



Written by [Michael Tennant](#) on July 4, 2011

## 49 Congressmen Seek Investigation of Kagan's ObamaCare Involvement

To that end, they have sent a [letter](#) to Rep. Lamar Smith (R-Texas), Chairman of the House Judiciary Committee, and Rep. John Conyers (D-Mich.), ranking member on the committee, asking the committee "to promptly investigate the extent to which ... Kagan was involved in preparing a legal defense of the Patient Protection and Affordable Care Act (PPACA) during her tenure as Solicitor General."



All the signers of the letter are Republicans. Two of them are presidential candidates: Reps. Michele Bachmann (R-Minn.) and Ron Paul (R-Texas). Twelve are physicians, including Paul and the lead signer, Rep. John Fleming (R-La.).

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"Contradictory to her 2010 confirmation testimony before the Senate Judiciary Committee," the letter reads, "recently released Department of Justice (DOJ) documents indicate that Justice Kagan actively participated with her Obama Administration colleagues in formulating a defense of PPACA."

Those documents have not been easy to come by. As the letter notes, "The Justice Department has been uncooperative to date" in providing the documents under "repeated" Freedom of Information Act (FOIA) requests.

[CNSNews.com](#), for example, filed a FOIA request seeking documents related to Kagan's involvement with the ObamaCare defense prior to her confirmation hearings. "The Justice Department," writes the conservative news site, "at first said it was exempt under the FOIA law from responding to CNSNews.com's request, but then it withdrew that letter and said in a second letter that it would prepare a response once CNSNews.com clarified two points." CNSNews.com provided the requested clarification almost immediately, but still the documents were not forthcoming. The Media Research Center, CNSNews.com's parent organization, then filed suit in federal court to force the department to turn over the documents.

Thus far only a handful of [documents](#) have been released. These documents "suggest that Kagan helped coordinate the Obama administration's legal strategy to defend Obamacare," according to [Judicial Watch](#), which also filed FOIA requests seeking the documents and is likewise suing the Justice Department because of its intransigence in providing them.

During her confirmation hearings, however, Kagan stated that she had not been asked for her opinion on the legality and constitutionality of PPACA as it related to the legislation itself or potential litigation of it, nor had she offered her opinion on the subject.



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The apparent contradiction between Kagan's testimony and the available documents "raises serious questions about Justice Kagan's ability to exercise objectivity in *any* case relevant to PPACA that comes before the Supreme Court," the Congressmen write in their letter. (Emphasis in original.) Moreover, they explain, federal law requires a justice to recuse himself in cases "where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy." "Even from the limited number of DOJ emails released to date," they conclude, "it is evident that Justice Kagan was involved in PPACA defense activities to a degree that warrants her disqualification from related proceedings as specified by" law.

With, as [Fleming put it](#), "dozens of lawsuits pending in the courts against" the "fundamentally unconstitutional" PPACA, some of which will undoubtedly end up before the Supreme Court, Kagan's objectivity with regard to that law is of the utmost concern. Someone who considers the defense of ObamaCare to be "of singular importance," as Kagan did in an e-mail dated March 21, 2010, just might be biased in favor of the law and against the plain meaning of the Constitution.

"Determining the extent of Justice Kagan's involvement is imperative for Americans to have confidence in the impartiality of the Supreme Court," said Fleming. "Americans have a legitimate right to know the truth."

Getting the Justice Department and the Obama administration to give it to them, however, is a tall order indeed.

Photo of Elena Kagen: AP Images



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