

The Supreme Court rejected that argument by an 8-to-0 vote.

1 HOUR AND 18 MINUTES AGO

## In fact, upon becoming dean, Kagan complied with Bush administration interpretation of law on military recruiters

**Solomon Amendment, enacted in 1994, required schools to provide access to military recruiters or lose funding.** The **Solomon Amendment** currently states that no funds from various federal agencies may be provided to schools:

if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents -

(1) the Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (in accordance with section 654 of this title and other applicable Federal laws) at that institution (or any subelement of that institution); or

(2) a student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

**In the 1990s, before Kagan became dean, Harvard Law had banned military recruiters from using the school's Office of Career Services.** Harvard Law School's Office of Career Services (OCS) maintains an anti-discrimination **policy** that bars employers who discriminate based on age, race, sex, or sexual orientation from recruiting through OCS. Up until 2002, Harvard Law barred the military from recruiting through OCS due to the military's "don't ask, don't tell" policy regarding homosexuality, but allowed military recruitment through the Harvard Law School **Veterans Association**.

**In 2002, still before Kagan became dean, Harvard Law reversed policy and allowed recruiters access to OCS.** In 2002, the Defense Department interpreted the Solomon Amendment to mean that if Harvard Law maintained its ban on military recruitment through the OCS then it risked losing federal funding. Harvard Law subsequently carved out an **exception** to its anti-discrimination policy to allow the military to recruit through OCS.

**Kagan continued to allow military recruiters access to OCS after becoming dean.** Kagan became dean of Harvard Law School in **2003**. In a September 2005 **letter** to the Harvard Law School community, Kagan stated that in 2003 and 2004, she maintained the exemption allowing military recruiters access to OCS in those years.

## Only after appellate court ruled the Solomon Amendment unconstitutional did Kagan ban recruiters from using OCS

**In 2004, federal appellate court ruled Solomon Amendment unconstitutional.** In 2004, a three-judge panel of the U.S. Court of Appeals for the 3rd Circuit **held** 2-1 in *FAIR v. Rumsfeld* that the Solomon Amendment violated First Amendment free-speech rights: "The Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom." In 2006, the Supreme Court **reversed** the 3rd Circuit decision.

**Reagan-appointed judge agreed with 3rd Circuit's ruling.** Judge Walter Stapleton, a **Reagan appointee**, joined the majority opinion in the case. Stapleton had previously been appointed to a federal district court judgeship by President Nixon.

**After the ruling, Kagan reinstated OCS ban but stated that Harvard Law School Veterans Association was coordinating military recruitment.** Kagan -- who became dean of Harvard Law in **2003** -- reinstated the ban against military recruitment through OCS for one semester in 2005 after the 3rd Circuit held that the law was unconstitutional. As Kagan explained in a September 2005 **letter** to her colleagues:

The Law School's anti-discrimination policy, adopted in 1979, provides that any employer that uses the services of OCS to recruit at the school must sign a statement indicating that that it does not discriminate on various bases, including sexual orientation. As a result of this policy, the military was barred for many years from using the services of OCS. The military retained full access to our students (and vice versa) through the good offices of the Harvard Law School Veterans Association, which essentially took the place of OCS in enabling interviews to occur.

[...]



Limbaugh: "Liberal elitist theoreticians" like Kagan "have no clue how real Americans live"

1 HOUR AND 29 MINUTES AGO



Limbaugh: Obama is "picking mirror images of himself" with Supreme Court nomination

1 HOUR AND 29 MINUTES AGO

I reinstated the application of our anti-discrimination policy to the military (after appropriate consultation with University officials) in the wake of the Third Circuit's decision; as a result, the military did not receive OCS assistance during our spring 2005 recruiting season.

## Dozens of other law professors, Cato Institute argued against the Bush administration position on Solomon Amendment

**Kagan joined a brief with 39 other Harvard law professors arguing that Harvard's policies did not violate the Solomon Amendment.** A brief written on behalf of Kagan (in her capacity as a Harvard Law professor, not dean) and 39 other Harvard Law professors argued that because Harvard did not discriminate against military recruiters, but rather applied the same anti-discrimination policy to the military that it applied to all employers, it did not violate the Solomon Amendment. From the [brief](#):

*First*, the Solomon Amendment's prohibition on funding is triggered only by policies that target the military or its recruiters for disfavored treatment. *Second*, once it is understood that evenhanded recruiting policies are beyond the statute's ken, it is clear that Harvard Law School in full compliance -- and the same is likely true of the vast majority of United States law schools.

[...]

Accordingly, this case is not -- and never has been -- about whether law schools may "discriminate" against the military or whether they must provide "equal access" to military recruiters. Instead, the question is whether the Solomon Amendment confers upon military recruiters the unprecedented entitlement to disregard neutral and generally applicable recruiting rules whenever a school's failure to make a special exemption might incidentally hinder or preclude military recruiting. The answer is "no."

The statute actually passed by Congress requires no such special exemptions. Instead, it targets university policies that "prohibit[], or in effect prevent[]" military recruiters "*from gaining access*" to campuses and students "*in a manner* that is ... equal in quality and scope" to that provided to any other employer.

**Cato Institute: "[P]atently paternalistic" Solomon Amendment violates the Constitution.** The libertarian Cato Institute filed a Supreme Court *amicus curiae* [brief](#) describing the position the government had taken in the litigation "patently paternalistic" and argued that it violated the First Amendment.

**Other law professors and law schools also submitted briefs arguing against the Bush administration's position on the Solomon Amendment.** Eight universities -- including Harvard -- [filed briefs](#) arguing against the government's position, as did [56 Columbia University law professors](#), [44 Yale law professors](#), the [Association of American Law Schools](#), and other organizations and individuals.

**Other law schools have had policies that accorded with Harvard's.** The Joint Appendix filed in connection with the appeal of *FAIR v. Rumsfeld* to the Supreme Court contains statements from numerous law professors [detailing](#) their law schools' attempts to restrict military recruiters' access to career services offices. Following the 3rd Circuit's decision, in addition to Harvard, Yale and New York Law also reportedly [reinstated](#) their restrictions against military recruiters.

**At least one other school had a more restrictive policy.** According to the *FAIR v. Rumsfeld* [complaint](#), from 1989-2002, at Whittier Law School, "Military recruiters were not permitted to post recruiting information, speak at school-sponsored events, sit at tables, access student/alumni addresses, leave material visible in any library area, or interview on campus. If a student expressed interest in a military JAG [Judge Advocate General] career, the director of career services would refer the student to a recruiting office."

## After DOD objected, Kagan again allowed recruiters on campus

In September 2005, after the Defense Department stated that it would continue to enforce its interpretation of the Solomon Amendment, Kagan [wrote](#):

Over the summer, however, the Department of Defense notified the University that it would withhold all possible funds if the Law School continued to bar the military from receiving OCS services. As a result, I have decided (again, after appropriate consultation) that we should lift our ban and except the military from our general non-discrimination policy. This will mean