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Kagan's role against military recruitment studied

By DENISE LAVOIE (AP) – 50 minutes ago

BOSTON — In a widely circulated 2003 memo, Harvard Law School dean Elena Kagan blasted the military's "don't ask, don't tell" policy for gay soldiers as "a moral injustice of the first order."

Kagan was explaining to students and faculty why military recruiters were allowed on campus again after almost 25 years of being banned from the law school's main recruitment office.

She said that under a federal law known as the Solomon Amendment, the university risked jeopardizing hundreds of millions of dollars in federal funding unless the school helped recruiters. The law allows the government to deny federal grants to schools that prohibit military recruitment on campus.

The following year, after a federal appeals court struck down the law as unconstitutional, Kagan re-imposed a ban on recruiters — a move that is now expected to be used as "anti-military" fodder by Republicans opposed to her confirmation to the U.S. Supreme Court. The issue was used against her during her confirmation hearing last year for her current post as U.S. solicitor general.

Former U.S. Attorney General Edwin Meese III, chairman of the Center for Legal and Judicial Studies at the Heritage Foundation, a conservative think tank, said Kagan's actions at Harvard raise important legal questions.

"(She) tried to essentially challenge the law and tried to get the Supreme Court to overrule what was a valid determination of policy by the Congress," Meese said.

Robert Levy, chairman of the Cato Institute's board of directors, agreed that Kagan is going to have to explain her position in that case.

"She wasn't one of the strongest advocates," Levy said. "But she was certainly in the camp."

But former Harvard Law Dean Robert Clark, Kagan's predecessor, called it "foolish" to criticize Kagan on the recruitment issue.

In an op-ed piece in The Wall Street Journal Tuesday, Clark said that when Kagan was named dean, she continued a policy he started the year before, when he began allowing the military to recruit through the school's career services office again following a threat by the federal government to cut off research funding at Harvard.

Clark said Kagan wrote a public memo stating her objection to "don't ask, don't tell" and "expressing her strong view that military service is a noble and socially valuable career path that should be encouraged and open to all of our graduates."

Kagan re-imposed the ban on recruiting only after the appeals court struck down the Solomon Amendment. Within months, she lifted the ban when the Supreme Court overturned the appeals court.

"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," Clark wrote. "Quite the opposite is true."

Kagan's supporters say she followed the law precisely in imposing the ban on recruiters, and again, several months later, when she lifted the ban.

"Elena Kagan does not have a single anti-military bone in her body," said Walter Dellinger, a former solicitor general in the Clinton administration who wrote a brief to the Supreme Court that was signed by 40 Harvard University professors, including Kagan.

Harvard had banned military recruiting through its career services office since 1979, when it passed an anti-discrimination policy for all employers who wanted to recruit there.

Adam Sorkin, the former president of Harvard Law School Lambda, a gay students' group, said Kagan "wasn't the big leader on this."

"All she did was follow the law at the time. When the 3rd Circuit court said the law is you don't have to allow the recruitment on campus, she didn't, and when the Supreme Court said you do, she did," said Sorkin, now a lawyer in Chicago.

Kagan was not the first at Harvard to take a stand against a military policy.

The Solomon Amendment was passed two decades after Harvard first banned military recruiters over the issue of discrimination against gays. Afterward, military recruiters were still allowed to recruit students on campus through the Harvard Law School Veterans Association, a student group.

However, after the Sept. 11, 2001, terror attacks, Republicans in Congress called it a disgrace that military recruiters were being hampered in a time of war, and the Bush administration threatened to cut off funding.

AP Associated Press

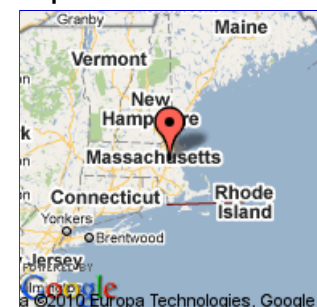
Photo 1 of 2



FILE - In this April 3, 2003 file photo, Harvard Law School Prof. Elena Kagan, left, chats with her former law students Danielle Gray, center, of Riverhead, N.Y., and Hien Tran, right, of Arlington, Va., on campus in Cambridge, Mass. after it was announced that Kagan will be the next dean of Harvard Law School. President Barack Obama nominated Kagan to the Supreme Court on Monday, May 10, 2010, declaring the former Harvard Law School dean "one of the nation's foremost legal minds." Danielle Gray was named an Associate Counsel to President Obama in 2009. (AP Photo/Elise Amendola, file)



Map



In 2002, Harvard Law School relented and allowed military recruiters to use a campus office.

Kagan continued that policy after becoming dean in 2003, the same year a major lawsuit was brought by 36 law schools challenging the Solomon Amendment. Harvard did not join the lawsuit, but filed a brief siding with the other schools.

In 2004, the 3rd U.S. Circuit Court of Appeals found the Solomon Amendment unconstitutional. The next day, Kagan banned military recruiters from using the campus office but still allowed work through the veterans group.

Yet again, under threat of a funding cutoff, Harvard relented and Kagan allowed the recruiters to use a campus placement office.

And in 2006, the Supreme Court unanimously reversed the 3rd Circuit, finding it constitutional to deny funding to schools that do not allow military recruiting.

Associated Press writers Russell Contreras in Boston and Mark Sherman in Washington contributed to this report.

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