



# Supreme Court Nominee Elena Kagan: Role in the Solomon Amendment Litigation

name redacted

Legislative Attorney

May 21, 2010

Congressional Research Service

7-....

[www.crs.gov](http://www.crs.gov)

R41248

## Summary

On May 10, 2010, President Obama nominated Elena Kagan to replace Justice John Paul Stevens as a member of the Supreme Court. Unlike the vast majority of other nominees to the Supreme Court, Kagan, a former dean at Harvard Law School (HLS) and current Solicitor General, has not been a member of the judiciary and therefore has never issued the judicial opinions that are a traditional source of insight into a nominee's legal views. Nevertheless, Kagan has written, contributed to, or otherwise signaled agreement with a wide array of legal documents during the course of her career, and some understanding of her views may be gleaned from these documents.

During her tenure as dean of HLS, Kagan, in conjunction with 39 of her faculty colleagues at the law school, signed an *amicus curiae* brief in support of the Forum for Academic and Institutional Rights (FAIR). At the time, FAIR, which consisted of a consortium of law schools and faculty members, was in the process of challenging the constitutionality of the Solomon Amendment, a federal law that requires colleges and universities that receive federal funds to give military recruiters the same access to students and campuses that is provided to other employers. The brief signed by Kagan and her colleagues offered a statutory argument and did not address broader constitutional arguments. Like many law schools and other academic institutions, HLS maintains a nondiscrimination policy that requires any employer that conducts on-campus recruiting to sign a document stating that it does not discriminate on various grounds, including "race, color, creed, national or ethnic origin, age, sex, gender identity, sexual orientation, marital or parental status, disability, source of income, or status as a veteran." HLS, along with many other institutions of higher education, had sought to bar military recruiters from its campus in response to the military's "Don't Ask, Don't Tell" (DADT) policy, which, with certain exceptions, requires the discharge of members of the armed services who engage in specified types of homosexual conduct. Ultimately, the Supreme Court upheld the constitutionality of the Solomon Amendment in the 2006 case *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*

## **Contents**

Introduction .....	1
The Solomon Amendment and Harvard Law School’s Nondiscrimination Policy .....	2
The <i>Amicus</i> Brief .....	3
The Supreme Court’s Decision .....	4
Conclusion.....	5

## **Contacts**

Author Contact Information .....	6
----------------------------------	---

## Introduction

On May 10, 2010, President Obama nominated Elena Kagan to replace Justice John Paul Stevens as a member of the Supreme Court. Unlike the vast majority of other nominees to the Supreme Court, Kagan, a former dean at Harvard Law School (HLS) and current Solicitor General, has not been a member of the judiciary and therefore has never issued the judicial opinions that are a traditional source of insight into a nominee's legal views. Nevertheless, Kagan has written, contributed to, or otherwise signaled agreement with a wide array of legal documents during the course of her career, and some understanding of her views may be gleaned from these documents.

During her tenure as dean of HLS, Kagan, in conjunction with 39 of her faculty colleagues at the law school, signed an *amicus curiae* brief in support of the Forum for Academic and Institutional Rights (FAIR),<sup>1</sup> a consortium of law schools and faculty members who were respondents in a case before the Supreme Court concerning access by military recruiters to college campuses. "*Amicus curiae*" literally means "friend of the court." It is common practice for individuals or groups who are not a party to the litigation but who nonetheless have an interest in the outcome to, with the Court's approval, submit *amicus* briefs in support of their positions. The HLS brief was among the 28 *amicus* briefs filed in the case. Of these briefs, which were filed by a variety of educational, public interest, and civic associations, among others, 14 were filed on behalf of FAIR. Twelve were filed on behalf of the petitioners, Secretary of Defense Donald Rumsfeld et al., who had sought Supreme Court review after FAIR had prevailed in the United States Court of Appeals for the Third Circuit. The remaining two briefs were filed by groups who expressed views on particular issues before the Court without taking the side of either party.

At the time of the brief, FAIR was in the process of challenging the constitutionality of the Solomon Amendment, a federal law that requires colleges and universities that receive federal funds to give military recruiters the same access to students and campuses that is provided to other employers.<sup>2</sup> Like many law schools and other academic institutions, HLS maintains a nondiscrimination policy that requires any employer that conducts on-campus recruiting to sign a document stating that it does not discriminate on various grounds, including "race, color, creed, national or ethnic origin, age, sex, gender identity, sexual orientation, marital or parental status, disability, source of income, or status as a veteran."<sup>3</sup> HLS, along with many other institutions of higher education, had sought to bar military recruiters from its campus in response to the military's "Don't Ask, Don't Tell" (DADT) policy, which, with certain exceptions, requires the discharge of members of the armed services who engage in specified types of homosexual conduct.<sup>4</sup> Ultimately, the Supreme Court upheld the constitutionality of the Solomon Amendment in the 2006 case *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*<sup>5</sup>

---

<sup>1</sup> Brief of Professors William Alford et al. as Amici Curiae in Support of Respondents, *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006) (No. 04-1152), 2004 U.S. Briefs 1152 (Sept. 21, 2005) (hereinafter "HLS *Amicus* Brief"). It is unclear who authored the brief.

<sup>2</sup> 10 U.S.C. § 983.

<sup>3</sup> Harvard Law School, *Employer Recruiting Policies and Guidelines*, <http://www.law.harvard.edu/current/careers/ocs/employers/recruiting-policies-employers/index.html>.

<sup>4</sup> 10 U.S.C. § 654. For more information on "Don't Ask, Don't Tell," see CRS Report R40782, "*Don't Ask, Don't Tell: The Law and Military Policy on Same-Sex Behavior*," by (name redacted), and CRS Report R40795, "*Don't Ask, Don't Tell: A Legal Analysis*," by (name redacted).

<sup>5</sup> 547 U.S. 47 (2006).

## The Solomon Amendment and Harvard Law School's Nondiscrimination Policy

Congressional concerns over military access to campuses for recruiting purposes have led to the enactment of several legislative proposals over the years.<sup>6</sup> Under perhaps the most well-known law, colloquially known as the Solomon Amendment, institutions of higher education risk losing certain federal funds if they deny military recruiters and ROTC access to campuses and students at institutions of higher education. Specifically, the statute prohibits an institution of higher education from receiving certain federal funds if the institution

has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents ... the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) 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.<sup>7</sup>

Meanwhile, HLS has, since 1979, maintained a nondiscrimination policy that required employers who used the school's Office of Career Services for recruitment purposes to verify that they do not discriminate on a variety of bases, including sexual orientation. Due to this policy, military recruiters instead conducted recruitment activities through a student veterans' group until 2002, when the Department of Defense (DOD) threatened to take enforcement action by withholding federal funds from the entire university. At that time, Dean Kagan's predecessor at HLS "reluctantly created an exception from the law school's general anti-discrimination policy for the military,"<sup>8</sup> thus allowing the military to recruit via the Office of Career Services. During her tenure as dean, Kagan continued this policy in 2003 and 2004, but in 2005 she briefly reinstated the ban on military recruiters in the wake of the Third Circuit ruling in favor of FAIR. When DOD threatened to withhold funds from Harvard University, Dean Kagan relented and once again exempted the military from HLS's nondiscrimination policy.<sup>9</sup> In light of the Supreme Court's subsequent ruling upholding the Solomon Amendment, this exemption continues in effect today.

In a 2005 letter to the HLS community describing her decision, Kagan appeared to reveal her personal views on a number of issues, including her belief in a policy of nondiscrimination on the basis of sexual orientation, her condemnation of the military's DADT policy, and her respect for the military. Stating her "own views on the matter," Kagan wrote:

I have said before how much I regret making this exception to our antidiscrimination policy. I believe the military's discriminatory employment policy is deeply wrong – both unwise and unjust. And this wrong tears at the fabric of our own community by denying an opportunity to some of our students that other of our students have. 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. The Law School remains firmly committed to the principle of equal opportunity for all persons, without regard to sexual orientation. And

---

<sup>6</sup> For more information on such laws, see CRS Report R40827, *Military Recruitment on High School and College Campuses: A Policy and Legal Analysis*, by (name redacted) and (name redacted).

<sup>7</sup> 10 U.S.C. § 983(b).

<sup>8</sup> Letter from Elena Kagan, Dean of Harvard Law School, to all members of the HLS community (Sept. 20, 2005), available at [http://www.law.harvard.edu/news/2005/09/20\\_recruiting.php](http://www.law.harvard.edu/news/2005/09/20_recruiting.php).

<sup>9</sup> *Id.*

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.<sup>10</sup>

Subsequently, HLS filed its *amicus* brief in support of FAIR. However, unlike FAIR, which was challenging the constitutionality of the Solomon Amendment, Kagan and her colleagues argued that the case should be resolved on statutory grounds. Their *amicus* brief is discussed below.

## The *Amicus* Brief

As noted above, the *amicus* brief signed by Kagan<sup>11</sup> and her HLS colleagues argued that the dispute over the Solomon Amendment should be resolved on statutory rather than constitutional grounds.<sup>12</sup> The statutory text of the Solomon Amendment bars institutions of higher education from prohibiting or preventing military recruiters from gaining access to students and campuses “in a manner that is ... equal in quality and scope” to the access provided to other employers. According to the brief, this statutory language makes clear that the Solomon Amendment would be violated only when an institution of higher education subjects the military to disfavored or unequal treatment. Thus, HLS and other schools with similar nondiscrimination policies were in compliance with the statute because these nondiscrimination policies were being applied evenly to both the military and other employers, meaning that the military was being granted access “equal in quality and scope” as the statute required. As the *amici* argued,

These policies do not single out military recruiters for disfavored treatment: Military recruiters are subject to exactly the same terms and conditions of access as every other employer. When other recruiters have failed to abide by these tenets, they have been excluded. When military recruiters have agreed to follow them, they have been welcomed.<sup>13</sup>

To bolster this argument, the *amicus* brief reviewed the legislative history of the Solomon Amendment, noting that the statute was not intended to apply to neutral practices but rather was designed to target policies that were specifically anti-military, such as policies that expressly prohibited military recruiting or that otherwise imposed special conditions on military recruiters.<sup>14</sup> Likewise, the *amici* criticized the government’s characterization of the law as requiring nothing more than equal opportunity for military recruiters. According to the brief, the government was actually seeking special treatment for the military because “the government has chosen to enforce the Solomon Amendment as if it conferred upon the military a unique privilege—one shared by no other employer, including other agencies of the Federal Government—to disregard neutral and generally applicable rules designed to govern the conduct of all recruiters.”<sup>15</sup>

---

<sup>10</sup> *Id.*

<sup>11</sup> Kagan signed the brief in her capacity as a law professor rather than in her official capacity as dean.

<sup>12</sup> The doctrine of constitutional doubt requires courts to avoid constitutional questions whenever possible. Thus, if a case raises both statutory and constitutional issues, a court will seek to resolve the dispute on statutory grounds. *See, e.g.,* *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Jones v. United States*, 529 U.S. 848, 857 (2000).

<sup>13</sup> HLS *Amicus* Brief, *supra* note 1, at \*2.

<sup>14</sup> *Id.* at \*3-9.

<sup>15</sup> *Id.* at \*9.

Urging the Court to reject the government’s interpretation of the statute, the *amici* argued that the Court should rule that “the Solomon Amendment applies only to policies that single out military recruiters for special disfavored treatment, not evenhanded policies that incidentally affect the military.”<sup>16</sup> Because the schools in question had not specifically barred military recruiting and had applied the nondiscrimination policy equally to all employers, the *amici* contended that the schools had not violated the law. According to the brief, these nondiscrimination policies are analogous to other requirements that schools establish to govern the on-campus recruiting process, such as rules regarding scheduling, communication with students, and employment offers, among others, and these requirements would be equally unlikely to violate the Solomon Amendment. Thus, “if the military fails to comply with the same evenhanded rules that govern everyone else, any resulting inability to interview is properly attributed to the government’s policies or practices rather than those of the educational institution.”<sup>17</sup>

Ultimately, the Court rejected the statutory construction articulated in HLS’s *amicus* brief and upheld the constitutionality of the Solomon Amendment. The Court’s decision is discussed below.

## The Supreme Court’s Decision

As noted above, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,<sup>18</sup> the Supreme Court unanimously upheld the constitutionality of the Solomon Amendment. Before reaching the constitutional question posed in the case, however, the Court first considered and rejected the statutory argument advanced in HLS’s *amicus* brief. Specifically, the Court held that because the statute requires the military to be granted the same “access to campuses and to students that is provided to any other employer,” the underlying rationale for granting such access is irrelevant. According to the Court,

The Solomon Amendment does not focus on the *content* of a school’s recruiting policy, as the *amici* would have it. Instead, it looks to the *result* achieved by the policy and compares the “access ... provided” military recruiters to that provided other recruiters. Applying the same policy to all recruiters is therefore insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military.... Under the statute, military recruiters must be given the same access as recruiters who comply with the policy.<sup>19</sup>

Turning to the constitutional question, the Court rejected FAIR’s assertion that it was a violation of the First Amendment for the federal government to condition university funding on compliance with the Solomon Amendment. Previously, a divided panel of the Third Circuit agreed that the Solomon Amendment had imposed an “unconstitutional condition” by compelling the law schools to convey messages of support for the military’s policy of discriminatory exclusion, but the Court reversed the lower court’s decision.

---

<sup>16</sup> Id. at \*10.

<sup>17</sup> Id. at \*13 (internal quotations omitted).

<sup>18</sup> 547 U.S. 47 (2006).

<sup>19</sup> Id. at 57-58.

First, the Court was unmoved by FAIR’s theory of unconstitutional conditions, largely because of fatal flaws they found in the law schools’ First Amendment analysis. According to the Court, “a funding condition cannot be unconstitutional if it could be constitutionally imposed directly.”<sup>20</sup> Although “expressive conduct” may be subject to First Amendment scrutiny, the Court held that the Solomon Amendment did not impair the First Amendment rights of the objecting institutions. Requiring law schools to facilitate recruiters’ access by sending out e-mails and scheduling military visits were deemed “a far cry from the compelled speech” found in earlier cases, and “[a]ccommodating the military’s message does not affect the law school’s speech, because the schools are not speaking when they host interviews and recruiting receptions.”<sup>21</sup> Nor, the Court found, would they be endorsing, or be seen as endorsing, the military policies to which they object because “[a] law school’s decision to allow recruiters on campus is not inherently expressive.”<sup>22</sup>

Second, the Court distinguished the doctrine of “expressive association,” as applied by *Dale v. Boy Scouts of America*,<sup>23</sup> a 2000 case in which the Court held that the Boy Scouts have an expressive right to exclude gay scoutmasters. Merely allowing recruiters on campus and providing them with the same services as other recruiters did not require the schools to “associate” with them. Nor did it prevent their expressing opposition to military policies in other ways. Moreover, unlike the *Boy Scouts* case, no group membership practices or affiliations were implicated by the Solomon Amendment. Recruiters do not become components of the law schools—like the Scout leaders there—but “are, by definition, outsiders who come onto campus for [a] limited purpose” and “not to become members of the school’s expressive association.”<sup>24</sup>

Finally, the Court recognized as “[beyond] dispute” that Congress has “broad and sweeping” powers over military manpower and personnel matters—“includ[ing] the authority to require campus access for military recruiters”—the exercise of which is generally entitled to judicial “deference.”<sup>25</sup> For these and other reasons, the Court rejected FAIR’s constitutional challenge to the Solomon Amendment.

## Conclusion

At the time Kagan and her HLS colleagues participated as *amici* in the litigation over the Solomon Amendment, many of the nation’s law schools maintained employment nondiscrimination policies and had, pursuant to such policies, barred military recruiters from their campuses in response to DOD’s DADT policy. In support of other institutions that were challenging DOD’s application of the Solomon Amendment, Kagan and her colleagues submitted an *amicus* brief in support of their position, and they argued for a decision on narrower statutory rather than constitutional grounds. The Court disagreed with this statutory interpretation, and, when FAIR lost its challenge, HLS and other institutions immediately complied with the ruling.

---

<sup>20</sup> *Id.* at 59- 60 (2006).

<sup>21</sup> *Id.* at 64.

<sup>22</sup> *Id.*

<sup>23</sup> 530 U.S. 640 (2000).

<sup>24</sup> *Id.* at 69.

<sup>25</sup> *Id.* at 58.



It is important to note that it is not clear what Kagan's participation in the *amicus* brief portends for her actual judicial philosophy. Because the *amicus* brief is the product of a litigation strategy rather than an unfiltered declaration of her legal viewpoint on the Solomon Amendment issue, the focus of the *amicus* brief does not necessarily reveal her judicial views on this issue or related matters.

## **Author Contact Information**

(name redacted)  
Legislative Attorney  
[redacted]@crs.lov.g7-....

# EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.