Written by **Joe Wolverton, II, J.D.** on July 5, 2012

Investigation Into Kagan's Role in ObamaCare

"Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."

Those words by Alexander Hamilton explain why one member of Congress is taking aim at one Supreme Court justice.

Representative Louie Gohmert (R-Texas), right, is calling for an investigation of Justice Elena Kagan, arguing that her prior service as solicitor general should have disqualified her from participating in last week's decision on the constitutionality of ObamaCare, a law she helped craft and defend as a former member of the Obama administration.

On Friday Gohmert, a member of the Tea Party Caucus, delivered a speech from the floor of the House insisting that as the government's top litigator Kagan surely would have advised the President on the possible legal challenges that his healthcare reform legislation would face. If not, says Gohmert, she would have been the "worst solicitor general in history."

Last Thursday Kagan and her fellow justices held that the individual mandate provision of ObamaCare — the part of the law that requires all Americans to purchase a qualifying health insurance plan or pay a tax penalty — was a constitutional exercise of Congress' power to tax and spend.

As for how Kagan might have acted as solicitor general in a way that in his opinion should have disqualified her from taking part in the decision, Gohmert said:

> Could [Kagan] have foreseen that perhaps a weakness of the brilliant [Chief Justice] John Roberts could be if you call something a penalty in a bill and then later call it a tax after it's passed, then maybe the Supreme Court should buy it?

Gohmert didn't wait until the Supreme Court issued its favorable ObamaCare ruling before reminding Americans that during her nomination hearings in the Senate, Kagan testified that she had neither offered the President her opinion about the health care bill nor taken part in meetings where the matter was discussed. On Wednesday Gohmert said: "If it turns out that she lied in order to get on the court, that she did express opinions about the bill, that she did participate in meetings about the bill, that would prove she lied to get on the court, and she should be impeached."

A review of the transcript of Justice Kagan's confirmation hearings reveals the following relevant exchange between Senator Tom Coburn (R-Okla.) and Elena Kagan:

> COBURN: Thank you. And my — I have two final questions. One, was there at any time — and I'm not asking what you expressed or anything else — was there at any time you were asked in your present position to express an opinion on the merits of the health care bill?

> KAGAN: There was not.

If in fact as solicitor general Kagan expressed opinions on the merits of ObamaCare, then Gohmert is correct in his assertion that Kagan lied to the Senate.

Gohmert was not a lone voice in the wilderness calling for Kagan to recuse herself from consideration of the healthcare challenge. Judicial Watch, for example, obtained e-mails in which Kagan remarked about the process of ObamaCare's passage in Congress. According to a report on the matter published in March by Judicial Watch:

> Emails previously obtained by Judicial Watch suggest that, during Justice Kagan's tenure as Solicitor General, the Office of the Solicitor General had been more involved in the legal defense of the PPACA [Patient Protection and Affordable Care Act) than had previously been disclosed. Late last year, another set of records were produced that included an email showing what appeared to be then-Solicitor General Kagan's excitement and support for the passage of the PPACA.

In his annual report on the federal judiciary published last year, Chief Justice John Roberts wrote that he had "complete confidence" in the ability of his fellow high court justices to determine the appropriate time to recuse themselves from cases wherein they may have personal interest.

Recusal is the process by which a judge abstains from participating in a hearing due to a conflict of interest. According to applicable federal law (U.S. Code Title 28, Section 455), a "judge shall recuse [himself or herself] in any case in which the judge's impartiality might reasonably be questioned."

Regarding the decision of a justice to recuse himself or herself, Roberts wrote in his report:

> Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455. They may consider recusal in response to a request from a party in a pending case, or on their own initiative. They may also examine precedent and scholarly publications, seek advice from the Court's Legal Office, consult colleagues, and even seek counsel from the Committee on Codes of Conduct. There is only one major difference in the recusal process: There is no higher court to review a Justice's decision not to recuse in a particular case. This is a consequence of the Constitution's command that there be only "one supreme Court." The Justices serve on the Nation's court of last resort.
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> As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.
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> Although a Justice's process for considering recusal is similar to that of the lower court judges, the Justice must consider an important factor that is not present in the lower courts. Lower court judges can freely substitute for one another. If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that recused judge's place. But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership. A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.

Notably, at the time of the court's announcement that it would hear the ObamaCare case, many pundits and congressmen were calling for Justice Clarence Thomas to recuse himself, as well, given his wife's

work with various groups actively opposing the Affordable Care Act.

Now that the recusal (or refusal) of Justice Kagan is a moot point with regard to the ObamaCare decision, Gohmert is determined to use the power of Congress to investigate Kagan's role in the White House's ObamaCare deliberations and to impeach her if he can prove she lied about how substantial a part she played in them.

Speaking from the steps of the Supreme Court, Gohmert declared: "When in the course of human events it becomes clear that you have people who will not follow the law, it's time to use orderly methods set forth in the Constitution to remove them from their offices, and get people who will abide by their oaths."

A spokesman for the Supreme Court could not be reached for comment on Gohmert's statements.