



Written by [Bruce Walker](#) on November 14, 2011

E-mails Suggest Kagan Misled Senate About ObamaCare

Tribe is a “liberal” professor who has written in the *New York Times* in defense of ObamaCare, has argued numerous cases before the Supreme Court, and was working for the Obama administration’s Department of Justice at the time of the e-mail exchange. The Media Research Council and Judicial Watch filed the Freedom of Information Act request on May 25, 2010, which was before Kagan’s Senate confirmation hearings for a position on the Supreme Court. That e-mail correspondence makes it clear that then-Solicitor General Kagan and Tribe had contacted each other about ObamaCare as early as March 21, 2010 and that Kagan likely has been a cheerleader for ObamaCare. The e-mails’ title refers to the upcoming vote on ObamaCare and says, “Fingers and toes crossed today.” In the e-mails Kagan says about the probable passage of ObamaCare: “I hear they have the votes, Larry!! Simply amazing.”



The e-mail correspondence trail, which was finally released on [November 10, 2011](#), after the Department of Justice had been sued in federal district court for the District of Columbia on November 23, 2010, a year before the documents were released, shows more than just an e-mail trail between Kagan and Tribe. The e-mails also show that there was at least a third individual involved, whose name has been redacted, and it shows actual meetings between those parties prior to Kagan testifying before the Senate Judiciary Committee.

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During those hearings, Senate Republicans sent Kagan a letter that asked: “Have you ever been asked about your opinion regarding the underlying legal or constitutional issues related to any proposed health care legislation, including but not limited to Pub. L. No. 111-148, or the underlying legal or constitutional issues related to potential litigation resulting from such legislation?” She answered, “No.”

Senate Republicans also sent another question which asked her: “Have you ever offered any views or comments regarding the underlying legal or constitutional issues related to any proposed health care legislation, including but not limited to Pub. L. No. 111-148, or the underlying legal or constitutional issues related to potential litigation resulting from such legislation?”

Elena Kagan again answered, “No.”

The newly released documents strongly suggest that at the very least, Kagan was not completely honest in her answers to questions from Senators that were part of her confirmation process and, perhaps, that she willfully lied. Beyond simple lying, these e-mails show a distinct lack of objectivity about litigation



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challenging Obama's healthcare legislation.

Any federal judge who has been involved with a case before it reaches his bench and whose involvement would indicate an inability to be wholly impartial is required to recuse himself (or herself) from the case. The specific language of the applicable federal statute, 28 USC 455, requires recusement by a justice from "any proceeding in which his impartiality might reasonably be questioned" and any time he has "expressed an opinion concerning the merits of the particular case in controversy" while he "served in governmental employment."

In June, Representative John Fleming, Chairman of the House Judiciary Committee, sent a letter to Eric Holder, which was signed by 48 other members of the House:

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

In recent weeks, questions have been raised about whether Justice Kagan's prior work on what became the Patient Protection and Affordable Care Act (PPACA) while serving as Solicitor General should disqualify her from hearing challenges to its constitutionality. During her Senate confirmation, then-Solicitor General Kagan answered "no" when questioned about whether she had ever been "asked about [her] opinion" or "offered any views or comments regarding the underlying legal or constitutional issues related to any proposed health care legislation ... or ... potential litigation resulting from such legislation." Yet, documents released by the Department in response to recent Freedom of Information Act requests raise questions about that unequivocal denial.

Misleading Congress or, worse, lying to Congress in its pursuit of constitutional duties, such as determining the suitability of judicially appointments, is serious business.

Photo of Elena Kagan: AP Images



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