Justices” as well as consult with your colleagues if questions about recusal in particular cases arose.<sup>7</sup> Judicial Watch believes that it would be of substantial benefit to the Court’s consideration of the legal challenges to the PPACA if, like Justice Scalia in the NEPDG matter, you were to address the facts surrounding your tenure as Solicitor General and the enactment and subsequent legal defense of the PPACA “as they existed,” not as they are being “surmised or reported,” as well as provide an articulation of your reasoning behind any decision regarding recusal. It is Judicial Watch’s hope that you will give serious consideration to addressing these matters and that doing so will provide greater transparency and increase public confidence in the impartiality and integrity of the Court.

Thank you for your attention to this matter.

Sincerely,

JUDICIAL WATCH, INC.



Thomas Fitton  
President

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<sup>7</sup> Responses to Sen. Jeff Sessions’ Questions for the Record, at Response to Question No. 1c.