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Elena Kagan: The Justice Who Knew Too Much

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ABOUT THE AUTHOR

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I. Introduction

At least eight of the Supreme Court's nine members will soon decide whether to review the constitutionality of the Patient Protection and Affordable Care Act ("PPACA"). The only question is whether Elena Kagan, the Court's most junior Justice, will also pass judgment on President Obama's signature law or recuse herself because of her role in defending PPACA's constitutionality as President Obama's Solicitor General.

As President Obama's top advocate, Kagan headed the office responsible for formulating the Administration's defense of PPACA—and oversaw the arguments both on appeal and in the lower courts because of PPACA's national importance. The President is now asking her to adopt the very same positions her office helped craft for him on this matter, but this time, as a Supreme Court Justice. Her jump from advocate to judge on the same issue raises profound questions about the propriety of her continued participation in the case. Moreover, the legitimacy of any decision where she is in the majority or plurality would be instantly suspect if she chooses not to recuse herself. To use a sports analogy, would anyone trust the outcome of a close game where the referee had been a coach for one of the teams *earlier in the game*?

For the reasons set forth below, we find it impossible for Justice Kagan to deny that she was directly involved in the defense of PPACA, and that she should therefore recuse herself from any consideration of PPACA's legality before the Supreme Court.

II. Summary of the Evidence

a. Kagan took early and aggressive action to involve her office in Obamacare.

Though her department normally only deals with appeals, Kagan made the decision to involve the Solicitor General's office before PPACA had even been signed into law. According to e-mails JCN has obtained,¹ Neal Katyal, Kagan's chief and only political deputy, stated in January 2010 that "Elena would definitely like OSG to be involved in this set of issues." After the first strategy meeting, Katyal emphasized his interest in getting the office "heavily involved even in the dct [District Court]."

Because it is so unusual for the Solicitor General's Office to get involved at the District Court level, not to mention before a law is passed, Kagan's approval, tacit or explicit, would have been required. The fact that she encouraged her Office's involvement at such an early stage could only mean that she believed it was necessary to ensure that the strongest possible arguments in defense of the law would be raised at the outset to set the stage for all the appeals that would certainly follow. Her actions had the added effect of communicating to the President and the rest of his Administration that the Solicitor General herself was on top of the legal challenges from the

¹ Had Kagan or the Obama Administration disclosed these and other documents discussed below during her confirmation hearings instead of waiting for drawn-out litigation under the Freedom of Information Act (FOIA), we are confident that the public debate about her role in defending the health care law would have been far more robust.

beginning and would not be caught off guard.

b. Kagan made key staffing decisions starting in January of 2010.

According to e-mails obtained by JCN, in early 2010 the Obama Administration organized a meeting to discuss strategy for defending the health care bill from anticipated legal challenges and asked Kagan's Office to send a representative. In response to the invitation, Neal Katyal, Kagan's political-appointee Deputy, said "[a]bsolutely right on. Let's crush them. I'll speak to Elena and designate someone [to attend]." Of all the people that Kagan could have designated to attend that first meeting, she chose the man who had already stated that her Office's role was to "crush" the opponents of PPACA.

Though the Solicitor General's office is otherwise staffed by career lawyers, Kagan assigned her chief and only political deputy to represent the office in this high-level meeting. Katyal, who eventually argued the case in the 11th Circuit, was clearly the point person assigned to the case, and his instructions were to "bring in Elena as needed." Kagan's staffing decisions on their own constitute substantial involvement in the case, but her delegation of the case to Katyal, her aggressive deputy, provides important insight into her own aggressive approach to the case.

c. Kagan was part of the deliberative process in the Obamacare defense strategy.

During her confirmation hearings, Kagan stated that she was present at "at least one" meeting in which the challenges to PPACA were discussed. But JCN has obtained documents indicating that her involvement was much more substantial than merely attending a single meeting.

We have received multiple documents concerning Kagan's involvement in the PPACA litigation containing redacted material that is exempted from production under FOIA's "b(5)" exemption. That exemption covers material normally protected by a privilege that makes it immune to disclosure, like the attorney-client privilege or, in the case of government policy makers, the deliberative process privilege. The implications of the numerous b(5) deliberative process exemptions are serious because they show that Kagan, unsurprisingly, received information about the PPACA litigation involving *strategy* (for that is what it means to deliberate) while Solicitor General. Because of the b(5) claims, we know that she is ethically barred from disclosing both what she learned and said about the government's views of the case to anyone. The fact that Kagan has inside information on the case is problematic enough, but this issue opens up all sorts of potential ethical problems.

For example, as often happens at oral argument, the representative from the Solicitor General's office could be asked by the Justices, "did the government ever consider argument X as an alternative to your current position?" The answer to that question can obviously be yes or no or anything in between. But if Justice Kagan sits on a PPACA case, she will know the answer to the question *before it is asked* because she participated in the case when the government's arguments were being hashed out. In fact, even if Kagan knew that the representative from her former office lied in answering that question, she would still be prohibited from telling her fellow Justices about it because of the deliberative process privilege.

III. Legal Analysis

a. Recusal Required under 28 U.S.C. §455(b)(3)

Although the Judicial Code of Ethics does not, by its terms, apply to Supreme Court Justices, mandatory recusals for the Justices are governed by federal law. Section 455(b)(3) of Title 28 addresses the specific case at hand: the recusal obligations of former government employees. It requires recusal where the judge “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.” 28 U.S.C. §455(b)(3).

Justice Kagan has stated under oath that she was never asked, nor did she ever offer, her opinion concerning the merits of *U.S. Department of Health and Human Services v. State of Florida, et al.*, (the “HHS” case) – the major court challenge to PPACA, and the one most likely to be heard at the Supreme Court. However, there is evidence suggesting that she participated as counsel concerning the proceeding and therefore is bound by federal law to recuse herself from the case.

While Kagan’s name does not appear on any filings in the HHS case, that level of involvement is not required to necessitate recusal. The statute nowhere defines either “counsel” or “participated,” but case law does give guidance, and that guidance indicates that *any personal* (as opposed to *pro forma*) participation in a case is sufficient to trigger recusal. Thus, while the titular head of a large office might not be barred from hearing a case if there was no previous personal involvement,² judges must recuse themselves if they have “previously taken a part, *albeit small*, in the investigation, preparation, or prosecution of a case.” *United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir. 1988) (emphasis added).

It is significant that recusal can also be triggered by involvement with a case before its official filing. Then-Justice Rehnquist has noted that he recused in a case in which he played “only an advisory role which terminated immediately prior to the commencement of the litigation.” *Laird v. Tatum*, 409 U.S. 824, 829 (1972). Other discussions of recusal indicate that involvement in investigations

² There is case law suggesting that, merely by virtue of her position as Solicitor General during the preparation for the government’s defense, Justice Kagan must recuse herself. The role of the U.S. Attorney is analogous to that of the Solicitor General insofar as both carry out their statutory duties via numerous staff, supervise their office and officially serve as counsel of record for the United States in all cases within their jurisdiction – at the trial level in the case of U.S. Attorneys, and at the Supreme Court level for the Solicitor General. In the Seventh, Eighth, and Ninth Circuits United States Attorneys that later become judges must recuse themselves from any proceeding that had been pending in any way in their offices, even if they were not substantively involved. *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994) (“This analysis imputes to the United States Attorney the knowledge and acts of his assistants.”); *United States v. Boyd*, 208 F.3d 638, 648 (7th Cir. 2000) (noting exception to requirement of personal participation for U.S. Attorneys); *Kendrick v. Carlson*, 995 F.2d 1440, 1444 (8th Cir. 1993) (“There is general agreement that a United States Attorney serves as counsel to the government in all prosecutions brought in his district while he is in office and that he therefore is prohibited from later presiding over such cases as a judge.”). *But see United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir. 1988) (“[T]he word ‘participated’ implies a higher degree of activity than simply being ‘of counsel.’ . . . One need not do anything to be ‘of counsel.’ ‘Participation’ connotes activity, however.”); *Mangum v. Hargett*, 67 F.3d 80, 83 (5th Cir. 1995) (following *Gipson* to hold that “§ 455(b)(3) does not mandate recusal unless the former government attorney has actually participated in some fashion in the proceedings”).

before a case is officially brought would make recusal appropriate. *See, e.g., Gipson*, 835 F.2d at 1326; *Barry v. United States*, 528 F.2d 1094, 1098 (7th Cir. 1976) (identifying a defendant’s arrest as the earliest point during which a criminal case can be considered to have begun). So the relevant time period for analyzing Kagan’s involvement does not begin on March 23, 2010, when the HHS complaint was filed. The preparation for litigation began at least as early as January 2010, when strategy meetings were organized by top DOJ officials to defend the law against anticipated challenges.³ At that time there was no opening on the Supreme Court and, by Kagan’s own testimony, she had not been informed that she was on the shortlist for a future opening. She stated that she had been carrying out the duties of the Solicitor General as normal, not recusing herself from new cases as she would do after her nomination.

Kagan’s responses to Senate questions during her confirmation process essentially admit her involvement in the case. When asked about the HHS case she stated: “I neither served as counsel of record nor played any substantial role, as defined above. *Therefore*, I would consider recusal on a case-by-case basis, carefully considering any arguments made for recusal and consulting with my colleagues and, if appropriate, with experts on judicial ethics” (emphasis added). What she is saying is that (in her mind) she did not participate in a manner that made her recusal a foregone conclusion, rather, that she would have to consider the matter carefully if it came up. In other words, she participated in the case, but not, according to her, substantially.

Kagan’s careful answer is a striking contrast to Neal Katyal’s description of her involvement in an email to Tracy Schmalzer, deputy director of the Justice Department’s Office of Public Affairs. He stated: “No, she never has been involved in any of it. I’ve run it for the Office, and have never discussed the issue with her one bit.” Kagan’s response to his email is telling. Less than two minutes later she replied, “This needs to be coordinated. Tracy, you should not say anything about this before talking to me.” Again, if she had truly been “walled off from Day One” as Katyal asserted in a later email on the topic, no coordination would have been needed. More likely, coordinating meant “getting our stories straight.”

In her hearing testimony, Kagan underestimated the scope of her recusal obligations, stating that she would recuse herself from any case in which she “officially formally approved something.” But her formal/informal distinction – along with an emphasis on recusal only for “substantial” involvement – has no basis in the case law and appears self-serving. Her descriptions of OSG participation in cases before the appellate level – like the PPACA strategizing – always carefully label such discussions “informal,” and outside of normal recordkeeping. But the approval of early OSG involvement and delegation to Katyal certainly constitute personal participation in the case, and that is all §455(b)(3) requires.

Kagan’s involvement with *U.S. Dept. of Health and Human Services* was consistent with her acting as counsel – both in a supervisory manner and because she received information normally

³ There is evidence in the FOIA record that OSG members thought pre-filing or pre-bill-passage involvement would not trigger recusal. In a May 12 email to Neal Katyal, veteran OSG lawyer Ed Kneedler discussed Kagan’s involvement in a case then before the Court that touched on health care. He noted “I discussed with Elena several times [material redacted]. Especially now that health care has passed, she may not want to be involved in that brief.”

limited to attorneys on a case. The decision to involve the Office of the Solicitor General in early strategizing is analogous to the kind of discretion that the Solicitor General often exercises as to appeals and that Justice Kagan herself acknowledged would trigger recusal. In responses to questions during her nomination process, Kagan stated that she would recuse herself from any case in which she authorized an appeal, intervention, or amicus brief, as well as cases in which she “participated in formulating the government’s litigating position.”

While Justice Kagan was never asked to authorize an appeal in *U.S. Dept. of Health and Human Services* during her tenure as Solicitor General, authorizing the type of strategizing to “formulat[e] the government’s litigating position” has a similar effect in terms of identifying the importance of a case and suggesting a judgment that the law’s constitutionality was defensible.⁴

Kagan’s receipt of privileged information also is something normally reserved to counsel. In the case of a high-ranking supervisor receiving deliberative material from her subordinates, Kagan’s failure to offer her own opinion explicitly may save her from forced recusal for “express[ing] an opinion concerning the merits of the particular case in controversy,” but it does little to shield her from having participated in the formulation of strategy and being treated as counsel by those involved. One exchange in particular highlights the problem. In a March 18, 2010 email to Deputy Attorney General Tom Perelli, Neal Katyal states, “In light of this, for what it is worth, my advice (I haven’t discussed this with Elena, but am cc’ing her here) would be that we start assembling a response, [material redacted] so that we have it ready to go.” Copying Kagan on this email not only made her a recipient of privileged internal information regarding the government’s strategy in the case, it created a situation where even a lack of response from Kagan constitutes tacit agreement with Katyal’s redacted proposal. The FOIA record presents an incomplete picture of the occasions on which Katyal or others involved in defense strategy may have made this type of statement to Kagan, but shows sufficient personal involvement to trigger 28 U.S.C. §455(b)(3).

b. Recusal Required under 28 U.S.C. §455(a)

Subsection (a) of Title 28 directs that “[a]ny justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). This is often referred to as the “catch-all” provision, and “covers situations not addressed by § 455(b) that nonetheless might be appropriate for recusal.” *Baker & Hostetler LLP v. U.S. Dept. of Commerce*, 471 F.3d 1355, 1357 (D.C. Cir. 2006).

Application of this provision is objective, that is, it looks, “not [to] the reality of bias or prejudice but its appearance.” *Liteky v. United States*, 510 U.S. 540, 548 (1994) (Scalia, J.) (emphasis in original). The relevant question is whether the “reasonable observer who is informed of all the surrounding facts and circumstances” would question the judge’s impartiality. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 924 (2004) (mem.) (Scalia, J.) (emphasis original). This test therefore requires recusal cases where no actual partiality exists, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988), such as when a judge himself is not aware

⁴ Unlike some administrations, the Obama Administration has not taken a universal position in defense of federal legislation, so her support of the law is significant. See, for instance, the Administration’s refusal to support the Defense of Marriage Act in court.

of the circumstances which create an appearance of partiality, *id.* at 859.

A reasonable person aware of all the relevant circumstances surrounding Kagan’s involvement would certainly question her impartiality in this case for all the reasons discussed earlier. Indeed, it is hard to imagine that Kagan herself would choose to sit on the case if it were one of the less interesting cases of the Court’s term. For instance, she recused herself in the case of *Abbott v. United States* even though internal documents JCN has obtained reveal that “Elena has not worked on this case.” The fact that the Administration believes the stakes are higher in the Obamacare context is hardly reason to relax recusal standards.

A parallel statute requiring recusal from any aspect of *U.S. Dept. of Health and Human Services* if Kagan were working for a private law firm supports the argument that her involvement as a judge raises reasonable concerns about her impartiality. Section 207 of Title 18 governs former government lawyers who enter private practice. Section 207(a)(2) creates a criminal bar on Kagan’s involvement in the case as a private lawyer until August 2012, merely by virtue of her having been Solicitor General while the matter was “pending under . . . her official responsibility.” If her involvement were deemed “personal and substantial,” she would be permanently barred from participating as a private lawyer. 18 U.S.C. §207(a)(1). Willful violations of this statute carry a penalty of up to five years in prison. 18 U.S.C. §216(a). While this statute does not apply to former government lawyers acting as judges, it informs the analysis of how a reasonable observer would view her involvement as a judge. It is passing strange that the standards should be *lower* for former government officials who move to a judicial role than those who simply return to private practice.

VI. Conclusion

Justice Kagan is well acquainted with the recusal process. In her first term on the Supreme Court she recused herself from 29 of the 82 cases decided on the merits – over a third of the Court’s oral argument docket – because of her previous work as Solicitor General. She has recused herself from even considering at least 69 cert-stage cases so far this term. *U.S. Dept. of Health and Human Services v. State of Florida, et al.* promises to be the most important Supreme Court decision in a century, with broad implications for the role of the federal government and the very nature of our constitutionally limited government. In order to secure the integrity of our Courts and of that decision in particular, Justice Kagan should recuse herself from ruling on the case.

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