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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

Blair A. Davis, Chief Counsel and Staff Director  
Brian A. B. Nicholson, Republican Staff Director

July 13, 2010

The Honorable Elena Kagan  
Office of the Solicitor General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Solicitor General Kagan:

Thank you for the answers you provided in response to the written questions submitted following your confirmation hearing. Although your answers have been helpful, there are some responses that need clarification in order for the Committee to have the information it needs to thoroughly review your record. Notably, we are concerned about the standard you would use to decide whether to recuse yourself from litigation you participated in as Solicitor General. In particular, we are concerned about litigation that was clearly anticipated, but had not yet to reached the point where your approval was sought for filings or pleadings.

In response to Senator Sessions' Question 1(b)(i), you stated: "I would recuse myself from any case in which I approved or denied a recommendation for action in the lower courts. This category would include cases in which I authorized an appeal, intervention, or the filing of an amicus brief. It would also include cases in which I denied leave to intervene or file an amicus brief." You also stated: "I would also recuse myself from any cases in which I did not take such official action but participated in formulating the government's litigating position or reviewed a draft pleading. In all other circumstances, I would consider recusal on a case-by-case basis."

In response to a question from Senator Coburn at your hearing, you indicated that you had not been asked to express an opinion on the "merits" of the health care bill (Pub. L. No. 111-148) in your role as Solicitor General. Numerous state attorneys general have filed a lawsuit challenging, amongst other things, the constitutionality of the health care bill. *See State of Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010). Please answer the following:

1. Were you ever present at a meeting in which *State of Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010) was discussed?

2. Have you ever been asked your opinion regarding the merits of or the underlying legal issues in *State of Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010)?
3. Have you ever been asked your opinion regarding any other legal issues that may arise from Pub. L. No. 111-148?
4. Have you ever offered any views or comments regarding either the merits of *State of Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010) or the strategy that the United States government should employ in defending Pub. L. No. 111-148?
5. Have you read, seen or reviewed any of the papers filed by the United States in *Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010), and, if so, before or after filing? Have you read, seen or reviewed any internal documents or memoranda discussing the case?
6. Were any documents filed in *Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010) while you were performing as Solicitor General?
7. Have you ever approved any document (either for filing with the court or for internal Administration use or distribution) with respect to *Florida v. U.S. Department of Health and Human Services*, No. 3:10cv91/RV/EMT (N.D. Fla. Filed Mar. 23, 2010)?
8. 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?
9. 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?
10. If your answer is "yes" to any of questions (1) to (9) or you were otherwise consulted regarding Pub. L. No. 111-148, will you recuse yourself from any related case, should you be confirmed?
11. If you answered "yes" to any of questions (1) to (9), and yet will not recuse yourself from any case related to Pub. L. No. 111-148, please explain why you refuse to, in the words of Justice Marshall, "quell any appearance of impropriety" that may result from your participation in such a case.

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- 12. What date did you cease performing responsibilities of the Solicitor General?
- 13. What duties are you now performing as Solicitor General?

We very much appreciated your prompt response to our initial questions for the record and look forward to your answers to the foregoing questions. Your answers to our questions are essential to the Committee's process of thoroughly reviewing your record prior to making our recommendation to the full Senate on your nomination.

Sincerely,

  
  


  
  


