Elena Kagan 'Cloud' Hangs Over Supreme Court as Obamacare Hearings Begin

By: Kenric Ward | Posted: March 26, 2012 9:45 AM

As the U.S. Supreme Court begins three days of hearings on the constitutionality of Obamacare Monday morning, Justice Elena Kagan is in the spotlight.

President Barack Obama's former solicitor general, whom he elevated to the high court, is expected to participate in the oral arguments -- despite repeated calls for Kagan to recuse herself, or to at least better explain her reasons for staying on the case.

In a letter to Kagan on March 22, Judicial Watch stated:

"The failure of the Justice Department to produce requested records in a timely manner, the dribbling out of requested records over time, the redaction and withholding of other records, and the refusal to respond to requests for records and information from several members of Congress have contributed to the substantial impression that additional details about your tenure as solicitor general and the enactment and subsequent legal defense of [Obamacare] are being withheld from the American people."

Tom Fitton, president of the judicial watchdog group, said:

"[As] the court ultimately rules on the various legal challenges to the [health-care law], it would be extraordinarily unfortunate if the court’s decision were overshadowed by controversy over your participation in the matter.

“It would leave a cloud hanging over the court’s decision and could undermine public confidence in the impartiality and integrity of the court as an institution,” Fitton wrote.

Judicial Watch stopped short of demanding that Kagan step aside from one of the biggest cases to appear before the nation’s top court, but other groups weren't so circumspect.
Mary Lewis, of the Texas-based Life and Liberty PAC, says "the law compels recusal. And even if the law were less explicit, we know that Kagan personally, as Obama's solicitor general, had authority and oversight in the crafting of the legal defense for Obamacare, which, however extensive her "hands on" role may have been, ethically disqualifies her from hearing the case on the Supreme Court.

"Impartiality is mandatory for a jurist. Not only may Kagan's bias and unethical participation in hearing Obamacare tip the scales to upholding this unconstitutional scheme, but her partisan reasoning and advocacy toward a favorable ruling could very well influence Justice Anthony Kennedy, the 'swing vote' on the court, or others, to lean leftward," Lewis said.

Larry Klayman, who heads Freedom Watch USA, has been trying to raise the issue of Kagan's possible bias.

He points to an email exchange from March 21, 2010, in which Kagan wrote to Harvard law professor Laurence Tribe about the impending congressional passage of Obamacare, formally known as the Patient Protection and Affordable Care Act:

“I hear they have votes, Larry!! Simply amazing,” Kagan enthused.


Klayman concluded: "Without a neutral, unbiased Supreme Court, there simply is no rule of law and any decision concerning the act will be seen as illegitimate."

Section 28 of the U.S. Code 455(b)(3) deals specifically with the recusal obligations of judges who are former government employees.

It states that recusal is required when a 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."

The section goes on to state: "Any justice, judge or magistrate judge of the United States shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned."

Marshall DeRosa, a political science professor at Florida Atlantic University, said, "In my opinion, Kagan should recuse. However, in the current political climate it's unlikely that she will.

"The issue is too big for the Left to risk losing a favorable outcome for the administration. She'll want to be part of the give-and-take process that shapes the
"Moreover, deciding on how the justices line up, she’ll want to include her jurisprudence in the opinion, whether majority, concurring, or dissenting. Her refusal to recuse herself is more evidence -- as if we need any -- of the politicization of the court."

Kagan maintains that she did not participate in crafting a legal defense of Obamacare and, thus, believes she can be objective in deciding the law's constitutionality.

The law’s individual mandate, which requires all citizens to purchase health insurance, has been challenged by Florida and 25 other states, along with the National Federation of Independent Businesses.

Meanwhile, liberal groups have alleged bias on the part of Justice Clarence Thomas, whose wife, Ginni, worked with groups that opposed the new law.

Like Kagan, Thomas has given no indication he will stand down. Decisions to stay out of a case are the responsibility of each individual justice.

Chief Justice John Roberts, while expressing confidence in his colleagues, has not taken any position on recusals.

Judicial Watch said that the White House, despite repeated inquiries, has declined to affirm that Kagan was excluded from Obamacare defense discussions during her tenure as solicitor general.

In his letter to Kagan last week, Fitton cited Justice Antonin Scalia’s handling of a 2004 case involving the National Energy Policy Development Group.

"When a controversy arose during the course of the NEPDG litigation over whether Justice Scalia should recuse himself from that matter, Justice Scalia issued an opinion stating: 'The decision whether a judge’s impartiality can reasonably be questioned is to be made in light of the facts as they existed, and not as they were surmised or reported.'

"Justice Scalia then provided a comprehensive recitation of the facts as they existed, not as they were surmised or reported, and an articulation of the reasoning behind his decision not to recuse himself."

Lecturing Kagan, Fitton stated:

"During your confirmation process, you wrote that you would ‘consider carefully the recusal practices of current and past justices’ as well as consult with your colleagues if questions about recusal in particular cases arose.

"Judicial Watch believes that it would be of substantial benefit to the court’s consideration of the legal challenges to the PPACA if, like Justice Scalia in the NEPDG
matter, you were to address the facts surrounding your tenure as solicitor general and the enactment and subsequent legal defense of the PPACA as they ‘existed,’ not as they are being ‘surmised or reported,’ as well as provide an articulation of your reasoning behind any decision regarding recusal.”

Kagan last year recused herself from ruling on Arizona’s immigration law, presumably because she was solicitor general when the Obama administration sued that state.

Charles Geyh, associate dean of research at the Indiana University School of Law, said, "I have yet to see information that leads me to believe there are grounds for disqualification" of Kagan or Thomas.

"In either case, you could conjure facts that could lead to that conclusion. But this is a politicized issue, and it isn't exactly a dispassionate forum," Geyh said.