

Testimony of Thomas N. Moe, Colonel USAF (ret)

United States Senate Committee on Judiciary

**Regarding the Nomination of Solicitor General Elena Kagan
to the Supreme Court of the United States
July 1, 2010**

Thank you Chairman Leahy and Senator Sessions for the opportunity to testify before this committee regarding the nomination of Solicitor General Elena Kagan to become an Associate Justice of the Supreme Court.

I appear today, as a military veteran with over 33 years service, to express my concern regarding this nomination for the following reasons.

Ms. Kagan has demonstrated a strong bias against the military, while Dean of the Harvard Law School, largely over policies concerning the eligibility of homosexuals to serve in the military. I believe this bias would color her judgment regarding cases involving the military that she would review. My concern goes beyond the fact that Ms. Kagan has never been a judge or practiced for any length of time as an attorney, but would nevertheless move directly to our highest court to review cases of the utmost importance to our country.

The issue is objectivity--any nominee for the high court should have experience or a record that demonstrates his or her capacity for objectivity. On the contrary, in the various positions of authority that she has held, Ms. Kagan has shown a troubling **lack** of objectivity, at least regarding the military. By her actions, Solicitor General Kagan has shown disregard, if not defiance of laws concerning the military. Her discrimination and disapproval was misdirected against those who, though charged with following those laws, had no say in policy or law making.

Ms. Kagan knowingly defied a particular law, the Solomon Amendment, which concerns military recruitment. During the time that she was Dean of the Harvard Law School, Ms. Kagan treated military recruiters as second-class citizens—with the effect of “shooting the messenger.” She has even called on her students to verbally criticize military personnel, while on other occasions she expressed support for uniformed individuals. Her superficial gestures did not mitigate official actions that were an affront to our military.

The one particular policy that she has championed, to allow homosexuals to serve openly in the military, has been the basis of her actions against military regulations and Federal law. Her position in this regard is most questionable in light of her complete absence of experience with or understanding of military policy and operations. It is unfortunate that in time of war she has presumed for herself the wisdom to demand a policy requiring the military to accept professed homosexuals in the military. Ms. Kagan

seems unaware that she has neither the experience on which to base that wisdom nor the responsibility to deal with the consequences of her convictions.

How can our warriors look at such people when they are poised at the tip of the sword, ready to sacrifice everything for their country, while a cloistered clique in ivory towers eats away at their institutions for the sake of narrow ideological interests? I can personally attest to the corrosive effect such people had on me as I suffered untold tortures at the hands of North Vietnamese Communists while our citizens at home attacked military veterans, committed violence against military facilities in the name of “peace,” and took political advantage of a nation at war to advance their own political careers.

I have voluntarily stood in the face of our country’s enemies--resolute and determined to suffer whatever personal consequences might be the price for the sake of our nation’s security. I support lawful rights of free speech, but I never could stomach critics within our borders who effectively attacked our backs while we faced enemies we believed to be a threat to our nation, our community and our family. Perhaps my brief testimony today reveals in part my concern for those whose attitudes toward the preservation of our nation and its people are manifest in political subterfuge instead of active, courageous and direct personal involvement that truly supports our military with actions, not just words.

As you know, in 1993 Congress passed and President Clinton signed Title 10 USC, Section 654, which codified long-standing Department of Defense regulations stating that homosexuals are not eligible for military service. The law also provided that the administration could omit from military regulations the requirement that persons joining the military make any reference to their sexual orientation. Prior to this administrative change, which is referred to as “Don’t Ask, Don’t Tell,” a person joining the military was required to answer a routine question about homosexuality on his or her induction form. (The Secretary of Defense may reestablish the former policy if deemed necessary.)

In 1995 Ms. Kagan joined the Clinton administration as Associate Counsel, Deputy Domestic Policy Advisor, but I know of no stand that she took against “Don’t Ask, Don’t Tell” during her tenure with Mr. Clinton.

When she was appointed Dean of the Harvard Law School in 2003, the United States Military enjoyed full and open access to the campus Career Services Office to recruit students to join the military. Yet she began to loudly condemn the law and policy, calling what in fact amounted to a more permissive treatment of homosexuals by the military “a profound wrong” and “a moral injustice of the first order.” Writing to the entire law school in October 2003, Kagan denounced the military’s recruiting policy as discriminatory and “abhorrent,” disregarding the fact that the 1993 law **was approved by strong, bi-partisan majorities in Congress.**

Her position was the cornerstone for her negative actions against the military. If Dean Kagan really wanted to stand on principle, she could have pressured Harvard to decline federal funds, or she could have resigned.

For many years Harvard Law School *had* banned the military from recruiting on campus, because in its view the military “discriminated” against homosexuals. When Congress saw that Harvard and other elite universities were excluding the military from recruiting on campus, it passed a law in 1994 that required universities and colleges to give the military equal access with other agencies to recruit on their campuses or face the loss of federal funds.

That law—called the Solomon Amendment after its originator Congressman Gerald Solomon—was repeatedly strengthened by Congress over the next ten years as some universities, including Harvard, continued to search for ways to continue to obstruct military recruiting. Specifically, the amended Solomon Amendment barred funding from any university that “prohibits, or in effect prevents” military recruiters from enjoying “access to students on campuses, for purposes of military recruiting in a manner that is **at least equal in quality and scope** to the access to campuses and to students that is provided to any other employer.”

Thus, in 2002, the Defense Department had threatened to cut off all federal funds for Harvard University unless its law school agreed to allow the military to recruit openly on campus through the Career Services Office. Faced with the loss of millions of taxpayer dollars, Harvard had acquiesced and lifted its restrictions.

Unfortunately, a little more than a year after Ms. Kagan assumed the position of Dean, and in spite of the DOD’s finding and Harvard’s acceptance of those findings, **she took it upon herself** to ban military recruiters from on-campus recruiting on an equal basis. She was apparently motivated by a ruling in November 2004 by the 3rd Circuit Court of Appeals finding the Solomon amendment was likely unconstitutional. But the 3rd Circuit Court **suspended its own ruling** pending review by the US Supreme Court. As a side note, the 3rd Circuit Court has appellate authority over certain states and territories but **not** Massachusetts, the home of Harvard University.

Nevertheless, in violation of the law, Ms. Kagan continued to use the 3rd Circuit Court’s opinion as an excuse to restrict military recruiters at the Harvard Law School even though there was no court order in place suspending enforcement of Solomon. Ms. Kagan has assured this committee that she would show “restraint” if she is confirmed as an Associate Justice. Her actions at Harvard suggest an inclination toward activism, not restraint or deference to laws affecting the military.

As a sop, she tried to direct military recruiters to work with the Harvard Law Student Veterans Association, a decision that violated the “equal treatment” requirement of Solomon. By any measure, the Veterans Association was not equipped to take the place of the full-time staff in the Career Services Office. Ms. Kagan’s decision, therefore, placed military recruiters at a clear disadvantage compared to nonmilitary

recruiters. She denied the military the ability to advertise through the normal recruiting channels, she barred them from even posting a job notice with the Career Services Office, and she prevented the military from collecting resumes or scheduling interviews as a participant in the school's regular interview season.

According to an Air Force email dated February 20, 2005, recruiters were reporting that Kagan's administration was "playing games" and "slow rolling" recruiters' requests for regular campus support in order to block them from recruiting on campus. The Army reported the same. In the words of an Army officer in charge of recruiting, "The Army was stonewalled at Harvard." Ironically, perhaps motivated by the recalcitrance of the dean, the military recruited five members in the spring of 2005--more than any other year during that decade according to the assistant dean of career services. Their success did not change the fact that the DOD had every right to threaten Harvard with the loss of federal funds in the summer of 2005. Accordingly, Ms. Kagan allowed recruiters equal access to the campus.

At the same time, she continued to denounce loudly what she called "the military's discriminatory recruitment policy," ignoring the fact that the military was merely following federal law. She also suggested that any military presence on campus felt "alienating" to Harvard Law students and staff.

In September 2005, Ms. Kagan escalated from hostile words to legal activism. She joined a number of other Harvard law professors in a "Friend of the Court" argument to the Supreme Court, claiming that Harvard Law could, without violating the Solomon Amendment, bar military recruiters, because it barred **all** recruiters who "discriminated" against homosexuals. In March, 2006 this argument, along with the "suspended" 3rd Circuit Court ruling was struck down by the Supreme Court **unanimously** in "Rumsfeld vs. FAIR (The Forum for Academic and Institutional Rights, which had filed a law suit on behalf of laws schools opposed to "Don't Ask, Don't Tell").

Even the most liberal-minded Justices rejected Ms. Kagan's position with a stinging rebuke that her theories were "rather clearly *not* what Congress had in mind" when it amended and strengthened the Solomon Amendment. She later acknowledged that the 3rd Circuit Court's decision did not justify her actions, but said **she acted anyway** in the "hope" that the Department of Defense "would choose not to enforce" the law. In every instance that her policies were reviewed, including by the Supreme Court, Dean Kagan was found in violation of the law.

I find Ms. Kagan's actions deeply troubling on a number of levels. As a citizen, I cannot support the appointment of justices who would pick and choose which laws they wish to follow, or choose to interpret laws to suit their political views or policy preferences or violate a law in hopes that the law would not be enforced. As a veteran, I am even more troubled by a potential activist justice who would not **defer to the other branches of government, particularly the Congress**, which the Supreme Court has, to date, recognized as **more qualified** to act on issues concerning the military.

Ms. Kagan has stated that she only wants all citizens to be able to serve in the military in order to have an equal chance to defend their country. In light of her antimilitary record in general, I find such a statement inconsistent with her actions. Anecdotal stories of Ms. Kagan inviting military members to Law School social events seem contrived and patronizing in light of her public stance including calls to incite public opposition to military recruiters. I refer to emails she sent campus wide, which have been cited in the Harvard Crimson, which called on students to demonstrate and speak against the presence of recruiters “clearly and forcefully.”

And what evidence is there that Ms. Kagan has shown an appreciation or even an **understanding** of the position of the Defense Department regarding homosexuals in the military? The policy has served the military in defense of our freedom and security, including Ms. Kagan’s right to challenge it lawfully, with the solid support of the US Congress and the Supreme Court.

We do not know whether former Dean Kagan had even reviewed the 15 findings that Congress incorporated in the 1993 law (Title 10 USC section 654) which state why homosexual activity in the military is harmful to its mission. As stated prominently in these findings, **the military is a specialized society, that is subject to special laws that would not apply to the citizenry at large.** These findings are based on the long, distinguished and successful history of our armed forces, pointing out that

- “military life is fundamentally different from civilian life;
- “the military’s standards of conduct apply to members of the armed forces at all times, whether or not that individual is physically on or off a military installation;
- “unit cohesion, that is, the bonds of trust among individual service members” is critical to “combat effectiveness” and
- “the prohibition against homosexual conduct is a **longstanding element of military law** that continues to be necessary in the unique circumstances of military service.”

I believe that people who do not understand the special nature of the military are, first of all, ignorant of the demanding, not to mention life-threatening, role that military members understand and willingly accept. Secondly, critics are in denial of the vital role that our armed forces have played for two centuries to ensure the survival of our nation—a nation where each citizen has the right to speak openly against those same armed forces and even to belittle their role in our nation’s history. **Those in our society who don’t recognize much less understand the special nature of the military should not be handed authority to make important decisions that affect it.**

There are a *number* of eligibility requirements that people must meet to join the military that could be seen in the civilian world as discriminatory. These requirements include issues of age, fitness, weight, visual acuity, intelligence, certain levels of education and standards of behavior to include personal financial responsibility and even responsibility toward one’s driving record. What is more, the requirements themselves

are not applied evenly, since they vary from one level to the next with the highest standards being applied to those with the most responsibility.

And I question whether Dean Kagan **consistently** applied her stated principles with regard to the issue of discrimination against homosexuals. Were she committed to this principle, she would have protested the presence of **any agency** or organization on campus that discriminated against homosexuals. Some Islamic extremist groups, for example, not only discriminate, they execute homosexuals under Sharia law.

Her principles did not seem to come in to play in 2005 when Prince Alwaleed Bin Tala established the Center of Islamic studies program at Harvard with a large gift. This was at a time when Ms. Kagan was dean of the Law School and was actively fighting against military recruiters because of the law and policy regarding homosexuals. Harvard's president, Mr. Summers, accepted the gift with lavish praise and gratitude, saying that the "program will enable us to **recruit additional faculty** of the highest caliber, adding to our strong team of professors who are focusing on this important area of scholarship."

Although the program was not part of the law school, Ms. Kagan could have applied her professed principles consistently and protested the group's presence on campus. Ms. Kagan apparently did not feel compelled to point out to Mr. Summers that the University had a policy prohibiting organizations that discriminate against homosexuals.

At the same time, Harvard and Ms. Kagan found no problem knowingly discriminating against military officer development programs such as ROTC on campus and denying equal access for military recruiters seeking to speak to campus students. This in spite of Ms. Kagan's professed "appreciation" of the military.

I find Ms. Kagan's actions deeply offensive as a veteran of the United States Armed Forces. Ms. Kagan claims that she only wanted all her students to have an equal chance to defend their country. But she would delay that day with actions that discouraged students from serving in the military.

Her defenders tell stories of Ms. Kagan inviting military veterans to parties and that she has specifically voiced her support of strong ties between the military and the law. Indeed on October 17, 2007, she addressed cadets at the United States Military Academy at West Point saying, "I would regret still more if ... disagreement created any broader chasm between law schools and the military. ... It must not because of what we, like all Americans, owe to you. And it must not because of what I am going to talk with you about tonight--because of **the deep, the fundamental, the necessary connection between military leadership and law**. That connection makes it imperative that we--military leaders and legal educators--join hands and be partners."

But whatever her professed tolerance for individual soldiers and veterans, the plain fact remains that she was all-too-willing to condemn the military as an institution for policies she dislikes.

Ms. Kagan served as a close advisor to President Clinton, who signed the 1993 statute into law that resulted in “Don’t Ask, Don’t Tell,” but she has never criticized him for that action even though she had ample opportunity after she left his administration. President Clinton spoke at Harvard’s graduation while she was dean in 2007, but she never called for students to protest against him. Ms. Kagan has written letters to Congress objecting to certain legislation dealing with the War on Terror, but I found no record that she has ever written to Congress to object to Don’t Ask, Don’t Tell.

Ms. Kagan was willing to give the benefit of the doubt to President Clinton and Members of Congress, but she would not extend the same courtesy to the officers of our nation’s military who wanted to recruit her students to serve as lawyers in the Armed Forces and thereby serve their country. Instead, she repeatedly condemned the military for policies created by civilian lawmakers and carried out by the Executive Branch-- policies that military members are sworn to uphold.

One of the proudest traditions of our military is its absolute commitment to civilian control. Congress and the civilian leadership at the Defense Department set the rules under which they operate, and our men and women in uniform accept those rules and execute their mission with vigor, even when they sometimes disagree with or don’t like the rules the political branches set. Should they not, they are dismissed.

I cannot understand how Ms. Kagan could believe that interfering with the military’s mission—frustrating its efforts to recruit talented lawyers to advise commanders and represent individual soldiers—would do anything to change the Don’t Ask, Don’t Tell policy she so abhorred. Indeed, it defies all logic to think that she would make more progress toward overturning Don’t Ask Don’t Tell by obstructing the work of junior military officers sent to recruit on university campuses than by protesting to the high public officials and Members of Congress who actually have the **authority** to change the policy.

Perhaps Ms. Kagan believed her actions were “symbolic”--that she had to at least pretend to “take a stand” according to the fashionable view in academia that seems passionately opposed to many things about the military. But her actions were *not* merely “symbolic” to the recruiting officers who had to work around the obstacles she put in their paths. They certainly were more than “symbolic” to the students who had served in the Armed Forces or who were hoping to join the military after graduation. It did not help that they had to watch their dean target the military for policies over which they had no control. They had to listen to their dean suggest that their classmates were justified in feeling “alienated” by the presence on campus of military officers.

It may have been “symbolic” and politically expedient to her. But I fear it is also symbolic--more than that: revealing--of the attitudes that she would take with her to the Supreme Court.

It is ironic that Ms. Kagan has been nominated to replace Justice John Paul Stevens, a decorated veteran of the US Navy in WWII. I respect the brief military service of Justices Alito and Kennedy, but upon Justice Steven’s retirement there will not be a veteran on the court with more than a modicum of active duty experience. In an interview Justice Stevens himself reportedly stated that he believes that there should be at least one veteran on the court. Much is said of the need for “diversity” in our institutions. In my view this is as much a consideration of diversity on the court as any other.

I compare that to a situation in my personal life when I was hired to be a research fellow at the Joan Kroc Peace Institute at Notre Dame, because the director at that time determined that for all the researchers in the Institute working on issues of world peace, not a single one of them had any professional military experience. How could the Institute resolve any of the vexing questions regarding war and peace when it did not have any military expertise to leaven its research?

Lastly, I would think that a person so opposed to existing rules governing the military as Ms. Kagan would *encourage* rather than block the participation of the product of her law school, its graduates, so that **they may be part of the composition of the military’s leadership and thus have the opportunity to influence military policy**. On the contrary, I see such vitriol against the military as expressed by those such as Ms. Kagan as evidence that they **don’t** seek to understand or influence military policy according to normal processes but instead to undermine military effectiveness, readiness and cohesion. This may not be their **intent**, but it is their **effect**.

I again thank the chairman and the committee for allowing me this opportunity to testify.