Congress of the United States
Washington, DC 20515

June 24, 2011

The Honorable Lamar S. Smith
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member, House Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Conyers:

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 (DOJ) documents indicate that Justice Kagan actively participated with her Obama Administration colleagues in formulating a defense of PPACA.

This revelation raises serious questions about Justice Kagan's ability to exercise objectivity in *any* case relevant to PPACA that comes before the Supreme Court. As you know, Section 455 of Title 28 of the United States Code establishes unambiguous conditions in which federal judges must recuse themselves from proceedings in which their impartiality might be reasonably questioned. According to the law, a justice should recuse themselves 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 through a Freedom of Information Act (FOIA) lawsuit, 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 Section 455.

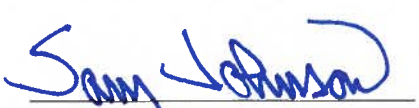
Regrettably the Justice Department has been uncooperative to date with repeated FOIA requests that seek the full body of relevant emails from the Office of the Solicitor General that would reveal the scope of Justice Kagan's involvement in PPACA defense activities. As numerous challenges to PPACA are rapidly progressing through the federal courts, it is increasingly likely that the Supreme Court will be called upon to decide the constitutionality of the law in the near future. This Congress, and the American people, deserve to have confidence in the integrity and impartiality of our Supreme Court and its justices. Towards that end, we ask that the Committee act expeditiously to investigate this matter to the fullest extent possible.

Sincerely,

JOHN FLEMING, M.D.
Member of Congress

MARSHA BLACKBURN
Member of Congress

JOSEPH PITTS
Member of Congress



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