

# **SOLICITOR GENERAL EMAIL FOIA SHOWS WHITE HOUSE STUNT FAIL**

In all the government shutdown, nuclear meltdown and Libya war of choice news dominating the media landscape the last couple of weeks, a completely juicy little tidbit was pried out of the Obama Administration by a right wing news outfit – and almost nobody picked up on it.

CNSNews, the cyber division of the Brent Bozell run right wing Media Research Center, has scored a bit of a coup with the acquisition of a set of FOIA documents from the Solicitor General's office partially detailing the unusual grooming of Elena Kagan to ascend to the Supreme Court. The 66 pages of documents are fascinating and offer a unique and rare glimpse into the backstage machinations in the SG Office. The FOIA CNSNews issued was targeted almost solely at the great whale the Ahab like conservative right are pursuing, the Affordable Healthcare Act they unaffectionately refer to as "ObamaCare".

Here is the thing, why would the Administration agree to turn over the emails? They are almost surely protected within the ambit of deliberative privilege exemption commonly recognized for the Executive Branch. Indeed, the first time CNSNews requested the records, the request was flatly rejected, back on June 22, 2010. But, the Administration, on its own, reconsidered, sought slight clarification and, finally, on March 15 of this year, delivered the FOIA records to CNSNews. The response letter from the Solicitor General's office facially states that they would have been well within their rights to so withhold, but "it would be appropriate to release significant portions of such records requested as a matter of agency discretion".

Uh huh. Experts in such matters were shocked. Kannon Shanmugam, a veteran of the SG's office now with Williams & Connolly, stated (subscription may be required):

...the documents represent "an unusual if not unprecedented" look at the office's operations. "It raises concerns about chilling lawyers in the office in the conduct of their work, and gives an incentive not to put things down in emails.

Indeed that would be seemingly very sound analysis. So, why did the Obama Administration give up the goods? For that, a quick look at what the emails depict, and what the FOIA asked for is necessary. As the FOIA search terms and parameters indicate, CNSNews was looking for instances of Elana Kagan's involvement in the legal debate, legal crafting and preparation for future litigation regarding the Affordable Healthcare Act. Why? Obviously, the conservative right is girding for the coming battle in the Supreme Court on the ACA that will be determinative in light of the complete split in lower courts so far. That is why the right wanted the material.

Why, however, did the Obama Administration take the extraordinary step of waiving executive deliberative privilege and give it to them?? Ah, that is where the "stunt" part of this story comes into play. Again from the NLJ:

The documents, mainly in the form of printouts of internal email chains, show that now-Acting Solicitor General Neal Katyal – not Kagan herself – was the point person within the office on discussions of the new health care reform law and how to defend it in court.

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Kagan was nominated to the high court on May 10, 2010, but as early as March 21,

the emails show that Kagan sought to keep herself out of the discussions of the health care law, possibly to avoid having to recuse when a challenge to the law came before the Supreme Court. During her Senate confirmation hearing last summer, Kagan said she had attended one meeting where the Florida lawsuit challenging the law was discussed, but was never asked to give her opinion on the merits of the case. Kagan also said White House Counsel Bob Bauer told her on March 5 that she was under consideration to fill a possible high court vacancy.

Kagan was selectively, and almost completely, walled off from the entire consideration by the Administration of the ACA and how it would be legally defended in the future. Because it had already been determined she would be installed on the Supreme court and they wanted to keep her from having to recuse herself when it came time for her and her fellow Justices to rule on the constitutionality and legality of the ACA and its components.

And now that Kagan is on SCOTUS and the specter of the ACA going there looms, the White House wanted to send a message to the conservative right, and a congress that may be getting weak in the knees, that they have the votes at the Supreme Court and ACA is going nowhere. Setting the tone for Obama and the Democratic House and Senate members to be able to have confidence to run on their big healthcare piece de resistance. Also, don't rule out the possibility the White House is doing this in response to the pressure on Justice Clarence Thomas to recuse because of the apparent conflict for his wife, Ginny. The right is *still* pissed John Roberts had to recuse himself in *Hamdan* after he was first elevated and they're also pissed Thomas is going to be pressured to recuse on healthcare. The White House is trying to ward off the coming attack on Kagan.

There was only one problem with their glorious horses head in the conservative wingnut bed – the White House apparently never disclosed the same documents to the Senate Judiciary Committee when they were requested during consideration of Kagan’s nomination. From everybody;s good old friend Joe diGenova, again in the NLJ article:

,,,“why they were not turned over to the Senate Judiciary Committee” when, during its confirmation hearing on Kagan, it wanted to know her involvement in the legal deliberations over health care reform. “Clearly, they were purposely not turned over. That now becomes as important a question as her involvement itself,” said diGenova, who has filed an FOIA request for even more related documents, including from the White House, on behalf of the conservative Judicial Crisis Network.

Oooops. Yes, if that is indeed the case as it appears, then diGenova actually has a pretty good point. If this is as it looks, it is a fail that makes the Keystone Kops look competent. What a way to step out of the gate for reelection.