

**TESTIMONY OF MR. TONY PERKINS**  
**PRESIDENT & CEO, FAMILY RESEARCH COUNCIL**  
**WASHINGTON, D.C.**

**BEFORE THE**  
**UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

**CONFIRMATION HEARINGS FOR THE APPOINTMENT OF**  
**ELENA KAGAN TO THE SUPREME COURT OF THE UNITED STATES**

**JULY 1, 2010**

Chairman Leahy, Ranking Member Sessions, and other members of the Committee,

I am grateful for the opportunity to address this body regarding the nomination of Solicitor General Elena Kagan to serve as an Associate Justice of the Supreme Court of the United States.

As a former Marine and police officer who spent many years in uniform, I will focus my remarks today on General Kagan's treatment of military recruiters at the Harvard Law School contrary to the requirements of a federal law, the Solomon Amendment. I will argue that her vehement opposition to that law – in the face of a clear federal mandate – raises doubts as to whether she possesses the requisite judicial temperament and impartial nature required of a Supreme Court justice.

General Kagan has been an outspoken opponent of the law passed by Congress in 1993 which prohibits open homosexuality in the military. Congress, recognizing the importance of widespread recruiting to the success of the military, later passed the law known as "the Solomon Amendment" in 1995. It requires any school receiving funding from the Department of Defense to allow military recruiters on campus.

It was not until 2002 that the Department of Defense began to enforce the Solomon Amendment's funding requirements. Under that pressure, Harvard reluctantly began to cooperate again with military recruiters. It was after then-Professor Kagan became dean of the Harvard Law School in 2003 that she wrote to the school to make clear just how grudging that cooperation would be in light of the military's "repugnant" policy.<sup>1</sup> She declared, "I abhor the military's discriminatory recruitment policy," and she added for good measure that the policy was "...a profound wrong—a moral injustice of the first order."

In 2005, regarding the Solomon Amendment, Dean Kagan wrote to the Harvard Law School community, "I believe the military's discriminatory employment policy is deeply wrong—both unwise and unjust."<sup>2</sup> "A moral injustice of the first order?" Really?

General Kagan's comments indicate that she had little or no concern about the specific needs of our military institutions or the men and women who serve in them. Her remarks reveal that nothing will stand in the way of her extensive and aggressive political activism – not even the well-being of the members of our armed forces.

Mr. Chairman, the purpose of our military is to fight and win this country's wars.

War is the most difficult human activity bar none. It requires organized groups of men and women to act with strategic and tactical lethality while its members are simultaneously being wounded and killed. As the great Prussian military analyst General Karl von Clausewitz wrote, "Everything in war is simple, but the simplest thing is difficult."

In war, the normal ways of living are completely sacrificed in the harsh, punishing environment of combat. Even in peace time settings and in units not engaged in combat, great sacrifices are required. Foremost among these deprivations is the elimination of personal privacy and space. Military life, by its nature, must be characterized by a regular lack of privacy and repeated situations of forced intimacy.

In such an environment it is *not* "a moral injustice of the first order" to minimize the sexual exposure that such an environment forces on soldiers, sailors, corpsmen, and airmen. *It is the only sensible and effective way to run a military organization.* The forced exposure of one's most intimate nature to others possessing the capacity for same-sex attraction would systematically corrode morale and military

effectiveness. It is this difficult reality that the military wishes to avoid with the adoption of policies like “Don’t Ask, Don’t Tell.”

Elena Kagan’s various remarks regarding the military recruiting controversy at Harvard suggest a breathtaking lack of perspective about the military and the national security needs of this nation. These deficiencies alone *should* call into question her qualifications to be an associate justice of the United States Supreme Court.

With all this said, it must be noted that the current law on homosexuality in the military has been *repeatedly* challenged—and upheld—by the federal courts. As all of you know, the Solomon Amendment was deemed constitutional by a unanimous Supreme Court. Then Dean Kagan had taken the opportunity of a circuit court ruling striking down the Solomon Amendment to stick the military recruiters in an off-campus ghetto even though the court had stayed its ruling. That stay did not stay Kagan.

Some writers have been defending Kagan’s actions on military recruiting, claiming they do not demonstrate that she is “anti-military.” There is truth in that only in that she does not oppose the military simply because they *are* the military.

However, she clearly *does* oppose the military because they have not yet bowed to the demands of the sexual counter-culture. It's not that Elena Kagan does not want the military to defend our nation against terrorism; it's just that she wants to use the military to advance the Left's radical social policies *more*. At least, from her record, we know her priorities.

This becomes even more clear when one examines a 2005 Harvard law professors' brief in the Solomon Amendment case -- which Kagan signed. Apart from its technical legal argument, this amicus brief began with a sweeping declaration that is startling in its implications. Kagan and the others declared, "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.'"

Note that Kagan and the professors condemn not only a society that "discriminates," but one "that tolerates discrimination by its members." The implications of this are chilling for the freedom of speech and the freedom of religion. It should be frightening not only to the majority of Americans that still affirm that homosexual behavior is morally wrong, but especially disturbing to

those whose views on homosexuality are the result of an orthodox view of the Bible which clearly characterizes homosexual conduct as sinful.

It should also be alarming for those of us who live in the 45 states that still define marriage as the union of a man and a woman. It seems rather obvious that Elena Kagan would strike down any marital statute – including the federal Defense of Marriage Act – which defines marriage as being only between one man and one woman. She should be asked to square the statement in the 2005 amicus brief with the view of the vast majority of Americans that traditional marriage is not only constitutional, but that it is the only acceptable form of marriage.

It is also worth noting that the nominee's outrage about the military recruiting policy has been selective and, perhaps, hypocritical. President Clinton signed the law, passed by Congress in 1993, that now defines policy regarding open homosexuality in the military. The Solomon Amendment also became law under President Clinton. Yet, those facts did not keep General Kagan from working in that administration to advance her career. Nor did it keep her from going along with Harvard University's acceptance of a massive gift from a Saudi Arabian prince who wished to insinuate acceptance of shariah law into one of America's foremost legal institutions. Shariah is the religious law of Saudi Arabia, and it

serves harsh treatment of women and homosexuals, but the prince and his minions did not receive the treatment dished out to the American military recruiters at Harvard Law School.

As an aside, General Kagan herself has been pointedly telling us all about her great love for the military as of late. She describes her close relations with military personnel at Harvard, and we hear about a 2007 speech at West Point. In my mind, this makes her actions somewhat worse because she was willing – through public e-mails and actions – to stigmatize the military as being morally inferior even though she supposedly had these close relationships. What are we to say of her? It appears that not even personal affection and friendships can trump her political and ideological commitments. This seems like a dangerous quality for a judge to have. In the courtroom, a neutral judge cannot abhor one of the parties that stand before her or cast off one party for the perceived greater good of the many.

In closing, I believe that Solicitor General Kagan subscribes to an ideological view of the world which will level all laws and institutions that do not accept the alternative sexual practices and living arrangements that she favors. It is a movement that is willing to sacrifice our military, our cherished institutions, and our freedoms for the sake of this narrow but incredibly disruptive ideological



agenda. She appears to have an agenda that neither the constitution nor the law will limit or constrain. We do not need a justice on the Supreme Court who sees it as her life mission to write the *Roe v. Wade* of homosexual rights. Her political and legal activism in this area endangers the military, and it endangers the institution of marriage. By themselves, these positions make her unfit to sit as an associate justice of the United States Supreme Court. I urge the Senate to reject her nomination.

## NOTES

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<sup>1</sup> E-mail, Dean Kagan to Harvard Law School, October 9, 2003.

<sup>2</sup> E-mail, Dean Kagan to Harvard Law School, September 20, 2005.