

SCOTUSblog Briefing Paper**Elena Kagan – “Don’t Ask, Don’t Tell”****June 17, 2010****I. Summary and Our Take**

Elena Kagan’s approach to military recruitment on campus is of interest to veterans and strong military backers, as well as those concerned with issues relating to gay rights. “Don’t ask, don’t tell” is also one of the few social issues on which Kagan has taken a strong stance.

At the time that Elena Kagan became dean of Harvard Law School, the school permitted on-campus recruiting by the military. The school had a general policy banning recruiting by employers who engage in discrimination. The military seemingly violated that policy through its “don’t ask, don’t tell” policy excluding gays and lesbians from openly serving. Kagan in 2003 called the military’s policy a “moral injustice of the first order.” But the school at the time did not enforce the ban against the military because a federal statute – the Solomon Amendment – provided that any university which excluded military recruiters would lose its federal funding. For Harvard, the loss of funding for the entire university (as opposed to the law school, which did not receive federal funds) would have been devastating.

In 2004, a federal court of appeals held by a divided vote that the Solomon Amendment was unconstitutional. Kagan immediately enforced the recruitment policy against the military. Kagan did not ban the military from campus, however, but instead took steps to arrange for a student group to facilitate contact between military recruiters and law students. Kagan’s policy generally tracked the law school’s approach in the period prior to 2001, during which the government had not taken the position that the Solomon Amendment applied to the law school’s recruiting policy.

Although the court of appeals decision was stayed, meaning that the Solomon Amendment remained in force, Kagan continued to enforce the school’s antidiscrimination policy. When, over the summer of 2005, the Department of Defense notified Harvard that it would withhold all funding if the law school continued to enforce its policy against the military, Kagan reversed herself and permitted the military to use on-campus recruiting facilities. In the email to the law school announcing the policy change, she did, however, encourage students to “express their views clearly and forcefully regarding the military’s discriminatory employment policy.”

Kagan personally took one further step in the controversy by joining *amicus* briefs in the court of appeals and the Supreme Court in the challenge to the Solomon Amendment. (While many law schools joined the lawsuit itself, Harvard did not.) The Supreme Court brief, written by former Acting Solicitor General Walter Dellinger and joined by thirty-nine prominent law professors in addition to Kagan, argued that the statute by its terms did not apply to policies like Harvard’s. It did not advance the constitutional challenge in the case – that the law violates the First Amendment. The Supreme Court unanimously rejected both the constitutional challenge and the academics’ statutory argument.

At her Solicitor General confirmation hearing, Kagan said that she would have defended the Solomon Amendment had she been Solicitor General at the time. She fully accepted that her legal view had not prevailed, and that her obligation would be to defend the law Congress enacted: “of course there was a reasonable basis [for the statute]. I mean, my gosh, the Court ruled 9-0.”

Aside from the “don’t ask, don’t tell” controversy, Kagan went out of her way to publicly convey her support for the armed forces. Numerous Harvard graduates who have served in the military have come forward to attest to her extensive efforts to honor students in the military, stressing her sincerity. She hosted dinners at Harvard for veterans. In 2007, she was invited to give the distinguished Evening Lecture at West Point before cadets, in which she explained that she was “in awe of [the cadets’] courage and dedication” and recognized that “my security and freedom and indeed everything else I value depend on all of you.” Kagan explained that in light “of the vital role the military plays in the well-being of the country,” she was “grieved” at the conflict between the military and law schools, including her “personal[ly]” belief “that the exclusion of gays and lesbians from the military is both unjust and unwise.” It was precisely because of her respect for the military that she “wish[ed] devoutly that these Americans could join this noblest of all professions and serve their country in this most important of ways.” Even in her emails to the law school censuring the “don’t ask, don’t tell” policy, she expressed appreciation for “the extraordinary service that members of the military provide to all of us.” Friends insist that she privately says the same.

Given the above, we believe that efforts to paint Kagan as anti-military are incorrect and unlikely to succeed. With respect to “don’t ask, don’t tell,” she enforced a neutral policy applicable to all employers, not one that targeted the military – a policy that was well within the mainstream of American law schools. She also established a back-channel mechanism for the military to reach potential law student recruits. Kagan’s other conduct (for example, her treatment of members of the service on campus) and her other statements (for example, her West Point speech) persuasively answer the claim that she bears hostility towards the military.

II. The Relevant Source Materials

- A. [Email to Harvard Law School on Oct. 6, 2003](#), explaining why military recruiters had started using campus recruiting facilities:
 - “I abhor the military's discriminatory recruitment policy. The importance of the military to our society -- and the extraordinary service that members of the military provide to all the rest of us -- makes this discrimination more, not less, repugnant. The military's policy deprives many men and women of courage and character from having the opportunity to serve their country in the greatest way possible. This is a profound wrong -- **a moral injustice of the first order.**”
- B. [Amicus brief submitted in *Rumsfeld v. Forum for Academic and Institutional Rights*](#), joined by Kagan, with – among others – Laurence Tribe, Martha Minow, Frank Michelman, Heather Gerken, and Elizabeth Warren (dated Sept. 21, 2005):

- Main argument: “The Solomon Amendment rules out policies that target military recruiters for disfavored treatment, but it does not touch evenhanded antidiscrimination rules that incidentally affect the military.”
 - “We are deeply committed to a fundamental moral principle: ‘A society that discriminates based on sexual orientation—or that tolerates discrimination by its members—is not a just society.’”
- C. [Email to Harvard Law School on Sept. 20, 2005:](#)
- Kagan states her “own views on the matter”: the military’s “don’t ask, don’t tell” policy is “deeply wrong – **both unwise and unjust.**”
 - “The importance of the military to our society – and the great service that members of the military provide to all the rest of us – heightens, rather than excuses, this inequity. . . . I look forward to the time when all our students can pursue any career path they desire, including the path of devoting their professional lives to the defense of their country.”
- D. [Email to Harvard Law School on Mar. 7, 2006:](#)
- “As most of you know by now, the Supreme Court in *Rumsfeld v. FAIR* yesterday upheld the Solomon Amendment, as interpreted by the U.S. Government, against legal challenge. I am disappointed by this decision, which rejected the statutory claim presented by a group of Harvard Law School professors as amici, as well as the constitutional claim raised by FAIR. In the wake of this decision, Harvard Law School will continue to provide Career Services assistance to the military, as the School does to non-discriminating employers. At the same time, **I hope that many members of the Harvard Law School community will accept the Court’s invitation to express their views clearly and forcefully regarding the military’s discriminatory employment policy.**”
- E. [“Evening Lecture”](#) to cadets at West Point (Oct. 17, 2007):
- “I want to thank all of the cadets here this evening . . . for all you will do to defend, protect, and strengthen this country. Each of you has made a decision—a profound commitment—to join ‘the long grey line’ of service. I am in awe of your courage and your dedication, especially in these times of great uncertainty and danger. **I know how much my security and freedom and indeed everything else I value depend on all of you.**”
 - “I don’t accept many outside speaking invitations; this may be the only talk of this kind that I’ll give this year. I accepted *this* invitation primarily to thank all of you senior cadets -- and to wish you godspeed as you go forward to serve your country and your fellow citizens in the greatest and most profound way possible.”
 - “I have been grieved in recent years to find your world and mine, the U.S. military and U.S. law schools, at odds – indeed, facing each other in court – on one issue. That issue is the military’s don’t-ask-don’t-tell policy. Law schools, including mine, believe that employment opportunities should

extend to all their students, regardless of their race or sex or sexual orientation. And I personally believe that the exclusion of gays and lesbians from the military is both unjust and unwise. I wish devoutly that these Americans too could join this noblest of all professions and serve their country in this most important of all ways.”

- F. During her confirmation as Solicitor General, Kagan said she would have defended the Solomon Amendment if she had been Solicitor General during *Rumsfeld v. FAIR*:
- At her Senate Judiciary Committee hearing, in response to a question from Senator Arlen Specter (Feb. 9, 2009): “There is a clear obligation on the part of the Solicitor General to defend a statute in that circumstance unless there’s no reasonable basis to argue for the statute . . . I feel comfortable saying--of course there was a reasonable basis. I mean, my gosh, the Supreme Court ruled 9-0.” ([video](#), 83:50)
 - [In response to written questions](#), again one from Senator Specter: “I am sure that had I been Solicitor General at the time the Third Circuit decision came down [in *Rumsfeld v. FAIR*], I would have asked the Supreme Court to review the decision. (Similarly, I would have sought appellate review in the Third Circuit had the district court held the Solomon amendment unconstitutional.) Indeed, this would have struck me as an easy case: a federal statute had been invalidated on constitutional grounds and there were clearly reasonable arguments that could be made in its defense. Those arguments, of course, would only be stronger today, in any future challenge to the Solomon Amendment, given the Supreme Court’s emphatic decision upholding that statute’s constitutionality. My approach to cases involving challenges to 10 U.S.C. § 654, the statute involving the don’t-ask-don’t-tell policy, would be the same.”

III. Statements by Supporters and Opponents

A. Opponents:

- **Curt Levey, director of the Committee for Justice** ([full statement](#)):
 - “[Kagan has] a demonstrated hostility to the very armed forces that make our freedom and constitutional rights possible.”
 - “Obama has chosen to replace the Court’s last veteran with a nominee who essentially spit in the eye of America’s armed forces. Kagan banished military recruiters from the Harvard Law School campus during a time of war, after pronouncing our armed forces guilty of ‘a moral injustice of the first order’ for carrying out the Clinton Administration’s ‘don’t ask, don’t tell’ policy.”
- **Tom Fitton, president of Judicial Watch** ([full statement](#)):
 - “President Obama’s nomination of Elena Kagan to the Supreme Court is irresponsible. Ms. Kagan is a liberal activist and political

operative with no experience as judge. A Supreme Court nominee ought to have significant practical experience as a lawyer or a judge – especially a nominee for the nation's highest court. Her decision to throw military recruiters off the campus of Harvard Law School during a time of war shows she is far to the left of mainstream America. The fact that she continued to work in the Clinton White House after it became clear that President Clinton lied under oath raises questions about her ethical judgment. And her record, as spotty as it is, shows that Ms. Kagan is a committed liberal judicial activist. . . . Tea Party activists ought to be paying close attention to this nomination.”

- **Tom McClusky, president of the Family Research Council** ([full statement](#)):
 - “Last year candidate Barack Obama repeatedly opined that students should have military service opportunities on campus. However, President Obama’s nominee for solicitor general, Harvard Law School Dean Elena Kagan, believes the military should be barred from campus. In fact, she fought all the way to the United States Supreme Court, trampling on students’ constitutional rights all the way there, in order to deny qualified students the opportunity to serve our country . . . Kagan’s staunch ideological opposition to the military and providing qualified students the opportunity to serve puts her well outside of the mainstream. Even Bill Clinton, who dodged a military draft during Vietnam, signed the law Kagan opposes, the Solomon amendment, with overwhelming congressional and public support.”
- **Carrie Severino, chief counsel and policy director of the Judicial Crisis Network** ([full statement](#)):
 - “Ever since her efforts to get on the D.C. Circuit were stymied for fear of her extremist views, Kagan has bent over backwards to avoid taking public positions on hot-button topics. Except when she can’t help herself, like when she banned military recruiters during wartime from Harvard Law School because their Democrat-initiated ‘don’t ask don’t tell’ policy was, in her words, ‘a moral injustice of the first order.’”
- **Senator James Inhofe** gave several reasons for an early commitment to vote against Kagan, including her attempt to “bar military recruiters from the Harvard Law campus.” ([AP](#), May 10, 2010)
- **Senator Jeff Sessions:**
 - “I think she made a big mistake [banning recruiters]. Was that disqualifying? I don’t know. We’ll see. But it’s a significant issue.” ([CNN](#), May 10, 2010)
 - “It was an unjustifiable decision [banning recruiters]. But rather than acknowledge that Ms. Kagan had acted in appropriately, the Obama Administration has instead done something odd to me. It’s

tried to defend this indefensible activity, distorting the clear facts in the process. We need to get that straight. As we begin to think about this nomination, we need to understand the facts.” (May 21, 2010, on the Senate floor, as reported by [Politico](#) on May 24)

- “Simply put, Harvard was legally bound by the Solomon Amendment every single day that Kagan was dean. Thus, when Kagan banned the military from the recruitment office, she wasn’t only discriminating against our men and women in uniform, but was doing so in defiance of federal law.” ([Tampa Tribune op-ed](#), June 13, 2010)
- [Ed Whelan on Bench Memos](#) (May 10, 2010):
 - “In her fervent opposition to the Don’t Ask, Don’t Tell law and the Solomon Amendment, Kagan elevated her own ideological commitment on gay rights above what Congress, acting on the advice of military leaders, had determined best served the interests of national security. At a time of war, in the face of the grand civilizational challenge that radical Islam poses, Kagan treated military recruiters *worse* than she treated the high-powered law firms that were donating their expensive legal services to anti-American terrorists.”
- [Ed Whelan on Bench Memos](#) (May 19, 2010):
 - “Last May, a Ninth Circuit panel ruled in *Witt v. Department of Air Force* that the Supreme Court’s 2003 decision in *Lawrence v. Texas* requires that the ‘Don’t Ask, Don’t Tell’ law ‘satisfy an intermediate level of scrutiny under substantive due process.’”
 - “Kagan’s failure to seek immediate review of the Ninth Circuit’s ruling is either a remarkably poor judgment call or a betrayal of her promise to set aside her personal opposition to ‘Don’t Ask, Don’t Tell’ in representing the interests of the United States. Alas, I have too much regard for Kagan’s legal ability to consider the first alternative to be plausible.”
- **Peter Beinart** at the [Daily Beast](#) (Apr. 26, 2010):
 - “Barring the military from campus is a bit like barring the president or even the flag. It’s more than a statement of criticism; it’s a statement of national estrangement.”

B. Supporters:

- Three **Harvard Law students and Iraq War veterans**, who supported military recruiting on campus, wrote a [letter to the editor in the Washington Times](#) (Feb. 5, 2009):
 - “[Kagan] has created an environment that is highly supportive of students who have served in the military. For the past three years, Miss Kagan has hosted a Veterans Day dinner for all former

service members and spouses. She pioneered this event on her own initiative, which has meant a great deal to students.”

- “Indeed, every year, Miss Kagan makes a point to mention the number of veterans in the first-year class during her welcome address to new students. Under her leadership, Harvard Law School has also gone out of its way to highlight our military service, publishing numerous articles on the school Web site and in alumni newsletters. These are not actions of an ‘anti-military zealot,’ and greater care should be exercised before someone is labeled as such.”
- **Vice President Biden**, speaking on [Good Morning America](#) (May 11, 2010):
 - “This is not a single bit of anti-military bias. She does think -- and I agree with her -- that the “Don't Ask, Don't Tell” policy is a very bad policy.”
- **Jeffrey Toobin** in the [New Yorker](#) (May 10, 2010):
 - “Kagan’s parsing of the issue seems, well, positively Obamaesque. She tried to walk the line between her liberal campus and the conservative military (and Congress), and seems to have come pretty close to pleasing both sides.”
 - “Kagan tried—tortuously—to steer a middle course. At first, she continued a previous policy of letting the military recruit. Then, in 2004, after the Third Circuit declared the Solomon Amendment unconstitutional, she evicted the military—sort of. She prohibited the military from using the school’s Office of Career Services, but allowed the recruiting of students to continue through the school’s veterans association. When the Solomon Amendment case went before the Supreme Court, Kagan sided with the plaintiffs—again, sort of. She signed a brief that did not go as far as the plaintiffs in the case wanted; the brief, written by her former Clinton Administration colleague Walter Dellinger, made a narrower point. It argued instead that the law did not apply as the government maintained. In any case, the Supreme Court unanimously rejected both the plaintiffs’ and Dellinger’s arguments and upheld the Solomon Amendment in full.”
- **Former Harvard Law School Dean Robert C. Clark**, in a [Wall Street Journal op-ed](#) (May 11, 2010), stressed that, as dean, Kagan continued a policy already in place:
 - The policy’s “practical effect on recruiting logistics was minimal.”
 - “Outside observers may disagree with the moral and policy judgments made by those at Harvard Law School. But it would be very wrong to portray Elena Kagan as hostile to the U.S. military. Quite the opposite is true.”
- **Emily Bazelon** at [Slate](#) (May 10, 2010):

- “[After the Third Circuit ruling], Kagan went back to Harvard's pre-2002 rule: Military recruiters met with students through the student veterans’ association rather than the law school's career-placement office. Again, this looks more like an accommodation than like a radical rejection of the military. Some gay-rights advocates on campus were disappointed and felt betrayed.”
- “Yes, there is that word again: evenhanded. It appears in the brief 15 times. *Judicial restraint, evenhanded antidiscrimination policy*—these phrases are all about signaling that the signers of the brief are reasonable, moderate, unobjectionable.”
- [Media Matters](#) (May 10, 2010):
 - “Kagan consistently followed the law, and Harvard students had access to military recruiters during her entire tenure as dean. Throughout Kagan's tenure as dean, Harvard law students had access to military recruiters -- either through Harvard's Office of Career Services or through the Harvard Law School Veterans Association.”
 - “Kagan's objections to DADT are mainstream, and her willingness to comply with and, as solicitor general, defend the Solomon Amendment demonstrate devotion to the rule of law.”

IV. News Sources

- A. Washington Post, [Foes may target Kagan's stance on military recruitment at Harvard](#) (Apr. 18, 2010)
- B. New York Times, [Potential Court Pick Faced Dilemma at Harvard](#) (May 6, 2010)
- C. National Public Radio, [Kagan's Attitude Toward Military Faces Scrutiny](#) (June 9, 2010)
- D. Politico, [Jeff Sessions rips Elena Kagan on military recruiting](#) (May 24, 2010)
- E. Los Angeles Times, [Kagan opposed military stance on gays](#) (May 12, 2010)
- F. Washington Post op-ed, [How I know Kagan isn't anti-military](#) (May 14, 2010)
- G. Boston Globe, [In Kagan stance on military, a complex history](#) (May 12, 2010)
- H. Associated Press, [Kagan's Role Against Military Recruitment Studied](#) (May 11, 2010)
- I. ABC News, [Sessions to Kagan: 'What were you thinking?'](#) (May 24, 2010)
- J. Washington Post, [Kagan, as Harvard law school dean, pursued two courses on 'don't ask' policy](#) (May 28, 2010)