



## Holder's Refusal Means Kagan's Recusal

### OVERVIEW IN BRIEF:

President Barack Obama has selected in Justice Elena Kagan a likeminded soul -- someone nearly identical in opinion with his radical views on the U.S. Constitution as a living, breathing document.

Kagan's activism in places such as Harvard University against military recruiters is illustrative enough.<sup>1</sup> Yet as recent e-mails uncovered by Judicial Watch have revealed, Kagan's cheerleading for Obamacare raises numerous questions about the intimate details of Kagan's advocacy for Obamacare while she served as solicitor general for the Justice Department.

After repeated requests for information by the House Judiciary Committee, Attorney General Eric Holder has point blank refused to provide information as requested by Congress. This refusal for basic information leads to one conclusion: **Justice Elena Kagan must recuse herself from the pending Supreme Court case on Obamacare.**

### QUICK FACTS:

- In 2003, Justice Antonin Scalia recused himself in *Newdow v. United States* 03-7 (2003) based on public comments given at a January 2003 event where Scalia spoke his opinion of the upcoming Ninth Circuit court case.
- In 2010, then Solicitor General Kagan spoke in favor of Obamacare in correspondence with members of the Justice Department
- Since the initial revelations, Attorney General Eric Holder has refused to answer questions from Congress regarding Kagan's involvement in the legal defense of Obamacare.
- Kagan has already recused herself from over two dozen cases being presented to the Supreme Court, as is consistent with former solicitors general who are appointed to the federal bench.
- Kagan refusal to recuse can only be perceived as a political act, in direct violation of 28 USC § 455

In any instance where an sitting federal or Supreme Court justice is either ethically or professionally conflicted, the Code of Federal Regulations (CFR) requires that justice to remove themselves from the case through recusal.

Given the evidence already obtained by Judicial Watch,<sup>ii</sup> Kagan has a responsibility under 28 USC § 455 to recuse herself from hearing the Obamacare case when it arrives before the Supreme Court.

In any given situation where the question of recusal of a judge arises, there are two items to be discerned. The language of 28 USC § 455 is unambiguous and clear: "*Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.*"

This standard of ethics as applied by federal code is relevant in the recusal of a specific justice in two ways:

1. The appearance of partiality -- and not the actual existence of partial conduct -- is the primary consideration for this statute, and,
2. That such a bar is placed where a reasonable individual could rightly question the impartiality of the justice.

Next, there are two additional distinctions to be made; one with the condition of the justice, the other regarding whether or not the question of such impartiality is deemed within reason.

There is a great deal of substantiated evidence that would call into question Kagan's impartiality with regards to Obamacare.

In the instance of the former, there is abundant evidence that the actions of Justice Elena Kagan, during her tenure as Solicitor General, cast serious doubts as to whether Kagan will be able to disassociate herself from the merits or demerits of legislation she not only defended, but cheered. Can it be seriously argued that Kagan would be willing or even able to reconsider her previously strongly held position as incorrect on the basis of law?

### Scalia Recuses in 2003

In 2003, Justice Antonin Scalia spoke at an event commemorating the Virginia Statute of Religious Freedom in Fredericksburg, Virginia.<sup>iii</sup> At this event, Scalia specifically commented on the ruling of the Ninth Circuit Court of Appeals regarding a case where the Pledge of Allegiance was being challenged by Dr. Michael Newdow.

At this event, sponsored by the Knights of Columbus and others, Scalia criticized the Ninth Circuit's ruling and gave specific arguments against the Ninth Circuit's ruling, implying that -- though he was willing to reconsider his opinion -- he (Scalia) had already arrived at a conclusion even before the case was heard by the Supreme Court.<sup>iv</sup>

Though Scalia was not coerced (other than by active public comment and legal pressure from Newdow himself), Scalia voluntarily chose to recuse himself from the case.<sup>v</sup>

This distinction in Scalia's 2003 decision to recuse himself is important as applied to the upcoming discussion on whether Justice Elena Kagan and, by a politically contrived extension, Justice Clarence Thomas, should recuse themselves from the upcoming case on Obamacare in 2012.

In the instance of Justice Thomas, there is no indication at all that Thomas' impartiality has been impaired or even could be called into question in the direct fashion where Justice Scalia's instance lays precedence.

On the other hand, there is no question where Justice Kagan's professional opinion remains on this topic. 28 USC § 455 is very clear on matters where one's bias can be reasonably questioned. Recusal is specifically designed as an outlet to preserve the integrity of the American court system.

Kagan's involvement with Obamacare as legislation was deep and involved. According to e-mails, Kagan aggressively moved to involve the Office of the Solicitor General (OSG) in the legal challenges to Obamacare.<sup>vi</sup> Further, evidence exists that Kagan participated in structuring the legal defense for Obamacare as noted by

**“I hear they have the votes, Larry!!  
Simply amazing.”**

**-- former Solicitor General Elena Kagan**  
*internal Justice Department e-mail to  
Harvard Professor Lawrence Tribe*  
March 21, 2010  
Source: [CNS News](#)

redacted material not covered by the Freedom of Information Act. These concerns have not been clarified either by the Justice Department or the Obama administration writ large.

Compounding the problem is Attorney General Eric Holder's outright refusal to respond in writing to the House Judiciary Committee's request for information regarding Kagan's e-mail history on Obamacare.<sup>vii</sup>

Such a situation where since March 2011 the Justice Department has refused to answer the questions of Congress -- and deflecting them as "unseemly" requests -- only serves to further the appearance of impartiality among reasonable members of the public. If there is nothing to hide, then why not allow sunlight to be the best disinfectant?

**The refusal of Holder to allow Congress access to this critical information reveals that members of the Obama administration know Kagan must recuse herself.**

In simpler terms: Holder's refusal means Kagan's recusal.

The sensitivity of the public towards any instance of partiality -- especially based upon legal guidelines in 28 USC § 455 as well as ethical precedent for recusal in Justice Scalia's instance in 2003 -- should be the primary focus of attention in any discussion on whether Justice Kagan should indeed recuse herself.

<sup>i</sup> Warren Richley, "How Elena Kagan worked to limit military recruiting at Harvard." *Christian Science Monitor*, February 25, 2010, <http://www.csmonitor.com/USA/Justice/2010/0625/How-Elena-Kagan-worked-to-limit-military-recruiting-at-Harvard>.

<sup>ii</sup> <http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>

<sup>iii</sup> Pamela Gould, "Religious Freedom Praised." *Free Lance-Star*, January 13, 2003 <http://fredericksburg.com/News/FLS/911/2003/012003/01132003/846367>.

<sup>iv</sup> *Newdow v. United States*, 03-7 (2003).

[http://supreme.lp.findlaw.com/supreme\\_court/briefs/02-1624/03-7\\_recuse.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/02-1624/03-7_recuse.pdf).

<sup>v</sup> Jessica Allen, "Scalia benched by remarks." *Free Lance-Star*, October 16, 2003 <http://fredericksburg.com/News/FLS/2003/102003/10162003/1135651/index.html>.

<sup>vi</sup> These items can be found cited in detail in the Judicial Crisis Network white paper entitled "Elena Kagan: The Justice Who Knew Too Much" dated November 9, 2011.

<sup>vii</sup> House Judiciary Committee, "Smith Presses Administration for Kagan Documents." November 22, 2011 <http://judiciary.house.gov/news/11222011.html>.